ELECTRONICALLY FILED JUL 19, 2019 CLERK OF SUPREME COURT

SUPREME COURT NO. 19-1197
POLK COUNTY CASE NO. EQCE084567

IN THE SUPREME COURT OF IOWA

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

Petitioners-Appellants,

v.

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

Respondents-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY, HONORABLE DAVID PORTER, DISTRICT COURT JUDGE

PETITIONERS'-APPELLANTS' BRIEF IN SUPPORT OF APPLICATION FOR TEMPORARY INJUCTION

EXPEDITED RELIEF REQUESTED

Rita Bettis Austen
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: 515-243-3988
Fax: 515-243-8506
Email: Rita.Bettis@aclu-ia.org

Shefali Aurora
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: 515-243-3988

Fax: 515-243-8506
Email: Shefali.Aurora@aclu-ia.org

John A. Knight *
ACLU Foundation
Lesbian Gay Bisexual Transgender & HIV Project
150 North Michigan Avenue, Suite 600
Chicago, Illinois 60601
Telephone: 312-201-9740
E-mail: jaknight@aclu.org

F. Thomas Hecht *
Nixon Peabody LLP
70 West Madison St., Ste. 3500
Chicago, IL 60601
Telephone: 312.977.4322
Fax: 312.977.4405
fthecht@nixonpeabody.com

Tina B. Solis *
Nixon Peabody LLP
70 West Madison St., Ste. 3500
Chicago, IL 60601
Telephone: 312.977.4482
Fax: 312.977.4405
tbsolis@nixonpeabody.com

Seth A. Horvath *
Nixon Peabody LLP
70 West Madison St., Ste. 3500
Chicago, IL 60601
Telephone: 312.977.4443
Fax: 312.977.4405
sahorvath@nixonpeabody.com

ATTORNEYS FOR PLAINTIFFS-PETITIONERS

*Admitted *pro hac vice* in the Iowa District Court case; Motion for admission *pro hac vice* in the Iowa Supreme Court case forthcoming

TABLE OF CONTENTS

I. STATEMENT OF THE CASE **5**

II. INTRODUCTION.. **6**

III. FACTUAL BACKGROUND **11**

A. Standards of Care for Gender Dysphoria....................................... **11**

B. Medicaid Coverage for Gender-Affirming Surgery in Iowa Prior to the Enactment of the Division **14**

C. The Division **16**

D. Mr. Vasquez... **21**

E. Ms. Covington **23**

F. One Iowa... **25**

IV. ARGUMENT **27**

A. Standard for Temporary Injunctive Relief...................................... **27**

B. Petitioners-Appellants have established a likelihood of succeeding on their claims that the Division violates their protected constitutional rights.. **27**

1. The Division violates Equal Protection because it facially discriminates on the basis of being transgender. 28

i. Transgender and non-transgender Iowans eligible for Medicaid are similarly situated for equal-protection purposes. 29

ii. The Division is facially discriminatory under the Iowa Constitution's equal-protection guarantee...30

iii. Discrimination against transgender people should be reviewed under heightened scrutiny. 32

a. Iowa's four-factor test for ascertaining the appropriate level of equal-protection scrutiny mandates applying heightened scrutiny to classifications based on transgender identity. 32

b. Factor one, the history of invidious discrimination against a group by the classification, supports heightened scrutiny. 34

c. Factor two, the relationship between transgender status and the ability to contribute to society, supports heightened scrutiny. 38

d. Factor three, the immutability of the trait at issue, supports heightened scrutiny. 40

e. Factor four, the political powerlessness of the class, supports heightened scrutiny. 40

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

v. The Division cannot survive intermediate or strict scrutiny. 45

vi. The Division cannot survive rational-basis review. 46

2.The Division violates Equal Protection because it was motivated by animus toward transgender people. 52

3.The Division violates the Iowa Constitution's Single-Subject rule. 57

4. The Division Violates Iowa's Title Rule. 69

5.The Division violates the Iowa Constitution's Inalienable Rights clause. 75

C. Petitioners-Appellants will continue to be substantially injured if this Court does not enjoin Respondents from enforcing the Division, and the balance of hardships warrants injunctive relief. 80

D. There is no adequate legal remedy available. 86

E. Petitioners'-Appellants' Claims Are Ripe. 93

1. Petitioners'-Appellants' claims require no further factual development. 94

2. Withholding adjudication will cause Petitioners-Appellants significant harm. 100

3. The futility of further administrative appeals makes petitioners' claims ripe...102

V. CONCLUSION 107

I. STATEMENT OF THE CASE

Petitioners-Appellants moved for temporary injunctive relief in the Iowa District Court for Polk County under the Iowa Constitution, arguing that Division XX of House File 766 ("the Division"), to be codified at Iowa Code § 216.7(3) (2019), violated Petitioners'-Appellants' constitutional rights because it: (1) violates equal protection by facially discriminating on the basis of transgender status, and cannot survive either heightened scrutiny or rational basis review; (2) violates equal protection because it was motivated by animus toward transgender people; (3) violates Iowa's Single-Subject Rule; (4) violates Iowa's Title Rule; and (5) violates Iowa's Inalienable Rights clause.

Respondents-Appellees resisted Petitioners'-Appellants' motion for a temporary injunction, and filed a motion to dismiss Petitioners'-Appellants' claims. On July 18, 2019, the District court denied Petitioners'-Appellants' motion for a temporary injunction and granted Respondents' motion to dismiss. *Covington et al. v. Reynolds et al.*, EQCE 084567 (July 18, 2019 Order Granting Dismissal and Denying Temp. Injunction) (hereinafter "Order").

On July 18, Petitioners-Appellants timely filed notice of appeal of the district court's order denying their motion and dismissing the case. Petitioners-Appellants also filed a Motion for a Temporary Injunction in this Court during the pendency of the appeal and any district court proceedings below on remand. Petitioners-Appellants have separately sought expedited review of the district court's dismissal. This brief is filed in support of Petitioners'-Appellants' Motion for a Temporary Injunction.

II. INTRODUCTION

This action challenges the validity of the Division under the Iowa Constitution. The Division, entitled "Provision of Certain Surgeries or Procedures--Exemption from Required Accommodations or Services," was passed by the Iowa Legislature on April 27, 2019, "deemed of immediate importance," and thus given an immediate effective date upon the Governor's signature. It was enacted with the sole purpose of overturning this Court's recent decision in *Good*. *See Good v. Iowa Dep't of Human Servs.*, 924 N.W.2d 853 (Iowa 2019). Governor Reynolds signed the Division into law on May 3, 2019, https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=hf766, at p. 87.

The Division facially discriminates against transgender Iowans by denying them Iowa Civil Rights Act's ("ICRA") protections against

discrimination in public accommodations related to the provision of publicly funded coverage for health care and reviving the administrative rule struck down as discriminatory in *Good*. Iowa Admin. Code r. 441-78.1(4) (hereinafter "the Regulation"). The intended result of the Division is to deny transgender Iowans Medicaid coverage for medically necessary medical care. Petitioners-Appellants Covington and Vasquez[1] are people who are transgender, which means that their gender identity differs from their birth-assigned sex. On March 8, 2019 this Court struck down Section 441-78.1(4) of the Iowa Administrative Code (the "Regulation"), a provision barring transgender individuals from obtaining Medicaid coverage for medically necessary surgery to treat gender dysphoria, a condition that only affects transgender people. *Good v. Iowa Dep't of Human Servs.*, 924 N.W.2d 853, 862-863 (Iowa 2019).

This Court found in *Good* that the Regulation violated ICRA protections against discrimination on the basis of gender identity in public

[1] Mr. Vasquez and his wife, Tammi, have not been able to save up enough money yet to legally change both of their last names from DeLathower to Vasquez, a family name on Mr. Vasquez's side. Mr. Vasquez associates the name DeLathower with his former name before he began living full time as himself, a man, and experiences discomfort when he is referred to using that name. He and his wife intend to change their last names together as soon as possible, and they identify with the name Vasquez. Mr. Vasquez would prefer to be referred to either by his first name, "Aiden", or "Mr. Vasquez" when possible.

accommodations, because the Regulation excluded transgender Iowans from coverage under Iowa Medicaid for medically necessary gender-affirming surgery to treat gender dysphoria—a serious medical condition which only arises in transgender people—while otherwise providing coverage for medically necessary surgery. *Id.*

This Court also recognized that the history of the Regulation revealed its discriminatory intent to "expressly exclude[] Iowa Medicaid coverage for gender-affirming surgery specifically because this surgery treats gender dysphoria of transgender individuals." *Id.* at 862. The Court decided that it did not need to reach the constitutional equal protection holding of the district court below, which found that the Regulation also violated the Iowa Constitutional guarantee to equal protection. *EerieAnna Good and Carol Beal*, Case No. CVCV054956 and CVCV055470 (consolidated), Ruling on Pets. for Judicial Review, at *33 (Iowa Dist. Ct. June 6, 2018), available at https://www.aclu-ia.org/sites/default/files/6-7-18_transgender_medicaid_decision.pdf.

Respondents have conceded that if the Division is allowed to stand, Iowa Medicaid will continue its policy of denying transgender Iowans on Medicaid coverage for life-saving, medically necessary surgery to treat their gender dysphoria, again enforcing the exact same Regulation this Court

declared illegal in *Good*. (Defs.' Resistance to Mot. for Injunctive Relief at 4) ("[T]he administrative rule [is] currently in effect . . . ."). In the case of Mr. Vasquez, the Division is *already* interfering with his ability to access their medically necessary care, and absent a temporary injunction he will continue to suffer that harm; likewise, Ms. Covington's care will soon be disrupted absent an injunction by this Court. (Ex. 1: Vasquez Aff. ¶¶ 19-25; Ex. 6: Covington Aff. ¶¶ 29-31; *see also* Ex. 2: Nisly/Vasquez Aff.; Ex. 3: Daniels Letter; Ex. 4: Eadeh/Vasquez Letter; Ex. 5: Watters-Vasquez Letter; Ex. 7 Nisly/Covington Aff.; Ex. 8: Eadeh/Covington Letter; Ex. 9: Watters/Covington Letter). Both Petitioners-Appellants planned to have gender-affirming surgery in September 2019. (Ex. 1: Vasquez Aff. ¶ 19; Ex. 6: Covington Aff. ¶ 26). Mr. Vasquez and Ms. Covington began the process of obtaining preapproval for Medicaid coverage of their gender-affirming surgeries after the recent Iowa Supreme court decision. (Ex. 6: Covington Aff. ¶ 20 ; Ex. 1: Vasquez Aff. ¶ 18). But they have been and will soon be, respectively, unable to complete the process and receive the requisite preapproval as a result of the Division. (Ex. 1: Vasquez Aff. ¶¶ 19-22; Ex. 6: Covington Aff. ¶¶ 29-30). Their denials pursuant to the Regulation is certain, not speculative. By singling out transgender Iowans for discriminatory treatment in this way, the Division intentionally and facially violates the rights

of Petitioners-Appellants Ms. Covington and Mr. Vasquez, and members of Petitioner One Iowa, to equal protection under the Iowa Constitution.

The Division also violates the Iowa Constitution's anti-logrolling provisions. Iowa Const. art. III, § 29. The "Single-Subject Rule" requires all matters in a piece of legislation to be germane to one another; the "Title Rule" requires the title of legislation to provide fair notice of its subject matter. Here, the General Assembly passed a bill containing matters not germane to each other—appropriations and protections against discrimination in public accommodations—and expressly *acknowledged* that it was doing so. Additionally, the title of the legislation, which pertained only to appropriations, provided no notice that the legislation created an exception to the substantive nondiscrimination protections under ICRA for transgender Iowans who rely on Medicaid to obtain their medically necessary healthcare. The Division is a quintessential example of unconstitutional logrolling.

Additionally, the Division violates the Iowa Constitution's inalienable-rights clause, which prohibits legislative action that impacts an inalienable right. The Division arbitrarily and unreasonably bars transgender Iowans who receive Medicaid coverage from obtaining medically necessary surgical care. The inalienable right to receive such care for Iowans who receive Medicaid

arises from its medical necessity and its connection to the expression of transgender Iowans' gender identity. The Division interferes with this right.

For these reasons, and as discussed in further detail below, Petitioners-Appellants seek an order temporarily enjoining enforcement of the Division during the pendency of Petitioners'-Appellants' appeal and any further district court proceedings below on remand.

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. (Ex.10: Ettner Aff. ¶ 12). The criteria for diagnosing gender dysphoria are set forth in Section 302.85 of DSM-V. (Ex.10: Ettner Aff. ¶13; Ex. 2: Nisly/Vasquez Aff., at 1; Ex. 7 Nisly/Covington Aff. at 1).

Gender dysphoria, if left untreated, can lead to serious medical problems, including clinically significant psychological distress and dysfunction, debilitating depression, and, for some people without access to appropriate medical care and treatment, suicidality and death. (Ex. 10: Ettner Aff. ¶ 15 ("Studies show a 41-43% rate of suicide attempts among this

population [individuals with severe gender dysphoria] without treatment, far above the baseline of 4.6% for North America." (citation omitted))). The standards of care for treating gender dysphoria ("Standards of Care" 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* The World Professional Association of Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Nonconforming People*, https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf. (*Id.* ¶ 16).

The Standards of Care are widely accepted evidence-based medical protocols that articulate professional consensus to guide health-care providers in medically managing gender dysphoria. (Ex. 10: Ettner Aff. ¶ 17). They are recognized as authoritative by the American Medical Association, the American Psychiatric Association, and the American Psychological Association, among others. (*Id.* ¶ 16). They are, in fact, so well-established that federal courts have declared that a prison's failure to provide health care in accordance with the Standards may constitute cruel and unusual punishment under the Eighth Amendment of the US Constitution. *Rosati v. Igbinoso*, 791 F.3d 1037, 1039–40 (9th Cir. 2015); *De'lonta v. Johnson*, 708

F.3d 520, 522–26 (4th Cir. 2013); *Fields v. Smith*, 653 F.3d 550, 553–59 (7th Cir. 2011); *Keohane v. Jones*, No. 4:16CV511a– MW/CAS, 2018 WL 4006798, at *3 (N.D. Fla. Aug. 22, 2018).

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

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

By the mid-1990s, there was consensus within the medical community that surgery was the only effective treatment for many individuals with severe gender dysphoria. (Ex. 10: Ettner Aff. ¶ 36). More than three decades of research confirms that surgery to modify primary and secondary sex characteristics and anatomy to align with a person's gender identity is

therapeutic, and therefore effective treatment for gender dysphoria. (*Id.* at ¶ 28, 39). For severely gender-dysphoric patients, surgery is, in fact, the only effective treatment. (*Id.* at ¶ 42).

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

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

As this Court already recognized in the *Good* case, the history of the Regulation that banned coverage for gender-affirming surgery demonstrated that the bar discriminated against transgender Iowans who receive Medicaid. *Good*, 924 N.W.2d at 862. Forty years ago, in *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980), the Eighth Circuit found that "Iowa[] Medicaid['s] . . . specific[] exclu[sion] [of] coverage for sex reassignment surgery" violated the federal Medicaid Act. *Id.* at 547–48. The exclusion was improper because, "[w]ithout any formal rulemaking proceedings or hearings," DHS created "an

irrebuttable presumption that the procedure of sex reassignment surgery [could] never be medically necessary when the surgery [was] a treatment for transsexualism." *Id*. at 549. This ban "reflect[ed] inadequate solicitude for the applicant's diagnosed condition, the treatment prescribed by the applicant's physicians, and the accumulated knowledge of the medical community." *Id*. It also violated one of Congress's core objectives in passing the Medicaid Act—that "medical judgments" would "play a primary role in the determination of medical necessity." *Id*.

Following the *Pinneke* decision, DHS initiated its normal rulemaking process. 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 struck down in *Good*. *Good*, 924 N.W.2d at 862; *see also Smith v. Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001) (upholding the Regulation based on inaccurate and outdated research in a challenge asserting only federal claims; no challenge under ICRA or Iowa Constitution was asserted or considered.)

In March 2019, this Court, like the District court below, found that the Medicaid Regulation was discriminatory as a violation of ICRA protections against discrimination in public accommodations on the basis of gender identity. *Good,* 924 N.W.2d at 853, 862-863; *Good*, No. CVCV054956, at

*12, 29. It recognized that a medical consensus had emerged that gender dysphoria is a serious medical condition and that treatment for gender dysphoria is medically necessary for many transgender people. *Good,* 924 N.W.2d at 862; *Good*, No. CVCV054956, at *28, 33; (Ex. 10: Ettner Aff. ¶ 43)

However, despite the Court's decision in *Good,* through enactment of the Division, the discriminatory Regulation, which Respondents never removed from the Iowa Administrative Code, was expressly reinstated, and is in effect. *See* Iowa Admin. Code r. 441-78, *available at* https://www.legis.iowa.gov/docs/iac/chapter/05-22-2019.441.78.pdf (current as of May 22, 2019); (Defs.' Resistance to Mot. for Injunctive Relief at 4) ("[T]he administrative rule [is] currently in effect . . . .").

C. The Division

On April 27, 2019, the last day of the Iowa legislative session, in a highly divided vote, the Iowa legislature amended the annual Health and Human Services Appropriations bill (the "Act"), House File 766, with the Division. In full, it provides:

DIVISION XX
PROVISION OF CERTAIN SURGERIES OR PROCEDURES
—— EXEMPTION FROM REQUIRED
ACCOMMODATIONS OR SERVICES

Sec. 93. Section 216.7, Code 2019, is amended by adding the following new subsection:

NEW SUBSECTION. 3. This section shall not require any state or local government unit or tax-supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder.

Sec. 94. EFFECTIVE DATE. This division of this Act, being deemed of immediate importance, takes effect upon enactment.

2019 Iowa Acts, House File 766, Division XX, https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=hf766, at p. 87. The Division thus adds a new subsection to section 216.7, which is the section in ICRA that provides protection against discrimination in public accommodations on the basis of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability. Iowa Code § 216.7. The Governor signed the Division into law on May 3, 2019.

Thus, the relevant section of ICRA, now including new subsection 3 pursuant to the Division, provides as follows:

216.7 Unfair practices — accommodations or services.

1. It shall be an unfair or discriminatory practice for any owner, lessee, sublessee, proprietor, manager, or superintendent of any public accommodation or any agent or employee thereof:

a. To refuse or deny to any person because of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability the accommodations,

advantages, facilities, services, or privileges thereof, or otherwise to discriminate against any person because of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability in the furnishing of such accommodations, advantages, facilities, services, or privileges.

b. To directly or indirectly advertise or in any other manner indicate or publicize that the patronage of persons of any particular race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability is unwelcome, objectionable, not acceptable, or not solicited.

2. This section shall not apply to:

a. Any bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose.

b. The rental or leasing to transient individuals of less than six rooms within a single housing accommodation by the occupant or owner of such housing accommodation if the occupant or owner or members of that person's family reside therein.

3. This section shall not require any state or local government unit or tax-supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder.

Iowa Code § 216.7 (as amended by the Division, 2019 Iowa Acts, House File 766) (emphasis added to show the new section challenged in this case).

The Division specifically carves out an exception to ICRA protections afforded to transgender Iowans from discrimination in access to public

accommodations. The Iowa Supreme Court in *Good* found that the Regulation's denial of Medicaid coverage to transgender Iowans for their medically necessary gender-affirming surgery violated these provisions of ICRA, and the Division has now taken that civil rights protection away from transgender Iowans with the purpose of restoring the Regulation's ban on coverage.

Legislators' contemporaneous comments also demonstrate its intent to undo the *Good* case by specifically authorizing this form of discrimination against transgender Iowans on Medicaid under ICRA as contained in the discriminatory Regulation. *See, e.g.,* Tony Leys and Barbara Rodriguez, *Iowa Republican Lawmakers Ban Use of Medicaid Dollars on Transgender Surgery*, Des Moines Register (Apr. 27, 2019), https://www.desmoinesregister.com/story/news/politics/2019/04/26/iowa-legislature-senate-republicans-propose-ban-medicaid-money-transgender-surgery-lawsuit-courts/3578920002/ (Sen. Mark Costello said the intent of the bill was "to change the administrative code back to the way it was for years before the lawsuit. He said he didn't feel such procedures are 'always medically necessary.'")

The Governor's comments demonstrate the same animus toward the *Good* decision, and toward transgender Iowans, as the comments of the

Division's legislative supporters. The Governor publicly stated her intent to enforce what she described as the state's long-standing policy of denying Medicaid recipients coverage for medically necessary gender-affirming care that had been in place prior to the *Good* decision: "This [the legislation] takes it back to the way it's always been. This has been the state's position for decades." *See* Caroline Cummings, *Gov. Reynolds stands by signing bill with Medicaid coverage ban for transgender surgery*, CBS 2/Fox 28 (May 7, 2019), *available at* https://cbs2iowa.com/news/local/gov-kim-reynolds-stands-by-decision-to-sign-budget-bill-with-transgender-surgery-ban. In signing the legislation, the Governor "acknowledged the *Good* decision but declined to weigh in on future lawsuits." *Id*. She made her intent to revert to the state's pre-*Good* policy of denying coverage under Iowa Medicaid plain: "The Supreme Court in their decision pointed out the statute. That gives the legislature . . . to go back and address it. They did that." *Id.* (omission in original). *See also* Stephen Gruber-Miller, *Kim Reynolds Signs Bill To Fund Health Programs, Cut Planned Parenthood, Restrict Money For Transgender Iowans' Surgery*, Des Moines Register (May 3, 2019), *available at* https://www.desmoinesregister.com/story/news/politics/2019/05/03/kim-reynolds-health-care-budget-transgender-surgeries-planned-parenthood-sex-education-iowa/1095376001 ("'This narrow provision simply clarifies that

Iowa's Civil Rights Act does not require taxpayer dollars to pay for sex reassignment and other similar surgeries. This returns us to what had been the state's position for years,' Reynolds spokesman Pat Garrett said in a statement.").

D. Mr. Vasquez

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

In early 2016, Mr. Vasquez began hormone therapy. (Ex. 1: Vasquez Aff., ¶ 7). In May 2016, he legally changed his first name. (*Id.* ¶ 10). In September 2016 he underwent a medically necessary double mastectomy as part of his treatment for gender dysphoria. (*Id.* ¶ 11). In October 2016 Mr. Vasquez amended the gender marker on his birth certificate, driver's license, and social-security card to reflect his male identity. (*Id.* ¶ 12). Mr. Vasquez's gender dysphoria exacerbates his depression and anxiety. He is distressed and

very uncomfortable with his genitalia, which do not align with his male gender identity. (*Id.* ¶ 13; 26).

Mr. Vasquez's health-care providers have also uniformly concluded that surgery is necessary to treat his gender dysphoria. (*See* Ex. 2 Nisly/Vasquez Aff.; Ex. 3: Daniels/Vasquez Letter; Ex. 4: Eadeh/Vasquez Letter; Ex. 5: Watters/Vasquez Letter). Mr. Vasquez's primary care physician, Dr. Nicole Nisly, concluded that "[g]ender affirming bottom surgery is medically necessary to treat Aiden's gender dysphoria…" (Ex. 2: Nisly/Vasquez Aff., at 1).

Following the Iowa Supreme Court's decision Mr. Vasquez began the process of obtaining preapproval for his gender-affirming surgery. (Ex. 1: Vasquez Aff. ¶ 18). He had scheduled a pre-operative consultation with his surgeon, Dr. Gast, for May 30, 2019, in preparation for his gender-affirming surgery to take place approximately September 2019. (Ex. 1: Vasquez Aff. ¶ 20). However, as a result of the Division, Dr. Gast's office was unable to confirm coverage under Medicaid for the preoperative appointment and informed him that they also could not assure preapproval for his surgery. (Ex. 1: Vasquez Aff. ¶¶ 22-23). As a result, he was forced to cancel the consultation. (Ex. 1: Vasquez Aff. ¶¶ 24-25). Because of the Division, Mr. Vasquez has been forced to indefinitely postpone his medically necessary

procedure. (Ex. 1: Vasquez Aff. ¶ 25-27). If the Division is not enjoined, Mr. Vasquez will continue to be deprived of the gender-affirming surgery for which he has a serious medical need. (Ex. 1: Vasquez Aff. ¶¶ 22-25).

E. Ms. Covington

Mika Covington is a twenty-eight-year-old woman who is transgender and who first questioned her gender identity when she was six years old. (Ex. 6: Covington Aff. ¶¶ 1, 3-4). She has expressed her female identity in various ways since high school, and in 2009 began the social transition to living as female full time. (Ex. 6: Covington Aff. ¶¶ 4-5, 7). In 2014, Ms. Covington legally changed her name. (Ex. 6: Covington Aff. ¶ 8). In 2015, Ms. Covington was diagnosed with gender dysphoria and began hormone therapy. (Ex. 6: Covington Aff. ¶ 11). In 2019, she amended the gender makers on her passport and social-security card to reflect her female identity. (Ex. 6: Covington Aff. ¶ 16).

As part of her treatment for gender dysphoria, Ms. Covington has lived full time as a woman in every aspect of her life for several years. (Ex. 6: Covington Aff. ¶ 15; Ettner Aff at ¶ 15; Standards of Care at 9–10, https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf.) Ms. Covington's gender dysphoria causes her to experience severe depression and anxiety. (Ex. 6: Covington Aff. ¶ 32). She is distressed and

very uncomfortable with her genitalia, which does not align with her gender identity and intensifies her depression and anxiety. (*Id.* ¶¶ 14, 19, 32).

Ms. Covington's health-care providers have uniformly concluded that surgery is necessary to treat her gender dysphoria. (Ex. 7 Nisly/Covington Aff.; Ex. 8: Eadeh/Covington Letter; Ex. 9: Watters/Covington Letter). For example, Ms. Covington's primary care physician, Dr. Nicole Nisly, has determined that "[g]ender affirming surgery is medically necessary to treat Mika's gender dysphoria" in accord with the standards and guideline set forth by the World Professional Association for Transgender Health ("WPATH"). (Ex. 7: Nisly/Covington Aff., at 1). Two psychologists have also determined that gender-affirming surgery is appropriate to treat her gender dysphoria under the WPATH standards. (Ex. 8: Eadeh/Covington Letter; Ex. 9: Watters/Covington Letter; Ex. 6: Covington Aff. ¶ 28).

Following the Iowa Supreme Court's decision in *Good*, Ms. Covington began the process to obtain preapproval for her gender-affirming surgery. (Ex. 6: Covington Aff. ¶ 24). Ms. Covington's primary care physician, Dr. Nicole Nisly, has referred her for surgery. (Ex. 7: Nisly/Covington Aff., at 1). Ms. Covington has also been evaluated by Elizabeth Watters and Hana-May Eadeh, two psychologists at the University of Iowa Hospitals and Clinics, who approved her for gender-affirming surgery to treat her gender dysphoria under

the WPATH standards. (Ex. 8: Eadeh/Covington Letter; Ex. 9: Watters/Covington Letter). According to her care plan with Dr. Nisly, she intended to schedule her surgery to occur at the University of Iowa Hospitals and Clinics in September 2019. (Ex. 6: Covington Aff. ¶ 26).

However, because of the Division, her request for preapproval of coverage for surgery to treat her gender dysphoria will be denied by Iowa Medicaid, and her treatment plan will be seriously disrupted. (Ex. 6: Covington Aff. ¶¶ 30-31). If the Division is not enjoined, Ms. Covington will be deprived of the gender-affirming surgery for which she has a serious medical need. (Ex. 6: Covington Aff. ¶¶ 30-33).

F. One Iowa

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

One Iowa has a major focus on increasing healthcare access for transgender Iowans. (*Id.* ¶ 55). Working with healthcare providers who specialize in issues related to transgender individuals, they help to inform other healthcare professionals and agencies about how to address transgender people who might be transitioning, and what kind of resources exist to help them through this process. (*Id.*)

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

IV. ARGUMENT

A. Standard for Temporary Injunctive Relief

The Iowa Rules of Civil Procedure establish that the Supreme Court may grant a temporary injunction "when the petition, supported by affidavit, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably injure the plaintiff." Iowa Rs. Civ. P. 1.1502(1); 1.1506(2). "A temporary injunction is a preventive remedy to maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation," *Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 95 (Iowa 1985), specifically in situations where a plaintiff is likely to succeed on the merits of her claim and is at risk of irreparable harm absent immediate judicial intervention, *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001).

Petitioners-Appellants easily meet the standard for this relief.

B. Petitioners-Appellants have established a likelihood of succeeding on their claims that the Division violates their protected constitutional rights.

A temporary injunction is warranted in this case because Petitioners-Appellants are likely to succeed on the merits of their Iowa Constitutional claims that: (1) the Division violates Petitioners'-Appellants' rights to equal protection because it is facially discriminatory; (2) the Division violates

Petitioners'-Appellants rights to equal protection because it was motivated by animus; (3) the Division violates the Single-Subject Rule; (4) the Division violates the Title Rule; and (5) the Division violates the Inalienable-Rights clause. Petitioners-Appellants need only show a likelihood of success on one of these claims to justify temporary injunctive relief.

1. The Division violates Equal Protection because it facially discriminates on the basis of being transgender.

The district court in the *Good* case correctly concluded that the state facially violates the Iowa Constitution's equal-protection guarantee when it denies transgender Iowans Medicaid coverage for medically necessary gender-affirming surgery, while as a general matter providing coverage to all Medicaid beneficiaries for their medically necessary care. *Good*, No. CVCV054956, at *20-34. In so finding, it carefully reviewed the challenged Regulation in light of the appropriate analysis to decide questions brought under Iowa's equal protection guarantee, as set forth in *Varnum*. *Good*, No. CVCV054956, at *20-33 (determining heightened scrutiny applies under state equal protection); *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009). While the district court below declined to reach the temporary injunction inquiry into likelihood of success on the merits, (Order at 10), the same discrimination in the Division also fails for the same reasons that the District court in *Good* properly found that Regulation resuscitated by the Division does.

i. Transgender and non-transgender Iowans eligible for Medicaid are similarly situated for equal-protection purposes.

The Iowa Constitution contains a two-part equal-protection guarantee. Iowa Const. art. I, §§ 1, 6. Although this Court looks to federal courts' interpretation of the U.S. Constitution in construing parallel provisions of the Iowa Constitution, it "jealously reserve[s] the right to develop an independent framework under the Iowa Constitution." *NextEra Energy Res., LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 45 (Iowa 2012). This is because, as this Court recently reaffirmed, the rights guaranteed to individuals under the Iowa Constitution have critical, independent importance, and the courts play a crucial role in protecting those rights. *Godfrey v. State*, 898 N.W.2d 844, 864–65, 869 (Iowa 2017).

Iowa's constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike under the law. *Gartner 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 people who are similarly situated with respect to the legitimate purposes of the law." *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009) (quotation marks omitted); *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002).

Here, the Division facially discriminates against transgender Medicaid recipients by specifically authorizing the discriminatory denial of medically necessary gender-affirming surgery rejected in the *Good* case. As the district court correctly concluded in the *Good* case, transgender and non-transgender Iowans eligible for Medicaid—the public accommodation that administers publicly-financed healthcare insurance most directly impacted by the Division—are similarly situated for equal-protection purposes. *Good*, No. CVCV054956, at *21-22. They are the same in all legally relevant ways because Medicaid recipients—transgender or not—share a financial need for medically necessary treatment. *In re Estate of Melby*, 841 N.W.2d 867, 875 (Iowa 2014) ("The Medicaid program was designed to serve individuals and families lacking adequate funds for basic health services . . . ."). Despite medical necessity, the Division expressly authorizes the state to discriminate against transgender Medicaid recipients by denying Petitioners-Appellants and other transgender individuals coverage for medically necessary health care based on nothing more than the fact that they are transgender.

ii. The Division is facially discriminatory under the Iowa Constitution's equal-protection guarantee.

As discussed above, and as the district court recognized already in *Good*, No. CVCV054956, at *17-20, 29-30, the Division facially discriminates against transgender Medicaid recipients.

The Division is facially discriminatory against transgender Medicaid recipients because it singles out transgender recipients, such as Petitioners-Appellants, by authorizing the denial of coverage for medically necessary care expressly because they are transgender through the reinstatement of the discriminatory Regulation that bars such coverage. *See* Iowa Admin. Code r. 441-78.1(4) (2017) (excluding coverage for "[p]rocedures related to transsexualism . . . [or] gender identity disorders" and "[s]urgeries for the purposes of sex reassignment") (invalidated by this Court in the *Good* case as discrimination in public accommodations under ICRA).

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009), is instructive. In *Varnum*, the "benefit denied by the marriage statute—the status of civil marriage for same-sex couples—[was] so closely correlated with being homosexual as to make it apparent the law [was] targeted at gay and lesbian people as a class." *Id*. at 885 (quotation marks omitted). Here, gender transition through social transition and medical interventions, such as surgical treatment for gender dysphoria, "is so closely correlated with being [transgender] as to make it apparent" that the discrimination specifically authorized by the Division, allowing for the denial of such treatment, "is targeted at [transgender] people as a class." *See id.* (quotation marks omitted).

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

This Court should hold, as the district court did in the *Good* case, that heightened scrutiny applies to classifications that discriminate against transgender individuals. First, the factors the Court relies on to decide whether a heightened level of review should apply to an identifiable group strongly support applying intermediate or strict scrutiny to transgender Iowans. Second, discrimination against transgender Iowans is a form of gender-based discrimination, which this Court reviews under intermediate scrutiny.

a. Iowa's four-factor test for ascertaining the appropriate level of equal-protection scrutiny mandates applying heightened scrutiny to classifications based on transgender identity.

The highest and most probing level of scrutiny under the Iowa Constitution—strict scrutiny—applies to classifications based on race, alienage, or national origin and those affecting fundamental rights. *Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009); *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998). Under this approach, classifications are presumptively invalid and must be "narrowly tailored to serve a compelling state interest." *In re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004).

A middle level of scrutiny called "intermediate scrutiny" exists between rational-basis review—discussed below—and strict scrutiny.

Varnum, 763 N.W.2d at 880. Intermediate scrutiny, like strict scrutiny, presumes classifications are invalid; it requires the party seeking to uphold a classification to demonstrate that it is "substantially related" to achieving an "important governmental objective[]." *Sherman*, 576 N.W.2d at 317 (quotation marks omitted). The justification for the classification must also be "genuine, not hypothesized or invented *post hoc* in response to litigation" and must not depend on "overbroad generalizations." *United States v. Virginia*, 518 U.S. 515, 533 (1996). This Court's decisions confirm that at least intermediate scrutiny applies to classifications based on gender, illegitimacy, and sexual orientation. *Varnum*, 763 N.W.2d at 895–96; *NextEra Energy Res., LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 46 (Iowa 2012).

This Court applies a four-factor test to determine the appropriate level of scrutiny under the Iowa Constitution's equal-protection guarantee. *Varnum*, 763 N.W.2d at 886–87. The factors 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 subject class." *Id.* at 887–88.

In *Varnum*, the Court cautioned against using a "rigid formula" to determine the appropriate level of equal-protection scrutiny and refused "to view all the factors as elements or as individually demanding a certain weight in each case." *Id*. at 886–89. Although no single factor is dispositive, the first two "have been critical to the analysis and could be considered as prerequisites to concluding a group is a suspect or quasi-suspect class," and the last two "supplement the analysis as a means to discern whether a need for heightened scrutiny exists" beyond rational basis. *Id*. at 889.

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

b. Factor one, the history of invidious discrimination against a group by the classification, supports heightened scrutiny.

In *Varnum*, the Court relied on national statistics, case law from other jurisdictions, and other sources to find that lesbian and gay individuals have experienced a history of invidious discrimination and prejudice. *Varnum 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 Court's reasoning in *Varnum*, particularly the General Assembly's decision to add sexual orientation to ICRA as a protected class in 2007. *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*. at 890.

Like sexual orientation, gender identity was added in 2007 as a protected class to both ICRA and the Iowa Anti-Bullying and Anti-Harassment Act. Iowa Code § 216.7(1)(a) (2018); Iowa Code § 280.28(2)(c) (2018). And like discrimination based on sexual orientation, discrimination based on transgender status has been extensively documented. James, S.E., et al., *The Report of the 2015 U.S. Transgender Survey*, Washington, DC: National Center for Transgender Equality (2016), https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF ("Transgender Survey"). Published in 2016, the Transgender Survey describes the discrimination, harassment, and even violence that transgender individuals encounter at school, in the workplace, when trying to find a place to live, during encounters with police, in doctors' offices and emergency rooms, at the hands of service providers and businesses, and in other aspects of life. *Id.*

In Iowa, widespread discrimination against transgender individuals has been documented by Professor Len Sandler and the University of Iowa

College of Law's Rainbow Health Clinic. Len Sandler, *Where Do I Fit In? A Snapshot of Transgender Discrimination in Iowa* (June 16, 2016), https://law.uiowa.edu/sites/law.uiowa.edu/files/Where%20Do%20I%20Fit%20In%20%20A%20Snapshot%20of%20Transgender%20Discrimination%20June%202016%20Public%20Release.pdf (the "Rainbow Health Clinic Report").

Transgender people nationally and in Iowa continue to face discrimination. And to the extent they have seen progress in protecting their rights, there is considerable backlash against that progress—including, unfortunately, through discriminatory legislation introduced in the most recent Iowa General Assembly. *See Trump's Record of Action Against Transgender People*, National Center for Transgender Equality, https://transequality.org/the-discrimination-administration; Sarah Tisinger, *Branstad Calls Obama's Transgender Policy 'Blackmail,'* WQAD (May 18, 2016), https://wqad.com/2016/05/18/branstad-calls-obamas-transgender-bathroom-policy-blackmail; Jeremy W. Peters et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. Times (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html; Brianne Pfannenstiel & Courtney Crowder, *Transgender 'Bathroom Bill' Introduced in Iowa House, Though Support*

Lags, Des Moines Register (Jan 31., 2018), https://www.desmoinesregister.com/story/news/politics/2018/01/31/transgender-bathroom-bill-iowa-lgbtq/1077963001/; Iowa H.B. 2164, 87 Gen. Assem. (Jan. 31, 2018) (if passed, law would deprive transgender K through 12 students in Iowa of access to boys' and girls' restrooms consistent with their gender identity); Lee Rood, *Nursing Facility Doors Slam Shut for Transgender Iowan*, Des Moines Register (May 18, 2016), https://www.desmoinesregister.com/story/news/investigations/readers-watchdog/2016/05/18/nursing-facility-doors-slam-shut-transgender-iowan/84490426. A number of these instances of discrimination against transgender individuals parallel examples cited by the *Varnum* court. *Compare Varnum*, 763 N.W.2d at 889 (describing ban on gay and lesbian individuals serving in the military as evidence of history of invidious discrimination) *with* Abby Phillip, Thomas Gibbons-Neff & Mike DeBonis, *Trump Announces That He Will Ban Transgender People From Serving in the Military*, WASH. POST (Jul. 26, 2017), https://www.washingtonpost.com/world/national-security/trump-announces-that-he-will-ban-transgender-people-from-serving-in-the-military/2017/07/26/6415371e-723a-11e7-803f-a6c989606ac7_story.html?utm_term=.0973fb923c58.

Of course, the worst and most recent example of animus against transgender people in Iowa is the Division itself, which intentionally and facially discriminates against transgender Iowans by stripping them of the right to nondiscrimination in Medicaid under ICRA following this Court's *Good* decision. Legislators' comments in debating the Division, discussed further below, illustrate the profound animus faced by transgender Iowans.

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

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

The second *Varnum* factor examines whether the class members' characteristics are related in any way to their ability to contribute to society. *Varnum 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 the Iowa General Assembly has outlawed discrimination based on gender identity shows that it recognizes

transgender Iowans' ability to contribute to society. *Compare Varnum*, 763 N.W.2d at 891 (finding that the Iowa legislature's prohibition against sexual-orientation discrimination sets forth "the public policy . . . that sexual orientation is not relevant to a person's ability to contribute to a number of societal institutions") *with* Iowa Code § 216.7(1) (barring discrimination based on "sexual orientation [or] gender identity"). The same is true of various letters that Iowa corporations submitted to the Iowa Civil Rights Commission in support of the 2007 ICRA amendments. 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. (*Id*.) Additionally, the evidence in the record includes unrebutted expert testimony that "[m]edical science recognizes that transgender individuals represent a normal variation of the diverse human population" and that "transgender people are fully capable of leading healthy, happy and productive lives." (Ex. 10: Ettner Aff. ¶ 32). "Being transgender does not affect a person's ability to be a good employee, parent, or citizen." (*Id*.)

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

d. Factor three, the immutability of the trait at issue, supports heightened scrutiny.

The third *Varnum* factor is satisfied when a trait is "so central to a person's identity that it would be abhorrent for the government to penalize a person for refusing to change [it]." *Varnum v. Brien*, 763 N.W.2d 862, 893 (Iowa 2009) (quotation marks omitted).

Gender identity, like sexual orientation, is a trait central to a person's identity. (Ex. 10: Ettner Aff. at ¶ 9, 32-34). The WPATH Standards of Care and other medical literature in the record demonstrate that gender identity is not subject to change through outside influence. (*Id.* ¶. 32-34). *See also* Standards of Care at 16, https://www.wpath.org/media.cms/Documents/SOC%20v7/SOC%20V7_English.pdf ("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."); (Ex. 10: Ettner Aff. ¶ 23-25) (gender identity is biologically based, innate or fixed at a very early age, and cannot be altered).

e. Factor four, the political powerlessness of the class, supports heightened scrutiny.

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 (quotation marks omitted).

Varnum 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 intermediate scrutiny because, for example, "females enjoyed at least some measure of political power when the Supreme Court first heightened its scrutiny of gender classifications." *Id.*

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. *Id*. (emphasis in original) (quotation marks omitted). As a result, increased political standing or power does not prevent a court from utilizing heightened scrutiny.

Transgender individuals in Iowa meet this standard. A 2016 study by the Williams Institute estimates that just 0.31 percent of Iowans identify as

transgender. Andrew R. Flores, Jody L. Herman, Gary J. Gates & Taylor N. T. Brown, *How Many Adults Identify as Transgender in the United States?*, Williams Inst. (Jun. 2016), http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf. Transgender individuals also face staggering rates of poverty and homelessness; the National Center for Transgender Equality estimates that nearly one-third of transgender people fall below the poverty line, a rate more than twice that of the general U.S. population, and nearly-one third of transgender people have experienced homelessness. Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality 5 (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf. Transgender individuals also face barriers to political representation. *See, e.g.*, Philip E. Jones, et al., *Explaining Public Opinion Toward Transgender People, Rights, and Candidates*, 82 PUB. OPINION Q. 252, 265 (Summer 2018) (in randomized experiment, nominating a transgender candidate reduced proportion of respondents who would vote for their own party's candidate from 68 percent to 37 percent).

Applying these principles here strongly supports a finding that transgender Iowans are politically weak, if not powerless. Although the

transgender community does not suffer from "absolute political powerlessness," transgender individuals cannot overturn discriminatory laws and policies, such as the Division, 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. *Varnum*, 763 N.W.2d at 894. (quotation marks omitted).

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

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

Many other courts have reached the same conclusion. *See, e.g., Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015)

(discrimination against transgender people subject to intermediate scrutiny); *Marlett v. Harrington*, No. 1:15–cv–01382–MJS (PC), 2015 WL 6123613, at *4 (E.D. Cal. 2015) (same); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (same); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (same); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 208–09 (D.D.C. 2017) (same); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 331 (M.D. Pa. 2017) (same); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (same); *Grimm v. Gloucester County Sch. Bd.*, 302 F. Supp. 3d 730, 748–50 (E.D. Va. 2018) (same); *M.A.B. v. Bd. of Educ. of Talbot County*, 286 F. Supp. 3d 704, 718–22 (D. Md. 2018) (same); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1142–45 (D. Idaho 2018) (same); *Karnoski v. Trump*, No. C17–1297–MJP, 2018 WL 1784464, at *1 (W.D. Wash. Apr. 13, 2018) (finding that "any attempt to exclude [transgender people] from military service will be looked at with . . . 'strict scrutiny'").

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) (intermediate scrutiny applies to gender classifications); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*,

858 F.3d 1034, 1051 (7th Cir. 2017) (same); *Glenn v. Brumby*, 663 F.3d 1312, 1318 (8th Cir. 2011) (same).

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

v. The Division cannot survive intermediate or strict scrutiny.

Of the two forms of heightened scrutiny, intermediate scrutiny requires a party seeking to uphold a classification to demonstrate that the "classification is substantially related to the achievement of an important governmental objective." *Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009). It is the government's burden to justify the classification based on specific policy or factual circumstances that it can prove, rather than broad generalizations. *Id*. "Classifications subject to strict scrutiny are presumptively invalid and must be narrowly tailored to serve a compelling governmental interest." *Id.*

Respondents cannot meet these standards, as the district court previously acknowledged in striking down the discriminatory Regulation in the *Good* case. *Good*, No. CVCV054956, at *26-30. There is no "compelling governmental interest" or "important governmental objective" advanced by excluding transgender individuals from Medicaid reimbursement for medically necessary procedures. *Id.* Gender dysphoria is a serious medical

condition. *Id.* (Ex. 10: Ettner Aff.; Ex. 2: Nisly/Vasquez Aff.; Ex. 7: Nisly/Covington Aff.; Ex. 1: Vasquez Aff.; Ex. 6: Covington Aff.). And surgical treatment for gender dysphoria is medically necessary and effective for Petitioners-Appellants. (Ex. 6: Covington Aff. ¶¶ 30-33; Ex. 7: Nisly/Covington Aff., at 1; Ex. 8: Eadeh/Covington Letter; Ex. 9: Watters/Covington Letter; Ettner Aff. at ¶ 10; Ex. 1: Vasquez Aff. ¶¶ 22-25; Ex. 2: Nisly/Vasquez Aff., at 1. Ex. 3: Daniels/Vasquez Letter; Ex. 4: Eadeh/Vasquez Letter; Ex. 5: Watters/Vasquez Letter).

Given the uniform acceptance in the medical community of this treatment's medical necessity for some transgender people on Medicaid, denying coverage cannot be justified on medical grounds. Nor, under intermediate or strict scrutiny, can it be justified as a cost-savings measure. *Varnum*, 763 N.W.2d at 902–04 (cost savings could not justify exclusion of same-sex couples from marriage).[2]

vi. The Division cannot survive rational-basis review.

The Division also cannot withstand rational-basis review. Rational-basis review requires a "plausible policy reason for the classification."

[2] Because cost savings are insufficient to justify a facially discriminatory law and the legislative record demonstrates that legislators were not motivated by cost-savings, the district court's determination that Petitioners'-Appellants' claims were not ripe on this basis, (Order at 10), was in error, as discussed below. (Part E).

Varnum v. Brien, 763 N.W.2d 862, 879 (Iowa 2009) (quotation marks omitted). It also requires that "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker" and that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Id*. (quotation marks omitted).

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

In the *Good* case, the district court concluded that the same classification at issue here did not withstand rational-basis review. *Good*, No. CVCV054956, at *30-34. For the reasons discussed above, there simply is no plausible policy reason advanced by, or rationally related to, excluding transgender individuals from Medicaid reimbursement for medically

necessary procedures. Surgical treatment for gender dysphoria, a serious medical condition, is necessary and effective. (Ex. 10: Ettner Aff. ¶ 50-54). And Medicaid coverage is crucial to ensuring the availability of that necessary treatment.

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

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

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

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

Additionally, any assertion by individual legislators, (*see* Part B.2 below), that surgical treatments for gender dysphoria have an "excessive cost" has no factual basis at all, and there was no fiscal analysis of the Division in the House File 766 legislative history to support that contention. *See* Iowa Legislative Services Agency, Fiscal Services Division, Notes on Bills and Amendments (NOBA), *Health and Human Services Appropriations Bill, House File 766,* https://www.legis.iowa.gov/docs/publications/NOBA/1045129.pdf. *See also Bassett*, 59 F. Supp. 3d at 851–52 (where defendant argued that "economics justif[ied] the legislation" at issue, defendant's evidence of costs savings was deficient since "there was no analysis of the potential fiscal impact" [in the legislative record] of the legislation).

In reality, the fiscal note accompanying the bill containing the Division did not include any reference to the cost of gender-affirming surgery, including the numbers provided by DHS, below. The legislative debates also contain no reference to those numbers. Petitioners'-Appellants' affidavit from

Senator Robert Hogg corroborates the absence of this information from the legislative record. (*See* Ex. 12: Hogg. Aff.). Senator Hogg's affidavit demonstrates that the Iowa Legislative Services Agency ("LSA") did not receive information about the projected costs of gender-affirming surgery from the DHS until *after* the end of the legislative session in which the Division was adopted. (*See id*., ¶ 3 & Ex. 12A: Benson Letter (letter from Deputy Director of DHS dated May 31, 2019, responding to LSA's request for information on behalf of Senator Hogg).) The affidavit also demonstrates that LSA "did not accept [DHS's] letter as the correct or the best analysis" and that "it [is] doing additional fiscal analysis on this issue," which is forthcoming. (Ex. 12: Hogg Aff. ¶ 4).

Further, publicly available data shows that cost-savings could not justify the Division, even assuming for the sake of argument those costs-savings were not being realized in a facially discriminatory manner. Providing insurance coverage for transgender patients has been shown to be "affordable and cost-effective, and has a low budget impact." William V. Padula, PhD et. al, *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, Johns Hopkins Bloomberg Sch. of Public Health, Dep't of Health Policy and Management (Oct. 19, 2015),

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4803686/ (finding the budget impact of this coverage is $0.016 per member per month, and provided "good value for reducing the risk of negative endpoints--HIV, depression, suicidality, and drug use"); *see also* Herman, Jody L., *Costs and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefits Plans* (Williams Institute, Sept. 2013) (noting that employers report zero or very low costs, and substantial benefits, for them and their employees when they provide transition-related health-care coverage in their employee-benefit plans). In fact, the State conceded below that "only a subset" of transgender individuals seeking treatment for gender dysphoria require surgical intervention. (Resistance at 11).

To the contrary, there are medical costs associated with *denying* those transgender people on Medicaid who do require surgery access to medically necessary transition-related care. With the availability of that care, transgender people's overall health and well-being improve, resulting in significant reductions in suicide attempts, depression, anxiety, substance abuse, and self-administration of hormone injections. Cal. Dep't of Ins., *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance* (Apr. 13, 2012), https://transgenderlawcenter.org/wp-

content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf.

2.The Division violates Equal Protection because it was motivated by animus toward transgender people.

The Division's sole purpose was to take away publicly funded Medicaid coverage for transgender Iowans. It does so by carving out an exception to ICRA's protections against discrimination in public accommodations that is directed specifically at transgender people and taking away the protections that only transgender people were afforded under the Iowa Supreme Court's decision in *Good.* A law is irrational and violates equal protection if its purpose is to target a disadvantaged group, as was the Division's purpose. *Windsor,* 133 S.Ct. at 2693 ("[t]he Constitution's guarantee of equality 'must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot' justify disparate treatment of that group.") (quoting *Moreno,* 413 U.S. at 534–35; *Romer,* 517 U.S. at 632)("[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."); *Cleburne,* 473 U.S. at 448 ("[M]ere negative attitudes, or fear, ... are not permissible bases for [a statutory classification]."); *Moreno,* 413 U.S. at 534 ("[The] amendment was intended to prevent so called 'hippies' and 'hippie communes' from participating in the food stamp program," and such

"a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

Here, the Division suffers from the same, rare constitutional deficiency of being a law plainly motivated by animus towards a disfavored group. It literally was passed in order to take away publicly funded healthcare for transgender individuals, who were, prior to the Division, entitled to such medical care. As this Court already recognized in the *Good* decision, all Iowans qualified to receive Medicaid are entitled to coverage for medically necessary surgery. *Good,* 924 N.W.2d at 858. But the Division plainly denies transgender Iowans this medical care, by taking away their protections under ICRA from discrimination in access to such health care.

The plain text, factual history, and legislative debate make clear the purpose of the law was specifically to deprive transgender Iowans on Medicaid of the very protections against discrimination in public accommodations that served as the basis for this Court's decision in *Good*. Notably, in *Good*, this Court also found that the history of the challenged Regulation prohibiting coverage for medically necessary gender-affirming surgery "support[ed] its holding that the rule's express bar on Medicaid coverage for gender-affirming surgical procedures discriminates against

transgender Medicaid recipients in Iowa under ICRA." *Good*, 924 N.W.2d at 862.

The legislature unfortunately doubled-down on that discriminatory history in passing the Division to authorize the discrimination this Court just invalidated in *Good*. In beseeching his colleagues to vote against the bill, Sen. Bolkcom stated:

> The language in this bill targets coverage for their [transgender Iowans'] essential and necessary medical treatments. It's ignorant. It's discrimination of the worst kind. It's a clear violation of the equal protection under the Iowa Constitution. And I hope somebody on your side has the guts to explain to us this afternoon why this language is in this bill.
>
> . . .
>
> The American Medical Association, the American Psychological Association, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists all support the view that medically necessary care is needed, and they believe these medical procedures should be covered under public insurance programs.
>
> . . .
>
> The undisputed medical evidence shows that gender-affirming surgical treatment may prevent social dysfunction, physical pain, and even death. If left untreated gender dysphoria often causes acute distress and isolation, impedes healthy personal development and interpersonal relationships, and destroys a person's ability to function effectively in daily life. Why we would want to prevent somebody from getting the medical care they need to function effectively in daily life I have no understanding of. Suicide and death are common among persons who are unable to access gender dysphoria treatment, with an

> attempted suicide rate of 41 to 43 percent for those individuals . . . compared to a baseline rate of about five percent for everybody in this room . . . the language in this bill is cruel. I think it's ignorant, it doesn't understand the science, and it discriminates against Iowans already marginalized.

Iowa General Assembly, Session, *House File 766* video recording of debate on 2019-04-027, https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190426012941549&dt=2019-04-26&offset=2721&bill=HF%20766&status=r, at 2:27:55 (Rep. Bolkcom).

Senator Costello, when asked by Sen. Bolkcom why the language was in the bill, plainly stated:

> As you probably know this language was in the administrative code for, has been for years and it was always practiced that way. A recent court case was decided that changed that and said that doesn't count, you have to, you are forced to provide those surgeries, so we are changing that policy back . . . It is a pretty expensive surgery, and I don't know that I agree with you that it is always medically necessary, which is what Medicaid is about. So we are taking the Code and saying it the way it was prior to this court decision, and I think a lot might people might have trouble paying for this surgery think it's not a proper use of federal or of our state monies. So we are trying to react to the lawsuit that came up.

Id. at 2:31:44.

Sen. Mark Costello said the intent of the bill was "to change the administrative code back to the way it was for years before the lawsuit. He said he didn't feel such procedures are 'always medically necessary.'" Tony

Leys and Barbara Rodriguez, *Iowa Republican lawmakers ban use of Medicaid dollars on transgender surgery*, Des Moines Register (Apr. 27, 2019),
https://www.desmoinesregister.com/story/news/politics/2019/04/26/iowa-legislature-senate-republicans-propose-ban-medicaid-money-transgender-surgery-lawsuit-courts/3578920002/

In the Iowa House, the only comments in support of the Division came from the bill manager, Rep. Fry, who described the function of the Division in plainly discriminatory terms, as "amending the Iowa Civil Rights Act to clarify that we are not requiring any government unit in the state to provide for gender reassignment surgeries." Iowa General Assembly, Session, *House File 766* video recording of debate on 2019-04-27, https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h20190427092516225&dt=2019-04-27&offset=6564&bill=HF%20766&status=r, at 11:24:30 (Rep. Fry). The rest of the comments in debate came from opponents. Rep. Wessel-Kroeschell criticized the Division, saying "[t]his amendment takes away the civil rights of Iowa's transgender population." *Id.* at 11:36:50 (comments by Rep. Wessel-Kroeschell). She added that "This proposal deserved to be thoroughly

examined, and it was not. This amendment was mean-spirited and cruel." *Id.* at 11:37:10.

Legislators debating the bill understood its discriminatory purpose. For example, Representative Running-Marquardt stated: "I question the integrity of a body that passes language that denies Iowans critical healthcare because they're transgender. That's what this bill does. . . We are codifying discrimination against people and their healthcare needs because they're transgender. . . . It is the doctor's decision what is critical healthcare. It is not the people in this chamber. It is not your decision." *Id.* at 12:30:20.

For these reasons, Petitioners-Appellants are likely to succeed on the merits of their equal protection claim.

3.The Division violates the Iowa Constitution's Single-Subject rule.

Petitioners-Appellants are also likely to succeed on the merits of their claim that the Division violates the Iowa Constitution's Single-Subject rule. Article III, § 29 contains two distinct but interrelated requirements: (1) that "[e]very act shall embrace but one subject, and matters properly connected therewith" (the Single-Subject Rule); and (2) that the act's subject "shall be expressed in the title" (the Title Rule). Iowa Const. Art. III, § 29. Thus, "Section 29 imposes two requirements upon the General assembly, one concerning the number of subjects that a single bill may address and the other

concerning the descriptive accuracy of a bill's title." Todd E. Pettys, *The Iowa State Constitution* 171 (2d ed. 2018).

The Single-Subject rule is concerned with *germaneness. Utilicorp*, 570 N.W.2d at 454 ("So to pass constitutional muster the matters contained in the act must be germane."); *Western Intern. V. Kirkpatrick*, 396 N.W.2d 359, 364 (Iowa 1986). Germaneness is a mandatory constitutional requirement*. State v. Mabry*, 460 N.W.2d 472, 474 (Iowa 1990) ("[T]o pass constitutional muster the matters contained in the act must be germane."); *Long v. Bd. of Sup'rs of Benton Cty.*, 142 N.W.2d 378, 382 (Iowa 1966) ("[L]imiting each bill to one subject means that extraneous matters may not be introduced into consideration of the bill by proposing amendments not germane to the subject under consideration."). "To be germane," the Court explains, "all matters treated [within the act] should fall under some one general idea and be so connected with or related to each other, either logically or in popular understanding, as to be part of . . . one general subject." *Utilicorp*, 570 N.W.2d at 454 (citing *State v. Mabry*, 460 N.W.2d 472, 474 (Iowa 1990)).

The Division violates the Single-Subject Rule under *Mabry* and *Kirkpatrick*.[3] The Division comprises a substantive new, third subsection to

---

[3] Invalidating the ICRA exception under the single-subject rule would not invalidate the remaining provisions of the Act. *Mabry*, 460 N.W.2d at 474.

the section of the Iowa Civil Rights Act, otherwise ensuring protections against nondiscrimination in public accommodations, section 216.7, which was log-rolled onto an annual appropriation to the Department of Human Services, the subject matter of the bill.[4] It facially carves out an area formerly covered by ICRA's non-discrimination protections to specifically deprive transgender Iowans on Medicaid access to medically necessary care on a non-discriminatory basis in accordance with the *Good* decision.

The subject matter of the Act of which the Division is part—the annual HHS Appropriations bill—has nothing to do with the subject matter of the Division—ICRA's protections against discrimination in public accommodations. Indeed, this case is analogous to *Western International v. Kirkpatrick,* 396 N.W.2d 359 (1986). There, the Court invalidated substantive changes to the workers' compensation laws contained in legislation that otherwise made non-substantive technical corrections throughout the Iowa Code as a violation of the Single-Subject Rule. *Id.* at 364-65. Burying a

---

[4] *See* 2019 Iowa Acts, House File 766, *available at* https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=hf766; *see also* video of debate at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190426012941549&dt=2019-04-26&offset=2721&bill=HF%20766&status=r, Sponsor, Rep. Costello, at 2:15:12) (introducing it for debate: "Ladies and gentlemen of the Senate, House File 766 is the Health and Human Services Appropriations bill.").

substantive, highly controversial piece of legislation that creates an exception to ICRA in an Act entitled "Appropriations" is even more dramatic than the workers' compensation amendment at issue in *Kirkpatrick*. Neither legislators nor the public could fairly anticipate a major change to ICRA based on the title of the Act. Under *Kirkpatrick*, the Division violates the single-subject rule.

Legislators expressly acknowledged that the amendment containing the Division was not germane to the annual Appropriations bill during debate in the House. H.J. 1064 (Apr. 27, 2019), *available at* https://www.legis.iowa.gov/docs/pubs/hjweb/pdf/April%2027,%202019.pdf #page=9; *see also* Iowa General Assembly, *House File 766*, video of debate in the House on Apr. 27, 2019, https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h20190427092516225&dt=2019-04-27&offset=6564&bill=HF%20766&status=r (point of order raised by Rep. Heddens challenging lack of germaneness of amendment; Rep. Upmeyer at 11:15:00-11:22:12 acknowledging and ruling on point of order); (Crow Aff. at ¶ 17). The point was ruled well taken by Representative Upmeyer, Speaker of the House. *Id.* ("You are correct. The amendment is not germane.") Then, Representative Fry—the amendment's sponsor—moved to suspend the rules

to consider the amendment anyway. *Id.* at 11:22:13-11:24:00. The motion narrowly passed. *Id.*

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

Unlike the single-subject rules of some other state constitutions, Art. III, section 29 is mandatory, not directory. *C.C. Taft Co. v. Alber*, 171 N.W. 719, 720 (Iowa 1919) ("[T]he provisions of the Constitution are mandatory and binding upon the Legislature, and that any act that contravenes the

provisions of the Constitution . . . is not binding upon the people or any of the agencies of government."); *Green v. City of Mt. Pleasant*, 131 N.W.2d 5, 18 (Iowa 1964) (same); *Western Int'l v. Kirkpatrick*, 396 N.W.2d 359, 366 (Iowa 1986) (referring to "the mandate of Article III, § 29 and striking portions of statute that violated Art. III, § 29"). Because Article III, § 29 is mandatory rather than directory, the legislature cannot cure the constitutional defect through a suspension of the rules vote, as took place here. Rather, statutes contravening the Single-Subject Rule are void.

The Supreme Court has described the Single-Subject Rule's purpose as "to prevent logrolling and to facilitate orderly legislative procedure." *Western Int'l v. Kirkpatrick*, 396 N.W.2d 359, 364 (Iowa 1986). The Court has described "logrolling" as "the practice of several minorities combining their proposals as different provisions of a single bill, and thus consolidating their votes so that a majority is obtained . . . where perhaps no single proposal of each minority could have obtained majority approval separately." *Long v. Bd. of Sup'rs of Benton Cty.*, 142 N.W.2d 378, 382 (Iowa 1966). In theory, "[b]y limiting each bill to a single subject, the issues presented by each bill can be better grasped and more intelligently discussed by the legislators." *Id.* The purpose of the Single-Subject Rule also includes "preventing surprise" and

"keep[ing] the citizens of the state fairly informed"). *State v. Mabry*, 460 N.W.2d 472, 473 (Iowa 1990).

These purposes were thwarted by the inclusion of the Division into the annual HHS Appropriations bill. Senator Joe Bolkcom and Keenan Crow, One Iowa's Director of Policy and Advocacy, both detailed the normal lawmaking process for substantive policy matters and how the process for log-rolling the Division into the annual HHS Appropriations bill derogated from the normal process, and the impact that had. Senator Bolkcom has been a legislator for more than 20 years and is an expert on the Iowa lawmaking process, having served on numerous committees over those years, (Ex. 13: Bolkcom Aff. ¶ 1-3); he also has particular competency to inform the Court as to the inappropriateness of including the Division within the annual HHS Appropriations bill, both as ranking member of the Appropriations Committee and because he was the original sponsor of the 2007 Amendment to the Iowa Civil Rights Act which added protections against nondiscrimination on the basis of gender identity and sexual orientation. (*Id.* ¶ 6); 2007 Iowa Acts, SF 427, *available at* https://www.legis.iowa.gov/legislation/billTracking/billHistory?ga=82&billName=SF427; Keenan Crow lobbies on behalf of One Iowa and is very familiar with the legislative process. (Ex. 11: Crow Aff. ¶ 1-3).

Normally a bill, once sponsored and filed, is assigned a subcommittee and committee. (Ex. 13: Bolkcom Aff. ¶ 5-6; Ex. 11: Crow Aff. ¶ 4-5). The subcommittee of legislators meets in public and invites formal public input. (Ex. 13: Bolkcom Aff. ¶ 5; Ex. 11: Crow Aff. ¶ 5). Legislators make any changes they decide are appropriate, and if a majority of the subcommittee votes to do so, advances the legislation to the full committee. (Ex. 13: Bolkcom Aff. ¶ 6; Ex. 11: Crow Aff. ¶ 5-6). Before the full committee, a larger group of legislators again make any changes to the legislation deemed to be appropriate by a majority of the committee, and upon a majority vote once amended, advance it to the full body to be voted on by that chamber. (Ex. 13: Bolkcom Aff. ¶ 6; Ex. 11: Crow Aff. ¶ 6-7). The same process takes place in the opposite chamber. (Ex. 13: Bolkcom Aff. ¶ 6; Ex. 11: Crow Aff. ¶ 7).

As both Senator Bolkcom and Keenan Crow explained, this process affords sufficient time and opportunity for input from the public, experts, impacted people, and other legislators. (Ex. 13: Bolkcom Aff. ¶ 4-6; Ex. 11: Crow Aff. ¶ 5-6, 8). But when logrolling occurs, as it did in this case, there is no such opportunity. (Ex. 13: Bolkcom Aff. ¶ 7-8; Ex. 11: Crow Aff. ¶ 10). The Division was never subject to any normal filing, subcommittee, or committee process. (Ex. 13: Bolkcom Aff. ¶ 7-8; Ex. 11: Crow Aff. ¶ 10).

Members of the public were not provided with an opportunity to submit input or share their concerns. (Ex. 13: Bolkcom Aff. ¶ 7-8; Ex. 11: Crow Aff. ¶ 10-11, 12-14, 16). Rather than the more typical weeks-to-months it takes to go through the normal lawmaking process, the time between the amendment containing the Division being filed and being passed by both chambers took a mere 32 hours. (Ex. 11: Crow Aff. ¶ 8, 12).

Senator Bolkcom described the process of amending ICRA to add protections against discrimination on the basis of gender identity and sexual orientation in 2007. (Ex. 13: Bolkcom Aff. at ¶ 5). The bill was introduced first on February 20, 2007, and was fully passed by the second chamber on April 29, 2007, over two months later. Bill History for 2007 Iowa Acts, SF 427, *available at* https://www.legis.iowa.gov/legislation/billTracking/billHistory?ga=82&billName=SF427. It was vetted by a subcommittee and full committee of both the Senate and House, through which process it was amended multiple times. *Id.*; (Ex. 13: Bolkcom Aff. ¶ 7). Yet the Division, which strips transgender people who rely on public accommodations for their healthcare of those same rights to nondiscrimination, bypassed those normal legislative procedures and took a mere 32 hours to pass. (Ex. 13: Bolkcom Aff. ¶ 8; Ex. 11: Crow Aff. ¶ 10, 12).

Keenan Crow described the chaos created by the improper logrolling process involved here, as One Iowa scrambled to alert the press, impacted transgender people, medical experts, and others about the Division. (Ex. 11: Crow Aff. ¶ 14). For example, several news media interviews about the Division had not even aired by the time it passed. (Ex. 11: Crow Aff. ¶ 14). The Division was especially harmful to the normal democratic process of lawmaking because it was filed through a "double-barreling" process, which involves filing a second-degree amendment to an amendment to a bill. (Ex. 13: Bolkcom Aff. ¶ 8; Ex. 11: Crow Aff. ¶ 11). That second-degree amendment, in turn, cannot be further amended, allowing no individualized debate or votes on individual items; instead, legislators could only vote on the appropriations bill as amended. (Ex. 13: Bolkcom Aff. ¶ 8; Ex. 11: Crow Aff. ¶ 11). It is Senator Bolkcom's opinion that had the Division gone through the normal lawmaking process, rather than the unconstitutional logrolling mechanism employed, it would have been defeated. (Ex. 13: Bolkcom Aff. ¶ 9).

Here, the General Assembly passed a bill that contained matters not germane to each other, and—extraordinarily—*expressly acknowledged* that it was doing so. Moreover, its inclusion of non-germane matters did in fact frustrate the purpose of the Single-Subject Rule by surprising both legislators,

(Ex. 13: Sen. Bolkcom Aff.), and citizens, (Ex. 11: Crow Aff. at ¶10). Because the matter of substantive protections to nondiscrimination in ICRA and annual HHS appropriations neither "[fell] under some one general idea" nor were they "so connected with or related to each other, either logically or in popular understanding, as to be part of . . . one general subject," the Division fails the Supreme Court's test for germaneness. *Utilicorp*, 570 N.W.2d at 454 (citing *State v. Mabry*, 460 N.W.2d 472, 474 (Iowa 1990)). To the contrary, the logical and popular understanding was and is the opposite—that the matter was *not* germane. It is difficult to imagine a more obvious—and unconstitutional—effort to flout Article III, § 29.

Furthermore, the facts in the *Utilicorp* case cited by the State in its Resistance below, (Resistance at 19), are so different from the facts of this one that the case supports Petitioners'-Appellants' argument, rather than the Respondents'-Appellees'. In *Utilicorp*, the Court explained that "[i]t is significant that all provisions in [the challenged legislation] relate to various provisions in Iowa Code chapter 476." *Utilicorp*, 570 N.W.2d at 453. The question in *Utilicorp* was whether a provision of legislation prohibiting nonutility use of equipment paid for by utility customers, made to the Code section governing the Iowa Utilities Board and the regulation of utilities generally, was germane to the legislation under Iowa's Single-Subject Rule.

Id. at 453. The other provisions of the legislation amended various other divisions of that same Code section, including divisions governing the location of the utility's principal office and the filing and processing of written complaints to the Utilities Board. *Id.* The Court in *Utilicorp* found that the provision's place in the legislation was "eminently logical" and "fits logically and neatly within the other sections." *Utilicorp* at 455.

Here, on the contrary, no provision of the annual HHS Appropriations bill, other than the Division Petitioners-Appellants challenge, made amendments or reference to Chapter 216, ICRA. 2019 Iowa Acts, House File 766. In fact, no annual HHS Appropriations bill—going back to the 2007 ICRA amendment adding gender identity and sexual orientation as protected classifications in the first place—has ever done so.[5] The Division's placement in the annual HHS Appropriations bill, unlike the utility provision at issue in *Utilicorp*, was not a logical location, and the Division does not fit with the other sections of this bill. The placement of the Division in the annual HHS Appropriations bill is not comparable to the provision upheld in *Utilicorp*.

The "fairly debatable test" requires legislation to be "clearly, plainly, and palpably" in violation of the germaneness requirement in order to strike

---

[5] *See* footnote 6, below, providing citations and links to each annual HHS Appropriations bill going back to 2007.

it down under the Single-Subject Rule. *Utilicorp* at 454 (citing *Mabry* at 474). While this standard is deferential, it is not meaningless or toothless, as the *Kirkpatrick* case demonstrates. Burying a substantive, highly controversial piece of legislation that creates an exception to ICRA in an annual Appropriations bill is even more dramatic than the workers' compensation amendment at issue in *Kirkpatrick*. The Division's lack of germaneness is not "fairly debatable"; rather, it is "clearly, plainly, and palpably" not germane to the annual HHS Appropriations bill containing it. Under *Kirkpatrick*, *Utilicorp*, and *Mabry* the Division violates the Single-Subject Rule.

4. The Division Violates Iowa's Title Rule.

The Division also violates Iowa's Title Rule. The Act's title, "An Act relating to appropriations for health and human services and veterans and including other related provisions and appropriations, providing penalties, and including effective date and retroactive and other applicability date provisions," does not reference ICRA at all, much less provide any notice that the Division would create an exception to ICRA's prohibition against gender-identity discrimination in public accommodations.

While the purpose of the Single-Subject rule is about the democratic legislative process, the purpose of the Title Rule is to ensure notice. *Kirkpatrick*, 396 N.W.2d at 365 (The "purpose of the [title] requirement is to

guarantee that reasonable notice is given to legislators and the public of the inclusion of provisions in a proposed bill; thus it is said to prevent surprise and fraud."); *see also State v. Talerico*, 290 N.W. 660, 663 (Iowa 1940) ("[The Title Rule] was designed to prevent surprise in legislation."). Therefore, in analyzing a title challenge, a court will determine whether a title "gives fair notice of a provision in the body of an act." *Kirkpatrick*, 396 N.W.2d at 365.

In *Utilicorp*, the Court pointed out that while provisions in the utilities bill upheld in that case might be controversial, "no citizen—certainly no legislator—should be surprised to find the subject of [the challenged provision] considered under the title of the act." *Utilicorp*, at 455. In *Kirkpatrick*, by contrast, the Court struck down a change to the workers' compensation appeal process that was buried in a technical "Code Corrections" bill as a violation of the Title Rule. *Id*. at 365. The Court reasoned that the "title must . . . give fair notice of the act's subject and it must not deceive its reader." *Id.* (internal citations omitted). In *Kirkpatrick*, the title stated that the bill "alter[ed] current practices, but d[id] not enlighten the reader as to what practices [were] being changed. There [was] no indication in the title . . . that the enactment effected a change in workers' compensation law or in appellate procedure involving workers' compensation cases." *Id.* The Court explained that the changes to the substantive workers'

compensation appeal procedure were "buried in the middle of a sixty-one section enactment which could fairly be said to make otherwise lexicographical changes. The reader of the title is not informed that a drastic change in the workers' compensation law will result from this bill's enactment." *Id.*

Likewise here, the title of the annual HHS Appropriations bill did not alert the reader that a "drastic change" to ICRA's protections against nondiscrimination would result from the bill's enactment. Like in *Kirkpatrick*, the changes were buried in the middle of a 108-page bill which could fairly be said to make otherwise appropriations-related changes. And in fact, both citizens and legislators were reasonably surprised. (Ex. 13: Bolkcom Aff. at ¶ 8; Ex. 11: Crow Aff. at ¶ 17, 18). There was no reasonable basis to expect that a substantive amendment to ICRA's nondiscrimination protections for transgender Iowans in public accommodations, in place since 2007, would ever be effectuated through any annual appropriations bill, much less the specific bill in question, whose title did not provide any notice of such a change.

In 2007, by contrast, when ICRA was amended to *add* the protections for gender identity and sexual orientation that the Division takes away from transgender Iowans receiving Medicaid, the bill's title provided notice of that

change. 2007 Iowa Acts, SF 427, *available at* https://www.legis.iowa.gov/legislation/billTracking/billHistory?ga=82&billName=SF427. The title read "A bill for an act relating to the Iowa civil rights Act and discrimination based upon a person's sexual orientation or gender identity." *Id.* While a legislator or private citizen would be quite surprised to find any annual appropriation in such a bill, they would logically expect the bill to amend ICRA in ways impacting LGBTQ people.

In fact, the title for *every* annual HHS Appropriations bill going back at least 12 years (as far back as the most recent amendment to ICRA adding the protections on the basis of gender identity and sexual orientation) has been exactly the same as the annual HHS appropriations bill containing the challenged Division—except in one way that demonstrates the violation of the Title Rule here. Prior to the Division's inclusion in the HHS appropriations bill this year, when additional subjects were included in the bill, there was, appropriately, a corresponding addition of that subject matter to the title of the bill. This happened in 2014, which is when veterans-related appropriations were incorporated into the annual HHS Appropriations bill for the first time. At that time, there was, properly, a corresponding addition of the word

veterans to the title of the bill.[6] In the same year, an additional matter regarding the county mental health and disability services fund was included

[6] 2018 Iowa Acts, Senate File 2418, https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=SF%202418 (entitled "A bill for an act relating to appropriations for health and human services and veterans and including other related provisions and appropriations, providing penalties, and including effective date and retroactive and other applicability date provisions"); 2017 Iowa Acts, House File 653, https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=HF%20653(entitled identically); 2016 Iowa Acts, House File 2460, https://www.legis.iowa.gov/legislation/BillBook?ga=86&ba=HF%202460 (entitled identically); 2015 Iowa Acts, Senate File 505, https://www.legis.iowa.gov/legislation/BillBook?ga=86&ba=SF%20505 (entitled identically); 2014 Iowa Acts, House File 2463, https://www.legis.iowa.gov/legislation/BillBook?ga=85&ba=HF%202463&v=e (entitled "An Act relating to appropriations for health and human services *and veterans* and including other related provisions and appropriations, *extending the duration of county mental health and disabilities services fund per capita levy provisions*, and including effective date and retroactive and other applicability date provisions."); 2013 Iowa Acts, Senate File 446, https://www.legis.iowa.gov/legislation/BillBook?ga=85&ba=SF%20446 (entitled "An Act relating to appropriations for health and human services and including other related provisions and appropriations, providing penalties, and including effective, retroactive, and applicability date provisions."); 2012 Iowa Acts, Senate File 2336, https://www.legis.iowa.gov/legislation/BillBook?ga=84&ba=SF%202336 (entitled identically); 2011 Iowa Acts, House File 649, https://www.legis.iowa.gov/legislation/BillBook?ga=84&ba=HF%20649 (entitled identically); 2010 Iowa Acts, House File 2526, https://www.legis.iowa.gov/legislation/BillBook?ga=83&ba=HF%202526 (entitled identically); 2009 Iowa Acts, House File 811, https://www.legis.iowa.gov/legislation/BillBook?ga=83&ba=HF%20811 (entitled identically); 2007 Iowa Acts, House File 909, https://www.legis.iowa.gov/legislation/BillBook?ga=82&ba=HF%20909 (entitled identically).

in the bill; that item was also properly added to the title of the annual HHS Appropriations bill for that year only. *Id.* Of course, no annual HHS Appropriations bill other than the one at issue here has contained any substantive amendment to chapter 216, ICRA, and no one would logically expect such a bill to do so.

Like the substantive policy change buried in the technical code corrections bill at issue in *Kirkpatrick*, the legislature's decision to bury the substantive change to ICRA in an annual appropriations bill is a particularly egregious violation of the Title Rule. Appropriations bills, like code corrections bills, are a different type of bill than other bills. This difference is not merely a legislative norm in Iowa; it has a constitutional dimension as well. Iowa Const. Art. III, § 16; *Rants v. Vilsack*, 684 N.W. 2d 193, 207-08 (Iowa 2004) (finding the executive's powers of veto are different when it comes to policy and appropriations bills, pursuant to Art. 3, § 16 of the Iowa Constitution.).

Because the title to the annual HHS Appropriations bill provided the reader with no notice that the bill contained a substantive new exception to ICRA, which strips transgender Iowans of the right to nondiscrimination in Medicaid coverage, the exception's subject was not germane to the annual HHS Appropriations bill, and the process the legislature used interfered with

the normal democratic lawmaking process, the bill violated the Single-Subject Rule. These rules are mandatory pursuant to Art. III, § 29 of the Iowa Constitution. The Division must be struck down. As a result, Petitioners-Appellants have shown a likelihood of success on these claims.

5.The Division violates the Iowa Constitution's Inalienable Rights clause.

Petitioners-Appellants are also likely to succeed on the merits of their claim that the Division violates the Iowa Constitution's inalienable-rights clause.

Article I section 1 of Iowa's Constitution guarantees:

> All men 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.

The Iowa Supreme Court has stated that the clause requires rational-basis review coextensive with the federal and state due-process clauses, *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 352 (Iowa 2015), and prevents "arbitrary, unreasonable legislative action that impacts an inalienable right," *Atwood v. Vilsack*, 725 N.W.2d 641, 651 (Iowa 2006). This "rational basis" test in practice, however, is not toothless under the Iowa Constitution. *See City of Sioux City*, 862 N.W.2d at 351.

The constitutionality of a law that impacts an inalienable right depends first on whether "the interests of the public generally, as distinguished from those of a particular class, require [state] interference; and, second, [whether] the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 177 (Iowa 2004). As to the first prong, the interests of the public, "[i]n each case, it is a question whether or not the collective benefit outweighs the specific restraint." *Benschoter v. Hakes*, 8 N.W.2d 481, 485 (Iowa 1943). As to the second prong, "restrictions that are prohibitive, oppressive or highly injurious . . . are invalid." *Gacke*, 684 N.W.2d at 177 (quoting *Steinberg-Baum & Co.*, 77 N.W.2d 15, 19 (Iowa 1956)); *see also State v. Osborne*, 154 N.W. 294, 300 (Iowa 1915) (inalienable-rights clause protects "the right to pursue a useful and harmless business without the imposition of oppressive burdens by the lawmaking power.").

The Court has also suggested that the inalienable-rights clause should provide greater protections than both the federal and state due-process clauses. In *City of Sioux City*, the Court acknowledged that it has never engaged in "any substantial analysis of the historical or philosophical origins of the clause, its function and purpose as the first section of the Bill of Rights in the Iowa Constitution, or the meaning of its generous text in contrast to the rights

language in the Federal Constitution." 862 N.W.2d at 351. The Court quoted with approval a 1993 law-review article by Bruce Kempkes. *Id.* at 352 (quoting Bruce Kempkes, *The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight*, 42 Drake L. Rev. 593 (1993), hereinafter "Kempkes"). In particular, the Court emphasized Kempkes's explanation of why the inalienable-rights clause should have meaning separate and independent from federal and state due-process principles:

> [T]he inalienable rights clause predated the passage of the Fourteenth Amendment by eleven years; the Iowa drafters placed a due process clause five clauses away in article I, section 6, which cannot be considered redundant; and the text of article I, section 1 is fundamentally different than either the Due Process or Equal Protection Clauses of the Federal Constitution.

Id. at 353 (citing Kempkes at 634). According to Kempkes, the debates at the Iowa Constitutional Convention suggest that the clause should be read to "invalidate legislation adversely affecting personal liberty and happiness unless their exercise in some way harms or presents an actual and substantial risk of harm to another person." Kempkes at 637.

Under either approach, rational-basis review or the heightened scrutiny contemplated by *City of Sioux City*, the Division violates the inalienable-rights clause. The Division arbitrarily and unreasonably bars transgender Iowans on Medicaid from obtaining medically necessary surgical care. The inalienable right to receive such care arises from its medical necessity, the fact that

impacted transgender Iowans rely on Medicaid to receive that medically necessary care, and its connection to the expression of transgender Iowans' gender identity. There is no public interest in interfering with this right that all Iowans on Medicaid have. *See Gacke*, 684 N.W.2d at 177. As demonstrated extensively above, gender dysphoria is a serious medical condition, and surgical treatment for gender dysphoria is medically necessary and effective. And there is no evidence that providing this treatment will impose excessive costs on the state, but rather that denying access to it will *increase* the costs of addressing transgender individuals' disproportionately high susceptibility to suicide attempts, depression, anxiety, and substance abuse and their self-administration of hormone injections.[7] Given these considerations, the Division's categorical ban on public funding for gender-affirming surgery is "unduly oppressive upon" transgender Iowans who rely on Medicaid for healthcare coverage for medically necessary care. *See id*.

The Iowa Supreme Court has upheld rights against state interference under the inalienable-rights clause in a wide variety of cases, particularly those involving rights to property and bodily safety. *See, e.g., In re N.N.E.*, 752 N.W.2d 1 (Iowa 2000) (upholding the right of parents to make child-rearing decisions without state interference); *Gacke*, 684 N.W.2d at 185

---

[7] *See* Part B(1)(vi), above.

(upholding the right of property owners to bring a nuisance suit notwithstanding the statutory immunity of putative defendants); *Gibb v. Hansen*, 286 N.W.2d 180 (Iowa 1979) (upholding the right of a witness to refuse to testify if doing so would threaten the witness's safety); *State v. Reese*, 272 N.W.2d 863 (Iowa 1978) (upholding an incarcerated person's right to a necessity defense in situations where the person escapes prison out of fear for his or her safety); *Hoover v. Iowa State Highway Comm'n*, 222 N.W. 438 (Iowa 1928) (upholding the right of a property owner to an injunction preventing a highway from being built on the property); *State v. Osborne*, 154 N.W. 294 (1915) (upholding the right of transient merchants to do business without first posting bond); *State v. Ward*, 152 N.W. 501 (Iowa 1915) (upholding the right of a property owner to shoot deer that threaten to damage property notwithstanding a statutory prohibition on unauthorized hunting).

Petitioners-Appellants seek only the right to receive the coverage necessary for their life, liberty, and bodily safety on the same terms as all other Medicaid-eligible Iowans; instead, they are subject to the arbitrary and discriminatory interference of the state through the Division, which impedes their access to this necessary care. Thus, Petitioners-Appellants need not take a position on whether the Inalienable Rights Clause requires a program such as Medicaid to meet the life-sustaining medical needs of indigent Iowans as a

general matter; rather, Petitioners-Appellants claim is that once such a program exists, the State of Iowa cannot interfere with their right to obtain this life-sustaining care they need on an arbitrary and discriminatory basis without violating the Inalienable Rights Clause. This right asserted by Petitioners-Appellants is precisely the right to be free from interference by the state in securing life, liberty, and bodily safety that Article I, § 1 protects. *See, e.g., Atwood*, 725 at 651; *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 352 (Iowa 2015); *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 177 (Iowa 2004) ("restrictions that are prohibitive, oppressive or highly injurious . . . are invalid.").

C. Petitioners-Appellants will continue to be substantially injured if this Court does not enjoin Respondents from enforcing the Division, and the balance of hardships warrants injunctive relief.

In addition to being likely to succeed on the merits of their petition, Petitioners-Appellants will continue to be substantially injured if the Division is allowed to be enforced to deny them coverage for their medically necessary care under Iowa Medicaid. *See Ney v. Ney*, 891 N.W.2d 446, 451 (Iowa Mar. 10, 2017) (district court may issue an injunction when "substantial injury will result from the invasion of the right or if substantial injury is to be reasonably apprehended to result from a threatened invasion of the right").

As an initial matter, the Division will continue to irreparably harm Petitioners-Appellants by violating their constitutional rights: "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (infringement of constitutional rights by facially invalid law causes irreparable harm) (citing 11A Charles Wright et al., Federal Practice & Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").[8]

As outlined in detail above, the Division will also continue to irreparably harm Petitioners-Appellants by further preventing them from accessing medically necessary care that is critical to their health, safety and welfare. (*See* Factual Background Part A). Ms. Covington has averred that the Division has exacerbated her depression and anxiety and "triggered . . . suicidal ideations." (Ex. 6: Covington Aff. ¶ 32). For his part, Mr. Vasquez has similarly averred that "[m]y depression, as well as my thoughts of self-harm, have been even more heightened" by the Division. (Ex. 1: Vasquez Aff.

---

[8] The district court below, in ignoring this aspect of irreparable injury to the Petitioners, explicitly declined to address the merits of Petitioners'-Appellants' constitutional claims. (Order at 10).

¶ 26). He is already experiencing interruption in his care as a result of the Division. (Ex. 1: Vazquez Aff. ¶¶ 19-25) (explaining he had to cancel his pre-operative evaluation in Madison, Wisconsin as a result of the Division). The various exhibits and affidavits from Petitioners'-Appellants' medical providers confirm that these harms are not a mere "*possibility* of irreparable harm," (Order at 10), but rather actual and severe irreparable harm that is occurring at this moment.

Courts repeatedly have held that emotional distress, anxiety, depression and physical pain resulting from inadequate medical treatment for gender dysphoria amount to irreparable harm. *See Hicklin v. Precynthe*, 2018 WL806764, at *10, *14 (E.D. Missouri Feb. 9, 2018) (enjoining prison system's denial of medically necessary transition-related treatments to transgender plaintiff in Eighth Amendment case, finding plaintiff showed irreparable harm based on evidence of worsening emotional distress and a substantial risk of self-harm, including "intrusive thoughts of self-castration" and suicidal ideation); *Edmo v. Idaho Dep't of Corrections*, 358 F.Supp.3d 1103, at 1128 (D. Idaho Dec. 13, 2018) (finding transgender inmate plaintiff satisfied the irreparable harm prong "by showing that she will suffer serious psychological harm and will be at high risk of self-castration and suicide in the absence of gender confirmation surgery"); *Flack v. Wis. Dep't of Health*

Servs., 328 F. Supp. 3d 931 (W.D. Wis. 2018) (granting preliminary injunction to transgender Medicaid recipients under Affordable Care Act and equal protection in their challenge to regulation excluding coverage for surgery to treat gender dysphoria). In addition, this Court has held that a plaintiff who avers that they are suffering mental health consequences and that they face a real risk of physical harm meets the irreparable harm standard. *Matlock v. Weets*, 531 N.W.2d 118, 122-23 (Iowa 1995) (granting injunction where lack of injunctive relief "has been a detriment to [plaintiff's] mental health" caused plaintiff to "fear[] for her own . . . physical safety").

The District court's rejection of Petitioners'-Appellants' showing of irreparable harm below consists of a single, three-sentence paragraph that ignored this uncontested affidavit evidence sufficient to demonstrate harm for purposes of a temporary injunction, *see* Iowa R. Civ. Pro. 1.1502 (1); 1.1506(2), and concluded that Petitioners-Appellants are merely suffering "distress . . . not tantamount to irreparable harm." (Order at 10). But Petitioners-Appellants are not suffering from "distress." They are suffering from severe gender dysphoria, a serious and life-threatening medical condition, for which gender-affirming surgery is the most and only effective treatment. (Ex. 10: Ettner Aff. ¶ 42). This is currently—not speculatively—causing Petitioners-Appellants irreparable harm by exacerbating their mental

health issues and threatening physical harm, up to and including death, if untreated. (*Id.* ¶ 15 ("Studies show a 41-43% rate of suicide attempts among this population [gender dysphoric individuals] without treatment, far above the baseline of 4.6% for North America." (citation omitted).)

The balance of harms between the parties in this case further supports a grant of temporary injunctive relief. While Petitioners-Appellants will be (and are already being) severely harmed by the Division's requirements, Respondents will not suffer any harm from Petitioners-Appellants receiving the medical care they require. *See Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) ("[T]hreatened injury to [constitutional rights] outweighs whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute." (citation omitted)); *Saint v. Neb. Sch. Activities Ass'n*, 684 F. Supp. 626, 628 (D. Neb. 1988) (no harm to defendant in losing the ability to enforce unconstitutional regulations). The District court, in dismissing the ample and unrebutted affidavit evidence of irreparable harm presented by Petitioners-Appellants, did not even engage in this required balance of harms inquiry. (Order at 10).

Finally, the status quo that this Court should protect with a temporary injunction is that Petitioners-Appellants were already in the process of

medical transition, including obtaining gender-affirming surgery, prior to the Division's signing and effective date. Gender-affirming surgery had already been determined to be medically necessary to treat both Ms. Covington's and Mr. Vasquez's gender dysphoria. They had already initiated the process to receive preapproval for coverage under Iowa Medicaid for the medically necessary gender-affirming surgeries, and already have care plans in place with their physicians to receive those procedures in September 2019. (*See* Ex. 2: Nisly/Vasquez Aff.; Ex. 3: Daniels/Vasquez Letter; Ex. 4: Eadeh/Vasquez Letter; Ex. 5: Watters/Vasquez Letter; Ex. 7 Nisly/Covington Aff.; Ex. 8: Eadeh/Covington Letter; Ex. 9: Watters/Covington Letter). Absent the challenged Division and the discriminatory Regulation, there is no other basis, factual or legal, to deny them care. (Ex. 1: Vasquez Aff. ¶¶ 19-22, 27-28; Ex. 6: Covington Aff. ¶¶ 29-30). They were both in process of seeking preapproval when the Division was signed into law. (Ex. 6: Covington Aff. ¶ 20 ; Ex. 1: Vasquez Aff. ¶ 18). Mr. Vasquez had to cancel his pre-surgical consultation with Dr. Gast in Madison because of the Division, and Ms. Covington's preapproval request following her upcoming July 2019 appointment will be denied despite medical necessity. (Ex. 1: Vasquez Aff.

¶¶ 19-22; Ex. 6: Covington Aff. ¶¶ 29-30).[9] Because temporary injunctions serve to protect the status quo of the parties during litigation, and because the status quo in this case is that Petitioners-Appellants are already entitled to receive the care for which they have demonstrated medical necessity, this factor also strongly favors a grant of a temporary injunction.

Because the injuries to the Petitioners-Appellants in denying them medically necessary care are ongoing and severe, and because there is no harm to the state in allowing them to receive the care to which they are entitled, this Court should grant the Petitioners-Appellants' motion for a temporary injunction to protect their ability to receive medically necessary care during the pendency of this case.

D. There is no adequate legal remedy available.

Finally, Petitioners-Appellants are entitled to an injunction because they have no adequate legal remedy for the Division's gross violation of their constitutional rights and their rights to necessary medical care, causing significant distress, pain and discomfort, risks of self-harm, and suicidality. (*See* Ex. 6: Covington Aff. ¶ 32; Ex. 1: Vasquez Aff. ¶ 26; Ex. 2: Nisly/Vasquez Aff.; Ex. 3: Daniels/Vasquez Letter; Ex. 4: Eadeh/Vasquez

[9] These uncontested affidavit facts also demonstrate the error in the district court's determination that the Petitioners'-Appellants' claims are not yet ripe, as discussed below. (Part E).

Letter; Ex. 5: Watters/Vasquez Letter; Ex. 7 Nisly/Covington Aff.; Ex. 8: Eadeh/Covington Letter; Ex. 9: Watters/Covington Letter; Ex. 10: Ettner Aff. ¶ 15).; Monetary damages are insufficient remedies to protect against these serious medical risks and harm. *See Ney*, 891 N.W.2d at 452 (there is no adequate legal remedy "if the character of the injury is such that it cannot be adequately compensated by damages at law" (internal quotation marks omitted)). The Division will cause transgender Iowans who rely on Medicaid for their medical coverage, including Petitioners-Appellants Covington and Vasquez, grievous injuries that cannot later be compensated by damages.

The dDistrict court erred in finding that because Petitioners-Appellants have not sought various administrative remedies under the Iowa Administrative Procedures Act, they are barred from seeking invalidation of the Division. (Order at 7-8). Petitioners-Appellants are challenging an unconstitutional statute in this action, not an administrative decision or rule. In requiring exhaustion of administrative remedies, The district court adopts a fundamental misunderstanding of the nature of Petitioners'-Appellants' challenge to an unconstitutional statute in this action, not an administrative decision or rule. Administrative remedies, are incapable of invalidating the Division, a statute—under any of Petitioner's state constitutional claims: violations of equal protection, the Single-Subject and Title Rules, and the

inalienable rights clause, because administrative remedies available through the Iowa Administrative Procedures Act are limited to challenging agency action, not statutes. *See Petit v. Iowa Dep't of Corrections*, 891 N.W.2d 189, 194 ("Iowa Code chapter 17A recognizes three distinct categories of agency action: rulemaking, adjudication or contested case, and other agency action.") (citing *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 833 (Iowa 2002)). By modifying ICRA the Division denies Petitioners-Appellants the ability to seek relief under ICRA through the Iowa Civil Rights Commission. Iowa Code Ann. § 216.16.

The district court also erroneously describes the Division as "nothing more than a statutory clarification of ICRA." (Order at 7). But a legislative amendment that purposely and facially harms transgender Iowans violates Iowa's equal-protection guarantee. That is true even where the amendment removes a statutory protection the state was never required to provide. *See Romer* v. *Evans*, 517 U.S. 620, 627 (1996) (recognizing that removal of, and prohibition against, state and local antidiscrimination protections violated federal equal protection); *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 534 (amendment of Food Stamp Act to exclude households of unrelated individuals, such as "hippies" living in "hippie communes," violated federal equal protection); *Perry v. Brown*, 671 F.3d 1052, 1083 (9th Cir. 2012),

vacated and remanded on other grounds sub nom. Hollingsworth v. Perry, 570 U.S. 693 (2013) (state initiative to take away marriage designation for same-sex couples violated equal protection, even if there was no federal constitutional right to marriage).

The fact that the Division reinstates the discriminatory Regulation does not save it from constitutional review, as the district court erroneously determined. To the contrary, by expressly authorizing DHS's invidious classification based on transgender status, the Division works together with the Regulation to cause serious, concrete and certain harm to Petitioners-Appellants and other transgender Iowans by denying them medical care they desperately need, solely because they are transgender. *See Diaz v. Brewer*, 656 F.3d 1008, 1012– 15 (9th Cir. 2011) (law limiting health-insurance benefits to married couples, when state law prohibited same-sex couples from marrying, violated equal protection); *Bassett v. Snyder*, 951 F. Supp. 2d 939, 963 (E.D. Mich. 2013) (same); *cf. Johnson v. New York*, 49 F.3d 75, 78–79 (2d Cir.1995) (employment policy discriminated on the basis of age, even though it did not mention age, where it incorporated another policy that discriminated based on age); *Erie Cnty. Retirees Ass'n v. Cnty. of Erie*, 220 F.3d 193, 211–13 (3d Cir. 2000) (same).

The district court erred in holding that requiring Petitioners-Appellants to retrace the steps of the *Good* plaintiffs by bringing an identical challenge to the Regulation constitutes an adequate remedy at law. (Order at 7-8). Challenges to rejections of rulemaking petitions and individual coverage decisions would be subject to an internal administrative appeals and judicial review under Iowa Code § 17A.19 (10), *Good,* 924 N.W.2d at 862, but the present case does not present either form of challenge. This Court has already determined that the Regulation violated ICRA's prohibition against discrimination on the basis of gender identity in public accommodations. *Id.* The district court in *Good* also determined that the Regulation violated Iowa's Equal Protection guarantee, *Good* District Court Case, at *33. The present case, in contrast, is a facial challenge to the Division and its effect in reinstating the discriminatory Regulation struck down by the Supreme Court's decision in *Good*.

The district court also erred in finding that Petitioners should be required to wait out an uncertain rulemaking process. The district court would require Petitioners-Appellants to file a petition for rulemaking with DHS and endure the process of notice and public comment to (possibly) rescind and (possibly) replace the discriminatory Regulation already struck down in *Good* but which Respondents concede the Division has revived. (Order at 9) ("DHS

should be given a full opportunity to amend or repeal its rules related to treatment of gender dysphoria before those issues are presented to the court.”). Exhaustion of one or more of the administrative proceedings is not required given the irreparable harm to Petitioners-Appellants, and would in any event be a futile exercise, since administrative review cannot invalidate a statute, such as the Division.[10] *See Tindal v. Norman*, 427 N.W.2d 871, 872-73 (Iowa 1988) (“because agencies cannot decide issues of statutory validity, administrative remedies are inadequate within the meaning of section 17A.19(1) when such a statutory challenge is made. Accordingly, the exhaustion doctrine does not bar [a litigant from seeking judicial relief before exhausting administrative remedies].”) (citation omitted)); *Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 837 (Iowa 1979) (finding a litigant who would suffer irreparable harm from administrative litigation delay may proceed to court without exhausting administrative remedies).

The standard rulemaking process the district court determined Petitioners-Appellants must wait for takes a minimum of 108 days and often takes longer. *See* Office of the Chief Information Officer, “A Sketch of the

---

[10] Because the concrete harms Petitioners-Appellants face as a result of the Division are supported by uncontested affidavit evidence and are not abstract, the district court was also in error in holding that Petitioners-Appellants must exhaust administrative remedies before the matter is ripe for adjudication, as explained further below in Part E.

Rulemaking Process," (last accessed Jul. 19, 2019), *available at* https://rules.iowa.gov/info/rulemaking-brief. This completely ignores the irreparable harm that the Petitioners-Appellants have shown they will face as a result of delayed care. Indeed, DHS has already been provided with ample time—decades—to rescind the discriminatory Regulation and revise its discriminatory practices. Instead of correcting its error, even after this Court determined the Regulation was discriminatory in *Good,* the State passed the Division and DHS has reinstated the discriminatory Regulation. (Resistance at 4) ("Should the Petitioners-Appellants disagree with the administrative rule currently in effect. . ."); (*see also* Part B, above) (quoting, among others, Governor Reynolds and bill Sponsor Senator Costello plainly stating that the Division was being enacted to reinstate the State's policy of denying coverage for gender-affirming surgery).

The district court ignored the uncontested affidavit evidence demonstrating the extreme irreparable harm to Petitioners-Appellants if they are forced to exhaust administrative remedies—injuries, including depression, anxiety, risk of self-harm and suicidality, which cannot later be adequately compensated by damages. (*See* Ex. 6: Covington Aff.; Ex. 1: Vasquez Aff.; *See* Ex. 6: Covington Aff. ¶ 32; Ex. 1: Vasquez Aff. ¶ 26; Ex. 2: Nisly/Vasquez Aff.; Ex. 3: Daniels/Vasquez Letter; Ex. 4: Eadeh/Vasquez

Letter; Ex. 5: Watters/Vasquez Letter; Ex. 7 Nisly/Covington Aff.; Ex. 8: Eadeh/Covington Letter; Ex. 9: Watters/Covington Letter; Ex. 10: Ettner Aff. ¶ 15). Because this statute may not be challenged through administrative remedies, those remedies do not constitute viable remedies at law, and Petitioners'-Appellants' motion for a temporary injunction should be granted.

E. Petitioners'-Appellants' Claims Are Ripe.

The district court below declined to issue a temporary injunction in part because it determined that Petitioners'-Appellants' claims were not ripe for judicial review. (Order at 10-11). This decision was incorrect. Under this Court's well-established twofold ripeness inquiry, Petitioners'-Appellants' claims are ripe for review because (1) Petitioners'-Appellants' claims require no further factual development; and (2) withholding adjudication would cause Petitioners-Appellants significant harm. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), a*brogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977); *see also State v. Tripp*, 766 N.W.2d 855, 859 (Iowa 2010) (citing *Abbott Labs.* for purposes of state ripeness doctrine). Additionally, Petitioners'-Appellants' claims are ripe because administrative appeals would be futile.

1. Petitioners'-Appellants' claims require no further factual development.

Petitioners'-Appellants' claims require no further factual development. Petitioners'-Appellants' equal protection, Single-Subject and Title Rule, and inalienable rights clause claims are "purely legal." *See Abbott Labs.*, 387 U.S. at 149; *see also Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1380–81 (11th Cir. 2019) (explaining facial challenges which present a purely legal argument are presumptively ripe for judicial review because "that type of argument does not rely on a developed factual record.") (citing *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009)). *See also Doe v. State*, 688 N.W.2d 265, 269 (Iowa 2004) (rejecting State's argument that prisoner lacked ripeness to challenge DOC screening procedure because he had not yet been denied release based on that procedure, explaining "… Doe does not claim a *present* deprivation of release. Rather, he claims that the effect of the DOC rule is to remove him from the class of inmates who may be *considered* for early release."); *see also Bassett v. Snyder*, 951 F. Supp. 939, 951, 952-53 (E.D. Mich. 2013) (finding that even though some of the plaintiffs had not yet had their fringe benefits provided through their same-sex partner's employment terminated as a result of the Michigan law barring benefits for domestic partners, such termination was

certain, and noting the purpose of the challenged law was to terminate their benefits).

The district court's determination that Petitioners-Appellants were required to formally seek pre-approval of gender-affirming surgery and be denied in order to perfect their claims was in error (Order at 11). The Respondents-Appellees conceded that the Division makes such requests futile acts, since it allows them to once again rely on the Regulation to deny coverage for gender-affirming surgery to Medicaid recipients solely because they are transgender, as it denied coverage to the Petitioners-Appellants in *Good* for the very same reasons. (Resistance at 4).

As in *Abbot, Doe,* and *Basset*, it is certain, not speculative, that the State will deny Petitioners-Appellants coverage for their medically necessary gender-affirming surgeries. Petitioner Vazquez has *already* experienced an interruption in his care as a result of the Division, (Ex: 1: Vazquez Aff. ¶ 18-27) (explaining that he cannot afford to travel to Dr. Gast's office in Madison, Wisconsin for his pre-surgical evaluation to seek pre-authorization, knowing that such a trip would be futile given the Division). He asks the Court to temporarily enjoin the Division so that he can obtain the care he needs. Petitioner Covington's deprivation of medically necessary care is also imminent absent a temporary injunction. Her next medical appointment, at

which time she is due to schedule her surgery and seek preauthorization, is July 30. (Ex. 6: Covington Aff. ¶ 21-31). Contrary to the district court's holding, these are non-speculative, "concrete ways" in which Petitioners-Appellants have been harmed and will be harmed by the Division. (Order at 11). The State cannot plausibly claim that it will not in fact rely on the Division's reinstatement of Regulation to deny Petitioners-Appellants preauthorization for coverage, (Resistance at 4), despite the medical necessity of the care. Rather, the district court's determination that Petitioners-Appellants must go through a futile and repetitive administrative hearing process serves to further delay Petitioners-Appellants from obtaining the medical care they so desperately need.

The district court also failed to recognize that a temporary injunction will not automatically lead to a pre-approval of Petitioners'-Appellants' claims for their surgeries, nor will it preempt administrative proceedings involved in Medicaid approval. If this Court temporarily invalidates the Division, transgender Iowans on Medicaid, like Petitioners-Appellants Covington and Vasquez, will be subject to the same requirements of medical necessity and eligibility as all other Iowans on Medicaid. Like all Iowa Medicaid recipients, they are still required to seek pre-authorization, and they can still, at that point, be denied on the basis of any nondiscriminatory reason.

So, for example, while they could not be denied coverage because their surgery has been prescribed to treat their gender dysphoria, they could be denied because they become ineligible for Medicaid based on income requirements, or if it were determined that their procedures were not medically necessary in their specific cases to treat their gender dysphoria.[11] Thus, an administrative challenge to the Division (or the Regulation) is not necessary to develop the facts of whether in Petitioners'-Appellants' cases gender-affirming surgery is medically necessary. Rather, invalidating the Division only requires that Iowa Medicaid, including private MCOs contracting with the state to administer the Medicaid program, comply with nondiscrimination requirements in the state constitution and ICRA as they do so. The individual facts of Petitioners'-Appellants' medical conditions thus have little to do with their constitutional arguments other than to show standing, irreparable harm

---

[11] These types of "anything-can-happen scenarios" are also insufficient to defeat ripeness. *See Thomas More Law Center*, 651 F.3d 529, 537 (6th Cir. 2011) (rejecting Defendant's argument that challenge to Affordable Care Act was not ripe because plaintiffs might die or their incomes might fall) (overturned), *overruled on other grounds by National Fed. Of Independent Business et al. v. Sebelius*, 567 U.S. 519 (2012)); *Bassett*, 951 F. Supp. 2d at 952-53 (rejecting challenge to ripeness based on possibility that same sex couples could separate, or that one employee could lose their job before their domestic partner loses benefits, because those speculative possibilities did not undermine causal relationship between defendant's conduct and harm alleged).

under the standard for a temporary injunction, and the harm that withholding adjudication would cause.

All the facts relevant to Petitioners'-Appellants' constitutional challenge to the Division are already well-established, and would not be in any way altered by a futile administrative appeals process. And even if Petitioners'-Appellants' challenge has collateral constitutional consequences for the discriminatory Regulation the Division reinstated as well, those legal questions similarly require no further factual development.

The district court also erred below in finding that "a full factual record from which the Court can assess Respondents' cost savings argument, and thereby, engage in a full constitutional analysis, does not yet exist." (Order at 8). First, costs savings are insufficient to justify a facially discriminatory law. *Racing Ass'n of Cent. Iowa v. Fitzgerald* ("*RACI*"), 675 N.W.2d 1, 12–15 (Iowa 2004) (even under rational-basis review, there must be some reasonable distinction between the group burdened with higher taxes, as compared to the favored group, to justify the higher costs); *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (same); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 854–55 (E.D. Mich. 2014) (same); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974) ("[A] state may not protect the public fisc by drawing an invidious distinction between classes of its citizens." (citation omitted)); *Varnum v.*

Brien, 763 N.W.2d 862, 903 (Iowa 2009) ("Excluding any group from civil marriage—African–Americans, illegitimates, aliens, even red-haired individuals—would conserve state resources in an equally 'rational' way. Yet, such classifications so obviously offend our society's collective sense of equality that courts have not hesitated to provide added protections against such inequalities."). 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. Costs savings are insufficient to justify the arbitrary distinction the Division creates between transgender persons and nontransgender persons in need of necessary medical care.

Second, the legislative history of the Division demonstrates that cost did not in fact motivate the Division. The fiscal note accompanying the bill containing the Division did not include any reference to the cost of gender-affirming surgery, including to the numbers now provided by DHS. And the legislative debates contain no reference to those numbers, either. Petitioners'-Appellants' affidavit from Senator Robert Hogg corroborates the absence of this information from the legislative record. (Ex. 12: Hogg Aff.). Senator Hogg's affidavit demonstrates that the Iowa Legislative Services Agency

(“LSA”) did not receive information about the projected costs of gender-affirming surgery from the DHS until *after* the end of the legislative session in which the Division was adopted. (*See id*., ¶ 3 & Ex. 12-A (letter from Deputy Director of DHS dated May 31, 2019, responding to LSA’s request for information on behalf of Senator Hogg).) The affidavit also demonstrates that LSA “did not accept [DHS’s] letter as the correct or the best analysis” and that “it [is] doing additional fiscal analysis on this issue,” which is forthcoming. (*Id*., ¶ 4). No further factual development will alter this legislative history or aid the Court in adjudicating the constitutional claims.

2. Withholding adjudication will cause Petitioners-Appellants significant harm.

The second prong of the ripeness inquiry also supports this Court’s adjudication of Petitioners’-Appellants’ claims, because absent a temporary injunction by this Court, the Petitioners-Appellants will suffer significant harm. Numerous courts have held that the emotional distress, anxiety, depression and physical pain resulting from inadequate medical treatment for gender dysphoria amount to irreparable harm. *See Hicklin v. Precynthe*, 2018 WL 806764, at *10, *14 (E.D. Mo. Feb. 9, 2018); *Edmo v. Idaho Dep’t of Corr.*, 358 F. Supp. 3d 1103, 1128 (D. Idaho Dec. 13, 2018); *Flack v. Wis. Dep’t of Health Servs.*, 328 F. Supp. 3d 931 (W.D. Wis. 2018).

The district court erred in holding that Petitioners-Appellants "have not established . . . the *dire* need for treatment and the *likelihood* of irreparable harm" for ripeness purposes. (Order at 11). The district court decided, against the uncontested affidavits and expert evidence, that Petitioners-Appellants do not need immediate treatment. *Id.* But Mr. Vazquez and Ms. Covington have both averred that their gender dystrophy causes depression and suicidal ideation, and that these symptoms have intensified because of the Division. (Ex. 1: Vazquez Aff. ¶ 26; Ex. 6: Covington Aff. ¶ 32). Ms. Covington's medical provider stated that her gender dystrophy had become "debilitating" (Ex. 7: Eadeh Letter), while Mr. Vazquez's doctor described gender-affirming surgery "as a vital quality of life and mental health issue for him." (Ex. 3: Daniels Letter). If actual and ongoing mental health issues and threatened physical injury constitute an injury so severe that there is no adequate remedy at law, *Matlock v. Weets*, 531 N.W.2d 118, 122-23 (Iowa 1995), then the Court should not require an individual to endure such injuries in the name of ripeness. *Cf. Salsbury Labs. v. Iowa Dep't Envtl. Quality*, 276 N.W.2d 830, 837 (Iowa 1979) ("[A] litigant who would suffer irreparable harm from administrative litigation delay may proceed to court without exhausting administrative remedies.").

Moreover, the district court failed to recognize that the alleged constitutional harms are *per se* irreparable. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (infringement of constitutional rights by facially invalid law causes irreparable harm) (citing 11A Charles Wright et al., Federal Practice & Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.")). This constitutional harm is relevant both for purposes of the temporary injunction's irreparability standard and for the purposes of the second ripeness prong.

3. The futility of further administrative appeals makes petitioners' claims ripe.

The district court held that Petitioners'-Appellants' claims are not yet ripe because they have not exhausted administrative remedies. (Order at 8). But Iowa courts do not require plaintiffs to map every rabbit hole of administrative remedies where such a "pursuit would be fruitless." *Riley v. Boxa*, 542 N.W.2d 519, 521 (Iowa 1996) (quoting *Alberhasky v. City of Iowa City*, 433 N.W.2d 693, 695 (Iowa 1988)); *Salsbury Labs. v. Iowa Dep't Envtl. Quality*, 276 N.W.2d 830, 830 (Iowa 1979) ("[A] fruitless pursuit of these

remedies is not required.”). This accords with federal ripeness doctrine. *See, e.g.*, *Commc’ns Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 432 (D.C. Cir. 1994) (holding exhaustion of administrative appeals not required where “where resort to administrative remedies would be futile because of the certainty of an adverse decision.”). Courts do not need to see ‘how things play out’ when they have the script in front of them—especially when the harm from letting things play out is significant to the litigants.

The administrative appeals contemplated by the district court would be futile. Regardless of the medical necessity of Petitioners’-Appellants’ surgeries, the Division revived a rule that *mandates* the denial of their claims. *See Good*, 924 N.W.2d at 858 (noting that the administrative rule bars gender-affirming surgery regardless of medical necessity). Nothing in the district court’s decision denies this. Nor does the district court contend with the fact that Respondent DHS is powerless to adjudicate either the constitutional claims against the Division that Petitioners-Appellants are actually making or the constitutional claims against the Regulation that it believes Petitioners-Appellants are making. *See Salsbury Labs. v. Iowa Dep’t of Envtl. Quality*, 276 N.W.2d 830, 836 (“Agencies cannot decide issues of statutory validity.”). Even if every fiber of every employee of every agency in the state of Iowa

ached to provide Petitioners-Appellants with the relief they seek, it would be futile to ask them because the response is preordained.

The district court determined that Petitioners-Appellants should seek to "request the adoption, amendment, or repeal of a rule" before turning to the courts. (Order at 9). But even if Petitioners-Appellants were challenging the Regulation, petitioning for rulemaking to correct an unlawful rule is not a prerequisite to challenging the unlawful rule in the first instance. The U.S. Court of Appeals for the D.C. Circuit's ripeness decision in *Fox Television Stations, Inc. v. FCC* is instructive. 280 F.3d 1027 (D.C. Cir. 2002), *modified on other grounds on reh'g*, 293 F.3d 537 (D.C. Cir. 2002). Even though plaintiffs had not petitioned for a rulemaking to rescind the regulation implicated by their constitutional challenge, the *Fox* Court held their claims ripe. *Id.* at 1039-40.

First, "the issues in this case are fit for judicial review because the questions presented are purely legal ones . . . [including] whether the challenged rules violate the First Amendment." *Id.* at 1039. To the extent that Petitioners'-Appellants' constitutional challenges to the Division here implicate the constitutionality of the discriminatory Regulation, the questions are also "purely legal" and thus ripe. For example, no amount of administrative notice and comment will provide the judiciary with helpful

information as to whether the legislature violated the Iowa Constitution's Single-Subject and Title Rules in passing the Division.

Second, "the petitioners will indeed be harmed" by a dismissal on ripeness grounds. *Id.* "Although they could challenge the Rules by other means, [*i.e.*, a petition for rulemaking,] retention of the Rules in the interim significantly harms" the parties. *Id.* In *Fox*, the harm was "prevent[ing] Time Warner from acquiring television stations in certain markets where it would like to do so." *Id.* Here, the harm is the indefinite postponement of medically necessary care, specifically the denial of a procedure which is acknowledged by medical experts to reduce the risk of depression, self-harm, and suicide (Ex. 10: Ettner Aff. ¶ 15) to patients whose depression and suicidal ideation is actually and currently being worsened by the Division (Ex. 1: Vasquez Aff. ¶ 26; Ex. 6: Covington Aff. ¶ 32). That harm is undeniably worse than not being able to buy a television station.

Finally, as the *Fox* Court noted, the government was "mistaken in asserting that the only remedy available to the petitioners is a remand for rulemaking . . . . [A] reviewing court may vacate the underlying rule if it determines not only that the commission failed to justify retention of the rule but that it is unlikely the Commission will be able to do so on remand." 280 F.3d at 91. For the same reasons that Petitioners-Appellants are likely to

prevail on the merits of their equal protection and inalienable rights claims, *see* Part D, above, DHS could not justify the administrative rule even if that were what Petitioners-Appellants were challenging here.

Likewise, Respondents raised—but the district court did not address—the abstract possibility of an administrative waiver as a ripeness issue. (*See* Defs.' Resistance at 4). But the process of applying for a waiver would be time-consuming, requiring a period in which Petitioners-Appellants would continue to suffer irreparable harm. *See* Part C, above. Additionally, the existence of a discretionary waiver buried in the administrative process does not bar a suit by a plaintiff who has not requested an allegedly unlawful law or policy be waived in their specific case. "[Respondents] cite no authority suggesting the petitioners were required to request a waiver from the agency even though a waiver is not the relief they seek from the court; nor do the intervenors proffer any reason to believe the petitioners would have been entitled to a waiver had they sought one." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1040 (D.C. Cir. 2002), *modified on other grounds on reh'g*, 293 F.3d 537 (D.C. Cir. 2002). And finally, a waiver would not grant Petitioners-Appellants the declaratory and injunctive relief they seek as to the constitutionality of the Division under their equal protection, Single-Subject and Title Rules, and Inalienable Rights clause claims.

V. CONCLUSION

Petitioners-Appellants have experienced significant ongoing and imminent injury as a result of the unconstitutional Division. Their claims are ripe because no further factual development is needed to adjudicate their constitutional claims, and absent adjudication, the injuries they will suffer are certain and not speculative.

WHEREFORE, Petitioners-Appellants pray this Court grant their Motion for Temporary Injunctive Relief and enjoin Respondents from enforcing the Division during the pendency of this case.

Respectfully submitted:

/s/Rita Bettis Austen
Rita Bettis Austen, AT0011558
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: 515-243-3988
Fax: 515-243-8506
Email: Rita.Bettis@aclu-ia.org

/s/ Shefali Aurora
Shefali Aurora, AT00012874
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: 515-243-3988
Fax: 515-243-8506
Email: Shefali.Aurora@aclu-ia.org

/s/ John A. Knight *
John A. Knight, PHV001725

ACLU Foundation
Lesbian Gay Bisexual Transgender Project
150 North Michigan Avenue, Suite 600
Chicago, Illinois 60601
Telephone: 312-201-9740
E-mail: jaknight@aclu.org

/s/ F. Thomas Hecht *
F. Thomas Hecht, PHV001733
Nixon Peabody LLP
70 West Madison St., Ste. 3500
Chicago, IL 60601
Telephone: 312.977.4322
Fax: 312.977.4405
fthecht@nixonpeabody.com

/s/ Tina B. Solis *
Tina B. Solis, PHV002257
Nixon Peabody LLP
70 West Madison St., Ste. 3500
Chicago, IL 60601
Telephone: 312.977.4482
Fax: 312.977.4405
tbsolis@nixonpeabody.com

/s/ Seth A. Horvath *
Seth A. Horvath, PHV001734
Nixon Peabody LLP
70 West Madison St., Ste. 3500
Chicago, IL 60601
Telephone: 312.977.4443
Fax: 312.977.4405
sahorvath@nixonpeabody.com

*Admitted *pro hac vice* in the Iowa District Court case; Motion for admission *pro hac vice* in the Iowa Supreme Court case forthcoming

ATTORNEYS FOR PETITIONERS-APPELLANTS