IN THE IOWA DISTRICT COURT FOR POLK COUNTY

AIDEN VASQUEZ, an individual, Petitioner, v. IOWA DEPARTMENT OF HUMAN SERVICES, an independent executive-branch agency of the State of Iowa, Respondent.	Case No. CVCV061729 **RESISTANCE TO MOTION TO DISMISS**

COMES NOW Petitioner Aiden Vasquez ("Mr. Vasquez"), by his undersigned counsel, and respectfully resists the motion to dismiss filed by Respondent the Iowa Department of Human Services ("DHS"). In support of this resistance, Mr. Vasquez states as follows:

INTRODUCTION

In *Good v. Iowa Department of Human Services*, 924 N.W.2d 853 (Iowa 2019), the Iowa Supreme Court held that section 441.78.1(4) of the Iowa Administrative Code (the "Regulation") was unlawful. The Regulation "specifically exclude[s]" Medicaid coverage for "[p]rocedures related to transsexualism . . . [or] gender identity disorders." Iowa Admin. Code r. 441-78.1(4)(b)(2) (2020). It also states 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) (2020). The Court found that the categorical ban on Medicaid coverage for gender-affirming surgery imposed by the Regulation violates the Iowa Civil Rights Act's ("ICRA") protections against gender-identity discrimination in public accommodations. *Good*, 924 N.W.2d at 862–63.

On May 3, 2019, the Iowa Legislature 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 to treat his gender dysphoria. Despite the consensus of Mr. Vasquez's health-care providers, 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—which DHS now seeks to dismiss in part—followed. To be clear, DHS does not seek dismissal of counts I, VI, or VII of Mr. Vasquez's petition for judicial review. Those counts allege that the Regulation violates the Iowa Constitution's equal-protection guarantee; causes a disproportionate negative impact on the rights of transgender people; and resulted in the unreasonable, arbitrary, and capricious denial of Mr. Vasquez's request for Medicaid coverage. (*See* Petition, Counts I, VI, VII.)

Instead, DHS seeks the dismissal of counts II through V of the petition and also seeks to limit the scope of the relief requested. Counts II through V allege that the Regulation violates ICRA's prohibitions against gender-identity and sex discrimination because Division XX, which

amended ICRA, is unconstitutional on multiple grounds, and, as a result, the preamendment version of ICRA on which the Supreme Court relied in *Good* remains in effect. (*See* Petition, Counts II, III, IV, V.) The relief requested by Mr. Vasquez includes, among other things, a declaratory judgment and injunction prohibiting the Regulation's enforcement and an award of attorney's fees and costs.

DHS challenges counts II through V of the petition, and Mr. Vasquez's requests for declaratory and injunctive relief and attorney's fees, on four separate grounds, none of which has any merit. *First*, DHS incorrectly argues that Mr. Vasquez cannot seek reversal of DHS's decision based on ICRA because DHS did not base its decision on ICRA, and Mr. Vasquez did not file an ICRA complaint before the Iowa Civil Rights Commission (the "Commission"). (Br. in Supp. of Mot. to Dismiss at 7.) In doing so, DHS fails to acknowledge that, but for the enactment of Division XX, which amended ICRA, DHS's denial of coverage would have violated the version of ICRA that existed before Division XX was unconstitutionally signed into law. DHS's decision thus was "based upon a provision of law"—i.e., Division XX—"that is unconstitutional on its face or as applied." Iowa Code § 17A.19(10)(a) (2021). DHS also fails to acknowledge that, where, as here, a discrimination claim is directed at the substance of a regulation, rather than at a discretionary individual decision applying the regulation, the regulation is subject to review under the procedures of the Iowa Administrative Procedure Act (the "APA"), not those of ICRA. *See Hollinrake v. Monroe County*, 433 N.W.2d 696, 698–99 (Iowa 1988).

Second, DHS incorrectly argues that Mr. Vasquez cannot seek reversal of DHS's decision based on Division XX's violation of the Iowa Constitution's single-subject and title rules because the time for asserting this challenge has passed. (Br. in Supp. of Mot. to Dismiss at 10.) DHS's argument disregards a critical fact that differentiates Mr. Vasquez's single-subject and title-rule

challenges from those at issue in the cases on which DHS relies: Mr. Vasquez's challenges were initiated before Division XX was codified and have been pending at all relevant times, either in court or in agency proceedings, since they were first asserted.

Third, DHS erroneously argues that Mr. Vasquez's prayer for attorney's fees and costs should be stricken because Mr. Vasquez is ineligible to seek attorney's fees as a prevailing party in this matter. (Br. in Supp. of Mot. to Dismiss at 13.) This argument, which requires the Court to prejudge the merits of this action and familiarize itself with the administrative record, is premature at the motion-to-dismiss stage of the case. It also ignores that both ICRA and the Iowa Equal Access to Justice Act ("EAJA") entitle prevailing parties to reasonable attorney's fees and that EAJA's exceptions to fee-shifting do not apply to this case.

Fourth, DHS erroneously argues that declaratory and injunctive relief are unavailable in judicial-review actions. (Br. in Supp. of Mot. to Dismiss at 15.) On the contrary, the APA expressly states that, in reviewing an agency action, a court "shall reverse, modify, or grant ***other appropriate relief*** from agency action, ***equitable or legal and including declaratory relief***," including on the grounds asserted by Mr. Vasquez in his petition. Iowa Code §§ 17A.19(10)(a), (b), (k), (n) (2021) (emphasis added). The APA thus specifically authorizes this Court to grant the declaratory and injunctive relief Mr. Vasquez seeks in this case, as the Iowa Supreme Court and district courts have acknowledged on numerous previous occasions.

For these reasons, and as discussed in further detail below, DHS's motion to dismiss should be denied in full, and Mr. Vasquez should be allowed to proceed with his petition for judicial review.

PROCEDURAL HISTORY

On August 14 and 17, 2020 Mr. Vasquez, through his physician, submitted requests to Amerigroup seeking Medicaid preauthorization for expenses related to a phalloplasty necessary to treat Mr. Vasquez's gender dysphoria. (Petition, ¶¶ 23–24.) After Amerigroup denied Mr. Vasquez's requests, he initiated an internal appeal using Amerigroup's grievance procedures, which Amerigroup denied. (*Id*., ¶¶ 25–29.)

Mr. Vasquez subsequently appealed Amerigroup's decision to DHS and, at a hearing before an administrative-law judge ("ALJ"), presented unrebutted evidence that the surgical treatment he requested was medically necessary. (*Id*., ¶¶ 30, 111–28). Following the hearing, the ALJ issued a proposed decision affirming Amerigroup's decision. (*Id*., ¶ 31.) On further review, the Director of DHS adopted the ALJ's ruling as the agency's final decision on Mr. Vasquez's appeal. (*Id*., ¶¶ 32–33.)

On April 22, 2021, Mr. Vasquez timely filed his petition in this Court. The petition seeks to vacate DHS's decision and enjoin the Regulation's enforcement. (*Id*., Relief Sought.)

MR. VASQUEZ'S ALLEGATIONS

Mr. Vasquez alleges, in relevant part, that he is a fifty-three-year-old transgender man who has been diagnosed with gender dysphoria, formally began the process of transitioning from female to male in 2016, and is currently eligible for Iowa Medicaid. (Petition, ¶¶ 100–10.) Five medical providers—a general-care physician and four clinical psychologists—concluded that surgery is medically necessary to treat his gender dysphoria. (*Id*., ¶¶ 111–28.) Additionally, the existing standards of care for gender dysphoria acknowledge that, for many transgender people suffering from severe gender dysphoria, such as Mr. Vasquez, surgical treatment is necessary to

affirm their gender identity and help them transition from living in one gender to living in another. (*Id*., ¶¶ 75–99.)

Despite this, DHS declined to provide Medicaid coverage for Mr. Vasquez's gender-affirming surgery based on the Regulation, which categorically prohibits Medicaid reimbursement for surgical procedures related to gender transition and gender dysphoria. (*See id*., ¶¶ 146–54.) Mr. Vasquez alleges that DHS's decision should be vacated because it (1) violates the Iowa Constitution's equal-protection guarantee (*id*., Count I); (2) violates ICRA's prohibition against gender-identity and sex discrimination (*id*., Counts II–V); (3) creates a disproportionate negative impact on private rights (*id*., Count VI); and (4) leads to denials of Medicaid coverage that are unreasonable, arbitrary, and capricious (*id*., Count VII).

LEGAL STANDARDS

In Iowa, motions to dismiss are disfavored. *Henry v. Shober*, 566 N.W.2d 190, 191 (Iowa 1997), *overruled on other grounds by Dickens v. Assoc. Anesthesiologists, P.C.*, 709 N.W.2d 122, 127 (Iowa 2006). Iowa applies a notice-pleading standard to petitions, which will survive a motion to dismiss "whenever a valid recovery can be gleaned from the pleadings." *Cutler v. Klass, Whicher, & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991).

"In determining whether to grant [a] motion to dismiss, a court views the well-pled facts of the petition in the light most favorable to the plaintiff, resolving any doubts in the plaintiff's favor." *Turner v. Iowa State Bank & Trust Co.*, 743 N.W.2d 1, 3 (Iowa 2007) (citing *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004)). A defendant carries a heavy burden to succeed on a motion to dismiss. As the Iowa Supreme Court has recognized:

> [T]he temptation is strong for a defendant to strike a vulnerable petition at the earliest opportunity. Experience has however taught us that vast judicial resources could be saved with the exercise of more professional patience. Under [our rule governing motions to dismiss] dismissals of many of the weakest cases must be

> reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of summary judgment, or even by way of defense at trial. From a defendant's standpoint, moreover, it is far from unknown for the flimsiest of cases to gain strength when its dismissal is reversed on appeal.

Cutler, 473 N.W.2d at 181.

As long as a plaintiff's petition alleges facts that, when accepted as true, establish the possibility of a valid recovery, a court must overrule the motion to dismiss. *Id*. Since the advent of notice pleading under the Iowa Rules of Civil Procedure, "it is a rare case which will not survive a [motion to dismiss]." *Am. Nat'l Bank v. Sivers*, 387 N.W.2d 138, 140 (Iowa 1986).

Under these well-established principles, the burden is on DHS, as the movant, to show that sufficient grounds exist to dismiss the claims against it based on facts alleged on the face of Mr. Vasquez's petition. As discussed below, DHS cannot meet this heavy burden.

ARGUMENT

I. Counts II and III of the petition establish the possibility of a valid recovery and should be allowed to stand.

Counts II and III of Mr. Vasquez's petition establish the possibility of a valid recovery and should be allowed to stand. *See Cutler*, 473 N.W.2d at 181. Neither of the two bases on which DHS seeks dismissal of those counts has any merit.

A. DHS's decision was based upon Division XX, a facially unconstitutional law.

DHS first argues that Mr. Vasquez cannot challenge DHS's decision under ICRA because DHS did not base its decision on ICRA. (Br. in Supp. of Mot. to Dismiss at 7.) This argument disregards the plain language of the APA and the grounds on which DHS relied to deny Mr. Vasquez's request for Medicaid coverage.

DHS concedes, as it must, that "if [its] decision or administrative rule was based on a statute with an alleged constitutional defect, Mr. Vasquez could challenge the constitutionality of that

statute . . . .” (Br. in Supp. of Mot. to Dismiss at 8.) *See, e.g., Gartner v. Iowa Dep’t of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013) (addressing, in a judicial-review case, the constitutionality of a statute presuming parentage of male spouses in heterosexual couples but not female spouses in lesbian couples). Mr. Vasquez’s allegations, which must be taken as true at the motion-to-dismiss stage, assert that DHS’s decision denying Mr. Vasquez’s request for Medicaid coverage was based on Division XX, an unconstitutional statute.

Counts II and III of the petition allege that Division XX amended ICRA with the sole purpose of allowing DHS and Amerigroup, as DHS’s agent, to apply the Regulation to discriminate against transgender Iowans without violating ICRA. 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.

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. *See State v. Zarate*, 908 N.W.2d 831, 844 (Iowa 2018) (holding that “[w]hen parts of a statute . . . 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”). 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.

DHS fails to acknowledge that, but for the enactment of Division XX, which amended ICRA, DHS's denial of coverage would have violated the version of ICRA that existed before Division XX was unconstitutionally signed into law. DHS's decision was thus "based upon a provision of law"—i.e., Division XX—"that is unconstitutional on its face or as applied." Iowa Code § 17A.19(10)(a) (2021).

DHS contends that "its decision here was not based on any statutory mandate," but rather on its "Medicaid administrative rules." (Br. in Supp. of Mot. to Dismiss at 8.) But the two provisions at issue—Division XX and the Regulation—are interdependent, not mutually exclusive. 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." Iowa Code § 216.7(3) (2021). This is so regardless of (1) an individual's eligibility for Medicaid coverage or (2) the medical necessity of the requested procedure. Division XX thus reinstated the Regulation, which expressly prohibits Medicaid coverage for gender-affirming surgery, since, under Division XX, DHS can apply the Regulation as written, notwithstanding the Iowa Supreme Court's decision in *Good*. *See Good*, 924 N.W.2d at 862–63.

Under Division XX, the state *could* amend the Regulation to permit the Medicaid coverage that is currently banned. But it has not done so. *See* Iowa Admin. Code r. 441-78.1(4) (2021). As a result, based on Division XX and the Regulation, any request by a transgender Iowan for surgical preauthorization under Iowa Medicaid will be denied.

For DHS to now claim that its denial of Mr. Vasquez's request for Medicaid coverage was "not based on" Division XX, but rather on the Regulation, ignores that the latter would no longer be in effect without the former. Because of the *Good* ruling, Division XX is a necessary component of any decision denying Medicaid coverage for gender-affirming surgery based on the Regulation. Mr. Vasquez therefore should be allowed to challenge the constitutionality of Division XX, which amended ICRA, and challenge the legality of the Regulation under the preamendment version of ICRA.

B. The APA's judicial-review procedures, not those of ICRA, govern this case.

DHS next argues that Mr. Vasquez cannot challenge DHS's decision under ICRA because Mr. Vasquez did not file a complaint with the Commission before filing this lawsuit. (Br. in Supp. of Mot. to Dismiss at 7.) DHS's argument contradicts longstanding Iowa Supreme Court precedent and should be rejected.

As a preliminary matter, DHS has forfeited the argument that Mr. Vasquez should have exhausted his administrative remedies before the Commission. DHS did not assert or consider this argument in the proceedings below. (*See* Admin. Record at 760–64, 925.) Therefore, the argument is not properly before this Court. *See Grudle v. Iowa Dep't Revenue & Fin.*, 450 N.W.2d 845, 847–48 (Iowa 1990) (declining to consider issues raised by agency in appeal from decision in petitioner's action for judicial review where the "issues were not litigated before the [agency]"); *Welch v. Iowa Dep't Emp't Servs.*, 421 N.W.2d 150, 152 (Iowa Ct. App. 1988) (declining to consider issue raised by agency in appeal from decision in petitioner's action for judicial review where agency did not raise issue below, because "the validity of agency decisions must rest upon the reasoning as given by the agency and not based upon counsel's post hoc rationalization").

Regardless, the Iowa Supreme Court's decision in *Hollinrake* establishes that, when a discrimination claim is directed at the substance of an agency regulation, rather than at a "discretionary individual" decision applying the regulation, review of the regulation is governed by the provisions of the APA, *see* Iowa Code § 17A.19.1, *et seq.* (2021), not those of ICRA, *see* Iowa Code § 216.1, *et seq*. (2021). Under the APA, DHS, not the Commission, was the appropriate administrative forum for Mr. Vasquez's arguments that the Regulation violates ICRA's prohibitions against gender-identity discrimination and sex discrimination.

Hollinrake involved an ICRA challenge to an Iowa Law Enforcement Academy regulation requiring law-enforcement officials to meet particular vision standards. *Hollinrake*, 433 N.W.2d at 697. The Iowa Supreme Court determined that the plaintiff was required to assert his challenge by seeking review of the academy's regulation under the APA rather than through a civil-rights action under ICRA before the Commission. *See id.* at 698–99. The Supreme Court's decision contemplated that the academy would hear the plaintiff's ICRA challenge and that the academy's determination would later be subject to judicial review under the APA. *See id*.

Here, as in *Hollinrake*, Mr. Vasquez's challenges to the Regulation's legality under ICRA are "directed at the alleged discriminatory nature" of the Regulation as a whole. *See id*. at 699. Those challenges are properly before this Court on judicial review under the APA.

Indeed, the APA expressly contemplates that Iowa administrative agencies will interpret statutes such as ICRA and that their interpretations will be subject to judicial review. This is implicit in the grounds for review set forth in section 17A.19(10) of the APA. Under section 17A.19(10), a court may reverse an agency action if substantial rights of the person seeking judicial relief have been prejudiced because the agency action is:

- "beyond 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) (emphasis added);

- "based upon an *erroneous interpretation of a provision of law* whose interpretation has not clearly been vested by a provision of law in the discretion of the agency," *see* Iowa Code § 17A.19(10)(c) (2021) (emphasis added); or

- "*not required by law* and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest . . . that it must necessarily be deemed to lack any foundation in rational agency policy," *see* Iowa Code § 17A.19(10)(k) (2021) (emphasis added).

Each of these provisions permits judicial review of whether an administrative agency's actions violate an Iowa statute, such as ICRA. These provisions further support the conclusion that DHS, not the Commission, was the appropriate administrative forum for Mr. Vasquez's challenges to the Regulation under ICRA.

The cases on which DHS relies do not alter this analysis. *McElroy v. State*, 703 N.W.2d 385, 389–91 (Iowa 2005), involved a claim that the defendant retaliated against the plaintiff by changing the terms of her employment after she complained that she was sexually harassed by a supervisor. Similarly, *U.S. Jaycees v. Cedar Rapids Jaycees*, 614 F. Supp. 515, 517–18 (N.D. Iowa 1985), involved a claim that the counterdefendant discriminated against the counterplaintiff by terminating its license to use the counterdefendant's trademark because the counterplaintiff admitted women as members of its organization. *Id*. at. Neither *McElroy* nor *U.S. Jaycees* involved challenges to the discriminatory nature of an agency regulation. *See McElroy*, 703 N.W.2d at 389–91; *U.S. Jaycees*, 614 F. Supp. at 517–18. They are inapposite and do not apply here.

II. Counts IV and V of the petition establish the possibility of a valid recovery and should be allowed to stand.

Mr. Vasquez likewise should be allowed to proceed with counts IV and V of the petition, which establish the possibility of a valid recovery. *See Cutler*, 473 N.W.2d at 181.

As a preliminary matter, DHS has forfeited the argument that Mr. Vasquez cannot seek reversal of DHS's decision based on Division XX's violation of the Iowa Constitution's single-subject and title rules because the time for asserting this challenge has passed. DHS did not assert or consider this argument in the proceedings below. (*See* Admin. Record at 760–64, 925.) Therefore, the argument is not properly before this Court. *See Grudle*, 450 N.W.2d at 847–48; *Welch*, 421 N.W.2d at 152.

Regardless, DHS's argument fails. The Iowa Supreme Court has described the single-subject rule's purpose as "to prevent logrolling and to facilitate orderly legislative procedure." *Western Int'l v. Kirkpatrick*, 396 N.W.2d 359, 364 (Iowa 1986). "Logrolling" is "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 v. Bd. of Supervisors of Benton County*, 142 N.W.2d 378, 382 (Iowa 1966). 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." *State v. Mabry*, 460 N.W.2d 472, 4743(Iowa 1990)

The single-subject rule is concerned with germaneness. *Utilicorp United v. Iowa Utilities Bd.*, 570 N.W.2d 451, 454 (Iowa 1997); *Kirkpatrick*, 396 N.W.2d at 364. Germaneness is a mandatory constitutional requirement. *Mabry*, 460 N.W.2d at 474 ("[T]o pass constitutional muster the matters contained in the act must be germane."); *Long*, 142 N.W.2d at 382 ("[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).

The single-subject rule is, moreover, 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, statutes that violate the rule are void.

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."); *see also 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").

Counts IV and V of the petition, like counts II and III, allege that the Regulation violates ICRA's prohibitions against gender-identity and sex discrimination. 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. (*See* Petition, ¶¶ 200–34.)

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. *See Zarate*, 908 N.W.2d at 844. 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.

DHS incorrectly argues that Mr. Vasquez's single-subject and title-rule challenges are untimely. (Br. in Supp. of Mot. to Dismiss at 10.) This argument disregards a critical fact that differentiates Mr. Vasquez's challenges from those at issue in the cases cited by DHS: Mr. Vasquez's challenges were initiated before Division XX was codified and have been pending at all relevant times, either in court or in agency proceedings, since they were first asserted.

As set forth in Mr. Vasquez's petition, after Division XX was enacted, Mr. Vasquez and two other plaintiffs challenged its constitutionality in *Covington v. Reynolds ex rel. State of Iowa et al.*, Case No. EQCE084567. (Petition, ¶¶ 70–71.) That lawsuit, which resulted in a decision finding that Mr. Vasquez and the other individual plaintiff had to request Medicaid

preauthorization for their gender-affirming surgeries before challenging Division XX's constitutionality, included single-subject and title-rule challenges to the statute. *See Covington v. Reynolds ex rel. State of Iowa et al.*, No. 19–1197, 949 N.W.2d 663, 2020 WL 4514691, at *3 (Iowa Ct. App. Aug. 5, 2020) (unpublished decision).

The final disposition of the *Covington* case did not occur until November 4, 2020, when the plaintiffs' application for further review was denied by the Iowa Supreme Court. *See Covington v. Reynolds ex rel. State of Iowa et al.*, No. 19–1197, Order Denying Application for Further Review (Iowa Sup. Ct. Nov. 4, 2020), *available at* https://www.aclu.org/legal-document/covington-v-reynolds-order-denying-further-review. (*See also* Petition, Ex. 10 at 1 n.1 (referencing Mr. Vasquez's pending application for further review in legal memorandum submitted to Amerigroup and DHS during administrative proceedings).) By the time the application for further review was denied, Mr. Vasquez had already requested Medicaid coverage from Amerigroup; received notices of denial; and commenced an internal appeal notifying Amerigroup, as DHS's agent, that its denial of coverage violated the single-subject and title rules. (*Id.*, ¶¶ 23–27, 136, 139; *see also id.*, Ex. 10.)

The *Covington* lawsuit was initiated within the "codification window" for Division XX, given that the lawsuit was filed on May 31, 2019, and Division XX was not codified until January 13, 2020. *See Covington v. Reynolds ex rel. State of Iowa et al.*, Case No. EQCE084567, Petition for Declaratory and Injunctive Relief (Iowa Dist. Ct. May 31, 2019), *available at* https://www/aclu.org/legal-document/covington-v-reynolds-petition-declaratory-and-injunctive-relief. The administrative proceedings subsequently initiated by Mr. Vasquez were a judicially mandated continuation of that lawsuit, necessitated by the Court of Appeals' ruling that Mr. Vasquez had to request Medicaid preauthorization for his gender-affirming surgery before

challenging Division XX's constitutionality, a decision the Supreme Court declined to review. *See Covington*, No. 19–1197, 949 N.W.2d 663, 2020 WL 4514691, at *3.

None of the cases cited by DHS relied on the "codification window" to reject a single-subject or title-rule challenge that was pending at the time the legislation in question was codified and remained pending after codification through contemporaneous and subsequent administrative proceedings. *See State v. Kolbet*, 638 N.W.2d 653, 661 (Iowa 2001) (rejecting single-subject challenge where "the act in question was codified *prior to* the time that it was challenged in defendant's criminal trial") (emphasis added); *Iowa Dep't of Transp. v. Iowa Dist. Ct. for Linn Cnty.*, 586 N.W.2d 374, 377 (Iowa 1998) (rejecting single-subject challenge where "codification of [the statute in question] occurred *before* the incidents and charges against [the] four criminal defendants . . . and before [the judge's] sentencing order") (emphasis in original); *State v. Taylor*, 557 N.W.2d 523, 526–27 (Iowa 1996) (upholding single-subject challenge on merits); *Mabry*, 460 N.W.2d at 475 (stating that "[n]o one had lodged a successful [single-subject] challenge to the legislation *before* the [code containing the legislation] was issued") (emphasis added).

In fact, this case is directly analogous to *Taylor*, which undermines, rather than supports, DHS's position. In *Taylor*, the Iowa Supreme Court noted that the state "conced[ed[that [the defendant] ha[d] timely and properly preserved his constitutional challenge" where he "raised the single subject and title defect by way of a motion to adjudicate law points filed *after* the law's effective date . . . but *before* its codification . . . ." *Taylor*, 557 N.W.2d at 526 (emphases in original). The Supreme Court later reaffirmed *Taylor* in *Linn County*, stating that "Taylor's challenge was made within the proper window of time." *Linn Cnty.*, 586 N.W.2d at 374.

Here, as in *Taylor*, Mr. Vasquez raised his single-subject and title-rule challenges after Division XX's effective date but before its codification, and those challenges have remained

continuously pending, in litigation or in administrative proceedings, since the time they were initially asserted. As in *Taylor*, Mr. Vasquez should be allowed to proceed with those challenges. This outcome is consistent with the important functions served by the single-subject rule and the title rule and with Mr. Vasquez's persistent, ongoing efforts to invoke the rights afforded by those rules.

III. Mr. Vasquez's request for attorney's fees was properly included in his petition and should be allowed to stand.

DHS's contention that Mr. Vasquez is ineligible to seek attorney's fees as a prevailing party in this matter is premature. Attorney's fees are not adjudicated until after a case is decided on the merits and a prevailing party has filed a fee application. At this stage, the Court would have to prejudge the merits of the action, and familiarize itself with the administrative record, in order to resolve DHS's opposition to fee-shifting. If the Court nevertheless considers DHS's arguments, it should reject them on the merits.

A. DHS's attorney's-fee arguments are premature at the motion-to-dismiss stage.

To survive a motion to dismiss under Iowa's notice-pleading standard, a plaintiff is only required to "give notice of the incident giving rise to the claim and the general nature of the claim." Iowa R. Civ. P. 1.402(2)(a); *Cemen Tech, Inc. v. Three D Indus., L.L.C.*, 753 N.W.2d 1, 12 (Iowa 2008); *Roush v. Mahaska State Bank*, 605 N.W.2d 6, 10 (Iowa 2000). A plaintiff is not required to set forth specific legal theories for recovery. *Roush*, 605 N.W.2d at 9.

In cases seeking fee-shifting, a plaintiff satisfies the notice-pleading standard by specifically pleading attorney's fees. 11 Ia. Prac., Civil & Appellate Procedure § 11:61 (2021 ed.); *Nelson Cabinets, Inc. v. Peiffer*, 542 N.W.2d 570, 573 (Iowa Ct. App. 1995) (citing *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 159 (Iowa 1993); *Wright v. Norris*, 193 Iowa 757, 762, 187 N.W. 482, 484 (1922); 25 C.J.S. Damages, §

131(c) (1966), *Schmidt v. Wilkinson*, 340 N.W.2d 282, 283 (Iowa 1983)). Nothing further is required. *See id.*

Here, by pleading a request for attorney's fees, Mr. Vasquez has done everything he needs to do under Iowa's notice-pleading standard to properly present his fee request. (Petition, Relief Sought.) This, in and of itself, is enough for the fee request to survive dismissal.

Procedurally, it is no more appropriate at this stage to determine whether Mr. Vasquez should be awarded attorney's fees than in would be to determine the amount of those fees. On the contrary, Iowa law anticipates that attorney's fees will be litigated after the merits of the case have been adjudicated, at which time there is a prevailing party and a losing party. *See* Iowa Code § 625.1 (2021); Iowa Code § 625.29 (2021); Iowa R. App. Pro. 6.103(2) ("A final order or judgment on an application for attorney's fees entered after the final order or judgment in the underlying action is separately appealable. The district court retains jurisdiction to consider an application for attorney's fees notwithstanding the appeal of a final order or judgment in the action.").

This sequence of events is required here, as it is in all cases, because deciding whether Mr. Vasquez will be eligible to recover attorney's fees requires this Court to make a legal determination and a factual determination, both of which are premature at this preliminary stage of the proceedings. As discussed below, both ICRA and EAJA entitle prevailing parties to reasonable attorney's fees. However, whether Mr. Vasquez will prevail in this action—a threshold question in deciding whether to award or deny an application for attorney's fees—cannot be determined in the context of DHS's motion to dismiss, which does not even seek dismissal of all the claims asserted by Mr. Vasquez.

Since Mr. Vasquez is not yet a prevailing party, it makes little sense for the Court to resolve factual questions about whether DHS's role below was primarily adjudicative, whether Medicaid

is a monetary or nonmonetary benefit, and whether Mr. Vasquez's "entitlement" or "eligibility" for this benefit was at issue. Those questions, absent prevailing-party status, are hypothetical and academic. *See, e.g.*, *State v. Wade*, 757 N.W.2d 618, 627 (Iowa 2008) (a matter "is ripe for adjudication when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative").

Additionally, deciding the applicability of any of the specific EAJA exceptions cited by DHS would require this Court to become fully familiar with the administrative record in this case—which was filed just three days before the submission of this resistance—and adjudicate these questions before the case is briefed, argued, and submitted. This is a terrible use of valuable judicial resources.

For these reasons, DHS's arguments are premature, and this Court should defer resolving questions regarding Mr. Vasquez's entitlement to attorney's fees until after it decides this judicial-review action on the merits, Mr. Vasquez prevails, and Mr. Vasquez chooses to file an application for attorney's fees.

B. DHS's attorney's-fee arguments fail on the merits.

1. ICRA and EAJA expressly authorize fee-shifting in this case, and neither the *Good* attorney's-fee decision nor *Hollinrake* prohibit it.

Assuming the Court chooses to resolve whether Mr. Vasquez hypothetically would be entitled to attorney's fees in this case (which it should not do), then DHS's legal arguments should be rejected on their merits. The plain language of ICRA and EAJA allows Mr. Vasquez to recover his attorney's fees and costs if he prevails. ICRA, which, by its own terms, must be "broadly" construed, expressly allows fee-shifting. *See* Iowa Code §§ 216.15(9)(a)(8), 216.16(6), 216.18(1) (2021). The APA, for its part, provides that "[n]othing in this Act shall abridge or deny to any person or party who is aggrieved or adversely affected by agency action the right to seek relief

from such action in the courts." Iowa Code § 17A.19 (2021). Likewise, the purpose of EAJA section 625.29, which also expressly provides for fee-shifting in non-rulemaking cases under the APA, is to facilitate meritorious claims by private parties against unreasonable exercises of administrative authority. Iowa Code § 625.29(1) (2021); Susan M. Olson, *How Much Access to Justice from State "Equal Access to Justice Acts"?*, 71 Chi.–Kent L. Rev. 547, 555 (1995).

DHS cites the *Good* attorney's-fee decision to support its arguments that (1) *Hollinrake* bars fee-shifting under ICRA for civil-rights claims brought in a judicial-review action under the APA, and (2) fee-shifting is prohibited in this case under EAJA's exceptions for cases in which "the state's role in the case was primarily adjudicative" or "the role of the state was to determine the eligibility or entitlement of an individual to a monetary benefit or its equivalent." Iowa Code § 625.29 (1)(a), (d) (2021). (*See* Br. in Supp. of Mot. to Dismiss at 14 (citing *Good v. Iowa Dep't of Human Servs.*, No. 18–1613, 2019 WL 5424960 (Iowa Ct. App. 2019) (unpublished decision)).) Yet, unlike the published Iowa Supreme Court merits opinion in *Good*, which Mr. Vasquez cites, the attorney's-fee decision in *Good* is *not* controlling, because unpublished Iowa Court of Appeals opinions do not constitute binding legal authority. *State v. Murray*, 796 N.W.2d 907, 910 (Iowa 2011) (citing Iowa Court Rule 6.904(2)(c) ("Unpublished opinions or decisions shall not constitute controlling legal authority."). *Good* also specifically did not reach the question whether the role of the agency in that case was "primarily adjudicative." *Good*, 2019 WL 5424960, at *11.

Nor does *Hollinrake* prohibit awarding attorneys' fees and costs under ICRA for violations asserted through the procedural mechanisms of the APA. *See Hollinrake*, 433 N.W.2d at 697–98; *Hollinrake v. Iowa Law Enforcement Acad., Monroe County*, 452 N.W.2d 598, 604 (Iowa 1990). *Hollinrake*'s holding is about the appropriate procedural mechanism for seeking remedies, not about the ultimate availability of attorneys' fees and costs. The *Hollinrake* Court did not rule on

the propriety of fee-shifting for ICRA claims brought through a judicial-review action under the APA. After the case was remanded, the plaintiff's ICRA disability-discrimination claim was unsuccessful, and the Court had no reason to address whether fee-shifting was appropriate. *Hollinrake*, 452 N.W.2d at 604.

Reading *Hollinrake* to prohibit fee-shifting when an ICRA claim is brought in an APA judicial-review action is inconsistent with the plain language of both statutes, as discussed above. It also undermines the legislative purpose of ICRA's fee-shifting provision. Awarding attorney's fees and costs to prevailing plaintiffs under ICRA is "crucial" to accomplish the statute's legislative purpose. *See Ackelson v. Manley Toy Direct, LLC*, 832 N.W.2d 678, 687 (Iowa 2013) (quoting *Ayala v. Ctr. Line, Inc.*, 415 N.W.2d 603, 605 (Iowa 1987)). And the legislature expressly mandated that ICRA must be "broadly" construed. *See* Iowa Code § 216.18(1) (2021). The dual functions of fee-shifting provisions, like the one found in ICRA for violating antidiscrimination laws, are to ensure that (1) plaintiffs are able to secure competent legal representation for meritorious claims and (2) attorneys working on contingency have an incentive to screen out nonmeritorious claims. Several courts and commentators have recognized these functions. *See, e.g.*, Robert V. Percival & Geoffrey Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, L. & Contempt. Probs. (Winter 1984); *Evans v. Jeff D.*, 475 U.S. 717, 745 (1986) (Brennan, J., dissenting) (discussing the legislative history of fee-shifting provisions); *see also Marek v. Chesny*, 473 U.S. 1, App. at 44–51 (1985) (Brennan, J., dissenting) (collecting federal statutory fee-shifting provisions); Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 Denv. U. L. Rev. 441, 493 (2014); *see also Lee v. State*, 906 N.W.2d 186, 201–02 (Iowa 2018) (discussing, in the context of an employment-discrimination and Family Medical Leave Act case, advancing the public interest through nonmonetary forms of

relief that go beyond individual litigants and achieve an environment of greater nondiscrimination for others.)

Neither the APA, the EAJA, nor *Hollinrake* prohibits, or conflicts with, ICRA's remedies for violating antidiscrimination laws. Consistent with established principles of statutory construction, the APA, the EAJA, and *Hollinrake* should be read harmoniously with ICRA's statutory right to reasonable attorneys' fees and costs for parties, like Mr. Vasquez, who prevail on their ICRA claims. *See* Iowa Code § 4.7 (2021); *Christenson v. Iowa Dist. Court for Polk Cnty.*, 557 N.W.2d 259, 263 (Iowa 1996); *Citizens' Aide/Ombudsman v. Miller*, 543 N.W.2d 899, 903 (Iowa 1996). If Mr. Vasquez prevails on his ICRA claims, and if he files an application for attorney's fees and costs, this Court should allow Mr. Vasquez to recover his attorneys' fees and costs under ICRA.

2. EAJA's exceptions to fee-shifting do not apply to this case.

The exclusions on which DHS relies to prematurely seek an exemption from EAJA's fee-shifting provision do not apply here. *First*, DHS's role in this case was not "primarily adjudicative." Iowa Code § 625.29(1)(b) (2021). *Second*, Medicaid is not a "monetary benefit or its equivalent" within the meaning of EAJA. Iowa Code § 625.29(1)(d) (2021). It is a nonmonetary, nonfungible, nondiscretionary benefit available for the sole purpose of acquiring medical treatment. *Third*, DHS's role in this case was not to determine Mr. Vasquez's "eligibility" for, or "entitlement" to, Medicaid. Iowa Code § 625.29(1)(d) (2021). Mr. Vasquez's eligibility for, and entitlement to, the Iowa Medicaid program were never at issue. These issues are addressed in turn below.

a. DHS's role in this case was not "primarily adjudicative."

DHS's role in this case was not "primarily adjudicative." Iowa Code § 625.29(1)(b) (2021). As the certified administrative record reflects, DHS merely fulfilled its statutory obligation to provide a process for Mr. Vasquez to appeal the denial of his benefits, preserving his claims for judicial review, without actually adjudicating any of them. Furthermore, whereas DHS argued in *Good* that Medicaid was not a public accommodation under ICRA—a position the Iowa Supreme Court ultimately rejected, *see Good*, 924 N.W.2d at 861—DHS made no similar legal or factual arguments below in this case.

Instead, the ALJ's proposed decision, adopted by DHS in its final decision, recognized that DHS had no jurisdiction to adjudicate Mr. Vasquez's claims:

> Administrative proceedings can only preserve claims that must be resolved by the judicial branch. *McCraken v. Iowa Dep't of Human Servs.*, 595 N.W.2d 779, 785 (Iowa 1999). This includes deciding whether the Department's MCO properly denied the [Mr. Vasquez's] request for payment of physician services and payment for gender-affirming surgery. These issues are preserved for judicial review. With no basis to address the constitutional challenges, the MCO decision must be affirmed.

(Admin. Record at 763; Admin. Record at 925 ("[T]he PROPOSED DECISION you received on March 2, 2021 is ADOPTED as the FINAL DECISION.").) As DHS must concede, there were no disputed facts to adjudicate below, and the agency did not, and legally could not, adjudicate Mr. Vasquez's legal arguments. Its role was not "primarily"—or, for that matter, *in any way*—adjudicative. Iowa Code § 625.29(1)(b) (2021). That exception to fee-shifting under EAJA does not apply.

The *Endress* and *Pfaltzgraff* cases, cited by DHS, are distinguishable, as is the *Branstad* case upon which both *Endress* and *Pfaltzgraff* relied. *Endress* dealt not only with preserving constitutional issues, but also with factual questions requiring agency adjudication regarding the

correct computation of overpayments for child-care services. *Endress v. Iowa Dep't of Human Servs.*, 944 N.W.2d 71, 76, 83 (2020). *Endress* did not purport to establish new law, but rather applied the analysis announced in *Branstad*. *Id.* (citing *Branstad v. State ex rel. Nat. Res. Comm'n*, 871 N.W.2d 291, 297 (Iowa 2015)).

In *Branstad*, the Court held that the Iowa Natural Resource Commission's role was "primarily adjudicative" in determining whether a restitution assessment was proper for an environmental violation. *Branstad*, 871 N.W.2d at 296. There, the Natural Resource Commission applied unchallenged rules to decide contested facts to determine whether or not the challenged conduct occurred and the degree or amount of damages caused by the conduct. *Id*. at 293–94. Facts were in dispute; no challenges to the legality or constitutionality of the underlying rules were levied. *See id*.

Pfaltzgraff likewise does not require finding that the "primarily adjudicative" exception in EAJA applies to Mr. Vasquez's case. *Pfaltzgraff* was the companion case to *Endress*. The Court in *Pfatlzgraff* did not independently analyze the exception at issue. *See Pfaltzgraff v. Iowa Dep't of Human Servs.*, 944 N.W.2d 112, 116 (Iowa 2020). There, as in *Endress*, the agency adjudicated facts regarding the computation of overpayments and a legal claim regarding unjust enrichment. *Id.*

Neither *Endress, Pfalzgraff*, nor *Branstad* were cases like this one, where no facts were in dispute and the agency literally did not adjudicate anything because it lacked jurisdiction to decide the claims preserved for judicial review. The administrative record shows that DHS did not adjudicate any factual dispute because no facts were in dispute. (Admin. Record at 761–62.) DHS neither presented any of its own evidence, nor sought to contest Mr. Vasquez's evidence, regarding the medical necessity of the treatment for which Mr. Vasquez seeks coverage. (*Id*.) The record

further shows that the agency could not, and therefore did not, adjudicate a legal dispute, either. (*Id*.) Thus, DHS's role below in this case was not primarily adjudicative—indeed, it was not adjudicative at all.

If DHS's broad interpretation of this exception were correct, then the APA's exhaustion requirement would mean that administrative agencies are *always* immune from fee-shifting for applying rules that violate the Iowa Constitution or ICRA. *See Remer v. Bd. of Med. Exam'rs,* 576 N.W.2d 598, 604 (J. Carter, specially concurring) (noting that "all administrative action that causes adverse consequences to a party seeking attorney's fees under section 625.29 will have gone through a contested case hearing process" and concluding that "this does not mean that the administrative action that is the subject of the complaint was primarily adjudicative").

That result undermines the plain text and legislative purpose of EAJA, which provides a remedy to Iowans whose rights are violated by state administrative agencies, except in limited circumstances. *See* Iowa Code § 625.29(1) (2021); Susan M. Olson, *How Much Access to Justice from State "Equal Access to Justice Acts"?*, 71 Chi.–Kent L. Rev. 547, 555, 561 (1995) (noting that Equal Access to Justice Acts were intended to equalize the resources of private parties and the government by shifting fees and costs to the government when a private party prevails against the government in an administrative or regulatory matter). EAJA expressly allows for fee-shifting in judicial-review actions of contested cases. Iowa Code § 625.29 (2021) (providing for fee-shifting in chapter 17A judicial-review actions, "other than for a rulemaking decision"). Construing the "primarily adjudicative" exception to encompass all contested cases, even when the agency literally did not and could not adjudicate anything, would swallow the rule whole and violate this express provision for fee-shifting in contested cases where the agency's role was *not* primarily adjudicative.

EAJA's legislative history also supports reading Iowa's limitations on attorney's fees and costs for prevailing parties narrowly against the state, not broadly in its favor, and allowing fee-shifting following contested cases. S.F. 470, 70th Gen. Assemb., 2d Sess. (Iowa 1983), https://www.legis.iowa.gov/docs/shelves/billbooks/70GA/SF%200470.pdf, at 5 (fees should be awarded to prevailing party in judicial-review action "other than for a rule-making decision under the Act"); Fiscal Note to S.F. 470, 70th Gen. Assemb., 2d Sess. (Iowa 1983), https://www.legis.iowa.gov/docs/shelves/billbooks/70GA/SF%200470.pdf, at 4–5 (containing no exclusion for non-rulemaking contested cases and anticipating a substantial annual cost to the state for overreaching administrative agencies).

DHS did not adjudicate Mr. Vasquez's legal claims, based on its own determination that it lacked jurisdiction to do so. Nor did it adjudicate any factual dispute. Allowing DHS to shield itself from fee liability based on the exhaustion requirement for contested cases would undermine the plain language and purpose of EAJA's fee-shifting provision. EAJA section 625.29(1)(b)'s exception for cases where an agency's role is "primarily adjudicative" does not apply here.

b. Medicaid is not a "monetary benefit or its equivalent."

Additionally, Medicaid is not a "monetary benefit or its equivalent" within the meaning of EAJA. Iowa Code § 625.29(1)(d) (2021). It is a nonmonetary, nonfungible, nondiscretionary benefit available for the sole purpose of acquiring medical treatment. As a result, the exception to fee-shifting for monetary benefits does not apply to this case.

Federal law defines Medicaid as "medical assistance provided under a state plan approved under Title XIX." 42 C.F.R. § 400.200. Medicaid benefits are distinctly nonmonetary. They are both nonfungible, and nondiscretionary, given that they may only be used to procure medically necessary care. *See* Iowa Dep't of Human Servs., Iowa Health & Wellness Plan, "Benefits,"

https://dhs.iowa.gov/IHAWP/benefits ("Benefits: doctor visits, women's health, prescription drugs, dental care, preventative health services (vaccinations, blood pressure, and cancer screenings), hospitalizations, emergency services, mental health and substance use services.").

Medical benefits under Medicaid are *not* provided in the form of cash assistance to be spent however the beneficiary may desire. Unlike unemployment benefits, social-security income, or other cash-assistance programs, the state limits which medical providers are available to Medicaid beneficiaries. Iowa Admin. Code R. 441.77 (setting out "conditions of participation for providers of medical and remedial care"); Iowa Admin. Code R. 441.79 (setting out "principles governing reimbursement of providers of medical and health services"); *see* Iowa Dep't of Human Servs., "Provider Enrollment, http://dhs.iowa.gov/ime/providers/enrollment ("Once a provider is enrolled with the [Iowa Medical Enterprise], they must go through the Managed Care Organization (MCO) credential process.").

Additionally, medical benefits, unlike cash-assistance programs, are determined not by their financial value or monetary amount, but rather by a recipient's medical need. Iowa Admin. Code R. 441.78.1 ("[P]ayment will be approved for all medically necessary services and supplies provided by the physician including services rendered in the physician's office or clinic, the home, in a hospital, nursing home or elsewhere."); *see* Iowa Dep't of Human Servs., "FAQs," https://dhs.iowa.gov/ime/members/member-resources/frequently-asked-questions ("All services are based on medical necessity.").

A *nonmonetary* benefit, such as Medicaid coverage, cannot be the "equivalent" of a *monetary* benefit. A "monetary benefit or its equivalent" is one in which the benefit is monetary in nature—in other words, cash or income assistance like social-security benefits and unemployment-insurance payments. The distinguishing nature of money, defined by its *fungibility*,

is essential in giving meaning to the term "monetary benefit or its equivalent" as used in EAJA. Another distinction between monetary and nonmonetary benefits is the *discretionary* nature of monetary benefits, which can be used to purchase or acquire anything of like value, versus the nondiscretionary nature of medical benefits, which cannot be used to acquire anything other than the prescribed treatment. *See, e.g.*, *Kent v. Employment Appeal Board*, 498 N.W.2d 687, 688 (Iowa 1993) (addressing propriety of fees in a case involving unemployment benefits, which are intended to supplant lost income and are monetary in nature). The distinction between monetary and nonmonetary benefits cannot simply be written out of the statute. While cash benefits are monetary in nature, medical benefits are not, because, as set forth above, they are not fungible, discretionary, or transferable.

As a result of prevailing in this action, Mr. Vasquez will have access to medical care that DHS discriminatorily and unconstitutionally denied to him based on his gender identity. This result is *not* equivalent to monetary damages or a monetary benefit. Iowa Code § 625.29(1)(d) (2021). As a result, section 625.29(1)(d)'s fee-shifting exception does not apply, and Mr. Vasquez will be eligible for attorney's fees if he prevails on the merits.

c. DHS's role in this case was not to determine Mr. Vasquez's eligibility for, or entitlement to, Medicaid

Finally, the exception to fee-shifting does not apply because DHS's role in this case was not to determine Mr. Vasquez's "eligibility" for, or "entitlement" to, Medicaid. Iowa Code § 625.29(1)(d) (2021).

Mr. Vasquez's "eligibility" for, or "entitlement" to, the Iowa Medicaid program is simply not at issue in this case. The administrative record shows that DHS has never contested his Medicaid eligibility. (Admin. Record at 760.) Eligibility for Medicaid in Iowa, as in all other states, involves meeting certain statutory criteria. In Iowa, Medicaid eligibility requires proof of Iowa

residency, proof of identity, and proof of either annual income below a given limit, a disability with a condition recognized by social security, or membership in a specific group (for example, pregnant women with low incomes). Iowa Admin. Code R. 441.75.1 ("Persons covered"); Iowa Admin. Code R. 441.75.25 ("'Member' shall mean a person who has been determined eligible for medical assistance under rule 441.75.1."); Iowa Admin. Code R. 441.75.71 ("Income limits"); *see also* Iowa Dep't of Human Servs., Iowa Health & Wellness Plan, "Who Qualifies," https://dhs.iowa.gov/ihawp/who-qualifies ("To be eligible for the Iowa Health and Wellness Plan, you must: Be an adult age 19 to 64; Have an income that does not exceed 133 [percent] of the Federal Poverty Level . . . Live in Iowa and be a U.S. Citizen; Not be otherwise eligible for Medicaid or Medicare.") A "beneficiary" is "a person who is entitled to Medicare benefits and/or has been determined to be eligible for Medicaid." 42 C.F.R. § 400.200.

Had Mr. Vasquez been denied coverage for the Medicaid program based on his entitlement to, or eligibility for, Medicaid benefits—for example, based on citizenship or income—that denial would fall within the scope of the exception set forth in EAJA (assuming that the benefits sought were monetary, which they are not). However, in this case, his entitlement to the Medicaid program was not contested. For this additional reason, section 625.29(1)(d)'s fee-shifting exception does not apply, and Mr. Vasquez will be eligible for fee-shifting under EAJA if he prevails on the merits.

IV. Mr. Vasquez's requests for declaratory and injunctive relief are available in this judicial-review case and should be allowed to stand.

DHS's argument that declaratory and injunctive relief are unavailable in this case is likewise meritless. (Br. in Supp. of Mot. to Dismiss at 15.) Declaratory and injunctive relief are expressly available in judicial-review actions.

The APA provides: "The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant ***other appropriate relief*** from agency action, ***equitable or legal and including declaratory relief*** . . . ." Iowa Code § 17A.19(10) (2021) (emphasis added). The same APA section then specifically sets forth the grounds pursued by Mr. Vasquez in his petition—APA sections 17A.19(10)(a), (b), (k), and (n)—as bases for a district court's jurisdiction to grant those forms of relief. Iowa Code § 17A.19(10) (2021). The APA thus specifically authorizes this Court to grant the declaratory and injunctive relief Mr. Vasquez seeks.

Unsurprisingly, given that the APA expressly grants a district court jurisdiction to provide this relief, the Iowa Supreme Court has affirmed numerous district-court decisions providing declaratory and injunctive relief in judicial-review actions. Of particular note, in *Good*, the Iowa Supreme Court affirmed a decision of this Court, by then-Chief Judge Gamble, that enjoined the same Regulation at issue in this case. *See Good v. Iowa Dep't of Human Servs.*, Case No. CVCV054956, Order Granting Pet. (Iowa Dist. Ct. June 6, 2018) (in relevant part, granting declaratory and injunctive relief), *available at* https://www.aclu-ia.org/sites/default/files/6-7-18_transgender_medicaid_decision.pdf; *Good*, 924 N.W.2d at 863 (upholding the district court's decision); *see also, e.g.*, *Gartner*, 830 N.W.2d at 354 (upholding the district court's decision, including its order that DHS issue a birth certificate naming both women spouses, because the rule and presumption-of-parentage statute on which it was based violated the Iowa Constitution's equal-protection guarantee); *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 269 (Iowa 2015) (declaring that the rule limiting access to medication abortion was unconstitutional).

The fact that DHS's unavailing argument was never raised, and thus was not adjudicated, in those cases is not enough to save the argument because jurisdictional questions need not be

raised or preserved by the parties or lower courts for appellate courts to decide them. *See, e.g.*, *In re Jorgensen*, 627 N.W.2d 550, 555 (Iowa 2001) ("We determine subject matter jurisdiction issues even though the parties have not raised them. Additionally, we examine the grounds for subject matter jurisdiction on our own motion before we proceed further. When we determine subject matter jurisdiction is lacking, the only appropriate disposition is to dismiss . . ."); *In re Adoption of Gardiner*, 287 N.W.2d 555, 559 (Iowa 1980) (appellate court does not have jurisdiction of subject matter over which trial court lacks jurisdiction).

Indeed, contrary to DHS's argument, in *Salsbury Labratories v. Iowa Department of Environmental Quality*, 276 N.W.2d 830, 833, 835 (Iowa 1979), the Iowa Supreme Court ruled that the plaintiffs were required to bring their claims for declaratory and injunctive relief against an agency action *through* a judicial-review action after exhausting them with the agency, rather than bring them in an original civil action as they had sought to do. *See also Kerr v. Iowa Pub. Serv. Co.*, 274 N.W.2d 283, 288 (Iowa 1979) (request to permanently enjoin agency rule had to be brought through 17A action for judicial review after exhausting agency remedies).

DHS misreads those cases to argue that "Iowa law expressly forecloses injunctive relief in judicial review proceedings." (Br. in Supp. of Mot. to Dismiss at 17.) Those cases stand for the propositions that (1) the APA is the exclusive means to seek declaratory and injunctive relief regarding agency actions and regulations, and (2) plaintiffs seeking this relief must exhaust their administrative remedies with an agency, and seek judicial review upon final agency action, rather than file an original civil action seeking that relief. The cases do not hold—and, indeed, given the plain language of APA section 17A.19(10), *could not have held*—that those types of relief are unavailable. *See* Iowa Code § 17A.19(10) (2021) (expressly granting district court jurisdiction to grant the forms of relief set forth in the statute).

DHS's attempt to avoid a permanent injunction "that would apply universally" likewise has no merit. (Br. in Supp. of Mot. to Dismiss at 17.) The APA expressly provides for "equitable" and "legal" relief, as discussed above. Iowa Code § 17A.19(10) (2021). It also expressly provides that one of the bases for such relief is demonstrating that a regulation is facially unconstitutional. Iowa Code § 17A.19(10)(a) (2021). A regulation that is facially unconstitutional is unconstitutional in all its applications. *See Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 230 (Iowa 2018). The appropriate relief for a facially unconstitutional regulation is the relief Chief Judge Gamble granted in *Good*—an injunction prohibiting the regulation "universally," in all its applications. *See Good*, 924 N.W.2d at 863 (affirming district court's judgment granting declaratory and injunctive relief); *Good*, Case No. CVCV054956, Order Granting Pet., at 41 (requiring unconstitutional and discriminatory language to be stricken from Regulation and prohibiting DHS from denying Medicaid coverage for medically necessary gender-affirming surgery to treat gender dysphoria).

If DHS's position were correct, then a facially unconstitutional regulation could be applied again and again, with each application subject to a new, independent legal challenge. The repetitive, serialized litigation that would follow from this interpretation of APA section 17A.19(10) is clearly not what the statute contemplates. *See State v. Adams*, 810 N.W.2d 365, 369 (Iowa 2012) (courts "will not construe the language of a statute to produce an absurd or impractical result"); *In re Detention of Bosworth*, 711 N.W.2d 280, 283 (Iowa 2006) (same).

Because the APA expressly grants a district court jurisdiction to provide declaratory and injunctive relief against illegal and unconstitutional agency actions, Mr. Vasquez's requests for declaratory and injunctive relief should stand, and DHS's motion to dismiss his requests for those forms of relief should be denied.

CONCLUSION

At this preliminary stage of the proceedings, and viewing the facts in the light most favorable to Mr. Vasquez, as the Court must, *Turner*, 743 N.W.2d at 3, DHS cannot meet the high burden necessary to obtain the dismissal of any of the counts it challenges. For the reasons stated above, the Court should enter an order denying DHS's motion to dismiss in its entirety and allowing Mr. Vasquez to proceed with his petition for judicial review of DHS's decision denying Medicaid reimbursement for his gender-affirming surgery.

Dated: May 24, 2021

Respectfully submitted,

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