IN THE IOWA DISTRICT COURT FOR POLK COUNTY

AIDEN VASQUEZ, an individual, and MIKA COVINGTON, an individual, Petitioners, v. IOWA DEPARTMENT OF HUMAN SERVICES, an independent executive-branch agency of the State of Iowa, Respondent.	Case Nos. CVCV061729 & CVCV062175 (consolidated) **MOTION TO RECONSIDER AUGUST 10, 2021, RULING ON MOTION TO DISMISS**

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COME NOW Petitioners Aiden Vasquez and Mika Covington (together, "Petitioners"), by their counsel, and respectfully move to reconsider the Court's August 10, 2021, ruling that Petitioners were required to file proceedings before the Iowa Civil Rights Commission (the "Commission") in order to pursue their Iowa Civil Rights Act ("ICRA") claims against the Iowa Department of Human Services ("DHS").

INTRODUCTION

On August 10, 2021, after briefing and argument, the Court entered an order granting in part and denying in part DHS's partial motion to dismiss this case. The Court found that, under *Jew v. University of Iowa*, 398 N.W.2d 861 (Iowa 1987), and *Hollinrake v. Monroe County*, 433 N.W.2d 696 (Iowa 1988), Petitioners were required to exhaust administrative remedies before the Commission in order to pursue their ICRA claims against DHS. (*See* 8/10/21 Order at 16.) The Court noted, but not did rule upon, Petitioners' argument that DHS forfeited its argument that Petitioners were required to exhaust their administrative remedies before the Commission. (*See id*. at 14.)

As discussed in further detail below, the Court should reconsider and vacate its administrative-exhaustion ruling. *First*, DHS forfeited its administrative-exhaustion argument by failing to assert it during Petitioners' administrative proceedings. *Second*, in a case such as this one, where a discrimination claim is directed at the substance of an agency regulation, rather than at a discretionary individual decision applying the regulation, review of the regulation is governed by the provisions of the Iowa Administrative Procedure Act ("APA"), not those of ICRA. This conclusion is confirmed by (1) the Iowa Supreme Court's decision in *Chiavetta v. Iowa Board of Nursing*, 595 N.W.2d 799 (Iowa 1999); (2) the absence of administrative exhaustion before the Commission in *Good v. Iowa Department of Human Services*, 924 N.W.2d

853 (Iowa 2019); and (3) DHS's admission in *Good v. Iowa Department of Human Services*, No. 18–1613, 2019 WL 5424960 (Iowa Ct. App. 2019) (unpublished decision), that administrative exhaustion before the Commission is unnecessary.

LEGAL STANDARDS

The Iowa Supreme Court has "long recognized that a district court has the power to correct its own perceived errors, so long as the court has jurisdiction of the case and the parties involved." *Carroll v. Martir*, 610 N.W.2d 850, 857 (Iowa 2000) (internal quotation marks omitted); *see also Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393, 396 (Iowa 1988) (same); *Larson v. Stech*, No. 20–1377, 2021 WL 2135169, at *2 (Iowa Ct. App. May 26, 2021) (same); *Benge v. Pruss*, No. 03–0931, 697 N.W.2d 128, 2005 WL 596991, at *2 n.1 (Iowa Ct. App. Mar. 16, 2005) (same); *State v. Kirschbaum*, 491 N.W.2d 199, 200 (Iowa Ct. App. 1992) (same). Put differently, "[u]ntil the district court has rendered a final order or decree, it has the power to correct any of the rulings, orders or partial summary judgments it has entered." *Carroll*, 610 N.W.2d at 857. This is because "a party has no vested interest in an erroneous ruling." *Id.*

The adoption of Rule 1.904 of the Iowa Rules of Civil Procedure did not alter district courts' inherent authority to reconsider nonfinal orders in any way. *See* Iowa R. Civ. P. 1.904, cmt. ("The rule is . . . not intended to affect prior case law concerning a court's inherent authority to reconsider."). Indeed, as the Iowa Court of Appeals found in *People's Bank v. Driesen*, No. 10–1676, 807 N.W.2d 157, 2011 WL 3925449 (Iowa Ct. App. Sept. 8, 2011), Rule 1.904(2) motions are "not the appropriate vehicle" to attack nonfinal orders, such as the partial summary-judgment ruling at issue in *Driesen* and the partial dismissal ruling at issue here, because, regardless of the rule, a district court has the inherent power to correct those rulings. *See id.* at *12.

ARGUMENT

I. DHS forfeited its administrative-exhaustion argument.

As an initial matter, as set forth in Petitioners' response to DHS's motion to dismiss, DHS forfeited its administrative-exhaustion argument. (*See* Resp. at 10.) DHS did not assert or consider this argument in the proceedings below. (*See* Vasquez Admin. Record 760–64, 925; Covington Admin. Record 582–84, 728.) Therefore, the argument is not properly before this Court. *See Grudle v. Iowa Dep't Revenue & Fin.*, 450 N.W.2d 845, 847–48 (Iowa 1990) (declining to consider issues raised by agency in appeal from decision in petitioner's action for judicial review where the "issues were not litigated before the [agency]"); *Welch v. Iowa Dep't Emp't Servs.*, 421 N.W.2d 150, 152 (Iowa Ct. App. 1988) (declining to consider issue raised by agency in appeal from decision in petitioner's action for judicial review where agency did not raise issue below, because "the validity of agency decisions must rest upon the reasoning as given by the agency and not based upon counsel's post hoc rationalization"). The Court should consider, and rule in Petitioners' favor on, this forfeiture argument.

II. The APA's administrative-exhaustion procedures, not those of ICRA, govern this case.

Additionally, regardless of forfeiture, the APA's administrative-exhaustion procedures, not those of ICRA, govern this case.

First, the Iowa Supreme Court's decision in *Chiavetta v. Iowa Board of Nursing*, 595 N.W.2d 799 (Iowa 1999), confirms that Petitioners were not required to assert their ICRA claims before the Commission. In *Chiavetta*, the Supreme Court applied its previous administrative-exhaustion decisions in *Jew* and *Hollinrake* in holding that the plaintiff was not exclusively restricted to challenging the Iowa Board of Nursing's disciplinary action against him in agency

proceedings before the board, and in a judicial-review action of the agency's decision, but rather had the right to sue the board under ICRA. *Id*. at 801–03.

In doing so, the Supreme Court discussed the same provision of ICRA on which DHS relies here, which states that ICRA "applies to persons claiming to be aggrieved by an unfair or discriminatory practice committed by the state or an agency or political subdivision of the state, *notwithstanding the terms of the Iowa administrative procedure Act*." *Id*. (quoting Iowa Code § 216.16(1)) (emphasis added)). The Supreme Court considered this language in conjunction with the same language from section 17A.19 of the APA referenced in this Court's August 10 order—namely, that "*[e]xcept as expressly provided otherwise by another statute referring to this chapter by name*, the judicial review provisions of this chapter shall be the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action." *Id*. (quoting Iowa Code §17A.19) (emphasis in original). (*See* 8/10/21 Order at 16.) Based on the nature of the plaintiff's claim against the board, the Court concluded that the claim fell within the "exception to [the] administrative framework" of section 17A.19 that the legislature "expressly carved out . . . for actions commenced under Iowa Code section 216.16(1)." *See id*. at 802.

Against this backdrop, the Court maintained the distinction established in *Jew* and *Hollinrake* between "direct attack[s] on [an] agency's statutory authority," such as the ICRA claims at issue this case and *Hollinrake*, and situations "where the challenged agency action . . . bears scant relation to the agency's mandate," such as the claims at issue in *Jew* and *Chiavetta*. *See id*. at 803. In particular, the Court noted that the challenge to agency authority in *Hollinrake* "struck at the very heart of the [agency's] statutory duty." *Id*. The Court concluded that this type of "direct attack on the agency's statutory authority ***must be confined to chapter 17A.***" *Id*.

(emphasis in original). Since, unlike here, "no published agency rule [was] implicated" in *Chiavetta*, and since the suit filed by the plaintiff in *Chiavetta* "f[ell] outside the scope of the nursing board's statutory mandate to license and discipline nurses," the "exception to the exclusivity provision of section 17A.19" of the APA set forth in section 216.16(1) of ICRA allowed the plaintiff to pursue his claims under ICRA. *See id*. at 803.

Chiavetta demonstrates that, although the language from ICRA on which DHS relies allows a plaintiff aggrieved by an agency action to pursue a claim against the agency under ICRA, it does not bar the plaintiff from pursuing that claim in the context of a judicial-review action under section 17A.19 of the APA. The opposite is true. As acknowledged in *Hollinrake* and reaffirmed in *Chiavetta*, where, as here, a claim "is directed at the alleged discriminatory nature" of a rule as a whole, in contrast to being directed at "a discretionary individual . . . decision" that has "little connection with the mandate of the agency," then the claim can—and, in fact, must—be asserted in the context of a section 17A.19 action. *See Hollinrake*, 433 N.W.2d at 699; *see also Chiavetta*, 595 N.W.2d at 802–03 (noting that such a claim "must be confined to chapter 17A").

If it were otherwise, then a party aggrieved by agency misconduct that violated ICRA would have to pursue two parallel, and potentially inconsistent, tracks of administrative exhaustion—one before the Commission and one before the agency whose rule is at issue—in order to receive complete relief. This interpretation increases, rather than minimizes, the potential for inefficiency and confusion, a result that must be avoided. *See State v. Adams*, 810 N.W.2d 365, 369 (Iowa 2012) (courts "will not construe the language of a statute to produce an absurd or impractical result"); *In re Detention of Bosworth*, 711 N.W.2d 280, 283 (Iowa 2006) (same).

Second, the absence of administrative exhaustion before the Commission in *Good* confirms that Petitioners were not required to assert their ICRA claims before the Commission. In that case, both plaintiffs asserted ICRA claims before DHS, and both plaintiffs were allowed to proceed with their claims. *See Good*, 924 N.W.2d at 858–59 (discussing administrative proceedings before DHS); *Good v. Iowa Dep't of Human Servs.*, No. CVCV054956, at *8–10 (same). The same should be true here.

Contrary to DHS's contention, the fact that DHS did not argue administrative exhaustion in *Good* is immaterial. (*See* Br. in Supp. Mot. to Dismiss at 10 n.1.) Administrative exhaustion is jurisdictional. *See Simpson v. Iowa Dep't Job Serv.*, 327 N.W.2d 775, 777 (Iowa 1982); *Graves v. Iowa Lakes Cmty. Coll.*, 639 N.W.2d 22, 26 & n.1 (Iowa 2002), *overruled on other grounds by Kiesau v. Bantz*, 686 N.W.2d 164, 171 (Iowa 2004). As a result, objections to administrative exhaustion cannot be waived just because they are not asserted. *See Simpson*, 327 N.W.2d at 777 (stating, in the context of addressing administrative-exhaustion argument sua sponte, that "jurisdiction of the subject matter . . . may be raised at any time and is not waived even by consent"); *Graves*, 639 N.W.2d at 26 & n.1 (stating, in context of addressing administrative-exhaustion argument asserted in cross-appeal, that subject-matter jurisdiction "cannot be waived by consent or estoppel").

Third, DHS's admission in the *Good* fee litigation that administrative exhaustion was unnecessary confirms that Petitioners were not required to assert their ICRA claims before the Commission. The *Good* fee litigation culminated in the entry of a judgment by the Court of Appeals affirming the denial of the plaintiffs' application for attorney's fees. *Good*, 2019 WL 5424960, at *5. During the course of the briefing resulting in that judgment, DHS conceded that section 17A.19 of the APA is the appropriate pathway for challenging the validity of an agency

rule that violates ICRA. Specifically, in arguing that the plaintiffs were not eligible for attorney's fees under ICRA, DHS stated as follows:

> Petitioners did not plead a claim under the ICRA. Rather, they merely pled an IAPA claim of a violation of the ICRA, ***as they were required to do pursuant to this Court's prior rulings***. *Hollinrake v. Monroe Cnty.*, 433 N.W.2d 696, 699–700 (Iowa 1988) (finding the IAPA to be the "exclusive means for challenging" agency rules as violative of the ICRA); *Chiavetta v. Iowa Bd. of Nursing*, 595 N.W.2d 799, 803 (Iowa 1999) (characterizing *Hollinrake* as "requiring" ICRA challenges to agency rules to be "confined to chapter 17A").

(*See* Ex. 1, 3/25/19 Appellee's Final Brief, *Good v. Iowa Dep't of Human Servs.*, No. 18–1613, at 15–16 (emphasis added).)

DHS thus conceded that the plaintiffs in *Good* were "required" to proceed with their ICRA claims in the context of an action for juridical review under the APA rather than by independently asserting those claims before the Commission. (*See id.*) DHS cannot reverse the position it asserted *Good* to escape a conclusion it wishes to avoid in this case. *See Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 573 (Iowa 2006) (stating that the doctrine of judicial estoppel, which "is intended to protect the integrity of the fact-finding process," and "may properly be raised by courts . . . on their own motion. . . .[,] prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding").

CONCLUSION

For these reasons, Petitioners respectfully requests the entry of an order (1) reconsidering the Court's August 10, 2021, ruling that Petitioners were required to file proceedings before the Commission in order to pursue their ICRA claims against DHS and (2) finding that DHS's denials of Petitioners' requests for Medicaid reimbursement for their gender-affirming surgery violated ICRA.

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Respectfully submitted,

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