Supreme Court No. 19–1197
Polk County Case No. EQCE084567

IN THE SUPREME COURT OF IOWA

MIKA COVINGTON, AIDEN DELATHOWER, and ONE IOWA, INC.,

Petitioners–Appellants,

v.

KIM REYNOLDS *ex rel.* STATE OF IOWA, and IOWA DEPARTMENT OF HUMAN SERVICES,

Respondents–Appellees.

Appeal from the Iowa District Court for Polk County
Honorable David Porter, District Court Judge

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ROUTING STATEMENT

Appellants Mika Covington ("Ms. Covington"), Aiden DeLathower (Vasquez) ("Mr. Vasquez"),[1] and One Iowa Inc. ("One Iowa") (together, "Appellants") respectfully ask this Court to retain this case under Sections 6.1101(2)(a), (d), and (f) of the Iowa Rules of Appellate Procedure.

STATEMENT OF THE CASE

I. Overview

Ms. Covington and Mr. Vasquez are transgender, meaning their gender identity differs from their birth-assigned sex. One Iowa is a nonpartisan, nonprofit organization that seeks to improve the lives of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") Iowans statewide. In the proceedings before the district court, Ms. Covington, Mr. Vasquez, and One Iowa requested a temporary and permanent injunction prohibiting Appellees Kim Reynolds *ex rel.* the State of Iowa, and the Iowa Department of Human Services ("DHS") (together, the "State"), from enforcing Division XX of House File 766 (the "Division"), which was signed into law on May 3, 2019.

[1] Mr. Vasquez associates the name "DeLathower" with his former name before he began living full time as himself, a man, and experiences discomfort when he is referred to using that name. He and his wife intend to formally change their last names together as soon as possible to "Vasquez," a family name. Mr. Vasquez would prefer to be referred to either by his first name, "Aiden," or by "Mr. Vasquez."

The State enacted the Division to negate this Court's recent decision in *Good v. Iowa Department of Human Services*, 924 N.W.2d 853 (Iowa 2019). In *Good*, the Court held that the categorical ban on Medicaid reimbursement for gender-affirming surgery imposed by section 441-78.1(4) of the Iowa Administrative Code (the "Regulation") violated the Iowa Civil Rights Act's ("ICRA") protections against gender-identity discrimination in public accommodations. *See id*. at 862–63. The Division was enacted by logrolling a substantive amendment to ICRA into an annual appropriations bill. It exempts state and local government units from ICRA's nondiscrimination protections for transgender Iowans seeking medically necessary care. This violates the Iowa Constitution's Equal-Protection Guarantee, Single-Subject and Title Rules, and Inalienable-Rights Clause.

The district court erroneously dismissed Appellants' lawsuit on ripeness and standing grounds, declining to reach the merits of Appellants' claims. (7/18/19 Order 10–12). The district also erroneously denied temporary injunctive relief. (7/18/19 Order 6–10). The court's decision should be reversed, and the case should be remanded for further proceedings.

First, Appellants' claims are ripe for adjudication. Contrary to the district court's order, Appellants were not required to engage in "the administrative process" before pursuing their claims. (*See* 7/18/19 Order 7–9,

11). Appellants have challenged the Division, a legislative action, not the Regulation, an agency action. As amended by the Division, 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 (to be codified at Iowa Code § 216.7(3) ("2019 Iowa Acts, HF766").

This is so regardless of (1) an individual's eligibility for Medicaid coverage or (2) the medical necessity of the requested procedure. Indeed, the State concedes that that Division reinstated the Regulation, which expressly prohibits Medicaid coverage for gender-affirming surgery. *See* Iowa Admin. Code r. 441-78.1(4) (2019). The Regulation was never removed from the Iowa Administrative Code, notwithstanding the district court's decision in *Good* that the Regulation violates the Iowa Constitution.

Under the Division, the State *could* amend the Regulation to permit the coverage that is currently banned. *But it has not done so*. Thus, under the current law, it is preordained that any request by Appellants, or any other transgender Iowans, for surgical preauthorization under Medicaid will be denied. The "administrative process" cannot change the Division, its

reinstatement of the Regulation, or any subsequent discriminatory policy or practice adopted in the Regulation's place.

Appellants' challenge to the constitutionality of the Division, however, *can*. Appellants seek to require the State to make Medicaid coverage determinations on the same bases as all other Iowans who receive Medicaid coverage—that is, on the bases of (1) their eligibility for coverage and (2) the medical necessity of the procedures they have requested. Granting injunctive relief in this case will entitle Appellants to nondiscriminatory coverage determinations under Iowa Medicaid. Once the baseline for these nondiscriminatory determinations has been properly reset, Appellants and other transgender Iowans will be subject to the same requirements of financial eligibility and medical necessity as all other Iowans on Medicaid, rather than singled out for coverage denials based on their transgender status. Whether this relief is warranted depends on the statutory language of the Division and the legislative procedure used in adopting it, not on the details of individualized Medicaid coverage determinations. Appellants' challenge to the Division can, and should, be adjudicated now, rather than after a time-consuming and futile "administrative process."

Second, One Iowa has standing to challenge the Division. One Iowa has direct organizational standing because the Division causes it direct injury.

One Iowa has diverted organizational resources to opposing and counteracting the Division and will continue to do so unless the Division is enjoined. And the Division has frustrated the organization's mission—which includes expanding access to healthcare for transgender Iowans—in specific and concrete ways distinct from the Division's effect on the general population.

Additionally, One Iowa has representational standing. The Division causes its board members, staff members, and volunteer members injury; the interests at stake are germane to the organization's purpose; and, neither the claims asserted nor the relief requested require the participation of One Iowa's individual members.

Finally, Appellants are entitled to a temporary injunction. Appellants are likely to succeed on the merits of their constitutional claim that the Division facially violates equal protection; they will face ongoing and serious injury absent relief, and the balance of hardships weigh in their favor; and, there is no adequate legal remedy available.

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. (Temp. Inj. Br., Ex. 10 ¶ 12). The criteria for diagnosing gender dysphoria are set forth in Section 302.85 of DSM-V. (Ex. 10 ¶ 13; Ex. 2 at 1; Ex. 7 at 1).

Gender dysphoria, if left untreated, 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 and treatment, suicidality and death. (Ex. 10 ¶ 15) ("Studies show a 41–43% rate of suicide attempts among this population [individuals with severe gender dysphoria] without treatment, far above the baseline of 4.6% for North America." (citation omitted)). The standards of care for treating gender dysphoria ("Standards of Care") 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 id.*, https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf. (Ex. 10 ¶ 16).

The Standards of Care are widely accepted evidence-based medical protocols that articulate professional consensus to guide healthcare providers in medically managing gender dysphoria. (Ex. 10 ¶ 17). They are recognized as authoritative by the American Medical Association ("AMA"), 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 healthcare in accordance with the Standards may be cruel and unusual punishment under the Eighth Amendment. *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); *Fields v. Smith*, 653 F.3d 550, 553–59 (7th Cir. 2011); *Keohane v. Jones*, No. 4:16CV511a–MW/CAS, 2018 WL 4006798, at *3 (N.D. Fla. Aug. 22, 2018), *appeal docketed*, No. 18–14096 (11th Cir. Sept. 26, 2018).

For many transgender people, necessary treatment for gender dysphoria may involve medical interventions that affirm their gender identity and help them transition from one gender to another. (Ex. 10 ¶¶ 18–19). This transition-related care may include hormone therapy, surgery—sometimes called "gender-affirming surgery," "gender-confirmation surgery" or "sex-reassignment surgery"—or other medical services that align a transgender person's body with the person's gender identity. (*Id*. ¶ 18).

The treatment for each transgender person is individualized to fulfill that person's particular needs. (Ex. 10 ¶¶ 18–19). The WPATH Standards of Care for treating gender dysphoria address all these forms of medical treatment, including surgery. (*Id*. ¶ 19).

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. (Ex. 10 ¶ 36). More than three decades of research confirms that surgery to modify primary and secondary sex characteristics and anatomy to align with a person's gender identity is therapeutic, effective treatment for gender dysphoria. (*Id.* ¶¶ 28, 39). For severely gender-dysphoric patients, surgery is the only effective treatment. (*Id.* ¶ 42).

Health experts have rejected the myth that these treatments are "cosmetic" or "experimental." (Ex. 10 ¶ 37–41). Indeed, all major medical associations—including the AMA, the American Psychological Association, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, and the WPATH—agree that gender dysphoria is a serious medical condition and that treatment for gender dysphoria is medically necessary for many transgender people. (Ex. 10 ¶ 43).

B. Medicaid Coverage for Gender-Affirming Surgery in Iowa Prior to the Division's Enactment

As this Court recognized in *Good*, the history of the Regulation at issue in that case demonstrated that the State's ban on Medicaid coverage for gender-affirming surgery was discriminatory. *Good*, 924 N.W.2d at 862. Forty years ago, in *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980), the Eighth Circuit found that "Iowa[] Medicaid['s] . . . specific[] exclu[sion] [of]

coverage for sex reassignment surgery" violated the federal Medicaid Act. *Id.* at 547–48. The exclusion was improper because, "[w]ithout any formal rulemaking proceedings or hearings," DHS created "an irrebuttable presumption that the procedure of sex reassignment surgery [could] never be medically necessary when the surgery [was] a treatment for transsexualism." *Id*. at 549. This ban "reflect[ed] inadequate solicitude for the applicant's diagnosed condition, the treatment prescribed by the applicant's physicians, and the accumulated knowledge of the medical community." *Id*. It also violated one of Congress's core objectives in passing the Medicaid Act—that "medical judgments" would "play a primary role in the determination of medical necessity." *Id*.

In 1995, following *Pinneke*, DHS initiated a rulemaking process to consider Medicaid coverage for gender-affirming surgery. After a public meeting of DHS's rulemaking body and review by the legislature's 's administrative-rules committee, DHS adopted the Regulation struck down in *Good*. *Good*, 924 N.W.2d at 862; *see also Smith v. Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001) (upholding the Regulation based on inaccurate and outdated research in a challenge asserting only federal claims, not claims based on ICRA or the Iowa Constitution).

In March 2019, this Court found that the Regulation violated ICRA's protections against gender-identity discrimination in public accommodations. *Good*, 924 N.W.2d at 853, 862–63. The Court recognized the medical profession's consensus that gender dysphoria is a serious medical condition and that, for some transgender people, surgical treatment for gender dysphoria is medically necessary. *Id*. at 862. (Ex. 10 ¶ 43).

Despite the Court's decision in *Good*, the State never removed the Regulation from the Iowa Administrative Code. *See* Iowa Admin. Code r. 441-78, *available at* https://www.legis.iowa.gov/docs/iac/chapter/05-22-22-2019.441.78.pdf (current as of May 22, 2019). Now, because of the Division, it is again in effect. (*See* Resistance Temp. Inj. 4 ("[T]he administrative rule [is] currently in effect . . . .").)

C. The Division

Through a sharply divided vote, on April 27, 2019, the last day of the legislative session, the Iowa legislature amended the annual Health and Human Services Appropriations bill, House File 766, with the Division:

> DIVISION XX
> PROVISION OF CERTAIN SURGERIES OR PROCEDURES
> —— EXEMPTION FROM REQUIRED
> ACCOMMODATIONS OR SERVICES
> Sec. 93. Section 216.7, Code 2019, is amended by adding the following new subsection:

> NEW SUBSECTION. 3. This section 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.
>
> Sec. 94. EFFECTIVE DATE. This division of this Act, being deemed of immediate importance, takes effect upon enactment.

2019 Iowa Acts, HF766, https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=hf766, p. 87. The governor signed the Division into law on May 3, 2019. 2019 Iowa Acts, HF 766.

As stated in its title, the Division adds a new "exemption" to the section of ICRA that prohibits discrimination in public accommodations based on race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability. Iowa Code § 216.7(3) (2019). This exemption facially carves out the nondiscrimination protections recognized in *Good*, which transgender Iowans on Medicaid rely on, from ICRA's otherwise comprehensive protections for public accommodations. *See id*.

In addition to the plain language of the Division, the contemporaneous comments of the legislators who enacted it demonstrate the legislature's express purpose to undo the *Good* decision by affirmatively authorizing discrimination against transgender Iowans seeking Medicaid coverage for gender-affirming surgery. Opponents of the legislation expressly warned their

colleagues that the Division "target[ed] coverage for [transgender Iowans'] essential and necessary medical treatments," "t[ook] away the civil rights of Iowa's transgender population," and would "codify discrimination against people and their healthcare needs because they're transgender." 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=s20904260129415 49&dt=2019-04-26&offset=2721&bill=HF%2076&status=r at 2:27:55 (Sen. Bolkcom); 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=H&clip=h20190427092516225&dt=2019-04-27&offset=6564&bill=HF%20766&status=r at 11:24:30 (Rep. Fry) & 11:36:50 (Rep. Wessel-Kroeschell).

In signing the legislation, the governor also expressed her intent to revert to the state's pre-*Good* policy of denying coverage for gender-affirming surgery under Iowa Medicaid: "'This takes it back to the way it's always been,' Reynolds said. 'This has been the state's position for decades.'" *See* Caroline Cummings, *Gov. Reynolds stands by signing bill with Medicaid coverage ban for transgender surgery*, CBS 2/Fox 28 (May 7, 2019), *available at* https://cbs2io.com/news/local/gov-kim-reynolds-stands-by-decision-to-sign-budget-bill-with-transgender-surgery-ban. *Id.*

D. Mr. Vasquez

Mr. Vasquez is a fifty-one-year-old man who is transgender. (Ex. 1 ¶¶ 1, 3–4). He has known he is male since the age of two. (*Id.*). He was diagnosed with gender dysphoria in 2016. (Ex. 1 ¶ 7). As part of his treatment for gender dysphoria, Mr. Vasquez has lived full time as a man in every aspect of his life for several years. (Ex. 1 ¶ 8). *See* WPATH at 9–10, https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf.

In early 2016, Mr. Vasquez began hormone therapy. (Ex. 1 ¶ 7). In May 2016, he legally changed his first name. (*Id.* ¶ 10). In September 2016 he underwent a medically necessary double mastectomy as part of his treatment for gender dysphoria. (*Id.* ¶ 11). In October 2016, Mr. Vasquez amended the gender marker on his birth certificate, driver's license, and social-security card to reflect his male identity. (*Id.* ¶ 12). Mr. Vasquez's gender dysphoria exacerbates his depression and anxiety. He is distressed and very uncomfortable with his genitalia, which do not align with his male gender identity. (*Id.* ¶¶ 13, 26).

Mr. Vasquez's healthcare providers have uniformly concluded that surgery is necessary to treat his gender dysphoria. (Exs. 2–5). His primary-care physician, Dr. Nisly, concluded that "[g]ender affirming bottom surgery is medically necessary to treat Aiden's gender dysphoria . . . ." (Ex. 2 at 1).

Following this Court's decision in *Good*, Mr. Vasquez began the process of seeking preapproval for his gender-affirming surgery. (Ex. 1 ¶ 18). He scheduled a preoperative consultation with his surgeon, Dr. Gast, for May 30, 2019, in preparation for scheduling gender-affirming surgery in or around September 2019. (Ex. 1 ¶ 20). However, as a result of the Division, Dr. Gast's office was unable to confirm coverage under Medicaid for the preoperative appointment and informed Mr. Vasquez that Dr. Gast could not ensure he would obtain preapproval for Mr. Vasquez's surgery. (Ex. 1 ¶¶ 22–23). As a result, Mr. Vasquez had to cancel the consultation. (Ex. 1 ¶¶ 24–25). Because of the Division, Mr. Vasquez has been forced to indefinitely postpone his medically necessary procedure. (Ex. 1 ¶¶ 25–27).

E. Ms. Covington

Ms. Covington is a twenty-eight-year-old woman who is transgender. (Ex. 6 ¶¶ 1, 3–4). She first questioned her gender identity when she was six years old. (*Id.*). She has expressed her female identity in various ways since high school and, in 2009, began the social transition to live full time as a woman. (Ex. 6 ¶¶ 4–5, 7). In 2014, Ms. Covington legally changed her name. (Ex. 6 ¶ 8). In 2015, Ms. Covington was diagnosed with gender dysphoria and began hormone therapy. (Ex. 6 ¶ 11). In 2019, she amended the gender

markers on her passport and social-security card to reflect her female identity. (Ex. 6 ¶ 16).

As part of her treatment for gender dysphoria, Ms. Covington has lived full time as a woman in every aspect of her life for several years. (Ex. 6 ¶ 15; Ex. 10 ¶ 15). *See* WPATH at 9–10. Ms. Covington's gender dysphoria causes severe depression and anxiety. (Ex. 6 ¶ 32). She is distressed and very uncomfortable with her genitalia, which does not align with her gender identity and intensifies her depression and anxiety. (*Id.* ¶¶ 14, 19, 32).

Ms. Covington's healthcare providers have uniformly concluded that surgery is necessary to treat her gender dysphoria. (Exs. 7–9). For example, Ms. Covington's primary-care physician, Dr. Nisly, has determined that "[g]ender affirming surgery is medically necessary to treat Mika's gender dysphoria" in accordance with the WPATH Standards of Care. (Ex. 7 at 1). Two psychologists have also determined that gender-affirming surgery is appropriate to treat Ms. Covington's gender dysphoria under the WPATH Standards. (Ex. 6 ¶ 28; Exs. 8–9).

Following this Court's decision in *Good*, Ms. Covington began the process of seeking preapproval for her gender-affirming surgery. (Ex. 6 ¶ 24). Dr. Nisly has referred Ms. Covington for surgery. (Ex. 7 at 1). Elizabeth Watters and Hana-May Eadeh, two psychologists at the University of Iowa

who evaluated Ms. Covington under the WPATH Standards, also approved her for gender-affirming surgery to treat her gender dysphoria. (Exs. 8–9).

According to Ms. Covington's care plan with Dr. Nisly, she intended to schedule her surgery to occur at the University of Iowa Hospitals and Clinics in September 2019. (Ex. 6 ¶ 26). However, because of the Division, her request for surgical preapproval will be denied by Iowa Medicaid, and her treatment plan will continue to be seriously disrupted. (*Id.* ¶¶ 30–31).

F. One Iowa

One Iowa is a nonpartisan, nonprofit organization that advances, empowers, and improves the lives of LGBTQ Iowans statewide. (Pet. ¶ 52). Its work includes educating Iowans about the LGBTQ community; training healthcare providers, law-enforcement personnel, business leaders, and others to ensure that LGBTQ Iowans are respected in every facet and stage of their lives; promoting policies within state and local government that protect the civil rights, health, and safety of LGBTQ Iowans; empowering future LGBTQ leaders through training and mentorship; and connecting LGBTQ Iowans with vital resources. (*Id.* ¶ 53).

A major focus of One Iowa is to increase healthcare access for transgender Iowans. (*Id.* ¶ 55). Working with healthcare providers who specialize in issues related to transgender people, One Iowa helps inform

healthcare professionals and agencies about issues facing transgender people and helps educate transgender Iowans about the resources available to them. (*Id*.).

In addition to serving the needs of the transgender community, many of One Iowa's supporters, donors, board members, and staff are transgender. (*Id*. ¶ 56). The organization has recently developed a "Transgender Advisory Council" to guide its work for transgender Iowans. (*Id.* ¶ 57). Ms. Covington and Mr. Vasquez are members of the Transgender Advisory Council. (*Id.* ¶ 58; Ex. 1 ¶ 9; Ex. 6 ¶ 9). In addition, One Iowa maintains a program called the "LGBTQ Leadership Institute," which actively recruits transgender Iowans to develop skills and enter community-leadership roles. (Pet. ¶ 59). Some transgender members of One Iowa's Transgender Advisory Council and LGBTQ Leadership Institute are on Iowa Medicaid, and gender-affirming surgery is medically necessary to treat their gender dysphoria. (Pet. ¶ 60).

III. Procedural History

A. Proceedings Before the District Court

On May 31, 2019, Appellants filed a petition, and motion for temporary injunctive relief, in the Iowa District Court for Polk County seeking to enjoin the State's enforcement of the Division. (Pet.; Temp. Inj. Br.). Appellants argued that the Division violates the Iowa Constitution on five separate

grounds. It violates the Equal-Protection Guarantee by facially discriminating against transgender Iowans based on their transgender status. (Temp. Inj. Br. 18–33; Temp. Inj. Reply 10–17). It also violates the Equal-Protection Guarantee because it was motivated by animus against transgender people. (Temp. Inj. Br. 33–36; Temp. Inj. Reply 17–23). It violates the Single-Subject Rule because the bill in which it was enacted addressed annual appropriations and permanent, substantive protections against discrimination in public accommodations, which are independent matters not germane to one another. (Temp. Inj. Br. 36–39; Temp. Inj. Reply 24–31). It violates the Title Rule because the bill's title, which pertained only to appropriations, provided no notice that the Division created an exception to ICRA's nondiscrimination protections. (Temp. Inj. Br. 36–39; Temp. Inj. Reply 32–36). And it violates the Inalienable-Rights Clause by arbitrarily barring transgender Iowans who receive Medicaid coverage from obtaining medically necessary surgical care. (Temp. Inj. Br. 39–42; Temp. Inj. Reply 36–39).

The State resisted Appellants' motion for a temporary injunction and moved to dismiss their claims. (Resistance Temp. Inj.; Mot. to Dismiss). On July 18, 2019, the district court denied Appellants' motion for a temporary injunction and granted the State's motion to dismiss. (*See* 7/18/19 Order).

The district court did not reach the merits of Appellants' claims. (*See* 7/18/19 Order 10). Instead, it held that Appellants had an adequate remedy at law, had not yet suffered irreparable harm, and had not asserted claims that were ripe for adjudication. (*Id.* 7–11). The court's analysis of the first two issues overlapped with its analysis of the third. (*See id.* 7–10, 11).

Emphasizing that "the administrative process [had] not yet commenced," the court found that "the contentions between the parties [were] purely 'abstract.'" (*Id.* 11). The court concluded that "the real goal" of Appellants' lawsuit was the "constitutional invalidation" of the Regulation itself, not the invalidation of the Division, and that, as a result, the litigation "process must start at the administrative level, just as it did in *Good*." (*Id.* 7–8). In doing so, the court suggested that "a full factual record," developed during administrative proceedings, would help it evaluate "the nature and type of medical procedures" sought by Appellants, "the medical support behind each," and the validity of the State's argument that "cost savings" justifies the denial of Medicaid coverage for gender-affirming surgery. (*Id.* 8–9). The court also determined, without citing any authority, that, given Appellants' arguments regarding "the science and treatment related to gender dysphoria," they should be required to file a petition for rulemaking and wait for the State

to "be given a full opportunity to amend or repeal its rules related to treatment for gender dysphoria before those issues are presented" in court. (*Id*. 9).

In addition, the district court found that, despite Appellants' "compelling" affidavits, Appellants had "not established . . . the *dire* need for treatment and the *likelihood* of irreparable harm, if [they] do not receive that treatment *immediately*." (*Id*. 11) (emphases in original). According to the court, Appellants' "distress [was] not tantamount to irreparable harm," and the "*possibility* of irreparable harm" was not sufficient to justify proceeding with the litigation. (*See id*. 10) (emphasis in original).

Finally, the district court held that One Iowa had neither "direct organizational standing," nor "representational standing," to challenge the Division. (*Id*. 12). It concluded that One Iowa's "direct organizational standing argument [was] flawed because . . . it [was] impossible to discern the injury [One Iowa] ha[d] suffered from an injury to the population in general." (*Id*.). It also concluded that One Iowa's "representational standing argument [was] . . . flawed because the relief requested require[d] the participation of individual [One Iowa] members in the lawsuit" since One Iowa purportedly "claim[ed] nothing more than the general vindication of the public interest . . . ." (*Id*.).

B. Proceedings Before This Court

On July 18, 2019, Appellants timely filed a notice of appeal. (Not. of Appeal). They also requested that this Court temporarily enjoin the Division's enforcement while this appeal is pending and during any district-court proceedings on remand. (7/19/19 Temp. Inj. Br. & Exs.). The Court denied Appellants' motion for the immediate issuance of a temporary injunction but granted them leave to include their request for temporary injunctive relief in this brief. (8/9/19 Order).

ARGUMENT

I. Standard of Review

"This Court reviews rulings on motions to dismiss for correction of legal error." *Venckus v. City of Iowa City*, 930 N.W.2d 792, 798 (Iowa 2019) (citing *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017)); *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State*, 763 N.W.2d 250, 257 (Iowa 2009) (dismissal for lack of standing reviewed for errors at law).

The framework for reviewing a decision on a motion to dismiss is well established under Iowa's notice-pleading standard. *Rieff v. Evans*, 630 N.W.2d 278, 292 (Iowa 2001); *see* Iowa R. Civ. P. 1.402(2)(a). Under this standard:

> a petition need not allege ultimate facts that support each element of the cause of action; however, a petition must contain factual

> allegations that give the defendant fair notice of the claim asserted so the defendant can adequately respond to the petition. The fair notice requirement is met if a petition informs the defendant of the incident giving rise to the claim and of the claim's general nature.

U.S. Bank v. Barbour, 770 N.W.2d 350, 353–54 (Iowa 2009) (quotation marks and citation omitted).

To uphold a dismissal, this Court must conclude "that *no state of facts is conceivable* under which [a] plaintiff might show a right of recovery." *Lakota Consol. Indep. Sch. v. Buffalo Ctr./Rake Cmty. Sch.*, 334 N.W.2d 704, 708 (Iowa 1983) (emphasis added). The Court must "consider [the petition] in the light most favorable to the plaintiff and resolve all doubts and ambiguities in the plaintiff's favor." *Stessman v. Am. Black Hawk Broad. Co.*, 416 N.W.2d 685, 686 (Iowa 1987). "Nearly every case will survive a motion to dismiss under notice pleading." *Barbour*, 770 N.W.2d at 353.

This Court's "standard of review governing the issuance of injunctions is de novo." *PIC USA v. North Carolina P'ship*, 672 N.W.2d 718, 722 (Iowa 2003). The Court recognizes that the issuance of "a temporary injunction rests largely within the sound judgment of the district court." *Id.* (quotation marks omitted). "This discretion is a legal one, and, if not based upon sufficient grounds, will be reversed." *Id.* (quotation marks omitted). In addition to the power of review, this Court has the authority to issue temporary injunctive

relief directly. Iowa R. Civ. Pro. 1.1502, 1.1506(2). (8/29/19 Order) (allowing Appellants to include a request for temporary injunction in this brief).

Because the district court's order granting Appellants' motion to dismiss on ripeness and standing grounds, and denying Appellants' motion for a temporary injunction, was erroneous, this Court should reverse and remand. Alternatively, this Court should grant Appellants temporary injunctive relief directly. Iowa R. Civ. Pro. 1.1506(2). (8/29/19 Order).

II. Appellants' claims are ripe.

The district court incorrectly held that Appellants' claims are not ripe. (*See* 7/18/19 Order 10–11). This issue was properly preserved for appeal since it was briefed, argued, and ruled on below. (*See* Resistance Temp. Inj. 5–6; Temp. Inj. Reply 5–10; Mot. to Dismiss 7–8; Resistance Mot. to Dismiss 10–11; 7/18/19 Order 10–11).

"The constitutional requirement of ripeness is basically a manifestation of the rule that courts should not address hypothetical questions." *Taft v. Iowa Dist. Court for Linn County*, 879 N.W.2d 634, 638 (Iowa 2016) (quotation marks omitted). "A case is ripe for adjudication when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative." *Id*. (quotation marks omitted); *State v. Tripp*, 776 N.W.2d 855, 859 (Iowa 2010); *State v. Wade*, 757 N.W.2d 618, 627 (Iowa 2008); *State v.*

Iowa Dist. Court for Blackhawk County, 616 N.W.2d 575, 578 (Iowa 2000). In determining whether a case is ripe, courts "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 49 (1967).

This case presents "an actual, present controversy" that should be adjudicated now, as opposed to after the so-called "administrative process" invoked by the district court. (*See* 7/18/19 Order 11). Appellants' claims are neither "hypothetical" nor "speculative." *See Taft*, 879 N.W.2d at 638; *Tripp*, 776 N.W. 2d at 859; *Wade*, 757 N.W.2d at 627; *Iowa Dist. Court*, 616 N.W.2d at 578. Instead, the claims are ripe for adjudication because (1) they are "fit[] . . . for judicial decision," and (2) "withholding" them from "court consideration" will cause Appellants significant "hardship." *See Abbott*, 387 U.S. at 149.

A. Appellants' claims are fit for judicial decision.

Appellants' claims are "fit[] . . . for judicial decision." *See Abbott*, 387 U.S. at 148–49; *see also Tripp*, 776 N.W.2d at 859 (citing *Abbott* for purposes of state ripeness doctrine); *Wade*, 757 N.W.2d at 627 (same); *Iowa Dist. Court for Blackhawk County*, 616 N.W.2d at 578 (same). They are not subject to "the administrative process" since they challenge a legislative action, not an agency action. They require no further factual development since they are

purely legal in nature. And they are not speculative since the Regulation, which the Division reinstated, remains in effect and mandates denying Medicaid coverage for gender-affirming surgery.

1. Appellants are not required to exhaust administrative remedies before pursuing their claims.

The district court incorrectly concluded that "the administrative process" for challenging denials of Medicaid coverage for gender-affirming surgery must be invoked before Appellants can seek to enjoin the Division's enforcement. (*See* 7/18/19 Order 7–9, 11). The court misconstrued the nature of Appellants' challenges to the Division and ignored the limitations of "the administrative process."

a. Appellants have challenged a legislative action, not an agency action.

First, Appellants have challenged a legislative action, not an agency action. There are "three distinct categories of agency action: rulemaking, adjudication or contested case, and other agency action." *See Petit v. Iowa Dep't of Corrs.*, 891 N.W.2d 189, 194 (Iowa 2017). The Division, a legislative enactment, was not the product of "rulemaking," did not involve agency "adjudication" or a "contested case" before an agency, and did not involve any "other agency action." *See id*.

Appellants allege, in part, that the legislative procedure by which the Division was enacted violates the Iowa Constitution's anti-logrolling provisions. (Temp. Inj. Br. 36–39; Temp. Inj. Reply 23–36). They also allege that the substance of the Division violates the Iowa Constitution's Equal-Protection Guarantee and Inalienable-Rights Clause. (Temp. Inj. Br. 18–36, 39–42; Temp. Inj. Reply 10–23, 36–39).

Appellants' anti-logrolling claims implicate issues with the legislative process that are fully independent from the Regulation. The State's violations of the Single-Subject and Title Rules arose from the manner in which the Division was enacted, not from the Division's reinstatement of the Regulation. The interests safeguarded by the Single-Subject and Title Rules—which ensure notice, input, and debate with respect to proposed legislation, and which protect the democratic process—cannot be secured or furthered by administrative remedies related to the Regulation. *See* Iowa Const., art. III, § 29; *State v. Mabry*, 460 N.W.2d 472, 473 (Iowa 1990); *Western Int'l v. Kirkpatrick*, 396 N.W.2d 359, 365 (Iowa 1986). As a result, "the administrative process" is irrelevant to Appellants' anti-logrolling claims.

The same is true of Appellants' equal-protection and inalienable-rights claims. The State's equal-protection and inalienable-rights violations arise from the Division, not from the Regulation. Both the Division and the

Regulation expressly discriminate against transgender people and violate the Iowa Constitution. But absent the Division, the Regulation would be unenforceable under this Court's decision in *Good*. *See Good*, 924 N.W.2d at 862–63 (enjoining the Regulation because it discriminates on the basis of gender identity in violation of ICRA). While the Division and the Regulation together make the denial of medically necessary gender-affirming surgery inevitable, the Regulation itself is not the target of Appellants' claims. Rather, Appellants' target is the Division, which expressly authorizes the State to discriminate against them solely because they are transgender. The Division takes away Appellants' statutory right under ICRA to a nondiscriminatory preapproval process to obtain Medicaid coverage for medically necessary care. *See* 2019 Iowa Acts, HF766. The "administrative process" has no bearing on the ripeness of Appellants' equal-protection or inalienable-rights claims.

Appellants' claims are *not* requests for gender-affirming surgery. Appellants seek to require the State to make coverage determinations regarding their surgical care on the same bases as all other Iowans who receive Medicaid coverage—that is, on the bases of (1) their eligibility for coverage and (2) the medical necessity of the procedures they have requested. Granting injunctive relief in this case will not entitle Appellants, or anyone else, to

gender-affirming surgery; it will merely entitle them to nondiscriminatory coverage determinations under Iowa Medicaid on the same terms as all other Iowans' requests for coverage of medical care. The injunctive relief requested by Appellants relates to the Division's statutory language and the procedure by which it was enacted, not the details of individualized Medicaid coverage determinations.

Indeed, neither DHS nor the Iowa Civil Rights Commission nor any other state agency even has the authority to resolve Appellants' constitutional challenges to the Division or return the law to the state in which it existed before the Division's enactment. "The executive department," including its agencies, "has the general power to execute and carry out the laws." *See Doe v. State*, 688 N.W.2d 265, 271 (Iowa 2004). But only "the judicial department has the power to interpret the constitution and laws, apply them, and decide controversies." *See id.; see also Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 836 (Iowa 1979) ("Agencies cannot decide issues of statutory validity.").

Appellants' challenge to the Division must be decided in court. And the proper mechanism for proceeding in court is an action for declaratory and injunctive relief, like Appellants' action here, not a judicial-review proceeding under the Iowa Administrative Procedure Act ("APA"), which only applies to

"agency action." *See* Iowa Code § 17A.19 (2019) (describing the "means by which a person or party who is aggrieved or adversely affected by *agency action* may seek judicial review of such *agency action*") (emphases added).

b. Engaging in the "administrative process" would be futile.

Second, a final administrative denial of Medicaid coverage is not a prerequisite to Appellants' lawsuit since engaging in "the administrative process" would be futile. The outcome of that process has been predetermined by the Division, which the State has conceded authorizes it to enforce the Regulation against Appellants. (*See, e.g.*, Resistance Temp. Inj. at 4 ("[T]he administrative rule [is] currently in effect . . . .")). The Regulation mandates denying Medicaid reimbursement for gender-affirming surgery. *See* Iowa Admin. Code r. 441-78.1(4) (2019); *see also Voyageurs Region Nat'l Park Ass'n v. Lujan*, 966 F.2d 424, 428 (8th Cir. 1992) (agency must follow its regulations); *Stoglin v. Apfel*, 130 F. Supp. 2d 1060, (S.D. Iowa 2000) (same); *United States v. Newell*, 516 F. Supp. 2d 971, 974 (S.D. Iowa 2007) (same). And no administrative agency has the authority to resolve Appellants' constitutional challenges to the Division. *See, e.g.*, *Doe*, 688 N.W.2d at 271; *Salsbury*, 276 N.W.2d at 836. Therefore, seeking preauthorization for Medicaid coverage for gender-affirming surgery is futile until the Division is enjoined. Appellants are not required to engage in a "fruitless pursuit of

unavailable remedies" just to obtain a formulaic denial of relief from a state agency. *See Sioux City Police Officers Ass'n v. City of Sioux City*, 495 N.W.2d 687, 693 (Iowa 1993) (quotation marks omitted).

This Court's decision in *Sioux City* is directly on point. There, the plaintiffs, various municipal unions, brought a declaratory-judgment action seeking a determination that a municipal resolution was unconstitutional. *Id*. at 690. The plaintiffs claimed that the resolution violated the Iowa Constitution's limitations on municipal home-rule authority, as well as the rights of their members to associate and marry under the First and Fourteenth Amendments. *Id*. This Court reversed the district court's decision that it did not have jurisdiction to render a declaratory ruling on the resolution's constitutionality. *Id*. at 691.

The Court rejected the defendant's contention that the plaintiffs were first required to proceed with their constitutional challenges before the Public Employment Relations Board ("PERB"), the agency charged with adjudicating labor disputes involving public employees. *See id*. at 691–93. The Court concluded that the PERB was not "the most appropriate tribunal to hear [the] case" because the plaintiffs sought "to have the [resolution] declared invalid," a matter "properly for the courts to decide rather than [the] PERB." *See id*. at 693. The PERB, observed the Court, could not "provide an

adequate remedy for the issues raised by [the] plaintiffs." As a result, the case "present[ed] exactly the kind of fruitless pursuit of unavailable remedies that necessitat[ed] an exception to the [administrative] exhaustion doctrine." *Id*.

Here, as in *Sioux City*, Appellants have asserted constitutional challenges to a legislative enactment. Just as the PERB was unable to resolve the plaintiffs' claims in that case, no state agency can resolve Appellants' claims in this one. Requiring Appellants to assert those claims anywhere other than before a court would be "fruitless." *See id*. This "administrative process" therefore does not render Appellants' claims unripe.

c. Appellants are not required to file a petition for rulemaking.

Third, Appellants are not required to file a petition for rulemaking before pursuing declaratory and injunctive relief. The district court erroneously determined that they should have "request[ed] the adoption" of a new administrative rule, or the "amendment[] or repeal of" the Regulation, before filing suit. (*See* 7/18/19 Order 9). But even if Appellants were challenging the Regulation (which, as discussed, they are not), petitioning for rulemaking to correct an unlawful rule is not a prerequisite to challenging the unlawful rule in the first instance. Neither the district court nor the State cited any authority suggesting otherwise. (*See* 7/18/19 Order 9; Resistance Temp. Inj. 4–5).

On the contrary, in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), *modified on other grounds on reh'g*, 293 F.3d 537 (D.C. Cir. 2002), the United States Court of Appeals for the District of Columbia Circuit held that, even though the plaintiffs had not filed a petition for rulemaking to rescind the regulations implicated by their constitutional challenge, their claims were ripe. *Id.* at 1039–40. In *Fox*, as in this case, the issues before the court were "fit for judicial review because [they were] purely legal ones," and the petitioners would "indeed be harmed" by a dismissal on ripeness grounds. *See id*. at 1039. Those considerations, not the theoretical possibility that the agency could amend the regulations in question, drove the court's decision-making. *See id*. at 1039–40.

Here, as in *Fox*, if the State decides to engage in rulemaking while this litigation is pending, that is the State's prerogative. But nothing compels Appellants to initiate that process. And no amount of administrative notice or commentary will provide the judiciary with helpful information on whether the legislature violated the Iowa Constitution's Equal-Protection Guarantee, Single-Subject and Title Rules, or Inalienable-Rights Clause by enacting the Division. *See Fox*, 280 F.3d at 1039 (fact that agency "was in a better position" than the court to determine whether to retain the regulations at issue

was "quite beside the point" for purposes of deciding whether petitioners' challenge to the regulations was ripe).

d. Appellants are not required to request an administrative waiver.

Fourth, Appellants are not required to request an administrative waiver of the Regulation before pursuing declaratory and injunctive relief. The State's argument to the contrary has no merit. (*See* Resistance Temp. Inj. 4). Even if Appellants were challenging the Regulation (which, again, they are not), the mere existence of a procedure for seeking a discretionary waiver of an unlawful regulation does not bar a plaintiff who has not requested the waiver from pursuing litigation to vindicate his or her rights. *See Fox*, 280 F.3d at 1040 (rejecting argument that waiver request was prerequisite to challenging regulations in court).

In *Fox*, as in this case, the government "cite[d] no authority suggesting the petitioners were required to request a waiver from the agency even though a waiver [was] not the relief they [sought] from the court." *See id.* at 1040. Nor, as in this case, did the government "proffer any reason to believe the petitioners would have been entitled to a waiver had they sought one." *Id.*

An administrative waiver would not grant Appellants the declaratory and injunctive relief they seek here—a judgment finding the Division null and void, and prohibiting its enforcement, based on the Iowa Constitution's Equal-

Protection Guarantee, Single-Subject and Title Rules, and Inalienable-Rights Clause. Nor, given the State's decision to reinstate the Regulation, do Appellants have any reason to believe they would receive a waiver if they applied for one. The existence of a procedure for requesting a waiver of the Regulation does not affect the ripeness of Appellants' challenge to the Division.

2. Appellants' claims require no further factual development.

Appellants' claims are also "fit[] . . . for judicial decision" because they require no further factual development. *See Abbott*, 387 U.S. at 148–49. The claims are "purely legal" in nature. *See id*. at 149; *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1380–81 (11th Cir. 2019).

The Division was enacted by logrolling a substantive amendment to ICRA into a routine annual appropriations bill. On its face, it exempts state and local government units from ICRA's nondiscrimination protections for transgender Iowans seeking medically necessary care. 2019 Iowa Acts, HF766, Division XX (stating the same in the title of Division XX: "Provision of Certain Surgeries or Procedures—*Exemption from Required Accommodations or Services*") (emphasis added).

This violates the Iowa Constitution's Equal-Protection Guarantee, Single-Subject and Title Rules, and Inalienable-Rights Clause. These "purely

legal" claims do not require further factual development. *See, e.g.*, *Abbott*, 387 U.S. at 149 (concluding that the issue presented, which was "purely legal," was "appropriate for judicial resolution"); *Club Madonna*, 924 F.3d at 1380–81 (explaining that facial challenges, which present a "purely legal argument" are "presumptively ripe for judicial review because that type of argument does not rely on a developed factual record") (quotation marks omitted).

The district court erred in finding that it needed a "full factual record" regarding "the nature and type of medical procedures" sought by Appellants to evaluate Appellants' arguments. (7/18/19 Order 8). Appellants' individualized Medicaid coverage determinations are not at issue here. Appellants seek to require the State to make those determinations based on the normal criteria—(1) their eligibility for coverage and (2) the medical necessity of the procedures they have requested—rather than on the discriminatory grounds permitted by the Division. The injunctive relief requested by Appellants will place them on equal footing with all other Iowa Medicaid recipients who apply for surgical care under Iowa Medicaid.

Given the nature of Appellants' challenge, whether this relief is warranted depends on the statutory language of the Division and the legislative procedure used in adopting it, not on the details of individualized Medicaid coverage determinations. No further factual development regarding

Appellants' individual medical conditions or prescribed surgical care is necessary for a court to adjudicate these issues.

The court further erred by finding that it needed "a full factual record" to "engage in a full constitutional analysis" of the State's argument that the Division does not violate equal protection because it promotes "cost savings". (*See* 7/18/18 Order 8). First, costs savings are insufficient to justify a facially discriminatory law. *See Racing Ass'n of Cent. Iowa v. Fitzgerald* ("*RACI*"), 675 N.W.2d 1, 12–15 (Iowa 2004) (even under rational-basis review, there must be some reasonable distinction between the group burdened with higher taxes, as compared to the favored group, to justify the higher costs); *Varnum v. Brien*, 763 N.W.2d 862, 903 (Iowa 2009) (rejecting cost savings as rationale for discriminatory treatment of same-sex couples); *see also Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974) ("[A] state may not protect the public fisc by drawing an invidious distinction between classes of its citizens."); *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (rejecting cost-savings rationale for discriminatory legislation); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 854–55 (E.D. Mich. 2014) (same).

There is no reasonable distinction between transgender and nontransgender individuals with regard to their need for Medicaid coverage for medically necessary surgical care. Both groups need financial assistance

for critically necessary medical treatments. No further factual development will advance or refute the legal argument that cost savings are insufficient to justify facially discriminatory legislation such as the Division.

Second, the legislative history of the Division demonstrates that cost savings did not motivate the Division. The fiscal note accompanying the bill containing the Division did not include any reference to the cost of gender-affirming surgery, including the numbers provided to the district court by DHS. *See* Iowa Legislative Services Agency ("LSA"), Fiscal Services Division, Notes on Bills and Amendments, *Health and Human Services Appropriations Bill, House File 766, available at* http://www.legis.iowa.gov/docs/publications/NOBA/1045129.pdf. (*Cf.* Resistance Temp. Inj., Randol Aff.) Nor do the legislative debates contain reference to those numbers. *See* 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=2019-04-26&offset=2721&bill=HF%20766&status=r.

Senator Robert Hogg's affidavit corroborates the absence of this information from the legislative record. (Temp. Inj. Reply, Ex. 3 Hogg Aff.) LSA did not receive information about the projected costs of gender-affirming surgery from DHS until *after* the end of the legislative session, *after* the

Division was adopted. (*See id*. ¶ 3 & Ex. 12-A) (letter from DHS Deputy Director dated May 31, 2019, responding to LSA's request for information on behalf of Senator Hogg). The affidavit also demonstrates that LSA "did not accept [DHS's] letter as the correct or the best analysis" and that "it [is] doing additional fiscal analysis on this issue," which is forthcoming. (*Id*. ¶ 4). No further factual development regarding Appellants' medical denials will alter this clear-cut legislative history.

To the extent further discovery could reveal *additional* evidence that the law was motivated by animus against transgender Iowans, and not cost savings in Medicaid overall, this is no basis for dismissal. Rather, if the district court perceived a need to develop a full factual record on legislative purpose, then it should have ordered the State to answer Appellants' petition so any necessary discovery could commence. *See, e.g.*, *Barbour*, 770 N.W.2d at 354; *Lakota Consol. Indep. Sch.*, 334 N.W.2d at 708 (dismissal should be denied unless "no state of facts is conceivable under which [a] plaintiff might show a right of recovery").

3. Appellants' claims are not speculative.

Finally, Appellants' claims are "fit[] . . . for judicial decision" because they are not speculative. *See Abbott*, 387 U.S. at 148–49. The future deprivation of a benefit is actionable where the deprivation is certain, not

speculative. *See Doe*, 688 N.W.2d at 269 (rejecting argument that prisoner's challenge to Iowa Department of Corrections' rule was not ripe because he had not yet been denied release based on the rule, where he claimed that "the effect of the . . . rule [was] to remove him from the class of inmates who may be *considered* for early release," even though he did not claim "a *present* deprivation of release") (emphases in original); *Bassett*, 951 F. Supp. 2d at 951, 952–53 (finding that, even though some of the plaintiffs had not yet had benefits terminated that they received through their same-sex partners' employment, their claims were ripe because termination was certain under the challenged law).

Here, as in *Doe* and *Basset*, it is certain, not speculative, that the State will deny Appellants coverage for their medically necessary gender-affirming surgeries. The State agrees that the Division reinstated the discriminatory Regulation. (*See, e.g.*, Resistance Temp. Inj. 4 ("[T]he administrative rule [is] currently in effect . . . ."). The Regulation mandates denying Medicaid reimbursement for gender-affirming surgery. *See* Iowa Admin. Code r. 441-78.1(4) (2019); *see Good*, 924 N.W.2d at 862–63. Thus, under the Division, Appellants are prohibited from receiving Medicaid reimbursement for the surgical treatment they need.

Additionally, Appellants have already experienced harm as a result of the Division's enactment. Mr. Vazquez could not afford to travel to his physician's office in Madison, Wisconsin, for a presurgical consultation to seek preauthorization for his surgical procedure, knowing that such a trip would be futile based on the Division. (*See* Ex. 1 ¶¶ 18–27). And Ms. Covington was due to seek preauthorization for, and schedule, her presurgical consultation following a July 30 medical appointment, but after the district court dismissed the lawsuit, she and her doctor did not seek preauthorization because doing so would be futile based on the Division. (*See* Ex. 6 ¶¶ 21–31). Contrary to the district court's holding, these are nonspeculative, "concrete ways" in which Appellants have been harmed, and will continue to be harmed, by the Division. (*See* 7/18/19 Order 11).

It is, moreover, immaterial that, even if the Division is enjoined, the State theoretically—albeit erroneously—could deny Medicaid coverage to Appellants on nondiscriminatory grounds, such as financial ineligibility or the absence of medical necessity. As discussed, the relief requested by Appellants—an injunction prohibiting the Division's enforcement—will not automatically lead to the preapproval of their requests for Medicaid reimbursement. If the Division is enjoined, transgender Iowans on Medicaid, like Appellants, will be subject to the same requirements of financial

eligibility and medical necessity as all other Iowans on Medicaid. Like all Medicaid recipients, Appellants will still be required to seek preauthorization for coverage. And, at that point, coverage could be denied on nondiscriminatory grounds.

These types of "anything-can-happen scenarios" are insufficient to defeat the ripeness of Appellants' claims. *See Thomas More Law Center v. Obama*, 651 F.3d 529, 537 (6th Cir. 2011) (rejecting the government's argument that a challenge to the Affordable Care Act was not ripe because the plaintiffs might die or their incomes might fall), *overruled on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)); *Bassett*, 951 F. Supp. 2d at 952–53 (rejecting challenge to ripeness based on possibility that same-sex couples could separate, or that one employee could lose a job before the employee's domestic partner lost benefits under the law at issue, because those speculative possibilities did not undermine the causal relationship between the defendant's conduct and the harm alleged). Regardless of the ultimate outcome of Appellants' preauthorization requests, their claims are ripe because, if Appellants prevail, they will be entitled to the nondiscriminatory consideration of those requests.

B. Withholding adjudication will cause Appellants significant hardship.

Appellants' claims are also ripe because "withholding" them from "court consideration" will cause Appellants significant "hardship." *See Abbott*, 387 U.S. at 149; *see also Tripp*, 776 N.W.2d at 859 (citing *Abbott* for purposes of state ripeness doctrine); *Wade*, 757 N.W.2d at 627 (same); *Iowa Dist. Court for Blackhawk County*, 616 N.W.2d at 578 (same).

The district court erred in finding that Appellants "have not established . . . the *dire* need for treatment and the *likelihood* of irreparable harm." (7/18/12 Order 11). First, the court ignored the notice-pleading standard that applies to motions to dismiss under Iowa law. The district court cited no authority for the proposition that Appellants were required to "establish[]" irreparable harm to show ripeness. While Appellants did, in fact, "establish[]" irreparable harm, as discussed below, that is not the applicable standard. At the motion-to-dismiss stage, a plaintiff need only allege facts that could *conceivably* entitle the plaintiff to relief, with the understanding that discovery may be required to further develop the facts prior to summary judgment or trial. *See, e.g.*, *Barbour*, 770 N.W.2d at 354; *Lakota Consol. Indep. Sch.*, 334 N.W.2d at 708.

Second, the district court ignored the uncontested allegations and affidavits establishing the severity of Appellants' gender dysphoria and the

immediacy of their need for treatment. As numerous courts have acknowledged, the emotional distress, anxiety, depression and physical pain resulting from inadequate medical treatment for gender dysphoria constitute irreparable harm. *See Hicklin v. Precynthe*, No. 4:16–cv–01357–NCC, 2018 WL 806764, at *10, 14 (E.D. Mo. Feb. 9, 2018) (granting preliminary injunction); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019) (upholding permanent injunction); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 942–46 (W.D. Wis. 2018) (granting preliminary injunction). Appellants averred that their gender dysphoria causes depression and suicidal ideation and that these symptoms have intensified because of the Division. (Pet. ¶¶ 29–36, 43–51; Temp. Inj. Br., Ex. 1 ¶ 26; Ex. 6 ¶ 32). Ms. Covington's medical provider stated that Ms. Covington's gender dysphoria has become "debilitating" (Ex. 7). And Mr. Vazquez's doctor described gender-affirming surgery "as a vital quality of life and mental health issue for him." (Ex. 3).

Actual and ongoing mental-health issues and threatened physical harm, as alleged by Appellants in their petition and supported by their affidavits, constitute injuries so severe they cannot adequately be remedied at law. *See Matlock v. Weets*, 531 N.W.2d 118, 122–23 (Iowa 1995). A court should not require an individual to endure these injuries in the name of ripeness. *Cf. Salsbury*, 276 N.W.2d at 837 ("[A] litigant who would suffer irreparable harm

from administrative litigation delay may proceed to court without exhausting administrative remedies.").

Third, the district court failed to recognize the constitutional dimension of Appellants' injuries. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (infringement of constitutional rights by facially invalid law causes irreparable harm) (citing 11A Charles Wright, et al., Federal Practice & Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.")). Appellants' constitutional rights are being violated. (*See* Temp. Inj. Br. 18–42; Temp. Inj. Reply 10–39). For this reason alone, delaying adjudication of their claims has imposed, and will continue to impose, significant "hardship." *See Abbott*, 387 U.S. at 149.

III. One Iowa has standing.

The district court also erred in holding that One Iowa lacks standing to challenge the Division. The issue was properly preserved for review since it

was briefed, argued, and ruled on below. (7/18/19 Order 12; Resistance Mot. to Dismiss 2–10).

One Iowa has standing in two ways, either of which is sufficient to challenge the Division. First, One Iowa has direct organizational standing because the Division causes it direct injury. Second, One Iowa has representational standing because the Division causes its board members, staff members, and volunteer members injury; the interests at stake are germane to the organization's purpose; and, neither the claims asserted nor the relief requested require the participation of One Iowa's individual members.

A. One Iowa has direct organizational standing.

The district court determined that One Iowa lacked direct standing to challenge the Division on its own behalf because One Iowa:

> failed to demonstrate how it has been injuriously affected . . . because the argument rests almost entirely on its stated mission, which is so broad that it encompasses every component of an LBGTQ member's life, therefore making it impossible to discern the injury it has suffered from an injury to the population in general.

(7/18/19 Order 12) (citing *Godfrey*, 752 N.W.2d at 420).

The district court's determination is reversible error. One Iowa has diverted organizational resources to counteract the Division. And the Division has frustrated the organization's mission—which includes expanding access

to healthcare for transgender Iowans—in specific and concrete ways distinct from the Division's effect on the general population.

Standing, while prudential rather than jurisdictional under the Iowa Constitution, "essentially follows the federal doctrine on standing." *Godfrey*, 752 N.W.2d at 424. Generally, standing doctrine requires a plaintiff to "(1) have a specific personal or legal interest in the litigation" [or] (2) be injuriously affected." *Id.* at 418 (citing *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004)). This Court has stated that drawing on federal law has been important, "especially as to actions to enforce public constitutional values by private individuals." *Id.*

To satisfy the first prong of the standing inquiry, the Court "no longer require[s] the litigant to allege a violation of a private right and do[es] not require traditional damages to be suffered. Instead, [the Court] require[s] the litigant to allege some type of injury different from the population in general." *Id.* at 420 (citing *Hurd v. Odgaard*, 297 N.W.2d 355, 358 (Iowa 1980)).

In *Hurd*, two lawyers who brought a mandamus action to compel a county to repair a courthouse satisfied the requirements for standing, even though they did not suffer monetary or other traditional damages, because their status as users of the building gave them an identifiable injury sufficient to confer standing. *Id.*; *Hurd*, 297 N.W.2d at 356, 358. In *Godfrey*, the Court

elaborated on the principle it applied in *Hurd* to distinguish the lawyers' interest as users of the courthouse from the interest of the general population. *Godfrey*, 752 N.W.2d at 420. The Court held that "litigants who share intangible interests in common with all other citizens must also identify some individual connection with the affected subject matter to satisfy the injury-in-fact requirement." *Id*. (quotation marks omitted). Such injuries in fact are "personal" to the litigant and not "abstract." *Id.* at 421, 424.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the United States Supreme Court recognized that direct organizational injury is typically shown in one of two ways: (1) the diversion of organizational resources to identify or counteract the allegedly unlawful action or (2) the frustration of the organization's mission. *Id.* at 379 (plaintiff sufficiently alleged direct organizational injury based on "the drain on the organization's resources" caused by the defendant's misconduct and the "perceptibl[e] impair[ment]" of the organization's activities).

Since *Havens*, several federal courts have applied this standard to evaluate direct organizational standing. *See, e.g., Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (fair-housing organization had direct standing based on the frustration of its efforts to assist equal access to housing for people with disabilities where the organization diverted resources

to monitor violations of the law and educate the public about the discrimination at issue); *People for the Ethical Treatment of Animals v. U.S. Dep't. of Agric.*, 797 F.3d 1087, 1095–97 (D.C. Cir. 2015) (concluding that PETA had standing to challenge "USDA's allegedly unlawful failure to apply . . . general animal welfare regulations to birds" where USDA's conduct "ha[d] perceptibly impaired [PETA's] ability to both bring . . . violations to the attention of the agency charged with preventing avian cruelty and continue to educate the public") (quotation marks omitted); *Action Alliance of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 935–37 (D.C. Cir. 1986) (finding that "four organizations that endeavor[ed], through informational, counseling, referral, and other services, to improve the lives of elderly citizens" had standing to challenge federal regulations they claimed were inconsistent with the Americans with Disabilities Act); *Abigail Alliance for Better Access to Dev'l Drugs v. Eschenbach*, 469 F.3d 129, 132–33 (D.C. Cir. 2006) (organization had standing where its activities "to assist its members and the public in accessing potentially life-saving drugs and its other activities, including counseling, referral, advocacy, and educational services" had been frustrated by defendant due to diversion of organizational time and resources); *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012) (NYCLU, which advocates for, among other

things, open government proceedings, had standing to sue municipal transit authority because it allegedly had attempted to exclude NYCLU's efforts to observe public hearings); *Nnebe v. Daus*, 644 F.3d 147, 156–57 (2d Cir. 2011) (nonprofit organization seeking to improve the lives of taxicab drivers had standing to challenge policy of suspending drivers' licenses because it had expended resources to counsel drivers).

In this case, One Iowa easily succeeds under either prong of the standard for direct organizational standing. One Iowa expends significant organizational resources to increase healthcare access for transgender Iowans. Through One Iowa's Transgender Advisory Council and LGBTQ Leadership Institute, One Iowa keeps transgender people, healthcare professionals, and agencies informed about how to help transgender Iowans who are transitioning from one gender to another. (Pet. ¶¶ 53, 55, 57, 59).

As a result of the Division, One Iowa must now expend additional time and resources to provide this education and advocacy. Additionally, in carrying out its mission to advance, empower, and improve the lives of LGBTQ Iowans statewide, One Iowa diverted substantial policy and advocacy resources to opposing the Division in the Iowa legislature and seeking a gubernatorial veto. (Pet. ¶ 52; Temp. Inj. Reply, Crow Aff. ¶ 13–15).

The Division has also frustrated One Iowa's organizational mission. Unlike the general population, One Iowa has a specific organizational focus on expanding access to healthcare for transgender Iowans and combatting discrimination against transgender Iowans in healthcare. (Pet. ¶¶ 52, 53, 55.) One Iowa achieves this mission by "working with healthcare providers who specialize in issues related to transgender individuals" to "inform other healthcare professionals and agencies about how to address transgender people who might be transitioning and what kind of resources exist to help them through this process." (Pet. ¶ 55.) *See also, e.g.*, 2019 Des Moines University–One Iowa Joint LGBTQ Health and Wellness Conference agenda, *available at* https://oneiowa.org/wp-content/uploads/2019/01/2019-FINAL-LGBTQ-Health-and-Wellness-Conference-Agenda-2019-.pdf; 2018 Des Moines University–One Iowa Joint LGBTQ Health and Wellness Conference Agenda, *available at* https://oneiowa.org/wp-content/uploads/2018/02/LGBTQ-Health-and-Wellness-Conference-Agenda-2018.pdf. One Iowa has even created a Transgender Advisory Council that guides the organization's mission in the area of transgender healthcare, both to expand access and reduce discrimination. (Pet. ¶ 57).

The Division has thwarted One Iowa's efforts to expand access to gender-affirming surgery for transgender Iowans on Medicaid. This includes

members of One Iowa's Transgender Advisory Council and members of One Iowa's LGBTQ Leadership Institute. (Pet. ¶ 60).

Contrary to the district court's conclusory determination at the motion-to-dismiss stage of this case, these concrete interests are entirely distinct from, and greater than, the interests of the members of the general population. The *Godfrey* case, cited by the district court, is distinguishable from this case on that basis. (*See* 7/18/19 Order at 12) (citing *Godfrey*, 752 N.W.2d at 420). In *Godfrey*, the petitioner brought a single-subject claim based on her status as a citizen, taxpayer, and potential workers'-compensation claimant. *Godfrey*, 752 N.W.2d at 417. The petitioner's citizen and taxpayer injuries were the same as those of the population in general. *Id*. at 423. And her injury as a potential workers'-compensation claimant was based "solely on her status as a worker with a prior work-related injury covered by the challenged workers' compensation statute." *Id.* at 423. It thus "d[id] nothing to establish the likelihood of an actual or immediate threat of another covered injury." *Id.*

Here, by contrast, there is no lack of immediacy. One Iowa's claims are not based on speculation that a prior injury may lead in the future to another injury, but rather on an immediate and continuing injury distinct from that of the general population. Iowa's generous notice-pleading standards do not require One Iowa to exhaustively plead the details of how it has suffered

injury. But reviewing the facts in a light favorable to One Iowa, as required, demonstrates that it has *already* suffered, and continues to suffer, harm as a result of the Division. As explained above, One Iowa has diverted resources to oppose and counteract the Division. And the Division has frustrated One Iowa's organizational purpose. One Iowa therefore has direct organizational standing to challenge the Division. The district court's dismissal of One Iowa on this basis should be reversed.

B. One Iowa has representational standing.

The district court also erroneously rejected One Iowa's representational standing on the following grounds: "[T]he relief requested requires the participation of individual members in the lawsuit. One Iowa claims nothing more than the general vindication of the public interest in seeing that the legislature acts in conformity with the constitution." (7/18/19 Order at 12) (citing *Godfrey*, 752 N.W.2d at 424).

The district court confused *the ability* of One Iowa's members to otherwise sue in their own right—an element of representational standing—with *a requirement* that individual members impacted by the Division *must* sue in their own right. This was erroneous. Here, neither the claims asserted nor the relief requested require the participation of One Iowa's individual members. Additionally, because the interests One Iowa seeks to protect "are

germane to the organization's purpose," *see id*., its interests meet the legal test for representational standing and exceed "the general vindication of the public interest." (7/18/19 Order at 12).

Iowa's representational-standing test parallels the federal test for representational standing. *See Citizens for Wash. Square v. Davenport*, 277 N.W.2d 882, 886 (Iowa 1979) (applying the standing test set forth in *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 433, 443 (1977)); *Homeowners Ass'n of Coves of Sundown Lake v. Appanoose County Bd. of Supervisors*, 847 N.W.2d 237, 2014 WL 1234312, at *2 (Iowa Ct. App. 2014) (unpublished decision) (same). Under this test, an organization has standing when (1) its members, or any one of them, would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt*, 432 U.S. at 343. Because One Iowa meets all three prongs of the test for representational standing, the district court's order should be reversed.

Under the first prong of the *Hunt* test, the organization must show that its members, or at least one of them, qualify for standing. *Id.* In this case, a number of One Iowa's supporters, donors, board members, and staff members, as well as volunteer members of One Iowa's Transgender Advisory

Council and LGBTQ Leadership Institute, are transgender, are current Iowa Medicaid recipients, and have a medical need for gender-affirming surgery. (Pet. ¶¶ 56–60). Ms. Covington and Mr. Vasquez are members of One Iowa's Transgender Advisory Council. (Pet. ¶ 58). The State did not challenge their standing to otherwise sue in their own their right in its motion to dismiss and has thus conceded this prong of the *Hunt* test. (*See* Mot. to Dismiss at 2–3).

Under the second prong of the *Hunt* test, the interest One Iowa seeks to protect must be "germane" to its purpose. *Hunt*, 432 U.S. at 343; *Homeowners Ass'n of Coves of Sundown Lake*, 847 N.W.2d at *2. One Iowa's purpose is to advance, empower, and improve the lives of LGBTQ Iowans statewide. (Pet. ¶ 52). More specifically, it has a major focus on increasing healthcare access for transgender Iowans. (Pet. ¶ 55). Working with healthcare providers who specialize in issues related to transgender people, One Iowa helps inform other healthcare professionals and agencies how to assist people who are transitioning from one gender to another and helps educate those people on resources available to facilitate their transitions. (*Id.*)

There is a clear nexus between One Iowa's purpose as an organization—i.e., advocating for LGBTQ rights, with a major focus on transgender people's right of access to healthcare—and the right One Iowa seeks to protect in this litigation—i.e., the right to nondiscrimination in

obtaining necessary healthcare for its transgender members. Because the interest asserted in bringing this litigation is germane to One Iowa's purpose, the district court erred in determining that One Iowa's interest was no different from the public's interest in ensuring that the legislature acts in conformity with the Iowa Constitution. (7/18/19 Order at 12.)

Under the final prong of the *Hunt* test, "neither the claim asserted nor the relief requested [must] require[] the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343; *Homeowners Ass'n of Coves of Sundown Lake*, 847 N.W.2d at *2. In evaluating this prong, the United States Supreme Court has focused on how particularized the harm is to each member of an organization and whether individualized proof would be required to address the individual members' claims.

Specifically, in *United Automobile Workers v. Brock*, 477 U.S. 274 (1986), the Court found the third prong of the *Hunt* test fulfilled where the suit "raise[d] a pure question of law" and did not require the examination of facts unique to each member of the organization. *Id*. at 287–88 (holding that union had standing to challenge federal agency policy affecting calculation of unemployment benefits, regardless of the fact that individual members' own unemployment-benefit claims would be determined in the future by the agency); *see also Homeowners Ass'n of Coves of Sundown Lake*, 847 N.W.2d

at *2. In addition, the Court clearly stated that individual participation is likely to be required when an association is seeking damages for members of its group but is normally not necessary when, as here, the association is seeking prospective injunctive relief. *Brock*, 477 U.S. at 287; *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996) (citing *Hunt*, 432 U.S. at 343).

Appellants are not challenging individual Medicaid coverage denials; they are challenging the Division itself. (Pet. ¶¶ 96–102.) As a result, no individual members are required to participate in the litigation. Appellants' challenge to the Division is similar to the challenge at issue in *Brock*. They are challenging the law by seeking prospective injunctive relief. And the issues raised are purely legal: whether the Division violates the Equal-Protection Guarantee on its face, whether the Division violates the Equal-Protection Guarantee because it was motivated by animus against transgender people, whether the passage of the Division violated the Single-Subject and Title Rules, and whether the Division facially violates the Inalienable-Rights Clause. As in *Brock*, if One Iowa successfully invalidates the Division, then DHS can still evaluate individual coverage claims for gender-affirming surgery on a case-by-case, patient-by-patient basis, consistent with normal Medicaid procedures.

One Iowa's members share an interest in overturning the Division so their individual claims under Medicaid can be determined according to member eligibility and medical necessity—that is, on the same bases as all other Iowans—rather than on the discriminatory basis that they are transgender. The district court's determination that individual members' claims must be adjudicated individually was erroneous.

Because One Iowa meets the three-prong test for representational standing, the district court's dismissal of One Iowa on this basis should be reversed.

IV. Appellants are entitled to a temporary injunction.

Finally, Appellants are entitled to a temporary injunction while this appeal is pending and while they litigate their claims below on remand. This issue was properly preserved for review. (7/18/19 Order 12; Mot. for Temp. Inj.; Resistance Temp. Inj.). This Court also has the authority to issue temporary injunctive relief directly. Iowa R. Civ. Pro. 1.1502, 1.1506(2); (8/29/19 Order).

The Court may grant a temporary injunction "when the petition, supported by affidavit, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably injure the plaintiff." Iowa R. Civ. P. 1.1502(1). "A temporary

injunction is a preventive remedy to maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation." *Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 95 (Iowa 1985). It is appropriate where a plaintiff is likely to succeed on the merits of a claim and risks irreparable harm absent immediate judicial intervention. *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001).

Below, and in the motion for a temporary injunction filed before this Court on July 19, 2019, Appellants sought a temporary injunction on five separate grounds. (*See* Pet.; Temp. Inj. Br.; Temp. Inj. Reply). Here, Appellants focus on their claim that the Division facially violates the Iowa Constitution's Equal-Protection Guarantee by discriminating against transgender Iowans based on their transgender status. This claim alone is sufficient to warrant the relief requested by Appellants.

A. Appellants are likely to succeed on the merits.

The district court in the *Good* case correctly held that the State facially violates the Iowa Constitution's Equal-Protection Guarantee when it denies transgender Iowans Medicaid coverage for medically necessary gender-affirming surgery while, as a general matter, providing coverage to all Medicaid beneficiaries for their medically necessary care. *Good v. Iowa Dep't*

of Human Servs., No. CVCV054956, at *20–34. The Division, which revives the Regulation, fails for the same reasons.

1. Transgender and nontransgender Iowans eligible for Medicaid are similarly situated.

The Iowa Constitution contains a two-part Equal-Protection Guarantee. Iowa Const. art. I, §§ 1, 6. Although this Court looks to federal courts' interpretation of the U.S. Constitution in construing parallel provisions of the Iowa Constitution, it "jealously reserve[s] the right to develop an independent framework under the Iowa Constitution." *NextEra Energy Res., LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 45 (Iowa 2012). This is because, as this 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*, 898 N.W.2d at 864–65.

Iowa's constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike under the law. *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 351 (Iowa 2013); *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*, 763 N.W.2d at 882 (quotation marks omitted); *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002).

Here, the Division facially discriminates against transgender Medicaid recipients by specifically authorizing the discriminatory denial of medically necessary gender-affirming surgery rejected in the *Good* case. As the district court correctly concluded in *Good*, transgender and nontransgender Iowans eligible for Medicaid—the public accommodation that administers the publicly financed healthcare insurance most directly impacted by the Division—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. *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 . . . ."). Despite medical necessity, the Division expressly authorizes the State to discriminate against transgender Medicaid recipients by denying their healthcare based on nothing more than the fact that they are transgender.

2. The Division is facially discriminatory.

The Division facially discriminates against transgender Medicaid recipients. It singles them out by reinstating the discriminatory Regulation, which authorizes the denial of Medicaid coverage for medically necessary care expressly based on transgender status. *See* Iowa Admin. Code r. 441-

78.1(4) (2019) (excluding coverage for "[p]rocedures related to transsexualism . . . [or] gender identity disorders" and "[s]urgeries for the purposes of sex reassignment") (invalidated by this Court in the *Good* case as discrimination in public accommodations under ICRA).

Varnum, is instructive. 763 N.W.2d 862. 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." *Id*. at 885 (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 Division, allowing for the denial of such treatment, "is targeted at [transgender] people as a class." *See id.* (quotation marks omitted).

3. The Division fails heightened scrutiny.

Discrimination against transgender people should be reviewed under heightened scrutiny for two reasons. First, this Court's applicable four-factor test strongly supports applying intermediate or strict scrutiny. Second, discrimination against transgender Iowans is a form of gender-based discrimination, which this Court reviews under intermediate scrutiny.

a. Iowa's four-factor test mandates applying heightened scrutiny to classifications based on transgender identity.

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 classifications are invalid; it requires the 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 (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 least 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.

This Court applies 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," and the last two "supplement the analysis as a means to discern whether a need for heightened scrutiny exists" beyond rational basis. *Id*. at 889.

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

i. History of invidious discrimination

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 enactment of several laws to protect individuals based on sexual orientation was critical to the Court's reasoning, 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) (2019); Iowa Code § 280.28(2)(c) (2019). 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: Nat'l Ctr. for Transgender Equality (2016), https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.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* (June 16, 2016), https://law.uiowa.edu/sites/law.uiowa.edu/files/Where%20Do%20I%20Fit%20In%20%20A%20Snapshot%20of%20Transgender%20Discrimination%20June%202016%20Public%20Release.pdf (the "Rainbow Health Clinic Report").

Transgender people nationally and in Iowa continue to face discrimination. And 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 the Iowa General Assembly. *See Trump's Record of Action Against Transgender People*, National Center for Transgender Equality, https://transequality.org/the-discrimination-administration; Sarah Tisinger, *Branstad Calls Obama's*

Transgender Policy 'Blackmail,' WQAD (May 18, 2016), https://wqad.com/2016/05/18/branstad-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), 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), http://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), http://www.desmoinesregister.com/story/news/investigations/readers-watchdog/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 Phillip, et al., *Trump Announces That He Will Ban Transgender People From Serving in the Military*, Wash. Post (Jul. 26, 2017),

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 the Division itself, which intentionally and facially discriminates against transgender Iowans by stripping them of the right under ICRA to nondiscrimination in Medicaid following this Court's *Good* decision. Legislators' comments in debating the Division, discussed above, further illustrate the profound animus faced by transgender Iowans. (*See* Statement of the Case Part II.C, above; Argument Part II.B.2, above).

ii. Transgender status and ability to contribute to society

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 the legislature outlawed gender-identity discrimination 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) (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. 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." (Ex. 10 ¶ 32). "Being transgender does not affect a person's ability to be a good employee, parent, or citizen." (*Id*.)

iii. Immutability of transgender status

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 (quotation marks omitted).

Gender identity, like sexual orientation, is a trait central to a person's identity. (Ex. 10 ¶¶ 9, 32–34). The WPATH Standards of Care and other medical literature in the record demonstrate that gender identity is not subject to change through outside influence. (*Id.* ¶¶ 32–34). *See also* WPATH at 16 ("Treatment 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."). (*Id*. ¶¶ 23–25) (gender identity is biologically based, innate or fixed at a very early age, and cannot be altered).

iv. Political powerlessness

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 (quotation marks omitted). "Absolute political powerlessness" is not required for a class to be subject to intermediate scrutiny because, 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.*

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. (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 Inst. (Jun. 2016), 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 U.S. population. S. E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality 5 (Dec. 2016), 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) (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).

v. Jurisdictions across the country support applying heightened scrutiny.

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. *See, e.g.*, *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015) (holding discrimination against transgender individuals is subject to heightened scrutiny based on history of discrimination and prejudice, transgender status having nothing to do with ability to contribute to society, and fact that transgender people comprise discrete minority class with political powerlessness to bring about change on its own); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (discrimination against transgender people subject to intermediate scrutiny); *Marlett v. Harrington*, No. 1:15–cv–01382–MJS (PC), 2015 WL 6123613, at *4 (E.D. Cal. 2015) (unreported decision) (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) (granting preliminary injunction) (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); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 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).

In addition, heightened scrutiny applies since discrimination against transgender people is a form of 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.*, No. 3:18–cv–309, __ F. Supp. 3d. __, 2019 WL 3858297, *33–38 (W.D. Wis. Aug. 16, 2019) (applying heightened scrutiny under Fourteenth Amendment to permanently enjoin Wisconsin Medicaid's exclusion of coverage of medically necessary gender-affirming surgery).

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

b. The Division 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 demonstrate 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 specific policy or factual circumstances that it can prove, rather than broad generalizations. *Id*. "Classifications subject to strict scrutiny are presumptively invalid and must be narrowly tailored to serve a compelling governmental interest." *Id.*

The State cannot meet these constitutional standards, as the district court acknowledged in striking down the discriminatory Regulation in *Good* and as the federal district court recognized in striking down Wisconsin's exclusion of Medicaid coverage for medically necessary gender-affirming surgery in *Flack*. *Good*, No. CVCV054956, at *26–30; *Flack*, 2019 WL 3858297 at *33–38. There is no "compelling governmental interest" or "important governmental objective" advanced by excluding transgender individuals from Medicaid reimbursement for medically necessary procedures. *Good*, No. CVCV054956, at *26–30.

Given the medical community's uniform acceptance of this treatment's medical necessity for some transgender people on Medicaid, denying coverage cannot be justified on medical grounds. *Good*, No. CVCV054956, at *27–30; *Flack*, 2019 WL 3858297 at *35–36. (Exs. 1–2, 6–7). And surgical treatment for gender dysphoria is medically necessary for Appellants. (Ex. 1 ¶¶ 22–25; Ex. 2 at 1; Exs. 3–5; Ex. 6 ¶¶ 30-33; Ex. 7 at 1; Exs. 8–9; Ex. 10 ¶ 10).

Nor, under intermediate or strict scrutiny, can denying coverage be justified as a cost-savings measure. *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; *Flack*, 2019 WL 3858297 at *37.

4. The Division fails rational-basis review.

The Division also cannot withstand rational-basis review. Rational-basis review requires a "plausible policy reason for the classification." *Varnum*, 763 N.W.2d at 879 (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*. (quotation marks omitted).

In this case, the State attempted to create an ad hoc cost-savings basis for the Division before the district court below. (Resistance Temp. Inj. 13–17). This rationale does not survive rational-basis review.

Although the rational-basis test is "deferential to legislative judgment, it is not a toothless one in Iowa." *RACI,* 675 N.W.2d at 9 (quotation marks omitted). In addition, rational-basis scrutiny does not protect laws that burden otherwise unprotected classes when the reason for a distinction 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*, the district court concluded that the same classification at issue here did not withstand rational-basis review. *Good,* No. CVCV054956, at *30–34. For the reasons discussed above, there simply 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. (Ex. 10 ¶ 50–54). And Medicaid coverage is crucial to ensuring the availability of that necessary treatment.

Moreover, under rational-basis review, the Division cannot be justified as a measure to save money since there is no reasonable distinction between transgender and nontransgender individuals as 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 persons 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 with higher taxes, 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 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.

In this case, the legislative facts show cost savings were never a serious rationale for the Division. As fully set forth above, there was no fiscal analysis of the Division in the House File 766 legislative history, and there was no debate discussion of projected costs or savings. (*See* Argument Part II.A.2, above). Nor do the facts support such a rationale, because providing public insurance coverage for transgender patients to obtain their medically necessary care has been shown to be highly cost-effective. (*Id.*). This rationale cannot save the Division under rational-basis review.

B. Appellants face ongoing substantial injury absent relief, and the balance of hardships warrants injunctive relief.

Appellants will continue to be substantially injured by the Division, which categorically deprives them of Medicaid coverage for care for which they have a current, ongoing medical need. *See Ney v. Ney*, 891 N.W.2d 446, 451 (Iowa 2017) (district court may issue an injunction when "substantial injury will result from the invasion of the right or if substantial injury is to be reasonably apprehended to result from a threatened invasion of the right").

First, as mentioned, the Division will continue to irreparably harm Appellants by violating their constitutional rights. (*See* Argument Part II.B, above). "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres*, 695 F.3d at 1002 (quoting *Elrod*, 427 U.S. at 373); *Ezell*, 651 F.3d at 699 (infringement of

constitutional rights by facially invalid law causes irreparable harm) (citing 11A Charles Wright et al., Federal Practice & Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). The district court below, in ignoring this aspect of irreparable injury, explicitly declined to address the merits of Appellants' constitutional claims. (7/18/19 Order 10).

Second, as detailed above, the Division will continue to irreparably harm Appellants by further preventing them from accessing medically necessary care that is critical to their health, safety, and welfare. (*See* Statement of the Case Part II.A). Appellants' medical providers' affidavits confirm that these harms are not a mere "*possibility*" (7/18/19 Order 10), but are actual and severe irreparable harms occurring at this moment.

Courts repeatedly have held that emotional distress, anxiety, depression and physical pain resulting from inadequate medical treatment for gender dysphoria amount to irreparable harm. *See Hicklin*, 2018 WL 806764, at *10, *14 (finding plaintiff in Eighth Amendment case challenging the denial of medically necessary treatment for gender dysphoria showed irreparable harm based on evidence of worsening emotional distress and a substantial risk of self-harm, including "intrusive thoughts of self-castration" and suicidal

ideation); *Edmo*, 935 F.3d at 785 (upholding permanent injunction on appeal; finding transgender inmate demonstrated irreparable harm because "her gender dysphoria cause[d] her to feel 'depressed,' 'disgusting,' 'tormented,' and 'hopeless,' and . . . caused past efforts and active thoughts of self-castration"); *Flack*, 2019 WL 3858297 at *33–37 (granting permanent injunction to transgender Medicaid recipients in their equal- protection challenge to Wisconsin coverage exclusion for surgery to treat gender dysphoria). In addition, this Court has held that a plaintiff who avers mental-health consequences and the existence of a real risk of physical harm meets the irreparable-harm standard. *Matlock*, 531 N.W.2d at 122–23 (granting injunction where lack of injunctive relief "ha[d] been a detriment to [plaintiff's] mental health" and caused plaintiff to "fear[] for her own . . . physical safety").

The district court's rejection of Appellants' showing of irreparable harm below consisted of three sentences ignoring this uncontested evidence. The court concluded that Appellants are merely suffering "distress . . . not tantamount to irreparable harm." (7/18/19 Order 10). But Appellants are not suffering from "distress." They are suffering from severe gender dysphoria, a serious and life-threatening medical condition, for which gender-affirming surgery is the only effective treatment. (Ex. 10 ¶ 42). This is currently—not

speculatively—causing Appellants irreparable harm by exacerbating their mental-health issues and threatening physical harm, up to and including death, if untreated. (*Id.* ¶ 15).

The balance of harms between the parties in this case further supports a temporary injunction. While Appellants are already being severely harmed by the Division, the State will not suffer any harm from reinstating a nondiscriminatory preapproval process for the medical care Appellants require. *See Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) ("[T]hreatened injury to [constitutional rights] outweighs whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute."); *Saint v. Neb. Sch. Activities Ass'n*, 684 F. Supp. 626, 628 (D. Neb. 1988) (no harm to defendant in losing the ability to enforce unconstitutional regulations). The district court, in dismissing the ample and unrebutted evidence of irreparable harm presented by Appellants, disregarded the required balance-of-harms inquiry. (7/18/19 Order 10).

Finally, a temporary injunction is warranted to protect the status quo of the parties as it existed prior to the Division's enactment. At the time the Division became law, Appellants were already in the process of medical transition. Gender-affirming surgery had already been determined to be

medically necessary to treat Ms. Covington's and Mr. Vasquez's gender dysphoria. They had already initiated the process to seek preapproval for coverage under Iowa Medicaid and already had care plans in place with their physicians to receive those procedures. (*See* Exs. 2–5, 8–9). Absent the challenged Division and the discriminatory Regulation it reinstated, both are qualified for preapproval. (Ex. 1 ¶¶ 19–22, 27–28; Ex. 6 ¶¶ 29–30). Appellants were both in the process of preparing to seekpreapproval when the Division was enacted. (Ex. 6 ¶ 20; Ex. 1 ¶ 18).

C. There is no adequate legal remedy available.

Finally, Appellants are entitled to an injunction because they have no adequate legal remedy for the Division's gross violation of their constitutional rights and their rights to necessary medical care, causing significant distress, pain and discomfort, risks of self-harm, and suicidality. (*See* Ex. 1 ¶ 26; Exs. 2–5; Ex. 6 ¶ 32; Exs. 7–9; Ex. 10 ¶ 15). The Division ensures discriminatory consideration of requests for preapproval of medical coverage for transgender Iowans who rely on Medicaid, including Appellants. Monetary damages are insufficient to protect against these serious constitutional violations, medical risks, and harm. *See Ney*, 891 N.W.2d at 452 (there is no adequate legal remedy "if the character of the injury is such that it cannot be adequately compensated by damages at law" (quotation marks omitted)).

The district court disregarded these harms, determining Appellants are required to first seek various administrative remedies under the Iowa APA before seeking to temporarily enjoin the Division. (7/18/19 Order at 7–8). For the reasons explained above, Appellants' claims challenging the Division are ripe now. (*See* Argument Part II, above). The district court's denial of a temporary injunction on this basis must be reversed.

CONCLUSION

Appellants' claims are ripe, and One Iowa has standing to challenge the Division. Appellants respectfully ask this Court to (1) reverse the district court's order dismissing Appellants' claims as not yet ripe for adjudication and dismissing One Iowa for lack of standing, (2) remand this case to the district court for further proceedings, and (3) temporarily enjoin the Division until final adjudication of this matter.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument.

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