IN THE SUPREME COURT OF IOWA

MIKA COVINGTON, AIDEN DELATHOWER, and ONE IOWA, INC., Petitioners, v. KIMBERLY K. REYNOLDS ex rel. STATE OF IOWA and IOWA DEPARTMENT OF HUMAN SERVICES, Respondents.	Supreme Ct. No. 19-1197 Polk Co. Case No. EQCE084567 **EMERGENCY MOTION FOR TEMPORARY INJUNCTION**

COME NOW, the Petitioners-Appellants Mika Covington, Aiden DeLathower, and One Iowa, Inc., by and through their attorneys, Rita Bettis Austen and Shefali Aurora of the American Civil Liberties Union of Iowa Foundation; John A. Knight of the American Civil Liberties Union Lesbian Gay Bisexual and Transgender & HIV Project; and F. Thomas Hecht, Tina B. Solis, and Seth A. Horvath of Nixon Peabody LLP, and respectfully submit this Emergency Motion for Temporary Injunctive Relief pursuant to Iowa R. Civ. Pro. 1.1502 and 1.1506(2), to stay enforcement of Division XX, Sections 93-94 of House File 766 (hereinafter "the Division"), which facially discriminates against transgender Iowans by creating an exception to Iowa's

Civil Rights Act protections against discrimination in public accommodations with the purpose and effect of discriminating against transgender Iowans by denying them publicly funded healthcare including Medicaid, and state as follows:

1. Petitioners-Appellants previously sought a temporary injunction from the Polk County District Court, which the court denied on July 18, 2019. (Ruling on Plaintiffs' Pet. For Temp. Inj.).

2. Because the rights of Petitioners-Appellants will "be lost or greatly impaired by delay", this Motion may be ruled upon at any time without awaiting a resistance. Iowa R. App. 1002(4).

3. A temporary injunction is appropriate when necessary "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). Such relief is appropriate if the movant demonstrates a likelihood of success on the merits, a threat of irreparable injury, and that the balance of harms favors relief. *See generally Opat v. Ludeking*, 666 N.W.2d 597, 603-04 (Iowa 2003); *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001).

4. Individual petitioner Aiden DeLathower ("Aiden Vasquez")[1] is a transgender man. (Ex. 1: Vasquez Aff. ¶¶ 3-4.) His medical providers have determined that he requires gender-affirming surgery to treat his gender dysphoria. (*Id.* ¶¶ 7, 13-15, 27; Ex. 2: Nisly/Vasquez Aff. at 1; Ex. 3: Daniels/Vasquez Letter; Ex. 4: Eadeh/Vasquez Letter; Ex. 5: Watters/Vasquez Letter.) He suffers depression and suicidal ideation because of his gender dysphoria, which have worsened because of Governor Reynolds's signing of the Division into law. (Ex. 1: Vasquez Aff. ¶ 26.) Mr. Vasquez receives Medicaid, and can neither afford his medically necessary gender-affirming surgery nor his required pre-operative consultation without Medicaid. (*Id.* ¶¶ 22-25.) Because the office of Mr. Vasquez's surgeon could not confirm that Medicaid would cover his treatment, Mr. Vasquez was forced to cancel his pre-operative consultation and could not schedule his surgery because in light of the Division, his surgeon's office could not confirm that Medicaid would cover his treatment. (*Id.*) Mr. Vasquez is therefore already

[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.

being required to forego medically necessary care because of the Division. (*Id.* ¶¶ 27-28.)

5. Individual petitioner Mika Covington is a transgender woman who suffers from gender dysphoria. (Ex. 6: Covington Aff. ¶ 3.) Like Mr. Vasquez, Ms. Covington's medical providers have determined that gender-affirming surgery is medically necessary to treat her gender dysphoria. (Ex. 6: Covington Aff. ¶¶ 23, 28; Ex. 7: Nisly/Covington Aff.; Ex. 8: Eadeh/Covington Letter; Ex. 9: Watters/Covington Letter.) Ms. Covington has suffered anxiety and depression because of her gender dysphoria, and because of her depression, has on several occasions required hospitalization after suicide attempts. (Ex. 6: Covington Aff. ¶ 14.) The passage of the Division has worsened Ms. Covington's depression and anxiety, causing her suicidal ideation to return and intensify. (*Id.* ¶ 32.) Ms. Covington receives Medicaid, and without preapproval of her gender-affirming surgery will not be able to have this medically necessary procedure in September 2019, as she and her had doctors planned. (*Id.* ¶¶ 30-33.) Ms. Covington is currently suffering irreparable harm as a result of the Division's mandated denial of medically necessary care. (*Id.* ¶ 33.)

6. Organizational petitioner One Iowa, Inc. ("One Iowa") is a nonprofit that advocates for the rights of LGBTQ Iowans, with a major focus

on improving healthcare for transgender Iowans. (Ex. 11: Crow Aff. ¶ 2; Pet. ¶¶ 54-55).

7. As explained more fully in Petitioners'-Appellants' Brief in Support of Temporary Injunction, filed herewith, Petitioners-Appellants are likely to succeed in their claims that the Division violates their rights under the Iowa Constitution's Equal Protection clause, Single Subject and Title Rules, and Inalienable Rights clause.

8. Petitioners-Appellants are likely to succeed on the merits of their equal protection claims for the same reasons that this Court held that, pre-Division, the Iowa Civil Rights Act prohibited denying transgender people coverage for medically necessary gender-affirming surgery. *Good*, 924 N.W.2d at 861-63 (holding the "express bar on Medicaid coverage for gender-affirming surgical procedures discriminates against transgender Medicaid recipients in Iowa" on the basis of gender identity); *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998) (noting that Iowa Constitution's equal protection guarantee forbids invidious discrimination "based on gender"); *see also Good*, No. CVCV054956 and CVCV055470 (consolidated), at *33 (holding that denying transgender Iowans medically necessary gender affirming surgery violates the equal protection guarantee of the Iowa Constitution).

9. Under this Court's four-factor test set forth in *Varnum*, heightened scrutiny is appropriate because (1) history reflects "invidious discrimination against the class burdened by the legislation," (2) where "the characteristics that distinguish the class [do not] indicate a typical class member's ability to contribute to society," (3) where "the distinguishing characteristic is 'immutable' or beyond the class members' control," and (4) "the political power of the subject class." *Varnum v. Brien*, 763 N.W.2d 862, 887-88 (Iowa 2009).

10. The Division cannot withstand either heightened or rational basis review.

11. Because classifications on the basis of transgender identity are subject to heightened scrutiny, the Division is presumptively unconstitutional and the state must provide an "exceedingly persuasive" substantial connection between the classification and an "important governmental objective." *Varnum*, 763 N.W.2d at 896-97 (internal citations omitted). The only possible "governmental objective" that Defendants have hinted at is saving money. *See* Defs.' Resistance to Mot. for Temp. Inj. at 13-17. But "a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens." *Mem. Hosp. v. Maricopa Cty*., 415 U.S 250, 263 (1974) (citation

omitted).[2] Iowa could not invoke fiscal probity to exclude a racial or religious group from receiving medically necessary care; for the same reason, it cannot justify its discrimination against Petitioners-Appellants by gesturing toward the budget.

12. The Division also cannot withstand rational basis review. Respondents' budgetary rationale fails even this lower level of review. *See Varnum*, 763 N.W.2d at 903 ("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."). Simply put, there is no basis for stripping medically necessary coverage from transgender Iowans besides animus, and therefore there is no rational basis for the Division at all.

[2] Even if budgetary considerations could justify excluding a suspect class from a public benefit, the legislative history demonstrates that the legislature could not have relied on money-saving as their rationale. The fiscal note accompanying the bill containing the Division did not include any reference to the cost of gender-affirming surgery. *See also* Ex. 12: Hogg Aff. (As of late June 2019, long after session ended, Legislative Services Agency had not completed fiscal analysis of Medicaid coverage of gender-affirming surgery).

13. Petitioners-Appellants are also likely to succeed on the merits of their Single Subject and Title Rule claims under the Iowa Constitution. *See* Iowa Const. art. III, § 29. Here, the title of the legislation in which the Division is contained pertains only to appropriations for health and human services. The title provides no notice that that the Division creates an exception to the substantive nondiscrimination protections under ICRA for transgender Iowans who rely on Medicaid to obtain their medically necessary healthcare. Nor is a substantive amendment to Iowa's Civil Rights Act germane to the bill's other subject, appropriations. Indeed, during the truncated legislative debate, the House recognized that the Division was not germane to the title or the budgetary subject matter of the bill and attempted to override the constitutional germaneness requirement with a simple rules vote. *See* H.J. 1064 (Apr. 27, 2019)[3], *available at* https://www.legis.iowa.gov/docs/pubs/hjweb/pdf/April%2027,%202019.pdf#page=9; *see also Des Moines Register and Tribune Co. v. Dwyer*, 542

[3] *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).

N.W.2d 491, 496 (Iowa 1996) (holding legislators cannot override constitutional requirements with changes to legislature's internal rules).

14. Petitioners-Appellants are likely to succeed on the merits of their claim under the inalienable rights clause of the Iowa Constitution. The Division arbitrarily, unreasonably, and invidiously 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.

15. Petitioners-Appellants also meet the other factors necessary for obtaining temporary injunctive relief because, as set forth in above ¶¶ 4-7, the Division will harm Petitioners-Appellants and these harms are irreparable. *See Good v. Iowa Dep't of Human Servs.*, 924 N.W2d 853, 859 (Iowa 2019) (citing expert testimony that state's denial of gender-affirming surgery causes "anxiety, depression, suicidality, and other attendant mental health issues"); *cf. Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (internal citation omitted)).

16. Furthermore, the balance of harms favors Petitioners-Appellants. Respondents will not suffer any harm from transgender Iowans receiving medically necessary gender-affirming surgeries while Petitioners are subjected to devastating immediate harm and risks of future harm from being denied the life-saving medical care they desperately need.

17. Petitioners'-Appellants' claims are ripe for adjudication under this Court's two-prong inquiry, because (1) Petitioners'-Appellants' claims require no further factual development; and (2) withholding adjudication would cause them significant harm. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 158-49; *see also State v. Tripp*, 776 N.W.2d 855, 859 (Iowa 2010) (citing *Abbott Labs* for purposes of state ripeness doctrine). Forcing Mr. Vasquez and Ms. Covington to futilely seek Medicaid coverage for their gender-affirming surgeries and be denied as a result of the Division's reinstatement of the regulation's exclusion of coverage is inconsistent with longstanding ripeness principles. Under those basic principles, litigants are not required to suffer irreparable injuries, when such injuries are certain as they are here, rather than speculative. Requiring Petitioners to formally seek pre-approval for surgery and be denied Medicaid coverage, as the state claims they must do, would provide the court no additional material facts for purposes of deciding Petitioners' equal protection, Title and Single Subject Rule, and Inalienable

Rights clause claims, but would have severe and potentially life-threatening consequences for their health by delaying them the medical care they need.

18. Finally, Petitioners-Appellants have no adequate legal remedy in this case. *See Ney v. Ney*, 891 N.W.2d 446, 451 (Iowa 2017) (holding injunction appropriate "if the available legal remedies are inadequate to avoid the substantial injury"). As explained more fully in Petitioners'-Appellants' Brief filed herewith, administrative appeals by individual Petitioners-Appellants Covington and Vasquez would be fruitless because, as Respondents concede, *see* Defs.' Resistance to Mot. for Injunctive Relief at 4 ("[T]he administrative rule [is] currently in effect . . . ."), the Division has the purpose and effect of reviving the rule this Court previously found to be discriminatory, because it makes the denial of their claims for gender-affirming surgery mandatory and inevitable regardless of medical necessity. *See* Iowa Admin. Code r. 441-78.1(4). Further administrative appeals cannot overturn the Division.[4] Petitioners-Appellants here should not be forced to

[4] The district court's admonition that Petitioners-Appellants should try to change the administrative code rather than seek judicial relief is without basis in law or reason. Ruling on Plaintiffs' Pet. For Temp. Inj. at 9. First, Petitioners-Appellants raise a constitutional challenge to a statute which no administrative agency has jurisdiction to consider; therefore, further administrative remedies would be *per se* inadequate. *Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 836 (Iowa 1979) ("Agencies cannot decide issues of statutory validity. If the constitutional issue does not need to be examined in a particular factual context, the administrative remedy is

postpone medically necessary care to retrace the steps of the *Good* plaintiffs when the real object of their challenge is not the administrative rule, but the statutory Division which has revived it.

19. Given the severe and potentially life-threatening health consequences of the Division, Petitioners-Appellants are further entitled to an injunction because damages as a remedy at law are inadequate; they have shown irreparable harm absent a temporary injunction. (Ex. 1, Vasquez Aff. ¶ 26; Ex. 6, Covington Aff. ¶ 32; Ex. 10, Ettner Expert Aff., ¶ 15.) *See Ney v. Ney*, 891 N.W.2d 446, 452 (Iowa 2017); *Matlock v. Weets*, 531 N.W.2d 118, 122 (Iowa 1995) (holding no adequate remedy at law where applicant's physical safety and mental health threatened); *Hicklin v. Precynthe*, 2018 WL 806764, *10, 14 (E.D. Mo. Feb. 9, 2018) (enjoining prison system's denial of medically necessary transition-related treatments to transgender plaintiff, 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*

'inadequate' . . . ." (internal citations omitted)). Second, even if the District Court were correct that Petitioners-Appellants are challenging a rule rather than a statute (which Petitioners-Appellants are not), courts do not require a party facing irreparable harm from an existing rule to file a petition for rulemaking, wait months or years for a response, and be denied before challenging the existing rule.

Corr., 358 F. Supp. 3d 1103, 1128 (D. Idaho 2018) (finding transgender inmate plaintiff showed irreparable harm "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 clause in their challenge to regulation excluding coverage for gender-affirming surgery). The District Court's description of the harms faced by Petitioners-Appellants as merely possible "distress" is utterly unsupported by the record and minimizes the serious immediate harm as well as the imminent danger the Division presents to the health and safety of Petitioners as well as other transgender Iowans.

20. For the reasons set forth above, and incorporating all the arguments set forth in their concurrently filed brief, Petitioners-Appellants are entitled to the temporary injunction they seek as necessary to protect their legal rights and their health and safety while this case proceeds toward final resolution.

WHEREFORE, Petitioners-Appellants pray this Court immediately act to temporarily enjoin the enforcement of the Division during the pendency of this appeal and any subsequent district court proceeding on remand.

Respectfully submitted,

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

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