IN THE IOWA DISTRICT COURT FOR POLK COUNTY

AIDEN VASQUEZ and MIKA COVINGTON, Petitioners, vs. **IOWA DEPARTMENT OF HUMAN SERVICES**, Respondent.	**Case No. CVCV061729** **RULING ON PETITION FOR JUDICIAL REVIEW**

INTRODUCTION

NOW on the 13th day of August, 2021, the above-captioned matter came on for hearing for oral arguments. The hearing was held via Zoom and was reported. Attorneys Seth Horvath, F. Thomas Hecht, Shefali Aurora, and Rita Bettis Austen appeared for the Petitioners. Attorney Thomas Ogden appeared for the Respondent. Before the Court is a Petition for Judicial Review, filed by Petitioners Aiden Vasquez ("Aiden") and Mika Covington ("Mika") on April 22, 2021, and their brief in support, filed on June 18, 2021.[1] Respondent, the Iowa Department of Human Services, filed its Resistance on July 19, 2021. Petitioners filed a reply on August 6, 2021.

The main issue for this Court on judicial review is whether the State should pay for gender-affirming surgery for the two Petitioners. Under Iowa law, the State is prohibited from paying for sex reassignment surgery. Iowa Code § 216.7(3) specifically states that "[t]his section shall not require any state or local government or tax-supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to

[1] Petitioners filed a supplemental brief on August 23, 2021, providing additional information for the procedural history and factual background specific to Petitioner Covington. DHS provided the Court with Petitioner Covington's administrative record on August 13, 2021.

transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." The Iowa Supreme Court found that a Department of Human Services' regulation prohibiting Medicaid coverage of surgical procedures related to gender identity disorders discriminated on the basis of gender identity, in violation of the Iowa Civil Rights Act ("ICRA"). After the Supreme Court ruled, the Iowa Legislature passed the existing law in 2020 that says the State should not pay for any type of transgender reassignment surgery.

Here, Aiden and Mika, who qualify for Iowa Medicaid, request the surgery and argue this statute discriminates against transgender Medicaid recipients. Aiden and Mika's doctors believe this surgery is medically necessary. The question before the Court is whether Iowa Code section 216.7(3) unlawfully discriminates so that the State of Iowa should be required to pay for Petitioners' surgeries. Based on the record before this Court, this statute violates the equal protection clause of the Iowa Constitution.

FINDINGS OF FACT & PROCEDURAL BACKGROUND

I. Aiden Vasquez

Petitioner Aiden Vasquez is a transgender man who was diagnosed with gender dysphoria in 2016. Vasquez Pet. ¶¶ 14–15. He is 53 years old at the time of this Judicial Review. Vasquez Admin. R. p. 1. He has a history of trauma and reported significant mental health issues. *See id.* at p. 19. "Gender dysphoria" is the medical diagnosis for the feeling of incongruence between one's gender identity and birth-assigned sex, previously known as "gender-identity disorder" or "transsexualism." *See id.* at p. 801, ¶ 12. Throughout 2016, Vasquez began hormone therapy, underwent a double mastectomy, socially transitioned to presenting as male through using male pronouns, legally changed his name, and amended his driver's license, social security card, and birth certificate to reflect his male gender identity. Pet'r's Br. on Judicial Review pp. 19–20. Dr.

Nicole Nisly, Vasquez's primary care physician since May 2016, stated in August of 2020 that "[g]ender affirming bottom surgery is medically necessary to treat [Mr. Vasquez's] gender dysphoria . . . ." Vasquez Admin. R. p. 13. Additionally, four clinical psychologists assessed Vasquez in August and September of 2020 and unanimously recommended gender reassignment/phalloplasty surgery. Pet'r's Br. pp. 21–22. *See also* Vasquez Admin. R. pp. 16–38.

Vasquez is a participant in Iowa Medicaid, and his assigned managed care organization ("MCO") is Amerigroup of Iowa Inc. (hereinafter, "Amerigroup"). Vasquez Pet. ¶¶ 8, 21–22. On August 14 and 17, 2020, Vasquez submitted requests to Amerigroup, through his physician, seeking Medicaid coverage for expenses related to an office visit and subsequent phalloplasty operation to treat his gender dysphoria. *Id.* at ¶¶ 23–24. On August 19 and 28, 2020, Amerigroup denied Vasquez's requests for preapproval for the phalloplasty and office visit, respectively. *Id.* at ¶¶ 25–26. In its letter to Vasquez regarding coverage for the phalloplasty, Amerigroup stated that "[g]ender surgery is not a covered benefit in Iowa" and it cannot pay for the surgery based on Iowa Administrative Code rule 441-78.1(4). Vasquez Admin. R. p. 345. In its letter to Vasquez regarding coverage for the office visit, Amerigroup stated that it "cannot approve an office visit by a provider that is outside of [Vasquez's] plan." *Id.* at p. 520. Furthermore, Amerigroup noted that Vasquez's request for surgery by this provider was not approved and thus concluded that Vasquez did not "need an office visit to be evaluated for a procedure that was not approved." *Id.* Amerigroup cited Iowa Administrative Code rules 441-78.1 and 79.9 as the basis for this decision. *Id.*

Vasquez initiated an appeal from Amerigroup's decisions on October 14, 2020, which Amerigroup denied on November 3 and 6, 2020. Pet. ¶¶ 27–29; Vasquez Admin. R. pp. 282, 286, 306. Again, Amerigroup indicated that it denied coverage for Vasquez's phalloplasty because

pursuant to Iowa Administrative Code rule 441-78-1(4), gender reassignment surgery is not a covered benefit in Iowa. Vasquez Admin. R. p. 286. Furthermore, Amerigroup upheld its denial of Vazquez's request for coverage for his office visit because the doctor was outside of his plan and the office visit was to consider a type of surgery that "is not covered under the program" and "all related services and supplies are also not covered." *Id.* at p. 306.

Vasquez then sought further review through an appeal of Amerigroup's decisions to the Iowa Department of Human Services (hereinafter, "DHS") on January 10, 2021. *Id.* at pp. 3–8. After a February 1, 2021, hearing, an administrative law judge ("ALJ") for the Iowa Department of Inspections and Appeals ("IDIA") issued a proposed decision on March 2, 2021, affirming Amerigroup's decisions. Vasquez Pet. at ¶¶ 9, 31; Vasquez Admin. R. pp. 696, 760–64. Vasquez subsequently appealed the ALJ's proposal to the Director of DHS on March 11, 2021. And on March 25, 2021, the Director adopted the ALJ's recommendation, affirming Amerigroup's denial of Medicaid coverage. Vasquez Pet. ¶¶ 9, 32–33; Vasquez Admin. R. pp. 766–67, 925. Vasquez asserts that he has thus exhausted all administrative remedies and has been adversely affected by DHS's final agency action. Vasquez Pet. ¶ 34.

II. Mika Covington

Petitioner Mika Covington is a transgender woman who was diagnosed with gender dysphoria and began receiving hormone therapy in 2015. Suppl. to Pet'rs' Br. p. 4. She is 30 years old at the time of this Judicial Review. Covington Admin. R. p. 1. She has a history of trauma and reported significant mental health issues. *See id.* at p. 21. In previous years, Covington began the process of socially transitioning from male to female, using pronouns "she," "her," and "hers" since 2009 and legally changing her name in 2014. Suppl. to Pet'rs' Br. p. 4. Covington also changed the gender markers on her identification documents to reflect her female gender identity.

Id. Dr. Nicole Nisly, Covington's primary care physician since 2015, stated in January 2021 that "[g]ender-affirming vaginoplasty surgery is medically necessary to treat [Ms. Covington's] gender dysphoria . . . ." Covington Admin. R. p. 352. Additionally, two clinical psychologists conducted assessments of Covington in January 2021. *Id.* at pp. 355–61. Both opined that Covington "met the [World Professional Association of Transgender Health] standards for receiving gender-affirming bottom surgery" and recommended it as a necessary treatment to help Covington "make significant progress in treating her gender dysphoria." *Id.* at pp. 357, 361.

Like Vasquez, Covington is a participant in Iowa Medicaid and her assigned MCO is also Amerigroup. Suppl. to Pet'rs' Br. pp. 4–5. In or around December 2020, she began the process of seeking coverage for gender-affirming surgery. *Id.* at 4. On December 3 and 7, 2020, Covington submitted a request to Amerigroup through her physician for expenses related to a vaginoplasty. Covington Admin. R. pp. 318–35. On December 16, 2020, Amerigroup denied the request, stating that it "cannot pay for the surgery" because "[g]ender surgery is not a covered benefit in Iowa." *Id.* at p. 337 (citing Iowa Admin. Code r. 441-78.1(4)).

Covington submitted an appeal of Amerigroup's decision on February 8, 2021. *Id.* at pp. 142–43, 146–47. On February 25, 2021, Amerigroup upheld the denial of coverage for the same reasons as originally cited. *Id.* at p. 275. Subsequently, Covington sought further review through an appeal to DHS and after an April 12 hearing, the ALJ issued a proposed decision affirming Amerigroup's decision on April 27, 2021. *Id.* at pp. 525, 581–90. On further review, the Director of DHS adopted the ALJ's ruling as the agency's final decision, affirming Amerigroup's denial of Medicaid coverage for Covington's gender-affirming surgery. *Id.* at p. 728.

III. Procedural History of Record and Petitions for Judicial Review

On April 22, 2021, Petitioner Vasquez filed a petition for judicial review under Iowa Code section 17A.19, alleging that DHS's decision should be vacated based on the following seven claims: (1) violation of equal protection; (2) gender identity and sex discrimination; (3) discriminatory animus against transgender people; (4) violation of the Iowa Constitution's single-subject rule; (5) violation of the Iowa Constitution's title rule; (6) disproportionate negative impact on private rights; and (7) there was an unreasonable, arbitrary, and capricious decision. Vasquez Pet. ¶¶ 155–245. On July 19, 2021, Petitioner Covington filed a similar petition for review, alleging the same claims as Vasquez. Covington Pet. ¶¶ 138–228. Both petitions seek an order from this Court reversing DHS's denial of the Petitioners' requests for Medicaid coverage pursuant to sections 17A.19(10)(a), (b), (k), and (n).[2] Vasquez Pet. pp. 23, 25, 27, 30, 33 35–36; Covington Pet. pp. 21, 23, 25, 28, 31, 33–34.

On May 13, 2021, Respondent filed a Motion to Dismiss, seeking dismissal of Counts II through V of Vasquez's Petition, as well as the requests for relief. Mot. to Dismiss ¶¶ 4–7. On August 10, 2021, this Court ruled on Respondent's Motion to Dismiss, dismissing the single-subject and title rule violations (Counts IV and V) and the Iowa ICRA violations (Counts II and III, in part). On August 23, 2021, Petitioners filed a motion for reconsideration, which the Court denied on November 19, 2021.[3]

On August 13, 2021, the Court granted Petitioners' uncontested motion to consolidate Vasquez and Covington's cases. On August 23, 2021, under Mr. Vasquez's case number, Petitioner filed a Supplement to Petitioners' Brief on Judicial Review, providing supplements to

[2] "The only differences between the two cases are the dates of their respective medical assessments and administrative appeals, as well as the details of their individual medical assessments . . . ." Uncontested Mot. to Consolidate Judicial-Review Proceedings ¶ 2.

[3] As a procedural note, Petitioners and Respondent filed their final briefs before the Court ruled on the motion to dismiss, thus including in these briefs arguments that the Court ultimately addressed and dismissed. The instant ruling incorporates the Court's rulings on the motion to dismiss and the motion for reconsideration.

the procedural history and factual background specifically relating to Ms. Covington. Any reference to "the Petition" and "Petitioners' brief" incorporates both Vasquez and Covington.

This is a Judicial Review Proceeding, so this Court reviews only the written record and hears legal arguments from opposing counsel. This case has an unusual record. This ruling reads like a prolonged default judgment. Petitioners filed a sixty-five page brief and sixty-one page reply brief to assert their extensive, wide-ranging causes of action. At the hearing Amerigroup denied the surgery because the regulations are still there and the regulations are still binding on Amerigroup. Vasquez, Admin. R. p. 711. They cited Iowa Administrative Code 441-78.1(4) and Iowa Code section 216.7 in denying the requests for surgery. They did follow Iowa law and denied Petitioners' requests for surgery and office visits for the surgery. But because the ALJ lacked the legal authority to decide the constitutionality of the legal provisions under Iowa law, no evidence or arguments were presented for this Court to review regarding any opposing views on medical necessity or facts supporting constitutionality. The question of being able to change one's sex, most radically through surgical intervention, is in the public forum and in social discourse. That dialogue is not in this record except to assert animus. There was no adversarial process in building this record to search for the truth. Petitioners presented their evidence and preserved their record.

At the hearings held before the ALJ, the Respondent in Covington's case submitted Exhibits A–G and Covington submitted Exhibits 1–7. Covington Admin. R. pp. 317–494; *id.* at pp. 527–61 (Tr. of Hr'g). Her exhibits included the affidavit by Dr. Nisly; an affidavit from Mr. Drustrup; an affidavit from Ms. Ball; an affidavit by Dr. Ettner; Ms. Covington's affidavit; the memorandum of law that was prepared on behalf of Ms. Covington; and Ms. Covington's authorization for representation by the Nixon Peabody firm, as well as the ACLU. Both sets of

exhibits were admitted without objection. Amerigroup did not offer any testimony. All of the record pointed to evidence that the vaginoplasty is a medically necessary procedure.

Similarly, in the Vasquez administrative hearing, the parties treated the case as a legal issue. Vasquez admitted Exhibits 1–8 and Respondent admitted Exhibits A–G (Exhibits A2–G2) (supporting documents for decision and Iowa Administrative Code 441.78.1(4))(appeal of surgery and second set for office visit). Vasquez Admin. R. pp. 698–733 (Tr. of Hr'g). The exhibits were admitted without objection. Exhibit 1 is from Mr. Vasquez's primary care physician, Nicole Nisley. Exhibit 2 is a letter and affidavit from Scott X. Fieker, a licensed mental health counselor who assessed Mr. Vasquez. Exhibit 3 is an affidavit from Amanda Goslin, a licensed marriage and family therapist. Exhibit 4 is an affidavit from Jacob Sandoval, also a licensed marriage and family therapist, who assessed Mr. Vasquez. Exhibit 5 is a letter and affidavit from Dr. Carol Daniels, Ph.D., a licensed marriage and family therapist who evaluated Mr. Vasquez. Exhibit 6 is from Dr. Randi Ettner, Ph.D. Exhibit 7 is an affidavit from Mr. Vasquez. The parties stipulated that Dr. Sherman would testify on behalf of Amerigroup that the denial letters accurately reflect the basis for Amerigroup's denial of surgery request. *Id.* at 716. They further stipulated that Amerigroup received and reviewed all of Vasquez's submitted materials regarding his appeal request. *Id.* at 717, 339. All of this record pointed to evidence that the phalloplasty is a medically necessary procedure.

LEGAL STANDARDS

I. Judicial Review

The Iowa Administrative Procedures Act codifies a court's judicial review of agency action in Iowa Code section 17A.19. Pursuant to this section, a district court has the power to "affirm the agency action or remand to the agency for further proceedings." Iowa Code § 17A.19(10).

Additionally, "[t]he court shall reverse, modify, or grant other appropriate relief from agency action . . . if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action" falls within any of the categories enumerated in subsection 10, paragraphs "a" through "n." *Id.*

"District courts exercise appellate jurisdiction over agency actions on petitions for judicial review." *Christiansen v. Iowa Bd. of Educ. Exam'rs*, 831 N.W.2d 179, 186 (Iowa 2013) (citation omitted). "The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity." Iowa Code § 17A.19(8)(a). "Because of the widely varying standards of review, it is essential for counsel to search for and pinpoint the precise claim of error on appeal." *Jacobsen Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010) (citation and internal quotations omitted). *See also Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012) ("Under Iowa Code section 17A.19(10) . . . [the] standard of review depends on the aspect of the agency's decision that forms the basis of the petition for judicial review.")

Generally, on judicial review, the court's "decision is controlled in large part by the deference we afford to decisions of administrative agencies." *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 844 (Iowa 2011). However, under section 17A.19(10)(a), the court "do[es] not give any deference to the agency with respect to the constitutionality of a statute or administrative rule because it is entirely within the province of the judiciary to determine the constitutionality of legislation enacted by other branches of government." *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 44 (Iowa 2012) (citation omitted). *See also* Iowa Code § 17A.19(11)(b). A petitioner is merely "required to raise constitutional issues, even though the agency lacks the authority to decide the issues, in order to preserve the constitutional issues for judicial review." *Endress v. Iowa Dep't of Hum. Servs.*, 944 N.W.2d 71, 83 (Iowa 2020) (citing

McCracken v. Iowa Dep't of Hum. Servs., 595 N.W.2d 779, 785 (Iowa 1999)).[4] Additionally, "[a]lthough the DHS is the state agency administering Medicaid benefits," Iowa courts "decline to give deference to the DHS interpretation of the [Medicaid] Act and the DHS's rules and regulations regarding Medicaid." *Cox v. Iowa Dep't of Hum. Servs*., 920 N.W.2d 545, 549 (Iowa 2018) (citing *Am. Eyecare v. Dep't of Hum. Servs.*, 770 N.W.2d 832, 836 (Iowa 2009) (declining to defer to the DHS's interpretation of its rules implementing Medicaid)).

II. Constitutional Issues

Petitioners claim the current law is a violation of equal protection. Under section 17A.19(10)(a), a court may grant relief from agency action if a person's substantial rights have been prejudiced because the agency action is "[u]nconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied." Iowa Code § 17A.19(10)(a). "When constitutional issues are raised . . . we must make an independent evaluation of the totality of the evidence and our review in such cases is de novo." *Simonson v. Iowa State Univ.*, 603 N.W.2d 557, 561 (Iowa 1999) (citation omitted). *See also Immaculate Conception Corp. v. Iowa Dep't of Transp.*, 656 N.W.2d 513, 515 (Iowa 2003) ("To the extent the appeal concerns issues of constitutional magnitude, we review the record de novo."); *Soo Line R.R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994) (same); *Adair Benevolent Soc'y v. State, Ins. Div.*, 489 N.W.2d 1, 3 (Iowa 1992) (same).

The Iowa Supreme Court "generally consider[s] the federal and state equal protection clauses to be 'identical in scope, import, and purpose.'" *Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 50 (Iowa 2016) (quoting *War Eagle Vill.*

[4] *See* Vasquez Admin. R. p. 763 (ALJ's Proposed Decision) (noting Vasquez's preservation of his constitutional arguments); Covington Admin. R. p. 589 (ALJ's Proposed Decision) (same).

Apartments v. Plummer, 775 N.W.2d 714, 719 (Iowa 2009)).[5] *See also Varnum v. Brien*, 763 N.W.2d 862, 878 n. 6 (Iowa 2009) (same). Thus, "absent an argument to the contrary, we generally decline to apply divergent analyses under the two constitutions." *Clayton v. Iowa Dist. Ct. for Scott Cnty.*, 907 N.W.2d 824, 827 (Iowa Ct. App. 2017). *See State v. Wade*, 757 N.W.2d 618, 624 (Iowa 2008).[6] Neither party here argues for a different standard under the Iowa Constitution.

ANALYSIS

The parties briefed a summary of the case law and legislative history of Medicaid coverage for gender-affirming surgery in Iowa. The history ultimately leads up to the key case from the Iowa Supreme Court that guides this decision, *Good v. Iowa Department of Human Services*, 924 N.W.2d 853, 856 (Iowa 2019), which held that rule 441-78.1(4)'s exclusion of Medicaid coverage for gender-affirming surgery violates the ICRA as amended by the legislature in 2007. The legislature then passed Iowa Code § 216.7(3) of the ICRA.

I. History of Medicaid Coverage for Gender-Affirming Surgery in Iowa

In *Pinneke v. Preisser*, a transgender woman sought relief from the Iowa Department of Social Services' ("DSS") denial of Medicaid funding, which was based solely on the State of Iowa Medicaid program's specific exclusion of coverage for sex reassignment surgery. 623 F.2d 546, 546–47 (8th Cir. 1980). Although not explicitly written into the statute, the Iowa legislature and judiciary operated under "an irrebuttable presumption that treatment of transsexualism by alteration of healthy tissue" could not be considered "medically necessary," but was rather more

[5] "Although [they] have generally applied the same analysis to federal and state equal protection claims, [Iowa appellate courts have] not foreclosed the possibility that there may be situations where differences in the scope, import, or purpose of the two provisions warrant divergent analyses." *Clayton v. Iowa Dist. Ct. for Scott Cnty.*, 907 N.W.2d 824, 827 (Iowa Ct. App. 2017) (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004)).

[6] *See also State v. Baker*, 925 N.W.2d 602, 610 (Iowa 2019) (involving search and seizure issues, but stating the general principle that "[w]hen counsel does not advance a distinct analytical framework under a parallel state constitutional provision, the Supreme Court ordinarily exercise prudence by applying the federal framework to our analysis of the state constitutional claim").

in the nature of cosmetic surgery. *Id.* at 548 n. 2. The Eighth Circuit found that Iowa's informal policy of "excluding the only available treatment known at this stage" for gender dysphoria from Medicaid coverage was "an arbitrary denial of benefits based solely on the 'diagnosis, type of illness, or condition'" and thus in violation of regulations set forth by the federal Department of Health, Education, and Welfare. *Id.* at 549 (quoting 42 C.F.R. § 440.230(c) (1979)).

The *Pinneke* court additionally concluded that Iowa's unwritten policy was not consistent with the objectives of the Medicaid statute, which included Congress's intent that "medical judgments . . . play a primary role in the determination of medical necessity." *Id.* The court noted that DSS "established an irrebuttable presumption that the procedure of sex reassignment surgery [could] never be medically necessary when the surgery [was] a treatment for transsexualism and remove[d] healthy, undamaged organs and tissue." *Id.* The United States Supreme Court emphasized the importance of a professional medical judgment in these cases, and Iowa's approach did not adequately consider "the applicant's diagnosed condition, the treatment prescribed by the applicant's physicians, and the accumulated knowledge of the medical community." *Id.* (citing *Beal v. Doe*, 432 U.S. 438, 445 n. 9 (1977)).

In 1993, the Department (now referred to as DHS rather than DSS) contracted with the Iowa Foundation for Medical Care[7] (hereinafter, "the Foundation") to provide a review and recommendation regarding Medicaid coverage for treatment of disorders such as gender identity disorder. *Smith v. Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001). After conducting a review of current medical literature and contacting various organizations, the Foundation provided a final recommendation for DHS "that, given the lack of consensus in the medical community and the

[7] "The Foundation is a federally designated medical peer review organization that, among other things, monitors the quality of care and the appropriateness of certain medical procedures for payment under Medicare and Medicaid programs." *Rasmussen*, 249 F.3d at 760.

availability of other treatment options, [DHS] should not fund sex reassignment surgery." *Id.* After publishing a notice of intended action and soliciting public comment, a proposed regulation prohibiting coverage was considered at a public meeting of DHS's policy-making body and then reviewed by the Administrative Rules Committee of the Iowa legislature. *Id.* at 760–61.

The regulatory exclusion was adopted as Iowa Administrative Code rule 441-78.1(4) (hereinafter referred to as "the Regulation"). The Regulation states, in relevant part, that "[c]osmetic, reconstructive, or plastic surgery performed in connection with certain conditions is specifically excluded." Iowa Admin. Code r. 441-78.1(4)(b). Among the list of these conditions is "[p]rocedures related to transsexualism, hermaphroditism, gender identity disorders, or body dysmorphic disorders." *Id.* at r. 441-78.1(4)(b)(2).

In 2001, the Eighth Circuit considered the legality of the Regulation adopted post-*Pinneke*. *Rasmussen*, 249 F.3d at 759. The *Rasmussen* court ultimately concluded that unlike in *Pinneke*, DHS "promulgated the regulation through a rulemaking process that involved professional medical judgment and the consideration of the current state of medical knowledge." *Id.* at 761. Therefore, the court could not say that the procedures were problematic, unreasonable, or inadequate. *Id.* Furthermore, the *Rasmussen* court determined it could not conclude that the Regulation was unreasonable, arbitrary, or inconsistent with the Medicaid Act. *Id.* Rather, the court stated that DHS's "research demonstrated the evolving nature of the diagnosis and treatment of gender identity disorder and the disagreement regarding the efficacy of sex reassignment surgery." *Id.* Additionally, the court found it important that the testimony of the petitioner's primary treating physician, who was a specialist in gender identity disorder, generally supported the conclusion that sex reassignment surgery may be medically necessary in some cases, but also "noted that the efficacy of the surgery ha[d] been questioned within the medical community." *Id.* at 756–57, 761.

In 2019, the Iowa Supreme Court revisited the legality of the Regulation after the Iowa legislature amended the Iowa Civil Rights Act in 2007 to add "gender identity" to the list of protected characteristics. *Good v. Iowa Dep't of Human Servs.*, 924 N.W.2d 853, 856 (Iowa 2019) (citing Iowa Code § 216.7(1)(a) (2009)). The question before the court was whether, in light of this amendment, the language of the Regulation regarding the prohibition of Medicaid coverage for surgical procedures related to "gender identity disorders" violated the ICRA or the Iowa Constitution. *Id.*

The *Good* court concluded that the ICRA's addition of "gender identity" to the list of protected groups "encompasses transgender individuals – especially those who have gender dysphoria – because discrimination against these individuals is based on the nonconformity between the gender identity and biological sex." *Id.* at 862. The court also noted that this new prohibition against denying Medicaid coverage for the two plaintiffs' gender-affirming surgical procedures extended to the director and staff of DHS, as well as DHS's agents, the MCOs. *Id.*

Furthermore, the court rejected DHS's argument that the Regulation was "nondiscriminatory because its exclusion of coverage for gender-affirming surgical procedures encompasses the broader category of 'cosmetic, reconstructive, or plastic surgery' that is 'performed primarily for psychological purposes.'" *Id.* (quoting Iowa Admin. Code r. 441-78.1(4)). The court found the record did not support this position as "DHS expressly denied [the plaintiffs] coverage for their surgical procedures because they were 'related to transsexualism . . . [or] gender identity disorders' and 'for the purpose of sex reassignment.'" *Id.* (quoting Iowa Admin. r. 441-78.1(4)(b)).

Moreover, the court found it telling that the Regulation *did* authorize payment for some cosmetic, reconstructive, and plastic surgeries that serve psychological purposes (*e.g.,* rule 441-

78.1(4)(a)'s inclusion of "[r]evision of disfiguring and extensive scars resulting from neoplastic surgery" and "[c]orrection of a congenital anomaly") but prohibited coverage for these same procedures merely if an individual was transgender. *Id.* Based on these conclusions, the *Good* court ultimately found that through its amendment of the ICRA, the legislature "specifically made it clear that individuals cannot be discriminated against on the basis of gender identity . . . ." *Id.* at 863. Therefore, the court found that "rule 441-78.1(4)'s exclusion of Medicaid coverage for gender-affirming surgery violates the ICRA as amended by the legislature in 2007." *Id*. at 863.

The Iowa Supreme Court's decision in *Good* was filed on March 8, 2019. In direct response to *Good*, the Iowa legislature signed Division XX into law on May 3, 2019. Division XX amended the ICRA's protection against unfair and discriminatory practices in public accommodations by adding a provision, that expressly stated that "[t]his section shall not require any state or local government 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(3). From this point on, the Court refers to "Division XX" as Iowa Code section 216.7(3).

This history now brings us to the point where Petitioners have filed Petitions for Judicial Review of Agency Action under Iowa Code section 17A.19 for denial of their respective requests for Medicaid coverage for gender-affirming surgery. Petitioners assert that DHS's denial was "based upon a provision of law that is unconstitutional on its face or as applied," "in violation of any provision of law," "[n]ot required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest," and "[o]therwise unreasonable, arbitrary, capricious, or an abuse of discretion." Iowa Code §§ 17A.19(10)(a), (b), (k), (n).

After a thorough review of DHS' records, it is clear that the amount of evidence submitted to the ALJ was, in both Vasquez's and Covington's appeals, overwhelmingly provided by the Petitioners. There is little, if any, documentation in the record to refute the medical and psychological evidence put forth by Petitioners.[8] There were no facts presented regarding the State's interest. Pursuant to the standards governing judicial review, the Court analyzes what is presented in this record for this dispute resolution.

II. Equal Protection Claim: Iowa Code § 216.7(3)

Although the district court in *Good* held underlying regulations (Iowa Administrative Code 441-78.1(4)) violate the ICRA and the equal protection clause of the Iowa Constitution, the Iowa Supreme Court did not address the constitutional claim and based its decision only on the Regulation's violation of the ICRA. *Good*, 924 N.W.2d at 856. This Court is asked to once again address the constitutional claim. Iowa Code section 216.7 governs unfair practices regarding accommodations or services, stating in part the following:

> It shall be an unfair or discriminatory practice for any . . . manager . . . of any public accommodation or any agent or employee thereof . . . [t]o refuse or deny to any person because of . . . sex . . . [or] gender identity . . . the accommodations, advantages, facilities, services, or privileges thereof . . . .

Iowa Code § 216.7(1)(a). To reiterate, the Iowa legislature enacted an amendment to section 216.7 on May 3, 2019, which was codified as subsection 3 and took effect in January 2020: "This section shall not require any state or local government unit or tax-supported district to provide for sex

[8] The search for ultimate truth may have been neglected at the Administrative Hearing. Although faith, ethical, and moral issues were not raised in this record and not considered here, there have been arguments expressing concern about a human person using invasive surgery for gender transitioning. The National Catholic Bioethics Center asserts that the claim that it is possible to change one's sex, or that sexual identity is fluid, contradicts scientific evidence, reason, the nature of the human person, and key tenets of the Catholic faith. *See Brief Statement on Transgenderism*, p. 599, The National Catholic Bioethics Quarterly, Winter 2016. The ethicists conclude the following: "It is clear that those with gender dysphoria suffer greatly and must be treated with great compassion and sympathy. However, the attempt must be made to dissuade them from actions that ultimately will not contribute to their individual flourishing and may cause irreversible harm." *Id*. at 603.

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(3).

Expressed in article I, section 6, the Iowa Constitution's equal protection clause provides the following: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. art. I, § 6. This "constitutional promise of equal protection 'is essentially a direction that all persons similarly situated should be treated alike.'" *Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009) (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004)). Therefore, "[t]o prove an equal protection violation, the plaintiffs must first establish that the statute treats similarly situated individuals differently." *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 32 (Iowa 2019) (citing *McQuistion v. City of Clinton*, 872 N.W.2d 817, 830 (Iowa 2015)). *See also Varnum*, 763 N.W.2d at 882 ("Under this threshold test, if plaintiffs cannot show as a preliminary matter that they are similarly situated, courts do not further consider whether their different treatment under a statute is permitted under the equal protection clause.").[9]

The Court notes as a preliminary matter that the arguments and responses provided by the parties regarding the constitutional issues of section 216.7(3) and the Regulation are similar, if not identically applied, and unavoidably intertwined. *See, e.g.*, Pet'rs' Br. p. 45 ("For the same reasons the Regulation is facially discriminatory . . . so, too, is Division XX."). As the overarching and

[9] *See also State v. Treptow*, 960 N.W.2d 98, 104 (Iowa 2021) ("The first step in our equal protection analysis is to determine whether the challenged law makes a distinction between similarly situated individuals with respect to the purposes of the law . . . This is a threshold test."); *Clayton v. Iowa Dist. Ct. for Scott Cnty.*, 907 N.W.2d 824, 828 (Iowa Ct. App. 2017) ("The 'threshold' test in any equal protection analysis is to determine whether the plaintiff is in fact similarly situated to the class of persons receiving differential treatment.").

primary issue, Petitioners assert that section 216.7(3) and its resurrection of the Regulation is discriminatory and thus violates equal protection by "allowing the state to deny Medicaid coverage for medically necessary surgery to transgender Iowans . . . solely because they are transgender." Pet'rs' Br. pp. 46–47 (citing *Diaz v. Brewer*, 656 F.3d 1008, 1012–15 (9th Cir. 2011) (concluding that a 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)). Section 216.7(3) "works together with the Regulation to violate equal protection, as did the statutes at issue in *Diaz* and *Bassett* . . . ." *Id.* at 47.

Additionally, Petitioners assert that the express purpose and effect of section 216.7(3) and its reinstatement of the Regulation, which was found to violate the ICRA,[10] "violates equal protection in the same way that taking away nondiscrimination protections, food stamps, and marriage violated equal protection in *Romer*, *Moreno*, and *Perry*." *Id.* (citing *Romer v. Evans*, 517 U.S. 620, 627 (1996); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); and *Perry v. Brown*, 671 F.3d 1052, 1083 (9th Cir. 2012)). Petitioners contend that, based on these authorities and contrary to Respondent's argument, "the state's discretion to determine what [the] ICRA does and does not cover is not a defense to [Petitioners'] equal protection challenge to section 216.7(3)." *Id. See, e.g.*, Resp't's Final Br. pp. 23–24, 27–28.

A. Whether Transgender and Non-Transgender Medicaid Beneficiaries are Similarly Situated

Petitioners argue that transgender and non-transgender Iowa Medicaid recipients are similarly situated in that both groups share a financial need for medically necessary treatment. Pet'rs' Br. p. 45. By contrast, Respondent asserts that Petitioners have not shown that they are similarly situated to non-transgender Medicaid beneficiaries for the purpose of section 216.7(3)

[10] *Good*, 924 N.W.2d at 862–63.

because non-transgender Medicaid beneficiaries are not protected by the ICRA: "The law makes clear that nothing in the [ICRA] requires a government unit to provide for, among other things, sex reassignment surgery. Nothing in the Act requires a government unit to provide for any other kind of surgery sought by a non-transgender Medicaid beneficiary either." Resp't's Final Br. p. 27. In response, Petitioners argue that all Iowans on Medicaid are protected by the ICRA. Pet'rs' Reply in Supp. of Br. on Judicial Review p. 34 (hereinafter, "Pet'rs' Reply").

The threshold question in the present equal protection analysis is whether transgender and non-transgender Medicaid recipients are similarly situated. *State v. Tucker*, 959 N.W.2d 140, 146 (Iowa 2021). "In considering whether two classes are similarly situated, a court cannot simply look at the trait used by the legislature to define a classification under a statute and conclude a person without that trait is not similarly situated to persons with the trait." *Varnum*, 763 N.W.2d at 882 ("'[S]imilarly situated' cannot mean simply 'similar in the possession of the classifying trait.' All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test." (quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 345 (1949))). However, the "similarly situated" requirement also "cannot possibly be interpreted to require plaintiffs to be identical in every way to people treated more favorably by the law." *Id.* at 882–83.

Varnum states: "The law itself must be equal." The relevant question is whether the law "treat[s] alike all people who are similarly situated with respect to the legitimate purposes of the law." *Varnum*, 763 N.W.2d at 882 (citations and internal quotations omitted). The Iowa Supreme Court recognizes that "[t]his requirement makes it impossible to pass judgment on the reasonableness of a [legislative] classification without taking into consideration, or identifying, the purpose of the law." *Id.* at 883 (alteration in original) (citation omitted). Therefore, the Court must

reference the purposes of section 216.7(3) and Medicaid "in order to meaningfully evaluate whether the law equally protects all people similarly situated with respect to those purposes." *Id.*

"Medicaid is a federal-state program through which the federal government provides funds for the provision of health care services to needy individuals through the participation of the states, which act as administrators of the funds." *Rasmussen*, 249 F.3d at 757 (citing 42 U.S.C. § 1396). *See also Colwell v. Iowa Dep't of Hum. Servs.*, 923 N.W.2d 225, 236–37 (Iowa 2019) ("The purpose of Medicaid is to provid[e] federal financial assistance to states that choose to reimburse certain costs of medical treatment for needy persons." (alteration in original) (citation omitted)).[11] The purpose of section 216.7(3) is to reinstate the Regulation codified at Iowa Administrative Code rule 441-78.1(4) by allowing "any state or local government unit or tax-supported district" to deny financial coverage "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(3). And the Regulation was intended to exclude coverage "for sex reassignment surgery" for Medicaid recipients who are transgender. *Good v. Dep't of Hum. Servs.*, CVCV054956, Ruling on Petitions for Judicial Review at 21 (Polk Cnty. Dist. Ct., June 6, 2018).

The district court in *Good v. Iowa Department of Human Services* already addressed this question of whether transgender and non-transgender individuals are similarly situated. CVCV054956, at *21–22. In that case, DHS did not dispute that these classes of individuals are, acknowledging in its brief that they "may be similarly situated." *Id.* at *22 n. 77. Regardless, in

[11] *See also Pediatric Specialty Care, Inc. v. Arkansas Dep't of Hum. Servs.*, 293 F.3d 472, 478 (8th Cir. 2002) ("Medicaid is a cooperative federal-state program designed to provide medical assistance and rehabilitation services to low-income individuals."); *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 . . . .").

light of the purposes articulated above, the court concluded that "transgender individuals who are Medicaid recipients because they lack funding for basic health services are similarly situated to non-transgender Medicaid recipients in essentially every way except their transgender status." *Id.* at *21–22.

Furthermore, Respondent's statement that "[n]on-transgender Medicaid beneficiaries are not protected by the Iowa Civil Rights Act"[12] may not be accurate. First, section 216.7(1) lists eight other protected groups: race, creed, color, sex, sexual orientation, national origin, religion, or disability. Respondent's argument remains narrow and ignores the fact that many non-transgender beneficiaries are protected by another category recognized in the ICRA. Second, the wording of section 216.7 does not indicate that *only* transgender individuals are protected by the ICRA. Rather, it states that it is an unfair or discriminatory practice to refuse or deny *any person* a public accommodation because of gender identity in general. Iowa Code § 216.7(1)(a). In other words, it would be just as unfair or discriminatory to deny a non-transgender person some kind of Medicaid coverage that is provided to transgender people.

Based on the foregoing, the Court concludes that transgender and non-transgender Iowans who are eligible for Medicaid are similarly situated for equal protection purposes. With this threshold met, the Court turns to Petitioners' assertion that section 216.7(3) violates the Iowa Constitution's equal protection guarantee on two grounds: (1) it facially discriminates against transgender people and (2) it was motivated by animus against transgender people. Pet'rs' Br. p. 44.

B. The Appropriate Level of Scrutiny for Gender Identity

[12] Resp't's Final Br., p. 27.

The Court must determine the appropriate level of judicial scrutiny to apply to classifications based on gender identity, as neither the United States Supreme Court nor the Iowa Supreme Court has specifically identified which level applies.[13] However, in *Varnum*, the Iowa Supreme Court relied on a general framework provided in numerous U.S. Supreme Court equal protection cases to guide its analysis under the Iowa Constitution regarding the appropriate level that applies to sexual orientation.[14] 763 N.W.2d at 886. The *Varnum* court noted that this is not a precise or rigid formula, but rather a set of four factors to consider in determining whether a classification "warrant[s] more demanding constitutional analysis" and thus a heightened form of scrutiny:

> (1) the history of invidious discrimination against the class burdened by the legislation; (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 886–88. The *Varnum* court recognized that the U.S. Supreme Court flexibly applies these four factors, not requiring nor even discussing every factor in every case.[15] *Id.* at 888. Thus, the

[13] The Fourth Circuit recently noted that "many district courts . . . have analyzed the relevant factors for determining suspect class status and held that transgender people are at least a quasi-suspect class." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 (4th Cir. 2020) (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 400 F. Supp. 3d 444 (E.D. Va. 2019); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 951–53 (W.D. Wis. 2018)). *See also supra* pp. 28–29 (listing additional courts that have applied intermediate scrutiny to gender identity).

[14] *See Varnum*, 763 N.W.2d at 886 n. 10 ("While we again note our authority to develop independent analyses under the Iowa Constitution, we nonetheless view the Supreme Court's general framework for determining the constitutional 'suspectness' of a class as a useful analytical starting point.").

[15] Citing *Palmore v. Sidoti*, 466 U.S. 429, 433–34 (1984) (foregoing analysis of political power); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n. 11 (1977) (jettisoning immutability requirement and scrutinizing classification of resident aliens closely despite aliens' voluntary status as residents); *Mathews v. Lucas*, 427 U.S. 495 at 505–06 (1976) (according heightened scrutiny to classifications based on illegitimacy despite mutability and political power of illegitimates); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976) (omitting any reference to immutability); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973) (omitting any reference to immutability); *Frontiero v. Richardson*, 411 U.S. 677, 685–88 (1973) (Brennan, J., plurality opinion) (scrutinizing classification based on gender

Varnum court similarly "refuse[d] to view all the factors as elements or as individually demanding a certain weight in every case." *Id.* at 889. However, the *Varnum* court observed that "the first two factors . . . have always been present when heightened scrutiny has been applied," stating these factors "have been critical to the analysis and could be considered as prerequisites to concluding a group is a suspect or quasi-suspect class." *Id.* The last two factors are then considered "to supplement the analysis as a means to discern whether a need for heightened scrutiny exists." *Id.*

Respondent argues that transgender status is not a quasi-suspect classification under the Iowa Constitution and is thus not entitled to heightened scrutiny. Resp't's Final Br. p. 16. Regarding the four factors enumerated above, "[t]he State does not dispute that [the first] two factors weigh in favor of applying heightened scrutiny to transgender individuals as a class." *Id.* at p. 17. The Court agrees that the record shows transgender people have suffered a "history of invidious discrimination" and that gender identity or being transgender does not "indicate a typical class member's ability to contribute to society."[16] *Varnum*, 763 N.W.2d at 887. Rather than add unnecessary pages to an already lengthy opinion, the Court incorporates Petitioners' arguments and evidence provided in the record in relation to these first two factors. *See* Pet'rs' Br. pp. 30–33. *See also* Vasquez Admin. R. p. 806, ¶ 34 (Aff. of Randi Ettner)[17] (providing expert testimony that "[m]edical science recognizes that transgender individuals represent a normal variation of the diverse human population" and they "are fully capable of leading healthy, happy and productive

closely despite political power of women); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (foregoing analysis of immutability).

[16] *But see* Vasquez Admin. R. p. 802, ¶ 14 (stating gender dysphoria "is associated with clinically significant distress or impairment in social, occupational or other important areas of functioning").

[17] Randi Ettner holds a PhD in psychology and is a licensed clinical and forensic psychologist with a specialization in the diagnosis, treatment, and management of individuals with gender dysphoria. Vasquez Admin. R. p. 799, ¶ 4. *See also id.* at pp. 799–800, ¶¶ 4–8 (providing a summary of Ettner's qualifications).

lives"); Vasquez Admin. R. p. 806, ¶ 39 ("Being transgender does not affect a person's ability to be a good employee, parent, or citizen.").

However, Respondent argues the inquiry does not end with these first two factors and likens the present case to a case in which the U.S. Supreme Court concluded that persons with an intellectual disability do not make up a suspect or quasi-suspect class. Resp't's Final Br. pp. 17–18 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)). Based on this case, Respondent asserts "courts should be especially cautious when asked to recognize as a suspect or quasi-suspect class a group that is 'diversified' and for whom medical treatment under the law 'is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.'" *Id.* (quoting *Cleburne*, 473 U.S. at 442–43). This point is well taken and considered in the present analysis.

In *Cleburne*, the court concluded the lower court erred in holding that intellectual disability is a quasi-suspect classification. 473 U.S. at 442. In drawing from an earlier case in which it declined to extend heightened review to differential treatment based on age, the court noted the takeaway "is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Id.* at 442–43 (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976)). In these types of cases, "the Equal Protection Clause requires only a rational means to serve a legitimate end." *Id.* at 443. According to Respondent, transgender individuals with gender dysphoria similarly have a distinguishing characteristic relevant to interests the State has the authority to implement – a need for varying degrees of medical services to treat their condition, like the intellectually disabled. Resp't's Final Br. p. 18.

On the other hand, Petitioners argue heightened scrutiny applies because discrimination against transgender people is a form of sex discrimination. Pet'rs' Br. p. 37. The U.S. Supreme Court recently stated that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1741 (2020). In the context of an employment discrimination example, the court explained that if "the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth," then "the individual employee's sex plays an unmistakable and impermissible role in the discharge decision." *Id.* at 1741–42. *See also id.* at 1747–48 ("We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."). According to Petitioners, "*Bostock* affirmed a long line of federal cases recognizing that discrimination against transgender people is sex discrimination." Pet'rs' Br. p. 59.[18]

Respondent disagrees, asserting that section 216.7(3) does not discriminate based on sex because "sex or gender identity of the Medicaid beneficiary has no bearing on the exclusion of the

[18] Citing *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571–580 (6th Cir. 2018); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) (holding intermediate scrutiny applies to gender classifications); *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (8th Cir. 2011) (same); *Barnes v. City of Cincinnati*, 401 F.3d 729, 736–38 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 572–75 (6th Cir. 2004); *Rosa v. Park W. Bank & Tr.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Harford*, 204 F.3d 1187, 1198–1203 (9th Cir. 2000); *see also Tovar v. Essential Health*, 857 F.3d 771, 775 (8th Cir. 2017) (assuming, for purposes of appeal, "that the prohibition on sex based discrimination under Title VII . . . encompasses protection for transgender individuals"); *Hunter v. United Parcel Servs., Inc.*, 697 F.3d 697, 702 (8th Cir. 2012) (same).

The Court acknowledges that this particular quote appears in the "violation of the ICRA" portion of Petitioners' brief, a claim that this Court dismissed. Petitioners also make the argument that gender identity discrimination is a form of sex discrimination and cite the *Bostock* case (and accompanying others) in additional sections. *See, e.g.*, Pet'rs' Br. p. 37. As noted at the beginning of this ruling, the claims and arguments made throughout the entirety of this case are intertwined and interrelated.

services requested" by Vasquez and Covington. Resp't's Final Br. p. 19. Rather, reasserting one of its primary arguments, Respondent contends that "Medicaid funds are available to treat gender dysphoria generally, just not when they are requested for these particular surgeries." *Id.* These particular surgeries are cosmetic, reconstructive, or plastic surgery, which are defined by the Regulation as "surgery which can be expected primarily to improve physical appearance or which is performed primarily for psychological purposes or which restores form but does not correct or materially improve the bodily functions." *Id.* at p. 14 (quoting Iowa Admin. Code r. 441-78.1(4)). The argument acknowledges that the psychological experience of disconnect with one's bodily sex is not to be minimized and it would call for the appropriate psychotherapy.

But according to Respondent, *Bostock* is inapplicable to the present case because in *Bostock*, sex discrimination occurs when an employer refuses to tolerate the "traits or actions" in an employee of one sex that he would tolerate in an employee of the opposite sex. *Id.* Here, however, "[a] person assigned male at birth cannot get Medicaid coverage for cosmetic, reconstructive, or plastic surgery if it is primarily to treat a psychological purpose, nor can a person assigned female at birth." *Id.* Respondent's argument hides the inescapable fact that sex is an inherent and related component of gender identity.

According to this record, the entire concept of transgenderism involves sex. For transgender individuals, their "body and gender identity do not match, giving rise to a sense of being 'wrongly embodied.'" Vasquez Admin. R. pp. 800–01, ¶ 11.[19] In a similar sense, the

[19] "At birth, infants are assigned a sex, typically male or female, based solely on the appearance of their external genitalia. This classification becomes the person's birth-assigned sex. Typically, persons born with the physical characteristics of males identify as male, and those with the physical characteristics of females identify as female. However, for transgender individuals, this is not the case." Vasquez Admin. R. pp. 800–01, ¶ 11. The medical and psychological professionals in this case believe that it is clear that surgical, hormonal, and other intervention directed toward the body is capable of meshing that person's innate sexual identity. In contrast, the Catholic Church recently released a teaching document pointing out issues with the claim that human beings have the capacity to "choose" their own gender or should alter their biological sex. *See* Congregation for Catholic Education, "*Male and Female He Created Them*": Towards a Path of Dialogue on the Question of Gender Theory in Education, Higher Education of

condition of gender dysphoria "is characterized by a strong and persistent incongruence between one's experienced and/or expressed gender identity and sex assigned at birth, resulting in clinically significant distress or impairment in functioning." *Id.* at p. 801, ¶ 12. Gender dysphoria, not to be confused with purely psychological disorders such as body dysmorphic disorder,[20] "is based on a realistic perception that one's body habitus does not align with one's gender identity." *Id.* at p. 801, ¶ 13.

Next, Respondent argues that Petitioners' reliance on *Bostock* is also misplaced because *Bostock*, a Title VII employment discrimination claim, has no application in the present context. Resp't's Final Br. p. 19. The analysis is helpful. However, Respondent also asserts *Bostock* is inapplicable to the challenged rule based on cases from the insurance industry. *Id.* at pp. 19–20. For example, Respondent contends that in *Geduldig v. Aiello*, the "U.S. Supreme Court held that an insurance plan can choose to cover some risks while excluding others without running afoul of the equal protection clause." *Id.* (citing 417 U.S. 484, 494 (1974) (specifically concluding that a disability insurance plan complied with the equal protection clause even though the plan declined to cover pregnancy-related disabilities)). Respondent points to the *Geduldig* court's reasoning that the plan was facially nondiscriminatory because "[t]here [was] no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at p. 20 (quoting 417 U.S. at 496–97). *See also id.* (quoting 417 U.S. at 495–96) (stating "[t]here is nothing in the Constitution . . . that requires the State to subordinate or

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the Catholic Church: congregation for Catholic education, Feb. 2, 2019, http://www.education.va/content/content/dam/CEC\documenti/19_0997_INGLESE.pdf.

[20] "Body Dysmorphic Disorder is characterized by a distorted perception that a particular aspect of one's physical appearance, e.g. one's nose, is flawed, causing the individual to feel 'deformed.'" Vasquez Admin. R. p. 801, ¶ 13.

compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has").

Petitioners assert *Geduldig* does not apply to the present case because "there is no reason to expand" it beyond its narrow context of pregnancy-based classifications. Pet'rs' Reply pp. 23–24. Rather, there are risks, disabilities, and medical conditions that only women can experience, and refusal to provide coverage for such things *is* a form of discrimination. Yes, "there is no risk from which men are protected and women are not" in that insurance plan, but it is not possible for biological men to experience pregnancy-related risks and disabilities. If it was, and the plan denied protection for such disabilities for both men and women, then it would not be discriminatory. But because it is a condition exclusively experienced by biological women, refusal to provide coverage is based on sex and the effect is discriminatory.

Courts are finding in recent years that gender identity discrimination is a form of sex discrimination. From district courts to circuit courts, 2004 to 2020, multiple other jurisdictions as persuasive authority have already reached this conclusion. For example, the Fourth Circuit recently explained that "[m]any courts, including the Seventh and Eleventh Circuits, have held that various forms of discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608–09 (4th Cir. 2020) (citing *Smith v. City of Salem*, 378 F.3d 566, 573–75, 578 (6th Cir. 2004); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 719 (D. Md. 2018); *Norsworthy v. Beard*, 87 F.Supp.3d 1104, 1119 (N.D. Cal. 2015)). *See also Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019); *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) ("The nature of the discrimination is the same; it may differ in degree but not in kind, and

discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause."); *Grimm*, 972 F.3d at 607 (holding that "heightened scrutiny applies to [plaintiff's] claim because the bathroom policy rests on sex-based classifications *and* because transgender people constitute at least a quasi-suspect class") (emphasis in original); *OutFront Minnesota v. Piper*, 62CV157501, Order (Ramsey Cnty., Minn. Dist. Ct., Nov. 14, 2016) (finding that a statute excluding sex reassignment surgery from coverage under Medical Assistance and MinnesotaCare violated the Minnesota Constitution because it "deprive[d] transgender persons of equal protection under the law"). *See supra* n. 13.

Furthermore, as quoted by the *Cleburne* court from an earlier decision, "what differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." 473 U.S. at 440–41 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (Brennan, J., plurality opinion)). This rationale also applies to gender identity, and goes toward the third factor previously mentioned: "whether the distinguishing characteristic is 'immutable' or beyond the class members' control." *Varnum*, 763 N.W.2d at 887. "A human trait that defines a group" has been described as "'immutable' when that trait exists 'solely by the accident of birth' . . . or when the person with the trait has no ability to change it . . . ." *Id.* at 892 (citing *Frontiero*, 411 U.S. at 686 (Brennan, J., plurality opinion) and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) (Brennan, White, Marshall, & Blackmun, J.J., concurring in part and dissenting in part)).

"Immutability is a factor in determining the appropriate level of scrutiny because the inability of a person to change a characteristic that is used to justify different treatment makes the discrimination violative of the rather 'basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *Varnum*, 763 N.W.2d at 892 (quoting *Weber v.*

Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)). In other words, "when a characteristic is immutable, different treatment based on this characteristic seems 'all the more invidious and unfair.'" *Id.* (quoting Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J. of L. & Pol'y 397, 403 (2001)). Furthermore, in examining the immutability of sexual orientation, the *Varnum* court "agree[d] with those courts that have held the immutability prong of the suspectness inquiry surely is satisfied when . . . the identifying trait is so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]." *Id.* at 893 (alterations in original) (citations & internal quotations omitted).

Petitioners argue that like sexual orientation, gender identity is a trait central to a person's identity, pointing to expert opinions in the agency record. Pet'rs' Br. p. 34; Vasquez Admin. R. pp. 800–01, ¶¶ 9–11 (Aff. of Randi Ettner). The record provides medical literature and studies on gender dysphoria, such as the World Professional Association of Transgender Health ("WPATH") Standards of Care, "demonstrate that gender identity is not subject to change through outside influence." Pet'rs' Br. p. 34; Vasquez Admin. R. pp. 803–07, ¶¶ 20–38. Rather, it is innate, biologically based, and cannot be altered. Pet'rs' Br. p. 34; Vasquez Admin. R. pp. 806–07, ¶¶ 34–38. "Past attempts to 'cure' transgender individuals and change their gender identity to match their birth-assigned gender were ineffective and caused extreme psychological damages. Such efforts are now considered unethical." Vasquez Admin. R. p. 806, ¶ 34 (Aff. of Randi Ettner). There is nothing in the record to rebut these statements.

Respondent argues that Iowa law sufficiently protects transgender people. In *Cleburne*, the court was concerned that there "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." Resp't's Final Br. p. 18 (quoting 473 U.S. at 443). Specifically, Respondent points to provisions in the Civil Rights Act, the Anti-Bullying and

Anti-Harassment Act, and the hate crime statutes as evidence that the Iowa legislature has addressed discrimination based on gender identity.[21] *Id.* (citing Iowa Code §§ 216.7 (civil rights), 280.28 (anti-bullying), and 729A.2 (hate crime)). This assertion relates to the fourth factor, implying that the political power of transgender people is strong and change has been made in their favor. In response, Petitioners point out that this is not the relevant standard for factor four, *i.e.*, analyzing the political power of the class. Pet'rs' Reply pp. 20–21. "Rather, the touchstone of the analysis should be whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means." *Varnum*, 763 N.W.2d at 894 (citation and internal quotations omitted). Under the Iowa Constitution, "the political powerlessness factor of the level-of-scrutiny inquiry does not require a showing of absolute political powerlessness." *Id.* Additionally, Petitioners argue that "increased political standing or power does not prevent a court from applying heightened scrutiny." Pet'rs' Br. p. 35. "[A] group's *current* political powerlessness is not a prerequisite to enhanced judicial protection." *Varnum*, 763 N.W.2d at 894 (emphasis added).

Petitioners assert that transgender Iowans are politically weak, or even powerless, "because of the community's small population size and the enduring societal prejudices against transgender people." Pet'rs' Br. p. 35. In support, Petitioners point to a 2016 study conducted by the UCLA School of Law's Williams Institute estimating that only 0.31 percent of Iowans identify as transgender. *Id.* (citing Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, Williams Inst. (June 2016), available at https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/). Additionally,

[21] *See* Vasquez Admin. R. p. 808, ¶ 46 (Aff. of Randi Ettner) ("Greater visibility and laws that prohibit discrimination have eased some hurdles, but in any event social marginalization should not be confused with, or seen as a challenge to the efficacy of, surgical treatment.").

Petitioners cite data demonstrating that "[t]ransgender individuals face staggering rates of poverty and homelessness." *Id.* "Nearly one-third of transgender people fall below the poverty line, more than twice the rate of the general US population," and almost "one-third of transgender people have experienced homelessness." *Id.* (citing Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equal. 5 (Dec. 2016), available at https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf).

Finally, regarding political representation, transgender individuals face barriers in being elected to public office, seemingly based solely on their status as transgender. For example, the results of a randomized experiment revealed that nominating a transgender candidate reduced the proportion of respondents who would vote for their own party's candidate from sixty-eight to thirty-seven percent. *Id.* at pp. 35–36 (citing Philip E. Jones et al., *Explaining Public Opinion Toward Transgender People, Rights, and Candidates*, 82 Pub. Op. Q. 252, 265 (2018), available at https://www.pejones.org/publication/2018_poq/2018_POQ.pdf).

Petitioners have created a strong record to drive their cause. Nevertheless, Respondent believes the challenged rule specifies procedures that are not covered for any Medicaid member regardless of sex—cosmetic, reconstructive, or plastic surgery to treat a primarily psychological condition. Respondent asserts that this regulation and law does not discriminate on the basis of sex or transgender status and that the rational basis test applies. But based on the preceding discussion, the Court concludes that gender identity is a quasi-suspect class and thus warrants heightened scrutiny.

When applied to transgender individuals and the classification of gender identity, the four factors used by the *Varnum* court demonstrate a need for a more constitutionally demanding analysis. Furthermore, the Court believes that gender identity discrimination is comparable to, if

not a form of, sex discrimination. Therefore, the Court concludes an intermediate scrutiny analysis of section 216.7(3)'s constitutionality should apply in the following section. Yet, for the sake of addressing all arguments, hoping to be comprehensive and because both parties assert that either intermediate scrutiny or rational basis supports their respective position, the Court also provides an analysis under the rational basis test. In both instances, the Court's ultimate conclusion is the same: Iowa Code section 216.7(3) violates the Equal Protection Clause of the Iowa Constitution.

C. Analysis of Section 216.7(3) Under Intermediate Scrutiny

Respondent argues that even if this Court finds that heightened scrutiny applies to classification based on gender identity, section 216.7(3) still complies with the Equal Protection Clause and withstands intermediate scrutiny. Resp't's Final Br. p. 21. According to Respondent, it "is substantially related to the important government interests in the protection of public health through the most efficient and effective distribution of Medicaid funding." *Id.*

In an intermediate scrutiny analysis, "the party seeking to uphold the statute [must] demonstrate the challenged classification is substantially related to the achievement of an important governmental objective." *Varnum*, 763 N.W.2d at 880 (citation omitted). *See also United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The burden of justification is demanding and it rests entirely on the State."). The *Varnum* court observed that in reviewing a gender-based classification under intermediate scrutiny, the "U.S. Supreme Court has stated: 'Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive."'" *Id.* at 897 (quoting *Virginia*, 518 U.S. at 532–33). Furthermore, "the justification for the classification must be genuine and must not depend on broad generalizations." *Id.* at 880 (citation omitted). *See also*

Virginia, 518 U.S. at 533 ("The justification must be genuine, not hypothesized or invented post hoc in response to litigation.")

Respondent argues health care costs and protecting public health are the important governmental objectives that section 216.7(3) contains. Resp't's Final Br. p. 22. In support, Respondent cites a number of cases in which courts have recognized these are important government interests. *IMS Health, Inc. v. Sorrell*, 630 F.3d 263, 276 (2d Cir. 2010), *aff'd*, 564 U.S. 552 (2011) ("[W]e agree with the district court that Vermont does have a substantial interest in both lowering health care costs and protecting public health."); *IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008), *abrogated on other grounds by Sorrell v. IMS Health, Inc.,* 564 U.S. 552 (2011) (finding that "cost containment is most assuredly a substantial government interest" and the government has a "substantial interest in reducing overall healthcare costs"); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1127 (10th Cir. 2015) (stating that "administrative convenience and economic cost-saving" are "relevant" to intermediate scrutiny analysis).

Additionally, Respondent contends that particularly in the Medicaid context, "courts have recognized an important government interest in protecting public funds and their proper distribution against the threat of fraud."[22] Resp't's Final Br. p. 23 (citing *ADL, Inc. v. Perales*, 1988 WL 83390, at *4 (S.D.N.Y. Aug. 2, 1988) ("It is beyond dispute that the government has an important concern in protecting public funds by guaranteeing that Medicaid providers are not engaging in fraud, and that overpayments are recovered.")). In response to Petitioners' argument that the *Varnum* court rejected "cost savings" as a justification for quasi-suspect classifications, Respondent contends that *Varnum* rejected cost savings as a general matter of the state's budget, not in the context of Medicaid and as part of an effort to ensure the neediest receive the most

[22] With the "medically necessary" affidavits in the record, fraud is not an issue in this case.

benefit from the Medicaid program. *Id.* Here, Respondent reasserts its argument that "[t]he state has been consistent in its position that cosmetic, reconstructive, or plastic surgery to treat a primarily psychological condition should be placed at the back of the line to conserve resources that, in the judgment of the agency, will more effectively fulfill the purpose of the Medicaid program elsewhere." *Id.* at p. 24.

Petitioners argue that "[g]iven the medical community's uniform acceptance that surgical treatment is medically necessary for some transgender people on Medicaid, denying coverage cannot be justified on medical grounds." Pet'rs' Br. p. 38 (citing *Good*, No. CVCV054956, at *27–30). *See also* Vasquez Admin. R. pp. 50, ¶ 48 (citing unrebutted studies confirming that "surgery is an effective treatment with low complication rates"); 52, ¶ 56 ("Surgery is the only effective treatment for severely gender dysphoric patients. Only reconstruction of the primary and/or secondary sex characteristics can create body congruence and eliminate anatomical dysphoria."), ¶ 57 (stating "[t]here is no controversy amongst mainstream medical professionals regarding the appropriateness and necessity of surgical care for Gender Dysphoria" and providing a list of these professional medical associations). The unrebutted letters and affidavits submitted by their healthcare providers establish that surgical treatment is specifically medically necessary for Vasquez and Covington. Vasquez Admin. R. pp. 769–812 (including affidavits of Dr. Nicole Nisly, counselor Scott Fieker, therapist Amanda Goslin, therapist Jacob Sandoval, and therapist Carol Daniels); Covington Admin R. pp. 11–29 (including affidavits of Dr. Nicole Nisly, counselor David Drustrup, and therapist Mary Ball).

Additionally, Petitioners contend that Respondent assumes, without any evidence, that the purpose of gender-affirming surgery is primarily psychological. Pet'rs' Br. p. 15. Unlike cosmetic surgery undergone for aesthetic reasons, medically necessary gender-affirming surgery is intended

to alter a person's body to affirm their gender identity and address the life-altering, sometimes life-threatening, consequences of gender dysphoria. *Id.* at pp. 14–15 (citing Vasquez Admin. R. pp. 801–02, ¶¶ 12–15 (demonstrating that gender-affirming surgical treatment may prevent social dysfunction, physical pain, and even death)). *See also* Vasquez Admin. R. pp. 807, ¶ 39; 811, ¶ 56 ("Achieving an authentic physical appearance is crucial to a patient's ability to live safely and comfortably."). In other words, according to the Petitioners' experts, there is a biological component to gender identity and gender dysphoria. *Id.* at p. 47, ¶ 35 ("Current scientific research suggests that gender identity is innate . . . and has a strong biological basis."); p. 48, ¶ 38 (stating that "gender identity is biologically based").

Furthermore, Petitioners assert that "denying coverage for medically necessary gender-affirming surgery cannot be justified as a cost-saving measure" for a number of reasons. Pet'rs' Br. p. 38. First, courts have already rejected an economic rationale under intermediate scrutiny. *Id.* (citing *Varnum*, 763 N.W.2d at 902–04; *Good*, No. CVCV054956, at * 27–29 (rejecting Respondent's cost-savings governmental interest as justification for the Regulation). In *Varnum*, the court rejected the "conservation of state resources" as a justification for excluding same-sex couples from marriage. 763 N.W.2d at 903. The court acknowledged that banning same-sex marriages might conserve some state resources, such as government benefits like tax benefits. *Id.* at 902–03. The same argument can be, and is, made in the present case: refusing coverage for gender-affirming surgery obviously conserves Medicaid funds. Doctor bills, hospital bills, rehabilitation bills, pharmaceutical costs, and ongoing medical and psychiatry care is expensive. The economic costs for this requested care from the medical profession would be high. However, in equal protection cases and "[w]hen heightened scrutiny is applicable, the means must substantially further the legislative end." *Varnum*, 763 N.W.2d at 903. "Consequently, in this case,

the [gender identity]-based classification must substantially further the conservation-of-resources objective." *Id.* The evidence in this record does not establish this conclusion.

Petitioners provide information, unrebutted by any opposing documents, demonstrating that "providing insurance coverage for transgender patients has been shown to be 'affordable and cost-effective, and has a low budget impact.'" Pet'rs' Br. pp. 40–41 (quoting William V. Padula 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 Pub. Health, Dep't of Health Pol'y and Mgmt. (Oct. 19, 2015), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4803686 (finding that the budget impact of this coverage was $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* Jody L. Herman, *Costs and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefits Plans*, Williams Inst. (Sept. 2013), available at https://williamsinstitute.law.ucla.edu/publications/trans-employee-transition-coverage/ (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).

Furthermore, as noted in a previous section, it is estimated that only approximately 0.31 percent of Iowans identify as transgender. Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, Williams Inst. (June 2016), available at https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/. This number decreases even further when one identifies the amount of individuals from this group who are medically approved candidates for gender-affirming surgery, such as Vasquez and Covington. *See*

Vasquez Admin. R. p. 803, ¶ 19 ("Of those individuals who seek treatment for gender dysphoria, only a subset requires surgical intervention.").

Additionally, Petitioners supply unrebutted literature revealing that there are greater medical costs associated with *denying* transgender people access to medically necessary transition-related care and procedures. Pet'rs' Br. p. 41. When such medical treatments are available and accessible, "transgender people's overall health and well-being improve, resulting in significant reductions in suicide attempts, depression, anxiety, substance abuse, and [care for adverse effects of] self-administration of hormone injections." *Id.* (citing Cal. Dep't of Ins., *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance* (Apr. 13, 2012), available at https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf). *See also* Vasquez Admin. R. p. 802, ¶¶ 15 ("Without treatment, gender dysphoric individuals experience anxiety, depression, suicidality and other attendant mental health issues . . . . Studies show a 41–43% rate of suicide attempts among this untreated population far above the baseline for North America."); p. 809, ¶ 48 (citing studies confirming that "surgery is an effective treatment with low complication rates").

Based on the foregoing, the Court concludes that the State has not met its demanding burden to prove that section 216.7(3) withstands intermediate scrutiny because it has not demonstrated that the amendment is "substantially related to the achievement of an important governmental objective." *Varnum*, 763 N.W.2d at 880 (citation omitted).

D. Analysis of Section 216.7(3) Under Rational Basis

If applying intermediate scrutiny is improper, Petitioners assert that, alternatively, section 216.7(3) does not satisfy the rational basis test. Pet'rs' Br. p. 45. "The [U.S.] Supreme Court has succinctly articulated the rational basis test under the Federal Constitution as a 'question [of]

whether the classifications drawn in a statute are reasonable in light of its purpose.'" *Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 50 (Iowa 2016) (alteration in original) (quoting *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964)). Using this test as a guiding principle, the Iowa Supreme Court "developed a three-part framework to assist [the] analysis when we evaluate whether the rational basis test has been met under the Iowa Constitution."[23] *Id.* (citations omitted).

First, the Court "must determine whether there was a valid, realistically conceivable purpose that served a legitimate government interest." *Id.* (citation and internal quotations omitted). Here, it may be cost and administration of a complex health care system. Next, the Court must "decide whether the identified reason has any basis in fact." *Id.* Finally, the Court "evaluate[s] whether the relationship between the classification and the purpose for the classification 'is so weak that the classification must be viewed as arbitrary.'" *Id.* (quoting *McQuistion*, 872 N.W.2d at 831). In short, the legislation "must be rationally related to a legitimate governmental purpose." *Cleburne*, 473 U.S. at 446. *See also Qwest Corp. v. Iowa State Bd. of Tax Review*, 829 N.W.2d 550, 558 (Iowa 2013) (quoting *Sanchez v. State*, 692 N.W.2d 812, 817–18 (Iowa 2005) ("Under rational-basis review, the statute need only be rationally related to a legitimate state interest.").

Additionally, the Iowa Supreme Court acknowledges that under a rational basis inquiry, "[t]he government is not required or expected to produce evidence to justify its action." *King v. State*, 818 N.W.2d 1, 28 (Iowa 2012). As they were not required to, the government did not produce evidence or experts. Rather, the challenging party "bear[s] the heavy burden of showing the statute unconstitutional and must negate every reasonable basis upon which the classification may be sustained." *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 32 (Iowa 2019) (citation omitted).

[23] *Bierkamp v. Rogers*, 293 N.W.2d 577, 580 (Iowa 1980) ("We have long found a standard similar to that of *McLaughlin* to flow from Article I, section 6.").

Therefore, the court "will not declare something unconstitutional under the rational-basis test unless it 'clearly, palpably, and without doubt infringe[s] upon the constitution.'" *Residential & Agric. Advisory Comm.*, 888 N.W.2d at 50 (quoting *Racing Ass'n of Cent. Iowa*, 675 N.W.2d at 8). "Nevertheless, the rational basis standard, while deferential, is not a toothless one in Iowa." *AFSCME Iowa Council 61*, 928 N.W.2d at 32 (citation and internal quotations omitted).

In a rational-basis review, "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Hughes v. City of Cedar Rapids, Iowa*, 840 F.3d 987, 996 (8th Cir. 2016) (citing *FCC v. Beach Commc'ns, Inc*., 508 U.S. 307, 313 (1993)). "[A]lthough actual proof of an asserted justification [i]s not necessary . . . the court w[ill] not simply accept it at face value and w[ill] examine it to determine whether it [i]s credible as opposed to specious." *AFSCME Iowa Council 61*, 928 N.W.2d at 32 (alterations in original) (quoting *LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 860 (Iowa 2015)). "Furthermore, some objectives . . . such as 'a bare . . . desire to harm a politically unpopular group,' . . . are not legitimate state interests." *Cleburne*, 473 U.S. at 446–47 (quoting *Moreno*, 413 U.S. at 534). *See also Animal Legal Def. Fund v. Reynolds*, 297 F.Supp.3d 901, 927 (S.D. Iowa 2018) (observing that a law may not satisfy rational basis review if it "is motivated by animus, or a desire to harm a politically unpopular group") (citing *United States v. Windsor*, 570 U.S. 744, 775 (2013) (finding the statute invalid because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" persons in same-sex marriages)).

As detailed above and unrebutted in this record, surgical treatment for gender dysphoria is a serious medical condition. Surgery is being suggested by these medical professionals for Petitioners as necessary and effective. Medicaid coverage is fundamental to ensure the availability of that treatment for economically disadvantaged Iowans. There has not been found a reasonable

distinction between transgender and nontransgender people relative to their need for Medicaid coverage for medically necessary surgical care. Once the medical community determined that surgery is medically necessary to treat this health issue, the government lost its rational basis to refuse to pay for the surgery. The law appears to draw an arbitrary distinction. So, there is no plausible policy reason advanced by, or rationally related to, excluding transgender people from Medicaid reimbursement for medically necessary procedures.

Based on a thorough review of this record, the Court concludes that section 216.7(3) does not withstand rational basis review and is therefore a violation of equal protection. Respondent asserts that the reasonable bases for denying Medicaid coverage to transgender individuals for gender-affirming surgery are cost-savings and allocation of resources to ensure that the greatest amount of needy people receive Medicaid coverage. Petitioners have met their burden to negate these bases, providing the amount of evidence demonstrating that granting transgender individuals' coverage for medically necessary gender-affirming surgery does not require the great amount of resources that Respondent implies and it may be the more cost-effective option.

The percentage of Iowans who are on Medicaid, identify as transgender, and qualify as candidates for gender-affirming surgery is incredibly small and the costs are negligible. And Petitioners supply ample and unrebutted evidence that there are greater medical costs associated with denying transgender individuals access to transition-related care and necessary surgical procedures. This law does not withstand rational basis review.

E. Motivated by Animus Against Transgender People

As an alternative to their claim that section 216.7(3) is facially discriminatory, Petitioners assert that the provision was motivated by animus toward transgender people. Pet'rs' Br. p. 48 (citing *Windsor*, 570 U.S. at 770 ("The 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."); *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]."); *see also 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.")). Petitioners argue that subsection (3)'s sole purpose is to take away publicly funded, medically necessary Medicaid coverage for transgender Iowans by creating an exception to the ICRA directed specifically at transgender people. *Id.* According to Petitioners, "[t]he evidence establishing [subsection (3)'s] discriminatory animus toward transgender people is overwhelming," citing quotations from Iowa senators and representatives regarding subsection (3). *Id.*

However, as Respondent accurately points out, the comments of individual legislators cited by Petitioners as evidence of the legislature's animus toward transgender individuals are mostly made by *opponents* of the legislation. Resp't's Final Br. p. 29. The comments cited by those who *supported* the bill do not demonstrate animus; "rather, they show that the legislature was merely clarifying an incorrect interpretation of the law by the courts." *Id.* at 29–30. *See Iowa State Educ. Ass'n v. Pub. Emp. Rels. Bd.*, 269 N.W.2d 446, 448 (Iowa 1978) ("A statute is often, perhaps generally, a consensus expression of conflicting private views. Those views are often subjective. A legislator can testify with authority only as to his own understanding of the words in question. What impelled another legislator to vote for the wording is apt to be unfathomable.").

This Court would never want to negatively impact public policy dialogue or debate. Truth seeking is imperative in our public policy debates. Opinions of legislators who opposed the amendment are not persuasive as evidence of the amendment's animus. This Court sees it as an integral part of our system for both sides of an issue to articulate opposition. Petitioners cite statements made by legislators who supported the amendment as evidence of animus. Petitioners provide examples of our legislature discussing policy and evaluation regarding the use of scarce state resources. Petitioners provided the statements made by Senator Mark Costello who disagreed that gender-affirming surgery "is always medically necessary, which is what Medicaid is about" and he stated that funding gender-affirming surgery through Medicaid is not "a proper use of federal or . . . state monies." Pet'rs' Br. p. 49 (citing Iowa General Assembly, Session, House File 766, Video Recording of 4/27/19 Debate).[24]

The Court does not find Petitioners' arguments persuasive. Respondent correctly points out that "the Iowa Supreme Court has repeatedly held that the views of an individual legislator are not persuasive in determining legislative intent." *Id.* at 29 (citing *Willis v. City of Des Moines*, 357 N.W.2d 567, 571 (Iowa 1984) ("We have rejected as inadmissible opinions offered by legislators on the subject of legislative intent."); *Iowa State Educ. Ass'n*, 269 N.W.2d at 448 ("[W]e are usually unwilling to rely upon the interpretations of individual legislators for statutory meaning."); *Tennant v. Kuhlemeier*, 120 N.W. 689, 690 (Iowa 1909) ("[T]he opinions of individual legislators, remarks on the passage of an act or the debates accompanying it, or the motives or purposes of individual legislators, or the intention of the draughtsman are too uncertain to be considered in the

[24] Available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190426012941549&dt=201904026&offset=2721&bill=HF%20766&status=r, at 2:31:44). *See also* Tony Leys & Barbara Rodriguez, *Iowa Republican Lawmakers Ban Use of Medicaid Dollars on Transgender Surgery*, The Des Moines Register (Apr. 27, 2019), available at https://www.desmoinesregister.com/story/news/politics/2019/04/26/iowa-legislature-senate-republicans-propose-ban-medicaid-money-transgender-surgery-lawsuit-courts/3578920002/).

construction of statutes.")). The Court did not find animus but what seemed to be missing was the review of current medical literature and the contacting of various organizations that were previously compiled by the Foundation. *See e.g.,Smith v. Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001).

This Court finds that the Petitioners have failed to prove that the record contains evidence that passage of the laws at issue were motivated by animus toward transgender people.

F. Legislative Process

The Petitioners have been highly critical of the passage of this law. Although the Court found that Petitioners' single-subject and title rule claims must be dismissed for procedural reasons, the Court wanted to briefly discuss Petitioners' arguments and how their complaints impact the overall ruling.

Petitioners submitted information about the proper and typical procedure for making changes to Iowa law regarding the committee process established by Senate and House rules. Vasquez Admin. R. p. 900, ¶ 5 (Aff. of State Senator Bolkcom). For example, the Senate rules provide for subcommittee meetings during which members of the public are invited to participate, to comment on proposed legislation, and to provide expertise regarding the subject matter of the legislation. *Id.* Petitioners provide affidavits explaining the process and procedure in great detail. *See* Vasquez Admin. R. pp. 900–08. Engaging in this process "provides for substantial public input and thoughtful evaluation of proposed laws."[25] *Id.* at p. 900, ¶ 6. As such, it "normally takes weeks to months to unfold." *Id.* at p. 905, ¶ 8. The Iowa legislature used this procedure in 2007 when it passed the bill to add sexual orientation and gender identity to the ICRA:

> That bill was assigned to a subcommittee by the committee chair. The subcommittee then met to discuss the bill and allow members of the public to

[25] *See also* Vasquez Admin. R. p. 904, ¶ 5 (Aff. of Keenan Crow) ("The subcommittee meeting in Iowa thus plays a vital role in our democratic governance.").

> provide testimony. The subcommittee recommended passage of the bill. [It] was then taken up by the full committee which recommended passage. The bill then went to the Senate floor for debate and passage. After it passed the Senate, it was sent to the House where it went through the same process.

Id. at p. 900, ¶ 6. The passage of what became Iowa Code section 216.7(3) was different.

The language added to the ICRA that became Iowa Code section 216.7(3) was included in House File 766 as Division XX. According to State Senator Joe Bolkcom from Johnson County, amendment S-3247 to S-3201 to House File 766, the amendment that included the language of Division XX, "was a surprise amendment filed the same day the bill was taken up, avoiding the usual, deliberative process." Vasquez Admin. R. p. 900, ¶ 7 (Aff. of State Senator Bolkcom). "The process used . . . was opaque, totally lacking in transparency." *Id.* at ¶ 8. Bolkcom described the timeline and procedure as follows:

> a. HF 766 came over to the Senate from the House on April 11 with no changes to the Civil Rights Act.
> b. There was a subcommittee meeting on April 22 where a Senate strikeafter amendment was offered. That proposed amendment did not include changes to the Civil Rights Act.
> c. The bill then went to the full Senate Appropriations Committee on the same day, April 22. A strikeafter amendment was offered in committee and adopted. This amendment did not contain any language changing the Civil Rights Act or transgender healthcare services. The amendment, S-3201, was filed for floor debate on HF 766.
> d. On April 26, a strikeafter amendment, S-3247 to amendment S-3201, was filed. It did contain language amending Iowa's Civil Rights Act by excluding the provision of transgender healthcare services from the requirements of the Act.
> e. A strikeafter amendment to a strikeafter amendment is called a "double briefing." It's an unusual procedure that knocks other proposed amendments out of order. Multiple proffered amendments could not be considered. This procedure made it impossible for the minority party in either the Senate or the House to offer any amendment to any division of the bill including Division XX.
> f. The bill was taken up the same day that S-3247 was filed, April 26.
> g. The amendment was adopted by a 31-19 vote.
> h. The amended bill including the Civil Rights Act changes was sent back to the House where it was put to a vote of the House the next day, April 27.

Id. at pp. 900–01, ¶ 8. Bolkcom testified that as a result of this abnormal process, he and his colleagues had "little opportunity . . . to contact constituents, medical experts and transgender Iowans who could provide input and expertise regarding the changes to the [ICRA] that would prohibit public monies from being used for transgender healthcare services." *Id.* at p. 900, ¶ 7.

Keenan Crow, the Director of Policy and Advocacy for One Iowa, echoed this sentiment in a submitted affidavit. Vasquez Admin. R. p. 903, ¶ 1. Crow represents One Iowa and One Iowa Action in the legislative process by advocating for or against proposed legislation to advance the rights of LGBTQ Iowans. *Id.* at ¶ 2. The affidavit showed that Division XX did not go through the normal lawmaking process, but rather surprised the public, advocacy groups like One Iowa, and lawmakers when it was offered as an amendment to the annual Health and Human Services budget bill. *Id.* at p. 905, ¶ 10. "The language in Division XX never saw a subcommittee hearing or a full committee hearing, and therefore members of the public were not allowed to comment in any formal way." *Id.* Instead, it was introduced as an amendment to an amendment to the bill on the floor of the Senate. *Id.* at ¶ 11. Crow stated that the language of "Division XX was not published and available for review until fewer than five hours before debate on the amendment began in the Senate." *Id.* at p. 906, ¶ 14.

The Iowa Supreme Court's decision in *Good* finding the Regulation was unconstitutional was filed on March 8, 2019. The Iowa legislature signed Division XX into law on May 3, 2019. The legislature quickly provided a response to *Good*. From the record there appears to be little public debate. The supporters of the amendment and those who voted in its favor provided no real support for their reasons for passing the law. The Court understands that elected policymakers are better suited to reevaluate the basis for legislation over time. *Qwest Corp. v. Iowa State Bd. of Tax Rev.*, 829 N.W.2d 550, 562 (Iowa 2013). As a result, there is little legislative history or professional

statements or guidance as part of the law-making process. This sparse record left the Court little information that may be necessary for decision- making.

Therefore, the Court has an agency record bursting with evidence from Petitioners explaining transgenderism and the current opinions of the medical community, as well as testimony from physicians declaring that gender-affirming surgery is medically necessary for these two Petitioners who are Iowa Medicaid recipients. The Court has little information as to why the State should not pay for this type of medically necessary surgery.

Based on the prior analysis above and the Iowa Supreme Court's guidance in *Good*, the Court finds no rational basis for Iowa's prohibition against medically necessary gender-affirming surgical procedures in the current statute. This Court holds that Iowa Code section 216.7(3) does not withstand constitutional attack under article I, section 6. This law violates the Equal Protection Clause of the Iowa Constitution on its face and as applied.

III. Equal Protection Claim: The Regulation

Petitioners assert that because Iowa Code section 216.7(3) amending the ICRA and, in essence, resurrecting the Regulation is unconstitutional, then the pre-amendment version of section 216.7 remains in effect. Pet'rs' Br. p. 56. "When parts of a statute or ordinance are constitutionally valid, but other discrete and identifiable parts are infirm," a court will "leave the valid parts in force on the assumption that the legislature would have intended those provisions to stand alone." *State v. Zarate*, 908 N.W.2d 831, 844 (Iowa 2018) (internal quotation marks and citations omitted).

Without the protection of section 216.7(3), the Regulation is now susceptible to scrutiny regarding its constitutionality. The Regulation states, in relevant part, that "[c]osmetic, reconstructive, or plastic surgery performed in connection with certain conditions is specifically excluded." Iowa Admin. Code r. 441-78.1(4)(b). Among the list of these conditions, the Regulation

specifically includes "[p]rocedures related to transsexualism, hermaphroditism, gender identity disorders, or body dysmorphic disorders." *Id.* at r. 441-78.1(4)(b)(2).

The ICRA explicitly protects gender identity, and has since 2007. Iowa Code § 216.7(1)(a). Yet here, the legislature singled out the protected class of transgender individuals, barring them from certain treatments and procedures directly related to one's gender identity. As previously discussed, Respondent asserts that the Regulation is not unconstitutional because it is substantially related to an important government interest, namely, ensuring that the most needy individuals receive the most benefit from the Medicaid program. Resp't's Final Br. pp. 23–24.[26] And as mentioned during this same discussion of section 216.7(3), "[w]hen heightened scrutiny is applicable, the means must substantially further the legislative end." *Varnum*, 763 N.W.2d at 903. "Consequently, in this case, the [gender identity]-based classification must substantially further the conservation-of-resources objective." *Id.*

After a review of the evidence in the record, the Court does not have documentation that this gender identity-based classification will substantially further the State's cost-saving goal. As explored above, Petitioners cite reports demonstrating that "providing insurance coverage for transgender patients has been shown to be 'affordable and cost-effective, and has a low budget impact.'" Pet'rs' Br. pp. 40–41.[27] Second, pointing out that transgender individuals make up a very small percentage of the population, Petitioners present studies revealing it is estimated that only

[26] Citing *Ellis v. Patterson*, 859 F.2d 52, 55 (8th Cir. 1988) (stating that Medicaid was designed "to provide the largest number of necessary medical services to the greatest number of needy people").

[27] Quoting William V. Padula 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 Pub. Health, Dep't of Health Pol'y and Mgmt. (Oct. 19, 2015), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4803686 (finding that the budget impact of this coverage was $0.016 per member per month and provided "good value for reducing the risk of negative endpoints—HIV, depression, suicidality, and drug use").

approximately 0.31 percent of Iowans identify as transgender. *Id.* at p. 35.[28] This number decreases even further when one identifies the amount of individuals from this group who are candidates and actually qualify for gender-affirming surgery, such as Vasquez and Covington. *See* Vasquez Admin. R. p. 803, ¶ 19 and Covington Admin. R. p. 35, ¶ 19 ("Of those individuals who seek treatment for gender dysphoria, only a subset requires surgical intervention."). Finally, Petitioners supply literature evidencing the greater medical costs associated with denying transgender people access to medically necessary transition-related care and procedures. Pet'rs' Br. p. 41. According to a study from the California Department of Insurance, when such medical treatments are available and accessible, "transgender people's overall health and well-being improve, resulting in significant reductions in suicide attempts, depression, anxiety, substance abuse, and [care for adverse effects of] self-administration of hormone injections." *Id.*[29] *See also* Vasquez Admin. R. p. 802, ¶ 15 and Covington Admin. R. p. 34, ¶ 15 ("Without treatment, gender dysphoric individuals experience anxiety, depression, suicidality and other attendant mental health issues.").

Furthermore, based on the evidence submitted by Petitioners in the agency records, the language of the Regulation clearly reveals changing assumptions from the medical community that gender dysphoria is a primarily psychological condition. As Respondent put it, "[t]he state has been consistent in its position that cosmetic, reconstructive, or plastic surgery to treat a primarily psychological condition should be placed at the back of the line to conserve resources that, in the judgment of the agency, will more effectively fulfill the purpose of the Medicaid program elsewhere." Resp't's Final Br. p. 24. However, the record shows that recent medical organizations

[28] Citing Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, Williams Inst. (June 2016), available at https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/.

[29] Citing Cal. Dep't of Ins., *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance* (Apr. 13, 2012), available at https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf.

have determined that gender dysphoria does not entirely fall within those categories. *See* Vasquez Admin. R. p. 806, ¶ 32 (stating that the 2013 publication of the DSM-5 employed gender dysphoria as a new diagnostic term "based on the evolving scientific understanding that gender incongruence is not a mental illness, but rather a serious, treatable, medical condition"); *id.* at p. 806, ¶ 33 (stating the World Health Organization reclassified gender identity disorder in June 2018, recognizing that gender incongruence is not a mental illness and instead incorporating it within a chapter dedicated to sexual health).

With the information provided uncontested in the record, it would seem that gender-affirming surgery such as a phalloplasty or vaginoplasty does not fall within the categories of cosmetic, reconstructive, or plastic surgery. Rather, the affidavits state that these kinds of surgeries serve medically necessary physical purposes. For example, expert testimony provided by Petitioners specifically distinguishes between gender dysphoria and more purely psychological conditions such as body dysmorphic disorder. *See supra* n. 20; Vasquez Admin. R. p. 801, ¶ 13. The Regulation, however, clearly lumps these two conditions together, treating them as the same and not showing the changing philosophy of the medical community of their respective (and distinct) medical treatments: "[p]rocedures related to transsexualism, hermaphroditism, *gender identity disorders, or body dysmorphic disorders*." Iowa Admin. Code r. 441-78.1(4)(b)(2) (emphasis added). The Regulation was adopted around 1993, and as shown in the record, medical treatments are evolving and changing. Medical professionals want to change the body to help with the mental health issues. "[E]qual protection can only be defined by the standards of each generation." *Varnum*, 763 N.W.2d at 877 (citing Cass R. Sunstein, Sexual Orientation and the Constitution, *A Note on the Relationship Between Due Process and Equal Protection*, 55 Univ. Chi. L. Rev. 1161, 1163 (1988) ("[T]he Equal Protection Clause looks forward, serving to

invalidate practices that were widespread at the time of its ratification and that were expected to endure.")).

As *Good* held, the Regulation violates the prohibition against gender identity discrimination reflected in the pre-amendment version of section 216.7 of ICRA. *See Good*, 924 N.W.2d at 862 (holding that the Regulation's plain language violated ICRA's prohibition against gender identity discrimination). *Id*. at 862. The analysis above shows that the Regulation used by DHS is actually unconstitutional as well as a violation of the ICRA.

A. Collateral Estoppel

Petitioners first assert that Respondent is collaterally estopped from relitigating the constitutionality of the Regulation, arguing that the court in *Good* already held that the Regulation violates the Iowa Constitution's equal protection guarantee. Pet'rs' Br. pp. 23–24 (citing *Good*, No. CVCV054956, at *21–31). The Court disagrees.

The doctrine of collateral estoppel, also called issue preclusion, "prevents parties from relitigating issues already raised and resolved in a prior action." *Clark v. State*, 955 N.W.2d 459, 464 (Iowa 2021) (citing *Emps. Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 22 (Iowa 2012)). Issue preclusion "serves several purposes: protecting parties from the vexation of relitigating identical issues, furthering judicial economy by reducing unnecessary litigation, and avoiding the problem of two authoritative but conflicting rulings on the same question." *Winger v. CM Holdings, L.L.C.*, 881 N.W.2d 433, 450 (Iowa 2016) (citation omitted). In order to have a preclusive effect, a determination must be "final" for issue preclusion purposes. *Emps. Mut. Cas. Co.*, 815 N.W.2d at 23. *See also Buckingham v. Fed. Land Bank Ass'n*, 398 N.W.2d 873, 876 (Iowa 1987) ("As a general rule, issue preclusion is applicable only when the issue raised were

[sic] determined conclusively in a prior action in which a judgment was entered." (internal quotation and citation omitted)).

"The doctrine of issue preclusion can be used defensively or offensively." *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 104 (Iowa 2011). In a defensive manner, issue preclusion is used "as a shield by 'a stranger to the judgment, ordinarily the defendant in the second action . . . [to] conclusively establish[] in his favor an issue which he must prove as an element of his defense.'" *Clark*, 955 N.W.2d at 465 (alteration in original) (quoting *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981)). "When used in an offensive manner, the plaintiff in the second action relies upon a former judgment against the defendant to establish an element of his or her claim." *Soults Farms, Inc.*, 797 N.W.2d at 104. However, offensive use of issue preclusion "is more restrictively and cautiously applied than defensive issue preclusion." *Winger*, 881 N.W.2d at 451 (citations omitted).[30] Iowa courts "look critically at a plaintiff's offensive use of issue preclusion because it forecloses an element of the plaintiff's claim adversely to the defendant based upon the prior litigation." *Soults Farms, Inc.*, 797 N.W.2d at 106 (citing *Gardner v. Hartford Ins. Accident & Indem. Co.*, 659 N.W.2d 198, 203 (Iowa 2003)).

The Iowa Supreme Court has consistently stated that the party asserting issue preclusion[31] must establish the following four elements:

> (1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

[30] *Clark*, 955 N.W.2d at 466 ("Even if the defendant was a party to the prior litigation, offensive use of issue preclusion is applied more restrictively and cautiously than when it is used defensively because there are less reasons [sic] justifying its offensive use than its defensive use." (internal quotations omitted)); *Fischer v. City of Sioux City*, 654 N.W.2d 544, 547 (Iowa 2002) ("Offensive issue preclusion lacks some of the policy support underlying the defensive use of the doctrine.").

[31] *See Fischer*, 654 N.W.2d at 548 (explaining the rationale behind why "the general rule is that issue preclusion–whether offensive or defensive–must be pled and proved by the party asserting it").

Fischer v. City of Sioux City, 654 N.W.2d 544, 547 (Iowa 2002) (citing *Hunter*, 300 N.W.2d at 123).

Furthermore, "[o]ffensive issue preclusion involves two extra considerations: (1) whether the opposing party in the earlier action was afforded a full and fair opportunity to litigate the issues . . . and (2) whether any other circumstances are present that would justify granting the party resisting issue preclusion occasion to relitigate the issues." *Winger*, 881 N.W.2d at 451. *See also Clark*, 955 N.W.2d at 466 (same); *Soults Farms, Inc.*, 797 N.W.2d at 104 (same); *Hunter*, 300 N.W.2d at 126 (same). For example, "courts will decline to apply issue preclusion when the party to be precluded lacked an incentive to litigate in the prior proceeding." *Winger*, 881 N.W.2d at 452.[32] Additionally, "the court must also consider whether treating an issue or fact as conclusively determined will complicate the determination of other issues in the subsequent action or prejudice the interests of the defending party." *Comes v. Microsoft Corp.*, 709 N.W.2d 114, 120 (Iowa 2006) (citing *Hunter*, 300 N.W.2d at 125).

In *Good*, although the district court concluded that the Regulation violated the ICRA and was unconstitutional, the Iowa Supreme Court on appeal, specifically declined to reach this issue, citing the doctrine of constitutional avoidance. 924 N.W.2d at 863. That constitutional ruling from the *Good* district court would not be binding on the district court. The Supreme Court has a "general preference for avoiding constitutional adjudication where possible." *State v. Iowa Dist. Ct.*, 843 N.W.2d 76, 85 (Iowa 2014). "The doctrine of constitutional avoidance suggests the proper course in the construction of a statute may be to steer clear of 'constitutional shoals' when possible." *Id. See also Mall Real Estate, L.L.C. v. City of Hamburg*, 818 N.W.2d 190, 200 (Iowa

[32] "As the Washington Supreme Court recognized, 'There must be sufficient motivation for a full and vigorous litigation of the issue' in the prior proceeding." *Winger*, 881 N.W.2d at 452 (citation omitted).

2012) ("The doctrine of constitutional avoidance counsels us to construe [a statute] in a fashion to avoid constitutional issues."); *Salsbury Laboratories v. Iowa Dep't of Environmental Quality*, 276 N.W.2d 830, 837 (Iowa 1979) ("Avoidance of constitutional issues except when necessary for proper disposition of controversy is a bulwark of American jurisprudence.").

Constitutional avoidance is not available in all cases. "The doctrine . . . is not a rule of error preservation and generally only applies when both statutory and constitutional questions are raised." *State v. Childs*, 898 N.W.2d 177, 193 (Iowa 2017) (Hecht, J., dissenting) (citing *State v. Hellstern*, 856 N.W.2d 355, 360 (Iowa 2014)).[33] "Nor is it a rule of law that must be uniformly applied to every case—it is a prudential consideration of judicial restraint applied in many cases, but not all." *Id.* However, the *Good* court was at liberty to exercise "such judicial restraint" because it found the Regulation violated the ICRA and continuing on to analyze the constitutional issue was unnecessary. 924 N.W.2d at 863.

B. Intermediate Scrutiny and Rational Basis Analyses of the Regulation

Petitioners and Respondent renew and equally apply their respective arguments from the section 216.7(3) discussion regarding the proper level of judicial scrutiny and the result of intermediate scrutiny and rational basis analyses to the Regulation.

The district court in *Good* already concluded that the Regulation does not withstand rational-basis review. No. CVCV054956, at *30–34. Petitioners assert that for the reasons they outlined above and those relied on by the district court in *Good*, "there is no plausible policy reason advanced by, or rationally related to, excluding transgender individuals from Medicaid

[33] *See also U.S. v. Kepler*, 879 F.Supp.2d 1006, 1009 (S.D. Iowa 2011) (acknowledging that "the canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them" (quoting *Clark v. Martinez*, 543 U.S. 371, 385 (2005))); *Saxton v. Fed. Hous. Fin. Agency*, 901 F.3d 954, 959 (8th Cir. 2018) (same).

reimbursement for medically necessary procedures." Pet'rs' Br. pp. 39–40. "Surgical treatment for gender dysphoria, a serious medical condition, is necessary and effective. And Medicaid coverage is crucial to ensure the availability of that treatment." *Id.* at p. 40.

Specifically, Respondent's proffered "cost-saving" governmental interest does not withstand rational basis review because "there is no reasonable distinction between transgender and nontransgender individuals relative to their need for Medicaid coverage for medically necessary surgical care. Both groups need financial assistance for critically necessary medical treatments." *Id.* (citing *Racing Ass'n of Cent. Iowa*, 675 N.W.2d at 12–15 (observing that even under rational-basis review, there must be some reasonable distinction between the group burdened by the law, as compared to the favored group, to justify the higher costs); *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)).

For the same reasons discussed regarding Iowa Code section 216.7(3), the Court concludes that intermediate scrutiny is appropriate. However, in reviewing the record, the Regulation withstands neither intermediate scrutiny nor rational basis review. For the same reasons previously discussed regarding Iowa Code section 216.7(3), the Regulation also violates equal protection. The antidiscrimination protections of the preamendment version of section 216.7 of ICRA continue to apply. *Good*, 924 N.W.2d at 863. See Pet'rs' Br. at 43–61.

IV. Additional Claims Under Iowa Code § 17A.19(10)

As the Court holds that Iowa Code section 216.7(3) and the Regulation are unconstitutional and the agency's decision is subject to reversal pursuant to Iowa Code section 17A.19(10)(a), it is unnecessary to analyze Petitioners' additional claims under subsections (k) and (n) (namely, that the agency action has a disproportionate negative impact on private rights and that the agency's decision was unreasonable, arbitrary, capricious, or an abuse of discretion, respectively).

Under section 17A.19(10)(k), Petitioners first assert that because the Regulation is unconstitutional and unlawful, DHS's decision to deny Medicaid coverage for Petitioners' respective gender-affirming surgeries on the basis of this Regulation is not only "[n]ot required by law," but also forbidden. Pet'rs' Br. p. 61. Second, Petitioners argue that the Regulation causes a disproportionate negative impact on the private rights of transgender individuals by categorically prohibiting them from receiving Medicaid coverage for medically necessary surgical treatment of gender dysphoria. *Id.* (citing Vasquez Admin. R. p. 802, ¶ 15). Additionally, Petitioners assert there is no public interest served by denying Medicaid coverage for this treatment. Respondent limits its response to the argument that this claim under subsection (k) arises from Petitioners' other claims and is thus subsumed into Petitioners' other challenges under subsection (a). Resp't's Final Br. pp. 39–40 (citing *Midwest Auto. III, LLC v. Iowa Dep't of Transp.*, 646 N.W.2d 417, 422 (Iowa 2002)).

As the Iowa Supreme Court stated in *Zieckler* v. *Ampride*, "[t]he facts of this case illustrate the obvious disproportionality between the [Regulation's] negative impact on appealing parties and its benefit to the public." 743 N.W.2d 530, 533 (Iowa 2007). Even applying Respondent's argument in preceding sections that the "benefits accruing to the public interest" include cost-savings and using that money for "more needy" individuals on Medicaid, the negative impact on transgender Medicaid recipients diagnosed with gender dysphoria certainly disproportionately outweighs any public interest served.

Under section 17A.19(10)(n), Petitioners argue that DHS acted arbitrarily and capriciously in applying the Regulation without any regard for the Iowa Constitution's equal protection guarantee, the ICRA's prohibitions against gender identity and sex discrimination, "or the unrefuted evidence that the surgical procedure[s] requested by [Vasquez and Covington are]

medically necessary and consistent with modern standards of medical care." Pet'rs' Br. p. 63. In support, Petitioners point to a 2016 case in which DHS successfully defended its decision not to apply one of its adopted rules that failed to conform to a subsequently enacted law. *Id*. (citing *Exceptional Persons, Inc. v. Iowa Dep't of Hum. Servs*., 878 N.W.2d 247, 252 (Iowa 2016) ("When a statute directly conflicts with a rule, the statute controls.")).

Respondent states that this claim under subsection (n) is also subsumed within Petitioners' other challenges, but nevertheless argues Petitioners' subsection (n) claim lacks merit. Resp't's Final Br. p. 40. Respondent asserts that DHS did not act arbitrarily and capriciously because it acted in accordance to its rule, and whether the rule is constitutionally valid is a separate question. *Id*. Furthermore, Respondent contends that the present case is distinct from *Exceptional Persons* because here there is no superseding statute; and even if the addition of "gender identity" to the ICRA qualifies, the legislature subsequently passed additional legislation (Iowa Code section 216.7(3)) making the Regulation consistent with the ICRA. *Id*. at p. 42.

The Court finds that DHS followed the law when making decisions about Petitioners' requested surgeries. The Iowa legislature subsequently passed additional legislation making the rule consistent with the statute. Additionally, Vasquez, Covington, (or any "interested person") could have filed a petition for rulemaking at any time over the past decade and asked the Department to repeal the rule. *See* Iowa Code § 17A.7(1). The denial of services for Petitioners was based on current Iowa law and DHS did not act in an unreasonable, arbitrary, or capricious manner.

V. Respondent's Requests for the Court to Limit Its Ruling and Deny Petitioners' Requested Declaratory and Injunctive Relief and Attorney Fees

The Court has found in favor of Petitioners. Respondent requests the Court limit its ruling to reversing the decision, remanding to DHS for reconsideration, and denying Petitioners'

requested declaratory and injunctive relief. Resp't's Final Br. p. 44. Respondent asserts that an injunction is not necessary nor an available form of relief. This is because judicial review itself is the adequate remedy and the successful petitioners receive exactly what they seek. *Id*. at p. 46.

Petitioners ask in their Petition for Judicial Review for attorney fees and expenses pursuant to section 625.29, which provides, in relevant part, for an award of fees and expenses to the prevailing party in an action for judicial review under Chapter 17A. *See* Iowa Code § 625.29(1) (2021). Both parties briefed whether an exception exists. Petitioners did not bring their challenge to the regulation pursuant to the ICRA procedures outlined in Iowa Code section 216.16. "The action arose from a proceeding in which the role of the state was to determine the eligibility or entitlement of an individual to a monetary benefit or its equivalent." *Id*. § 625.29(1)(d). Based on the reasoning in *Good v. Iowa Department of Human Services*, 2019 WL 5424960 (Iowa Ct. App. 2019), this Court finds that the application of exception (d) prevents Vasquez and Covington's recovery of fees pursuant to section 625.29(1).

The Court has considered Petitioners' other arguments. For the reasons stated in Respondent's Final Brief, pages 44–47, Covington and Vasquez's requests for attorney fees and other declaratory, injunctive, and other relief are denied. The Court determines after consideration that they are without merit.

Vasquez and Covington have brought petitions for judicial review. The Court grants their petitions in part and so their cases shall be remanded. Based on the decision regarding the legal authorities, the Petitioners will be able to proceed to request Medicaid coverage for surgical treatment of gender dysphoria.

In conclusion, this Court determines that the Department of Human Services must not approve Amerigroup's denial of Petitioners request for Medicaid coverage for their respective

gender-affirming surgery and plan covered office visits. As such, the Court hereby reverses the decision of the Department of Human Services and concludes that Petitioners have established the unconstitutionality of the law and regulations at issue. DHS should be prohibited from denying Medicaid coverage for medically necessary gender-affirming surgery to treat gender dysphoria. This case should also be remanded to the Department of Human Services for further proceedings, consistent with this Ruling and the appropriate coverage plan restrictions.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The language of Iowa Administrative Code rule 441-78.1(4) pertaining to the exclusion of coverage for sex reassignment surgery in connection to the treatment of transsexualism should be and is hereby held to violate the Iowa Civil Rights Act and the Equal Protection Clause of the Iowa Constitution. The language of the Regulation excluding coverage for sex reassignment surgery for transsexualism shall be stricken from the Regulation and the remaining language must be interpreted and applied in a manner allowing transgender individuals coverage under Iowa Medicaid for medically necessary gender affirming surgery for the treatment of Gender Dysphoria and other relevant diagnoses.

2. The Court concludes that Iowa Code section 216.7(3) violates the equal protection provision of the Iowa Constitution on its face and as applied.

3. That this case is **REMANDED** to the Department of Human Services for further proceedings, consistent with this Ruling and the coverage plan. Petitioners' Petition for Judicial Review must be **GRANTED** as stated in this ruling.

4. That the Decision of the Department of Human Services is hereby **REVERSED**.

5. Petitioners' requests for attorney fees and injunctive relief are **DENIED**.

6. Court costs assessed to the Respondent Iowa Department of Human Services.

State of Iowa Courts

Case Number	**Case Title**
CVCV061729	AIDEN VASQUEZ V IOWA DEPARTMENT OF HUMAN SERVICES
Type:	OTHER ORDER

So Ordered

William P. Kelly, District Court Judge,
Fifth Judicial District of Iowa

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