IN THE IOWA DISTRICT COURT FOR POLK COUNTY

EERIEANNA GOOD, an individual, Petitioner, v. IOWA DEPARTMENT OF HUMAN SERVICES, an independent executive-branch agency of the State of Iowa, Respondent.	)	Case No. CVCV054956 CVCV055470 (consolidated)
CAROL BEAL, an individual, Petitioner, v. IOWA DEPARTMENT OF HUMAN SERVICES, an independent executive-branch agency of the State of Iowa, Respondent.	)	**PETITIONERS' BRIEF ON JUDICIAL REVIEW**

Rita Bettis, AT0011558
ACLU of Iowa Foundation Inc.
505 Fifth Avenue, Ste. 901
Des Moines, IA 50309-2316
Telephone: 515-207-0567
Facsimile: 515-243-8506
rita.bettis@aclu-ia.org

John Knight, PHV001725
ACLU Foundation
LGBT & HIV Project
150 North Michigan Avenue, Ste. 600
Chicago, IL 60601
Telephone: 312-201-9740
Facsimile: 312-288-5225
jknight@aclu-il.org

F. Thomas Hecht, PHV001733
Tina B. Solis, PHV001311
Seth A. Horvath, PHV001734
Nixon Peabody LLP
70 West Madison Street, Ste. 3500
Chicago, IL 60601
Telephone: 312-977-4443
Facsimile: 312-977-4405
fthecht@nixonpeabody.com
tbsolis@nixonpeabody.com
sahorvath@nixonpeabody.com

TABLE OF CONTENTS & AUTHORITIES

INTRODUCTION 8

ISSUES PRESENTED FOR REVIEW 11

STATEMENT OF THE CASE 12

I. Overview 12

II. Procedural History 13

A. Ms. Good 13

B. Ms. Beal 15

III. Factual Background 17

A. Standards of Care for Gender Dysphoria 17

B. Medicaid Coverage for Gender-Affirming Surgery in Iowa 20

C. Ms. Good 20

D. Ms. Beal 23

E. The MCOs and DHS 25

SCOPE AND STANDARDS OF REVIEW 25

Cases

Iowa Planners Network v. Iowa State Commerce Comm'n, 373 N.W.2d 106 (Iowa 1985) 25

Lakeside Casino v. Blue, 743 N.W.2d 169 (Iowa 2007) 25

Statutes

Iowa Code §§ 17A.19(10)(a), (b), (c), (k), (n) (2017) 25

ARGUMENT 26

I. The Regulation violates ICRA 26

Cases

Thoms v. Iowa Pub. Employees Ret. Sys., 715 N.W.2d 7 (Iowa 2006) 26

City of Des Moines v. Employment Appeal Bd., 722 N.W.2d 183 (Iowa 2006).....26

Des Moines Area Reg'l Transit Auth. v. Young, 856 N.W.2d 383, 2014 WL 4937960 (Iowa Ct. App. 2014).....26

Statutes

Iowa Code §§ 17A.19(10)(b), (c) (2017).....26

Other

Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act (1998) Chapter 17A, Code of Iowa (House File 667 As Adopted)* 62 (1998) 26

A. The Regulation violates ICRA's prohibition against gender-identity discrimination.....27

1. The Regulation violates the plain meaning of ICRA 27

Cases

University of Iowa v. Dunbar, 590 N.W.2d 510 (Iowa 1999) 27

Carolan v. Hill, 553 N.W.2d 882 (Iowa 1996).....27

Statutes

Iowa Code § 216.7(1)(a) (2017) 27

Iowa Code § 216.2(13)(b) (2017) 27

Other

Iowa Admin. Code r. 441.78.1(249A) (2017) 28

2. Even under a restrictive interpretation of ICRA, DHS qualifies as a "public accommodation" 29

Cases

Torres v. N. Fayette Comty. Sch. Dist., 600 F. Supp. 2d 1026 (N.D. Iowa 2008) 30

Kirt v. Fashion Bug #3253, Inc., 479 F. Supp. 2d 938 (N.D. Iowa 2007).....30

Statutes

Iowa Code § 216.7(1)(a) (2017) 29

Iowa Code §§ 216.2(13)(a), (b) (2017).....29

Other

Ltr. from Richard C. Turner, Attorney General, to Dennis L. Freeman, State Representative, and Rolland A. Gallagher, Director, Iowa, Beer & Liquor Control Dep't, 1972 WL 262259 (Feb. 2, 1972) 30

3. ICRA must be broadly construed.....31

Cases

Pippen v. State, 854 N.W.2d 1 (Iowa 2014) 31

Probasco v. Iowa Civil Rights Comm'n, 420 N.W.2d 432 (Iowa 1988) 31

Statutes

Iowa Code § 216.18(1) (2017).....31

B. The Regulation violates ICRA's prohibition against sex discrimination 31

Cases

Vivian v. Madison, 601 N.W.2d 872 (Iowa 1999) 32

Wright v. Winnebago Indus., Inc., 551 F. Supp. 2d 836 (N.D. Iowa 2008).....32

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).....32

Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) 32

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005).....32

Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).....32

Rosa v. Park W. Bank & Trust, 214 F.3d 213 (1st Cir. 2000) 32

Schwenk v. Harford, 204 F.3d 1187 (9th Cir. 2000).....33

Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017).....33

Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984).....33

Tovar v. Essentia Health, 857 F.3d 771 (8th Cir. 2017).....33

Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470 (Iowa 1983).....33

Statutes

Iowa Code § 216.7(1)(a) (2017).....33

II. The Regulation violates the Iowa Constitution's equal-protection guarantee.....34

Cases

ABC Disposal Sys. v. Iowa Dep't of Natural Res., 681 N.W.2d 596 (Iowa 2004).....34

Gartner v. Iowa Dep't of Public Health, 830 N.W.2d 335 (Iowa 2013).....34

NextEra Energy Res., LLC v. Iowa Utilities Bd., 815 N.W.2d 30 (Iowa 2012).....34

Statutes

Iowa Code § 17A.19(10)(a) (2017).....34

A. Transgender and nontransgender Iowans eligible for Medicaid are similarly situated for equal-protection purposes.....34

Cases

NextEra Energy Res., LLC v. Iowa Utilities Bd., 815 N.W.2d 30 (Iowa 2012).....35

State v. Pals, 805 N.W.2d 767 (Iowa 2011).....35

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).....35

Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004).....35

State v. Null, 836 N.W.2d 41 (Iowa 2013).....35

Godfrey v. State, 898 N.W.2d 844, 864 (Iowa 2017).....35

Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013).....36

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 36

Bowers v. Polk County Bd. of Supervisors, 638 N.W.2d 682 (Iowa 2002) 36

Racing Ass'n of Cent. Iowa v. Fitzgerald, 648 N.W.2d 555, 559 (Iowa 2002) 36

Other

Iowa Const. art. I, §§ 1, 6 34

B. Discrimination against transgender people should be reviewed under heightened scrutiny. 37

1. Iowa's four-factor test for ascertaining the appropriate level of equal-protection scrutiny mandates applying heightened scrutiny 37

Cases

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) 37

Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998) 37

In re S.A.J.B., 679 N.W.2d 645 (Iowa 2004) 37

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 37

United States v. Virginia, 518 U.S. 515 (1996) 38

NextEra Energy Res., LLC v. Iowa Utilities Bd., 815 N.W.2d 30 (Iowa 2012) 38

a. Factor #1: The History of Invidious Discrimination Against the Group Burdened by the Classification 38

Cases

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) 39

Statutes

Iowa Code § 216.7(1)(a) (2017) 39

Iowa Code § 280.28(2)(c) (2017) 39

b. Factor #2: Gender Identity and the Ability to Contribute to Society 40

Cases

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).....40

c. Factor #3: Immutability 41

Cases

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).....41

Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) 41

d. Factor #4: Political Powerlessness.....42

Cases

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).....42

Frontiero v. Richardson, 411 U.S. 677 (1973) 42

In re Marriage Cases, 183 P.3d 384 (Cal. 2008).....43

2. Jurisdictions across the country support applying heightened scrutiny to classifications that discriminate against transgender individuals.....43

Cases

Adkins v. City of New York, 143 F. Supp. 3d 134 (S.D.N.Y. 2015) 43

Norsworthy v. Beard, 87 F. Supp. 3d 1104 (N.D. Cal. 2015).....44

Marlett v. Harrington, No. 1:15–cv–01382–MJS (PC), 2015 WL 6123613 (E.D. Cal. 2015).....44

Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ., 208 F. Supp. 3d 850 (S.D. Ohio 2016) 44

Evancho v. Pine–Richland Sch. Dist., No. CV 2:16–01537, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017) 44

Doe 1 v. Trump, No. 17–1597 (CKK), 2017 WL 4873042 (D.D.C. Oct. 30, 2017) 44

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).....44

Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).....44

Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017).....44

Glen v. Brumby, 663 F.3d 1312 (8th Cir. 2011).....44

C. The Regulation cannot survive heightened scrutiny.....44

Cases

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).....44

U.S. v. Virginia, 518 U.S. 515 (1996).....45

D. The Regulation cannot survive rational-basis review.....45

Cases

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).....45

Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004).....45

Matthews v. de Castro, 429 U.S. 181 (1976).....45

U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).....46

III. The Regulation has a disproportionate negative impact on private rights.....46

Cases

Zieckler v. Ampride, 743 N.W.2d 530 (Iowa 2007).....46

Statutes

Iowa Code § 17A.19(10)(k) (2017).....46

IV. The Regulation is arbitrary and capricious.....47

Cases

Birchansky Real Estate, L.C. v. Iowa Dep't of Pub. Health, State Health Facilities Council, 737 N.W.2d 134 (Iowa 2007).....47

Soo Line R.R. Co. v. Iowa Dep't of Transp., 521 N.W.2d 685 (Iowa 1994).....48

Hough v. Iowa Dep't of Personnel, 666 N.W.2d 168 (Iowa 2003).....48

Stephenson v. Furnas Elec. Co., 522 N.W.2d 828 (Iowa 1994) 48

JBS Swift & Co. v. Hedberg, 873 N.W.2d 276 (Iowa Ct. App. 2015) 48

Meyer v. IBP, Inc., 710 N.W.2d 213 (Iowa 2006) 48

Armstrong v. State of Iowa Bldgs. & Grounds, 382 N.W.2d 161 (Iowa 1986) 48

Van Hollen v. Fed. Election Comm'n, 811 F.3d 486 (D.C. Cir. 2016) 48

Ravenwood v. Daines, No. 06–cv-6355–CJS, 2009 WL 2163105 (W.D.N.Y. July 17, 2009) 49

Cruz v. Zucker, 116 F. Supp. 3d 334 (S.D.N.Y. 2015) 49

Exceptional Persons, Inc. v. Iowa Dep't of Human Servs., 878 N.W.2d 247 (Iowa 2016) 49

Statutes

Iowa Code § 17A.19(10)(n) (2017) 47

Other

Iowa Admin. Bulletin ARC 2371C (Jan. 1, 2016) 50

Iowa Admin. Bulletin ARC 2164C (Sept. 30, 2015) 50

Iowa Admin. Bulletin ARC 1297C (Feb. 5, 2014) 50

Iowa Admin. Bulletin ARC 1052 (Oct. 2, 2013) 50

Iowa Admin. Bulletin ARC 0305C (Sept. 5, 2012) 50

CONCLUSION 50

Statutes

Iowa Code § 216.7(1)(a) (2017) 50

Iowa Code § 216.2(13)(b) (2017) 50

Iowa Code § 17A.19(10)(a), (b), (c), (k), (n) (2017) 50

Other

Iowa Const. art. I, §§ 1, 6 50

COME NOW Petitioners EerieAnna Good ("Ms. Good") and Carol Beal ("Ms. Beal") (collectively, "Petitioners"), by their undersigned counsel, and respectfully submit the following brief on judicial review of the Iowa Department of Human Services' ("DHS") denials of their requests for Medicaid coverage for gender-affirming surgery:

INTRODUCTION

"Gender identity" is a well-established medical concept referring to a person's internal sense of gender. (Good Ans. ¶ 44.)[1] All human beings develop this basic understanding of belonging to a gender. (*Id*. ¶ 45.) Gender identity is an innate and immutable aspect of personality. (Good AR 48, ¶ 9; 54, ¶¶ 32–34.) Typically, people who are designated male at birth based on their external anatomy identify as boys or men, and people designated female at birth identify as girls or women. (Good Ans. ¶ 47.)

For transgender people, gender identity differs from the sex assigned at birth. (*Id*. ¶ 48; Good AR 48, ¶¶ 9–10.) Women who are transgender, for example, are women who were assigned the "male" gender at birth but have a female gender identity. (Good Ans. ¶ 49.) Similarly, men who are transgender are men who were assigned the "female" gender at birth but have a male gender identity. (*Id*. ¶ 50.) The medical diagnosis for the feeling of incongruence between one's gender identity and one's birth-assigned sex is "gender dysphoria" (previously known as "gender-identity disorder" or "transsexualism"). (*Id*. ¶ 51; Good AR 49, ¶ 11.)

This action arises from Section 441.78.1(4) of the Iowa Administrative Code's ("Section 441.78.1(4)" or the "Regulation") categorical ban on Medicaid coverage for surgical treatment of

[1] The citation format throughout this brief is as follows: "Good Pet." refers to Ms. Good's petition for judicial review, "Beal Pet." refers to Ms. Beal's petition for judicial review, "Good Ans." refers to DHS's answer to Ms. Good's petition for judicial review, "Good AR" refers to Ms. Good's administrative record, and "Beal AR" refers to Ms. Beal's administrative record. As of this filing, DHS has not submitted an answer to Ms. Beal's petition.

"transsexualism," "gender identity disorder," and "sex reassignment," on which DHS relied to deny Petitioners expense reimbursement for medically necessary surgery to treat their gender dysphoria. The State of Iowa's Medicaid program ("Iowa Medicaid") provides coverage for medically necessary care for a broad range of medical conditions. But the Regulation bars Medicaid coverage for medically necessary gender-affirming surgery to treat gender dysphoria—a medical condition only experienced by transgender individuals—even though Medicaid coverage is provided for the same surgery for other medical conditions. The Regulation "specifically exclude[s]" coverage for "[p]rocedures related to transsexualism . . . [or] gender identity disorders." *See* Iowa Admin. Code r. 441.78.1(4)(b)(2) (2017). It also states that "[s]urgeries for the purpose of sex reassignment are not considered as restoring bodily function and are excluded from coverage." *See* Iowa Admin. Code r. 441.78.1(4) (2017).

This discriminatory exclusion from Medicaid coverage has no basis in medical science and has been uniformly condemned by leading medical organizations. It is unlawful and unconstitutional.

Specifically, the Regulation's categorical exclusion of Medicaid coverage for gender-affirming surgery violates the Iowa Civil Rights Act's ("ICRA" or "Act") express prohibitions against gender-identity and sex discrimination. *See* Iowa Code § 17A.19(10)(b) (2017); Iowa Code §§ 216.7(1)(a), 216.2(13)(b) (2017). Under ICRA, it is discriminatory and unlawful for any agent of a "public accommodation," including a state government unit such as DHS, to deny services or privileges based on gender identity or sex. The Regulation expressly discriminates based on gender identity by imposing burdens solely on transgender persons—the only individuals who seek surgery related to "transsexualism" or "gender identity disorders" as set forth in Section 441.78.1(4). The Regulation discriminates based on sex by perpetuating

discrimination arising from transgender status, the failure to conform to gender stereotypes, and the transition from living in accord with birth-assigned gender to living in accord with gender identity.

The Regulation's categorical exclusion of Medicaid coverage for gender-affirming surgery also violates the Iowa Constitution's equal-protection guarantee. *See* Iowa Code § 17A.19(10)(a) (2017); Iowa Const. art. I, §§ 1, 6. Under the Regulation, Iowa Medicaid covers certain medically necessary treatment for nontransgender Medicaid participants that it does not cover for transgender Medicaid participants for whom it is a necessary part of their gender-affirming care. Both groups need financial assistance for medical treatment, but only one group receives the assistance. There is no compelling or important government interest furthered by this discriminatory classification. As a result, it fails strict and intermediate constitutional review. And while this heightened scrutiny is appropriate for reviewing a classification that discriminates against transgender people, the classification also fails rational-basis review because there is no plausible policy reason for it.

Finally, the Regulation and DHS's denial of Medicaid coverage for medically necessary gender-affirming surgery for Petitioners have had a disproportionate negative impact on private rights and are arbitrary and capricious. *See* Iowa Code §§ 17A.19(10)(k), (n) (2017).

As a result of DHS's unlawful, unconstitutional, arbitrary, and capricious denial of Medicaid coverage for Petitioners' gender dysphoria under the Regulation, Petitioners are entitled to (1) a declaratory ruling that the Regulation violates ICRA, the Iowa Constitution's equal-protection guarantee, and the Iowa Administrative Procedure Act ("APA"); (2) an order invalidating the Regulation and enjoining any further application of it to deny Medicaid coverage for gender-affirming surgical care to treat gender dysphoria; and (3) an order reversing and

vacating DHS's decision denying Petitioners' requests for coverage and requiring DHS to approve the requests.

ISSUES PRESENTED FOR REVIEW[2]

I. Does the Regulation violate ICRA?

   A. Does the Regulation violate ICRA's prohibition against gender-identity discrimination?

   B. Does the Regulation violate ICRA's prohibition against sex discrimination?

II. Does the Regulation violate the Iowa Constitution's equal-protection guarantee?

   A. Are transgender and nontransgender Iowans who are eligible for Medicaid similarly situated for equal-protection purposes?

   B. Should discrimination against transgender people be reviewed under heightened scrutiny?

   C. Does the Regulation survive heightened scrutiny under the Iowa Constitution's equal-protection guarantee?

   D. Does the Regulation survive rational-basis review under the Iowa Constitution's equal-protection guarantee?

III. Does the Regulation have a disproportionate negative impact on private rights?

IV. Is the Regulation arbitrary and capricious?

[2] "Cases, statutes and other authorities referred to in the argument covering" a particular issue are listed under each issue in the Table of Contents & Authorities on pages two through nine as required by the Court's December 6, 2017, order. (*See* 11/6/17 Order Establishing Schedule of Proceedings.)

STATEMENT OF THE CASE

I. Overview

Medicaid is a cooperative federal–state program through which the federal government assists states financially to help them furnish medical care to needy individuals. *TLC Home Health Care, LLC v. Iowa Dep't of Human Servs.*, 638 N.W.2d 708, 711 (Iowa 2002) (quoting *Madrid Home for the Aging v. Iowa Dep't of Human Servs.,* 557 N.W.2d 507, 511 (Iowa 1996)). (Good Ans. ¶ 15.) Individuals eligible for Iowa Medicaid include but are not limited to adults between nineteen and sixty-four years old whose income is at or below 133 percent of the Federal Poverty Level, a measure of income issued every year by the United States Department of Health and Human Services. (*Id*. ¶ 15.)

Ms. Good, who is transgender, requested Medicaid coverage for an orchiectomy to treat her gender dysphoria. (*Id*. ¶ 3.) Four health-care providers agreed that the surgical procedure she sought to undergo was medically necessary to treat her gender dysphoria. (*Id*.) Despite this consensus, AmeriHealth, the managed-care organization ("MCO") to which Ms. Good is assigned under Iowa Medicaid, denied her coverage for the surgery under Section 441.78.1(4). (*Id*.)

Ms. Beal, who is likewise transgender, requested Medicaid coverage for a vaginoplasty, penectomy, bilateral orchiectomy, clitoroplasty, urethroplasty, labiaplasty, and perineoplasty to treat her gender dysphoria. (*See* Beal AR 69, ¶ 3.) Four health-care providers agreed that the surgical procedure she sought to undergo was medically necessary to treat her gender dysphoria. (*Id*. 62–75.) Despite the consensus of Ms. Beal's providers, Amerigroup, the MCO to which Ms. Beal is assigned under Iowa Medicaid, denied coverage for the surgery under Section 441.78.1(4). (*Id*. 170.)

Two administrative-law judges ("ALJ") for the Iowa Department of Inspections and Appeals, Division of Administrative Hearings, recommended affirming AmeriHealth's and Amerigroup's (collectively, the "MCOs") decisions. (Good AR 70–76; Beal AR 95–101.) Subsequently, DHS's director (the "Director") adopted the ALJs' recommendations and affirmed the MCOs' denials of coverage for Petitioners' procedures. (Good AR 1–3; Beal AR 1–5.)

This litigation followed. In it, Petitioners challenge DHS's denials of Medicaid coverage as unlawful, unconstitutional, arbitrary and capricious, and disproportionately harmful in accordance with Sections 17A.19(10)(a), 17A.19(10)(b), 17A.19(10)(c), 17A.19(10)(k), and 17A.19(10)(n) of the APA. *See* Iowa Code §§ 17A.19(10)(a), (b), (c), (k), (n) (2017). They seek declaratory and injunctive relief barring further application of the Regulation and an order reversing DHS's denials of their requests for Medicaid coverage.

II. Procedural History

A. Ms. Good

On January 27, 2017, Ms. Good, through her physician, Bradley Erickson, MD ("Dr. Erickson"), requested Medicaid preapproval of expenses for an orchiectomy from AmeriHealth. (Good Ans. ¶ 19.) AmeriHealth denied the request, advising Dr. Erickson that "the request for orchiectomy for gender dysphoria" could not be approved because of the Regulation, which excludes from coverage "[s]urgeries for the purpose of sex reassignment." (Good AR 220–22.)

Ms. Good initiated an internal appeal from AmeriHealth's February 2 decision under Section 249A.4(11) of the Iowa Code and Section VI of the AmeriHealth Caritas Iowa Provider Manual. (Good AR 89–124.) In support of her appeal, she provided assessments from Katherine Imborek, MD ("Dr. Imborek"), Jacob Priest, PhD ("Dr. Priest"), Armeda Wojciak, PhD ("Dr. Wojciak"), and Dr. Erickson; her own affidavit; the affidavit of Randi Ettner, PhD ("Dr.

Ettner"), an internationally known expert on gender-dypshoria treatment; and a memorandum of law explaining that the Regulation violates ICRA and the Iowa Constitution's equal-protection guarantee. (*Id*.)

AmeriHealth denied Ms. Good's appeal. (*Id*. 266–69.) AmeriHealth's decision reiterated that, based on the information provided to AmeriHealth, the orchiectomy requested by Ms. Good was excluded from coverage by the Regulation. (*Id*. 266–67.)

Ms. Good subsequently appealed AmeriHealth's decision to DHS. (*Id*. 274–80.) After considering the parties' posthearing briefs and the administrative record, the ALJ issued a proposed decision affirming AmeriHealth's decision. (*Id*. 70–76.) The ALJ's decision did not resolve Ms. Good's challenges to AmeriHealth's decision on the merits, but rather concluded that resolving those challenges was the judiciary's role and did not fall within the scope of the pending administrative proceeding, noting that the issues raised by Ms. Good were "preserved for judicial review." (*Id*. 76.)

Ms. Good next appealed the ALJ's proposed decision to the Director of DHS. (*Id*. 6–66.) The Director adopted the ALJ's proposed decision as DHS's final decision on Ms. Good's appeal. (*Id*. 1–3.) The Director concluded that the agency "lack[ed] jurisdiction" to decide Ms. Good's arguments that the Regulation "violates the equal protection clause [of the Iowa Constitution] and the Iowa Civil Rights Act," noting that these issues were "preserved for judicial review." (*Id*. 2.)

On September 21, 2017, Ms. Good filed her petition for judicial review in this Court. She alleges that DHS's decision should be vacated because it (1) violates ICRA's prohibition against gender-identity discrimination (Good Pet. Count I); (2) violates ICRA's prohibition against sex discrimination (*id*. Count II); (3) violates the Iowa Constitution's equal-protection guarantee

under both heightened scrutiny and rational-basis review (*id*. Count III); (4) creates a disproportionate negative impact on private rights (*id*. Count IV); and (5) is unreasonable, arbitrary, and capricious (*id*. Count V). DHS's motion to dismiss the petition was denied on November 27, 2017.

B. Ms. Beal

On June 8, 2017, Ms. Beal's physician, Loren Schechter, MD ("Dr. Schechter"), requested Medicaid preapproval from Amerigroup to perform a vaginoplasty, penectomy, bilateral orchiectomy, clitoroplasty, urethroplasty, labiaplasty, and perineoplasty on Ms. Beal. (*See* Beal AR 43, 71.) Amerigroup denied the request, advising Ms. Beal that her "request [for] gender reassignment surgery" was not a covered benefit as part of her Medicaid plan and could not be approved based on the provisions of the Regulation. (Beal Pet. Ex. 5.)

Ms. Beal initiated an internal appeal from Amerigroup's June 14 decision under Section 249A.4(11) of the Iowa Code and Chapter 14 of the Amerigroup Provider Manual. (Beal AR 190–91.) In support of her appeal, she provided assessments from Dr. Priest, Dr. Wojciak, and Dr. Schechter; an assessment from Elizabeth Graf, PA-C ("Ms. Graf"); her own affidavit; the affidavit of Dr. Ettner; and a memorandum of law explaining that the Regulation violates ICRA and the Iowa Constitution's equal-protection guarantee. (*Id*. 192–221.)

Amerigroup denied Ms. Beal's appeal. (*Id*. 143–47.) Amerigroup's decision reiterated that, based on the information provided to Amerigroup, the gender-affirming surgery requested by Ms. Beal was excluded from coverage by the Regulation. (*Id.* 143.)

Ms. Beal subsequently appealed Amerigroup's decision to DHS. (*Id.* 227–67.) After considering the parties' posthearing briefs and the administrative record, the ALJ issued a proposed decision affirming Amerigroup's decision. (*Id.* 95–101.) The ALJ's decision did not

resolve Ms. Beal's equal-protection challenge to Amerigroup's decision on the merits, but rather concluded that resolving the challenge did not fall within the scope of the pending administrative proceeding and was "preserved . . . for the Judicial Branch to address." (*Id*. 98–99.) With respect to Ms. Beal's ICRA challenge, the ALJ's decision found, without any support from the relevant statutory language or other legal authority, (1) that it was "questionable whether sex reassignment surgery prohibited by an Iowa Administrative Code Medicaid rule properly falls within the parameters of a public accommodation" and (2) that ICRA's prohibition on sex discrimination does not apply to "transsexuals." (*Id*. 99–100.)

Ms. Beal next appealed the ALJ's proposed decision to the Director of DHS. (*Id.* 38–91.) The Director adopted the ALJ's proposed decision as DHS's final decision on Ms. Beal's appeal. (*Id.* 1–5.) The Director concluded that the DHS "lack[ed] jurisdiction" to decide Ms. Beal's equal-protection challenge but noted that this challenge was "preserved for judicial review." (*Id*. 4.) With respect to Ms. Beal's ICRA challenge, the Director concluded (1) that "Iowa Medicaid" itself is not a "public accommodation" for purposes of ICRA, failing to address whether DHS is a "public accommodation," and (2) that ICRA's prohibition on sex discrimination does not apply to Ms. Beal, failing to address, among other things, ICRA's explicit prohibition against gender-identity discrimination. (*Id*. 2–4.)

On December 15, 2017, Ms. Beal filed her petition for judicial review in this Court. Like Ms. Good, she alleges that DHS's decision should be vacated because it (1) violates ICRA's prohibition against gender-identity discrimination (Beal Pet. Count I); (2) violates ICRA's prohibition against sex discrimination (*id*. Count II); (3) violates the Iowa Constitution's equal-protection guarantee under both heightened scrutiny and rational-basis review (*id*. Count III); (4) creates a disproportionate negative impact on private rights (*id*. Count IV); and (5) is

unreasonable, arbitrary, and capricious (*id*. Count V). On January 26, 2018, the Court consolidated Ms. Beal's case with Ms. Good's case and denied DHS's motion to dismiss Ms. Beal's case.

III. 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. (Beal AR 78, ¶ 11.) The criteria for diagnosing gender dysphoria are set forth in Section 302.85 of DSM-V. (*Id*. 78–79, ¶¶ 11–13.)

If left untreated, gender dysphoria can lead to serious medical problems, including clinically significant psychological distress and dysfunction, debilitating depression, and, for some people without access to appropriate medical care and treatment, suicidality and death. (*Id*. 79, ¶ 14.)

The standards of care for treating gender dysphoria ("Standards of Care" or "Standards) are set forth in the World Professional Association of Transgender Health ("WPATH") Standards of Care for the Health of Transsexual, Transgender, and Nonconforming People. *See* http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351. (*Id*. ¶ 15.) WPATH is a nonprofit interdisciplinary professional and educational organization devoted to transgender health. (Good Ans. ¶ 55.)

The Standards of Care are widely accepted, evidence-based, best-practice medical protocols that articulate professional consensus to guide health-care professionals in medically managing gender dysphoria by providing the parameters within which they may provide care to

individuals with this condition. (Beal AR 79, ¶ 16.) They are recognized as authoritative by the American Medical Association, the American Psychiatric Association, and the American Psychological Association, among others. (*Id*. ¶ 15.) They are, in fact, so well established that federal courts have declared that a prison's failure to provide health care in accordance with the Standards may constitute cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution. *See, e.g., Rosati v. Igbinoso*, 791 F.3d 1037, 1039–40 (9th Cir. 2015); *De'lonta v. Johnson*, 708 F.3d 520, 522–26 (4th Cir. 2013); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231–32 (D. Mass. 2012).

For many transgender people, necessary treatment for gender dysphoria may require medical interventions to affirm their gender identity and help them transition from living in one gender to another. (*Id*. ¶ 17; Good Ans. ¶ 60.) This transition-related care may include hormone therapy, surgery (sometimes called "gender-confirmation surgery" or "sex-reassignment surgery"), and other medical services to align a transgender person's body with the individual's gender identity. (Beal AR 79 ¶ 17; Good Ans. ¶ 61.)

The treatment for each transgender person is individualized to fulfill that person's particular needs. (Beal AR 79–80, ¶¶ 15–18; Good Ans. ¶ 62.) The WPATH Standards of Care for treating gender dysphoria address all these forms of medical treatment, including surgery to alter primary and secondary sex characteristics. (Beal AR 79–80, ¶¶ 16–17.)

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. (*Id*. 82, ¶ 28; *see also id*. 87, ¶ 54.) More than three decades of research confirms that surgery to modify primary and secondary sex characteristics and align gender identity with anatomy is therapeutic and is therefore effective treatment for gender dysphoria. (*Id*. 83, ¶ 36; *see also id*. 86, ¶ 53.) For

appropriately assessed severe gender-dysphoric patients, surgery is the only effective treatment. (*See id*.)

Health experts have rejected the myth that these treatments are "cosmetic" or "experimental" and have recognized that the treatments can provide safe and effective care for a serious health condition. (*Id*. 86, ¶¶ 48–52; Good Ans. ¶ 67.) Indeed, leading medical groups, including the American Medical Association,[3] the American Psychological Association,[4] the American Academy of Family Physicians,[5] the American College of Obstetricians and Gynecologists,[6] the National Association of Social Workers,[7] and WPATH,[8] all agree that gender dysphoria is a serious medical condition, that treatment for gender dysphoria is medically necessary for many transgender people, and that insurers should provide coverage for these treatments. (Beal AR 87, ¶ 54.)

---

[3] *See* Resolution 122 (A–108), *available at*: http://www.ama-assn.org/resources/doc/PolicyFinder/policyfiles/HnE/H-185.950.htm.

[4] *See* Position Statement on Access to Care for Transgender and Gender Variant Individuals (2012), *available at*: www.psychiatry.org/File%20Library/Advocacy%20and20%Newsroom/Position%20Statements/ps2012_TransgenderCare.pdf.

[5] *See* Resolution No. 1004 (2012), *available at*: http://www.aafp.org/dam/AAFP/documents/about_us/special_constituencies/2012RCAR_Advocacy.pdf.

[6] *See* Committee Opinion No. 512: Health Care for Transgender Individuals, *available at*: http://www.ncfr.org/news/acog-releases-new-committee-opinion-transgender-persons.

[7] *See* Transgender and Gender Identity Issues Policy Statement, *available at*: http://www.socialworkers.org/da/da2008/finalvoting/documents/Transgender%202nd%20round%20-%20Clean.pdf.

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

B. Medicaid Coverage for Gender-Affirming Surgery in Iowa

In 1993, DHS contracted with the Iowa Foundation for Medical Care, now known as Telligen Inc. (the "Foundation"), to analyze whether to provide Medicaid coverage for treating conditions like gender dysphoria, which, at the time, was known as gender-identity disorder. (Good Ans. ¶ 34.) Following its receipt of the Foundation's report, DHS recommended a rulemaking process by publishing a notice of intended action and soliciting public commentary. (*Id*. ¶ 35.) In 1995, after a public meeting of DHS's rulemaking body and review by the Iowa General Assembly's administrative-rules committee, DHS adopted the Regulation. (*Id*. ¶ 36.)

The Regulation stated, in relevant part, that "[s]urgeries for the purpose of sex reassignment are not considered as restoring bodily function and are excluded from coverage." Iowa Admin. Code r. 441.78.1(4) (2017). It also stated that "[c]osmetic, reconstructive, or plastic surgery performed in connection with certain conditions is specifically excluded. These conditions are: . . . [p]rocedures related to transsexualism . . . [or] gender identity disorders." Iowa Admin. Code r. 441.78.1(4)(b)(2) (2017).

The Regulation remains in effect. Since its promulgation more than two decades ago, it has not been updated or modified to reflect medical developments in the research or treatment of gender dysphoria. (*Id*. ¶ 42.) Nor have any studies been commissioned to revisit the validity of the medical research or conclusions on which the Regulation was based. (*Id*. ¶ 43.)

C. Ms. Good

Ms. Good is a twenty-seven-year-old transgender woman who has known that she is female since the age of seven. (Good AR 122, ¶¶ 1, 3.) She was diagnosed with gender dysphoria in 2013. (*Id*. ¶ 4.) Ms. Good has presented as female full-time and used female pronouns since 2010 and has lived full-time as a woman in every aspect of her life for several years as treatment

for her gender dysphoria. (*Id*. 122–23, ¶¶ 4–6.) This "social transition"—i.e., changing gender expression and role to live consistently with a person's gender identity—is one form of treatment for gender dysphoria. *See* Standards of Care at 9–10, *available at* http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351.

In 2014, Ms. Good began hormone therapy. (*Id*. 123, ¶ 7.) In 2016, she legally changed her name, birth certificate, driver's license, and social-security card to reflect her female identity. (*Id*. ¶ 8.)

Ms. Good's gender dysphoria exacerbates her existing depression and anxiety. (*Id*. 122, ¶ 4.) She is distressed and very uncomfortable with her genitalia, which does not align with her gender identity. (*Id*. 123–24, ¶ 9.) To better present as female, she tucks and wears a girdle for up to twelve hours or more each day. (*Id*.) These measures help her present outwardly as female in conformity with her gender identity but are very painful and uncomfortable. (*Id*.)

In or around January 2017, Ms. Good began the process of seeking Medicaid coverage for gender-affirming surgery from her MCO, AmeriHealth. (Good Ans. ¶ 77.) Ms. Good, a participant in Iowa Medicaid, is eligible for Medicaid reimbursement. (*Id*. ¶ 78.)

Ms. Good's health-care providers have uniformly concluded that surgery is necessary to treat her gender dysphoria. In February 2017, Dr. Imborek, Ms. Good's primary-care physician, assessed her condition. (Good AR 137–40.) She confirmed that Ms. Good has been diagnosed with gender dysphoria, has been on hormone treatment since February 2014 without complications, and has been living fully in her affirmed gender since that time as well. (*Id*. 137–39.) She also concluded that gender-affirming surgery is medically necessary to treat Ms. Good's gender dysphoria. (*Id*.)

In February 2017, Dr. Priest, the Director of the University of Iowa's LGBTQ Clinic, performed a psychosocial assessment on Ms. Good in which he stated:

> [Ms. Good] . . . meets the eligibility and readiness criteria for surgery as set forth [in] the [WPATH standards of care]. Specifically, she is aware of the potential risks of surgery and she is capable of making an[] informed decision. Additionally, even though she has been taking estrogen, she still experiences distress because her body is not congruent with her gender. Given this, she meets diagnostic criteria for gender dysphoria. This dysphoria is not better accounted for by another diagnosis.
>
> It is my opinion that gender affirming surgery is a necessary treatment for [Ms. Good's] gender dysphoria. It is likely that much of the distress that she is currently experiencing stems from the lack of congruence between her body and her gender. It is likely that surgery would help alleviate much of her distress and improve her quality of life. Therefore, I support [Ms. Good's] desire for gender affirming surgery. She understands the potential risks and benefits of surgery and appears to be making an informed decision.

(*Id*. 141–44.)

In March 2017, Dr. Wojciak, the Program Coordinator for the Couple and Family Therapy Program of the University of Iowa's LGBTQ Clinic, performed a psychosocial assessment on Ms. Good. (*Id*. 145–49.) Dr. Wojciak concurred with Dr. Priest's assessment that Ms. Good meets the diagnostic criteria for gender dysphoria, that she meets WPATH's eligibility and readiness criteria for gender-affirming surgery, and that gender-affirming surgery is medically necessary treatment for Ms. Good's gender dysphoria. (*Id.* 146.)

In March 2017, Dr. Erickson, Ms. Good's surgeon, opined:

> [Drs. Imborek, Priest, and Wojciak] believe (and I concur) that Ms. Good's gender dysphoria would be significantly improved by undergoing an orchiectomy. Further, AmeriHealth . . . covers orchiectomy procedures for other medical conditions, such as testicular cancer, pain and torsion [and an orchiectomy procedure] is an equally necessary and proper treatment for transgender women with gender dysphoria, including Ms. Good. The treatment of Ms. Good is consistent with the [WPATH] guidelines . . . .

(*Id*. 150–53.)

D. Ms. Beal

Ms. Beal is a forty-two-year-old transgender woman who has known that she is female since roughly the age of five. (Beal AR 89, ¶¶ 1, 3.) She was diagnosed with gender dysphoria in 1989. (*Id*. 90, ¶ 5.) She has expressed her female identity in various ways since the age of ten, at which time she decided, with her family's support, to transition to living as female full-time. (*Id*. 89–90, ¶ 3.)

In 1989, Ms. Beal began hormone therapy. (*Id*. 90, ¶ 5.) In 2014, Ms. Beal legally changed her name, birth certificate, driver's license, and social-security card to reflect her female identity. (*Id*. 90–91, ¶ 8.)

Ms. Beal's gender dysphoria causes her to experience depression and anxiety. (*Id*. 90, ¶ 6.) She is distressed and very uncomfortable with her genitalia, which does not align with her gender identity and thereby exacerbates her depression and anxiety. (*Id*. 91, ¶ 9.)

In or around June 2017, Ms. Beal began the process of seeking Medicaid coverage for gender-affirming surgery from her MCO, Amerigroup. (*Id*. 43, 71.) Ms. Beal, a participant in Iowa Medicaid, is eligible for Medicaid reimbursement. (*Id*. 165.)

Ms. Beal's health-care providers have uniformly concluded that surgery is necessary to treat her gender dysphoria. In February 2017, Dr. Priest performed a psychosocial assessment on Ms. Beal in which he stated:

> [Ms. Beal] . . . meets the eligibility and readiness criteria for surgery as set forth [in] the Standards of Care of the World Professional Association for Transgender Health (WPATH). Specifically, she is aware of the potential risks of surgery and she is capable of making an[] informed decision. Additionally, even though she has been taking estrogen, she still experiences distress because her body is not congruent with her gender. Given this, she meets diagnostic criteria for gender dysphoria. This dysphoria is not better accounted for by another diagnosis.
>
> It is my opinion that gender affirming surgery is a necessary treatment for [Ms. Beal's] gender dysphoria. It is likely that surgery would help alleviate her

> gender dysphoria, her depressive symptoms, and improve her quality of life. Therefore, I support [Ms. Beal's] desire for gender affirming surgery. She understands the potential risks and benefits of surgery and appears to be making an informed decision.

(Beal AR 65–68.)

In or around February 2017, Dr. Wojciak performed a psychosocial assessment on Ms. Beal. (*Id*. 72–75.) Dr. Wojciak concurred with Dr. Priest's assessment that Ms. Beal meets the diagnostic criteria for gender dysphoria, that she meets WPATH's eligibility and readiness criteria for gender-affirming surgery, and that gender-affirming surgery is medically necessary treatment for Ms. Beal's gender dysphoria. (*Id*.)

Ms. Graf, a certified physician assistant who has been administering Ms. Beal's hormone therapy since February 2017, provided the following assessment of Ms. Beal's eligibility for surgical treatment:

> [Ms. Beal] is interested in pursuing vaginoplasty as the next step in treatment of her gender dysphoria, and is a good candidate. According to the World Professional Association for Transgender Health (WPATH) guidelines, she is a good candidate for surgery and has met WPATH criteria. Her judgment appears to be sound and good, and informed consent about the risks and benefits of the procedure has been obtained. She is married and has the support system necessary to undergo vaginoplasty and postoperative care. She has stable income from her work as a medical assistant. [Ms. Beal] has an attentive local physician who cares for her other medical issues . . . .

(*Id*. 62–64.)

In June 2017, Dr. Schechter, Ms. Beal's surgeon opined:

> Ms. Beal has satisfied the criteria for medical necessity as established by The World Professional Association for Transgender Health. Specifically, she has 1) persistent, well-documented gender dysphoria, 2) capacity to make an informed consent for treatment, 3) age of majority, 4) if significant medical or mental health concerns are present, control of such concerns are present, control of such concerns, and 5) twelve continuous months of hormone therapy appropriate for the patient's gender.

(*Id*. 69–71.)

Dr. Schechter further opined:

> In my experience, it would be highly unusual for an insurance company to deny coverage for each of the procedures [at issue] for medical conditions other than gender dysphoria such as post-oncologic reconstruction, post-traumatic reconstructions, post-infectious reconstruction, or for reconstruction of congenital defects or anomalies. These are equally necessary and proper treatments for transgender women with gender dysphoria, including for Ms. Beal.

(*Id*. 70, ¶ 5.)

E. The MCOs and DHS

In the proceedings below, neither the MCOs nor DHS submitted any evidence contradicting the affidavits presented by Ms. Good or Ms. Beal. (*See* Good AR 160–65; Beal AR 102–08, 110–13.) They limited their opposition to legal arguments based on the alleged absence of discrimination, the alleged inapplicability of ICRA, and the MCOs' contractual obligations to apply the Regulation as written. (*See* Good AR 160–65; Beal AR 102–08, 110–13.) Petitioners' evidence that the surgical procedures they requested are medically necessary is unrebutted. (*See* Good AR 31–46; Beal AR 65–75, 89–91.) So, too, is their evidence pertaining to the standards of care applicable to gender dysphoria. (*See* Good AR 47–59; Beal AR 76–88.)

SCOPE AND STANDARDS OF REVIEW

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

Petitioners allege six grounds for reversing DHS's decisions under five sections of the APA: 17A.19(10)(a), 17A.19(10)(b), 17A.19(10)(c), 17A.19(10)(k), and 17A.19(10)(n). *See* Iowa Code §§ 17A.19(10)(a), (b), (c) (k), (n) (2017). The relevant standards are set forth below.

ARGUMENT

I. The Regulation violates ICRA.

Under Section 17A.19(10)(b) of the APA, a court may reverse an agency action if "substantial rights of the person seeking judicial relief have been prejudiced because the agency action . . . is [b]eyond the authority delegated to the agency by any provision of law or in violation of any provision of law." *See* Iowa Code § 17A.19(10)(b) (2017).

Relatedly, under Section 17A.19(10)(c) of the APA a court may reverse an agency action if "substantial rights of the person seeking judicial relief have been prejudiced because the agency action . . . is [b]ased upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency." *See* Iowa Code § 17A.19(10)(c) (2017).

"'Normally, the interpretation of a statute is a pure question of law over which agencies are not delegated any special powers by the General Assembly so[] a court is free to, and usually does, substitute its judgment de novo for that of the agency and determine if the agency interpretation of the statute is correct.'" *Thoms v. Iowa Pub. Employees Ret. Sys.*, 715 N.W.2d 7, 10–11 (Iowa 2006) (quoting Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act (1998) Chapter 17A, Code of Iowa (House File 667 As Adopted)* 62 (1998)); *see also City of Des Moines v. Employment Appeal Bd.*, 722 N.W.2d 183, 191 (Iowa 2006) (where the legislature does not vest the interpretation of a statute with an agency, a court "does not give any deference to the view of the agency and employ[s] a correction-of-errors-at-law standard of review"); *Des Moines Area Reg'l Transit Auth. v. Young*, 856 N.W.2d 383, 2014 WL 4937960, at *1 (Iowa Ct. App. 2014) (unpublished) (agency's "legal findings are reversed for errors of law"). Here, DHS's interpretation of ICRA is not entitled to any deference and should be reviewed de novo.

A. The Regulation violates ICRA's prohibition against gender-identity discrimination.

1. The Regulation violates the plain meaning of ICRA.

"The intent of the legislature is the polestar of statutory construction and is primarily to be ascertained based on the language employed in the statute." *Univ. of Iowa v. Dunbar*, 590 N.W.2d 510, 511 (Iowa 1999). "Precise, unambiguous language will be given its plain and rational meaning in light of the subject matter." *Carolan v. Hill*, 553 N.W.2d 882, 887 (Iowa 1996).

The plain language of ICRA expressly states that it is "unfair or discriminatory" for any "employee or agent" of a "public accommodation" to deny services based on "sex [or] gender identity." *See* Iowa Code § 216.7(1)(a) (2017) ("It shall be an unfair or discriminatory practice for any . . . employee or agent [of any public accommodation] . . . [t]o refuse or deny to any person because of . . . sex [or] gender identity . . . the accommodations, advantages, facilities, services or privileges thereof, or otherwise to discriminate against any person because of . . sex [or] gender identity . . . in the furnishing of such accommodations, advantages, facilities, services or privileges.").

"Public accommodation[s]" expressly include "each state . . . government unit . . . that offers services . . . [or] benefits to the public . . . .," such as DHS. *See* Iowa Code § 216.2(13)(b) (2017).

As "agent[s]" of DHS, the MCOs were expressly prohibited by the terms of ICRA from discriminating against Petitioners on the basis of gender identity. (*See* Good Ans. ¶¶ 17–18.) And as "employee[s] or agent[s]" of DHS, the Director and his staff were expressly prohibited from endorsing the MCOs' discriminatory decisions. (*See id*. ¶ 14.) Yet that is what the MCOs, the Director, and the Director's staff, each acting on behalf of DHS, did when they denied expense

reimbursement for Petitioners' gender-affirming surgery, a medically necessary treatment for gender dysphoria intended to help transgender people affirm their gender identity and transition from living in one gender to another. (Beal AR 79 ¶ 17; Good Ans. ¶ 60.)

Indeed, the Regulation expressly singles out transgender Iowans for discriminatory treatment by denying Medicaid-eligible individuals coverage for medically necessary treatment solely because they are transgender since transgender people are the only individuals who seek surgery related to "transsexualism" or "gender identity disorders" as set forth in Section 441.78.1(4). Discrimination against transgender persons is by its very nature discrimination on the basis of gender identity given that a person is defined as transgender by the fact that their gender identity fails to match their birth-assigned gender. (Beal AR 77 ¶¶ 9–10.)

Gender dysphoria is a serious medical condition that, if left untreated, can lead to clinically significant psychological distress and dysfunction, debilitating depression, and, for some people without access to appropriate medical care and treatment, suicidality and death. (Beal AR 78–79, ¶¶ 11, 14.) Since the mid-1990s, there has been consensus within the medical community that surgery is the only effective treatment for many individuals with severe gender dysphoria. (*Id*. 82, ¶ 28; 83, ¶ 36; 86, ¶ 53; 87, ¶ 54.) But despite this consensus, and despite health experts' rejection of the myth that gender-affirming surgery is "cosmetic" or "experimental" (*id*. 86, ¶¶ 48–52; Good Ans. ¶ 67), the Regulation categorically prohibits transgender individuals from receiving Medicaid coverage for surgical care that is available to nongtransgender individuals for conditions other than gender dysphoria, such as testicular cancer, pain, and torsion; postoncologic reconstruction; posttraumatic reconstruction; postinfection reconstruction; and reconstruction of congenital defects or anomalies. (Good AR 150–53; Beal AR 70, ¶ 5.) *See, e.g.,* Iowa Admin. Code r. 441.78.1(249A) (2017) (approving

reimbursement "[w]hen a surgical procedure primarily restores bodily function, whether or not there is a concomitant improvement in physical appearance," despite that, under the Regulation, "[s]urgeries for the purpose of sex reassignment are not considered as restoring bodily function and are excluded from coverage"). This discriminatory treatment of transgender individuals is a per se violation of ICRA's prohibition against gender-identity discrimination.

2. Even under a restrictive interpretation of ICRA, DHS qualifies as a "public accommodation."

DHS has argued that the Regulation is not subject to ICRA since Medicaid is not a "public accommodation" under ICRA. The Court previously rejected DHS's proposed interpretation of the Act (*see* 11/27/17 Order), which is based on the false premises that (1) a "public accommodation" must be a physical facility open to the public, and (2) the "public accommodation" at issue in this case is the Medicaid program itself, which, DHS has argued, is not a physical facility open to the public. This highly restrictive reading of the Act ignores its plain language, which expressly covers "employee[s] or "agent[s]," such as the MCOs, the Director, or the Director's staff, of "state . . . government unit[s]," such as DHS, "that offer[] services . . . [or] benefits," such as Medicaid, "to the public," such as Petitioners and other Medicaid participants. *See* Iowa Code §§ 216.7(1)(a), 216.2(13)(b) (2017).

In any event, even if "state . . . government unit[s]" were limited to physical facilities, DHS would still qualify as a "public accommodation."

First, DHS has multiple offices across the State of Iowa. *See, e.g.,* Iowa Dep't of Human Servs., DHS Offices Map, *available at*: http://dhs.iowa.gov/dhs_office_locator. At least one of those offices was involved in denying Medicaid benefits to Petitioners. (*See* Good Ans. ¶ 14; Good AR 1–3; Beal AR 1–5.) Petitioners were therefore subject to a discriminatory practice by an agent or employee of DHS operating out of a DHS facility when DHS denied them Medicaid

coverage on the basis of their gender identity. These circumstances satisfy even DHS's proposed restrictive definition of "public accommodation" under Section 216.2(13)(b) of ICRA. *See* Iowa Code § 216.2(13)(b) (2017).

Second, DHS satisfies the definition of "public accommodation" set forth in Section 216.2(13)(a) of the Act. Under that provision, "public accommodation[s]" expressly include "facilit[ies] . . . that offer services to . . . nonmembers [of any organization or association] gratuitously . . . if the accommodation receives governmental support or subsidy." *See* Iowa Code § 216.2(13)(a) (2017).

DHS operates "facilities" throughout the State of Iowa that "offer services" to members of the public "gratuitously," such as Medicaid. (*See* Good Ans. ¶ 14.) And those facilities "receive[] governmental support or subsidy" in that they are funded by the State of Iowa. (*See* Good Ans. ¶ 15.) Therefore, even under Section 216.2(13)(a)'s definition of "public accommodation," the Director of DHS and his staff, as "employee[s] or agent[s]" of DHS, were prohibited from discriminating on the basis of gender identity in administering the Iowa Medicaid program from an office of the Iowa state government. *Cf.* Ltr. from Richard C. Turner, Attorney General, to Dennis L. Freeman, State Representative, and Rolland A. Gallagher, Director, Iowa, Beer & Liquor Control Dep't, 1972 WL 262259 (Feb. 2, 1972) (noting that even a private club may become a public accommodation if it receives government support or subsidy).

It is, moreover, immaterial that Petitioners were not denied physical access to DHS's office facility. Section 216.2(13)(a) covers the denial of services administered by a public facility, as multiple courts have acknowledged. *See Torres v. N. Fayette Comty. Sch. Dist.,* 600 F. Supp. 2d 1026, 1031 (N.D. Iowa 2008) ("[A] person subject to discrimination in

accommodation is denied the use of a public facility *or the services or privileges of a public facility* . . .") (emphasis added); *Kirt v. Fashion Bug #3253, Inc.*, 479 F. Supp. 2d 938, 963 (N.D. Iowa 2007) ("[A] properly adapted prima facie case . . . requires [the plaintiff] to prove . . . [that the plaintiff] sought to enjoy the accommodations, advantages, facilities, *services, or privileges* of a 'public accommodation . . . .'") (emphasis added). DHS's conduct falls within the scope of Section 216.2(13)(a).

3. ICRA must be broadly construed.

The Iowa General Assembly has declared that ICRA "shall be broadly construed to effectuate its purpose." Iowa Code § 216.18(1) (2017). And the Iowa Supreme Court has reaffirmed this principle, noting that "[a]n Iowa court faced with competing legal interpretations of [ICRA] must keep in mind the legislative direction of broadly interpreting the Act when choosing among plausible legal alternatives." *Pippen v. State*, 854 N.W.2d 1, 28 (Iowa 2014); *see also Probasco v. Iowa Civil Rights Comm'n*, 420 N.W.2d 432, 435 (Iowa 1988) ("Remedial legislation should be construed liberally consistent with its statutory purpose.").

Here, Petitioners maintain that the only plausible interpretation of "public accommodation" includes DHS, a "state . . . government unit." Yet, even assuming DHS's restrictive interpretation of Section 216.2(13)(b) of the Act were a "plausible legal alternative[]" (which it is not), Petitioners' interpretation must be adopted to ensure that the Act is "broadly construed." *See* Iowa Code § 216.18(1) (2017); *Pippen*, 854 N.W.2d at 28.

B. The Regulation violates ICRA's prohibition against sex discrimination.

For the same reasons set forth above, the Regulation violates ICRA's prohibition against sex discrimination: As "agent[s]" of DHS, the MCOs were expressly prohibited by the terms of ICRA from discriminating against Petitioners on the basis of sex. And as "employee[s] or

agent[s]" of DHS, the Director and his staff were expressly prohibited from endorsing the MCOs' discriminatory decisions. Yet that is what the MCOs, the Director, and the Director's staff did when they denied expense reimbursement for Petitioners' gender-affirming surgery, a medically necessary treatment for gender dysphoria intended to help transgender people affirm their gender identity and transition from living in one gender to another. (Beal AR 79 ¶ 17; Good Ans. ¶ 60.)

Discrimination based on transgender status constitutes sex discrimination, as dictated by nearly three decades of federal case law, which guides Iowa courts' interpretation of ICRA. *See Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999) (noting that because "ICRA was modeled after Title VII of the United States Civil Rights Act, Iowa courts turn to federal law for guidance in evaluating . . . ICRA"); *see also Wright v. Winnebago Indus., Inc.*, 551 F. Supp. 2d 836, 845 (N.D. Iowa 2008) (same).

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the U.S. Supreme Court held that sex discrimination encompasses discrimination based on a person's failure to conform to stereotypical gender norms—the type of discrimination to which transgender individuals are subjected. *See id*. at 250–252, 258. Since *Price Waterhouse* was decided, numerous federal courts have recognized that discrimination against transgender persons is sex discrimination. *See Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . . [D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination."); *see also Barnes v. City of Cincinnati*, 401 F.3d 729, 736–37 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 573–75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust*,

214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Harford*, 204 F.3d 1187, 1198–1203 (9th Cir. 2000).

Recent case law further reaffirms this position. In *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), the Seventh Circuit reasoned that, under *Price Waterhouse*, discrimination against transgender individuals is, by its very nature, sex discrimination. *Id*. at 1048. This is because, "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Id*.

In so holding, the Seventh Circuit effectively overruled the conclusion of *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), that discrimination against transgender people was not sex discrimination. *Id*. The Eighth Circuit recently has shown a similar inclination. *See Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017) (assuming, for purposes of appeal, "that the prohibition on sex based discrimination under Title VII . . . encompass[ed] protection for transgender individuals" notwithstanding a previous decision by the court that transgender persons were not protected by Title VII).

The Iowa Supreme Court's outdated decision in *Sommers v. Iowa Civil Rights Commission*, 337 N.W.2d 470 (Iowa 1983), is distinguishable. In *Sommers*, the Court held that ICRA's prohibition against sex discrimination did not encompass discrimination based on "transsexualism." *See id*. at 473–74. *Sommers* was, however, decided before ICRA was amended in 2007 to prohibit gender-identity discrimination. *Compare id*. at 472 (quoting provisions of ICRA in effect in 1983 when *Sommers* was decided), *with* Iowa Code § 216.7(1)(a) (2017) (prohibiting, among other things, discrimination based on "gender identity"). It has therefore been superseded by statutory amendment.

To the extent *Sommers* survives at all, it is only relevant to sex discrimination, not gender-identity discrimination. And the pre-*Price Waterhouse* case law on which *Sommers* relied, which was predicated on a narrow definition of what constitutes "sex," was "eviscerated by *Price Waterhouse*." *See Smith*, 378 F.3d at 573.

In light of this case law, the Regulation and DHS's denials of Petitioners' requests for Medicaid coverage violate ICRA's prohibition against sex discrimination. The Regulation discriminates based on sex by perpetuating discrimination arising from a person's transgender status, failure to conform to stereotypical gender norms, and transition from one gender to another. It denies Medicaid coverage for procedures to conform a person's body to a gender that is different from that assigned at birth while affording coverage for identical procedures for other medical purposes. This is unlawful.

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

Under Section 17A.19(10)(a) of the APA, a court may reverse an agency action if "substantial rights of the person seeking judicial relief have been prejudiced because the agency action . . . is [u]nconstitutional on its face or as applied or is based on a provision of law that is unconstitutional on its face or as applied." *See* Iowa Code § 17A.19(10)(a) (2017).

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

A. Transgender and nontransgender Iowans eligible for Medicaid are similarly situated for equal-protection purposes.

The Iowa Constitution contains a two-part equal-protection guarantee. Section 6 of Article I states that "[a]ll laws of a general nature shall have a uniform operation; the general

assembly shall not grant any citizen or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. art. I, § 6. Section 1 of Article I states that "[a]ll men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." Iowa Const. art. I, § 1.

Although the Iowa Supreme 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 Utilities Bd.*, 815 N.W.2d 30, 45 (Iowa 2012); *State v. Pals*, 805 N.W.2d 767, 771–72 (Iowa 2011); *Varnum v. Brien*, 763 N.W.2d 862, 896 n.23 (Iowa 2009); *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004); *see also State v. Null*, 836 N.W.2d 41, 70 n.7 (Iowa 2013) ("A decision of this court to depart from federal precedent arises from our independent and unfettered authority to interpret the Iowa Constitution.").

This is because, as the Iowa Supreme Court recently reaffirmed, the rights guaranteed to individuals under the Iowa Constitution have critical, independent importance, and the courts play a crucial role in protecting those rights. *See Godfrey v. State*, 898 N.W.2d 844, 864 (Iowa 2017) ("Unlike the federal constitutional framers who did not originally include a bill of rights and ultimately tacked them on as amendments to the United States Constitution, the framers of the Iowa Constitution put the Bill of Rights in the very first article. . . . Our founders did not cringe at the thought of individual rights and liberties—they embraced them."); *see also id.* at 865 ("It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens."); *id.* at 869 ("The rights and remedies of the Bill of Rights are not subject to

legislative dilution as there is no elasticity in the specific guaranty of the Constitution.") (internal quotation marks omitted).

Iowa's constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike under the law. *See 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, the equal-protection guarantee requires "that laws treat alike all those who are similarly situated with respect to the purpose of the law." *Varnum*, 763 N.W.2d at 882 (internal quotation marks omitted); *see Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002).

When the *Varnum* court held that same-sex couples are situated similarly to different-sex couples for purposes of Iowa's marriage laws, it described this requirement as a "narrow threshold test." *Varnum*, 763 N.W.2d at 882. But "a court cannot simply look at the trait used by the legislature to define a classification under a statute and conclude a person without the trait is not similarly situated to persons with the trait." *Id*. (citing *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 648 N.W.2d 555, 559 (Iowa 2002)). As the court in *Varnum* explained:

> [T]he similarly situated requirement cannot possibly be interpreted to require plaintiffs to be identical in every way to people treated more favorably by the law. No two people or groups of people are the same in every way, and nearly every equal protection claim could be run aground onto the shoals of a threshold analysis if the two groups needed to be a mirror image of one another. Such a threshold analysis would hollow out the constitution's promise of equal protection.

Id. at 882–83.

In this case, as in *Varnum*, transgender and nontransgender Iowans who are eligible for Medicaid are similarly situated for equal-protection purposes. They are alike in all legally relevant ways except for the transgender identity on which the disparate treatment at issue here is

based. Despite medical necessity, DHS denies Petitioners and other transgender individuals coverage for health care based on nothing more than the fact that they are transgender. (*See* Good AR 1–3; Beal AR 1–5.)

B. Discrimination against transgender people should be reviewed under heightened scrutiny.

No Iowa court has ruled on the level of scrutiny applicable to classifications that discriminate against transgender individuals. This Court should find that heightened scrutiny applies to those classifications under the Iowa Constitution.

1. Iowa's four-factor test for ascertaining the appropriate level of equal-protection scrutiny mandates applying heightened scrutiny.

The highest and most probing level of scrutiny under the Iowa Constitution applies to classifications based on race, alienage, or national origin and those affecting fundamental rights. *Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009); *see also 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." *See In re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004). This is because race, alienage, and national origin are factors that are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. . . ." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

A middle level of scrutiny called "intermediate scrutiny" exists between rational-basis review—discussed below (*see infra* Arg., § II(D))—and strict scrutiny. *Varnum*, 763 N.W.2d at 880 (citing *Cleburne*, 473 U.S. at 445). Intermediate scrutiny requires the party seeking to uphold a classification to demonstrate that it is "substantially related" to achieving an "important governmental objective[]." *See Sherman*, 576 N.W.2d at 317 (internal quotation marks omitted).

The justification for the classification must also be "genuine" and must not depend on "overbroad generalizations." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The Iowa Supreme Court's decisions confirm that intermediate scrutiny applies to classifications based on gender, illegitimacy, and sexual orientation. *See Varnum*, 763 N.W.2d at 895–96; *NextEra Energy Res., LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 46 (Iowa 2012).

Iowa courts apply a four-factor test to determine the appropriate level of scrutiny under the Iowa Constitution's equal-protection guarantee. *Varnum*, 763 N.W.2d at 887. The factors include "(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 class." *Id.*

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." *See 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 heightened scrutiny to classifications that discriminate against transgender Iowans.

a. Factor #1: The History of Invidious Discrimination Against the Group Burdened by the Classification

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 v. Brien*, 763 N.W.2d 862, 889–90 (Iowa 2009). The Iowa General Assembly's enactment of several laws to protect individuals based on sexual orientation was critical to the *Varnum* court's findings, particularly the General Assembly's decision to add sexual orientation to ICRA as a protected class in 2007. *See id*. at 889–91. These enactments, which included 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*.

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. *See* Iowa Code § 216.7(1)(a) (2017); Iowa Code § 280.28(2)(c) (2017). And like discrimination based on sexual orientation, discrimination based on transgender status has been extensively documented. *See* James, S.E., *et al*., The Report of the 2015 U.S. Transgender Survey, Washington, D.C.: National Center for Transgender Equality (2016) ("Transgender Survey"), *available at*: https://transequality.org/sites /default/files/docs/usts/USTS-Full-Report-Dec17.pdf. 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.

In Iowa, widespread transgender discrimination has been documented by Professor Len Sandler and the University of Iowa College of Law's Rainbow Health Clinic. *See* Where Do I Fit In? A Snapshot of Transgender Discrimination in Iowa, June 16, 2016, *available at* https://law.uiowa.edu/sites/law.uiowa.edu/files/Where%20Do%20I%20Fit%20In%20%20A%A2

0Snapshot%20of%20Transgender%20Discrimination%20June%202016%20Public%20Release.pdf. ("Rainbow Health Clinic Report").

Transgender people nationally and in Iowa continue to face discrimination and, to the extent they have seen any progress in the protection of their rights, backlash against such progress. *See Brandstad calls Obama's transgender policy 'blackmail,' available at*: http://wqad.com/2016/05/18/branstad-calls-obamas-transgender-bathroom-policy-blackmail/; *Trump Rescinds Rules on Bathrooms for Transgender Students*, *available at*: https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html; *Transgender 'bathroom bill' introduced in Iowa House, though support lags*, *available at*: https://www.desmoinesregister.com/story/news/politics/2018/01/31/transgender-bathroom-bill-uiowa-lgbtq/1077963001/; Iowa H.B. 2164, 87 Gen. Assem. (Jan. 31, 2018) (depriving transgender K through 12 students of access to boys' and girls' restrooms consistent with their gender identity); *see also Nursing facility doors slam shut for transgender Iowan*, *available at*: http://www.desmoinesregister.com/story/news/investigations/readers-watchdog/2016/05/18/nursing-facility-doors-slamshut-transgender-iowan/84490426/.

These examples illustrate the long, troubling history of invidious discrimination against transgender individuals in Iowa and elsewhere. *See Varnum*, 763 N.W.2d at 889–90.

b. Factor #2: Gender Identity and the 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. *See Varnum v. Brien*, 763 N.W.2d 862, 890 (Iowa 2009). In *Varnum*, the test was satisfied by (1) the lack of any holding by any court that lesbian, gay, or bisexual people are unable to contribute to daily life and (2) the existence of ICRA's protections against sexual-orientation discrimination. *Id*. at 890–91.

A person's gender identity or transgender status is irrelevant to the person's ability to contribute to society. The fact that the Iowa General Assembly has outlawed discrimination based on gender identity shows that it recognizes transgender Iowans' ability to contribute to society. *See, e.g., id*. (finding that the Iowa legislature's prohibition against discrimination based on sexual orientation sets forth "the public policy . . . that sexual orientation is not relevant to a person's ability to contribute to a number of societal institutions"). The same is true of various letters that Iowa corporations submitted to the Iowa Civil Rights Commission in support of the 2007 ICRA amendments. *See* Rainbow Health Clinic Report at 10. Those letters, which attest to the need for a state law protecting lesbian, gay, bisexual, and transgender ("LGBT") Iowans against discrimination, illustrate the high premium Iowa employers place on their LGBT employees. *See id*. (*See also* Beal AR 83, ¶ 35.)

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

c. Factor #3: Immutability

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 v. Brien*, 763 N.W.2d 862, 893 (Iowa 2009) (quoting *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 439 (Conn. 2008)) (internal quotation marks omitted).

Gender identity, like sexual orientation, is a trait central to a person's identity. (Beal AR 77, ¶ 9; 83, ¶¶ 32–34.) No person should be penalized for failing to change that trait. The WPATH Standards of Care and other medical literature demonstrate that gender identity is not

subject to change through outside influence. (*See id.* 77, ¶ 9; 80–83, ¶¶ 19–34.) *See also* Standards of Care at 16, *available at* http://www.wpath.org/site_pagge.cfm?pk_association_webpage_menu=1351 ("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.").

In *Varnum*, the plaintiffs overcame the government's misguided argument that sexual orientation is a choice. *See id*. at 892–93. DHS makes no similar argument here. It has not challenged Petitioners' evidence that gender identity is immutable, thereby conceding the point for purposes of these proceedings. (*See* Good AR 160–65; Beal AR 102–08, 110–13.)

d. Factor #4: Political Powerlessness

The last *Varnum* factor is whether people experience political powerlessness as a result of being the members of a similarly situated class. *Varnum v. Brien*, 763 N.W.2d 862, 887–88 (Iowa 2009). The "touchstone" of this analysis is whether a group "lacks sufficient political strength to bring a prompt end to . . . prejudice and discrimination through traditional political means." *Id*. at 894 (internal quotation marks omitted).

The *Varnum* court identified two considerations that help define the boundaries of political powerlessness. First, "absolute political powerlessness" is not required for a class to be subject to heightened 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.* (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

Second, "a group's current political powerlessness is not a prerequisite to enhanced judicial protection." *Id*. "'[I]f a group's *current* political powerlessness [was] a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it

would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications'" in the face of growing political power for women, racial minorities, and others. *See id*. (quoting *In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008)) (emphasis in original). As a result, increased political standing or power does not prevent a court from utilizing heightened scrutiny.

Applying these principles here strongly supports a finding that transgender Iowans are politically powerless. Although the transgender community does not suffer from "absolute political powerlessness," *see id*., transgender individuals cannot overturn discriminatory laws and policies, such as the Regulation, through the legislative process. Transgender Iowans lack the political power to bring a "prompt end to the prejudice" that they experience because of the community's small population size and the enduring societal prejudices against transgender people. *See id*. (internal quotation marks omitted).

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

A growing number of courts have found that heightened scrutiny is appropriate to examine classifications based on transgender status. In *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015), an Occupy Wall Street protestor was arrested and alleged that he was treated differently, separated from other inmates, chained to a pipe in a bathroom, and called off-color names by police because he was transgender. *Id*. at 138. The plaintiff argued that because transgender people represent a suspect or quasi-suspect class, the discrimination against him was subject to heightened scrutiny. *Id.* at 139.

The court agreed, finding that transgender individuals have suffered a history of discrimination and prejudice, that a person's identity as transgender has nothing to do with the person's ability to contribute to society, and that transgender people represent a discrete minority

class that is politically powerless to bring about change on its own. *Id*. at 139–40. The court reasoned that the "underrepresentation inquiry is easier with respect to transgender people" because, while there have been gay members of Congress and gay judges, "there is no indication that there have ever been any transgender members [of either]." *Id*. at 140; *see also, e.g., Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (finding that discrimination against transgender people must be reviewed under heightened scrutiny); *Marlett v. Harrington*, No. 1:15–cv–01382–MJS (PC), 2015 WL 6123613, at *4 (E.D. Cal. 2015) (same); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (same); *Evancho v. Pine–Richland Sch. Dist.,* No. CV 2:16–01537, 2017 WL 770619, at *13 (W.D. Pa. Feb. 27, 2017) (same); *Doe 1 v. Trump*, No. 17–1597 (CKK), 2017 WL 4873042, at *27–28 (D.D.C. Oct. 30, 2017) (same).

In addition, heightened scrutiny applies since discrimination against transgender people is a form of sex discrimination. *Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009) (citing *Sherman v. Pella Corp.,* 576 N.W.2d 312, 317 (Iowa 1998)) (heightened scrutiny applies to gender classifications); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (applying heightened scrutiny to discrimination because it was based on gender); *Glen v. Brumby*, 663 F.3d 1312, 1320 (8th Cir. 2011) (same).

C. The Regulation cannot survive heightened scrutiny.

Of the two forms of heightened scrutiny, "[c]lassifications subject to strict scrutiny are presumptively invalid and must be narrowly tailored to serve a compelling governmental interest." *Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009). Intermediate scrutiny requires a party seeking to uphold a classification to demonstrate that the "challenged classification is substantially related to the achievement of an important governmental objective." *Id.* 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. *See U.S. v. Virginia*, 518 U.S. 515, 516 (1996).

DHS cannot meet either of these standards. There is no compelling governmental interest or important governmental objective advanced by excluding transgender individuals from Medicaid reimbursement for medically necessary procedures. Gender dysphoria is a serious medical condition. (Good Ans. ¶ 51; Beal AR 78, ¶ 11; 79, ¶ 14.) And surgical treatment for gender dysphoria is medically necessary and effective. (Good Ans. ¶¶ 60–61, 67; Beal AR 79 ¶ 17; 82, ¶ 28; 83, ¶ 36; 86–87, ¶¶ 48–54.) Therefore, denying coverage cannot be justified on medical grounds. Nor, under heighted review, can it be justified as a cost-savings measure. *See, e.g., Varnum*, 763 N.W.2d at 902–04 (cost savings could not justify exclusion of same-sex couples from marriage). The Regulation cannot pass heightened scrutiny.

D. The Regulation cannot survive rational-basis review.

The Regulation also cannot withstand rational-basis review, which requires (1) a "plausible policy reason for the classification" and (2) that "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker" and (3) that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009) (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004)).

Although the rational-basis test is "deferential to legislative judgment, 'it is not a toothless one' in Iowa." *Id.* at 9 (quoting *Mathews v. de Castro*, 429 U.S. 181, 185 (1976)). 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. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

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. (Good Ans. ¶¶ 51, 60–61, 67; Beal AR 78, ¶ 11; 79 ¶¶ 14, 17; 82, ¶ 28; 83, ¶ 36; 86–87, ¶¶ 48–54.) And Medicaid coverage is crucial to ensuring the availability of that necessary treatment. (*See* Beal AR 87, ¶ 54.)

Moreover, under rational-basis review, the Regulation's surgical ban cannot be justified as a measure to save money since 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. *See, e.g., Fitzgerald*, 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). The Regulation cannot withstand rational-basis review.

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

Under Section 17A.19(10)(k) of the APA, a court may reverse an agency action if "substantial rights of the person seeking judicial relief have been prejudiced because an agency action is . . . [n]ot required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy." *See* Iowa Code § 17A.19(10)(k) (2017); *Zieckler v. Ampride*, 743 N.W.2d 530, 533 (Iowa 2007).

Petitioners clearly have rights under ICRA and the Iowa Constitution's equal-protection guarantee that have been violated in this case. Even DHS acknowledges that Petitioners "ha[ve] a right to be treated in accordance with the provisions of . . . ICRA and the Iowa Constitution." (Good Ans. ¶ 148.)

Petitioners' disproportionality claims, which arise from these rights, are straightforward. An unlawful, unconstitutional administrative regulation, such as Section 441.78.1(4), is not only "not required," it is forbidden. The Regulation causes a disproportionate negative impact on the private rights of transgender individuals such as Petitioners by categorically prohibiting them from receiving Medicaid coverage for medically necessary surgical treatment of gender dysphoria. (*See* Beal AR 79, ¶ 14.) And there is no public interest served by denying Medicaid coverage for medically necessary and effective treatment. (*Id*. ¶ 17; Good Ans. ¶ 60; *see also* Beal AR 82, ¶ 28; 83, ¶ 36; 86, ¶ 53; 87, ¶ 54.) In light of this, the Regulation, and the decisions based on it, cannot stand.

IV. The Regulation is arbitrary and capricious.

Under Section 17A.19(10)(n) of the APA, a court may reverse an agency action if "substantial rights of the person seeking judicial relief have been prejudiced because the agency action is . . . unreasonable, arbitrary, capricious, or an abuse of discretion. *See* Iowa Code § 17A.19(10)(n) (2017); *Birchansky Real Estate, L.C. v. Iowa Dep't of Pub. Health, State Health Facilities Council*, 737 N.W.2d 134, 140 (Iowa 2007).

Petitioners' arbitrary-and-capricious claims challenge DHS's 2017 decisions to enforce the Regulation's categorical surgical ban against Petitioners in light of current law and current evidence regarding medical necessity and the applicable standards of care—not DHS's 1994 decision to adopt the Regulation. For purposes of Petitioners' claims, the relevant agency action

is the ongoing exclusion of benefits for Petitioners and others similarly situated, not the Regulation's enactment.

This approach is consistent with well-established Iowa case law. An agency action is considered arbitrary or capricious "when it is taken without regard to the law or facts of the case" pending before the agency. *See Soo Line R.R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688–89 (Iowa 1994); *Hough v. Iowa Dep't of Personnel*, 666 N.W.2d 168, 170 (Iowa 2003).

An agency "of course cannot act unconstitutionally, in violation of a statutory mandate, or without substantial support in the record." *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994). Although an "agency is entitled to reconcile competing evidence," it is not entitled to "ignore competing evidence." *JBS Swift & Co. v. Hedberg*, 873 N.W.2d 276, 280–81 (Iowa Ct. App. 2015); *see also Meyer v. IBP, Inc.*, 710 N.W.2d 213, 225 (Iowa 2006) ("[T]he commissioner commits error by failing to weigh and consider all of the evidence."); *Armstrong v. State of Iowa Bldgs. & Grounds*, 382 N.W.2d 161, 165 (Iowa 1986) (stating that it is reversible error for the commissioner to fail to "weigh and consider all the evidence").

Here, DHS blindly applied the Regulation without regard for ICRA (*see supra* Arg. § I), the Iowa Constitution's equal-protection guarantee (*see supra* Arg., § II), or the unrefuted evidence that the surgical procedures requested by Petitioners are medically necessary and consistent with modern standards of care (*see supra* St. of the Case, § III). This was improper.

Van Hollen v. Federal Election Commission, 811 F.3d 486 (D.C. Cir. 2016), on which DHS has previously relied, is distinguishable. *Van Hollen* simply states that a reviewing court evaluates "the agency's rationale at the time of decision." *Id.* at 495. It does not state that the relevant "decision" date is the date a rule is adopted. If that were the case, then a party could

never challenge an agency's application of a rule to the circumstances of a particular case after the rule's adoption.

Ravenwood v. Daines, No. 06–cv-6355–CJS, 2009 WL 2163105 (W.D.N.Y. July 17, 2009), on which DHS also has previously relied, is likewise distinguishable. *Ravenwood* does not stand for the proposition that a plaintiff cannot challenge the application of a previously adopted administrative rule; it simply notes that the passage of time, in itself, does not render a rule unreasonable. *See id*. at *13. Here, Petitioners do not rely on the mere passage of time to challenge the Regulation, but rather on concrete developments in the law and medical science that have occurred since the time the Regulation was enacted. (*Compare* Good Ans. ¶¶ 42–43 *with* Good Ans. ¶¶ 60–61 & Beal AR 79, ¶ 17; 83, ¶ 36; 86, ¶ 53.) *See also Cruz v. Zucker*, 116 F. Supp. 3d 334, 343 (S.D.N.Y. 2015) (allegations regarding a regulatory bar prohibiting reimbursement for gender-affirming surgeries and other treatments similar to the regulatory bar at issue in *Ravenwood* were sufficient to make out a violation of the federal Medicaid Act).

When laws change and regulations fail to be amended to conform with those changes, the regulations become unlawful and unenforceable; when the regulations nevertheless continue to be enforced against a person, the enforcing agency has violated the law as to that individual. *See Exceptional Persons, Inc. v. Iowa Dep't of Human Servs.*, 878 N.W.2d 247, 252 (Iowa 2016) ("When a statute directly conflicts with a rule, the statute controls.") (internal citation omitted). In *Exceptional Persons*, the very same agency whose actions Petitioners challenge here argued as much—successfully—to the Iowa Supreme Court when defending its decision not to apply a 2009 rule that failed to conform with a subsequently enacted law, arguing that it must apply the law over prior, nonconforming rules. *Id.*

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

The specific legislative history of the Regulation shows that it was reviewed by DHS in 2010, 2012, 2013, 2015, 2015, and 2016. Iowa Admin. Bulletin ARC 2371C (Jan. 1, 2016), *available at*: https://www.legis.iowa.gov/docs/aco/arc/2361C.pdf; Iowa Admin. Bulletin ARC 2164C (Sept. 30, 2015), *available at*: https://www.legis.iowa.gov/docs/aco/arc/2164C.pdf; Iowa Admin. Bulletin ARC 1297C (Feb. 5, 2014), *available at*: https://www.legis.iowa.gov/docs/Aco/arc/1297 C.pdf; Iowa Admin. Bulletin ARC 1052 (Oct. 2, 2013), *available at*: https://www.legis.iowa.gov/docs/aco/arc/1052C.pdf; Iowa Admin. Bulletin ARC 0305C (Sept. 5, 2012), *available at* https://www.legis.iowa.gov/docs/aco/arc/0305C.pdf; Iowa Admin. Bulletin ARC 8714B (May 5, 2010), *available at*: https://www.legis.iowa.gov/docs/aco/arc/8714B.pdf. Despite this review, DHS has failed to put an end to the Regulation's discrimination against transgender Iowans in violation of ICRA and the Iowa Constitution.

DHS's application of the Regulation was arbitrary and capricious. The Court should reverse the agency's denials of Petitioners' requests for Medicaid coverage.

CONCLUSION

The Regulation's categorical exclusion of Medicaid coverage for gender-affirming surgery violates ICRA's express prohibitions against gender-identity and sex discrimination and the Iowa Constitution's equal-protection guarantee. *See* Iowa Code §§ 216.7(1)(a), 216.2(13)(b) (2017); Iowa Const. art. I, §§ 1, 6; Iowa Code § 17A.19(10)(a), (b), (c) (2017). It also has a

disproportionate negative impact on private rights and is arbitrary and capricious. *See* Iowa Code §§ 17A.19(10)(k), (n) (2017).

For the reasons stated above, Petitioners respectfully request the following relief:

a. A declaratory ruling that the Regulation:

   i. violates ICRA's prohibitions on sex and gender-identity discrimination;

   ii. violates the Iowa Constitution's equal-protection guarantee facially and as applied;

   iii. creates a disproportionate negative impact on private rights; and

   iv. is arbitrary and capricious;

b. An order invalidating the Regulation and enjoining any further application of it to deny Medicaid coverage for gender-affirming surgery;

c. An order:

   i. reversing and vacating DHS's affirmance of the MCOs' denials of Ms. Good's request for Medicaid coverage for an orchiectomy and Ms. Beal's request for Medicaid coverage for a vaginoplasty, penectomy, bilateral orchiectomy, clitoroplasty, urethroplasty, labiaplasty, and perineoplasty; and

   ii. requiring DHS to approve coverage for those procedures;

d. An award of attorneys' fees and costs; and

e. Any other relief the Court deems just and proper.

Dated: February 9, 2018

Respectfully submitted,

/s/ Rita Bettis
Rita Bettis, AT0011558
ACLU of Iowa Foundation Inc.
505 Fifth Avenue, Ste. 901
Des Moines, IA 50309-2316
Telephone: 515-207-0567
Facsimile: 515-243-8506
rita.bettis@aclu-ia.org

/s/ F. Thomas Hecht
F. Thomas Hecht, PHV001733
Nixon Peabody LLP
70 West Madison Street, Ste. 3500
Chicago, IL 60601
Telephone: 312-977-4322
Facsimile: 312-977-4405
fthecht@nixonpeabody.com

/s/ Tina B. Solis
Tina B. Solis, PHV001311
Nixon Peabody LLP
70 West Madison Street, Ste. 3500
Chicago, IL 60601
Telephone: 312-977-4482
Facsimile: 312-977-4405
tbsolis@nixonpeabody.com

/s/ Seth A. Horvath
Seth A. Horvath, PHV001734
Nixon Peabody LLP
70 West Madison Street, Ste. 3500
Chicago, IL 60601
Telephone: 312-977-4443
Facsimile: 312-977-4405
sahorvath@nixonpeabody.com

/s/ John Knight
John Knight, PHV001725
ACLU Foundation
LGBT & HIV Project
150 North Michigan Avenue, Ste. 600
Chicago, IL 60601
Telephone: 312-201-9740
Facsimile: 312-288-5225
jknight@aclu-il.org