IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MIKA COVINGTON, AIDEN DELATHOWER[1], and ONE IOWA, INC. Petitioners, v. KIM REYNOLDS and IOWA DEPARTMENT OF HUMAN SERVICES, Respondents.	**CASE NO. EQCE084567** **MOTION TO DISMISS**

COME NOW Respondents Kim Reynolds and Iowa Department of Human Services, by and through undersigned counsel, and move to dismiss the Petition for Declaratory and Injunctive Relief because One Iowa, Inc. lacks standing, because Petitioner Mika Covington and Petitioner Aiden Vasquez have an adequate remedy at law, and because the matter is not ripe.

I. MOTION TO DISMISS STANDARD

"A motion to dismiss tests the legal sufficiency of the challenged pleading." *Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192, 194 (Iowa 2007). The petition's facts are "assessed in the light most favorable to the plaintiffs, and all doubts and ambiguities are resolved in the plaintiffs' favor." *Id.* However, the Court does *not* presume the petition's legal conclusions are true or resolve them in the plaintiffs' favor. *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014); *Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 8 (Iowa 2006). Under that standard, the petition in this case is legally insufficient and this Court should dismiss it.

[1] Footnote 1 in the petition expresses a preference of Aiden Delathower to be referred to as Aiden Vasquez. Defendants accept and adopt this request.

II. PETITIONER ONE IOWA, INC., LACKS STANDING

"Courts have traditionally been cautious in exercising their authority to decide disputes." *Godfrey v. State*, 752 N.W.2d 413, 417 (Iowa 2008). They generally "refuse to decide disputes presented in a lawsuit when the party asserting an issue is not properly situated to seek an adjudication." *Id.* A party that is properly situated has standing. *See id.* To demonstrate standing, a party must have *both* a personal interest at stake in the litigation and be injuriously affected. *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 864 (Iowa 2005) (characterizing these elements as "separate requirements for standing."). These two requirements—a personal interest at stake and an injurious effect—form a two-prong test.

When evaluating standing, the Court's "task is not to judge the merits of the plaintiffs' contentions," but "to determine whether these plaintiffs are the proper parties to bring the action." *Id.* at 870. "In short, the focus is on the party, not on the claim." *Id.* at 864. The legal merit of the claim is irrelevant. *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004). Indeed, in *Godfrey*, "[t]he district court concluded the litigant had no standing to assert" a single-subject claim, "and dismissed the action without addressing the merits." *Godfrey*, 752 N.W.2d at 416. The Court should do the same here.

Standing is particularly important in cases where petitioners assert single-subject rule violations because article III, section 29 of the Iowa Constitution "involves the internal processes of a coordinate branch of government." Op. No. 79–2–9, 1979 WL 21163, at *3. "In a system of government characterized by separation of powers, the respect due a coordinate branch of government makes it inappropriate for a court lightly to conclude that the legislative branch has not abided by its primary obligation to operate within constitutional requirements." *Id.*; *see also Godfrey*, 752 N.W.2d at 427 (recognizing the single-subject requirement primarily addresses

"the internal workings of the legislative process"); Op. No. 85–5–1, 1985 WL 68969, at *1–2 (Iowa Att'y Gen. May 1, 1985) ("[C]ourts traditionally have been reluctant to void legislation on grounds that the General Assembly violated constitutional provisions which structure the legislative process. . . . Primary responsibility for enforcement of the constitutional values embodied in Article III, § 29 rests with the legislature, whose members are sworn to uphold the constitution."). Requiring a petitioner raising a single-subject claim to demonstrate standing ensures that the Court is not proceeding lightly.

One Iowa, Inc. is not a natural person. It will never be a Medicaid beneficiary and will never be affected personally by any medical coverage decisions. The challenged change to the Iowa Civil Rights Act "does not cause or threaten direct and concrete injury" to One Iowa, Inc. *Preterm–Cleveland, Inc. v. Kasich*, 102 N.E.3d 461, 469 (Ohio 2018). "[T]he constitutionality of a statute may not be attacked by one whose rights are not, or are not about to be, adversely affected by the operation of the statute." *Vietnam Veterans Against the War v. Veterans Mem'l Auditorium Comm'n*, 211 N.W.2d 333, 335 (Iowa 1973). Without an individualized stake in the controversy, an entity "who is merely the self-constituted spokesman of a constitutional point of view can not ask [the Court] to pass on it." *Coleman v. Miller*, 307 U.S. 433, 467, 59 S. Ct. 972, 988 (1939) (Frankfurter, J., dissenting). The standing requirement means that a person cannot "challenge a statute until they are placed in a position in which the statute adversely affects them." *State v. Kolbet*, 638 N.W.2d 653, 661 (Iowa 2001). Further, because both Ms. Covington and Mr. Vasquez are members of One Iowa, Inc., the corporate interests of the organization are sufficiently represented by its members and co-Petitioners, Ms. Covington and Mr. Vazquez.

III. PETITIONERS FAIL TO STATE A CLAIM FOR EQUITABLE RELIEF

An injunction is an "extraordinary remedy" that should not be granted unless "clearly required to avoid irreparable damage." *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 639 (Iowa 1991). Injunctive relief is not appropriate, however, where the petitioner has an adequate remedy at law. The petitioners do have an adequate remedy at law. For this reason, they fail to state a claim for equitable relief.

The petitioners have not yet requested pre-authorization for the services mentioned in their Petition. The requests have not been evaluated. There have been no notices of decision issued on the requested services. Once those steps are satisfied, if the requested service is denied, Mr. Vasquez and Ms. Covington, like other Medicaid beneficiaries, have a number of avenues for appeal of the decision. Members who receive benefits through a managed care organization (MCO) can request reconsideration. If the result is unsatisfactory, the Member can appeal to a State Fair Hearing to an administrative law judge at the Department of Inspections and Appeals. There are special provisions for emergency appeals for medical situations that require expedited relief. Unfavorable decisions by an ALJ can be appealed to the Director of Department of Human Services, and from there, can be the subject of judicial review before the district court under Iowa Code chapter 17A. Members can also request an exception to policy. Medical coverage decisions necessarily implicate medical needs and very real risks of harm. For that reason, both federal and state law provide a fulsome appeal process. Otherwise, any coverage decision would be subject to emergency injunctive relief proceedings.

> One requirement for the issuance of a temporary injunction is a showing of the likelihood or probability of success on the merits of the underlying claim. *See Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001); *Kent Prods.*, 245 Iowa at 212, 61 N.W.2d at 715. Here, the plaintiff's underlying claim is an equitable action for permanent injunctive relief. *See* Iowa R. Civ. P. 1.1501 ("An injunction may be obtained as an independent remedy by an action in equity,

> or as an auxiliary remedy in any action."). Permanent injunctive relief is an extraordinary remedy that is granted only when there is no other way to avoid irreparable harm to the plaintiff. *See Planned Parenthood of Mid–Iowa v. Maki*, 478 N.W.2d 637, 639 (Iowa 1991); *Myers v. Caple*, 258 N.W.2d 301, 304–05 (Iowa 1977).

Lewis Investments, Inc. v. City of Iowa City, 703 N.W.2d 180, 184 (Iowa 2005). "Accordingly, if a plaintiff has an adequate remedy at law, injunctive relief as an independent remedy is not available." *Lewis Investments, Inc.*, 703 N.W.2d at 185 (citing *Opat v. Ludeking*, 666 N.W.2d 597, 603 (Iowa 2003); *Sergeant Bluff–Luton Sch. Dist. v. City of Sioux City*, 562 N.W.2d 154, 156 (Iowa 1997)).

Medicaid Appeals Process

Medicaid, a cooperative federal aid program, helps the states provide medical assistance to the poor. *Lankford v. Sherman*, 451 F.3d 496, 504 (8th Cir. 2006); *see* Iowa Code § 249A.2(3), (6), (7), (10). States can draw down federal dollars to spend, if the State abides by federal requirements. Failure to comply with federal requirements may jeopardize federal funds. 42 U.S.C. §§ 1396a(a)(1)-(65), 1396(c); *See* Iowa Code § 249A.4 (introductory paragraph and subsections (6) and (9)(b)); Iowa Code § 249A.2(7).

Federal regulations at 42 CFR 438.408 provide for an appeal process for adverse benefits decisions within the Medicaid program. Presently, Medicaid benefits are delivered through managed care organizations (MCO) which are contractors to the State of Iowa. The contract between the MCO and the State requires, at provision 8.15.4, a grievance process and an appeal process that comports with 42 C.F.R. § 438.408. Further, the contract requires the MCO to provide an expedited appeal process where the Contractor provides a decision within 72 hours of receiving the appeal to accommodate emergency situations.

This appeal process to judicial review is precisely the path taken by the petitioners in *Good* and *Beale*. It allows for the development of the record with respect to medical need and

allows the decision-makers within the MCO and the Department of Human Services to weigh individual circumstances and information while applying the administrative rule.

Exceptions to Policy

Iowa Code section 17A dictates the structure for administrative rules and for exceptions to those rules. Petitioners challenge a Medicaid rule which could also be subject to a request for an exception to policy. Iowa Code § 17A.9A sets forth the criteria for seeking a waiver of an administrative rule. Upon request for a waiver, an agency may in its sole discretion issue a waiver or variance from the requirements of a rule if the agency finds, based on clear and convincing evidence, all of the following: (a) the application of the rule would pose an undue hardship; (b) the waiver requested would not prejudice the substantial legal rights of any person; the provisions of a rule subject to the request for a waiver are not specifically mandated by statute or another provision of law; (d) substantially equal protection will be afforded by other means. Iowa Code § 17A.9A(2). The Department's standards for requesting an exception to policy are set out at Iowa Administrative Code 441-1.8.

Petition for Rulemaking.

To change the rule itself, Petitioners have an adequate remedy at law by petitioning for rule-making. The statutory change in question does not require or preclude coverage of surgical transitions for transgender Iowans. It merely provides that the Iowa Civil Rights Act does not require such surgical transitions to be funded. Should the Petitioners disagree with the administrative rule currently in effect, the Petitioners can petition for rule-making under Iowa Code § 17A.7. "An interested person may petition an agency requesting the adoption, amendment, or repeal of a rule." Iowa Code § 17A.7(1).

IV. The Dispute is not Ripe

Because neither Petitioner has requested pre-authorization for the services, received a notice of decision denying the service, taken any of the steps in the appeals process, or sought relief under 17A through an exception to policy or petition for rulemaking, the matter is not ripe. Further, because the petitioners have not requested or been denied coverage, they have not experienced any discrimination that could be remedied through the suit under the Equal Protection Clause.

The ripeness doctrine prevents courts from entangling themselves in abstract disagreements. It also "protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Iowa Coal Min. Co. v. Monroe Cty.*, 555 N.W.2d 418, 432 (Iowa 1996) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)).

"While elegant-sounding in theory, judicial ripeness often proves something of a cantaloupe." *S. Dakota v. Mineta*, 278 F. Supp. 2d 1025, 1027 (D.S.D. 2003). "The difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979). The Supreme Court has directed that the ripeness inquiry requires examination of both the "fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149; *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n.*, 461 U.S. 190, 201 (1983).

Here, the administrative processes have not even begun. The petitioners may intend surgeries in the future, but they have not requested pre-authorization. Nothing in the pleadings suggests that the procedures are scheduled or that there are medical limitations on when the

surgery could be scheduled. Should the court weigh in on the medical coverage decision before requests are made, the court risks pre-empting the administrative process as a whole. It will always be to a person's benefit to rush to the courthouse with their medical information in hand rather than work through the process – a process that allows the insurer (here, Medicaid) to gather sufficient facts to make an informed decision which can then be defended in the administrative process. Judicial review is available for adverse administrative decisions. By their own pleadings, each of these petitioners has lived for years as transgender without gender affirming surgery. If an imminent need arises, expedited review is available through the administrative process.

V. Conclusion

One Iowa, Inc. lacks standing to challenge the change to the Iowa Civil Rights Act. One Iowa, Inc. is not a natural person and therefore will never be a Medicaid beneficiary so will not be subject to any of the medical coverage decisions related to transition surgeries. The Petition should be dismissed because the Medicaid beneficiaries, Ms. Covington and Mr. Vasquez, have adequate remedies at law through the Medicaid appeals process. These processes exist to provide due process for important medical coverage decisions. There are expedited procedures available if needed. Further, the petitioners have not requested exceptions to policy. The petitioners object to the Medicaid rule, but have not petitioned for rulemaking under the Administrative Procedures Act. The matter is not ripe for adjudication because the petitioners have not exercised any of the available legal remedies.

WHEREFORE, Respondents respectfully request that the Petition for Declaratory and Injunctive Relief be dismissed.

/s/ Jeffrey S. Thompson

Jeffrey S. Thompson AT0009692
Solicitor General of Iowa
Office of the Attorney General of Iowa
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
Telephone: 515-281-5164
Facsimile: 515-281-4209
Email:jeffrey.thompson@ag.iowa.gov

ATTORNEY FOR RESPONDENTS

Original E-filed.

Service to:

Rita Bettis Austen
ACLU Iowa
505 Fifth Ave, Suite 808
Des Moines, IA 50309

Shefali Aurora
ACLU Iowa
505 Fifth Ave, Suite 808
Des Moines, IA 50309
John Knight
ACLU Foundation
LGBT & HIV Project
150 North Michigan Ave., Suite 600
Chicago, IL 60601

F. Thomas Hecht
Nixon Peabody LLP
70 West Madison Street, Ste. 3500
Chicago, IL 60601

Tina B. Solis
Nixon Peabody LLP
70 West Madison Street, Suite 3500
Chicago, IL 60601

Seth A. Horvath
Nixon Peabody LLP
70 West Madison Street, Ste 3500
Chicago, IL 60601
ATTORNEYS FOR PETITIONERS

PROOF OF SERVICE

The undersigned certifies that the foregoing document was served upon each of the persons identified as receiving a copy in the following manner on this 26 day of June, 2019:

☐ U.S. Mail	☐ FAX
☐ Hand Delivery	☐ Overnight Courier
☐ Federal Express	☐ Other
☒ ECF System Participant (Electronic Service)	

Signature: /s/ *Meghan Jolly*