IN THE IOWA DISTRICT COURT FOR POLK COUNTY

AIDEN VASQUEZ, Petitioner, v. IOWA DEPARTMENT OF HUMAN SERVICES, Respondent.	Case No. CVCV061729 **RESPONDENT'S FINAL BRIEF**

Respondent Iowa Department of Human Services files the following final brief.

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INTRODUCTION

Aiden Vasquez sought preauthorization from his managed care organization ("MCO") for phalloplasty and a related office visit under Iowa's Medicaid program. The MCO denied the request, relying on a Department of Human Services administrative rule excluding from coverage most "cosmetic reconstructive or plastic surgery," including "[p]rocedures related to transsexualism, hermaphroditism, gender identity disorders, or body dysmorphic disorders." Iowa Admin. Code r. 441—78.1(4). Following a contested case proceeding, the Department affirmed the denial.

Vasquez now seeks judicial review of the Department's decision. He raises numerous constitutional and statutory challenges. But all his challenges fail, and the Department's decision should be affirmed.

Vasquez's equal-protection challenge to the Department's decision fails because (1) transgender Iowans are not treated differently than similarly situated Medicaid beneficiaries; (2) transgender status is not a quasi-suspect class under the Iowa Constitution; (3) the Department's rule does not discriminate on the basis of sex; and (4) the rule satisfies both the rational basis test and intermediate scrutiny. Vasquez's challenges based on chapter 17A also fail for the same reasons—the decision was not arbitrary and capricious and his claim under 17A.19(10)(*k*) is subsumed in his other challenges.

Vasquez's other challenges improperly attempt to resurrect—within the confines of this narrow appellate proceeding—his earlier, broader lawsuit that was dismissed. His challenge to the 2019 amendment to the Iowa Civil Rights Act fails because that statute was not a basis for the Department's decision. And even if the challenge could be considered, it was not unconstitutional for the legislature to clarify the scope of the Civil Rights Act in response to judicial interpretation of that Act. Similarly, Vasquez's single-subject and title challenges need not be considered because they are untimely. But they too fail on the merits because the amendment was contained in a bill that was properly titled and that contained both policy and appropriations related to Medicaid and the health and welfare of Iowans.

Vasquez also seeks attorney fees to which he is not entitled and sweeping injunctive and declaratory relief that goes beyond that necessary to remedy his alleged harm. So even if the Court reverses the Department's decision on one of the bases properly before the court in this judicial review proceeding, the Court should

nevertheless decline to grant this improper relief. Instead, the Court would need only to reverse and remand to the Department to reconsider its decision in light of the ruling.

Yet because none of Vasquez's claims succeed, this Court should affirm the Department's decision.

BACKGROUND

Iowa Medicaid covers medically necessary services for needy Iowans. *See* Iowa Code ch. 249A; Iowa Admin. Code r. 441—78.1; *see also Exceptional Persons, Inc. v. Iowa Dep't of Human Servs.*, 878 N.W.2d 247, 248 (Iowa 2016) (noting the Department "is responsible for managing the Medicaid program in Iowa"). And most such services are provided by contracted managed care organizations. *See* Iowa Admin. Code ch. 441—73 pmbl., r. 441—73.2. Before 1979, the Department had an unwritten policy of excluding sex reassignment surgeries from covered physician services based on existing exclusions and limitations for "cosmetic surgery" and "mental diseases." *Pinneke v. Preisser*, 623 F.2d 546, 549–50 (8th Cir. 1980). That unwritten policy, however, was implemented "[w]ithout any formal rulemaking proceedings or hearings," and so the Eighth Circuit concluded such denial of funding was arbitrary. *Id.* at 549; *accord Smith v. Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001) (characterizing *Pinneke* the same way).

In 1994, the State clarified its rule excluding surgery performed for primarily psychological purposes to specify that sex reassignment surgery fell within that exclusion, in compliance with the Eighth Circuit's admonition in *Pinneke*. The resulting rule provides in relevant part:

> 78.1(4) For the purposes of this program, cosmetic, reconstructive, or plastic surgery is surgery which can be expected primarily to improve physical appearance or which is performed primarily for psychological purposes…. Surgeries for the purpose of sex reassignment are not considered as restoring bodily function and are excluded from coverage.
>
> a. Coverage under the program is generally not available for cosmetic, reconstructive, or plastic surgery…

Iowa Admin. Code r. 441—78.1(4); *see also* Iowa Admin. Code r. 441-78.1(4)(b)(2) (excluding surgeries for certain conditions, including "transsexualism" and "gender identity disorder"), 441—78.1(4)(d)(15)–(17) (excluding "sex reassignment," "penile implant procedures," and "insertion of prosthetic testicles"). The Eighth Circuit concluded this rule was "both reasonable and consistent with the Medicaid Act." *Smith*, 249 F.3d at 761.

The Iowa legislature later amended the Iowa Civil Rights Act to add "gender identity" to the list of protected classifications. *See* 2007 Iowa Acts ch. 191, §§ 5–6 (codified at Iowa Code § 216.7(1)(*a*) (2009)). Section 216.7(1)(*a*) provides that it is "unfair or discriminatory" for any "agent or employee" of a "public accommodation" to deny services based on "gender identity." Iowa Code § 216.7(1)(*a*). Transgender individuals fall within this gender identity classification "because discrimination against these individuals is based on the nonconformity between their gender identity and biological sex." *Good v. Iowa Dep't of Hum. Servs.*, 924 N.W.2d 853, 862 (Iowa 2019).

In 2017, two transgender Iowans were denied preapproval for gender-affirming surgery. The Department relied on the administrative rule. And the two Iowans sought judicial review of the decision arguing, among other claims, that the decision

violated the Iowa Civil Rights Act and the Iowa Constitution. The Iowa Supreme Court held that the Department violated the Act's prohibition on public accommodation discrimination when it denied coverage expressly because the requested procedures related to gender identity disorders. *Good*, 924 N.W.2d at 862. Relying on the "time-honored doctrine of constitutional avoidance," the Court did not hold that excluding coverage for gender-affirming surgery violates the Iowa Constitution. *Id.* at 863. Nor did it hold that the State could not deny such coverage for reasons other than that the surgery treats gender dysphoria in transgender individuals.

After *Good*, the legislature amended the Iowa Civil Rights Act. The Act now states that the prohibition on public accommodation discrimination "shall not require any state or local government unit or tax-supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." 2019 Iowa Acts ch. 85, § 93 (codified at Iowa Code § 216.7(3)). The amendment was effective immediately upon its enactment on May 3, 2019, and codified when the 2020 Iowa Code was deemed officially published on January 13, 2020. *See* 2019 Iowa Acts ch. 85, § 94; Iowa Code §§ 2B.12(2), 2B.17(2)(*b*), 2B.17A(2) (setting a default "publication date" of "the first day of the next regular session of the general assembly"); *see also* 2021 Iowa Code Vol. VIII., at VIII-1459 (noting historical chronology of 2020 Iowa Code).

Vasquez and two other plaintiffs brought a declaratory judgment action challenging the amendment shortly after its enactment. The Iowa District Court for Polk County dismissed the action, holding that the claims were not ripe and that one of the plaintiffs lacked standing. The decision was affirmed by the Iowa Court of Appeals in *Covington v. Reynolds*, No. 19-1197, 2020 WL 4514691 (Iowa Ct. App. Aug. 5, 2020). The Court of Appeals explained that the plaintiffs "[had] not requested Medicaid pre-authorization, their Medicaid providers [had] not evaluated the request, and no notice of decision had been issued. The district court determined that until their Medicaid providers deny them coverage, the controversy is purely abstract because they have not been adversely affected in a concrete way. We agree." *Id*. at *3. It also reasoned that "[a]lthough the legislature has amended the ICRA so that the administrative rule no longer violates the law, the question of whether Medicaid must provide a recipient with a gender-affirming surgical procedure still resides, ultimately, with the DHS." *Id*. For that reason, the Court of Appeals held that the plaintiffs with standing had a legally adequate means of redress through the administrative process. *Id*.

Vasquez then sought Medicaid preapproval from his MCO in August 2020. His request was denied, and he appealed the denial to the Iowa Department of Human Services. The decision to deny coverage was affirmed by the agency in a contested case proceeding. And Vasquez now seeks judicial review.

STANDARD OF REVIEW

On judicial review, the district court functions in an appellate capacity. *Lowe's Home Ctrs., LLC v. Iowa Dep't of Revenue,* 921 N.W.2d 38, 45 (Iowa 2018); *see also Black v. Univ. of Iowa*, 362 N.W.2d 459,461–64 (Iowa 1985) (discussing the importance of "maintaining the integrity" of judicial review proceedings as "appellate in nature" while holding that original causes of action cannot be joined together with judicial review proceedings). The petitioner must "particularize the grounds upon which they s[eek] relief." *Kohorst v. Iowa State Commerce Comm'n*, 348 N.W.2d 619, 621 (Iowa 1984).

Vasquez's challenge relies on subsections (*a*), (*b*), (*k*), and (*n*) of Iowa Code section 17A.19(10). Subsection (*a*) permits the Court to grant relief if the agency action was "unconstitutional on its face or as applied or is based on a provision of law that is unconstitutional on its face or as applied. Iowa Code § 17A.19(10)(*a*). Subsection (*b*) allows the Court to grant relief if the agency action was "[b]eyond the authority delegated to the agency by any provision of law or in violation of any provision of law." *Id.* § 17A.19(10)(*b*). Subsection (*k*) allows the Court to grant relief if the agency action was "not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from the action that it must necessarily be deemed to lack any foundation in rational agency policy." *Id.* § 17A.19(10)(*k*). And subsection (*n*) allows the Court to grant relief if the agency action was "[o]therwise unreasonable, arbitrary, capricious, or an abuse of discretion." *Id.* § 17A.19(10)(*n*).

Courts "are authorized to grant relief only if the agency's action is affected by error of law, unsupported by substantial evidence in the record, or characterized by abuse of discretion." *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148, 151 (Iowa 1997); *see also Bridgstone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 90 (Iowa 1997); *Burns v. Bd. of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993). Where interpretation of the law has not been vested in the discretion of an agency, legal issues are subject to de novo review. *Bearinger v. Iowa Dep't of Transp.*, 844 N.W.2d 104, 106 (Iowa 2014). Ultimately, of course, "[t]he burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity." Iowa Code § 17A.19(8)(*a*).

ARGUMENT

I. The Department's decision does not violate the equal protection clause of the Iowa Constitution as alleged in Count I.

"The foundational principle of equal protection is expressed in article I, section 6 of the Iowa Constitution, which provides: '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.'" *Varnum v. Brien*, 763 N.W.2d 862, 878 (Iowa 2009) (quoting Iowa Const. art. I, § 6). However, "[e]ven in the zealous protection of the constitution's mandate of equal protection, courts must give respect to the legislative process and presume its enactments are constitutional." *Id.* Our system of government requires the legislature and administrative agencies "to make difficult policy choices,

including distributing benefits and burdens amongst the citizens of Iowa." *Id.* "In this process, some classifications and barriers are inevitable." *Id*

A. The prior district court decision in *Good* is not preclusive on constitutionality because that holding was one of two independent bases relied on by the district court, and the Supreme Court affirmed on only the statutory basis.

Vasquez contends that the district court's previous determination in *Good v. Department of Human Services*—that denying Medicaid coverage for gender affirming surgery violates the Iowa Constitution's equal-protection guarantee—is preclusive here. (Vasquez Br. at 23–25). That constitutional holding, however, was one of four bases on which the district court reversed the Department's decision in *Good*. *See Good v. Dep't of Human Servs.*, 924 N.W.2d 853, 859 (Iowa 2019). The district court also held that the Department's decision violated the Iowa Civil Rights Act, had a grossly disproportionate impact on private rights, and was arbitrary and capricious. *See id.* On appeal, the Iowa Supreme Court affirmed the district court based only on the Iowa Civil Rights Act. *See id.* at 863. The Court relied on "the time-honored doctrine of constitutional avoidance" in purposefully declining to reach the validity of the district court's constitutional decision. *Id.*[1]

[1] The Supreme Court also did not reach the other two statutory grounds for reversal aside from the Iowa Civil Rights Act. *See Good*, 924 N.W.2d at 860. Therefore, those grounds were not necessary and essential to the result either. *See Samara v. Matar*, 419 P.3d 924, 925 (Cal. 2018) (holding that when "a conclusion relied on by the trial court" is "challenged on appeal, but not addressed by the appellate court," the trial court judgment should be treated for preclusion purposes "as though the trial court had not relied on the unreviewed ground").

Vasquez must establish four elements to invoke issue preclusion based on a determination against the Department in prior litigation:

> (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.

Emp'rs Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17, 22 (Iowa 2012). And because Vasquez seeks to use issue preclusion offensively to establish the elements of its equal protection claim, the standard is heightened. *Id.*; *accord Clark v. State*, 955 N.W.2d 459, 466 (Iowa 2021) ("[O]ffensive use of issue preclusion is applied more restrictively and cautiously than when it is used defensively because there are [fewer] reasons justifying its offensive use . . . ." (cleaned up)). Vasquez must also show that the Department "was afforded a full and fair opportunity to litigate the issues" and "whether any other circumstances are present that would justify granting . . . [the Department] occasion to relitigate the issues." *Emp'rs Mut. Cas. Co.*, 815 N.W.2d at 22; *accord Clark*, 955 N.W.2d at 466.

Here, there is a strong "other circumstance": the constitutional dimension of this case. Courts should be particularly cautious about applying issue preclusion in constitutional adjudication. *See Montana v. United States*, 440 U.S. 147, 163 (1979) ("Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical"); *Yeoman v. Commonwealth*, 983 S.W.2d 459, 466 (Ky. 1998) (noting in a close case, "given the

magnitude of the constitutional issues involved, we should err on the side of caution by resolving the issue on the merits"); *Gold v. DiCarlo*, 235 F. Supp. 817, 820 (S.D.N.Y. 1964) ("At least in the constitutional area, the considerations of finality that stand behind the res judicata doctrine must be balanced against and ofttimes give way to the government's need to regulate abuses that change with the passage of time."). But at least one other element of offensive issue preclusion is also missing.

The Iowa Supreme Court has not yet addressed whether a district court's alternative independent determinations are necessary and essential to the judgment and thus entitled to preclusive effect. But the Second Restatement of Judgments provides that they are not. *See* Restatement (Second) Judgments § 27 cmt. *i* ("If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone."); *id.* cmt. *o* ("If the appellate court upholds one of these determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination."). So do several other jurisdictions. *See Halpvern v. Schwartz*, 426 F.2d 102, 105–08 (2d Cir. 1970) (adopting the same rule after extensive analysis and providing the seminal basis for the Restatement); *Newton v. Tyson Foods, Inc.*, No. C98-30, 1999 WL 33656868, at *5 (N.D. Iowa Mar. 26, 1999) (applying the Restatement under federal law); *see also, e.g.*, *Beaver v. John Q. Hammons Hotels, L.P.*, 138 S.W.3d 664, 670 (Ark. 2003); *Samara v. Matar*, 419 P.3d 924, 925 (Cal. 2018); *Stanton v. Schultz*, 222 P.3d 303,

309–10 (Colo. 2010); *Humana, Inc. v. Davis*, 407 S.E.2d 725, 726–27 (Ga. 1991); *Lynch v. Town of Groton*, 418 N.E.2d 1281, 1281 (Mass. App. Ct. 1981); *Omimex Canada, Ltd. v. State*, 346 P.3d 1125, 1130 (Mont. 2015); *Tydings v. Greenfield, Stein & Senior, LLP*, 897 N.E.2d 1044, 1047 (N.Y. 2008).

The Iowa Supreme Court has repeatedly adopted other portions of section 27 of the Second Restatement of Judgments as the governing law for issue preclusion in Iowa. *See, e.g., Stender v. Blessum*, 897 N.W.2d 491, 513 (Iowa 2017); *Winnebago Indus., Inc. v. Havery*, 727 N.W.2d 567, 572 (Iowa 2006); *Grant v. Iowa Dep't of Human Servs.*, 722 N.W.2d 169, 174-77 (Iowa 2006); *Comes v. Microsoft Corp.*, 709 N.W.2d 114, 121 (Iowa 2006). And more recently, it followed section *36* of the Restatement in addressing (and rejecting) a different claim of offensive issue preclusion against the State. *See Clark*, 955 N.W.2d at 469. This Court should follow the Restatement here.

Because the district court's decision in *Good* was based on four alternative and independent determinations, no individual determination was necessary and essential to the judgment. *See* Restatement (Second) Judgments § 27 cmt. *i*. And on appeal, the Supreme Court only reached the Iowa Civil Rights Act ground for reversal, so the other three grounds—including the constitutional holding—are not preclusive here. *See* Restatement (Second) Judgments § 27 cmt. *o*. Concluding otherwise would destroy the constitutional avoidance doctrine upon which the Supreme Court relied. *See Good*, 924 N.W.2d at 863. Instead of avoiding a constitutional question, it would implicitly decide all unreached questions and

insulate them from further litigation. *See Samara*, 419 P.3d at 932 ("Affording preclusive effect to a trial court determination that evades appellate review might speed up the resolution of controversies, but it would do so at the expense of fairness, accuracy, and the integrity of the judicial system. We decline to endorse that tradeoff."). Such a result would be absurd. The *Good* district court decision has no preclusive effect here.

B. Vasquez has not shown that the rule treats transgender Iowans differently than similarly situated Medicaid beneficiaries.

To prove an equal protection violation, a plaintiff must first establish that the statute or administrative rule treats similarly situated individuals differently. *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 32 (Iowa 2019). "Generally, however, determining whether classifications involve similarly situated individuals is intertwined with whether the identified classification has any rational basis." *Id.* Here, the challenged rule excludes, as a general matter, "cosmetic, reconstructive, or plastic surgery." Iowa Admin. Code r. 441—78.1(4). The rule defines "cosmetic, reconstructive, or plastic surgery" as "surgery which can be expected primarily to improve physical appearance or which is performed primarily for psychological purposes or which restores form but which does not correct or materially improve the bodily functions." *Id.* Vasquez argues he is similarly situated to all other Medicaid beneficiaries—specifically that he and all other beneficiaries "are the same in all legally relevant ways because [they] … share a financial need for medically necessary treatment." (Vasquez Br. at 26.) Even accepting Vasquez's own broad formulation,

however, the challenged rule does not create a classification based on transgender status.[2]

The equal protection clause requires that laws, or in this case an administrative rule, treat alike all people who are similarly situated *with respect to the legitimate purposes of the rule*. *See Varnum*, 763 N.W.2d at 882. This Court could treat that requirement in either of two ways. First, it could conclude that all Medicaid beneficiaries are similarly situated for purposes of the program itself and that the differential treatment is based not on transgender status, but on whether the beneficiary is seeking cosmetic, reconstructive, or plastic surgery, or whether they are seeking some other medically necessary treatment that is not excluded. In that case, similarly situated people are treated differently but the differential treatment does not offend the equal protection clause. *See Varnum*, 763 N.W.2d at 885 (citing *Clements v. Fashing*, 457 U.S. 957, 967 (1982) ("Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution")).

Second, this Court could conclude that individuals who are seeking cosmetic, reconstructive, or plastic surgery to treat gender dysphoria are similarly situated to other individuals who are seeking such surgery to treat other primarily psychological conditions. In that case, because the rule specifically identifies gender dysphoria in

[2] Notably, Vasquez's formulation is overbroad even under the Medicaid Act—which does not treat *all* Medicaid beneficiaries as similarly situated, but only those "patients who can be effectively treated by the same . . . procedure." *Dexter v. Kirschner*, 984 F.2d 979, 986 (9th Cir. 1992).

subsection 441—78.1(4)(b)(2), the rule creates a classification based on transgender status, but it does not treat similarly situated people differently because, despite listing specific examples in the rule, all such surgeries are excluded when they are primarily for the purpose of treating a psychological condition.[3] Under that formulation, Vasquez has not satisfied the equal protection clause's threshold test. *In re Det. of Hennings*, 744 N.W.2d 333, 339 (Iowa 2008) ("If the two groups are not similarly situated, we need not scrutinize the legislature's differing treatment of them.").

C. Transgender status is not a quasi-suspect classification under the Iowa Constitution.

Because Vasquez has not shown that the challenged rule treats transgender individuals differently from similarly situated Medicaid beneficiaries, this Court need not decide whether transgender individuals constitute a quasi-suspect class for purposes of the equal protection clause. *See Good*, 924 N.W.2d at 863 (discussing the doctrine of constitutional avoidance). But if it does reach that question, it should conclude that they do not. In his brief, Vasquez explains the "four-factor" test the Iowa Supreme Court used in *Varnum* to determine whether classifications based on

[3] In *Good*, the Iowa Supreme Court held that the record in that case did not support the agency's argument that it did not discriminate between individuals seeking cosmetic, reconstructive, or plastic surgeries performed primarily for a psychological purpose in part because, "the rule authorizes payment for some cosmetic, reconstructive, and plastic surgeries that serve psychological purposes," citing subsection 441-78.1(4)(a). *Good*, 924 N.W.2d at 862. But the approved surgeries in that subsection are intended to treat congenital anomalies and "accidental injury or surgical trauma" and are more likely those "expected to primarily improve physical appearance" or those "which restore[] or correct form but which [do] not correct or materially improve the bodily functions," rather than those which are performed "primarily for psychological purposes." Iowa Admin. Code r. 441-78.1(4).

sexual orientation were entitled to heightened scrutiny. In *Varnum*, the Court explained that the four factors are not elements, but that the first two—"history of intentional discrimination and relationship of classifying characteristic to a person's ability to contribute"—could be considered "prerequisites" for declaring a suspect or quasi-suspect class. *Varnum*, 763 N.W.2d at 889. The State does not dispute that those two factors weigh in favor of applying heightened scrutiny to transgender individuals as a class. But the inquiry does not end there.

Neither the Iowa Supreme Court nor the United States Court of Appeals for the Eighth Circuit has held that transgender status is a suspect or quasi-suspect class. Other courts are divided on the issue. *Compare, e.g.*, *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015) (applying intermediate scrutiny to classifications based on transgender status), *with Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 668–69 (W.D. Pa. 2015) (holding that transgender status is not a suspect or quasi-suspect classification and citing cases to the same effect). Moreover, 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." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-43 (1985).

In *Cleburne*, the United States Supreme Court declined to recognize the intellectually disabled as a suspect or quasi-suspect class despite perhaps qualifying for such treatment based on the first or second factors of the test later adopted in

Varnum. *See id.* It held 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 441-42 (citing *Mass. Bd. of Retire'ment v. Murgia*, 427 U.S. 307 (1976) (declining to recognize the aged as a suspect or quasi-suspect class despite history of discrimination)). Transgender individuals with gender dysphoria have a distinguishing characteristic relevant to interests the State has authority to implement, namely, like the intellectually disabled, a need for varying degrees of medical services to treat their condition.

As was the case in *Cleburne*, the legislative response to the "plight" of transgender Iowans "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Cleburne*, 473 U.S. at 443. Discrimination based on gender identity has been addressed by the Iowa legislature in the Civil Rights Act, the Anti-Bullying and Anti-Harassment Act, and the hate crime statutes. See Iowa Code §§ 216.7 (civil rights); 280.28 (anti-bullying); 729A.2 (hate crime). Medically necessary medical treatment for gender dysphoria is generally available to Medicaid beneficiaries in Iowa and the exclusion of cosmetic, reconstructive, or plastic surgery is a near complete exclusion that is designed to conserve the program's resources, not to harm transgender individuals. Given the wide variation in the medical needs of transgender Iowans, "governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in

shaping and limiting their remedial efforts," especially in the context of the state Medicaid program. *See Cleburne*, 473 U.S. at 445.

D. The rule does not discriminate based on sex.

Vasquez also argues that heightened scrutiny is appropriate because "discrimination against transgender people is a form of sex discrimination." (Vasquez Br. at 37.) He cites *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741-43 (2020), for support. But *Bostock* involved a Title VII employment discrimination claim and its central logic—that sex discrimination occurs when an employer refuses to tolerate in an employee of one sex "traits or actions" that he would tolerate in a member of the other sex—has no application in this context. *See Bostock*, 140 S. Ct. at 1741. In this case, the sex or gender identity of the Medicaid beneficiary has no bearing on the exclusion of the services requested by Vasquez. 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. *Bostock* is especially inapplicable here, where Medicaid funds *are* available to treat gender dysphoria generally, just not when they are requested for these particular surgeries. *See Hennessy-Waller v. Snyder*, __ F. Supp. 3d ___, 2021 WL 1192842, at *8 (D. Ariz. March 30, 2021) (rejecting sex discrimination claim based on exclusion of gender affirming surgery from state Medicaid program and distinguinshing *Flack v. Wis. Dept. of Health Servs.*, 395 F. Supp. 3d 1001 (W.D. Wis. 2019)).

Bostick's inapplicability to the challenged rule is confirmed by cases from the insurance industry. In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the United States

Supreme Court held that an insurance plan can choose to cover some risks while excluding others without running afoul of the equal protection clause. Specifically, it held that a disability insurance plan complied with the equal protection clause even though it declined to cover pregnancy-related disabilities. *Id.* at 494. The Court explained 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 496-97. It further reasoned:

> It is evident that a totally comprehensive program would be substantially more costly than the present program and would inevitably require state subsidy, a higher rate of employee contribution, a lower scale of benefits for those suffering insured disabilities, or some combination of these measures. There is nothing in the Constitution, however, that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has.

Id. at 495-96.

Other cases, like *Geduldig*, stand for the proposition that health insurance benefit exclusions do not facially discriminate on the basis of sex, so long as they exclude coverage for comparable procedures for both sexes. For example, in *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679-81 (8th Cir. 1996), the Eighth Circuirt held that a benefits exclusion for infertility treatment did not discriminate against women because it applied to all infertile workers, both men and women. Likewise, *Saks v. Franklin Covey Co.*, 316 F.3d 337, 347 (2d. Cir. 2003), held that a benefits exclusion for surgical impregnation procedures did not discriminate against women because "male and female employees affected by infertility are equally disadvantaged by the exclusion of surgical impregnation procedures." And the court in *In re Union*

Pacific Railroad Employment Practices Litigation, 479 F.3d 936, 943-45 (8th Cir. 2007), upheld a benefits exclusion for contraception because it affected both men and women.

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. It does not discriminate on the basis of sex or transgender status. The rational basis test applies.

E. The rule satisfies both intermediate scrutiny and the rational basis test.

Regardless of the applicable standard of review—rational basis or intermediate scrutiny—the challenged rule complies with the equal protection clause. The rule is substantially related to the important government interests in the protection of public health through the most efficient and effective distribution of Medicaid funding.

"The rational basis test defers to the legislature's prerogative to make policy decisions by requiring only a plausible policy justification, mere rationality of the facts underlying the decision and, again, a merely rational relationship between the classification and the policy justification." *Varnum*, 763 N.W.2d at 879. Importantly, courts will uphold classifications based on judgments the legislature could have made, without requiring proof or evidence that they actually did make them. *AFSCME Iowa Council 61*, 928 N.W.2d at 33 (quoting *King v. State*, 818 N.W.2d 1, 30 (Iowa 2012)); *see also id.* at 37 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)) ("[B]ecause we never require a legislature to articulate its reasons

for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.... 'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.").

Intermediate scrutiny flips the burden and requires "the party seeking to uphold the statute to demonstrate the challenged classification is substantially related to the achievement of an important governmental interest." *Varnum*, 763 N.W.2d at 880. The justification "must be genuine and must not depend on broad generalizations." *Id.* In addition, the justification must not be "invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Courts have recognized that containing health care costs and protecting public health are important government interests. *See 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) ("[C]ost containment is most assuredly a substantial government interest."; 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) ("administrative convenience and economic cost-saving" are "relevant" to intermediate scrutiny analysis).

The United States Supreme Court has recognized that conserving scarce resources and the related issues of "economic supply and distributional fairness" also qualify as important government interests. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 568 (1980); *see also, id.* at 576 (Blackmun, J., concurring) ("[P]reventing … low quality health care [is a] 'substantial,' legitimate, and important state goal[]."). And in the Medicaid context, courts have recognized an important government interest in protecting public funds and their proper distribution against the threat of fraud. *See, e.g.*, *ADL, Inc. v. Perales*, No. 88 CIV. 4749 (JFK), 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.").

Vasquez argues that *Varnum* rejected "cost savings" as a justification for a quasi-suspect classification. (Vasquez Br. at 38.) But *Varnum* rejected cost savings as a general matter of the state's budget, not as part of an effort to ensure the most needy receive the most benefit from the Medicaid program. The example that Vasquez cites—segregating children by race in an effort to save money—is inapposite. Medicaid was designed "to provide the largest number of necessary medical services to the greatest number of needy people." *Ellis v. Patterson*, 859 F.2d 52, 55 (8th Cir.1988). Federal regulations permit a state to "place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures." 42 C.F.R. § 440.230(d); *see also* Iowa Code § 249A.4(1) (delegating to the director of the Department the responsibility of "[d]etermin[ing] the greatest amount, duration, and

scope of assistance which may be provided, and the broadest range of eligible individuals to whom assistance may effectively be provided, under this chapter within the limitations of available funds.").

The 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. Because the rule is substantially related to an important government interest, it does not violate the equal protection clause even under heightened scrutiny.

II. The Department's decision does not violate the Iowa Civil Rights Act as alleged in Counts II, III, IV, and V.

Vasquez seeks to go further than merely reversing the Department's decision on his preauthorization request as unconstitutional. And he cannot allege that the decision violates the Iowa Civil Rights Act as amended and codified because it now expressly clarifies that the Act doesn't require Medicaid to provide his requested surgery. *See* Iowa Code § 216.7(3). So he instead seeks to challenge the constitutionality of the 2019 amendment to the Iowa Civil Rights Act adding this clarification, and the process by which the amendment was enacted. But this he cannot do because section 17A.19 of the Iowa Code does not authorize relief on this basis. And even if the challenge could be brought here, the amendment to the Iowa Civil Rights Act is constitutional. It does not violate the equal protection clause and was enacted in compliance with the single-subject and title requirements of the Iowa Constitution.

A. Alleged unconstitutionality of an amendment to the Iowa Civil Rights Act is not a basis for relief in this contested case proceeding that was not brought under that Act or based on that provision of law.

Section 17A.19(10)(*a*) authorizes a court reviewing agency action to "reverse, modify, or grant other appropriate relief" when "substantial rights of the person seeking judicial relief have been prejudiced because the agency action is . . . unconstitutional 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*). Relying on this provision, Vasquez could—and does—argue that the Department's decision in his case violated the Iowa Constitution. He could—and also does—argue that the administrative rule on which the Department's decision was based was unconstitutional. And if the Department's decision or administrative rule was based on a statute with an alleged constitutional defect, Vasquez could challenge the constitutionality of that statute as well.

But the Department's decision here was not based on any statutory mandate. And it was not "based upon" the Iowa Civil Rights Act, or its 2019 amendment, within the meaning of that phrase in section 17A.19(10)(*b*). This is a Medicaid contested case, applying the Department's Medicaid administrative rules. The Medicaid program and its rules are authorized by the Medical Assistance Act, Iowa Code ch. 249A—not the Iowa Civil Rights Act, Iowa Code ch. 216. Counts II and III do not allege any constitutional defects in a provision of law on which the Department's decision was based. They must thus be dismissed.

The Iowa Civil Rights Act amendment that Vasquez attempts to challenge did clarify that the Act cannot be a basis for requiring "any state or local government unit or tax-supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." 2019 Iowa Acts ch. 85, § 93 (codified at Iowa Code § 216.7(3)). But this amendment merely limited an enforcement statute, thus restricting the authority of another agency, the Iowa Civil Rights Commission, to enforce public accommodation law and narrowing the scope of the related private cause of action. The amendment did not mandate the Department's decision here. And it did not authorize or prompt the administrative rule on which the Department based its decision. That rule had been adopted more than two decades before the challenged amendment. In short, the Department's decision was not "based upon" the amendment to the Iowa Civil Rights Act, and accordingly its alleged unconstitutionality cannot be a basis for relief here.

Vasquez's claims under Counts II and III are even further defective because this alleged constitutional issue is another step removed from any applicability to this contested case. Because the amendment is unconstitutional, Vasquez reasons, the pre-2019 Iowa Civil Rights Act remains in effect, and its prohibition on gender identity discrimination is violated by the Department's decision here. *See* Iowa Code § 17A.19(10)(b) (authorizing relief when the agency action is "in violation of any provision of law"). Yet as discussed above, the constitutionality of the amendment is outside the scope of this judicial review action. The Civil Rights Act as currently

enacted does not require approval of Vasquez's preauthorization request. *See* Iowa Code § 216.7(3). So unlike in *Good*, the Department's decision does not violate the Iowa Civil Rights Act.

B. Clarifying the scope of the Iowa Civil Rights Act after a court decision interpreting the Act does not violate the equal-protection clause of the Iowa Constitution.

Vasquez argues that he is similarly situated to non-transgender Medicaid beneficiaries for the purposes of the Iowa Civil Rights Act for same reasons as he argues he is similarly situated for purposes of the administrative rule. But he is not. Non-transgender Medicaid beneficiaries are not protected by the Iowa Civil Rights Act. For this reason, transgender and non-transgender Medicaid beneficiaries are not similarly situated. But it is also for this reason that the law does not treat them differently. The law makes clear that nothing in the Iowa Civil Rights Act 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.

In *Good*, the Iowa Supreme Court interpreted the Iowa Civil Rights Act, relying significantly on the 2007 amendment adding gender identity to the list of protected groups. *See Good*, 924 N.W.2d at 862–63. The Court concluded the 2007 amendment continued a series of volleys between courts and the Department, following the Department's former unwritten policy, the Eighth Circuit's decision in *Pinneke*, the Department's rule it enacted after *Pinneke*, and the Eighth Circuit's

decision upholding that rule in *Smith*. *See id.* The Court's own decision became the latest in the series.

After *Good*, the Legislature enacted a narrow amendment clarifying that the public accommodation protections did not require governments to provide gender affirming surgery. The legislature could have responded by clarifying Medicaid wasn't a public accommodation—removing all statutory civil rights protections. Or it could have removed gender identity protections completely. And it could have even prohibited Medicaid from providing these surgeries. It did none of these things. Instead, the legislature merely clarified that it did not intend the Iowa Civil Rights Act to mean what the Supreme Court said it did in *Good*. This is not animus and it is not constitutionally suspect. Indeed, it is a key feature of constitutional avoidance—permitting the legislature to respond to a statutory interpretation decision. *See Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 81 (Iowa 2013) (Cady, C.J., concurring specially) ("[L]egislative bodies can clarify or change the law to reflect [their] intent."); *see also, e.g.*, *Taft v. Iowa Dist. Ct.*, 828 N.W.2d 309, 317 (Iowa 2013) ("When a statute is amended soon after controversy has arisen as to the meaning of ambiguous terms in an enactment, the court has reason to believe the legislature intended the amendment to provide clarification of such terms."); *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 40 (Iowa 2012) (concluding that when a particular issue "was being litigated in the courts," the timing of a legislative amendment "confirms that the general assembly was trying to clarify the law in this area"); *Bob Zimmerman Ford, Inc. v. Midwest Auto. I, L.L.C.*, 679 N.W.2d 606, 610

(Iowa 2004) (finding "reason to suspect" that a legislative amendment "was in direct response" to a court decision, and thus concluding "it represents an attempt to clarify the meaning of the statute").

As "evidence" of the legislature's animus toward transgender individuals, Vasquez cites several comments of individual legislators, mostly made by *opponents* of the legislation. But the Iowa Supreme Court has repeatedly held that the views of an individual legislator are not persuasive in determining legislative intent. *See, e.g., 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 Ed. Association-Iowa Higher Ed. Ass'n v. Public Employment Relations Bd.*, 269 N.W.2d 446, 448 (Iowa 1978) ("The legislative process is a complex one. 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. Accordingly we are usually unwilling to rely upon the interpretations of individual legislators for statutory meaning. This unwillingness exists even where, as here, the legislators who testify are knowledgeable and entitled to our respect."); *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 construction of statutes."). In any event, the comments that Vasquez cites made

by the bills *supporters* do not show animus toward transgender individuals—rather, they show that the legislature was merely clarifying an incorrect interpretation of the law by the courts.

C. Any single-subject or title violation was cured by codification of the Iowa Civil Rights Act amendment before initiation of this proceeding.

There is "a window of time measured from the date legislation is passed until such legislation is codified. During this window of time, the legislation may be challenged as violative of article III, section 29 of the Iowa Constitution." *State v. Mabry*, 460 N.W.2d 472, 475 (Iowa 1990). "Absent a successful challenge during this period of time, the new legislation, if it is otherwise constitutional, becomes valid law," even if its passage violated article III, section 29. *Id.* Future challenges under article III, section 29 are "barred even though future litigants may claim they were in no position to make such a challenge before the codification." *Id.* In other words, "[o]nce a bill is codified, any constitutional defect relating to title or subject matter is cured." *State v. Taylor*, 557 N.W.2d 523, 526 (Iowa 1996).

The codification window means that for some pieces of legislation, no challenge on single-subject or title grounds is possible, even if the passage of time and subsequent codification is "entirely fortuitous." *State v. Kolbet*, 638 N.W.2d 653, 661 (Iowa 2001). The challenger in *Kolbet* contended it was unfair to reject his single-subject claim as untimely because "he did not have standing to challenge the act until criminal charges were brought against him." *Id.* The Court rejected his assertion, because even though litigants can't "challenge a statute until they are placed in a

position in which the statute adversely affects them," *id.*, the interest in finality of legislation outweighs any rock-and-a-hard-place counterargument surrounding the timing of the challenge. That a claim under article III, section 29 may be irretrievably lost simply due to the passage of time is an "inescapable conclusion" that follows from the codification window. *Id.*; *see also Iowa Dep't of Transp. v. Iowa Dist. Ct.*, 586 N.W.2d 374, 378–79 (Iowa 1998) (holding that even a successful district court decision within the codification window doesn't preserve a challenge in future cases because it must be a successful *appellate* decision).

Vasquez's petition demonstrates on its face that the legislation he seeks to challenge under article III, section 29 of the Iowa Constitution (in Count IV and Count V) has already been codified. The legislation was enacted in 2019. 2019 Iowa Acts ch. 85, § 93. (Petition ¶ 7.) A new Iowa Code is codified and published "as soon as possible after the final adjournment" of the legislature. Iowa Code § 2B.12(2). Further, each "edition of the Iowa Code shall contain each Code section in its new or amended form." *Id.* § 2B.12(3). Typically, the codification and publication processes are both complete within one year after the legislature adjourns. *See, e.g.*, *Kolbet*, 638 N.W.2d at 661 ("[T]he statute was enacted in the spring of 1997 . . . . The Code containing the amendment was released by the Code Editor on January 8, 1998. That was the date beyond which no constitutional challenge based on a noninclusive title could be lodged."); *Iowa Dep't of Transp.*, 586 N.W.2d at 376–77 (statute passed in May 1996 and codified by January 8, 1997); *Mabry*, 460 N.W.2d at 475 (legislation "enacted and signed by the governor in 1980", and "first appeared in the 1981 Code").

Here, the 2019 legislation was codified by January 13, 2020. *See* Iowa Code §§ 2B.12(2), 2B.17(2)(*b*), 2B.17A(2) ("If the legislative services agency does not provide a publication date for the Iowa Code, the publication date shall be the first day of the next regular session of the general assembly convened pursuant to Article III, section 2, of the Constitution of the State of Iowa."); *see also* 2021 Iowa Code Vol. VIII., at VIII-1459 (noting historical chronology of 2020 Iowa Code and the first day of session). Vasquez's petition expressly recognizes as much; it mentions where the 2019 session law is *codified* in the 2020 version of the Iowa Code. (Petition ¶¶ 7, 69.) A session law that has been codified cannot be challenged under article III, section 29. Thus, Vasquez's current single-subject and title challenges, filed in 2021, are outside the codification window and cannot proceed.

Beginning the administrative process by requesting Medicaid preapproval on August 14, 2020 (Petition ¶ 23) does not save Vasquez's claims under article III, section 29. Nor does the fact that Vasquez briefed challenges under article III, section 29 before the agency in October 2020. (Petition ¶ 139 & Exhibit 10 at 19–25, 33.) First, "a constitutional challenge of this nature must actually be presented *to the court* prior to codification"—not to an agency. *Kolbet*, 638 N.W.2d at 661 (emphasis added). An agency is not a court. Second, even if beginning the administrative process *could* constitute "lodging" a constitutional challenge under article III, section 29, August 2020 and October 2020 were still outside the codification window—which closed on January 13, 2020, for the 2019 session laws. Vasquez's previous challenge to the statute (Petition ¶ 71) does not save his current claims under article III, section

29 either. That previous challenge did not succeed, and the codification window bars single-subject and title claims unless there is "a *successful* challenge" within the window. *Mabry*, 460 N.W.2d at 475 (emphasis added).

Nor can the administrative proceedings be considered "continuation" of Vasquez's previous lawsuit. 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, since Vasquez requested Medicaid coverage while his application for further review in docket number 19–1197 was pending, the two competing proceedings 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.

D. The enactment of the Amendment as a part of the annual health and human services appropriation bill complied with the single-subject and title requirements of the Iowa Constitution.

Article III, section 29 of the Iowa Constitution provides, as relevant here: "Every Act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title." This provision includes two separate requirements for legislation: a single-subject requirement and a title requirement.

The Iowa Supreme Court has long held that article III, section 29, "should be liberally construed so one act may embrace all matters reasonably connected with the subject expressed in the title and not utterly incongruous thereto." *Long v. Bd. of Sup'rs*, 142 N.W.2d 378, 381 (Iowa 1966); *see also State ex rel. Weir v. Cty. Judge*, 2 Iowa 280, 285 (1855) (adopting a deferential interpretation in the first case under an

earlier version of the single-subject clause because the contrary would "render null a large portion of the legislation of the state, and render future legislation so inconvenient as to make it nearly impracticable"). The provisions of an act need only "fall under some one general idea and be so connected with or related to each other, either logically or in popular understanding, as to be part of or germane to one general subject." *Long*, 142 N.W. 2d at 381. When two or more provisions may at first appear dissimilar, a court must "search for (or to eliminate the presence of) a single purpose toward which the several dissimilar parts of the bill relate." *Miller v. Bair*, 444 N.W.2d 487, 490 (Iowa 1989). This is because the constitutional clause itself permits not just "one subject" but also "matters properly connected therewith" Iowa Const. art. III, § 29; *see Miller*, 444 N.W.2d at 489.

To violate the single-subject requirement, "an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other." *Long*, 142 N.W. 2d at 381. If the violation is "fairly debatable," the act must still be upheld because courts should only act "in extreme cases" where legislation is "clearly, plainly and palpably" unconstitutional. *Utilicorp United Inc. v. Iowa Utilities Bd.*, 570 N.W.2d 451, 454 (Iowa 1997).

This is not such an extreme case, even if Vasquez's claims are timely. The challenged amendment was contained in the annual health and human services appropriation bill. *See* 2019 Iowa Acts ch. 85, §§ 93-94. The title of the bill was "An Act relating to appropriations for health and human services and veterans and

including other related provisions and appropriations, providing penalties, and including effective date and retroactive and other applicability date provisions." *See* 2019 Iowa Acts ch. 85.

The subject of the bill is accurately reflected in the title. It provides funding and enacts other related provisions for health, human services, and veterans. More colloquially, it could be characterized as Iowa's health and welfare system. This is a broad subject—and a big bill, covering 56 pages of the Iowa Acts—but it is a single subject.

The challenged amendment easily fits within this subject and is not "discordant" or without "any legitimate connection" to the rest of the bill. *Long*, 142 N.W. 2d at 381. Medicaid-related provisions made up much of the bill, as one would expect since Medicaid involves both health and human services. *See, e.g.*, 2019 Iowa Acts ch. 85, §§ 3(2)(c), 12, 13, 24(3), 31, 42, 43, 44, 63, 64, 92, 95, 103, 104, 108. It appropriates $1.4 billion dollars for Medicaid. *See id.* § 13. And the challenged amendment similarly relates to Medicaid—it superseded an Iowa Supreme Court decision interpreting the Iowa Civil Rights Act to require payment of certain Medicaid expenses by providing that the Act does not impose such a requirement.

And because this was a "related provision" to health and human services, it is accurately described in the title as well. Particularly for a lengthy, detailed bill such as this, a full index of every provision is not constitutionally required in a title. *See Utilicorp United*, 570 N.W.2d at 455. The title requirement, liked the single-subject requirement must be given a "liberal construction" and must be upheld unless

"matter utterly incongruous to the general subject of the statute is buried in the act." *Id.* And as Vasquez implicitly acknowledges with his citation to the legislative debates (Vasquez Br. at 49-50), this provision was not buried in the bill. It was known and vigorously opposed by a minority of legislators in each chamber. Vasquez distracts from this proper analysis by challenging the legislative process leading to the enactment of the Act. (Vasquez Br. at 51-54). But these issues are irrelevant to the required constitutional analysis of whether the Act embraces one subject. The single-subject clause does not prohibit bills from being amended to broaden or even change their subject during the legislative process. Neither does it require subcommittee or committee review of bills or amendments or mandate delays of weeks or months from the introduction of a bill until its passage. It does not guarantee the right to offer additional amendments on bills bouncing between chambers. It does not mandate public hearings. And it does not prevent the Legislature from working around the clock and into the morning hours as it completes the legislative session. These are matters governed by the internal rules and practices of the House and Senate—not Article III, section 29 of the Iowa Constitution.

Vasquez puts particular weight on the fact that the challenged Amendment was added in an amendment on the House floor that was ruled nongermane under House Rule 38. (Vasquez Br. at 51). That rule requires that "[a]n amendment must be germane to the subject matter of the bill it seeks to amend" and that "[a]n amendment to an amendment must be germane both to the amendment and the bill it seeks to amend." 88th Gen. Assemb. House Rule 38, https://www.

legis.iowa.gov/docs/publications/HR/1037437.pdf. And it reflects the House's internal procedure that the scope of a bill should ordinarily not be changed on the House floor, without the support of a constitutional majority to suspend that ordinary rule. See 88th Gen. Assemb. House Rule 69A(1)(d) (requiring a constitutional majority for approval of a motion to suspend house rules).

But it does not follow that just because an amendment exceeds the scope of the underlying bill that the amended bill does not have a new broader single subject. Take the county officer compensation statute held to be constitutional in *Long* even though it contained a seemingly unrelated provision mandating courthouses remain open on Saturdays. 142 N.W. 2d at 380. If it had initially been introduced as a bill only regarding courthouse hours, an amendment to add the remaining provisions about the compensation and other duties of county officers would have certainly been nongermane on the House floor. Yet if that amendment were passed after suspending the germaneness rule, the new bill would have a different, broader subject. And if this broader bill were then enacted—identical in substance to the statute upheld in *Long*—surely the result would be the same as in that case.

Nothing in the text of the Constitution or prior cases suggests that the subject of an Act should be analyzed differently depending on whether it was introduced with a broad subject or broadened by amendments in committee or—as occurred with the Act here—on the House floor.[4]

[4] Some state constitutions *do* contain provisions prohibiting a change in the original purpose of bills. *See, e.g.*, Mich. Const. art. IV, § 24 ("No bill shall be altered or amended on its passage through either house so as to change its original purpose as

Vasquez and others who opposed passage of the Act are understandably disappointed that majorities of the House and Senate succeeded in passing it. And those who believe that the process used to do so lacked sufficient fairness or transparency are free to make that political case to legislators and the voters who elect them. But if the Court reaches the merits of the constitutional issue in this lawsuit, the question is whether the Act that was enacted by the Legislature and Governor "embraces but one subject, and matters properly connected therewith; which subject shall be expressed in the title." Iowa Const. art. III, § 29. Because the Act complies with this requirement, Vasquez's single-subject and title claims fails as a matter of law or the merits as well.

III. Vasquez's negative-impact-on-private-rights challenge under section 17A.19(10)(*k*) is subsumed into his other challenges.

Vasquez acknowledges that his "disproportionality claim" under Iowa Code section 17A.19(10)(*k*) arises from his other claims. (Vasquez Br. at 61.) He identifies the Iowa Constitution and Iowa Civil Rights Act (Vasquez Br. at 61), and asserts the Department's decision negatively impacts his rights under those authorities—but his other challenges already address those issues, and Vasquez does not identify any other private rights that he contends have been negatively impacted. In other words, his only asserted basis on which to find a violation of section 17A.19(10)(*k*) relies completely on first finding a violation of some other subsection of section 17A.19(10).

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determined by its total content and not alone by its title."). The Iowa Constitution does not.

Under the circumstances, that means Vasquez's claim under subsection (10)(*k*) is subsumed into his other challenges. *See Midwest Auto. III, LLC v. Iowa Dep't of Transp.*, 646 N.W.2d 417, 422 (Iowa 2002) (condensing "multi-faceted" arguments raised by a judicial review petitioner "into three general categories"). His contentions under subsection (10)(*k*) "duplicate arguments made with respect to" other challenges, and should therefore be folded into those other challenges. *Id.*

IV. Denying coverage was not arbitrary or capricious.

Like his challenge under subsection (10)(*k*), Vasquez's challenge under subsection (10)(*n*) should be folded into his other challenges, for similar reasons. To the extent he argues the Department's decision was arbitrary and capricious *because* it was also unconstitutional or violated the Iowa Civil Rights Act, his contentions are subsumed within those underlying challenges. *Cf. Midwest Auto.*, 646 N.W.2d at 422 (subsuming a challenge under subsection (10)(*n*) within a separate substantial evidence challenge). But even if not subsumed, those arguments lack merit.

"The terms 'arbitrary' and 'capricious,' when applied to test the propriety of agency action[,] are practically synonymous . . . ." *Churchill Truck Lines, Inc. v. Transp. Regulation Bd.*, 274 N.W.2d 295, 299 (Iowa 1979). "An agency's action is 'arbitrary' or 'capricious' when it is taken without regard to the law or facts of the case." *Arora v. Iowa Bd. of Med. Exam'rs*, 564 N.W.2d 4, 7 (Iowa 1997). The Department's decision in this case does not meet that standard because it occurred *with* regard to the law by applying the Department's rule. Whether the rule is constitutionally valid is a separate question, also presented elsewhere in this judicial

review proceeding—but finding the rule unconstitutional was not even within the Department's authority.

Agencies undoubtedly "cannot act unconstitutionally." *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994). But it is also "*exclusively* up to the judiciary to determine the constitutionality of . . . rules enacted by" executive branch agencies. *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 605 (Iowa 2004) (emphasis added); *accord Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 344 (Iowa 2013); *NextEra Energy*, 815 N.W.2d at 44. Vasquez's contention that *not* invalidating the Department's rule was arbitrary and capricious must fail, because the Department had no authority to do that in the first place. Only the judiciary can. Instead, the Department had to apply the rule.

Relatedly, Vasquez's contentions would, if accepted, place the Department in a no-win situation. Had the Department not applied its rule, it could be subject—if a petitioner with proper standing filed a petition—to judicial review proceedings in which the petitioner asserted the Department took action that was "inconsistent with a rule of the agency." Iowa Code § 17A.19(10)(*g*). True, the Department could *waive* its rule, *see id.* § 17A.9A—but only upon a clear and convincing showing of undue hardship, and only if Vasquez asked it to do so. *See id.* § 17A.9A(2)–(3) (setting forth the findings an agency must make to waive a rule, and providing the "burden of persuasion rests with the person who petitions" for waiver); *AT&T Commc'ns of the Midwest, Inc. v. Iowa Utils. Bd.*, 687 N.W.2d 554, 559–60 (Iowa 2004) (per curiam) (concluding an agency cannot sua sponte waive rules); Iowa Admin. Code r. 441—1.8

(establishing the procedure for requesting exceptions to Department rules). Vasquez did not ask the Department to waive its rule based on undue hardship; he only sought to *invalidate* the rule. His contention now—that the Department should have ignored its rule even though he didn't ask for a waiver under an established process that might accomplish exactly what he wants, without requiring much (if any) constitutional analysis—places fault on the Department no matter what. But administrative law is not and should not be "a 'heads I win, tails you lose' situation." *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 119 (Iowa 2011).

Finally, not *repealing* the relevant rule sua sponte was not arbitrary and capricious either. Vasquez's comparison to *Exceptional Persons, Inc. v. Iowa Dep't of Human Services*, 878 N.W.2d 247 (Iowa 2016) is unavailing because first, there was no superseding statute here as there was in *Exceptional Persons*; and second, even if the addition of gender identity to the Iowa Civil Rights Act would otherwise qualify, the legislature subsequently passed additional legislation making the rule consistent with the statute. Additionally, Vasquez (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 fact that the Department did not do so sua sponte was not unreasonable, arbitrary, or capricious and does not independently entitle Vasquez to relief.

IV. If the Court reverses the Department's decision, it must still deny Vasquez's request for attorney fees because the Department's action was primarily adjudicative and arose from a proceeding in which the role of the state was to determine Vasquez's entitlement to a monetary benefit or its equivalent.

Iowa Code section 625.29 allows a prevailing party in an action for judicial review to collect attorney fees unless the prevailing party is the State or any one of a list of exceptions applies. Iowa Code § 625.29(1)(*a*)–(*h*). In this case, Vasquez is not entitled to a fee award even if he does prevail because the exceptions in section 625.29(*b*) and (*d*) apply. Section 625.29(*d*) excepts actions that arise "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." The Iowa Court of Appeals determined that a request for Medicaid preauthorization for services to treat gender dysphoria fell within this exception in *Good v. Iowa Dep't of Hum. Servs*, 2019 WL 5424960 (Iowa Ct. App. Oct. 23, 2019). Vasquez's identical claim falls within the exception as well.

Vasquez also cannot recover attorney fees even if he prevails because the role of the Department was "primarily adjudicative." *See* Iowa Code § 625.29(b). The Iowa Supreme Court has held that where an agency decision preserves constitutional claims over which it has no authority for judicial review and denies relief, its role is primarily adjudicative and the exception applies. *See Endress v. Iowa Dep't of Hum. Servs.*, 944 N.W.2d 71, 83 (Iowa 2020); *Pfaltzgraff v. Iowa Dep't of Hum. Servs.*, 944 N.W.2d 112 (Iowa 2020). 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.

Vasquez's request for attorney fees runs squarely into these precedents and must be dismissed.[5]

V. If the Court reversed the Department's decision, it should just reverse the decision and remand for reconsideration by the Department and deny all Vasquez's other requested declaratory and injunctive relief.

"Judicial review proceedings are fundamentally different from original actions commenced in the district court." *Black*, 362 N.W.2d at 462. One fundamental difference is that judicial review proceedings "provide only those types of relief to the successful petitioner which chapter 17A specifically prescribes." *Id.*; *see also Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 238 (Iowa 1981) (recognizing the "severely limited extent of relief available on judicial review"). Chapter 17A does not specifically prescribe injunctive relief as an available remedy. It authorizes "other appropriate relief," including equitable relief, *see* Iowa Code § 17A.19(10), but that catchall does not apply in all circumstances and does not include injunctions in any circumstance.

Equitable relief on judicial review could include a stay (not an injunction) of specific, affirmative agency action. *See id.* § 17A.19(5)(*c*). That could include staying

[5] Vasquez does not cite any specific statute entitling him to attorney fees. Respondent recognizes that the Iowa Civil Rights Act also permits the district court to award attorney fees to a successful complainant. *See* Iowa Code § 216.15(9)(*a*)(8). But because Vasquez did not bring his challenge pursuant to the Iowa Civil Rights Act procedures outlined in section 216.16, the fee-shifting provision in the Act does not apply to this action. *See Good*, 2019 WL 5424960, at *3.

an order or decision that must be or will be implemented; or it could include staying an agency determination to suspend or revoke a license, so that the license continues while judicial review is pending. *See, e.g.*, *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1, 4 n.3 (Iowa 2020) (per curiam) (assuming without deciding that judicial review petitioners could seek a stay that delayed implementation of an emergency directive issued by the secretary of state); *Pro Farmer Grain, Inc. v. Iowa Dep't of Agric. & Land Stewardship*, 427 N.W.2d 466, 467 (Iowa 1988) (noting a district court granted a stay on judicial review of an agency order calling "for the revocation of petitioner's license"); *R & V, Ltd. v. Iowa Dep't of Commerce*, 470 N.W.2d 59, 60 (Iowa Ct. App. 1991) (noting a district court stayed an agency order that suspended an establishment's liquor license for 45 days). But here, the Department did not take affirmative action *against* Vasquez that might justify a stay of that action; it merely declined to grant a request he made to it. *See* Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1295 (1975) (discussing the "distinction between cases in which government is seeking to take action against the citizen [and] those in which it is simply denying a citizen's request"). Under those circumstances, there is nothing to "stay," and nothing to "enjoin."

Indeed, Vasquez's petition contains few specifics about what he wants enjoined. He simply pleads that he must receive "permanent injunctive relief." (Petition ¶ 249.) But relief that enjoins what? The petition goes on to suggest the injunction sought is an injunction categorically prohibiting application of Iowa Administrative Code rule 441—78.1(4). (Petition ¶ 252 & Request for Relief ¶ (b).)

But that request must fail, because the petition's legal conclusion that there is no adequate remedy at law (Petition ¶ 252) is patently incorrect. Vasquez has brought a petition for judicial review that, if successful, would entitle him to exactly what he seeks—Medicaid coverage for surgical treatment of gender dysphoria. Thus, there is no need for any injunction, nor is it even available, because *judicial review itself* is an adequate remedy.

And to the extent Vasquez seeks a broader injunction against the rule that would apply universally, that is beyond the scope of judicial review of this *specific* agency action. The Department denied Vasquez's specific request for coverage; it did not, for example, issue a broad declaratory order that said the Department will always apply, and never waive, that rule. *See* Iowa Code §§ 17A.9 (declaratory orders), 17A.9A (waivers); Iowa Admin. Code r. 441—1.8 (authorizing exceptions to Department rules and establishing the procedure for making such a request).

Most importantly, however, Iowa law expressly forecloses injunctive relief in judicial review proceedings. Judicial review—even with its attendant limits—is a petitioner's *exclusive* remedy. *See* Iowa Code § 17A.19. Chapter 17A "provided one form of judicial review and made it an appellate process." *Salsbury Labs. v. Iowa Dep't of Envt'l Quality*, 276 N.W.2d 830, 835 (Iowa 1979). Requests for injunctive relief, however, are original actions (not appellate actions) with different "standards of inquiry and review." *Id.* Judicial review simply cannot "be discarded at will in favor of certiorari, declaratory judgment, *or injunction*." *Id.* (emphasis added). "There is no basis on which to conclude the 'exclusive means' language in section 17A.19 is

mitigated by an exception for common-law writs such as . . . injunction." *Id.* Because injunctions are incompatible with judicial review, Vasquez's request for injunctive relief must be dismissed.

To the extent Vasquez seeks freestanding declaratory relief under the Rules of Civil Procedure (Petition ¶ 247), that too is incompatible with judicial review. *See id.* (concluding judicial review cannot "be discarded at will in favor of . . . declaratory judgment"). Any declaratory relief available in this proceeding is limited to those declarations incident to other relief granted under Iowa Code section 17A.19(10).

CONCLUSION

For these reasons, the Department of Human Services respectfully requests that the Court affirm the Department's final decision in this contested case proceeding. In the alternative, if the Court concludes the Department's decision must be reversed on some basis, the Court should limit its relief to an order reversing the Department's decision and remanding to the Department for reconsideration. Vasquez's requests for attorney fees and other declaratory, injunctive, and other relief must be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT
IOWA DEPARTMENT OF
HUMAN SERVICES

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 July 19, 2021:

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

Signature: */s/ Samuel P. Langholz*