IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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<tr><td>MIKA COVINGTON, AIDEN DELATHOWER, and ONE IOWA, INC.,

Petitioners,

v.

KIM REYNOLDS ex rel. STATE OF IOWA and IOWA DEPARTMENT OF HUMAN SERVICES,

Respondents.</td><td>Equity Case No. EQCE084567

PETITIONERS' REPLY TO RESPONDENTS' RESISTANCE TO MOTION FOR INJUNCTIVE RELIEF</td></tr>
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COME NOW Petitioners, and in Reply to Respondents' Resistance to their Motion for a Temporary Injunction, state as follows:

I. Introduction

Nothing the State has argued in their Resistance refutes Petitioners' entitlement to a temporary injunction. The State's procedural arguments misconstrue this case as a challenge to an administrative regulation, when it is in fact a facial challenge to a discriminatory statute, while also seeking to ignore the imminent injury to Petitioners absent a temporary injunction. The State's substantive arguments against Petitioners' equal protection claims misstate the constitutional analysis regarding facial challenges and challenges based on animus, and have already been rejected by this District Court in *Good*. *EerieAnna Good and Carol Beal v. Iowa Dep't of Human Servs.* [hereinafter "*Good* District Court Case"], Case No. CVCV054956 and CVCV055470 (consolidated), Ruling on Pets. for Judicial Review, at *33 (Iowa Dist. Ct. June 6, 2018), *available at*

https://www.aclu-ia.org/sites/default/files/6-7-18_transgender_medicaid_decision.pdf.

Their arguments regarding Petitioners' Single-Subject and Title Rule claims are belied by the language of the Division itself and the annual appropriations bill in which it is found, as well

as legislative acknowledgments of non-germaneness. Finally, their arguments that Petitioners' inalienable rights are not violated by the Division relies on a false distinction between positive and negative rights that has no application to Petitioners' case. For these reasons, as set forth below, and in Petitioners' main brief, this Court should grant the temporary injunction.

II. Argument

A. Petitioners Do Not Have an Adequate Remedy at Law.

The State argues that because Petitioners have not sought various administrative remedies under the Iowa Administrative Procedures Act, they are barred from seeking invalidation of the Division, a State statute that violates their constitutional rights under Iowa's Equal Protection guarantees, Single-Subject and Title Rules, and Inalienable Rights Clause. Specifically, the State takes the position that to challenge the Division, Petitioners must pursue one or more of three separate administrative procedures: an appeal of an individual coverage denial, a petition to challenge the discriminatory and unconstitutional Regulation, or an exception to the state's policy of denying medically necessary gender affirming surgery. (Resistance at 2-4). These arguments fail because Petitioners are challenging an unconstitutional statute in this action, not an administrative decision or rule.

Respondents adopt a fundamental misunderstanding of the nature of Petitioners' claims. Respondents detail the appeal process taken in the *Good* case, and argue that Petitioners should be required to follow the same process and bring an identical challenge to the Regulation once again, despite the Iowa Supreme Court's and this District Court's determination that it is discriminatory. (Id.) Challenges to Regulations or coverage decisions would be subject to an internal administrative appeals and judicial review under Iowa Code § 17A.19 (10), *Good v. Iowa Dep't of Human Servs.,* 924 N.W.2d 853, 862-863 (Iowa 2019), but the present case does not present either

form of challenge. This case, in contrast, is a facial challenge to the Division and its effect in reinstating the discriminatory Regulation that was struck down in *Good*. It would be nonsensical for Petitioners to file a new administrative challenge to the Regulation itself, or to a denial of coverage pursuant to the Regulation, given that the Iowa Supreme Court has already decided that case and struck down the Regulation. Rather, this case addresses, among Petitioners' other claims, the specific facially discriminatory language of the Division that restores the discriminatory Regulation by exempting Petitioners and other transgender persons in need of Medicaid coverage for surgical treatment of gender dysphoria from the non-discrimination protections available under the Iowa Civil Rights Act ("ICRA") solely because they are transgender. Exhaustion of one or more of the administrative proceedings proposed by the State is not required and would in any event be a futile exercise, since administrative review cannot invalidate a statute, such as the Division.

The Iowa Supreme Court has already determined that the Regulation violated the ICRA prohibition against discrimination on the basis of gender identity in public accommodations. *Id.* This District Court also determined that the Regulation violated Iowa's Equal Protection guarantee, *Good* District Court Case, at *33, a holding which the Iowa Supreme Court did not reach, but also did not disturb. The present case however challenges the Division, and the discrimination it causes by expressly bringing back to life the discriminatory Regulation struck down by the Supreme Court's decision in *Good*.

As they must, Respondents concede the discriminatory effect of the Division in reinstating the discriminatory Regulation invalidated by the Iowa Supreme Court under the Iowa Civil Rights Act in *Good*. (Resistance at 4) ("Should the Petitioners disagree with the administrative rule currently in effect. . ."); (Pet. Br. at 12, 35) (quoting, among others, Governor Reynolds and bill

Sponsor Senator Costello plainly stating that the Division was being enacted reinstate the State's policy of denying coverage for gender affirming surgery). As a result of the Division, the State will deny medically necessary gender affirming surgery to Iowans on Medicaid, including Petitioners, who have a medical need for that care, simply because they are transgender.

Petitioners are entitled to an injunction because they have no adequate legal remedy for the Division's violation of their constitutional rights. The Division facially discriminates against transgender persons by exempting them from ICRA protections against discrimination on the basis of gender identity in public accommodations thereby reinstating the Regulation that denies them coverage for their necessary medical care and causes them significant distress, pain and discomfort, risks of self-harm, and suicidality, solely because they are transgender. (*See* Ex. 6: Covington Aff.; Ex. 1: DeLathower Aff.; *See* Ex. 6: Covington Aff. ¶ 32; Ex. 1: Vasquez Aff. ¶ 26; Ex. 2: Nisley/ Vasquez Aff.; Ex. 3: Daniels/Vasquez Letter; Ex. 4: Eadeh/Vasquez Letter; Ex. 5: Waters/Vasquez Letter; Ex. 7 Nisley/ Covington Aff.; Ex. 8: Eadeh/Covington Letter; Ex. 9: Waters/Covington Letter; Ex. 10: Ettner Aff. ¶ 15). Monetary damages are insufficient remedies to protect against these serious medical risks and harm. *See Ney*, 891 N.W.2d at 452 (there is no adequate legal remedy "if the character of the injury is such that it cannot be adequately compensated by damages at law") (internal quotation marks omitted).

Administrative remedies, including those suggested by the State in their Resistance, are incapable of invalidating the Division, a statute—under any of Petitioner's state constitutional claims: violations of equal protection, the Single-Subject and Title Rules, and the inalienable rights clause, because administrative remedies available through the Iowa Administrative Procedures Act are limited to challenging agency action, not statutes. *See Petit v. Iowa Dep't of Corrections*, 891 N.W.2d 189, 194 ("Iowa Code chapter 17A recognizes three distinct categories of agency action:

rulemaking, adjudication or contested case, and other agency action.") (citing *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 833 (Iowa 2002)).

The Division causes transgender Iowans who rely on Medicaid for their medical coverage, including Petitioners Covington and DeLathower, grievous injuries that cannot later be compensated by damages. Because this statute may not be challenged through administrative remedies, those remedies do not constitute viable remedies at law, and Petitioners' motion for a temporary injunction should be granted.

B. Petitioners' Claims Are Ripe.

The State asserts that Petitioners must seek and be denied pre-authorization for their surgeries before their claims against the Division are ripe. (Resistance at 5-6). This argument fails under the Court's two-prong ripeness inquiry both because Petitioners' claims require no further factual development and because withholding adjudication would cause them significant harm.

The Supreme Court employs a two-part test for assessing ripeness, whereby the Court balances "a twofold aspect, requiring us to evaluate both [1] the fitness of the issue for judicial decision and [2] the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967) (abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). The Supreme Court applied that test in three companion cases. In *Abbott* and *Garnder v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 170 (1967), which challenged a regulation on statutory interpretation grounds, the Court found that the challenge to the administrative regulations at issue were ripe, reasoning that the claims made were purely legal requiring no further factual development, *Id.* By contrast in a third case, *Toilet Goods Ass'n, Inc. v. Garnder*, 387 U.S. 158, 161 (1967), the Court found that the challenge was unripe, because it required factual development to show "what types of enforcement problems are encountered by

the [agency], the need for various sorts of supervision . . . and the safeguards devised to protect legitimate trade secrets." *Id.*

Thus, in applying the twofold inquiry into ripeness, the degree of factual development required to determine whether the injuries claimed by the plaintiffs are speculative or not is often determinative. *Id.; compare Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 812 (2003) (finding further factual development was required before claim was ripe) *with Caraco Pharmaceutical Laboratories, Ltd. v. Forest Laboratories, Inc.*, 527 F.3d 1278, 1295 (Fed. Cir. 2008) (ripeness inquiry satisfied both because further factual development not needed to decide claims and withholding adjudication would forestall relief from claimed injury).

In accord with this rule, facial challenges which present a purely legal argument are presumptively ripe for judicial review because "that type of argument does not rely on a developed factual record." *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1380–81 (11th Cir. 2019) (finding challenge under federal and state preemption needed no further factual development and so was ripe) (citing *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009)). Even as-applied challenges requiring no further factual development are ripe for review, so long as standing is met. *Id.* (finding as applied speech, equal protection, and contract clause violation required no more factual development to be ripe for review, because it was undisputed that the plaintiff was subject to the challenged ordinance.) *See also Doe v. State*, 688 N.W.2d 265, 269 (Iowa 2004) (rejecting State's argument that prisoner lacked ripeness to challenge DOC screening procedure because he had not yet been denied release based on that procedure, explaining "… Doe does not claim a *present* deprivation of release. Rather, he claims that the effect of the DOC rule is to remove him from the class of inmates who may be *considered* for early release."); *see also Bassett*, 951 F. Supp. 939, 951, 952-53 (E.D. Mich. 2013) (finding that even

though some of the plaintiffs had not yet had their fringe benefits provided through their same-sex partner's employment terminated as a result of the Michigan law barring benefits for domestic partners, such termination was certain, and noting the purpose of the challenged law was to terminate their benefits.)

Here, no further factual inquiry is required to determine likelihood of success on Petitioners' equal protection, Single-Subject and Title Rule, or inalienable rights clause claims. The State concedes that the Division makes such requests futile acts, since it allows the State to once again rely on the Regulation to deny coverage for gender affirming surgery to Medicaid recipients solely because they are transgender, as it denied coverage to the Petitioners in *Good* for the very same reasons. (Resistance at 4). It is certain, not speculative, that the State will deny Petitioners coverage for their medically necessary gender affirming surgeries. Petitioner Vazquez has *already* experienced an interruption in his care as a result of the Division, (Ex: 1: Vazquez Aff. ¶ 18-27) (explaining that he cannot afford to travel to Dr. Gast's office in Madison, Wisconsin for his pre-surgical evaluation to seek pre-authorization, knowing that such a trip would be futile given the Division). He asks the Court to temporarily enjoin the Division so that he can obtain the care he needs. Petitioner Covington's deprivation of care is also imminent absent a temporary injunction. Her next medical appointment, at which time she is due to schedule her surgery and seek preauthorization, is July 30. (Ex. 6: Covington Aff. ¶ 21-31). The State cannot plausibly claim that it will not in fact rely on the Division's reinstatement of Regulation to deny Petitioners preauthorization for coverage, (Resistance at 4), despite the medical necessity of the care; rather its suggestion that Petitioner must go through a futile and repetitive administrative hearing process must be seen for what it is—nothing more than a cynical effort to further delay Petitioners from obtaining the medical care they so desperately need.

The second prong of the ripeness inquiry also supports this Court's adjudication of Petitioners' claims, because absent a temporary injunction by this Court, the Petitioners will suffer irreparable harm. Numerous courts have held that the emotional distress, anxiety, depression and physical pain resulting from inadequate medical treatment for gender dysphoria amount to irreparable harm. *See* Pet. Br. at 43, citing *Hicklin v. Precynthe*, 2018 WL 806764, at *10, *14 (E.D. Missouri Feb. 9, 2018); *Edmo v. Idaho Dep't of Corrections*, 358 F.Supp.3d 1103, at 1128 (D. Idaho Dec. 13, 2018); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931 (W.D. Wis. 2018).

The State attempts to minimize this ongoing and imminent harm to Petitioners absent a temporary injunction by this Court, arguing that Petitioners "have lived for years as transgender without gender affirming surgery." (Resistance at 6). To the contrary, as Petitioners' affidavits and the affidavits of their medical providers make clear, in the absence of gender affirming care, the Petitioners have experienced clinically significant distress, pain and discomfort, depression, anxiety, self-harm, and suicidality. (*See* Ex. 6: Covington Aff. ¶ 32; Ex. 1: Vasquez Aff. ¶ 26; Ex. 2: Nisley/Vasquez Aff.; Ex. 3: Daniels/Vasquez Letter; Ex. 4: Eadeh/Vasquez Letter; Ex. 5: Waters/Vasquez Letter; Ex. 7 Nisley/Covington Aff.; Ex. 8: Eadeh/Covington Letter; Ex. 9: Waters/Covington Letter; Ex. 10: Ettner Aff. ¶ 15.). These extreme medical conditions put the Petitioners at ongoing imminent risk, for which there is a medically effective surgical treatment about which there is broad medical consensus, and which Petitioners' medical providers have determined are medically necessary for them specifically. (Id.) Both Petitioners' affidavits explain that as soon as the Iowa Supreme Court decided the *Good* case striking down the discriminatory Regulation that barred them from receiving medically necessary gender affirming care, and allowing them for the first time to go about the steps required to evaluate them for gender affirming

surgical care by seeking multiple psychological evaluations, surgical pre-operative evaluation, and referral by their treating physician, Dr. Nisly, they did so. (Ex. 6: Covington Aff ¶ 20; Ex. 1: Vazquz 18-19.)

Finally, the State's contention that "should the court weigh in on the medical coverage decision before the [pre-authorization] requests are made, the court risks pre-empting the administrative process as a whole," (Resistance at 6), is also completely without merit. If this Court temporarily invalidates the Division, transgender Iowans on Medicaid, like Petitioners Covington and Vazquez, will be subject to the same requirements of medical necessity and eligibility as all other Iowans on Medicaid. They are still required to seek pre-authorization, and they can still, at that point, be denied on the basis of any nondiscriminatory reason. So, for example, while they could not be denied coverage because their surgery has been prescribed to treat their gender dysphoria, they could be denied because they become ineligible for Medicaid based on income requirements, or if it were determined that their procedures were not medically necessary in their specific cases to treat their gender dysphoria.[1] Rather, invalidating the Division only requires that Iowa Medicaid, including private MCOs contracting with the state to administer the Medicaid program, comply with nondiscrimination requirements in the state constitution and the ICRA as they do so.

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[1] These types of "anything-can-happen scenarios" are also insufficient to defeat ripeness. *See Thomas More Law Center*, 651 F.3d 529, 537 (6th Cir. 2011) (rejecting Defendant's argument that challenge to Affordable Care Act was not ripe because plaintiffs might die or their incomes might fall) (overturned on other grounds by *National Fed. Of Independent Business et al. v. Sebelius*, 567 U.S. 519 (2012)); *Bassett*, 951 F. Supp. at 952-53 (rejecting challenge to ripeness based on possibility that same sex couples could separate, or that one employee could lose their job before their domestic partner loses benefits, because those speculative possibilities did not undermine causal relationship between defendant's conduct and harm alleged).

Petitioners have experienced significant ongoing and imminent injury as a result of the unconstitutional Division. Their claims are ripe because no further factual development is needed to adjudicate their constitutional claims, and absent adjudication, the injuries they will suffer are certain and not speculative.

C. Petitioners have established a likelihood of success on their claim that the Division violates Iowa's Equal Protection guarantee.

As Petitioners have explained (*see* Pet. Br. at 18–36), the Division violates the Iowa Constitution's equal-protection clause on two separate grounds. *First*, the Division facially discriminates against transgender Iowans based on their gender identity. (*Id*. at 18–33.) Transgender and nontransgender Iowa Medicaid recipients are similarly situated for equal-protection purposes in that both groups share a financial need for medically necessary treatment. (*Id*. at 18–20.) But the Division discriminates against transgender Medicaid recipients, such as Petitioners, by authorizing the denial of Medicaid coverage for medically necessary gender-affirming surgery simply because the recipients of such coverage are transgender. (*Id*. at 20–21.) This facially discriminatory classification is unconstitutional under either heightened scrutiny or rational-basis review. (*Id*. at 21–30.) Under heightened scrutiny, there is no compelling governmental interest or important governmental objective advanced by excluding transgender individuals from Medicaid reimbursement for medically necessary procedures. (*Id*. at 29–30.) And under rational-basis review, there is no plausible policy reason advanced by, or rationally related to, this type of exclusion. Surgical treatment for gender dysphoria, a serious medical condition, is necessary and effective; Medicaid coverage is crucial to ensuring the availability of that necessary treatment for Medicaid eligible Iowans. (*Id*. at 30–33.)

These issues were litigated before this Court, and decided in favor of the petitioners in the *Good* case in the context of the *Good* petitioners' challenge to the constitutionality of Iowa Admin.

R. 441–78 (the "Regulation"). *See Good* District Court Case, at *33 (finding that the Regulation violated the Iowa Constitution's equal-protection clause). They should be decided in Petitioners' favor here as well, given that, among other things, the Division enables the Department of Human Services ("DHS") to enforce the unconstitutional Regulation at issue in *Good*, which remains in effect.

Second, the Division was motivated by animus toward transgender people. (*Id*. at 33–36.) A law is irrational, and violates equal protection, if its purpose is to target a disadvantaged group. (*Id*. at 33.) The Division's sole purpose is to take away publicly funded Medicaid coverage for transgender Iowans, as evidenced by the plain text of the law, the procedural history surrounding its enactment, and the legislative debates that led to its adoption. (*Id*. at 33–36.) Before the Division was enacted, the ICRA, as interpreted by the *Good* decision, afforded transgender people protection against discrimination in public accommodations under the ICRA. (*Id*.) *See Good*, 924 N.W.2d at 862–63 (finding that the Regulation violates the ICRA). The Division creates an express exception to this protection, thereby violating the Iowa Constitution's equal-protection clause. (*Id*.)

In response, the State argues that the Division does not violate equal protection because (1) the legislature has the authority to define the scope of the civil-rights legislation it enacts (Resistance at 9–10); (2) the Division does not treat similarly situated individuals differently (*id*. at 10–13); and (3) in enacting the Division, the legislature was motivated not by an animus toward transgender people, but by a desire to balance access to Medicaid funds, a limited government resource (*id*. at 13–17). These arguments have no merit.

1. The Division violates equal protection because it facially discriminates on the basis of transgender status.

The district court in the *Good* case correctly concluded that denying transgender Iowans Medicaid coverage for medically necessary gender-affirming surgery, while, as a general matter,

providing coverage to all Medicaid beneficiaries for their medically necessary care, facially violates the Iowa Constitution's equal-protection guarantee. *Good* District Court Case, at *20–34. The Division facially discriminates against transgender Iowans in the exact same manner as the Regulation at issue in *Good* by enabling the State to enforce the discriminatory Regulation that was struck down under the ICRA in *Good*. This Court's prior invalidation of the Regulation on equal-protection grounds is controlling law in this challenge to the Division on the same constitutional grounds. The Court should abide by its prior ruling in *Good* and enjoin the State's enforcement of the Division.

i. The legislature's discretion to amend the ICRA does not preserve the Division from Petitioners' equal-protection challenge.

As an initial matter, contrary to the State's position (*see* State's Resp. at 9–10), the legislature does not have boundless discretion to amend the ICRA when it does so with the purpose and effect of harming a discrete group of Iowans. "[T]he Iowa Constitution of 1857 tended to limit the power of the legislature while it protected the independence of the court [system]." *Godfrey v. State*, 898 N.W.2d 844, 865 (2017). These limitations included the Bill of Rights, which "the framers of the Iowa Constitution put . . . in the very first article." *Id*. at 864. This was consistent with the constitutional framers' desire "to put upon the record every guarantee that could be legitimately placed [in the constitution] in order that Iowa . . . might . . . have the best and most clearly defined Bill of Rights" of any state in the country. *Id*. (internal quotation marks omitted).

The Iowa Constitution's Bill of Rights includes a two-part equal-protection guarantee. Iowa Const. art. I, §§ 1, 6. This guarantee is essentially a direction that all persons similarly situated should be treated alike under the law. *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 351 (Iowa 2013); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). More precisely, it requires "that laws treat alike all people who are similarly situated with respect to the legitimate

purposes of the law." *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009) (internal quotation marks omitted); *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002).

A legislative amendment that violates this constitutional limitation by purposely harming transgender Iowans violates Iowa's equal-protection guarantee. That is true even where the amendment removes a statutory protection the state was never required to provide. *See Romer* v. *Evans*, 517 U.S. 620, 627 (1996) (recognizing that removal of, and prohibition against, state and local antidiscrimination protections violated federal equal protection); *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 534 (amendment of Food Stamp Act to exclude households of unrelated individuals, such as "hippies" living in "hippie communes," violated federal equal protection); *Perry v. Brown*, 671 F.3d 1052, 1083 (9th Cir. 2012), *vacated and remanded on other grounds sub nom. Hollingsworth v. Perry*, 570 U.S. 693 (2013) (state initiative to take away marriage designation for same-sex couples violated equal protection, even if there was no federal constitutional right to marriage).

Here, the Division does not simply take away the ICRA's protections from discrimination by third-party private actors as occurred in *Romer*; it specifically authorizes the State to discriminate. The Division does so by restoring the discriminatory Regulation struck down under the ICRA in *Good*. The Division thus violates equal protection by working together with the Regulation to deny Medicaid coverage for medically necessary surgery to Petitioners and other transgender Iowans solely because they are transgender. *See Diaz v. Brewer*, 656 F.3d 1008, 1012–15 (9th Cir. 2011) (law limiting health-insurance benefits to married couples, when state law prohibited same-sex couples from marrying, violated equal protection); *Bassett v. Snyder*, 951 F. Supp. 2d 939, 963 (E.D. Mich. 2013) (same); *cf. Johnson v. New York*, 49 F.3d 75, 78–79 (2d Cir.1995) (employment policy discriminated on the basis of age, even though it did not mention

age, where it incorporated another policy that discriminated based on age); *Erie Cnty. Retirees Ass'n v. Cnty. of Erie, Pa.,* 220 F.3d 193, 211–13 (3d Cir.2000) (same).

On its face, the Division states that the public-accommodation provisions of the ICRA "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." Iowa Code § 216.7. The State can therefore again enforce the discriminatory Regulation that was struck down in *Good*. *Good*, 924 N.W.2d at 862–63 (concluding that "expressly exclud[ing] Iowa Medicaid coverage for gender-affirming surgery specifically because this surgery treats gender dysphoria of transgender individuals" constitutes unlawful discrimination). The Division's express purpose and effect of taking away protections under the ICRA violates equal protection in the same way that taking away nondiscrimination protections, food stamps, and the marriage designation violated equal protection in *Romer, Moreno*, and *Perry*. *See Romer,* 517 U.S. at 627; *Moreno*, 413 U.S. at 534; and *Perry*, 671 F.3d at 1083. Moreover, the Division works together with the Regulation to violate equal protection, as did the statutes at issue in *Diaz* and *Bassett*, which limited benefits to married couples where state law at the time prevented same-sex couples from marrying. Based on these well-established authorities, the legislature's discretion to amend the ICRA does not preserve the Division from Petitioners' equal-protection challenge.

ii. Transgender and nontransgender Iowans eligible for Medicaid are similarly situated for equal-protection purposes.

The State's argument that the Division does not treat similarly situated individuals differently likewise has no merit. (State's Br. at 10–13.) As this Court correctly concluded in *Good*, transgender and nontransgender Iowans eligible for Medicaid are similarly situated for equal-protection purposes. *Good* District Court Case, at *21 –22. They are the same in all legally relevant

ways because Medicaid recipients—transgender or not—share a financial need for medically necessary treatment. *In re Estate of Melby*, 841 N.W.2d 867, 875 (Iowa 2014) ("The Medicaid program was designed to serve individuals and families lacking adequate funds for basic health services . . . ."). Despite medical necessity, the Division expressly authorizes the State to discriminate against transgender Medicaid recipients by denying them coverage for medically necessary health care based solely on the fact that they are transgender.

The State claims that the Division does not treat similarly situated individuals differently because some of the procedures to which the Division applies do not pertain to transgender individuals, and the Division is "aimed at a court decision," not "at a person's transgender status." (Resistance at 10–13.) The State's argument overlooks several critical aspects of the Division.

First, the Division's discrimination against certain nontransgender individuals does not alter the fact that it treats transgender and nontransgender Medicaid recipients differently. Although the Division excludes Medicaid coverage for surgical procedures related to "hermaphroditism" and "body dysmorphic disorder," *see* Iowa Code § 216.7, the relevant question is not whether transgender Medicaid recipients seeking medically necessary surgical care are similarly situated to intersex people or people suffering from body dysmorphia; it is whether they are similarly situated to nontransgender Medicaid recipients seeking medically necessary surgical care. To be sure, people who are intersex, or people with body dysmorphia, may be able to assert their own claims challenging the Division. But the Division's broader discrimination against these two additional groups of people does not offset or cancel out its discrimination against transgender individuals. This is subject to the further caveat that surgery is not even recognized as a viable treatment for body dysmorphia. (*See* Ettner Aff., ¶ 12.) The Division's prohibition of medically

ineffective treatment for body dysmorphia is therefore vastly different from its prohibition of medically necessary treatment for gender dysphoria.

Second, the State ignores the Division's full legal context. Although the Division "is aimed at a court decision," it is also "aimed at a person's transgender status." (*See* Resistance at 12.) The two concepts are seamlessly intertwined. Before the *Good* case was decided, DHS's Regulation categorically prohibited Medicaid reimbursement for gender-affirming surgery. *See* Iowa Admin. R. 441–78. In *Good*, this Court and the Iowa Supreme Court determined that the Regulation was unlawful, precluding the State from enforcing the Regulation to deny Medicaid coverage to qualified transgender individuals seeking medically necessary surgical care. *Good* District Court Case, at *12–20 (finding that the Regulation violates the ICRA); *Good*, 924 N.W.2d at 862–63 (same). The Division reinstates the discriminatory Regulation. Under the Division's plain terms, the State is no longer required to fund "sex reassignment surgery . . . related to transsexualism [or] gender identity disorder." *See* Iowa Code § 216.7(3). Instead, it can deny Medicaid coverage for medically necessary gender-affirming surgery based on the regulatory ban invalidated in *Good*. By reinstating the discriminatory Regulation, the Division targets transgender people in the same way the Regulation itself targeted them for decades.

Third, the State improperly relies on the nature of the rights Petitioners seek to protect to define the scope of the relevant classification for equal-protection purposes. (Resistance at 12.) According to the State, people seeking to secure nondiscriminatory access to Medicaid coverage under the ICRA are somehow different from people seeking to secure other rights under the statute. (*See id*. ("[T]he statute may be said to treat people who desire to assert their rights under the Civil Rights Act in order to oblige the government to pay for one of these medical procedures differently than those people who desire to assert their rights under the Civil Rights Act in other contexts and

for other purposes. . . . [T]hese two groups of people are not similarly situated with respect to the purpose of the Civil Rights Act . . . .") The vague semantic distinction on which the State relies ignores the realities of the discriminatory classification imposed by the Division. The Division expressly singles out transgender Iowans for discriminatory treatment by allowing the State to deny Medicaid-eligible individuals coverage for medically necessary treatment solely because they are transgender, returning the law to the outdated status quo that existed before *Good*. Transgender people are the only individuals who have a medical need for surgical procedures related to "transsexualism" or "gender identity disorders," the procedures categorically banned by the Division. Discrimination against transgender people is, by its very nature, unconstitutional discrimination on the basis of gender identity and sex because people who are transgender face discrimination due to the failure of their birth-assigned gender to accord with their gender identity.

The State's attempt to justify the Division as a facially neutral response to the court system's interpretation of the ICRA completely ignores the discriminatory purpose and effect of the statute. Transgender and nontransgender Iowans eligible for Medicaid are similarly situated for equal-protection purposes. And the Division improperly discriminates between these two groups. For these reasons, Petitioners are likely to succeed on the merits of their claim that the Division facially discriminates against transgender people.

2.The Division violates equal protection because it was motivated by animus toward transgender people.

Given that Petitioners have established that the Division facially discriminates against transgender Iowans based on their gender identity, they need not demonstrate that the Division was motivated by animus toward transgender people in order to obtain temporary injunctive relief on their equal-protection claim. They have, however, established discriminatory animus as an *alternative* basis for the requested relief, as set forth in their opening brief and discussed in further

detail below. The Court can award that relief based *either* on the Division's facial discrimination against transgender Iowans *or* on the discriminatory animus that led to the statute's adoption or on *both* grounds.

A law is irrational, and violates equal protection, if its purpose is to target a disadvantaged group. *United States v. Windsor*, 570 U.S. 744, 770 (2013) ("The Constitution's guarantee of equality 'must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot' justify disparate treatment of that group.") (quoting *Dep't of Agriculture v. Moreno,* 413 U.S. 528, 534–35 (1973)); *Romer v. Evans,* 517 U.S. 620, 632 (1996) ("[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."); *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 448 (1985) ("[M]ere negative attitudes, or fear . . . are not permissible bases for [a statutory classification]."); *see also Moreno,* 413 U.S. at 534 ("[The] amendment was intended to prevent so called 'hippies' and 'hippie communes' from participating in the food stamp program," and such "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

The Division's sole purpose is to take away publicly funded, medically necessary Medicaid coverage for transgender Iowans. It does so by creating an exception to the ICRA directed specifically at transgender people. Before the Division was enacted, the ICRA, as interpreted by the *Good* decision, afforded transgender people protection against the discriminatory denial of Medicaid coverage for gender-affirming surgery. *See Good*, 924 N.W.2d at 862–63 (finding that the Regulation violates the ICRA). The Division undermines this protection by amending the ICRA to allow enforcement of the discriminatory Regulation.

The evidence establishing the Division's discriminatory animus is overwhelming:

- In urging his colleagues to vote against the Division, Senator Joseph Bolkcom identified the discriminatory purpose of the legislation, noting that "[t]he language in this bill targets coverage for their [transgender Iowans'] essential and necessary medical treatments." Iowa General Assembly, Session, *House File 766* video recording of debate on 2019-04-027, https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190426012941549&dt=2019-04-26&offset=2721&bill=HF%20766&status=r, at 2:27:55 (Sen. Bolkcom). Senator Bolkcom also explained to his colleagues that the country's marquee medical associations "support the view that medically necessary care is needed" and "believe these medical procedures should be covered under public insurance programs." *Id*.

- Well-aware of the Division's discriminatory purpose, Senator Mark Costello plainly stated that the Division was being enacted "to react to the lawsuit that came up" by changing the administrative code back to the way it was before the lawsuit. *See id.* at 2:31:44. Senator Costello did not agree that gender-affirming surgery "is always medically necessary, which is what Medicaid is about," and did not agree that funding gender-affirming surgery through Medicaid was "a proper use of federal or . . . state monies." *Id.; see also* Tony Leys and Barbara Rodriguez, *Iowa Republican lawmakers ban use of Medicaid dollars on transgender surgery*, Des Moines Register (Apr. 27, 2019), https://www.desmoinesregister.com/story/news/politics/2019/04/26/iowa-legislature-senate-republicans-propose-ban-medicaid-money-transgender-surgery-lawsuit-courts/3578920002/.

- In the Iowa House of Representatives, the only comments supporting the Division came from the bill manager, Representative Joel Fry, who described the Division's function, in discriminatory terms, as "amending the Iowa Civil Rights Act to clarify that we are not requiring any government unit in the state to provide for gender reassignment surgeries." Iowa General Assembly, Session, *House File 766* video recording of debate on 2019-04-27, https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h20190427092516225&dt=2019-04-27&offset=6564&bill=HF%20766&status=r, at 11:24:30 (Rep. Fry).

- The rest of the comments in the House debate came from opponents. For example, Representative Beth Wessel-Kroeschell criticized the Division, saying: "This amendment takes away the civil rights of Iowa's transgender population." *Id.* at 11:36:50 (Rep. Wessel-Kroeschell). She added: "This proposal deserved to be thoroughly examined, and it was not. This amendment was mean-spirited and cruel." *Id.* at 11:37:10.

- Similarly, Representative Kirsten Running-Marquardt stated: "I question the integrity of a body that passes language that denies Iowans critical healthcare because they're transgender. That's what this bill does. . . We are codifying discrimination against people and their healthcare needs because they're

transgender. . . . It is the doctor's decision what is critical healthcare. It is not the people in this chamber. It is not your decision." *Id.* at 12:30:20 (Rep. Running-Marquardt).

- Governor Reynolds, for her part, is on record as saying: "This [the legislation] takes it back to the way it's always been. This has been the state's position for decades." *See* https://cbs2iowa.com/news/local/gov-kim-reynolds-stands-by-decision-to-sign-budget-bill-with-transgender-surgery-ban.

The State fails to even address this legislative history, which illustrates that the legislators debating the Division, and Governor Reynolds, understood the discriminatory purpose of the law. (*See* Resistance at 13–17.) Instead, the State argues that the Division was enacted "for the purpose of ensuring Medicaid continues to be able to provide (*Id*. at 14) (internal quotation marks omitted). This argument is deeply flawed.

First, costs savings are insufficient to justify a facially discriminatory law. *Racing Ass'n of Cent. Iowa v. Fitzgerald* ("*RACI*"), 675 N.W.2d 1, 12–15 (Iowa 2004) (even under rational-basis review, there must be some reasonable distinction between the group burdened with higher taxes, as compared to the favored group, to justify the higher costs); *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (same); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 854–55 (E.D. Mich. 2014) (same); *Varnum v. Brien*, 763 N.W.2d 862, 903 (Iowa 2009) ("Excluding any group from civil marriage—African–Americans, illegitimates, aliens, even red-haired individuals—would conserve state resources in an equally 'rational' way. Yet, such classifications so obviously offend our society's collective sense of equality that courts have not hesitated to provide added protections against such inequalities."). There is no reasonable distinction between transgender and nontransgender individuals with regard to their need for Medicaid coverage for medically necessary surgical care. Both groups need financial assistance for critically necessary medical treatments. Costs savings are insufficient to justify the arbitrary distinction the Division creates between transgender persons and nontransgender persons in need of necessary medical care.

Second, providing insurance coverage for transgender patients has been shown to be "affordable and cost-effective, and has a low budget impact." William V. Padula, PhD et. al, *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, Johns Hopkins Bloomberg Sch. of Public Health, Dep't of Health Policy and Management (Oct. 19, 2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4803686/ (finding the budget impact of this coverage is $0.016 per member per month, and provided "good value for reducing the risk of negative endpoints--HIV, depression, suicidality, and drug use"); *see also* Herman, Jody L., *Costs and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefits Plans* (Williams Institute, Sept. 2013) (noting that employers report zero or very low costs, and substantial benefits, for them and their employees when they provide transition-related health-care coverage in their employee-benefit plans). In fact, the State concedes that "only a subset" of transgender individuals seeking treatment for gender dysphoria requests surgical intervention. (Resistance at 11.)

Third, there are medical costs associated with *denying* transgender people access to medically necessary transition-related care. With the availability of that care, transgender people's overall health and well-being improve, resulting in significant reductions in suicide attempts, depression, anxiety, substance abuse, and self-administration of hormone injections. Cal. Dep't of Ins., *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance* (Apr. 13, 2012), https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf.

Fourth, the assertions by various legislators that surgical treatments for gender dysphoria have an "excessive cost" have no factual basis. The legislative history in House File 766 contains

no analysis to support this contention. *See* Iowa Legislative Services Agency, Fiscal Services Division, Notes on Bills and Amendments (NOBA), *Health and Human Services Appropriations Bill, House File 766,* https://www.legis.iowa.gov/docs/publications/NOBA/1045129.pdf.

The State's affidavit from Michael Randol, DHS's Medicaid Director, does not change the status of the legislative record. (*See* Randol Aff.) The affidavit does not state that DHS provided any cost figures to the appropriations committee that initially considered the legislation. (*See id.*, ¶¶ 1–20.) Nor does it state that any cost figures were provided to the legislature as a whole. (*See id.*) The affidavit therefore has no bearing on discerning the legislature's intent in enacting the Division. *See, e.g., Bassett*, 59 F. Supp. 3d at 851–52 (where defendant argued that "economics justif[ied] the legislation" at issue, defendant's evidence of costs savings was deficient since "there was no analysis of the potential fiscal impact" of the legislation).

In reality, the fiscal note accompanying the bill containing the Division did not include any reference to the cost of gender-affirming surgery, including to the numbers now provided by DHS. And the legislative debates contain no reference to those numbers, either. Petitioners' affidavit from Senator Robert Hogg corroborates the absence of this information from the legislative record. (*See* Hogg. Aff.) Senator Hogg's affidavit demonstrates that the Iowa Legislative Services Agency ("LSA") did not receive information about the projected costs of gender-affirming surgery from the DHS until *after* the end of the legislative session in which the Division was adopted. (*See id.*, ¶ 3 & Ex. A (letter from Deputy Director of DHS dated May 31, 2019, responding to LSA's request for information on behalf of Senator Hogg).) The affidavit also demonstrates that LSA "did not accept [DHS's] letter as the correct or the best analysis" and that "it [is] doing additional fiscal analysis on this issue," which is forthcoming. (*Id.*, ¶ 4.)

Fifth, the fact that the legislature did not completely remove the ICRA's protections against gender-identity discrimination from the statute does not negate the Division's discriminatory intent. (*See* Resistance at 17 ("If motivated by animus toward transgender persons, the legislature could have removed gender identity as one of the protected statuses covered by the Iowa Civil Rights Act. It did not do so.").) Such a change would have been *even more* discriminatory than the legislature's targeted assault on the *Good* decision. The legislature's misconduct is not beyond reproach simply because it decided to refrain from a broader revocation of the ICRA's gender-identity protections.

For these reasons, Petitioners are likely to succeed on the merits of their claim that the Division's enactment was motivated by discriminatory animus against transgender Iowans.

D. Petitioners have established a likelihood of success on their claim that the Division violates Iowa's single-subject and Title Rules under Article III, section 29.

The State argues that the Division did not violate the Single-Subject Rule under Article III, section 29. According to the State, the Division "is clearly connected to monetary issues relating to health, human services, and veterans" and "was directed at clarifying what the Iowa Civil Rights Act did and did not require the Iowa Medicaid program to pay for." (Resistance at 20). The State also argues that the Division did not violate the Title Rule because the subject matter, which the State describes as "amend[ing] the Iowa Civil Rights Act to clarify what it does and does not require the Iowa Medicaid program to pay for", was "clearly expressed in the Act's title". (Resistance at 21).

These arguments fail because (1) they misstate the nature of the Division itself, (2) the substantive change to protections against discrimination in public accommodations for transgender Iowans challenged in this case was not germane to the annual appropriations matters otherwise

contained in the annual Health and Human Services Appropriations ("HHS Appropriations") bill, and (3) the title of the annual HHS Appropriations bill provided no notice, as required, to citizens or legislators of the substantive change to the nondiscrimination protections contained in the ICRA.

Article III, § 29 contains two distinct but interrelated requirements: (1) that "[e]very act shall embrace but one subject, and matters properly connected therewith" (the Single-Subject Rule); and (2) that the act's subject "shall be expressed in the title" (the Title Rule). Iowa Const. Art. III, § 29. Thus, "Section 29 imposes two requirements upon the General assembly, one concerning the number of subjects that a single bill may address and the other concerning the descriptive accuracy of a bill's title." Todd E. Pettys, *The Iowa State Constitution* 171 (2d ed. 2018). Each is discussed in turn below.

1. The Division Violates Iowa's Single-Subject Rule.

The State misstates the nature of the Division to try to save it from Iowa's Single-Subject Rule. Contrary to the State's efforts to rebrand the Division in its Resistance, the Division is not some mere funding restriction on an annual appropriation to the Department of Human Services, the subject matter of the bill.[2] To the contrary, it comprises a substantive new, third subsection to the section of the Iowa Civil Rights Act, otherwise ensuring protections against nondiscrimination in public accommodations, section 216.7. It facially carves out an area formerly covered by ICRA's non-discrimination protections to specifically deprive transgender Iowans on Medicaid to

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[2] *See* 2019 Iowa Acts, House File 766, *available at* https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=hf766; *see also* video of debate at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190426012941549&dt=2019-04-26&offset=2721&bill=HF%20766&status=r, Sponsor, Rep. Costello, at 2:15:12) (introducing it for debate: "Ladies and gentlemen of the Senate, House File 766 is the Health and Human Services Appropriations bill.")

access to medically necessary care on a non-discriminatory basis in accordance with the *Good* decision.

The Single-Subject rule is concerned with *germaneness. Utilicorp*, 570 N.W.2d at 454 ("So to pass constitutional muster the matters contained in the act must be germane."); *Western Intern. V. Kirkpatrick*, 396 N.W.2d 359, 364 (Iowa 1986). Germaneness is a mandatory constitutional requirement. *State v. Mabry*, 460 N.W.2d 472, 474 (Iowa 1990) ("[T]o pass constitutional muster the matters contained in the act must be germane."); *Long v. Bd. of Sup'rs of Benton Cty.*, 142 N.W.2d 378, 382 (Iowa 1966) ("[L]imiting each bill to one subject means that extraneous matters may not be introduced into consideration of the bill by proposing amendments not germane to the subject under consideration."). "To be germane," the Court explains, "all matters treated [within the act] should 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 . . . one general subject." *Utilicorp*, 570 N.W.2d at 454 (citing *State v. Mabry*, 460 N.W.2d 472, 474 (Iowa 1990)).

Here, the subject matter of the Act of which the Division is part—the annual HHS Appropriations bill—has nothing to do with the subject matter of the Division—ICRA's protections against discrimination in public accommodations. Legislators expressly acknowledged that the amendment containing the Division was not germane to the annual Appropriations bill during debate in the House. H.J. 1064 (Apr. 27, 2019), *available at* https://www.legis.iowa.gov/docs/pubs/hjweb/pdf/April%2027,%202019.pdf#page=9; *see also* Iowa General Assembly, *House File 766*, video of debate in the House on Apr. 27, 2019, https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h20190427092516225&dt=2019-04-27&offset=6564&bill=HF%20766&status=r (point of order raised by Rep. Heddens challenging lack of germaneness of amendment; Rep. Upmeyer at 11:15:00-11:22:12

acknowledging and ruling on point of order); (Crow Aff. at ¶ 17). The point was ruled well taken by Representative Upmeyer, Speaker of the House. *Id.* ("You are correct. The amendment is not germane.") Then, Representative Fry—the amendment's sponsor—moved to suspend the rules to consider the amendment anyway. *Id.* at 11:22:13-11:24:00. The motion narrowly passed. *Id.*

Representative Fry's motion to suspend the rules may have remedied the Division's noncompliance with the General Assembly's internal procedures, but it does nothing to cure the amendment's illegality under Single-Subject rule. "It is entirely the prerogative of the legislature . . . to make, interpret, and enforce its own procedural rules, and the judiciary cannot compel the legislature to act in accordance with its own procedural rules *so long as constitutional questions are not implicated*." *Des Moines Register and Tribune Co. v. Dwyer*, 542 N.W.2d 491, 496 (Iowa 1996) (emphasis added); *see also Carlton v. Grimes*, 23 N.W.2d 883, 889 (Iowa 1946) ("Whether either chamber strictly observes these [internal procedural] rules or waives or suspends them is a matter entirely within its own control or discretion, *so long as it observes the mandatory requirements of the Constitution*. If any of these [constitutional] requirements are covered by its rules, such rules must be obeyed . . . ." (emphasis added)).

Unlike the Single-Subject Rules of some other state constitutions, Art. III, section 29 is mandatory, not directory. *C.C. Taft Co. v. Alber*, 171 N.W. 719, 720 (Iowa 1919) ("[T]he provisions of the Constitution are mandatory and binding upon the Legislature, and that any act that contravenes the provisions of the Constitution . . . is not binding upon the people or any of the agencies of government."); *Green v. City of Mt. Pleasant*, 131 N.W.2d 5, 18 (Iowa 1964) (same); *Western Int'l v. Kirkpatrick*, 396 N.W.2d 359, 366 (Iowa 1986) (referring to "the mandate of Article III, § 29 and striking portions of statute that violated Art. III, § 29"). Because Article III, § 29 is mandatory rather than directory, the legislature cannot cure the constitutional defect through

a suspension of the rules type of vote, as took place here. Rather, statutes contravening the Single-Subject Rule are void.

The Supreme Court has described the Single-Subject Rule's purpose as "to prevent logrolling and to facilitate orderly legislative procedure." *Western Int'l v. Kirkpatrick*, 396 N.W.2d 359, 364 (Iowa 1986). The Court has described "logrolling" as "the practice of several minorities combining their proposals as different provisions of a single bill, and thus consolidating their votes so that a majority is obtained . . . where perhaps no single proposal of each minority could have obtained majority approval separately." *Long v. Bd. of Sup'rs of Benton Cty.*, 142 N.W.2d 378, 382 (Iowa 1966). In theory, "[b]y limiting each bill to a single subject, the issues presented by each bill can be better grasped and more intelligently discussed by the legislators." *Id.* The purpose of the Single-Subject Rule also includes "preventing surprise" and "keep[ing] the citizens of the state fairly informed"). *State v. Mabry*, 460 N.W.2d 472, 473 (Iowa 1990).

These purposes were thwarted by the inclusion of the Division into the annual HHS Appropriations bill. Senator Joe Bolkcom and Keenan Crow, One Iowa's Director of Policy and Advocacy, both detailed the normal lawmaking process for substantive policy matters and how the process for log-rolling the Division into the annual HHS Appropriations bill derogated from the normal process, and the impact that had. Senator Bolkcom has been a legislator for more than 20 years and is an expert on the Iowa lawmaking process, having served on numerous committees over those years, (Bolkcom Aff. ¶ 1-3); he also has particular competency to inform the Court as to the inappropriateness of including the Division within the annual HHS Appropriations bill, both as ranking member of the Appropriations Committee and because he was the original sponsor of the 2007 Amendment to the Iowa Civil Rights Act which added protections against nondiscrimination on the basis of gender identity and sexual orientation. (Bolkcom Aff. ¶ 6); 2007

Iowa Acts, SF 427, *available at* https://www.legis.iowa.gov/legislation/billTracking/billHistory?ga=82&billName=SF427; Keenan Crow lobbies on behalf of One Iowa and is very familiar with the legislative process. (Crow Aff. ¶ 1-3).

Normally a bill, once sponsored and filed, is assigned a subcommittee and committee. (Bolkcom Aff. ¶ 5-6; Crow Aff. ¶ 4-5). The subcommittee of legislators meets in public and invites formal public input. (Bolkcom Aff. ¶ 5; Crow Aff. ¶ 5). Legislators make any changes they decide are appropriate, and if a majority of the subcommittee votes to do so, advances the legislation to the full committee. (Bolkcom Aff. ¶ 6; Crow Aff. ¶ 5-6). Before the full committee, a larger group of legislators again make any changes to the legislation deemed to be appropriate by a majority of the committee, and upon a majority vote once amended, advance it to the full body to be voted on by that chamber. (Bolkcom Aff. ¶ 6; Crow Aff. ¶ 6-7). The same process takes place in the opposite chamber. (Bolkcom Aff. ¶ 6; Crow Aff. ¶ 7).

As both Senator Bolkcom and Keenan Crow explained, this process affords sufficient time and opportunity for input from the public, experts, impacted people, and other legislators. (Bolkcom Aff. ¶ 4-6; Crow Aff. ¶ 5-6, 8). But when logrolling occurs, as it did in this case, there is no such opportunity. (Bolkcom Aff. ¶ 7-8; Crow Aff. ¶ 10). The Division was never subject to any normal filing, subcommittee, or committee process. (Bolkcom Aff. ¶ 7-8; Crow Aff. ¶ 10). Members of the public were not provided with an opportunity to submit input or share their concerns. (Bolkcom Aff. ¶ 7-8; Crow Aff. ¶ 10-11, 12-14, 16). Rather than the more typical weeks-to-months it takes to go through the normal lawmaking process, the time between the amendment containing the Division being filed and being passed by both chambers took a mere 32 hours. (Crow Aff. ¶ 8, 12).

Senator Bolkcom described the process of amending the ICRA to add protections against discrimination on the basis of gender identity and sexual orientation in 2007. (Bolkcom Aff. at ¶ 5). The bill was introduced first on February 20, 2007, and was fully passed by the second chamber on April 29, 2007, over two months later. Bill History for 2007 Iowa Acts, SF 427, *available at* https://www.legis.iowa.gov/legislation/billTracking/billHistory?ga=82&billName=SF427. It was vetted by a subcommittee and full committee of both the Senate and House, through which process it was amended multiple times. *Id.*; (Bolkcom Aff. at ¶ 7). Yet the Division, which strips transgender people who rely on public accommodations for their healthcare of those same rights to nondiscrimination, bypassed those normal legislative procedures and took a mere 32 hours to pass. (Bolkcom Aff. at ¶ 8; Crow Aff. at ¶ 10, 12).

Keenan Crow described the chaos created by the improper logrolling process involved here, as One Iowa scrambled to alert the press, impacted transgender people, medical experts, and others about the Division. (Crow Aff. ¶ 14). For example, several news media interviews about the Division had not even aired by the time it passed. (Crow Aff. ¶ 14). The Division was especially harmful to the normal democratic process of lawmaking because it was filed through a "double-barreling" process, which involves filing a second-degree amendment to an amendment to a bill. (Bolkcom Aff. ¶ 8; Crow Aff. ¶ 11). That second-degree amendment, in turn, cannot be further amended, allowing no individualized debate or votes on individual items; instead, legislators could only vote on the appropriations bill as amended. (Bolkcom Aff. ¶ 8; Crow Aff. ¶ 11). It is Senator Bolkcom's opinion that had the Division gone through the normal lawmaking process, rather than the unconstitutional logrolling mechanism employed, it would have been defeated. (Bolkcom Aff. ¶ 9).

Here, the General Assembly passed a bill that contained matters not germane to each other, and—extraordinarily—*expressly acknowledged* that it was doing so. Moreover, its inclusion of non-germane matters did in fact frustrate the purpose of the Single-Subject Rule by surprising both legislators, (Sen. Bolkcom Aff.), and citizens, (Crow Aff. at ¶10). Because the matter of substantive protections to nondiscrimination in ICRA and annual HHS appropriations neither "[fell] under some one general idea" nor were they "so connected with or related to each other, either logically or in popular understanding, as to be part of . . . one general subject," the Division fails the Supreme Court's test for germaneness. *Utilicorp*, 570 N.W.2d at 454 (citing *State v. Mabry*, 460 N.W.2d 472, 474 (Iowa 1990)). To the contrary, the logical and popular understanding was and is the opposite—that the matter was *not* germane. It is difficult to imagine a more obvious—and unconstitutional—effort to flout Article III, § 29.

Furthermore, the facts in the *Utilicorp* case cited by the State in its Resistance, (Resistance at 19), are so different from the facts of this one that the case supports Petitioners' argument, rather than the State's. In *Utilicorp*, the Court explained that "[i]t is significant that all provisions in [the challenged legislation] relate to various provisions in Iowa Code chapter 476." *Utilicorp*, 570 N.W.2d at 453. The question in *Utilicorp* was whether a provision of legislation prohibiting nonutility use of equipment paid for by utility customers, made to the Code section governing the Iowa Utilities Board and the regulation of utilities generally, was germane to the legislation under Iowa's Single-Subject Rule. *Id.* at 453. The other provisions of the legislation amended various other divisions of that same Code section, including divisions governing the location of the utility's principal office and the filing and processing of written complaints to the Utilities Board. *Id.* The Court in *Utilicorp* found that the provision's place in the legislation was "eminently logical" and "fits logically and neatly within the other sections." *Utilicorp* at 455.

Here, on the contrary, no provision of the annual HHS Appropriations bill, other than the Division Petitioners challenge, made amendments or reference to chapter 216, the ICRA. 2019 Iowa Acts, House File 766. In fact, no annual HHS Appropriations bill—going back to the 2007 ICRA amendment adding gender identity and sexual orientation as protected classifications in the first place—has ever done so.[3] The Division's placement in the annual HHS Appropriations bill, unlike the utility provision at issue in *Utilicorp*, was not a logical location, and the Division does not fit within the other sections. The placement of the Division in the annual HHS Appropriations bill is not comparable to the provision upheld in *Utilicorp*.

Instead, the Division is much more like the one struck down by the Court in the *Kirkpatrick* case as a violation of the Single-Subject Rule. There, the Court invalidated substantive changes to the workers' compensation laws contained in legislation that otherwise made non-substantive technical corrections throughout the Iowa Code. *Kirkpatrick* at 364-65; (Pet. Br. at 38-39).

The "fairly debatable test" requires legislation to be "clearly, plainly, and palpably" in violation of the germaneness requirement in order to strike it down under the Single-Subject Rule. *Utilicorp* at 454 (citing *Mabry* at 474). While this standard is deferential, it is not meaningless or toothless, as the *Kirkpatrick* case demonstrates. Burying a substantive, highly controversial piece of legislation that creates an exception to the ICRA in an annual Appropriations bill is even more dramatic than the workers' compensation amendment at issue in *Kirkpatrick*. The Division's lack of germaneness is not "fairly debatable"; rather, it is "clearly, plainly, and palpably" not germane to the annual HHS Appropriations bill containing it. Under *Kirkpatrick*, *Utilicorp*, and *Mabry* the Division violates the Single-Subject Rule.

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[3] *See* footnote 4, below, providing citations and links to each annual HHS Appropriations bill going back to 2007.

2. The Division Violates Iowa's Title Rule.

The State's argument that the Division complied with the Title Rule is similarly belied by the plain text of the Division and the Title of the annual HHS Appropriations bill containing it. The Division violates Iowa's Title Rule because the Act's title, "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," does not reference the ICRA at all, much less provide any notice that the Division would create an exception to the ICRA's prohibition against gender-identity discrimination in public accommodations.

While the purpose of the Single-Subject rule is about the democratic legislative process, the purpose of the Title Rule is to ensure notice. *Kirkpatrick*, 396 N.W.2d at 365 (The "purpose of the [title] requirement is to guarantee that reasonable notice is given to legislators and the public of the inclusion of provisions in a proposed bill; thus it is said to prevent surprise and fraud."); *see also State v. Talerico*, 290 N.W. 660, 663 (Iowa 1940) ("[The Title Rule] was designed to prevent surprise in legislation."). Therefore, in analyzing a title challenge, a court will determine whether a title "gives fair notice of a provision in the body of an act." *Kirkpatrick*, 396 N.W.2d at 365.

In *Utilicorp*, the Court pointed out that while provisions in the utilities bill upheld in that case might be controversial, "no citizen—certainly no legislator—should be surprised to find the subject of [the challenged provision] considered under the title of the act." *Utilicorp*, at 455. In *Kirkpatrick*, by contrast, the Court struck down a change to the workers' compensation appeal process that was buried in a technical "Code Corrections" bill as a violation of the Title Rule. *Id.* at 365. The Court reasoned that the "title must . . . give fair notice of the act's subject and it must not deceive its reader." *Id.* (internal citations omitted). In *Kirkpatrick*, the title stated that the bill

"alter[ed] current practices, but d[id] not enlighten the reader as to what practices [were] being changed. There [was] no indication in the title . . . that the enactment effected a change in workers' compensation law or in appellate procedure involving workers' compensation cases." *Id.* The Court explained that the changes to the substantive workers' compensation appeal procedure were "buried in the middle of a sixty-one section enactment which could fairly be said to make otherwise lexicographical changes. The reader of the title is not informed that a drastic change in the workers' compensation law will result from this bill's enactment." *Id.*

Likewise here, the title of the annual HHS Appropriations bill did not alert the reader that a "drastic change" to the ICRA's protections against nondiscrimination would result from the bill's enactment. Like in *Kirkpatrick*, the changes were buried in the middle of a 108-page bill which could fairly be said to make otherwise appropriations-related changes. And in fact, both citizens and legislators were reasonably surprised. (Bolkcom Aff. at ¶ 8; Crow Aff. at ¶ 17, 18). There was no reasonable basis to expect that a substantive amendment to the ICRA's nondiscrimination protections for transgender Iowans in public accommodations, in place since 2007, would ever be amended through any annual appropriations bill, much less the specific bill in question, whose title did not provide any notice of such a change.

In 2007, by contrast, when the ICRA was amended to *add* the protections for gender identity and sexual orientation that the Division now seeks to take away from transgender Iowans receiving Medicaid, the bill's title provided notice of that change. 2007 Iowa Acts, SF 427, *available at* https://www.legis.iowa.gov/legislation/billTracking/billHistory?ga=82&billName=SF427. The title read "A bill for an act relating to the Iowa civil rights Act and discrimination based upon a person's sexual orientation or gender identity." *Id.* While a legislator or private citizen would be

quite surprised to find any annual appropriation in such a bill, they would logically expect the bill to amend the Iowa Civil Rights Act in ways impacting LGBTQ people.

In fact, the title for *every* annual HHS Appropriations bill going back at least 12 years (as far back as the most recent amendment to the ICRA adding the protections on the basis of gender identity and sexual orientation) has been exactly the same as the annual HHS appropriations bill containing the challenged Division—except in one way that demonstrates the violation of the Title Rule here. Prior to the Division's inclusion in the HHS appropriations bill this year, when additional subjects were included in the bill, there was, appropriately, a corresponding addition of that subject matter to the title of the bill. This happened in 2014, which is when veterans-related appropriations were incorporated into the annual HHS Appropriations bill for the first time. At that time, there was, properly, a corresponding addition of the word veterans to the title of the bill.[4]

[4] 2018 Iowa Acts, Senate File 2418, https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=SF%202418 (entitled "A bill for 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"); 2017 Iowa Acts, House File 653, https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=HF%20653(entitled identically); 2016 Iowa Acts, House File 2460, https://www.legis.iowa.gov/legislation/BillBook?ga=86&ba=HF%202460 (entitled identically); 2015 Iowa Acts, Senate File 505, https://www.legis.iowa.gov/legislation/BillBook?ga=86&ba=SF%20505 (entitled identically); 2014 Iowa Acts, House File 2463, https://www.legis.iowa.gov/legislation/BillBook?ga=85&ba=HF%202463&v=e (entitled "An Act relating to appropriations for health and human services *and veterans* and including other related provisions and appropriations, *extending the duration of county mental health and disabilities services fund per capita levy provisions*, and including effective date and retroactive and other applicability date provisions."); 2013 Iowa Acts, Senate File 446, https://www.legis.iowa.gov/legislation/BillBook?ga=85&ba=SF%20446 (entitled "An Act relating to appropriations for health and human services and including other related provisions and appropriations, providing penalties, and including effective, retroactive, and applicability date provisions."); 2012 Iowa Acts, Senate File 2336, https://www.legis.iowa.gov/legislation/BillBook?ga=84&ba=SF%202336 (entitled identically); 2011 Iowa Acts, House File 649, https://www.legis.iowa.gov/legislation/BillBook?ga=84&ba=HF%20649 (entitled identically);

In the same year, an additional matter regarding the county mental health and disability services fund was included in the bill; that item was also properly added to the title of the annual HHS Appropriations bill for that year only. *Id.* Of course, no annual HHS Appropriations bill other than the one at issue here has contained any substantive amendment to chapter 216, the ICRA, and no one would logically expect such a bill to do so.

Like the substantive policy change buried in the technical code corrections bill at issue in *Kirkpatrick*, the legislature's decision to bury the substantive change to ICRA in an annual appropriations bill is a particularly egregious violation of the Title Rule. Appropriations bills, like code corrections bills, are a different type of bill than other bills. This difference is not merely a legislative norm in Iowa; it has a constitutional dimension as well. Iowa Const. Art. III, § 16; *Rants v. Vilsack*, 684 N.W. 2d 193, 207-08 (Iowa 2004) (finding the executive's powers of veto are different when it comes to policy and appropriations bills, pursuant to Art. 3, § 16 of the Iowa Constitution.).

Because the title to the annual HHS Appropriations bill provided the reader with no notice that the bill contained a substantive new exception to the ICRA to strip transgender Iowans of the right to nondiscrimination in Medicaid coverage, the bill violated the Title Rule; because the exception's subject was not germane to the annual HHS Appropriations bill, and the process the legislature used interfered with the normal democratic lawmaking process, the bill violated the Single-Subject Rule. These rules are mandatory pursuant to Art. III, ¶ 29 of the Iowa Constitution.

2010 Iowa Acts, House File 2526,
https://www.legis.iowa.gov/legislation/BillBook?ga=83&ba=HF%202526 (entitled identically);
2009 Iowa Acts, House File 811,
https://www.legis.iowa.gov/legislation/BillBook?ga=83&ba=HF%20811 (entitled identically);
2007 Iowa Acts, House File 909,
https://www.legis.iowa.gov/legislation/BillBook?ga=82&ba=HF%20909 (entitled identically).

The Division must be struck down. As a result, Petitioners have shown a likelihood of success on these claims.

V. Petitioners have established a likelihood of success on their claim that the Division violates Iowa's Inalienable Rights Clause.

The State asserts that because there is not an established inalienable right to state-funded medical care under Article I, § 1, the Petitioners have not shown a likelihood of success on their claim. (Resistance at 21-23.) The State also claims that even if the Division does implicate Petitioners' inalienable rights, the Division is nonetheless a reasonable regulation, because a legislative interest to conserve costs is a legitimate and non-discriminatory one. (Resistance at 23-25.) These arguments fail both because they misstate the nature of the inalienable right asserted by Petitioners, and because the Division is arbitrary and facially discriminatory against transgender people.

The State bases its argument that Petitioners' inalienable rights to life, liberty, and bodily safety are not implicated by the Division on a false distinction it draws between "negative rights" and "positive rights." (Resistance at 22). It argues that those cases Petitioners cite in their motion for a temporary injunction finding a right to life, liberty, and bodily safety, (*see* Pet. Br. at 39-40), "deal with negative rights—rights to be free from governmental interference or coercion." (Id.). The State argues, on the other hand, that the rights sought by Petitioners in this case are "a positive right" . . . "to order affirmative action by the State in the form of monetary compensation to pay for their health care needs." (Id.).

This argument is unavailing because as Petitioners make clear in their main brief, they are not asserting a right to medically necessary care under the inalienable rights clause; the joint-federal Medicaid program already provides that right to those Iowans, like Petitioners, who are Medicaid eligible. The Division, however, denies it to Petitioners because they are transgender.

Absent this care, Petitioners face a serious risk of self-harm, anxiety, depression, and even suicidality, in addition to other increased medical risks, for example, from ongoing hormone therapy. (See Ex. 6: Covington Aff. ¶ 32; Ex. 1: Vasquez Aff. ¶ 26; Ex. 2: Nisley/Vasquez Aff.; Ex. 3: Daniels/Vasquez Letter; Ex. 4: Eadeh/Vasquez Letter; Ex. 5: Waters/Vasquez Letter; Ex. 7 Nisley/Covington Aff.; Ex. 8: Eadeh/Covington Letter; Ex. 9: Waters/Covington Letter; Ex. 10: Ettner Aff. ¶ 15.) Nor does the State contest the medical necessity determinations made by the Petitioners' physicians. But for the Division, which interferes with this right to coverage for medically necessary medical care, Petitioners *would* be able to obtain that care on the same basis as all other Iowans on Medicaid. *See Good v. Iowa Dep't of Human Servs.*, 924 N.W.2d at 862-63. (concluding that Medicaid generally pays for medically necessary surgery).

Petitioners seek only the right to receive the coverage necessary for their life, liberty, and bodily safety on the same terms as all other Medicaid-eligible Iowans; instead, they are subject to the arbitrary and discriminatory interference of the state through the Division, which impedes their access to this necessary care. As the State concedes, article I, section 1 "prevents only arbitrary, unreasonable legislative action." (Resistance at 23) (citing *Atwood v. Vilsack*, 725 N.W.2d 641, 651 (Iowa 2006). Thus, Petitioners need not take a position on whether the Inalienable Rights Clause requires a program such as Medicaid to meet the life-sustaining medical needs of indigent Iowans as a general matter; rather, Petitioners claim is that once such a program exists, the State of Iowa cannot interfere with their right to obtain this life-sustaining care they need on an arbitrary and discriminatory basis without violating the Inalienable Rights Clause. This right asserted by Petitioners is precisely the right to be free from interference by the state in securing life, liberty, and bodily safety that Article I, § 1 protects. *See, e.g., Atwood*, 725 at 651; *City of Sioux City v.*

Jacobsma, 862 N.W.2d 335, 352 (Iowa 2015); *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 177 (Iowa 2004) ("restrictions that are prohibitive, oppressive or highly injurious . . . are invalid.").

The State's argument that the Division is nonetheless reasonable because *some* of the gender affirming surgeries that *some* transgender Iowans on Medicaid need have an "excessive cost" is without merit. While the state's assertions regarding costs are unsupported and inaccurate, (*see* discussion of cost in Equal Protection section above, at 20-22; Pet. Br. at 31-32)[5], ultimately here, as there, these assertions about cost are irrelevant. The State's arguments about cost miss the point. Many forms of healthcare are expensive. But any cost-savings measures, to be legitimate, must be non-discriminatory, and the Court gives closer scrutiny to laws which curtail benefits only for a certain group. *See, e.g., U.S. Dept. of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973) ("a bare . . . desire to harm a politically unpopular group is not a legitimate state interest."); *Massachusetts v. United States Dep't of Health and Human Servs.,* 682 F.3d 1, 11, 14 (1st Cir. 2012) (cost savings alone are insufficient to justify an otherwise discriminatory statute.); *Diaz v. Brewer*, 656 F.3d 1008, 1013-14 (9th Cir. 2018). The problem with the Division is not that it might save costs—although that is dubious, given the governmental and academic research finding gender affirming surgery coverage is highly cost effective. (Pet. Br. at 32). Any cost-savings interests can instead be accomplished through non-discriminatory measures. The problem is that the Division, like the Regulation struck down in *Good*, arbitrarily, and in a discriminatory manner, targets transgender

[5] The affidavit provided by the State's Medicaid Director acknowledges that the outrageously inaccurate numbers it provided to estimate fiscal impact of providing medically necessary surgery are "highly unlikely" because not all transgender Iowans on Medicaid will require any gender affirming surgery at all, and of those who do, not all will require the same surgeries. (Randol Decl., Ex. D at 4). Indeed, a number of gender affirming surgeries, which will comprise the full extent of needed surgery for many transgender people, such as mastectomy and orchiectomy procedures are very *low* cost, as reflected in the State's own exhibits estimating cost per procedure. (Randol Decl., Ex. B).

people to be deprived of their right to nondiscrimination in coverage for medically necessary care under Medicaid, while generally providing coverage for medically necessary care to Medicaid eligible Iowans. *See Good*, 924 N.W.2d at 862-63 (finding the Regulation, which denies coverage on the same terms as authorized by the Division, violates ICRA); *Good* District Court Case, at *33 (finding the Regulation was a violation of the state Equal Protection clause as well as the ICRA).

Because the Division violates the Petitioners' inalienable rights under the Iowa Constitution by arbitrarily and in a discriminatory manner depriving them of coverage required to obtain their medically-necessary care otherwise provided by Medicaid, Petitioners have shown a likelihood of success on their article I, section 1 claim.

III. Conclusion

WHEREFORE, Petitioners pray this Court grant their Motion for Temporary Injunctive Relief and enjoin Respondents from enforcing the Division during the pendency of this case.

Respectfully submitted:

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