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**COMES NOW** Petitioner Aiden Vasquez (“Mr. Vasquez”), by his counsel, and respectfully submits the following brief requesting judicial review of the Iowa Department of Human Services’ (“DHS”) denial of his request for Medicaid coverage for gender-affirming surgery. As alleged in Mr. Vasquez’s petition, and as discussed in further detail below, the regulation on which the denial was based (1) violates the Iowa Constitution’s equal-protection guarantee; (2) violates the Iowa Civil Rights Act (“ICRA”); (3) causes a disproportionate negative impact on the rights of transgender people; and (4) resulted in the unreasonable, arbitrary, and capricious denial of Mr. Vasquez’s request for Medicaid coverage.

### **INTRODUCTION**

“Gender identity” is a well-established medical concept referring to a person’s internal sense of gender. (AR 800, ¶ 10.) All human beings develop this basic understanding of belonging to a gender. (*Id.*) Gender identity is an innate and immutable aspect of personality. (*Id.*, ¶ 9; AR 806–07, ¶¶ 34–35, 38.) Typically, people who are designated male at birth based on their external anatomy identify as boys or men, and people designated female at birth identify as girls or women. (AR 800, ¶ 11.)

For transgender people, gender identity differs from the sex assigned to them at birth. (AR 800–01, ¶¶ 9, 11.) Women who are transgender, for example, are women who were assigned the male gender at birth but have a female gender identity. (*Id.*) Similarly, men who are transgender are men who were assigned the female gender at birth but have a male gender identity. (*Id.*) The medical diagnosis for the feeling of incongruence between one’s gender identity and birth-assigned sex is “gender dysphoria,” previously known as “gender-identity disorder” or “transsexualism.” (AR 801, ¶ 12.)

This action challenges the constitutionality and legality of section 441.78.1(4) of the Iowa Administrative Code (the “Regulation”), which categorically bans Medicaid coverage for surgical treatment of “transsexualism,” “gender identity disorder,” and “sex reassignment.” *See* Iowa Admin. Code r. 441.78.1(4)(b)(2) (2021). The Regulation “specifically exclude[s]” coverage for “[p]rocedures related to transsexualism . . . [or] gender identity disorders.” *Id.* It also states that “[s]urgeries for the purpose of sex reassignment are not considered as restoring bodily function and are excluded from coverage.” *Id.*

In *Good v. Iowa Department of Human Services*, 924 N.W.2d 853 (Iowa 2019), the Iowa Supreme Court held that the Regulation was unlawful. The Court found that the categorical ban on Medicaid coverage for gender-affirming surgery imposed by the Regulation violated ICRA’s prohibition against gender-identity discrimination in public accommodations. *Good*, 924 N.W.2d at 862–63.

On May 3, 2019, the Iowa General Assembly signed Division XX of House File 766 (“Division XX”) into law. The legislature enacted Division XX to negate the Iowa Supreme Court’s decision in *Good*. As amended by Division XX, ICRA’s protections against discrimination in public accommodations no longer “require any state or local government unit or tax-supported district to provide for sex reassignment surgery” or any surgical procedure “related to transsexualism [or] gender identity disorder.” *See* 2019 Iowa House Acts, House File 766, Division XX (codified at Iowa Code § 216.7(3) (2021)).

Following the Supreme Court’s decision in *Good* and the legislature’s enactment of Division XX, Mr. Vasquez, who is transgender, requested Medicaid coverage for a phalloplasty to treat his gender dysphoria. Five health-care providers agreed that the surgical procedure Mr. Vasquez sought to undergo was medically necessary. Despite this consensus, Amerigroup of

Iowa Inc. (“Amerigroup”), the managed-care organization (“MCO”) to which Mr. Vasquez is assigned under Iowa Medicaid, denied coverage for the surgery under the Regulation, and DHS upheld the denial. This lawsuit against DHS followed.

DHS improperly relied on the Regulation to deny Mr. Vasquez’s request for Medicaid coverage. *First*, the Regulation’s categorical exclusion of Medicaid coverage for gender-affirming surgery violates equal protection. *See* Iowa Code § 17A.19(10)(a) (2021); Iowa Const. art. I, §§ 1, 6. As a threshold matter, DHS should be collaterally estopped from relitigating the constitutionality of the Regulation based on the conclusive resolution of that issue in *Good*. But regardless of collateral estoppel, the Regulation cannot support DHS’s decision. Under the Regulation, Iowa Medicaid covers certain surgical treatment for nontransgender Medicaid participants that it does not cover for transgender Medicaid participants, even though the treatment is a medically necessary part of the latter group’s gender-affirming care. Both groups need financial assistance for the treatment, but only one group receives the assistance. There is no compelling or important government interest furthered by this discriminatory classification. As a result, the Regulation fails heightened scrutiny, both strict and intermediate. Alternatively, the classification fails rational-basis review because there is no plausible policy reason for denying medically necessary care for transgender people.

*Second*, the Regulation violates ICRA.<sup>1</sup> *See* Iowa Code § 17A.19(10)(b) (2021); Iowa Code §§ 216.7(1)(a), 216.2(13)(b) (2021). Division XX’s intended effect of exempting state and local government units from ICRA’s nondiscrimination protections for transgender Iowans seeking medically necessary care violates the Iowa Constitution’s equal-protection guarantee.

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<sup>1</sup> As of the date of this filing, the motion to dismiss applicable to this argument, to which Mr. Vasquez has responded in full, remains pending.

Additionally, Division XX, which amended ICRA by logrolling a substantive amendment to ICRA's public-accommodation provisions into an annual appropriations bill, violates the Iowa Constitution's single-subject and title rules. Because Division XX is unconstitutional, the amendment to ICRA under which "state or local government unit[s] or tax-supported district[s]" are no longer required "to provide for sex reassignment surgery" or any surgical procedure "related to transsexualism [or] gender identity disorder" is null and void. *See* Iowa Code § 216.7(3) (2021). The preamendment version of section 216.7 of ICRA, protecting against the discriminatory denial of gender-affirming surgery, therefore remains in effect. As set forth in *Good*, ICRA's protections against gender-identity discrimination prohibit the Regulation's categorical ban on Medicaid reimbursement for gender-affirming surgery. *See Good*, 924 N.W.2d at 862–63. So, too, do ICRA's protections against sex discrimination.

*Third*, the Regulation has a disproportionate negative impact on the private rights of transgender individuals such as Mr. Vasquez. *See* Iowa Code §§ 17A.19(10)(k) (2021). It categorically prohibits those individuals from receiving Medicaid coverage for medically necessary surgical treatment of gender dysphoria, and there is no public interest served by denying coverage for this treatment.

*Fourth*, DHS's denial of Medicaid coverage for the medically necessary gender-affirming surgery requested by Mr. Vasquez was arbitrary and capricious. *See* Iowa Code § 17A.19(10)(n) (2021). DHS applied the Regulation without any regard for the Iowa Constitution's equal-protection guarantee, ICRA's prohibitions against gender-identity and sex discrimination, or the unrefuted evidence that the surgical procedure requested by Mr. Vasquez is medically necessary and consistent with modern standards of medical care.



As a result of DHS's unconstitutional, unlawful, disproportionately harmful, arbitrary, and capricious denial of Medicaid coverage for Mr. Vasquez's gender-affirming surgery under the Regulation, Mr. Vasquez is entitled to (1) a declaratory ruling that the Regulation violates the Iowa Constitution's equal-protection guarantee, ICRA, and the Iowa Administrative Procedure Act ("APA"); (2) an order invalidating the Regulation and enjoining any further application of it to deny Medicaid coverage for medically necessary gender-affirming surgery; (3) an order reversing and vacating DHS's decision denying Mr. Vasquez's request for Medicaid coverage; and (4) an order requiring DHS to cover the expenses associated with Mr. Vasquez's gender-affirming surgery.

**ISSUES PRESENTED FOR REVIEW**

- I. Does the Regulation violate the Iowa Constitution's equal-protection guarantee? Yes. *See* Argument Part I.
  - A. Is DHS collaterally estopped from relitigating the constitutionality of the Regulation? Yes. *See* Argument Part I(A).
  - B. Does the Regulation discriminate against transgender Iowans who participate in Iowa Medicaid? Yes. *See* Argument Part I(B).
  - B. Is the Regulation constitutionally justified? No. *See* Argument Part I(C).
    1. Does the Regulation fail heightened scrutiny under the Iowa Constitution's equal-protection guarantee? Yes. *See* Argument Part I(C)(1).
    2. Alternatively, does the Regulation fail rational-basis review under the Iowa Constitution's equal-protection guarantee? Yes. *See* Argument Part I(C)(2).

- II. Does the Regulation violate ICRA? Yes. *See* Argument Part II.
  - A. Is Division XX unconstitutional? Yes. *See* Argument Part II(A).
    - 1. Does Division XX violate the Iowa Constitution’s equal-protection guarantee by facially discriminating against transgender Iowans who participate in Iowa Medicaid? Yes. *See* Argument Part II(A)(1)(a).
    - 2. Alternatively, does Division XX violate the Iowa Constitution’s equal-protection guarantee because it was motivated by animus toward transgender people? Yes. *See* Argument Part II(A)(1)(b).
    - 3. Alternatively, does Division XX violate the Iowa Constitution’s single-subject rule? Yes. *See* Argument Part II(A)(2)(a).
    - 4. Alternatively, does Division XX violate the Iowa Constitution’s title rule? Yes. *See* Argument Part II(A)(2)(b).
  - B. Under the version of ICRA that was in effect before Division XX was enacted, does the Regulation violate ICRA’s prohibition against gender-identity discrimination? Yes. *See* Argument Parts II(B) & (C).
  - C. Alternatively, under the version of ICRA that was in effect before Division XX was enacted, does the Regulation violate ICRA’s prohibition against sex discrimination? Yes. *See* Argument Parts II(B) & (D).
- III. Does the Regulation have a disproportionate negative impact on private rights? Yes. *See* Argument Part III.
- IV. Was DHS’s denial of Medicaid coverage based on the Regulation arbitrary and capricious? Yes. *See* Argument Part IV.

## STATEMENT OF THE CASE

### **I. Procedural History**

Medicaid is a cooperative federal–state program in which the federal government helps state governments provide medical care to needy individuals. *TLC Home Health Care, LLC v. Iowa Dep’t of Human Servs.*, 638 N.W.2d 708, 711 (Iowa 2002); *Madrid Home for the Aging v. Iowa Dep’t of Human Servs.*, 557 N.W.2d 507, 511 (Iowa 1996). Individuals eligible for Iowa Medicaid include, but are not limited to, adults between the ages of 19 and 64 whose income is at or below 133 percent of the Federal Poverty Level, a measure of income issued every year by the United States Department of Health and Human Services. *See Iowa Dep’t of Human Servs., Who Receives Medicaid*, available at <https://dhs.iowa.gov/ime/members/who-receives-medicaid>.

On August 14, 2020, Mr. Vasquez, through his physician, submitted a request to Amerigroup seeking Medicaid preauthorization for expenses related to a phalloplasty necessary to treat his gender dysphoria. (AR 339.) Five medical providers—a general-care physician and four clinical psychologists—concluded that the requested surgery is medically necessary. (AR 153–67.) Despite the consensus of Mr. Vasquez’s health-care providers, Amerigroup denied coverage for the surgery under the Regulation. (AR 345, 520.) After Amerigroup denied Mr. Vasquez’s request, he initiated an internal appeal using Amerigroup’s grievance procedures, which Amerigroup denied. (AR 151.)

Mr. Vasquez subsequently appealed Amerigroup’s decision to DHS and, at a hearing before an administrative-law judge (“ALJ”), presented un rebutted evidence that the surgical treatment he requested was medically necessary. (AR 3, 696, 762.) Following the hearing, the ALJ issued a proposed decision affirming Amerigroup’s decision. (AR 760.) On further review,

DHS's director adopted the ALJ's ruling as the agency's final decision regarding Mr. Vasquez's appeal. (AR 766, 925.)

On April 22, 2021, Mr. Vasquez timely filed his petition in this Court. The petition challenges DHS's denial of Medicaid coverage as unconstitutional, unlawful, disproportionately harmful, arbitrary, and capricious in accordance with sections 17A.19(10)(a), (b), (k), and (n) of the APA. *See* Iowa Code §§ 17A.19(10)(a), (b), (k), (n) (2021). Mr. Vasquez seeks declaratory and injunctive relief barring further application of the Regulation and an order reversing DHS's denial of his request for Medicaid coverage.

## **II. Factual Background**

### **A. Standards of Care for Gender Dysphoria**

Gender dysphoria is a serious medical condition codified in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-V"), and the International Statistical Classification of Diseases and Related Health Problems, Tenth Edition. (AR 801, ¶ 12.) The criteria for diagnosing gender dysphoria are set forth in section 302.85 of DSM-V. (*Id.*, ¶ 14.)

If left untreated, gender dysphoria can lead to serious medical problems, including clinically significant psychological distress and dysfunction, debilitating depression, and, for some people without access to appropriate medical care, suicidality and death. (AR 802, ¶ 15.)

The standards of care for treating gender dysphoria ("Standards of Care" or "Standards") are set forth in the World Professional Association of Transgender Health ("WPATH") Standards of Care for the Health of Transsexual, Transgender, and Nonconforming People. *See* Standards of Care, available at [http://www.wpath.org/site\\_page.cfm?pk\\_association\\_webpage\\_menu=1351](http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351). (*Id.* ¶ 16.) WPATH is a nonprofit interdisciplinary professional and educational organization devoted to transgender health. (AR 800, ¶ 6.)

The Standards of Care are widely accepted, evidence-based, best-practice medical protocols that articulate professional consensus to guide health-care professionals in medically managing gender dysphoria by providing the parameters within which they may provide care to individuals with this condition. (AR 802, ¶ 17.) The Standards are recognized as authoritative by the American Medical Association, the American Psychiatric Association, and the American Psychological Association, among others. (*Id.* ¶ 16.) They are, in fact, so well established that federal courts have declared that a prison’s failure to provide health care that complies with the Standards may qualify as cruel and unusual punishment under the Eighth Amendment of the US Constitution. *See, e.g., Rosati v. Igbinoso*, 791 F.3d 1037, 1039–40 (9th Cir. 2015); *De’lonta v. Johnson*, 708 F.3d 520, 522–26 (4th Cir. 2013); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231–32 (D. Mass. 2012).

For many transgender people, necessary treatment for gender dysphoria may require medical interventions to affirm their gender identity and help them transition from living in one gender to living in another. (AR 802–03, ¶¶ 18–19.) This transition-related care may include hormone therapy, surgery (sometimes called “gender-confirmation surgery” or “sex-reassignment surgery”), and other medical services to align a transgender person’s body with their gender identity. (*Id.*)

The treatment for each transgender person is individualized to fulfill that person’s particular needs. (AR 802–03, ¶¶ 16–19.) The Standards of Care for treating gender dysphoria address all these forms of medical treatment, including surgery to alter primary and secondary sex characteristics. (*Id.*)

By the mid-1990s, there was consensus within the medical community that surgery was the only effective treatment for many individuals with severe gender dysphoria. (AR 805, ¶ 29;

AR 810, ¶ 54.) More than three decades of research confirms that surgery to modify primary and secondary sex characteristics and align gender identity with anatomy is therapeutic and is therefore effective treatment for gender dysphoria. (AR 807, ¶ 40; AR 810, ¶ 54.) For appropriately assessed severe gender-dysphoric patients, surgery is the only effective treatment. (AR 811, ¶ 56.)

Health experts have rejected the myth that these treatments are “cosmetic” or “experimental” and have recognized that the treatments can provide safe and effective care for a serious health condition. (AR 810, ¶ 54.) Indeed, leading medical groups, including the American Medical Association,<sup>2</sup> the American Psychological Association,<sup>3</sup> the American Academy of Family Physicians,<sup>4</sup> the American College of Obstetricians and Gynecologists,<sup>5</sup> the National Association of Social Workers,<sup>6</sup> and WPATH,<sup>7</sup> all agree that gender dysphoria is a serious medical condition, that treatment for gender dysphoria is medically necessary for many

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<sup>2</sup> See Resolution 122 (A–108), available at <http://www.ama-assn.org/resources/doc/PolicyFinder/policyfiles/HnE/H-185.950.htm>.

<sup>3</sup> See Position Statement on Access to Care for Transgender and Gender Variant Individuals (2012), available at [www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012\\_TransgenderCare.pdf](http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012_TransgenderCare.pdf).

<sup>4</sup> See Resolution No. 1004 (2012), available at [http://www.aafp.org/dam/AAFP/documents/about\\_us/special\\_constituencies/2012RCAR\\_Advocacy.pdf](http://www.aafp.org/dam/AAFP/documents/about_us/special_constituencies/2012RCAR_Advocacy.pdf).

<sup>5</sup> See Committee Opinion No. 512: Health Care for Transgender Individuals, available at <http://www.nfcr.org/news/acog-releases-new-committee-opinion-transgender-persons>.

<sup>6</sup> See Transgender and Gender Identity Issues Policy Statement, available at <http://www.socialworkers.org/da/da2008/finalvoting/documents/Transgender%202nd%20round%20-%20Clean.pdf>.

<sup>7</sup> See Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the USA (2008), available at <http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf>.

transgender people, and that insurers should provide coverage for these treatments. (AR 811, ¶ 57.)

**B. Medicaid Coverage for Gender-Affirming Surgery in Iowa**

**1. *Pinneke v. Preisser***

In 1980, in *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980), the United States Court of Appeals for the Eighth Circuit held that Iowa’s blanket policy of denying Medicaid benefits for gender-affirming surgery was arbitrary. *See id.* at 549. The *Pinneke* court found that the policy violated a federal Medicaid regulation prohibiting a state from denying benefits to an otherwise eligible individual “solely because of the diagnosis, type of illness, or condition.” *See id.* (internal quotation marks and citation omitted). The *Pinneke* court also found that, without any formal rulemaking proceedings or hearings, DHS’s irrebuttable presumption that gender-affirming surgery could never be medically necessary was inconsistent with the statutory objectives of Medicaid. *See id.*

In 1993, in the wake of *Pinneke*, DHS contracted with the Iowa Foundation for Medical Care, now known as Telligen Inc. (the “Foundation”), to analyze whether to provide Medicaid coverage for treating conditions like gender dysphoria, which, at the time, was known as gender-identity disorder. (*See* AR 799, ¶ 1; AR 861.) Following DHS’s receipt of the Foundation’s report, it recommended a rulemaking process by publishing a notice of intended action and soliciting public commentary. (*Id.*)

In 1995, after a public meeting of DHS’s rulemaking body and review by the legislature’s administrative-rules committee, DHS adopted the Regulation. (*Id.*) The Regulation stated, in relevant part, that “[s]urgeries for the purpose of sex reassignment are not considered as restoring bodily function and are excluded from coverage.” Iowa Admin. Code r. 441.78.1(4) (2021). It

also stated that “[c]osmetic, reconstructive, or plastic surgery performed in connection with certain conditions is specifically excluded. These conditions are: . . . [p]rocedures related to transsexualism . . . [or] gender identity disorders.” Iowa Admin. Code r. 441.78.1(4)(b)(2) (2021).

**2. *Smith v. Rasmussen***

In *Smith v. Rasmussen*, 249 F.3d 755 (8th Cir. 2001), the Eighth Circuit considered a challenge to the Regulation based on section 1983 and rights conferred by the federal Medicaid Act. The *Smith* court upheld the Regulation, noting that, in 1994, at the time the Regulation was adopted, the evidence before DHS reflected that (1) the medical community disagreed “regarding the efficacy of sex reassignment surgery,” and (2) the surgery was excluded from coverage under Medicare. *Id.* at 761.

The *Smith* court’s decision was based on research that was flawed at the time the Regulation was enacted and that has since been superseded by new research providing additional evidence of the defects in the Foundation’s report. (AR 811, ¶ 58.) Additionally, on May 30, 2014, the United States Department of Health and Human Services’ Departmental Appeals Board ruled that Medicare’s categorical exclusion of coverage for transition-related care is inconsistent with contemporary science and medical standards of care. *See* Department of Health and Human Services, Departmental Appeals Board, Appellate Division, NCD 140.3, Transsexual Surgery, Docket No. A-13-87 (May 30, 2014), available at <https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2014/dab2576.pdf>.

**3. *Good v. Iowa Department of Human Services***

In *Good v. Iowa Department of Human Services*, two plaintiffs sought to enjoin the Regulation on the basis that it violated ICRA’s prohibitions against gender-identity and sex discrimination and the Iowa Constitution’s equal-protection guarantee. *Good v. Iowa Dep’t of*



*Human Servs.*, No. CVCV054956, at \*1–10. This Court enjoined the Regulation, holding that it facially discriminated against transgender Iowans based on their gender identity in violation of ICRA and the Iowa Constitution’s equal-protection guarantee. *Good*, No. CVCV054956, at \*11–42.

On appeal, the Iowa Supreme Court affirmed this Court’s decision on the basis that categorically banning Medicaid coverage for gender-affirming surgery violated ICRA’s protections against gender-identity discrimination in public accommodations. As the Supreme Court explained, “[i]n 2007, the Iowa legislature amended . . . [ICRA] to add ‘gender identity’ to the list of protected groups.” *Good*, 924 N.W.2d at 862. Under section 216.7(1)(a) of ICRA, “it is ‘unfair or discriminatory’ for any ‘agent or employee’ of a ‘public accommodation’ to deny services based on ‘gender identity.’” *Id.* The Court acknowledged that “ICRA’s gender identity classification encompasses transgender individuals—especially those who have gender dysphoria—because discrimination against these individuals is based on the nonconformity between their gender identity and biological sex.” *Id.* The Court also acknowledged that ICRA’s “prohibition against denying coverage for [the plaintiffs’] gender-affirming surgical procedures extend[ed] to the director and staff of . . . DHS, as well as its agents, the MCOs,” including Amerigroup, the MCO for one of the plaintiffs. *Id.*

The Court went on to hold that the Regulation’s plain language violated ICRA’s prohibition against gender-identity discrimination. *Id.* at 862. The Court found that the record did “not support . . . DHS’s position that [the Regulation] is nondiscriminatory because its exclusion of coverage for gender-affirming surgical procedures encompasses the broader category of ‘cosmetic, reconstructive, or plastic surgery’ that is ‘performed primarily for psychological purposes.’” *Id.* at 862. The Court emphasized that “DHS expressly denied [the plaintiffs]

coverage for their surgical procedures because they were ‘related to transsexualism . . . [or] gender identity disorders’ and ‘for the purpose of sex reassignment.’” *Id.* The Court also emphasized that the Regulation “authorize[d] payment for some cosmetic, reconstructive, and plastic surgeries that serve psychological purposes” yet “prohibit[ed] coverage” for the “same” procedures if those procedures were requested by a transgender individual. *Id.* For these reasons, the Court concluded that the Regulation was discriminatory under ICRA.

The Court also noted that “the history behind” the Regulation supported its holding. *Id.* According to the Court, before *Pinneke* was decided, DHS “had an unwritten policy of excluding sex reassignment surgeries from Medicaid coverage based on Medicaid’s coverage limitations on ‘cosmetic surgery’ and ‘mental diseases.’” *Id.* Then, after the Eighth Circuit decided *Pinneke*, DHS amended the Regulation “to clarify that [it] excluded Medicaid coverage for ‘sex reassignment procedures’ and ‘gender identity disorders.’” *Id.* Based on this history, the Court concluded that the Regulation “expressly excluded Iowa Medicaid coverage for gender-affirming surgery specifically because this surgery treats gender dysphoria of transgender individuals.” *Id.* The legislature’s 2007 amendment of ICRA, which postdated DHS’s amendment of the Regulation, “made it clear that individuals cannot be discriminated against on the basis of gender identity,” including under the Regulation. *See id.* at 862–63.

#### **4. *Covington v. Reynolds ex rel. Iowa***

On May 3, 2019, in response to the Iowa Supreme Court’s decision in *Good*, the legislature signed Division XX into law. As amended by Division XX, ICRA’s protections against discrimination in public accommodations no longer “require any state or local government unit or tax-supported district to provide for sex reassignment surgery” or any

surgical procedure “related to transsexualism [or] gender identity disorder.” *See* 2019 Iowa House Acts, House File 766, Division XX (codified at Iowa Code § 216.7(3) (2021)).

After Division XX was enacted, Mr. Vasquez and two other plaintiffs challenged the statute’s constitutionality. In *Covington v. Reynolds ex rel. Iowa*, No. 19–1197, 949 N.W.2d 663, 2020 WL 4514691 (Iowa Ct. App. Aug. 5, 2020) (unpublished), the Iowa Court of Appeals held that, because Mr. Vasquez and the other plaintiffs had not yet requested Medicaid preauthorization for gender-affirming surgery at the time their lawsuit was filed, and because no Medicaid providers had evaluated any requests from the plaintiffs, the controversy over Division XX’s constitutionality was not ripe for adjudication. *Id.* at \*3. The Court of Appeals also held that, under the circumstances, there was no basis for injunctive relief because the plaintiffs had an adequate remedy at law “through . . . DHS’s administrative process,” which they could use to request Medicaid coverage. *Id.*

As of the filing of this brief, Division XX and the Regulation both remain in effect. Since the Regulation’s promulgation more than two decades ago, the Regulation has not been updated or modified to reflect developments in the medical research on gender dysphoria or developments in gender dysphoria’s treatment. (*See* AR 799, ¶ 1; AR 861.) Nor have any studies been commissioned to revisit the validity of the research or conclusions on which the Regulation was based. (*Id.*)

### **C. Mr. Vasquez**

Mr. Vasquez is a fifty-three-year-old transgender man who has known that he is male since his early childhood. (AR 814, ¶¶ 1, 4.) Mr. Vasquez has expressed his male identity in various ways since the age of eight. (AR 814, ¶ 4.) He was diagnosed with gender dysphoria in 2016. (AR 815, ¶ 7.) In January 2016, he began hormone therapy. (*Id.*) Shortly after beginning

hormone therapy, Mr. Vasquez began the process of socially transitioning from presenting as female to presenting as male by using the pronouns “he,” “him,” and “his” and using men’s restrooms in public places. (*Id.*, ¶ 8.) This “social transition”—i.e., changing gender expression and role to live consistently with a person’s gender identity—is one form of treatment for gender dysphoria. *See* Standards of Care at 9–10, available at [http://www.wpath.org/site\\_page.cfm?pk\\_association\\_webpage\\_menu=1351](http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351).

In May 2016, Mr. Vasquez legally changed his name, and amended his driver’s license and social-security card, to reflect his male identity. (AR 815, ¶ 10.) In September 2016, Mr. Vasquez underwent a double mastectomy, using a CareCredit card obtained for that purpose, to better align his body with his gender identity. (*Id.*, ¶ 11.) In October 2016, Mr. Vasquez amended his birth certificate, and changed the gender markers on his identification documents, to reflect his male gender identity. (*Id.*, ¶ 12.)

Mr. Vasquez has a long history of self-harm and suicidality stemming from depression caused by his gender dysphoria. (AR 817, ¶ 26.) He is severely distressed with his genitalia, which does not align with his gender identity and exacerbates his depression. (AR 815, ¶ 13.)

In or around August 2020, Mr. Vasquez began the process of seeking Medicaid coverage for gender-affirming surgery from his MCO, Amerigroup. (AR 339.) Mr. Vasquez, a participant in Iowa Medicaid, is eligible for Medicaid reimbursement. (AR 816, ¶ 17.)

Mr. Vasquez’s health-care providers have uniformly concluded that surgery is necessary to treat his gender dysphoria. Nicole Nisly (“Dr. Nisly”) is Mr. Vasquez’s primary-care physician. (AR 769, ¶ 2.) She has treated Mr. Vasquez since May 2016. (*Id.*) In August 2020, she stated:

In my professional medical opinion and judgment[,] the sex designation of [Mr. Vasquez] has been permanently changed. All of the treatments [he] received

under my care were medically necessary, clinically appropriate, and in accord with the standards and guidelines for treatment of Gender Dysphoria, ICD-9 Code 302.85, by the World Professional Association for Transgender Health, American Medical Association, American Psychiatric Association, American Psychological Association, and the American College of Obstetricians and Gynecologists. [Mr. Vasquez] has also under[gone] gender affirming top surgery (mastectomy).

Gender affirming bottom surgery is medically necessary to treat [Mr. Vasquez's] gender dysphoria and I support this decision and referral.

(AR 772.)

Scott X. Fieker ("Mr. Fieker") is a clinical psychologist. (AR 775, ¶ 2.) In August 2020,

Mr. Fieker assessed Mr. Vasquez, stating:

I have no hesitation in recommending [Mr. Vasquez] for the procedure he is requesting. It is my professional opinion as a Licensed Mental Health Counselor in the State of Iowa that he meets and exceeds the criteria as set forth by the World Professional Association for Transgender Healthcare.

(AR 778.)

Amanda Goslin ("Ms. Goslin") is a clinical psychologist. (AR 780, ¶ 2.) In August 2020,

Ms. Goslin assessed Mr. Vasquez, stating:

[Mr. Vasquez] has met the WPATH Standards for receiving gender reaffirming bottom surgery. He has persistent, well-documented gender dysphoria and his other mental health concerns are well controlled. Additionally, he has the capacity to make an informed decision and is over the age of 18. I believe that receiving gender reaffirming bottom surgery will help [Mr. Vasquez] to make significant progress in treating his gender dysphoria. Therefore, I recommend that [Mr. Vasquez] receive gender reaffirming bottom surgery.

(AR 784.)

Jacob Sandoval ("Mr. Sandoval") is a clinical psychologist. (AR 787, ¶ 2.) In August 2020, Mr. Sandoval assessed Mr. Vasquez, stating that Mr. Vasquez, who is "over the age of 18" and has "the capacity to make an informed decision," has "persistent, well documented gender dysphoria." (AR 791.) Mr. Sandoval noted that any other "significant mental health or medical concerns" presented by Mr. Vasquez are "well controlled." (*Id.*) Mr. Sandoval also stated:

Based upon the interview completed with [Mr. Vasquez], it is clear he has experienced marked gender dysphoria throughout his life. Moreover, these feelings increased after top surgery due to not feeling whole. [Mr. Vasquez] is over 18, is making an informed decision, and understands the risks and benefits of bottom surgery. It is my recommendation that [Mr. Vasquez] has access to receive bottom surgery and that this treatment would help his mood and dysphoria.

(*Id.*)

Dr. Carol Daniels, PhD (“Dr. Daniels”), is a clinical psychologist. (AR 794, ¶ 2.) In September 2020, Dr. Daniels assessed Mr. Vasquez, stating:

I believe [Mr. Vasquez] to be capable of making an informed decision about undertaking surgery and that the next appropriate step for him is to undergo such surgery. In my belief, this will help him make significant progress for further treatment of his gender dysphoria. I see it as a vital quality of life and mental health issue for him, and I recommend [Mr.] Vasquez for gender reassignment/phalloplasty surgery.

(AR 797.)

#### **D. Amerigroup and DHS**

In the proceedings below, neither Amerigroup nor DHS submitted any evidence contradicting the affidavits presented by Mr. Vasquez. (*See* AR 3, 696, 762.) The evidence showing that the surgical procedure Mr. Vasquez requested is medically necessary is un rebutted. (*See id.*) So, too, is the evidence regarding the standards of care for gender dysphoria. (*See id.*)

#### **STANDARDS OF REVIEW**

On judicial review of an agency action, this Court “functions in an appellate capacity to . . . correct errors of law on the part of the agency.” *Iowa Planners Network v. Iowa State Commerce Comm’n*, 373 N.W.2d 106, 108 (Iowa 1985). In doing so, the Court must “apply the standards of section 17A.19(10) [of the APA]” to the agency’s decision. *See Lakeside Casino v. Blue*, 743 N.W.2d 169, 172–73 (Iowa 2007).

Mr. Vasquez has alleged seven grounds for reversing DHS's denial of Medicaid coverage under four sections of the APA: sections 17A.19(10)(a), (b), (k), and (n). *See* Iowa Code §§ 17A.19(10)(a), (b), (c) (k), (n) (2021). The relevant standards are set forth below.

**ARGUMENT**

**I. The Regulation violates the Iowa Constitution's equal-protection guarantee.**

Under section 17A.19(10)(a) of the APA, a court may reverse an agency action if “substantial rights of the person seeking judicial relief have been prejudiced because the agency action . . . is [u]nconstitutional on its face or as applied or is based on a provision of law that is unconstitutional on its face or as applied.” *See* Iowa Code § 17A.19(10)(a) (2021).

Constitutional questions raised in agency proceedings are reviewed de novo. *Gartner v. Iowa Dep't of Public Health*, 830 N.W.2d 335, 344 (Iowa 2013); *NextEra Energy Res., LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 44 (Iowa 2012); *ABC Disposal Sys. v. Iowa Dep't of Natural Res.*, 681 N.W.2d 596, 605 (Iowa 2004).

As discussed in further detail below, DHS is collaterally estopped from relitigating the constitutionality of the Regulation. But regardless of collateral estoppel, the same legal analysis that applied in *Good* applies here. The Regulation facially discriminates against similarly situated Iowans without an adequate constitutional justification. Because the Regulation is unconstitutional, DHS should be prohibited from applying it, and Mr. Vasquez should receive the Medicaid reimbursement for which he requested preapproval.

**A. DHS is collaterally estopped from relitigating the constitutionality of the Regulation.**

Collateral estoppel, or issue preclusion, “prevents a party to a prior action in which a judgment has been rendered from relitigating in a subsequent action issues raised and resolved in the previous action.” *Dettman v. Kruckenberg*, 613 N.W.2d 238, 244 (Iowa 2000) (internal

quotation marks omitted). The doctrine “serves a dual purpose”: (1) “protect[ing] litigants from the vexation of relitigating identical issues with identical parties or those persons with a significant connective interest to the prior litigation” and (2) “promot[ing] the interest of judicial economy by preventing unnecessary litigation.” *See State ex rel. Casas v. Fellmer*, 521 N.W.2d 738, 740–41 (Iowa 1994); *Penn v. Iowa State Bd. of Regents*, 577 N.W.2d 393, 398 (Iowa 1998).

Collateral estoppel “applies if the following four requirements are met: (1) the issue determined in the prior action is identical to the present issue; (2) the issue was raised and litigated in the prior action; (3) the issue was material and relevant to the disposition in the prior action; and (4) the determination made of the issue in the prior action was necessary and essential to that resulting judgment.” *Dettman*, 613 N.W.2d at 244 (internal quotation marks omitted). If these requirements are met, then collateral estoppel can be used “offensively” unless the party against whom it is being applied lacked a “full and fair opportunity” to litigate the issue in question during the first action or “other circumstances” justify giving the party an opportunity to relitigate the issue. *See Gardner v. Hartford Ins. Accident & Indemnity Co.*, 659 N.W.2d 198, 203 (Iowa 2003).

This is not the first case challenging the constitutionality of the Regulation. In *Good*, this Court held that the Regulation violates the Iowa Constitution’s equal-protection guarantee. *Good*, No. CVCV054956, at \*21–31. The Court reasoned that:

- Transgender and nontransgender Medicaid recipients are similarly situated for equal-protection purposes, *id.*, at \*21–22;
- “The Regulation clearly discriminates against transgender Medicaid recipients on the basis of gender identity by excluding coverage for medically necessary gender affirming surgery as treatment for the biological components of [g]ender [d]ysphoria while covering the same surgical procedures for other biological as well as psychological conditions of nontransgender individuals,” *id.* at \*29;



- “[G]ender identity based exclusion of medically necessary gender affirming surgery and other therapeutic surgeries performed as treatment for [g]ender [d]ysphoria does not further in a substantial way an important governmental objective,” *id.* at \*30; and, alternatively,
- The Regulation fails rational-basis review because it achieves the purported goal of “cost savings . . . through an extreme degree of underinclusiveness,” and “the medical consensus” is that gender-affirming surgery “can be medically necessary to treat [gender dysphoria],” *id.* at \*32–34.

As a remedy, the Court entered an injunction (1) requiring the language of the Regulation excluding Medicaid coverage for gender-affirming surgery to be stricken and (2) requiring “the remaining language” to be “interpreted and applied in a manner allowing transgender individuals coverage under Iowa Medicaid for medically necessary gender affirming surgery for the treatment of [g]ender [d]ysphoria.” *Id.* at \*41.

On review, the Iowa Supreme Court did not disturb this Court’s equal-protection ruling or its injunction. *See Good*, 924 N.W.2d at 863. Instead, the Supreme Court declined to reach the constitutional issue and affirmed this Court’s judgment. *Id.*

The exact same equal-protection issue presented by this case was determined in *Good*, was material to its disposition, and was necessary to the resulting judgment. *See Dettman*, 613 N.W.2d at 244. Additionally, DHS, which was a party to the *Good* litigation, had a full and fair opportunity to litigate the issue, and no other circumstances warrant allowing DHS to litigate it again. *See Gardner*, 659 N.W.2d at 203. For these reasons, this Court’s prior equal-protection ruling should be given preclusive effect, and DHS should be barred from relitigating it.

**B. The Regulation is facially discriminatory.**

The Iowa Constitution contains a two-part equal-protection guarantee. Iowa Const. art. I, §§ 1, 6. Although Iowa courts look to federal courts’ interpretation of the US Constitution in construing parallel provisions of the Iowa Constitution, they “jealously reserve the right to

develop an independent framework under the Iowa Constitution.” *NextEra*, 815 N.W.2d at 45. This is because, as the Iowa Supreme Court recently reaffirmed, the rights guaranteed to individuals under the Iowa Constitution have critical, independent importance, and the courts play a crucial role in protecting those rights. *Godfrey v. State*, 898 N.W.2d 844, 864–65 (Iowa 2017).

Iowa’s constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike under the law. *Gartner* 830 N.W.2d at 351; *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). More precisely, it requires “that laws treat alike all people who are similarly situated with respect to the legitimate purposes of the law.” *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009) (internal quotation marks omitted); *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002).

Medicaid is a “cooperative federal–state program through which the federal government provides financial assistance to states so that they may furnish medical care to needy individuals.” *TLC*, 638 N.W.2d at 711; *Madrid*, 557 N.W.2d at 511. As this Court correctly concluded in *Good*, transgender and nontransgender Iowans eligible for Medicaid—the public accommodation that administers the publicly financed health-care insurance affected by the Regulation—are similarly situated for equal-protection purposes. *Good*, No. CVCV054956, at \*21–22. They are the same in all legally relevant ways because Medicaid recipients, transgender or not, share a financial need for medically necessary treatment. *See In re Estate of Melby*, 841 N.W.2d 867, 875 (Iowa 2014) (“The Medicaid program was designed to serve individuals and families lacking adequate funds for basic health services . . .”).

The Regulation facially discriminates against transgender Medicaid recipients by specifically authorizing the discriminatory denial of medically necessary gender-affirming

surgery. *See* Iowa Admin. Code r. 441-78.1(4) (2021) (excluding coverage for “[p]rocedures related to transsexualism . . . [or] gender identity disorders” and “[s]urgeries for the purposes of sex reassignment”). Put differently, despite medical necessity, the Regulation lets the state discriminate against transgender Medicaid recipients by denying them health care based on nothing more than the fact that they are transgender. This is improper, as both this Court and the Iowa Supreme Court recognized in *Good*.

In *Good*, this Court found that the Regulation “clearly discriminates against transgender Medicaid recipients on the basis of gender identity by excluding coverage for medically necessary gender affirming surgery as treatment for the biological components of [g]ender [d]ysphoria while covering the same surgical procedures for other biological as well as psychological conditions of nontransgender individuals.” *Good*, No. CVCV054956, at \*29. Similarly, the Supreme Court found that the record in *Good* did “not support . . . DHS’s position that [the Regulation] is nondiscriminatory because its exclusion of coverage for gender-affirming surgical procedures encompasses the broader category of ‘cosmetic, reconstructive, or plastic surgery’ that is ‘performed primarily for psychological purposes.’” *Good*, 924 N.W.2d at 862. The Court emphasized that “DHS expressly denied [the plaintiffs] coverage for their surgical procedures because they were ‘related to transsexualism . . . [or] gender identity disorders’ and ‘for the purpose of sex reassignment.’” *Id.* The Court also emphasized that the Regulation “authorize[d] payment for some cosmetic, reconstructive, and plastic surgeries that serve psychological purposes” yet “prohibit[ed] coverage” for the “same” procedures if those procedures were requested by a transgender individual. *Id.*

The Iowa Supreme Court’s landmark decision in *Varnum* further underscores the discriminatory nature of the Regulation. In *Varnum*, the “benefit denied by the marriage

statute—the status of civil marriage for same-sex couples—[was] so closely correlated with being homosexual as to make it apparent the law [was] targeted at gay and lesbian people as a class.” *Varnum*, 763 N.W.2d at 885 (internal quotation marks omitted). Here, gender transition through social transition and medical interventions, such as surgical treatment for gender dysphoria, “is so closely correlated with being [transgender] as to make it apparent” that the discrimination specifically authorized by the Regulation, which allows for the denial of this treatment, “is targeted at [transgender] people as a class.” *See id.* (internal quotation marks omitted). For these reasons, the Regulation, like the statute at issue in *Varnum*, is facially discriminatory.

**C. The Regulation is not constitutionally justified.**

The Iowa Supreme Court has not decided what level of scrutiny applies to classifications that disfavor transgender individuals. Regardless, the Regulation fails both heightened scrutiny and rational-basis review.

**1. The Regulation fails heightened scrutiny.**

The Regulation fails heightened scrutiny, both intermediate and strict. *See Good*, No. CVCV054956, at \*22–26.

**a. Iowa’s four-factor test for ascertaining the appropriate level of equal-protection scrutiny mandates applying heightened scrutiny.**

The highest and most probing level of scrutiny under the Iowa Constitution—strict scrutiny—applies to classifications based on race, alienage, or national origin and those affecting fundamental rights. *Varnum*, 763 N.W.2d at 880; *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998). Under this approach, classifications are presumptively invalid and must be

“narrowly tailored to serve a compelling state interest.” *In re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004).

A middle level of scrutiny called “intermediate scrutiny” exists between rational-basis review—discussed below—and strict scrutiny. *Varnum*, 763 N.W.2d at 880. Intermediate scrutiny, like strict scrutiny, presumes that classifications are invalid, requiring a party seeking to uphold a classification to demonstrate that it is “substantially related” to achieving an “important governmental objective[.]” *Sherman*, 576 N.W.2d at 317 (internal quotation marks omitted). The justification for the classification must also be “genuine, not hypothesized or invented *post hoc* in response to litigation,” and must not depend on “overbroad generalizations.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). This Court’s decisions confirm that, at a minimum, intermediate scrutiny applies to classifications based on gender, illegitimacy, and sexual orientation. *Varnum*, 763 N.W.2d at 895–96; *NextEra*, 815 N.W.2d at 46.

Iowa courts apply a four-factor test to determine the appropriate level of scrutiny under the Iowa Constitution’s equal-protection guarantee. *Varnum*, 763 N.W.2d at 886–87. The factors are “(1) the history of invidious discrimination against the class burdened by [a particular classification]; (2) whether the characteristics that distinguish the class indicate a typical class member’s ability to contribute to society; (3) whether the distinguishing characteristic is immutable or beyond the class members’ control; and (4) the political power of the subject class.” *Id.* at 887–88.

In *Varnum*, the Court cautioned against using a “rigid formula” to determine the appropriate level of equal-protection scrutiny and refused “to view all the factors as elements or as individually demanding a certain weight in each case.” *Id.* at 886–89. Although no single factor is dispositive, the first two “have been critical to the analysis and could be considered as

prerequisites to concluding a group is a suspect or quasi-suspect class.” *Id.* at 889. The last two “supplement the analysis as a means to discern whether a need for heightened scrutiny exists” beyond rational basis. *Id.*

The four-factor *Varnum* test mandates applying at least intermediate scrutiny to classifications that discriminate against transgender Iowans.

**i. Factor one, the history of invidious discrimination against transgender people, supports heightened scrutiny.**

In *Varnum*, the Court relied on national statistics, case law from other jurisdictions, and other sources to find that lesbian and gay individuals have experienced a history of invidious discrimination and prejudice. *Varnum*, 763 N.W.2d at 889–90. The Iowa legislature’s enactment of several laws to protect individuals based on sexual orientation was critical to the Court’s reasoning in *Varnum*, particularly the legislature’s decision to add sexual orientation to ICRA as a protected class in 2007. *Id.* at 889–91. These enactments, including laws to counter bullying and harassment in schools and prohibit discrimination in credit, education, employment, housing, and public accommodations, demonstrated legislative recognition of the need to remedy historical sexual-orientation-based discrimination. *Id.* at 890.

Like sexual orientation, gender identity was added in 2007 as a protected class to both ICRA and the Iowa Anti-Bullying and Anti-Harassment Act. Iowa Code § 216.7(1)(a) (2021); Iowa Code § 280.28(2)(c) (2021). And like discrimination based on sexual orientation, discrimination based on transgender status has been extensively documented. S.E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, Washington, DC, National Center for Transgender Equality (2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (“Transgender Survey”). Published in 2016, the Transgender

Survey describes the discrimination, harassment, and even violence that transgender individuals encounter at school, in the workplace, when trying to find a place to live, during encounters with police, in doctors' offices and emergency rooms, at the hands of service providers and businesses, and in other aspects of life. *Id.*

In Iowa, widespread discrimination against transgender individuals has been documented by Professor Len Sandler and the University of Iowa College of Law's Rainbow Health Clinic. Len Sandler, *Where Do I Fit In? A Snapshot of Transgender Discrimination in Iowa* (2016), available at <https://law.uiowa.edu/sites/law.uiowa.edu/files/2021-06/Where%20Do%20I%20Fit%20In%20--%20A%20Snapshot%20of%20Transgender%20Discrimination%20June%202021%20Public%20Release.pdf> (the "Rainbow Health Clinic Report").

Transgender people nationally and in Iowa continue to face discrimination. To the extent they have seen progress in protecting their rights, there is considerable backlash against that progress—including, unfortunately, through discriminatory legislation introduced in a recent Iowa General Assembly. See *Trump's Record of Action Against Transgender People*, National Center for Transgender Equality, available at <https://transequality.org/the-discrimination-administration>; Sarah Tisinger, *Brandstad Calls Obama's Transgender Policy 'Blackmail,'* WQAD (May 18, 2016), available at <https://wqad.com/2016/05/18/brandstad-calls-obamas-transgender-bathroom-policy-blackmail>; Jeremy W. Peters, et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. Times (Feb. 22, 2017), available at <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html>; Brianne Pfannenstiel et al., *Transgender 'Bathroom Bill' Introduced in Iowa House, Though Support Lags*, Des Moines Register (Jan. 31, 2018), available at <https://www.desmoinesregister.com/story/news/politics/2018/01/31/transgender-bathroom-bill-iowa-lgbtq/1077963001>; Iowa H.B. 2164, 87 Gen. Assem.

(Jan. 31, 2018) (proposed bill to deprive transgender students in Iowa of access to boys' and girls' restrooms consistent with their gender identity); Lee Rood, *Nursing Facility Doors Slam Shut for Transgender Iowan*, Des Moines Register (May 18, 2016), available at <https://www.desmoinesregister.com/story/news/investigations/readerswatchdog/2016/05/18/nursing-facility-doors-slam-shut-transgender-iowan/84490426>.

A number of these instances of discrimination against transgender individuals parallel examples cited in *Varnum*. Compare *Varnum*, 763 N.W.2d at 889 (describing ban on gay and lesbian individuals serving in the military as evidence of history of invidious discrimination) with Abby Philip, et al., *Trump Announces That He Will Ban Transgender People from Serving in the Military*, Wash. Post (July 26, 2017), available at [https://www.washingtonpost.com/world/national-security/trump-announces-that-he-will-ban-transgender-people-from-serving-in-the-military/2017/07/26/6415371e-723a-11e7-803f-a6c989606ac7\\_story.html?utm\\_term=.0973fb923c58](https://www.washingtonpost.com/world/national-security/trump-announces-that-he-will-ban-transgender-people-from-serving-in-the-military/2017/07/26/6415371e-723a-11e7-803f-a6c989606ac7_story.html?utm_term=.0973fb923c58).

The worst and most recent example of animus against transgender people in Iowa is Division XX, which intentionally and facially discriminates against transgender Iowans by stripping them of the right under ICRA to nondiscrimination in Medicaid following the Iowa Supreme Court's decision in *Good*. Legislators' comments in debating Division XX, discussed below, further illustrate the profound animus faced by transgender Iowans. (See Argument Part II(A)(1)(b).) Taken together, these examples illustrate the long, troubling history of invidious discrimination against transgender individuals in Iowa and elsewhere. *Varnum*, 763 N.W.2d at 889–90.



**ii. Factor two, the relationship between transgender status and the ability to contribute to society, supports heightened scrutiny.**

The second *Varnum* factor examines whether the class members’ characteristics are related in any way to their ability to contribute to society. *Varnum*, 763 N.W.2d at 890. A person’s gender identity or transgender status is irrelevant to the person’s ability to contribute to society. The fact that the legislature outlawed discrimination based on gender identity shows that it recognized transgender Iowans’ ability to contribute to society. *Compare id.* at 891 (finding that the legislature’s prohibition against sexual-orientation discrimination sets forth “the public policy . . . that sexual orientation is not relevant to a person’s ability to contribute to a number of societal institutions”) with Iowa Code § 216.7(1) (2021) (barring discrimination based on “sexual orientation [or] gender identity”).

Letters that Iowa corporations submitted to the Iowa Civil Rights Commission in support of the 2007 ICRA amendments show the same. *See* Rainbow Health Clinic Report at 10. Those letters attest to the need for a law protecting LGBTQ Iowans against discrimination, illustrating the high premium Iowa employers place on their LGBTQ employees. *Id.*

Additionally, the record includes unrebutted expert testimony that “[m]edical science recognizes that transgender individuals represent a normal variation of the diverse human population” and that “transgender people are fully capable of leading healthy, happy and productive lives.” (AR 806, ¶ 34.) “Being transgender does not affect a person’s ability to be a good employee, parent, or citizen.” (AR 806, ¶ 39.)

Consistent with *Varnum*, these sources support a finding that gender identity or transgender status, like sexual orientation, has no bearing on a person’s ability to contribute to society. *Varnum*, 763 N.W.2d at 890.

**iii. Factor three, the immutability of transgender status, supports heightened scrutiny.**

The third *Varnum* factor is satisfied when a trait is “so central to a person’s identity that it would be abhorrent for the government to penalize a person for refusing to change [it].” *Varnum*, 763 N.W.2d at 893 (internal quotation marks omitted).

Gender identity, like sexual orientation, is a trait central to a person’s identity. (AR 800–01, ¶¶ 9–11.) The WPATH Standards of Care and other medical literature in the record demonstrate that gender identity is not subject to change through outside influence. (AR 803–07, ¶¶ 20–38.) Gender identity is biologically based, innate or fixed at a very early age, and cannot be altered. (AR 806–07, ¶¶ 34–38.) As noted in the Standards of Care, “[t]reatment aimed at trying to change a person’s gender identity and expression to become more congruent with sex assigned at birth has been attempted in the past without success . . . . Such treatment is no longer considered ethical.” See Standards of Care at 16, available at [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf).

Based on these considerations, the third *Varnum* factor supports applying heightened scrutiny.

**iv. Factor four, the political powerlessness of transgender people, supports heightened scrutiny.**

The last *Varnum* factor examines the historical political powerlessness of the class. *Varnum*, 763 N.W.2d at 887–88. The “touchstone” of this analysis is whether a group “lacks sufficient political strength to bring a prompt end to . . . prejudice and discrimination through traditional political means.” *Id.* at 894 (internal quotation marks omitted). “Absolute political powerlessness” is not required for a class to be subject to intermediate scrutiny. *Id.* For example, “females enjoyed at least some measure of political power when the Supreme Court first

heightened its scrutiny of gender classifications.” *Id.* Additionally, “a group’s current political powerlessness is not a prerequisite to enhanced judicial protection.” *Id.* “[I]f a group’s *current* political powerlessness [were] a prerequisite to a characteristic’s being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications” in the face of growing political power for women, racial minorities, and others. *Id.* (emphasis in original) (internal quotation marks omitted). As a result, increased political standing or power does not prevent a court from applying heightened scrutiny.

Transgender Iowans are politically weak, if not “powerless,” because of the community’s small population size and the enduring societal prejudices against transgender people. *Varnum*, 763 N.W.2d at 894. (internal quotation marks omitted). A 2016 study by the Williams Institute estimates that just 0.31 percent of Iowans identify as transgender. Andrew R. Flores, et al., *How Many Adults Identify as Transgender in the United States?*, Williams Institute (June 2016), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

Transgender individuals face staggering rates of poverty and homelessness. Nearly one-third of transgender people fall below the poverty line, more than twice the rate of the general US population. S. E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, Nat’l Ctr. for Transgender Equality 5 (Dec. 2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. Nearly one third of transgender people have experienced homelessness. *Id.*

Transgender individuals also face barriers to political representation. *See, e.g.*, Philip E. Jones, et al., *Explaining Public Opinion Toward Transgender People, Rights, and Candidates*,

82 Pub. Opinion Q. 252, 265 (Summer 2018), available at <https://academic.oup.com/poq/article/82/2/252/4996117> (in randomized experiment, nominating a transgender candidate reduced proportion of respondents who would vote for their own party's candidate from 68 percent to 37 percent).

Based on these considerations, the fourth *Varnum* factor likewise supports applying heightened scrutiny.

**b. Jurisdictions across the country support applying heightened scrutiny to classifications that discriminate against transgender individuals.**

Applying a similar analysis, a growing number of courts have found that intermediate or strict scrutiny is appropriate to examine classifications based on transgender status. For example, in *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015), the court found that discrimination against transgender individuals is subject to heightened scrutiny since transgender people have suffered a history of discrimination and prejudice, a person's identity as transgender has nothing to do with the person's ability to contribute to society, and transgender people represent a discrete minority class that is politically powerless to bring about change on its own. *Id.* at 139–40.

Many other courts have reached the same conclusion. *See, e.g., Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (discrimination against transgender people is subject to intermediate scrutiny); *Marlett v. Harrington*, No. 1:15-cv-01382-MJS (PC), 2015 WL 6123613, at \*4 (E.D. Cal. 2015) (same); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (same), *stay of preliminary injunction denied*, 845 F.3d 217, 222 (6th Cir. 2016); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (same); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp.

3d 321, 331 (M.D. Pa. 2017) (same); *Grimm v. Gloucester County Sch. Bd.*, 302 F. Supp. 3d 730, 748–50 (E.D. Va. 2018) (same); *M.A.B. v. Bd. of Educ. of Talbot County*, 286 F. Supp. 3d 704, 718–22 (D. Md. 2018) (same); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1142–45 (D. Idaho 2018) (same); *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019); *Stone v. Trump*, 400 F. Supp. 3d 317, 355 (D. Md. 2019) (same); *Ray v. McCloud*, No. 2:18–CV–272, 2020 WL 8172750, at \*8–9 (S.D. Ohio Dec. 16, 2020).

In addition, heightened scrutiny applies since discrimination against transgender people is a form of sex discrimination. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1741–43 (2020) (discrimination against someone because they are transgender is sex discrimination); *Varnum*, 763 N.W.2d at 880 (intermediate scrutiny applies to gender classifications); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (same); *Glenn v. Brumby*, 663 F.3d 1312, 1318 (8th Cir. 2011) (same); *Flack v. Wis. Dep’t of Health Servs.*, 395 F. Supp. 3d 1001, 1019–22 (W.D. Wis. 2019) (applying heightened scrutiny under Fourteenth Amendment to permanently enjoin Wisconsin Medicaid’s exclusion of coverage for medically necessary gender-affirming surgery);

Because the Regulation classifies Medicaid beneficiaries based on transgender status, heightened scrutiny applies.

- c. **The Regulation is not substantially related to an important governmental objective or narrowly tailored to a compelling governmental interest.**

Of the two forms of heightened scrutiny, intermediate scrutiny requires a party seeking to uphold a classification to show that the “classification is substantially related to the achievement of an important governmental objective.” *Varnum*, 763 N.W.2d at 880. It is the government’s

burden to justify the classification based on a specific policy or factual circumstances that it can prove rather than on “broad generalizations.” *Id.*

The second form of heightened scrutiny, strict scrutiny, is even more exacting. “Classifications subject to strict scrutiny are presumptively invalid . . . .” *Id.* They “must be narrowly tailored to serve a compelling governmental interest.” *Id.*

The Regulation cannot meet these constitutional standards, as this Court acknowledged in striking down the Regulation in *Good*. *Good*, No. CVCV054956, at \*26–30. There is no “important governmental objective” or “compelling governmental interest” advanced by excluding transgender individuals from Medicaid reimbursement for medically necessary surgical procedures. *See id.*; *see also Flack*, 395 F. Supp. 3d. at 1019–22 (striking down Wisconsin’s exclusion of Medicaid coverage for medically necessary gender-affirming surgery).

Given the medical community’s uniform acceptance that surgical treatment is medically necessary for some transgender people on Medicaid, denying coverage cannot be justified on medical grounds. *Good*, No. CVCV054956, at \*27–30. Surgical treatment for gender dysphoria is medically necessary for Mr. Vasquez, as demonstrated by the unrebutted letters and affidavits submitted by his health-care providers. (AR 769–812.)

Additionally, denying coverage for medically necessary gender-affirming surgery cannot be justified as a cost-savings measure under either intermediate or strict scrutiny. Courts have rejected this rationale. *See Varnum*, 763 N.W.2d at 902–04 (cost savings could not justify exclusion of same-sex couples from marriage); *Good*, No. CVCV054956, at \*27, 28–29 (rejecting cost-savings justification for Regulation). No court, for example, would conclude, that separate education for African American children is acceptable simply because educating

children in separate facilities would save the state money. An economic justification for a suspect classification is invalid under intermediate or strict scrutiny.

For these reasons, the Regulation cannot withstand heightened scrutiny under the Iowa Constitution's equal-protection guarantee. Because the Regulation is unconstitutional, it cannot support DHS's denial of Mr. Vasquez's request for Medicaid coverage.

## **2. The Regulation fails rational-basis review.**

Alternatively, the Regulation cannot withstand rational-basis review. Rational-basis review requires a "plausible policy reason for the classification." *Varnum*, 763 N.W.2d at 879 (internal quotation marks omitted). It requires that "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker" and that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Id.* (internal quotation marks omitted).

Although the rational-basis test is "deferential to legislative judgment, it is not a toothless one in Iowa." *Racing Ass'n of Cent. Iowa v. Fitzgerald* ("RACI"), 675 N.W.2d 1, 9 (Iowa 2004) (internal quotation marks omitted). In addition, rational-basis scrutiny does not protect laws that burden otherwise unprotected classes when a classification is based purely on animus. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). At the very least, a "more searching form of rational basis review [is applied] to strike down such laws under the Equal Protection Clause." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

In *Good*, this Court concluded that the Regulation did not withstand rational-basis review. *Good*, No. CVCV054956, at \*30–34. For the reasons discussed above (*see* Argument Part I(C)(1)(c)), and those relied on by this Court in *Good*, there is no plausible policy reason advanced by, or rationally related to, excluding transgender individuals from Medicaid

reimbursement for medically necessary procedures. Surgical treatment for gender dysphoria, a serious medical condition, is necessary and effective. And Medicaid coverage is crucial to ensure the availability of that treatment.

Under rational-basis review, the Regulation cannot be justified as a measure to save money since there is no reasonable distinction between transgender and nontransgender individuals relative to their need for Medicaid coverage for medically necessary surgical care. Both groups need financial assistance for critically necessary medical treatments. Cost savings are insufficient to justify the arbitrary distinction the Regulation creates between transgender and nontransgender people in need of necessary medical care. *RACI*, 675 N.W.2d at 12–15 (even under rational-basis review, there must be some reasonable distinction between the group burdened by the law, as compared to the favored group, to justify the higher costs); *see also Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 854–55 (E.D. Mich. 2014).

*Varnum* further supports this conclusion. While *Varnum* applied intermediate scrutiny to Iowa’s marriage statute, the *Varnum* Court’s rejection of cost savings as a rationale for the discriminatory treatment of same-sex couples applies equally to rational-basis review:

Excluding any group from civil marriage—African-Americans, illegitimates, aliens, even red-haired individuals—would conserve state resources in an equally “rational” way. Yet, such classifications so obviously offend our society’s collective sense of equality that courts have not hesitated to provide added protections against such inequalities.

*Varnum*, 763 N.W.2d at 903.

Indeed, providing insurance coverage for transgender patients has been shown to be “affordable and cost-effective, and has a low budget impact.” William V. Padula, PhD, et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S.*



*Transgender Population: A Cost-Effectiveness Analysis*, Johns Hopkins Bloomberg Sch. of Public Health, Dep't of Health Policy and Management (Oct. 19, 2015), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4803686> (finding that the budget impact of this coverage was \$0.016 per member per month and provided “good value for reducing the risk of negative endpoints—HIV, depression, suicidality, and drug use”); see also Herman, Jody L., *Costs and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefits Plans*, Williams Institute (Sept. 2013), available at <https://williamsinstitute.law.ucla.edu/publications/trans-employee-transition-coverage/> (noting that employers report zero or very low costs, and substantial benefits, for them and their employees when they provide transition-related health-care coverage in their employee-benefit plans).

In reality, there are medical costs associated with *denying* transgender people access to medically necessary transition-related care. With the availability of that care, transgender people's overall health and well-being improve, resulting in significant reductions in suicide attempts, depression, anxiety, substance abuse, and self-administration of hormone injections. Cal. Dep't of Ins., *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance* (Apr. 13, 2012), available at <https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf>.

Based on this literature, it should come as no surprise that more and more state governments are ending exclusions on coverage for gender-affirming surgery. See Cal. Dep't of Health Care Servs., *Ensuring Access to Medi-Cal Services for Transgender Beneficiaries* (Oct. 6, 2016), available at <http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL/APL16-013.pdf>; 10 Colo. Code Regs. § 2505-10 8.735; Conn. Gen. Stat. § 46a-71(a); Del. Dep't of Ins., *The Gender Identity Nondiscrimination Act of 2013* (March 2016)

Bulletin 86, available at <https://insurance.delaware.gov/wp-content/uploads/sites/15/2016/11domestic-foreign-insurers-bulletin-no86.pdf>; Dep't of Health Care Finance, *DHCF Issues Policy Clarifying Medicaid Coverage of Gender Reassignment Surgery* (Sept. 2016), available at <https://dhcf.dc.gov/release/dhcf-issues-policy-clarifying-medicaid-coverage-gender-reassignment-surgery.pdf>; Haw. Rev. Stat. §§ 431:10A-118.3(a), 432:1-607.3, 432D-26.3 (2016); Maryland Dep't of Health & Mental Hygiene, *Managed Care Organizations Transmittal No. 110* (March 2016), available at [https://mmcp.health.maryland.gov/MCOupdates/Documents/pt\\_37\\_16.pdf](https://mmcp.health.maryland.gov/MCOupdates/Documents/pt_37_16.pdf); MassHealth, *Guidelines for Medical Necessity Determination for Gender Reassignment Surgery* (2015), available at <https://www.mass.gov/files/documents/2016/07/ow/mg-genderreassignment.pdf>; Minn. Dep't of Human Servs., *Provider Manual* (2017), available at [https://www.dhs.state.mn.us/main/idcplg?IdcService=GET\\_DYNAMIC\\_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=DHS-297587](https://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=DHS-297587); Mont. Dep't of Pub. Health & Human Servs., *Healthcare Programs Notice* (May 2017), available at <https://medicaidprovider.mt.gov/Portals/68/docs/providernotices/2017/provnoticenondiscriminationgendertransition05252017.pdf>; *Web Announcement 1532* (2018), available at [https://www.medicaid.nv.gov/Downloads/provider/web\\_announcement\\_1532\\_20180223.pdf](https://www.medicaid.nv.gov/Downloads/provider/web_announcement_1532_20180223.pdf); 2017 NJ Sess. Law Serv. Ch. 176 (ASSEMBLY 4568) (WEST); 18 N.Y.C.R.R. 505.2; Ore. Health Auth., *Oregon Health Plan Handbook 13* (March 2017), available at [https://aix-xweb1p.state.or.us/es\\_xweb/DHSforms/Served/he9035.pdf](https://aix-xweb1p.state.or.us/es_xweb/DHSforms/Served/he9035.pdf); Penn. Dep't of Human Servs., *Medical Assistance Bulletin 99-16-11* (July 2016), available at [http://www.dhs.pa.gov/cs/groups/webcontent/documents/bulletin\\_admin/c\\_233793.pdf](http://www.dhs.pa.gov/cs/groups/webcontent/documents/bulletin_admin/c_233793.pdf); R.I. Exec. Office of Health & Human Servs., *Gender Dysphoria/Gender Nonconformity Coverage Guidelines* (2015), available at [http://www.eohhs.ri.gov/Portals/0/Uploads/Documents/MA%20Providers/MA%20Reference%20Guides/Physician/gender\\_dysphoria.pdf](http://www.eohhs.ri.gov/Portals/0/Uploads/Documents/MA%20Providers/MA%20Reference%20Guides/Physician/gender_dysphoria.pdf); Wash. Admin. Code §

182-531-1675; Dep't of Vt. Health Access, *Gender Reassignment Surgery* (2016), available at <http://dvha.vermont.gov/for-providers/gender-reassignment-surgery-w-icd-10-coded-111616.pdf>; Christy Mallory et al., *Medicaid Coverage for Gender-Affirming Care*, Williams Institute (Oct. 2019), available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiqr9vz\\_6HxAhWtAp0JHe2\\_BBUQFjAGegQICBAF&url=https%3A%2F%2Fwilliamsinstitute.law.ucla.edu%2Fwp-content%2Fuploads%2FMedicaid-Gender-Care-Oct-2019.pdf&usq=AOvVaw2f7fn\\_6eSMt-2x9C62pMcW](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiqr9vz_6HxAhWtAp0JHe2_BBUQFjAGegQICBAF&url=https%3A%2F%2Fwilliamsinstitute.law.ucla.edu%2Fwp-content%2Fuploads%2FMedicaid-Gender-Care-Oct-2019.pdf&usq=AOvVaw2f7fn_6eSMt-2x9C62pMcW) (summarizing the status of Medicaid coverage for gender-affirming care, including surgery, among state governments); see also Dep't of Health & Human Servs. Dep't'l Appeals Bd. Decision No. 2576 (May 30, 2014), available at <https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2014/dab2576.pdf> (addressing Medicare coverage for transition-related care).

For these reasons, the Regulation cannot withstand rational-basis review under the Iowa Constitution's equal-protection guarantee. Because the Regulation is unconstitutional, it cannot support DHS's denial of Mr. Vasquez's request for Medicaid coverage.

## **II. The Regulation violates ICRA.**

As set forth above, under section 17A.19(10)(a) of the APA, a court may reverse an agency action if “substantial rights of the person seeking judicial relief have been prejudiced because the agency action . . . is [u]nconstitutional on its face or as applied or is based on a provision of law that is unconstitutional on its face or as applied.” See Iowa Code § 17A.19(10)(a) (2021). Constitutional questions raised in agency proceedings are reviewed de novo. *ABC Disposal*, 681 N.W.2d at 605; *Gartner*, 830 N.W.2d at 344; *NextEra*, 815 N.W.2d 30 at 44.

Relatedly, under section 17A.19(10)(b) of the APA, a court may reverse an agency action if “substantial rights of the person seeking judicial relief have been prejudiced because the agency action . . . is [b]eyond the authority delegated to the agency by any provision of law or in violation of any provision of law.” *See* Iowa Code § 17A.19(10)(b) (2021). An agency’s interpretation of a statute is reviewed de novo. *Thoms v. Iowa Pub. Employees Ret. Sys.*, 715 N.W.2d 7, 10–11 (Iowa 2006); *City of Des Moines v. Employment Appeal Bd.*, 722 N.W.2d 183, 191 (Iowa 2006).

The Regulation violates ICRA’s prohibitions against gender-identity and sex discrimination. Those prohibitions remain in effect since Division XX, which purported to amend ICRA by excluding “state or local government unit[s] or tax-supported district[s]” from having “to provide for sex reassignment surgery” or any surgical procedure “related to transsexualism [or] gender identity disorder,” is unconstitutional. *See* Iowa Code § 216.7(3) (2021).

**A. Division XX is null and void.**

Although Division XX purported to amend ICRA to allow DHS and Amerigroup, as DHS’s agent, to apply the Regulation without violating ICRA, Division XX itself violates the Iowa Constitution and is therefore null and void.

**1. Division XX violates the Iowa Constitution’s equal-protection guarantee.**

Division XX violates the Iowa Constitution’s equal-protection guarantee because it (1) facially discriminates against transgender people and (2) was motivated by animus against transgender people.

**a. Division XX is facially discriminatory.**

For the same reasons the Regulation is facially discriminatory (*see* Argument Part I(B)), so, too, is Division XX. Division XX facially discriminates against transgender Iowans based on their gender identity. Transgender and nontransgender Iowa Medicaid recipients are similarly situated for equal-protection purposes in that both groups share a financial need for medically necessary treatment. Division XX discriminates against transgender Medicaid recipients, such as Mr. Vasquez, by authorizing the denial of Medicaid coverage for medically necessary gender-affirming surgery simply because the recipients of this coverage are transgender.

This facially discriminatory classification is unconstitutional under either heightened scrutiny or rational-basis review. Under heightened scrutiny, there is no important governmental objective or compelling governmental interest advanced by excluding transgender individuals from Medicaid reimbursement for medically necessary procedures. And under rational-basis review, there is no plausible policy reason advanced by, or rationally related to, this type of exclusion. Surgical treatment for gender dysphoria, a serious medical condition, is necessary and effective; Medicaid coverage is crucial to ensuring the availability of that necessary treatment.

The legislature's discretion to decide the scope of ICRA's coverage does not render Division XX nondiscriminatory. The legislature does not have boundless discretion to amend ICRA when it does so with the purpose and effect of harming a discrete group of Iowans.

“[T]he Iowa Constitution of 1857 tended to limit the power of the legislature while it protected the independence of the court [system].” *Godfrey*, 898 N.W.2d at 865. These limitations included the Bill of Rights, which “the framers of the Iowa Constitution put . . . in the very first article.” *Id.* at 864. This was consistent with the constitutional framers' desire “to put upon the record every guarantee that could be legitimately placed [in the constitution] in order

that Iowa . . . might . . . have the best and most clearly defined Bill of Rights” of any state in the country. *Id.* (internal quotation marks omitted).

The Iowa Constitution’s Bill of Rights includes a two-part equal-protection guarantee. *See* Iowa Const. art. I, §§ 1, 6. As mentioned, this guarantee requires “that laws treat alike all people who are similarly situated with respect to the legitimate purposes of the law.” *Varnum*, 763 N.W.2d at 882 (internal quotation marks omitted); *Bowers*, 638 N.W.2d at 689.

A legislative amendment that violates this constitutional limitation by purposely harming transgender Iowans violates Iowa’s equal-protection guarantee. This is true even where the amendment removes statutory protections the state was never required to provide. *See Romer v. Evans*, 517 U.S. 620, 627 (1996) (recognizing that removal of, and prohibition against, state and local antidiscrimination protections violated federal equal protection); *Moreno*, 413 U.S. at 534 (amendment of Food Stamp Act to exclude households of unrelated individuals, such as “hippies” living in “hippie communes,” violated federal equal-protection clause); *Perry v. Brown*, 671 F.3d 1052, 1083 (9th Cir. 2012), *vacated and remanded on other grounds sub nom. Hollingsworth v. Perry*, 570 U.S. 693 (2013) (state initiative to take away marriage for same-sex couples violated equal protection, even if there was no federal constitutional right to marriage).

Division XX does not simply take away ICRA’s protections from discrimination by third-party private actors, as occurred in *Romer*; it specifically authorizes the state to discriminate. It does so by restoring the discriminatory Regulation struck down under ICRA in *Good*. Division XX thus violates equal protection by, together with the Regulation, allowing the state to deny Medicaid coverage for medically necessary surgery to transgender Iowans, including Mr. Vasquez, solely because they are transgender. *See Diaz*, 656 F.3d at 1012–15 (law limiting health-insurance benefits to married couples, when state law prohibited same-sex couples from

marrying, violated equal protection); *Bassett*, 951 F. Supp. 2d at 963 (same); *cf. Johnson v. New York*, 49 F.3d 75, 79 (2d Cir.1995) (employment policy discriminated based on age, even though it did not mention age, where it incorporated another policy that discriminated based on age); *Erie Cnty. Retirees Ass'n v. Cnty. of Erie, Pa.*, 220 F.3d 193, 211 (3d Cir.2000) (same).

On its face, Division XX states that the public-accommodation provisions of ICRA “shall not require any state or local government unit or tax-supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder.” Iowa Code § 216.7(3) (2021). Based on Division XX, the discriminatory Regulation that was struck down in *Good* is once again effective. *Good*, 924 N.W.2d at 862–63 (concluding that “expressly exclud[ing] Iowa Medicaid coverage for gender-affirming surgery specifically because this surgery treats gender dysphoria of transgender individuals” constitutes unlawful discrimination).

Division XX’s express purpose and effect of taking away protections under ICRA violates equal protection in the same way that taking away nondiscrimination protections, food stamps, and marriage violated equal protection in *Romer*, *Moreno*, and *Perry*. *See Romer*, 517 U.S. at 627; *Moreno*, 413 U.S. at 534; and *Perry*, 671 F.3d at 1083. Division XX works together with the Regulation to violate equal protection, as did the statutes at issue in *Diaz* and *Bassett*, which limited benefits to married couples where state law at the time prevented same-sex couples from marrying. Based on these well-established authorities, the state’s discretion to determine what ICRA does and does not cover is not a defense to Mr. Vasquez’s equal-protection challenge to Division XX.

**b. Division XX was motivated by animus toward transgender people.**

Alternatively, Division XX violates the Iowa Constitution’s equal-protection guarantee because it was motivated by animus toward transgender people.

A law is irrational, and violates equal protection, if its purpose is to target a disadvantaged group. *United States v. Windsor*, 570 U.S. 744, 770 (2013) (“The Constitution’s guarantee of equality ‘must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”) (quoting *Moreno*, 413 U.S. at 534–35); *Romer*, 517 U.S. at 632 (“[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”); *Cleburne*, 473 U.S. at 448 (“[M]ere negative attitudes, or fear . . . are not permissible bases for [a statutory classification.]”); *see also Moreno*, 413 U.S. at 534 (“[The] amendment was intended to prevent so called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program,” and such “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”).

Division XX’s sole purpose is to take away publicly funded, medically necessary Medicaid coverage for transgender Iowans. It does so by creating an exception to ICRA directed specifically at transgender people. Before Division XX was enacted, ICRA, as interpreted by the Iowa Supreme Court in *Good*, afforded transgender people protection against the discriminatory denial of Medicaid coverage for gender-affirming surgery. *See Good*, 924 N.W.2d at 862–63 (finding that the Regulation violates ICRA). Division XX undermines this protection by amending ICRA to allow enforcement of the discriminatory Regulation.

The evidence establishing Division XX’s discriminatory animus toward transgender people is overwhelming:



- In urging his colleagues to vote against Division XX, Senator Joseph Bolkcom identified the discriminatory purpose of the legislation, noting that “[t]he language in this bill targets coverage for [transgender Iowans’] essential and necessary medical treatments.” Iowa General Assembly, Session, House File 766, Video Recording of 4/27/19 Debate, *available at* <https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190426012941549&dt=201904026&offset=2721&bill=HF%20766&status=r>, at 2:27:55 (Sen. Bolkcom). Senator Bolkcom also explained to his colleagues that the country’s marquee medical associations “support the view that medically necessary care is needed” and “believe these medical procedures should be covered under public insurance programs.” *Id.*
- Well-aware of Division XX’s discriminatory purpose, Senator Mark Costello plainly stated that Division XX was being enacted “to react to the lawsuit that came up” by changing the administrative code back to the way it was before the lawsuit. *See id.* at 2:31:44. Senator Costello did not agree that gender-affirming surgery “is always medically necessary, which is what Medicaid is about,” and also did not agree that funding gender-affirming surgery through Medicaid was “a proper use of federal or . . . state monies.” *See id.*; *see also* Tony Leys & Barbara Rodriguez, *Iowa Republican lawmakers ban use of Medicaid dollars on transgender surgery*, The Des Moines Register (Apr. 27, 2019), *available at* <https://www.desmoinesregister.com/story/news/politics/2019/04/26/iowa-legislature-senate-republicans-propose-ban-medicaid-money-transgender-surgery-lawsuit-courts/3578920002/>.
- In the Iowa House of Representatives, the only comments supporting Division XX came from the bill manager, Representative Joel Fry, who described Division XX’s function, in discriminatory terms, as “amending [ICRA] to clarify that we are not requiring any government unit in the state to provide for gender reassignment surgeries.” Iowa General Assembly Session, House File 766, Video Recording of 4/27/19 Debate, *available at* <https://www.legis.iowa.gov/dashboard?video&chamber=H&clip=h20190427092516225&dt=2019-04-27&offset=6564&bill=HF%20766&status=r>, at 11:24:30 (Rep. Fry).
- The rest of the comments in the House debate came from opponents. For example, Representative Beth Wessel-Kroeschell criticized Division XX, saying: “This amendment takes away the civil rights of Iowa’s transgender population.” *Id.* at 11:36:50 (Rep. Wessel-Kroeschell). She added: “This proposal deserved to be thoroughly examined, and it was not. This amendment was mean-spirited and cruel.” *Id.* at 11:37:10.
- Similarly, Representative Kirsten Running-Marquardt stated: “I question the integrity of a body that passes language that denies Iowans critical health care because they’re transgender. That’s what this bill does. . . We

are codifying discrimination against people and their health-care needs because they're transgender. . . . It is the doctor's decision what is critical health care. It is not the people in this chamber. It is not your decision." *Id.* at 12:30:20 (Rep. Running-Marquardt).

- Governor Kim Reynolds, for her part, is on record as saying: "This [legislation] takes it back to the way it's always been. This has been the state's position for decades." See Caroline Cummings, *Governor Reynolds stands by signing bill with Medicaid coverage ban on transgender surgery* (May 7, 2019), available at <https://cbs2iowa.com/news/local/gov-kim-reynolds-stands-by-decision-to-sign-budget-bill-with-transgender-surgery-ban>.

Because Division XX was motivated by animus toward transgender people, it violates the Iowa Constitution's equal-protection guarantee.

**2. Division XX violates the Iowa Constitution's single-subject and title rules.**

Division XX also violates the Iowa Constitution's single-subject and title rules. Section 29 of Article III of the Iowa Constitution contains two distinct but interrelated requirements: (1) "[e]very act shall embrace but one subject, and matters properly connected therewith" (the single-subject rule), and (2) the act's subject "shall be expressed in the title" (the title rule). Iowa Const. Art. III, § 29. Thus, "[s]ection 29 imposes two requirements upon the General assembly, one concerning the number of subjects that a single bill may address and the other concerning the descriptive accuracy of a bill's title." Todd E. Pettys, *The Iowa State Constitution* 171 (2d ed. 2018). Division XX violates both requirements.

**a. Division XX violates the single-subject rule.**

Division XX was part of the legislature's annual Health and Human Services Appropriations Bill ("HHS Appropriations Bill") in 2019. But Division XX was not merely a funding restriction on a DHS appropriation. On the contrary, it was a new, substantive third subsection to the section of ICRA otherwise ensuring protections against nondiscrimination in

public accommodations. It carved out an area formerly covered by ICRA’s nondiscrimination protections, thereby depriving transgender Iowans on Medicaid of nondiscriminatory access to medically necessary care.

The single-subject rule is concerned with germaneness. *Utilicorp United v. Iowa Utilities Bd.*, 570 N.W.2d 451, 454 (Iowa 1997); *Western Int’l v. Kirkpatrick*, 396 N.W.2d 359, 364 (Iowa 1986). Germaneness is a mandatory constitutional requirement. *State v. Mabry*, 460 N.W.2d 472, 474 (Iowa 1990) (“[T]o pass constitutional muster the matters contained in the act must be germane.”); *Long v. Bd. of Supervisors of Benton County*, 142 N.W.2d 378, 382 (Iowa 1966) (“[L]imiting each bill to one subject means that extraneous matters may not be introduced into consideration of the bill by proposing amendments not germane to the subject under consideration.”). “To be germane,” the Iowa Supreme Court has explained, “all matters treated [within the act] should fall under some one general idea and be so connected with or related to each other, either logically or in popular understanding, as to be part of . . . one general subject.” *Utilicorp*, 570 N.W.2d at 454 (internal quotation marks omitted).

Here, the subject matter of the act of which Division XX was part—i.e., the annual HHS Appropriations Bill—has nothing to do with the subject matter of Division XX—i.e., ICRA’s protections against discrimination in public accommodations. Legislators expressly acknowledged that the amendment containing Division XX was not germane to the annual HHS Appropriations Bill. House Journal 1064 (Apr. 27, 2019), available at <https://www.legis.iowa.gov/docs/pubs/hjweb/pdf/April%2027,%202019.pdf#page=9>; see also Iowa General Assembly, House File 766, Video Recording of 4/27/19 Debate, available at <https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h20190427092516225&dt=2019-04-27&offset6564&bill=HF%20766&status=r> (point of order raised by Representative Heddens challenging

amendment's lack of germaneness; Representative Upmeyer, at 11:15:00 through 11:22:12, acknowledging and ruling on point of order). This point was ruled well taken by Representative Upmeyer, Speaker of the House. *Id.* (“You are correct. The amendment is not germane.”) Then, Representative Fry, the amendment's sponsor, moved to suspend the rules to consider the amendment anyway. *Id.* at 11:22:13– 11:24:00. The motion narrowly passed. *Id.*

Representative Fry's motion to suspend the rules may have remedied Division XX's noncompliance with the legislature's internal procedures, but it did nothing to cure the amendment's unconstitutionality under the single-subject rule. “It is entirely the prerogative of the legislature . . . to make, interpret, and enforce its own procedural rules, and the judiciary cannot compel the legislature to act in accordance with its own procedural rules *so long as constitutional questions are not implicated.*” *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 496 (Iowa 1996) (emphasis added); *see also Carlton v. Grimes*, 23 N.W.2d 883, 889 (Iowa 1946) (“Whether either chamber strictly observes these [internal procedural] rules or waives or suspends them is a matter entirely within its own control or discretion, *so long as it observes the mandatory requirements of the Constitution.* If any of these [constitutional] requirements are covered by its rules, such rules must be obeyed . . . .”) (emphasis added).

The single-subject rule is mandatory, not directory. *C.C. Taft Co. v. Alber*, 171 N.W. 719, 720 (Iowa 1919) (“[T]he provisions of the Constitution are mandatory and binding upon the Legislature, and . . . any act that contravenes the provisions of the Constitution . . . is not binding upon the people or any of the agencies of government.”); *Green v. City of Mt. Pleasant*, 131 N.W.2d 5, 18 (Iowa 1964) (same); *Kirkpatrick*, 396 N.W.2d at 366 (referring to “the mandate of Article III, § 29” and striking portions of statute that violated that provision). Because the single-subject rule is mandatory rather than directory, the legislature could not cure the constitutional

defect through a suspension-of-the-rules vote, as took place here. Rather, statutes contravening the single-subject rule are void.

The Iowa Supreme Court has described the single-subject rule's purpose as "to prevent logrolling and to facilitate orderly legislative procedure." *Kirkpatrick*, 396 N.W.2d at 364. The Court has described "logrolling" as "the practice of several minorities combining their proposals as different provisions of a single bill, and thus consolidating their votes so that a majority is obtained . . . where perhaps no single proposal of each minority could have obtained majority approval separately." *Long*, 142 N.W.2d at 382. In theory, "[b]y limiting each bill to a single subject, the issues presented by each bill can be better grasped and more intelligently discussed by the legislators." *Id.* The purposes of the single-subject rule also include "preventing surprise" and "keep[ing] the citizens of the state fairly informed." *Mabry*, 460 N.W.2d at 473.

These purposes were thwarted by including Division XX in the annual HHS Appropriations Bill. Affidavits from Senator Joe Bolkcom ("Sen. Bolkcom") and Keenan Crow ("Crow"), the Director of Policy and Advocacy for One Iowa, detail the normal lawmaking process for substantive policy matters and how incorporating Division XX into the annual HHS Appropriations Bill derogated from that process.

Normally, a bill, once sponsored and filed, is assigned to a subcommittee and committee. (AR 900, ¶¶ 5–6; AR 903–04, ¶¶ 4–5.) The subcommittee of legislators meets in public, invites formal public input, and makes any changes to the legislation that it deems appropriate. (AR 900, ¶ 5; AR 904, ¶ 5.) A majority of the subcommittee may then advance the legislation to a full committee. (AR 900, ¶ 6; AR 904–05, ¶¶ 5–6.) Before the full committee, a larger group of legislators makes any changes to the legislation deemed appropriate by a majority of the committee and may, after a majority vote, advance the legislation to the full chamber for a vote.

(AR 900, ¶ 6; AR 904–05, ¶¶ 6–7.) The same process takes place in the opposite chamber. (AR 900, ¶ 6; AR 905, ¶ 7.)

As both Senator Bolkcom and Crow explained, this process affords sufficient time and opportunity for input from the public, experts, impacted people, and other legislators. (AR 900, ¶¶ 4–6; AR 904–05, ¶¶ 5–6, 8.) But when logrolling occurs, as it did in this case, there is no opportunity for this input. (AR 900–01, ¶¶ 7–8; AR 905, ¶ 10.)

Division XX was never subject to normal filing, subcommittee, or committee processes. (AR 900–01, ¶¶ 7–8; AR 905, ¶ 10.) Members of the public had no opportunity to submit input or share their concerns. (AR 900–01, ¶¶ 7–8; AR 905–07, ¶ 10–11, 12–14, 16.) Rather than the typical time frame of several weeks to months that usually accompanies the lawmaking process, the time between filing the amendment containing Division XX, on the one hand, and passing the final legislation in both chambers, on the other, was a mere 32 hours. (AR 900–01, ¶ 8, AR 906, ¶ 12.)

The legislature’s inclusion of nongermane matters in the annual HHS Appropriations Bill frustrated the purpose of the single-subject rule by surprising both legislators and citizens. (AR 900–01, ¶ 8; AR 905, ¶ 10.) Substantive antidiscrimination protections and annual HHS appropriations do not “fall under . . . one general idea.” *Utilicorp*, 570 N.W.2d at 454 (internal quotation marks omitted). Nor are they “so connected with or related to each other, either logically or in popular understanding, as to be part of . . . one general subject.” *Id.* (internal quotation marks omitted). In the end, the legislature passed a bill that contained matters not germane to each other and—extraordinarily—*acknowledged* that it was doing so. It is difficult to imagine a starker effort to flout the single-subject rule.

**b. Division XX violates the title rule.**

Division XX also violates the title rule. The title of the annual HHS Appropriations Bill was: “An Act relating to appropriations for health and human services and veterans and including other related provisions and appropriations, providing penalties, and including effective date and retroactive and other applicability date provisions.” 2019 Iowa Acts, House File 766, available at <https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba-hf766>, p. 1. This title does not reference ICRA at all, much less provide any notice that Division XX would create an exception to ICRA’s prohibition against gender-identity discrimination in public accommodations.

While the purpose of the single-subject rule is to preserve the overall integrity of the democratic legislative process, the purpose of the title rule is to ensure notice to legislators and the public about what is being included in a bill. *Kirkpatrick*, 396 N.W.2d at 365 (“The purpose of the [title] requirement is to guarantee that reasonable notice is given to legislators and the public of the inclusion of provisions in a proposed bill; thus it is said to prevent surprise and fraud.”); *State v. Talerico*, 290 N.W. 660, 663 (Iowa 1940) (“[The title rule] was designed to prevent surprise in legislation.”). Therefore, in analyzing a title-rule challenge, a court will determine whether a title “gives fair notice of a provision in the body of an act.” See *Kirkpatrick*, 396 N.W.2d at 365 (striking down legislation for violating the title rule where the title in question did not inform readers “that a drastic change in the workers’ compensation law [would] result from [the legislation’s] enactment”).

Here, the title of the annual HHS Appropriations Bill did not alert readers that a “drastic change” to ICRA’s protections against nondiscrimination would result from the bill’s enactment. See *id.* The changes were buried in the middle of a 108-page bill otherwise related to

appropriations. And there was no reasonable basis to expect that a substantive amendment to ICRA’s nondiscrimination protections for transgender Iowans in public accommodations, in place since 2007, would be amended through annual appropriations legislation. *Cf.* 2007 Iowa Acts, Senate File 427, available at <https://www.legis.iowa.gov/legislation/billTracking/billHistory?ga=82&billName=SF427> (indicating that, when ICRA was amended in 2007, the title of the bill *adding* protections against gender-identity discrimination was “A bill for an act relating to the Iowa civil rights Act and discrimination based upon a person’s sexual orientation or gender identity”). The title of the Annual Appropriations Bill containing Division XX unfairly took both citizens and legislators by surprise, thereby violating the title rule. (AR 900–01, ¶ 8; AR 907–08, ¶ 17, 18.)

**B. The preamendment version of section 216.7 of ICRA remains in effect.**

Because Division XX is unconstitutional, the amendment to ICRA under which “state or local government unit[s] or tax-supported district[s]” are no longer required “to provide for sex reassignment surgery” or any surgical procedure “related to transsexualism [or] gender identity disorder” is null and void. *See* Iowa Code § 216.7(3) (2021). As the Iowa Supreme Court has long held, “[w]hen parts of a statute or ordinance are constitutionally valid, but other discrete and identifiable parts are infirm,” a court will “leave the valid parts in force on the assumption that the legislature would have intended those provisions to stand alone.” *See State v. Zarate*, 908 N.W.2d 831, 844 (Iowa 2018) (internal quotation marks and citations omitted). The preamendment version of section 216.7 of ICRA does not suffer from any constitutional infirmities. That version, which prohibits gender-identity and sex discrimination in public accommodations, and contains no exclusions for gender-affirming surgery, remains in effect.



**C. The Regulation violates ICRA’s prohibition against gender-identity discrimination.**

The Regulation violates ICRA’s prohibition against gender-identity discrimination. As the Iowa Supreme Court explained in *Good*, “[i]n 2007, the Iowa legislature amended . . . ICRA to add ‘gender identity’ to the list of protected groups.” *Good*, 924 N.W.2d at 862. Under section 216.7(1)(a) of ICRA, “it is ‘unfair or discriminatory’ for any ‘agent or employee’ of a ‘public accommodation’ to deny services based on ‘gender identity.’” *Id.* The Court acknowledged that “ICRA’s gender identity classification encompasses transgender individuals—especially those who have gender dysphoria—because discrimination against these individuals is based on the nonconformity between their gender identity and biological sex.” The Court further acknowledged that ICRA’s “prohibition against denying coverage for [the plaintiffs’] gender-affirming surgical procedures extend[ed] to the director and staff of . . . DHS, as well as its agents, the MCOs,” including Amerigroup, the MCO for one of the plaintiffs. *Id.*

The Court went on to hold that the Regulation’s plain language violates ICRA’s prohibition against gender-identity discrimination. *Id.* at 862. The record did “not support . . . DHS’s position that [the Regulation] is nondiscriminatory because its exclusion of coverage for gender-affirming surgical procedures encompasses the broader category of ‘cosmetic, reconstructive, or plastic surgery’ that is ‘performed primarily for psychological purposes.’” *Id.* at 862. The Court emphasized that “DHS expressly denied [the plaintiffs] coverage for their surgical procedures because they were ‘related to transsexualism . . . [or] gender identity disorders’ and ‘for the purpose of sex reassignment.’” *Id.* The Court also emphasized that the Regulation “authorize[d] payment for some cosmetic, reconstructive, and plastic surgeries that serve psychological purposes” yet “prohibit[ed] coverage” for the “same” procedures if those

procedures were requested by a transgender individual. *Id.* For these reasons, the Regulation was discriminatory under ICRA.

The Court also noted that “the history behind” the Regulation supported its holding. *Id.* Many years ago, DHS “had an unwritten policy of excluding sex reassignment surgeries from Medicaid coverage based on Medicaid’s coverage limitations on ‘cosmetic surgery’ and ‘mental diseases.’” *Id.* Then, in 1980, the United States Court of Appeals for the Eighth Circuit held that this “informal policy” was improper. *Id.* After the Eight Circuit’s decision, DHS amended the Regulation “to clarify that [it] excluded Medicaid coverage for ‘sex reassignment procedures’ and ‘gender identity disorders.’” *Id.* Based on this history, the Court concluded that the Regulation “expressly excluded Iowa Medicaid coverage for gender-affirming surgery specifically because this surgery treats gender dysphoria of transgender individuals.” *Id.* The legislature’s 2007 amendment of ICRA, which postdated DHS’s amendment of the Regulation, “made it clear that individuals cannot be discriminated against on the basis of gender identity,” including under the Regulation. *See id.* at 862–63.

Because Division XX is unconstitutional, the Court’s holding in *Good* regarding ICRA’s gender-identity protections continues to govern the Regulation. As established in *Good*, the Regulation’s categorical ban on Medicaid reimbursement for gender-affirming surgery violates ICRA’s prohibition against gender-identity discrimination. As a result, the Regulation cannot support DHS’s denial of Mr. Vasquez’s request for Medicaid coverage.

**D. The Regulation violates ICRA’s prohibition against sex discrimination.**

The Regulation also violates ICRA’s prohibition against sex discrimination. Discrimination based on transgender status constitutes sex discrimination, as dictated by over three decades of federal case law, which guides Iowa courts’ interpretation of ICRA. *Vivian v.*

*Madison*, 601 N.W.2d 872, 873 (Iowa 1999) (noting that because “ICRA was modeled after Title VII of the United States Civil Rights Act, Iowa courts turn to federal law for guidance in evaluating . . . ICRA”); *Wright v. Winnebago Indus., Inc.*, 551 F. Supp. 2d 836, 845 (N.D. Iowa 2008) (same).

Most recently, in *Bostock v. Clayton County*, the United States Supreme Court held that, under Title VII, discrimination against someone because they are transgender is sex discrimination. *Bostock*, 140 S. Ct. at 1741–43. The Court reasoned that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.* at 1741.

In doing so, *Bostock* affirmed a long line of federal cases recognizing that discrimination against transgender people is sex discrimination. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571–580 (6th Cir. 2018); *Whitaker*, 858 F.3d at 1048; *Glenn*, 663 F.3d at 1316–17; *Barnes v. City of Cincinnati*, 401 F.3d 729, 736–38 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 572–75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Harford*, 204 F.3d 1187, 1198–1203 (9th Cir. 2000); *see also Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017) (assuming, for purposes of appeal, “that the prohibition on sex based discrimination under Title VII . . . encompasses protection for transgender individuals”); *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 702 (8th Cir. 2012) (same).

As these cases acknowledged, “discrimination on the basis of transgender and transitioning status” is by its very nature sex discrimination. *R.G.*, 884 F.3d at 574–75. It is “analytically impossible” to make a decision based on an individual’s “status as a transgender person without being motivated, at least in part, by the [person’s] sex.” *Id.* at 575. “There is no

way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity . . . .” *Id.* at 576–77.

These cases, for their part, drew on the United States Supreme Court’s holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which the Court held that sex discrimination encompasses discrimination based on a person’s failure to conform to stereotypical gender norms—the type of discrimination to which transgender individuals are subjected. *Id.* at 250–52, 258 (plurality opinion); *see also id.* at 258–61 (White, J., concurring); *id.* at 272–73 (O’Connor, J., concurring). The Iowa Supreme Court has adopted the *Price Waterhouse* definition of “sex” for cases arising under ICRA. *See Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 71 (Iowa 2013) (“[A] decision based on a gender stereotype can amount to unlawful sex discrimination.”)

The Iowa Supreme Court’s decision in *Sommers v. Iowa Civil Rights Commission*, 337 N.W.2d 470 (Iowa 1983), is based on a constricted definition of “sex” borrowed from federal case law that has been superseded by the intervening decisions discussed above. In *Sommers*, the Court held that ICRA’s prohibition against sex discrimination did not encompass discrimination based on “transsexualism.” *Id.* at 473–74. But *Sommers* was predicated on a narrow definition of “sex” based on the Eighth Circuit’s decision in *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1981), as well as other federal decisions that were “eviscerated by *Price Waterhouse*,” and then again by *Bostock*. *See Smith*, 378 F.3d at 573,

In light of the superseding federal case law postdating the cases on which *Sommers* was based, *Sommers* is no longer good law, and the Regulation violates ICRA’s prohibition against sex discrimination. The Regulation discriminates based on sex by restricting coverage for necessary medical treatment to a class of people based on their failure to conform to

stereotypical gender norms and the fact of their transition from one gender to another, both of which amount to sex discrimination. It denies Medicaid coverage for medically necessary procedures to conform a person's body to a gender that is different from the gender assigned at birth while covering comparable procedures for other medically necessary purposes.

Given Division XX's unconstitutionality, the Regulation's categorical ban on Medicaid reimbursement for gender-affirming surgery violates ICRA's prohibition against sex discrimination. As a result, the Regulation cannot support the denial of Mr. Vasquez's request for Medicaid coverage.

**III. The Regulation has a disproportionate negative impact on private rights.**

Under Section 17A.19(10)(k) of the APA, a court may reverse an agency action if "substantial rights of the person seeking judicial relief have been prejudiced because an agency action is . . . [n]ot required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy." *See* Iowa Code § 17A.19(10)(k) (2021); *Zieckler v. Ampride*, 743 N.W.2d 530, 533 (Iowa 2007).

Mr. Vasquez's rights under the Iowa Constitution's equal-protection guarantee and ICRA have been violated. His disproportionality claim, which arises from these rights, is straightforward. An unconstitutional, unlawful administrative regulation, such as the Regulation at issue here, is not only "[n]ot required," but also forbidden. The Regulation causes a disproportionate negative impact on the private rights of transgender individuals such as Mr. Vasquez by categorically prohibiting them from receiving Medicaid coverage for medically necessary surgical treatment of gender dysphoria. (*See* AR 802, ¶ 15.) And there is no public interest served by denying Medicaid coverage for medically necessary and effective treatment.

(See AR 805, ¶ 29; AR 807, ¶ 40; AR 811, ¶¶ 56–57.) Based on these considerations, the Regulation cannot stand.

**IV. DHS’s denial of Mr. Vasquez’s request for Medicaid coverage was arbitrary and capricious.**

Under Section 17A.19(10)(n) of the APA, a court may reverse an agency action if “substantial rights of the person seeking judicial relief have been prejudiced because the agency action is . . . unreasonable, arbitrary, capricious, or an abuse of discretion. See Iowa Code § 17A.19(10)(n) (2021); *Birchansky Real Estate, L.C. v. Iowa Dep’t of Pub. Health, State Health Facilities Council*, 737 N.W.2d 134, 140 (Iowa 2007).

Mr. Vasquez challenges DHS’s decision to enforce the Regulation’s categorical surgical ban against him based on current law and current evidence regarding medical necessity and the applicable standards of care, not based on DHS’s 1994 decision to adopt the Regulation. For purposes of this claim, the relevant agency action is the ongoing exclusion of benefits for Mr. Vasquez, and for others similarly situated, not the Regulation’s enactment.

This approach is consistent with well-established Iowa case law. An agency action is considered arbitrary or capricious “when it is taken without regard to the law or facts of the case” pending before the agency. See *Soo Line R.R. Co. v. Iowa Dep’t of Transp.*, 521 N.W.2d 685, 688–89 (Iowa 1994); *Hough v. Iowa Dep’t of Personnel*, 666 N.W.2d 168, 170 (Iowa 2003). An agency “of course cannot act unconstitutionally, in violation of a statutory mandate, or without substantial support in the record.” *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994). Although an “agency is entitled to reconcile competing evidence,” it is not entitled to “ignore competing evidence.” *JBS Swift & Co. v. Hedberg*, 873 N.W.2d 276, 280–81 (Iowa Ct. App. 2015); see also *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 225 (Iowa 2006) (stating that an agency “commits error by failing to weigh and consider all of the evidence”); *Armstrong v. State*

of *Iowa Bldgs. & Grounds*, 382 N.W.2d 161, 165 (Iowa 1986) (stating that it is reversible error for an agency to fail to “weigh and consider all the evidence”).

DHS applied the Regulation without any regard for the Iowa Constitution’s equal-protection guarantee (*see* Argument Part I), ICRA’s prohibitions against gender-identity and sex discrimination (*see* Argument Part II), or the unrefuted evidence that the surgical procedure requested by Mr. Vasquez is medically necessary and consistent with modern standards of medical care (*see* Statement of the Case Parts II(A) & (C)). This was improper.

Where, as here, the law changes and the state fails to amend a regulation to conform to the change, the regulation become unlawful and unenforceable, and the state violates the law when it seeks to enforce the regulation. *See, e.g., Exceptional Persons, Inc. v. Iowa Dep’t of Human Servs.*, 878 N.W.2d 247, 252 (Iowa 2016) (“When a statute directly conflicts with a rule, the statute controls.”) (internal citation omitted). In *Exceptional Persons*, the very same agency whose actions Mr. Vasquez challenges here successfully argued this proposition to the Iowa Supreme Court when defending its decision not to apply a 2009 rule that failed to conform with a subsequently enacted law, arguing that the agency must apply the law over a prior nonconforming rule. *Id.*

For this very reason, the well-known practice of administrative agencies in Iowa is to regularly review all administrative rules to ensure consistency with changing law, reviewing each rule no less than every five years. This is typically referred to by each agency as its “five-year regular review” process.

The specific legislative history of the Regulation shows that it was reviewed by DHS in 2010, 2012, 2013, 2015, 2015, and 2016. Iowa Admin. Bulletin ARC 2371C (Jan. 1, 2016), available at <https://www.legis.iowa.gov/docs/aco/arc/2361C.pdf>; Iowa Admin. Bulletin ARC

2164C (Sept. 30, 2015), *available at* <https://www.legis.iowa.gov/docs/aco/arc/2164C.pdf>; Iowa Admin. Bulletin ARC 1297C (Feb. 5, 2014), *available at* <https://www.legis.iowa.gov/docs/Aco/arc/1297C.pdf>; Iowa Admin. Bulletin ARC 1052 (Oct. 2, 2013), *available at* <https://www.legis.iowa.gov/docs/aco/arc/1052C.pdf>; Iowa Admin. Bulletin ARC 0305C (Sept. 5, 2012), *available at* <https://www.legis.iowa.gov/docs/aco/arc/0305C.pdf>; Iowa Admin. Bulletin ARC 8714B (May 5, 2010), *available at* <https://www.legis.iowa.gov/docs/aco/arc/8714B.pdf>. Despite this review process, DHS has failed to put an end to the Regulation's discrimination against transgender Iowans.

DHS's application of the discriminatory Regulation was arbitrary and capricious. The Court should reverse the agency's denial of Mr. Vasquez's request for Medicaid coverage.

### **CONCLUSION**

For the reasons stated above, Mr. Vasquez respectfully requests the following relief:

- a. A declaratory ruling that:
  - i. The Regulation facially violates the Iowa Constitution's equal-protection guarantee;
  - ii. The Regulation violates ICRA's prohibitions against gender-identity and sex discrimination because Division XX, which purported to amend ICRA:
    - (1) violates the Iowa Constitution's equal-protection guarantee on its face;
    - (2) violates the Iowa Constitution's equal-protection guarantee because it was enacted based on discriminatory animus toward transgender people;



- (3) violates the Iowa Constitution's single-subject rule; and
- (4) violates the Iowa Constitution's title rule;
- vi. The Regulation creates a disproportionate negative impact on private rights; and
- vii. DHS's denial of Mr. Vasquez's request for Medicaid coverage was unreasonable, arbitrary, and capricious;
- b. An order invalidating the Regulation and enjoining any further application of the Regulation to deny Medicaid coverage for gender-affirming surgery;
- c. An order reversing and vacating DHS's approval of Amerigroup's denial of Mr. Vasquez's request for Medicaid coverage for a phalloplasty and an office visit and requiring DHS to approve the coverage; and
- d. Any other relief the Court deems just.

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Respectfully submitted,

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