IN THE IOWA DISTRICT COURT FOR POLK COUNTY

AIDEN VASQUEZ, Petitioner, v. IOWA DEPARTMENT OF HUMAN SERVICES, Respondent.	Case No. CVCV061729 **REPLY IN SUPPORT OF MOTION TO DISMISS** **(COUNTS II, III, IV, AND V AND CLAIMS FOR RELIEF)**

Respondent Iowa Department of Human Services states the following in support of its motion to dismiss and in reply to Petitioner Aiden Vasquez's resistance to that motion under Iowa Rules of Civil Procedure 1.421 and 1.431(5).

ARGUMENT

I. The Department's arguments for rejecting Vasquez's claims of error are not forfeited because Vasquez confuses issues of error preservation with principles of judicial review.

Vasquez contends the Department's arguments that his single-subject challenge in Counts IV and V were "forfeited" because the Department "did not assert or consider this argument in the proceedings below." (Vasquez Resistance at 13). He makes the same contention as to the Department's argument that it's inappropriate to consider an Iowa Civil Rights Act challenge in this judicial review proceeding. (*See id.* at 10). But Vasquez conflates issues of error preservation with principles of judicially reviewing only the decision actually made by an agency.

Or course, "the validity of agency decision must rest upon the reasoning as given by the agency and not based upon counsel's post hoc rationalization." *Welch v.*

Iowa Dep't of Emp't Servs., 421 N.W.2d 150, 152 (Iowa 1988). And an agency cannot come up with a new rationale for its decision for the first time in judicial review. *See Grudle v. Iowa Dep't of Rev. & Fin.*, 450 N.W.2d 845, 847–48 (Iowa 1990) (declining to consider new grounds for imposing a tax entirely different legally and factually than what had been argued or decided by the agency in the tax protest); *Welch*, 421 N.W. 2d at 152 (declining to consider new grounds for denying unemployment benefits not argued or decided by the agency in the administrative proceeding).

Vasquez would thus be justified in preventing the Department from introducing new reasoning for its decision denying his preauthorization request for Medicaid benefits. For example, the Department could not now argue preauthorization was properly denied because Vasquez has failed to present sufficient medical evidence of a diagnosis of gender dysphoria. That reasoning was not a ground for the Department's denial. And introduction of this new argument on appeal that had not been argued or decided by the agency would run afoul of *Grudle* and *Welch*.

But the Department was not required to anticipate, consider, and preemptively reject Vasquez's claims that its decision prejudiced his substantial rights in violation of section 17A.19(10), to argue against those claims now on judicial review. This would create an absurd recursive loop—inefficiently requiring an agency to consider questions it doesn't have authority to decide. The proper venue to challenge Vasquez's claims of error under 17A.19(10) is here—in this Court.

This is particularly so on Vasquez's constitutional challenge. Vasquez contends that this Court cannot consider the Department's argument that his single-subject challenge fails as a matter of law—since it was brought after codification—because the Department did not assert the argument or decide the question in his contested case proceeding. But the Department does not have authority to decide constitutional questions. *See Endress v. Iowa Dep't of Hum. Servs.*, 944 N.W.2d 71, 83 ("DHS lacked authority to decide [petitioner's] constitutional issues."). Vasquez raised his constitutional argument in the proceeding. The Department recognized it lacked authority to decide the question. And now the issue is preserved for this Court to rule. To tie the Department's hands and say it cannot defend the constitutionality of a statute now—merely because it did not engage in a futile exercise—would serve no purpose, unnecessarily complicate administrative proceedings, and result in erroneous decisions on judicial review.

II. Vasquez's theory of "continuously pending" separate proceedings does not extend the codification window for single-subject and title challenges.

Vasquez contends that because he raised challenges under article III, section 29 of the Iowa Constitution in his previous lawsuit, and then made those challenges again in a separate request to the Department filed before procedendo issued from his appeal in the previous lawsuit, his challenges under article III, section 29 were "pending at all relevant times." (Vasquez Resistance at 15). He thus reasons that these multiple proceedings defeat, evade, or otherwise leave open the codification window. He further asserts that the subsequent administrative proceedings were a

"continuation" of the earlier lawsuit (Vasquez Resistance at 16) despite both matters progressing at the same time in different forums. His argument fails as a matter of both law and logic.

"The codification process . . . cuts off a right of constitutional challenge under Article III, section 29 if no one has lodged a challenge before codification is complete." *Tabor v. State*, 519 N.W.2d 378, 380 (Iowa 1994). To preserve a constitutional claim under article III, section 29, the "challenge" that must be "lodged" must satisfy two prerequisites. First, it must be presented to a court before codification. *See State v. Kolbet*, 638 N.W.2d 653, 661 (Iowa 2001). An agency is not a court. Second, it must be a *successful* challenge. *See State v. Mabry*, 460 N.W.2d 472, 475 (Iowa 1990). Vasquez's previous lawsuit, decided on appeal under docket number 19–1197, met the first criteria but not the second.

Furthermore, even though it still wouldn't have qualified as a "lodged" challenge when made to the Department, Vasquez could have initiated the administrative proceedings before codification and at least made it a closer question. The docket for case number 19–1197 reflects that a notice of appeal was filed in Vasquez's previous lawsuit on July 18, 2019. That was months before codification of the relevant legislation in January 2020. Vasquez did not have to put all his eggs in the appeal basket. He could've elected not to appeal and instead immediately pursued administrative proceedings; or he could've taken the double-barreled path he eventually chose and initiated administrative proceedings while also filing a notice of appeal. But he didn't, until August 2020—months *after* codification, *and* after the

Iowa Court of Appeals affirmed the district court's conclusion that Vasquez's claims were not ripe. The consequence of that choice is that his single-subject and title claims are now untimely.

Vasquez's assertion that the administrative proceedings were a "continuation" of his previous lawsuit (Vasquez Resistance at 16) does not withstand even cursory analysis. The administrative proceedings may have been a continuation of the ultimate *dispute*—whether Vasquez is entitled to Medicaid funding—but they are not and were not a continuation of the *lawsuit*. The distinction is critical. Indeed, Vasquez notes in resistance that he requested Medicaid coverage while his application for further review in docket number 19–1197 was pending. (Vasquez Resistance at 16). These two competing proceedings, then, are by definition not a continuation of one another, because both were occurring at the same time. *Cf. Johnson v. Ward*, 265 N.W.2d 746, 749 (Iowa 1978) (finding two actions were not a continuation of one another—and thus were appropriate for res judicata—when the plaintiff "started a new action" while his "appeal from the dismissal of his original petition . . . was pending"). Administrative proceedings perhaps could be a continuation of a lawsuit—*if* they arose out of a remand order from a district court judicial review proceeding. *See* Iowa Code § 17A.19(10) (authorizing a court to "remand to the agency for further proceedings"). But that's not what happened here. There was no remand, only dismissal. The two proceedings had factual commonalities but were not one continuous "challenge" and do not save Vasquez's current single-subject and title claims.

The codification window functions like a statute of repose, under which "the mere passage of time can prevent a legal right from ever arising." *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 408 (Iowa 1993). The codification window has this effect because, as the Iowa Supreme Court has held in a slightly different context, a challenger may not be cognizably injured until after codification, but that challenge is nonetheless too late. *See Kolbet*, 638 N.W.2d at 661. The codification window's purpose is to establish a point of finality (for legislation) and stability (in the law). Its consequences may be stark, and may create an "entirely fortuitous" result in some circumstances, but the bright line rule is an "inescapable conclusion" of the *Mabry* doctrine that adopted the codification window. *Id.*

Vasquez's administrative proceedings were not a "continuation" of his previous lawsuit, and so his single-subject and title claims—presented to this Court more than a year after codification—are untimely. Count IV and Count V must be dismissed.

IV. Vasquez's request for attorney fees may be properly dismissed because the outcome will not affect the nature of these proceedings—which precludes the availability of attorney fees—and judicial economy will benefit from resolution now.

Vasquez contends the Department's motion to dismiss his request for attorney fees is premature because it would require the court to prejudge the merits of the action and review the administrative record to resolve the question. But this is not so because Vasquez's request fails as a matter of law—regardless whether he is successful on any of his claims. And resolving the question now will avoid the possibility of protracted litigation, thus advancing interests of judicial economy and certainty for the parties.

As an initial matter, Vasquez's reliance on general notice pleading authority is misplaced. (Vasquez Resistance at 18–19). This is a judicial review proceeding, which has heightened pleading standards. *See Second Injury Fund of Iowa v. Klebs*, 539 N.W.2d 178, 180 (Iowa 1995) ("Notice pleading, therefore, is not sufficient in an appellate review proceeding under chapter 17A because the pleading requirements set forth in section 17A.19(4) are much more stringent than those required in an original action under Iowa Rule of Civil Procedure [1.402]"); *Kohorst v. Iowa State Commerce Comm'n*, 348 N.W.2d 619, 621 (Iowa 1984) (same). And the availability of attorney fees in a judicial review proceeding is a question of law. *See Endress*, 944 N.W.2d at 76.

No deep dive into the administrative record is necessary to conclude the request for fees must fail. Vasquez's petition makes clear that he is challenging the Department's decision denying his request for services under Medicaid. (Petition ¶¶ 8–9). This decision was initially made by an MCO under contract with the Department. (*Id.* ¶¶ 8, 21, 26, 129–134). It was reviewed by an independent administrative law judge in a contested case proceeding who upheld the denial as required by Department rules. (*Id.* ¶¶ 9, 31, 147–50); *see also* Iowa Admin. Code r. 441-73.13, 7.4(2) (granting right to contested case hearing for Medicaid denials). The ALJ also recognized the agency could not decide constitutional questions and preserved those challenges for judicial review. (Petition ¶ 149). And the Department adopted that decision as its final decision. (*Id.* ¶¶ 9, 33, 152–53).

The Iowa Supreme Court has already concluded that the Department's adjudication of a person's entitlement to public benefits in a contested case proceeding before an administrative law judge is primarily adjudicative and thus precludes an award of attorney fees under Iowa Code § 625.29(1)(*b*). *See Endress*, 944 N.W.2d at 81–83. This is so even where the Department does not decide constitutional questions and merely preserves them for judicial review. *Id.* at 83 (reasoning that an agency's determination that it lacks jurisdiction to decide a constitutional issue is still primarily adjudicative and does not entitle party to attorney fees). Like in *Endress*, the Department here determined some questions—that Vasquez was properly denied Medicaid benefits under its administrative rule—and preserved constitutional questions for judicial review. The Department's role was primarily adjudicative and Vasquez's request for attorney fees thus fails.

And the Iowa Court of Appeals has concluded on nearly identical facts that the Department's decision denying preauthorization for gender affirming surgery under Medicaid in a contested case proceeding is a determination of eligibility or entitlement of an individual to a monetary benefit or its equivalent, precluding the award of attorney fees under Iowa Code § 625.29(1)(*d*).[1] *Good v. Iowa Dep't of Hum. Servs.*, No. 18–1613, 2019 WL 5424960, at *4–5 (Iowa Ct. App. Oct. 23, 2019). Indeed,

[1] In *Good*, the court of appeals declined to decide whether the proceeding was primarily adjudicative because the *Endress* case deciding that question was still before the Iowa Supreme Court. *See Good*, 2019 WL 5424960, at *5 n.6. And as discussed, the Supreme Court ultimately rejected the argument that preserving constitutional questions removed a contested case proceeding from the primarily adjudicative exception. *Endress*, 944 N.W.2d at 83.

Good is unpublished. But it is directly on point, recent, and decided by an appellate court with jurisdiction over any appeal of this case. *See State v. Lindsey*, 881 N.W.2d 411, 414 n.1 (Iowa 2016) (noting that while an unpublished decision is not binding on the appellate courts, it "helps define the issues actually before the district court"). It is entitled to respect and consideration for its persuasive value, particularly where Vasquez has offered no principled argument that it is wrongly decided.

Vasquez also suggests that the Iowa Civil Rights Act provides an alternative basis for awarding attorney fees. But *Good* also rejected this argument—even though the plaintiffs in *Good* successfully based their judicial review challenge on a violation of the Iowa Civil Rights Act—because a judicial review action under chapter 17A necessarily is not an action under section 216.16 (a part of the Iowa Civil Rights Act). *See Good*, 2019 WL 5424960, at *3. And this is so regardless whether this Court concludes that Vasquez can proceed with Counts II through V based on his constitutional challenges to the amendment to the Iowa Civil Rights. Even if those claims are not dismissed, as in *Good,* this action is not brought under section 216.16.

As Vasquez points out, if his request for attorney fees is not dismissed and he succeeds on the merits, the award of attorney fees could be a separate final order, separately appealable. (Vasquez Resistance at 19). That precise situation arose in *Good*, resulting in extended litigation and two appellate decisions. Interests of finality and judicial economy will be best served by dismissing this defective request for attorney fees now and sparing further unnecessary litigation. *See Hensley v.*

Eckerhart, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

CONCLUSION

The Department of Human Services respectfully requests that the court dismiss Counts II, III, IV, and V, and Vasquez's requests for attorney fees and declaratory, injunctive, and other relief, except for his request for an order reversing the Department's final decision in this contested case proceeding.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on June 3, 2021:

☐ U.S. Mail	☐ FAX
☐ Hand Delivery	☐ Overnight Courier
☐ Federal Express	☐ Other
☒ EDMS	

Signature: */s/ Samuel P. Langholz*