IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

JESSE VROEGH, Plaintiff, v. **IOWA DEPARTMENT OF CORRECTIONS, WELLMARK INC., d/b/a WELLMARK BLUE CROSS AND BLUE SHIELD OF IOWA, and PATTI WACHTENDORF, Individually and in her Official Capacities,** Defendants.	*	Case No. LACL138797 **PLAINTIFF'S RESISTANCE TO STATE DEFENDANTS' MOTION TO DISMISS DEPARTMANT OF ADMINISTRATIVE SERVICES AS A PARTY AND TO DISMISS COUNTS II, III AND IV**

COMES NOW the Plaintiff, Jesse Vroegh, by and through his undersigned attorneys, and hereby resists the State Defendants' Motion to Dismiss Department of Administrative Services as a Party and to Dismiss Counts II, III and IV. In support thereof, Plaintiff states as follows:

BACKGROUND INFORMATION

Plaintiff Jesse Vroegh ("Vroegh") was employed as a nurse for the State of Iowa Department of Corrections from 2009 through December 8, 2016. (Pet. ¶ 22). Vroegh is a man who is transgender and began undergoing medical treatment for gender dysphoria in March 2014. (Pet. ¶¶ 11-20). Vroegh has brought the following claims in this suit against the State Defendants, who have moved to dismiss:[1]

- COUNT I: Discrimination based on gender identity and sex under the Iowa Civil Rights Act against his former employer, the Iowa Department of Corrections, and

[1] Count V is against Wellmark Inc., the health insurance carrier who provides the State employee medical benefits plan which denies coverage for transgender employees for medical treatment and procedures that it covers for non-transgender employees.

supervisor, Patti Wachtendorf, in that they refused to allow Vroegh to use the restroom and locker room facilities consistent with his gender identity;

- COUNT II: Discrimination in the provision and administration of benefits on the basis of sex and gender identity against the Iowa Department of Corrections and the Iowa Department of Administrative Services, in that these Defendants denied Vroegh the same level of healthcare benefit coverage that they provide to non-transgender employees;

- COUNT III; Violation of the equal protection provisions of the Iowa Constitution based on sex against the Iowa Department of Corrections, Iowa Department of Administrative Services, and Wachtendorf, based on the Defendants' denying Vroegh the use of restrooms and locker facilities that match his gender identity and their denying Vroegh healthcare coverage for medically necessary treatment;

- COUNT IV: Violation of the equal protection provisions of the Iowa Constitution based on transgender status against the Iowa Department of Corrections, Iowa Department of Administrative Services, and Wachtendorf, for the same reasons set forth in Count III.

After exhausting his administrative remedies, Vroegh filed suit against Defendants on August 28, 2017. The State Defendants filed a pre-answer Motion to Dismiss on September 21, 2017, requesting that the Court dismiss the Department of Administrative Services ("DAS") as a party and dismiss in full Counts II, III and IV of Vroegh's Petition. For the reasons set forth below, Defendants' motion should be denied in full.

ARGUMENT

I. The Legal Standard for a Motion to Dismiss

In Iowa, the filing or granting of motions to dismiss is disfavored. *Henry v. Shober*, 566 N.W.2d 190, 191 (Iowa 1997) (overruled on other grounds in *Dickens v. Associated Anesthesiologists, P.C.*, 709 N.W.2d 122, 127 (Iowa 2006)). Iowa applies a notice pleading standard to petitions, and a petition will survive a motion to dismiss as long as the pleadings establish any possibility of valid recovery. *Cutler v. Klass, Whicher, & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991). "In determining whether to grant the motion to dismiss, a court views the

well-pled facts of the petition in the light most favorable to the plaintiff, resolving any doubts in the plaintiff's favor." *Turner v. Iowa State Bank & Trust Co.*, 743 N.W.2d 1, 3 (Iowa 2007). (citing *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004)). A defendant carries a heavy burden to succeed on a motion to dismiss:

> We recognize the temptation is strong for a defendant to strike a vulnerable petition at the earliest opportunity. Experience has however taught us that vast judicial resources could be saved with the exercise of more professional patience. Under [our rule governing motions to dismiss] dismissals of many of the weakest cases must be reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of summary judgment, or even by way of defense at trial. From a defendant's standpoint, moreover, it is far from unknown for the flimsiest of cases to gain strength when its dismissal is reversed on appeal.

Cutler, 473 N.W.2d at 181. So long as the plaintiff's petition alleges facts which, when accepted as true, establish the possibility of a valid recovery, the court must overrule the motion to dismiss. *Turner*, 743 N.W.2d at 3. Since the advent of notice pleading under the Iowa Rules of Civil Procedure, "it is a rare case which will not survive a [motion to dismiss]." *Am. Nat'l Bank v. Sivers*, 387 N.W.2d 138, 140 (Iowa 1986).

Thus, the burden is on State Defendants, as the moving parties, to establish that a sufficient basis exists to dismiss suit against them based on facts alleged on the face of the Petition. As set forth below, they cannot meet this burden.

II. The State Cannot Use the Collective Bargaining Agreement as a Shield for Discriminatory Practices.

Defendants contend that this Court should dismiss Count II of the complaint because the discriminatory insurance policy at issue is a subject of mandatory bargaining, which neither "the State [n]or DAS can alter . . . unilaterally." (Mot. to Dismiss, at 6). This argument fails. Simply put, "provisions…in a collective bargaining agreement do not override statutory civil rights

provisions." *Polk County Secondary Roads v. Iowa Civil Rights Comm'n*, 468 N.W.2d 811, 816 (Iowa 1991). In that case, Polk County sought to enforce a collective bargaining agreement provision, which purported to prohibit employees from being able to access arbitration to resolve a grievance if the employee had previously taken any action through any court or governmental agency regarding the same complaint. *Id.* at 814. The employee, who filed a complaint with the Iowa Civil Rights Commission prior to seeking arbitration, argued that it was a violation of the Iowa Civil Rights Act ("ICRA") to preempt his contractual rights to arbitrate as a result of his prior exercise of his statutory rights under ICRA. *Id.* He pointed to the provision of ICRA that makes it illegal to discriminate against a person because he or she has filed a complaint under the ICRA. *Id.* at 816. The Iowa Supreme Court upheld the determination by the Commission finding that the provision amounted to illegal retaliation, finding that "[p]rovisions for arbitration in a collective bargaining agreement do not override statutory civil rights provisions." *Id.* Indeed, it reasoned, the challenged provision "is ineffective because, as the Commission's order points out, under Iowa law there is no choice to be made. Iowa law which specifically requires state civil rights complaints initially to be filed with the Commission." *Id.* at 817. In other words, the provision of the collective bargaining agreement, because it violated ICRA, was null. It did not preempt the employee's rights under ICRA.

Vroegh's statutory right to be free from discrimination on the basis of "sex" and "gender identity," *see* Iowa Code § 216.6(1)(a), likewise may not be bargained away. In fact, to permit such contracting would contravene the fundamental principle of contract law that "an agreement that is contrary to the provisions of any statute or intends to be repugnant to general common law policy is void." *Reynolds v. Nichols & Co.*, 12 Iowa 398, 403 (Iowa 1861); *see also Miller v. Marshall County*, 641 N.W.2d 742, 751-52 (Iowa 2012) (Generally, when a portion of an

agreement is deemed invalid for being a violation of the law, that portion is not enforceable, while the remaining portions can be separated from the illegality if the invalid purpose is merely incidental to the purpose of the contract.).

Federal cases interpreting the application of Title VII to issues involving a collective bargaining agreement also support the Iowa Supreme Court's conclusion in *Polk County Secondary Roads*. *See Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999) (While federal case law interpreting Title VII is not controlling, because "the ICRA was modeled after Title VII of the United States Civil Rights Act, Iowa courts turn to federal law for guidance in evaluating the ICRA."); *see also Wright v. Winnebago Indus., Inc.*, 551 F. Supp. 2d 836, 845 (N.D. Iowa 2008) (same). Under federal law, "a collective-bargaining contract . . . may [not] be employed to violate [Title VII]." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977). "An individual's right to equal employment opportunities . . . . can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). "'[T]he rights assured by Title VII are not rights which can be bargained away-either by a union, by an employer, or by both acting in concert.'" *United States v. St. Louis-San Francisco Ry.*, 464 F.2d 301, 309 (8th Cir. 1972) (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir. 1972)). In short, it is immaterial that a discriminatory policy is the product of contractual bargaining because "[e]mployers are not shielded from liability under Title VII if discrimination results from a collective bargaining agreement." *Schiffman v. Cimarron Aircraft Corp.*, 615 F. Supp. 382, 386 (W.D. Okla. Aug. 8, 1985) (citing *Taylor v. Armco Steel Corp.*, 373 F. Supp.

885, 906 (S.D. Tex. 1973) and *NOW, Inc., St. Paul Chapter v. Minn. Mining & Mfg. Co.,* 73 F.R.D. 467, 470 (D. Minn. 1977)).[2]

Schiffman is instructive. There, the employer provided a disability insurance policy to its employees that did not cover maternity benefits in violation of the Pregnancy Discrimination Act. *Schiffman,* 615 F. Supp. at 382. The court held that the disability policy was a *per se* violation of Title VII because it drew unlawful distinctions based on pregnancy. *Id.* at 385. It rejected the defendant's argument that it was not responsible for any discrimination because the employees voted to determine policy coverage, holding that "A vote of the employees is comparable to labor union collective bargaining. Employers are not shielded from liability under Title VII if discrimination results from a collective bargaining agreement." *Id.* (internal citations omitted). The same logic applies here. DAS had responsibility for selecting the plan, and its selection of a plan that violates ICRA's prohibition of discrimination against transgender employees may subject it to liability regardless of the collective bargaining agreement. Neither the DAS nor the union can bargain away Vroegh's right to be free from discrimination.

Whether or not DAS chose the discriminatory policy challenged by Vroegh, it is liable for it, since "employers are ultimately responsible for the "compensation, terms, conditions, [and] privileges of employment" provided to employees," and "an employer that adopts a fringe-benefit scheme that discriminates among its employees on the basis of…sex…violates Title

[2] Indeed, while insurance coverage is generally subject to collective bargaining, any bargaining for purposes of creating discriminatory terms of coverage would not have been a proper subject of bargaining. *See Waterloo Police Protective Ass'n v. Pub. Employment Relations Bd.*, 497 N.W.2d 833, 835 (Iowa 1993) (finding that even if "the subject matter of the disputed item is fairly included within one of the mandatory bargaining topics listed in section 20.9," the Court must also "consider whether bargaining as to that matter would be contrary to any statute (*see* Iowa Code § 20.28) or other legal prohibition.") (citing *Aplington Community Sch. Dist. v. Iowa PERB,* 392 N.W.2d 495, 498 (Iowa 1986); *City of Mason City v. PERB,* 316 N.W.2d 851, 853 (Iowa 1982); *Marshalltown Educ. Ass'n v. PERB,* 299 N.W.2d 469, 470–71 (Iowa 1980)).

VII," regardless of the policy's derivation. *Arizona Governing Comm. For Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1089 (1983). In *Norris*, a state employer administered a discriminatory deferred compensation plan that provided women "lower monthly benefits than [men] who deferred the same amount of compensation." *Id.* at 1079. In its defense, the state contended that it was not liable under Title VII because "it [was] the companies chosen by [the state] to participate in the plan that calculate[d] and pa[id] the retirement benefits," not the state itself. *Id.* at 1086. In rejecting this argument, the Court noted that "it is well established that both parties to a discriminatory contract are liable for any discriminatory provisions the contract contains, regardless of which party initially suggested inclusion of the discriminatory provisions." *Id.* at 1090. It further explained that "[i]t would be inconsistent with the broad remedial purposes of Title VII to hold that an employer who adopts a discriminatory fringe benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a nondiscriminatory basis." *Id.* at 1091.[3]

Therefore, state Defendants cannot be shielded from liability stemming from their discrimination on the basis of sex and gender identity against Vroegh in violation of ICRA because insurance coverage was the subject of collective bargaining. For these reasons, State Defendants' arguments that Count II should be dismissed fail.

III. *Godfrey* does not Preclude Plaintiff's Constitutional Claims

State Defendants argue that Vroegh's state constitutional claims should be dismissed

[3] Even if the insurance coverage denied Vroegh is subject to a collective bargaining agreement, this court has the inherent authority to void illegal contracts or contractual provisions. *Miller v. Marshall County*, 641 N.W.2d 742, 751-52 (Iowa 2012). Moreover, "when a portion of an agreement is deemed invalid," Iowa courts may sever "the remaining portions of the agreement…[so] long as they can be separated from the illegality." *Id. Cf. Polk County Secondary Roads v. Iowa Civil Rights Comm'n*, 468 N.W.2d 811, 818 (Iowa 1991) (the Commission "clearly . . . may prevent" a clause in violation of ICRA "from being enforced.").

because the Iowa Civil Rights Act ("ICRA") provides "an adequate and appropriate remedy," citing the *Godfrey* decision. (Mot. to Dismiss at 7.) This argument fails for two reasons.

First, *Godfrey* addressed the availability of *Bivens*-type monetary damages for violations of the Iowa Constitution when monetary damages are available through the ICRA. It does not stand for the proposition that traditional, equitable forms of relief are unavailable. Even if this Court were to dismiss Vroegh's state constitutional claims for monetary damages, it should not dismiss his claims for declaratory and injunctive relief.

Second, the determination that the remedies available through ICRA were adequate *in Godfrey's particular case* does not mean that remedies available to Vroegh under ICRA are similarly adequate to address his monetary claims, because *Godfrey* calls for a case-by-case analysis of whether ICRA provides an adequate damage remedy for the challenged conduct. In this case, existing facts, which will be further developed through discovery, support a finding that the ICRA does not provide Vroegh with an adequate remedy.

1. The availability of equitable remedies for constitutional violations are not preempted by ICRA.

At most, *Godfrey* stands for the proposition that a *tort for monetary damages* for state constitutional due process or equal protection violations exists when the legislature has not provided an adequate remedy. *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017). *Godfrey* does not in any way address *constitutional claims brought in equity seeking declaratory and injunctive relief*, as brought by the Plaintiff in this case. It therefore provides no basis for dismissal of Plaintiff's state constitutional claims outright.

In *Godfrey*, a majority of the court concluded that *Bivens*-type tort claims for monetary damages are available under the Iowa Constitution. While three justices would allow for parallel state constitutional claims for damages and state Civil Rights Act claims for damages, Chief

Justice Cady would only allow state constitutional claims for monetary damages to be brought when the Iowa Civil Rights Act's remedy is inadequate. *Id.* at 877 (". . . constitutional rights are distinguishable from common law or statutory claims. . . . Because the interests being vindicated are different, parallel claims are appropriate."), 880 (Cady, C.J., concurring in part and dissenting in part) ("I concur in the [Justice Appel] opinion of the court to the extent it would recognize a tort claim under the Iowa Constitution when the legislature has not provided an adequate remedy."). But this is a separate matter from that of the availability of traditional, equitable relief for state constitutional violations. Even the dissent in *Godfrey*, while disavowing the availability of *Bivens* monetary damages in this type of action, recognizes the Court's authority to provide declaratory and injunctive relief for constitutional violations under article XII, section 1 of the Iowa Constitution. *Id.* at 883-34 (Mansfield, J., dissenting) ("[W]e have crafted remedies, such as the exclusionary rule and declaratory and injunctive relief, implementing the basic directive of article XII, section 1 that unconstitutional acts are void. What we have not done in the past 160 years is go beyond declaring unconstitutional actions void…").

Chief Justice Cady's concurring opinion stands only for the prospect that in Godfrey's case, the statutory remedies available through ICRA were adequate. It does not stand for the proposed rule Defendants assert in their Motion to Dismiss that in all cases traditional equitable remedies (declaratory, injunctive, mandamus) would not be necessary to adequately redress harms. Nor does it necessarily bar the recovery of *Bivens*-type monetary damages in all cases.

2. The adequacy of ICRA remedies to address claims must be determined on a case-by-case basis upon sufficient factual development.

As Justice Appel's lead opinion in *Godfrey* pointed out, "it is important to distinguish between preemption and the question of adequacy of the statutory remedy." *Godfrey*, 898 N.W.2d at 872. For Chief Justice Cady, too, the question of whether state constitutional claims

provide an adequate remedy must be determined on a case-by-case basis. *Id.* at 880 (". . . I find the Iowa Civil Rights Act (ICRA) provides that remedy here, *at least with respect to* Christopher J. Godfrey's claim against the state for discrimination on the basis of sexual orientation.") (emphasis added). Justice Appel's concise summary of the case's holding likewise states, "On the question of whether the Iowa Civil Rights Act provides an adequate remedy sufficient to stay any *Bivens*-type claim, a majority concludes that the remedy provided by chapter 216 is adequate *under the facts and circumstances of that case*. . ." *Id.* at 847 (emphasis added). Thus, showing that there exist statutory remedies under ICRA is not enough to preempt Vroegh's constitutional claims. The state must sufficiently prove—which it cannot do at this stage of proceedings—that the statutory remedies are adequate.

In Vroegh's case, ICRA remedies are inadequate because punitive damages are appropriate. A majority of the Court recognized that ICRA, which does not allow for the recovery of punitive damages, may not be adequate to address constitutional claims. *Id.* at 878-79, 881 (Cady, C.J., concurring in part and dissenting in part) (citing analogous U.S. Supreme Court precedent finding "without qualification, that punitive damages are 'especially appropriate to redress the violation by a Government official of a citizen's constitutional rights.'") In such cases, both the Appel and Cady opinions recognize the appropriateness of punitive damages in some *Bivens*-type state constitutional tort actions. *Id.* Chief Justice Cady was careful to point out that in the *Godfrey* case, Godfrey made "no claim that an action will not adequately provide him with compensatory damages." *Id.* By contrast, Vroegh has sought all appropriate damages and relief the Court deems just and proper under the circumstances, including punitive damages. (Am. Pet. 10.) It is simply premature for the state to argue that punitive damages should not be available to redress Vroegh's constitutional harms at this early stage.

The *Godfrey* decision is the first case to recognize the potential availability of punitive damages for violations of state constitutional rights, and there is not any other precedent setting out the standard for punitive damages in this specific context. However, the test developed for awarding punitive damages in federal *Bivens* actions against federal officials and 42 U.S.C. § 1983 actions against state employees are instructive. *See Carlson v. Green*, 446 U.S. 14, 22 (1980) (Recognizing that punitive damages would be available in a *Bivens* suit, since federal officials must "face at least the same liability as state officials guilty of the same constitutional transgression"). In the seminal case setting out a standard for awarding punitive damages in Section 1983 civil rights actions, the U.S. Supreme Court approved a jury instruction that allowed punitive damages for conduct demonstrating an evil motive, intentional wrongdoing, or reckless or callous indifference or disregard for the plaintiff's constitutional rights. *Smith v. Wade*, 461 U.S. 30, 56 (1983) (finding Missouri guard at a reformatory for youthful first offenders could be held liable for punitive damages upon a finding of reckless or careless disregard for the rights or safety of inmate after the inmate was harassed, beaten, and sexually assaulted by his cellmates); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999) (approving award of punitive damages under Title VII for intentional employment discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual," and without showing of "egregious" misconduct, while "recognize[ing] that Congress looked to the Court's decision in *Smith* in adopting" the Title VII standard).[4]

[4] While in *Davis v. Passman*, 442 U.S. 228, 248 (1979), the Supreme Court found that a former Congressional employee could seek damages in a *Bivens* action for sex discrimination but that those damages would not be available if she could sue under Title VII, *id.* at 247 n.26 (citing *Brown v. General Servs. Admin.*, 425 U.S. 820, (1976)). Suits under Section 1983 are not subject to the same limitation. *See Molnar v. Booth*, 229 F.3d 593, 599, 603 (7th Cir. 2000) (affirming award of damages in action under both Title VII and Section 1983). The Iowa Supreme Court looks to the federal courts' interpretation of the United States Constitution in construing parallel

Courts repeatedly have upheld punitive damage awards against public officials for discriminatory practices in constitutional tort claims, including in the employment context. In *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003), for example, the Eleventh Circuit affirmed an award of 13.3 million dollars in punitive damages in Section 1983 action against members and the director of the board of trustees of the library to seven Caucasian librarians who were "transferred from meaningful, supervisory positions to dead-end, nonmanagerial jobs," *id.* at 1358, because of their race., *id.* at 1350. Punitive damages were appropriate, since counsel for the trustees admitted that the trustees "knew it was a violation of federal law to transfer people on the basis of race." *Id.* at 1360. *See also Molnar*, 229 F.3d at 597 (affirming jury award of $25,000 in punitive damages in teacher's Section 1983 sexual harassment case against principal at school where she taught because jury could have found that principal "acted with malice or reckless indifference toward" the intern); *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1109 (10th Cir. 2004) (upholding jury award of punitive damages in 1983 action to African American mayoral appointee against mayor and supervisor for discharging her from her position on the basis of protected speech, against mayor for denying her a post-termination contract because of her race, and for denying her a contract and publicly disparaging her because of her association with African-American groups). *Cf. Quigley v. Winter*, 598 F.3d 938, 952-953 (8th

---

provisions of the Iowa Constitution, but "jealously reserve[s] the right to develop an independent framework under the Iowa Constitution." *NextEra Energy Resources LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 45 (Iowa 2012), *State v. Pals*, 805 N.W.2d 767, 771-72 (Iowa 2011); *Varnum v. Brien*, 763 N.W.2d 862, 896 n.23 (Iowa 2009); *Racing Ass'n Of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) (emphasis in the original). *See also State v. Null*, 836 N.W.2d 41, 70 n.7 ("A decision of this court to depart from federal precedent arises from our independent and unfettered authority to interpret the Iowa Constitution."); *State v. Baldon*, 829 N.W.2d 785, 803 (Iowa 2013) (Appel, J., specially concurring) ("[It is] well-established Iowa law that we jealously reserve our right to construe our state constitution independently of decisions of the United States Supreme Court interpreting parallel provisions of the Federal Constitution.")

Cir. 2010) (after noting that the Eighth Circuit "appl[ies] the same standard for punitive damages in [federal Fair Housing Act] cases as . . . in employment discrimination and 42 U.S.C. § 1983 civil rights cases," court approved $54,750 in punitive damages to female tenant against landlord in federal Fair Housing Act suit for sex discrimination, sexual harassment, and related claims, because landlord "admitted at trial he knew sexual harassment was unlawful" and that "he . . . was not to discriminate on the basis of sex.").

The standard used for determining the availability of punitive damages under Iowa law in tort claim contexts other than for violations of state constitutional rights is similar. Under Iowa Code section 668A.1, for example, punitive damages may be imposed to punish the defendant's "willful and wanton" disregard for the rights or safety of others, Iowa Code § 668A.1 (2017), for the purpose of deterring the defendant, and others, from repeating similar conduct in the future. *Holt v. Quality Egg, L.L.C.*, 777 F. Supp. 2d 1160, 1173 (N.D. Iowa 2011). "Willful and wanton," under Iowa Code section 668A.1 means the defendant 'has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which is usually accompanied by a conscious indifference to the consequences.'" *Id.* at 1171 (quoting *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 617 (Iowa 2000)).

The facts in this case support the applicability of punitive damages under this test. It is an outrageous and unreasonable act for the state, as an employer, to intentionally enact, enforce, and defend policies and procedures that it knew at the time constituted unlawful discrimination in violation of the Iowa Civil Rights Act and the equal protection guarantee of the Iowa Constitution. Here, Defendants had that knowledge, both from materials and guidance produced by the state itself, as well as from interpretations of an analogous federal nondiscrimination

provision in the Affordable Care Act by the federal government. The Iowa Civil Rights Commission has published and makes available for all employers in the state a "*Sexual Orientation & Gender Identity Employment Brochure"*. Iowa Civil Rights Commission, "Sexual Orientation & Gender Identity Employment Brochure," *available at* https://icrc.iowa.gov/sites/default/files/publications/2016/SOGIEmpl.pdf (hereinafter "ICRC Employer Guidance"). The Guidance specifically makes clear that the state's conduct in denying Vroegh equal access to sex-segregated facilities constitutes a violation of his rights under the ICRA:

> *Does the new law require employers to eliminate gender-segregated restrooms?*
> No. It is still legal in Iowa for employers to maintain gender-segregated restrooms. The new law does require, however, that employers permit employees to access those restrooms in accordance with their gender identity, rather than their assigned sex at birth.

ICRC Employer Guidance. The Guidance further provides that "Harassment based on sexual orientation and gender identity can include malicious conduct, sexual advances, and intentional misuse of gender specific pronouns." *Id.* Further, the Guidance specifically requires equality in the provision of employment benefits without regard to gender identity, putting State Defendants on ample notice that its employer-sponsored health insurance plans violated the Iowa Civil Rights Act:

> *Must an employer provide benefits to an LGBT employee?*
> Benefits must be provided to employees without regard to their sexual orientation or gender identity. Benefits include such things as vacation time, insurance policies, holiday time, and other things that are provided to the employees by the employer. Benefits, such as insurance, must be provided to gay and lesbian employees to the same extent that the same benefits are provided to other employees in similar circumstances.

Id.

Beyond the plain text of the guidance—and the ICRA itself—the State of Iowa and Wellmark had every reason to believe a ban on transition-related care constituted gender identity and sex discrimination based on rules developed in the analogous federal context. Defendants

knew that the federal government considered bans on transition-related care violative of the non-discrimination clause of the Affordable Care Act. On May 18, 2016, the Office of Civil Rights of the U.S. Department of Health and Human Services "issued a new final rule implementing section 1557 of the Affordable Care Act. *See* 45 CFR part 92, "*Nondiscrimination in health Programs and Activities*," 81 Fed. Reg. 31376, May 18, 2016." (Wellmark's Resp. to ICRC Compl., Sept. 12, 2016, at 2.) Indeed, in an apparent attempt to address that federal requirement of nondiscrimination in healthcare, through some process of information sharing or negotiation between Wellmark and the State of Iowa, the Iowa Correctional Institute for Women "amended its plan, effective January 1, 2017, to provide benefit exception review for 'transgender individuals, sex-specific preventative care services . . . that his or her attending provider has determined are medically appropriate.'" (Wellmark's Resp. to ICRC Req. for Info., Apr. 24, 2017, at 5.)[5]

The callous indifference to Vroegh's constitutional rights was further demonstrated when he sought to remedy his disparate treatment. Despite its knowledge that the ban on equal use of gender-segregated facilities and health insurance for people who are transgender violated Vroegh's rights to nondiscrimination and equal protection, Defendants intentionally and callously acted to deny him use of the men's facilities, misgendered him, and deprived him of medically necessary benefits, even stating to Vroegh that it would continue to do so because transgender issues were "too controversial." (Am. Pet. 5, ¶31.) Further factual development in this case through discovery further support to Vroegh's claim for punitive damages. For all these reasons, the Defendant's claim that ICRA provides an adequate remedy for Vroegh's claims is

[5] This fact also illustrates that Chapter 20 collective bargaining was no impediment to efforts to seek to comply with ICRA.

premature and ultimately likely to fail on the merits. *Cutler*, 473 N.W.2d at 181 (requiring Defendant to prove no possibility of a valid recovery).

Respectfully submitted,

SHERINIAN & HASSO LAW FIRM

By /s/ Melissa C. Hasso
Melissa C. Hasso AT0009833
E-mail: mhasso@sherinianlaw.com
521 E. Locust St., Suite 300
Des Moines, IA 50309
Telephone (515) 224-2079
Facsimile (515) 224-2321

ACLU OF IOWA

/s/ Rita Bettis
Rita Bettis, AT0011558
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 901
Des Moines, IA 50309–2316
Telephone: 515.243.3988
Fax: 515.243.8506
Email: Rita.Bettis@aclu-ia.org

ACLU LGBT and HIV Project

/s/ John Knight
John A. Knight, PHV001725
ACLU Foundation
LGBT and HIV Project
150 N. Michigan Ave., Ste. 600
Chicago, Illinois 60601

ATTORNEYS FOR PLAINTIFF

Copy to:

Thomas J. Miller
Attorney General of Iowa

Julia Kim
Julie.kim@iowa.gov

Assistant Attorney General

William A. Hill
William.Hill@iowa.gov
Assistant Attorney General

Hoover State Office Building
1305 East Walnut St.
Des Moines, IA 50319
Telephone: 515-281-5164
Fax: 515-281-4209

ATTORNEYS FOR STATE DEFENDANTS

Mary Funk
NYEMASTER GOODE
700 Walnut Street, Suite 1600
Des Moines, IA 50309
Telephone: (515) 283-8029
Fax: (515) 283-8045
Email: mef@nyemaster.com

ATTORNEYS FOR DEFENDANT WELLMARK, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on October 5, 2017.

By: _____ U.S. Mail _____ Facsimile
_____ Hand Delivered _____ Overnight Courier
_____ Certified Mail ___X_ Other: EDMS, electronic service

Signature /s/Rita Bettis