SUPREME COURT NO. 20-0484
POLK COUNTY DISTRICT COURT NO. LACL138797

**IN THE SUPREME COURT OF IOWA**

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**Jesse Vroegh,**

Plaintiff-Appellee/Cross-Appellant

v.

**Wellmark Inc., d/b/a Wellmark Blue Cross and Blue Shield of Iowa,**

Defendant-Cross-Appellee,

and

**Iowa Department of Corrections, Iowa Department of Administrative Services, and Patti Wachtendorf in her Official Capacity,**

Defendants-Appellants.

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*APPEAL FROM THE IOWA DISTRICT COURT*
*FOR POLK COUNTY*
*HONORABLE SCOTT D. ROSENBERG, JUDGE*
*AND DAVID MAY, JUDGE*

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# APPELLEE/CROSS-APPELLANT FINAL BRIEF

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Rita Bettis Austen
ACLU of Iowa Foundation
505 Fifth Ave., Ste. 808

Des Moines, IA 50309
Phone: (515) 243-3988
Fax: (515) 243-8506
Email: rita.bettis@aclu-ia.org

Shefali Aurora
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: (515) 243-3988
Fax: (515) 243-8506
Email: Shefali.Aurora@aclu-ia.org

John A. Knight*
ACLU Foundation
Lesbian Gay Bisexual Transgender & HIV Project
150 North Michigan Avenue, Suite 600
Chicago, Illinois 60601
Telephone: (312) 201-9740
E-mail: jaknight@aclu.org

Melissa C. Hasso
SHERINIAN & HASSO LAW FIRM
111 E. Grand Ave., Ste. 212
Des Moines, IA 50309
Telephone: (515) 224-2079
Facsimile: (515) 224-2321
E-mail: mhasso@sherinianlaw.com

ATTORNEYS FOR PLAINTIFF

**Admitted PHV*

**Attorneys for Plaintiff-Appellee/Cross Appellant**

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## APPELLEE ARGUMENTS

1. **Whether the trial court's instructions were correct statements of the law and whether the omitted instructions were applicable under the facts of this case.**

### Authorities

*Fry v. Blauvelt,* 818 N.W.2d 123 (Iowa 2012)

*Pavone v. Kirke,* 801 N.W.2d 477 (Iowa 2011)

*Rivera v. Woodward Res. Ctr.,* 865 N.W.2d 887 (Iowa 2015)

*Thavenet v. Davis,* 589 N.W.2d 233 (Iowa 1999)

*Weyerhaeuser v. Thermogas Co.,* 620 N.W.2d 819 (Iowa 2000)

*Haltom v. Des Moines Area Reg'l Transit Auth.,* No. 9-654/09-0190, 2009 WL 2960400 (Iowa Ct. App. Sept. 2, 2009)

*State v. Taylor,* 596 N.W.2d 55 (Iowa 1999)

*Carpenter v. Campbell Auto Co.,* 159 Iowa 52 (Iowa 1913)

*Vachon v. Broadlawns Med. Found.*, 490 N.W.2d 820 (Iowa 1992)

*Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008)

*Sommerville v. Hobby Lobby Stores*, ALS No. 13-0060C (Ill. Hum. Rts. Comm'n 2015) (May 15, 2015 Recommended Liability Determination)

*Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971)

*Cruzan v. Special Sch. Dist.,* No.1, 294 F.3d 981 (8th Cir. 2002)

*Woodbury Co. v. Iowa Civil Rights Comm'n*, 335 N.W.2d 161 (Iowa 1983)

*Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979)

*Valline v. Murken*, No. 3-137/02-0843, 2003 WL 21361344 (Iowa Ct. App. June 13, 2003)

*Renda v. Iowa Civil Rights Comm'n,* 784 N.W.2d 8 (Iowa 2010)

*Hawkins v. Grinnell Reg'l Med. Ctr.,* 929 N.W.2d 261 (Iowa 2019)

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**2. Whether the trial court abused its discretion in excluding evidence regarding Vroegh's termination and his alleged "motive" in bringing this action.**

**Authorities**

*Giza v. BNSF Ry. Co.*, 843 N.W.2d 713 (Iowa 2014)

*In re Det. of Stenzel,* 827 N.W.2d 690 (Iowa 2013)

*State v. Jordan,* 779 N.W.2d 751 (Iowa 2010)

*Kobashigawa v. Silva,* 300 P.3d 579 (Hawai'i 2013)

*Dickerman v. N. Trust Co.,* 176 U.S. 181 (1900)

*Karim v. Gunn,* 999 A.2d 888 (D.C. 2010)

*Somers v. AAA Temp Servs.,* 284 N.E.2d 462 (Ill. Ct. App. 1972)

**3. Whether the trial court properly submitted Vroegh's sex discrimination claims to the jury.**

**Authorities**

*Rivera v. Woodward Res. Ctr.,* 865 N.W.2d 887 (Iowa 2015)

*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)

*Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470 (Iowa 1983)

Iowa Code § 216.6

Iowa Code § 216.6A

*Bostock v. Clayton Cnty, Georgia*, 140 S.Ct. 1731 (2020)

*Vivian v. Madison,* 601 N.W.2d 872 (Iowa 1999)

*Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982)

*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)

*Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004)

*Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977)

*Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977)

*Voyles v. Ralph K. Davies Medical Ctr.*, 403 F. Supp. 456 (N.D. Cal. 1975)

*Radtke v. Miscellaneous Drivers & Helpers Union Loc. 638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023 (D. Minn. 2012)

*Schwenk v. Harford*, 204 F.3d 1187 (9th Cir. 2000)

*M.A.B. v. Bd. of Educ. of Talbot Cty.,* 286 F. Supp. 3d 704 (D. Md. 2018)

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*Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)

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*Tovar v. Essentia Health*, 857 F.3d 771 (8th Cir. 2017)

*Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697 (8th Cir. 2012)

*Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64 (Iowa 2013)

*Gray v. Kinseth Corp.*, 636 N.W.2d 100 (Iowa 2001)

Iowa Code § 216.18(1)

*Pippen v. State*, 854 N.W.2d 1 (Iowa 2014)

*Probasco v. Iowa Civil Rights Comm'n*, 420 N.W.2d 432 (Iowa 1988)

*E.E.O.C. v. R.G. & G.R. Harris Funeral Homes,* Inc., 884 F.3d 560 (6th Cir. 2018)

*Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016)

*Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1 (Iowa 2009)

Iowa Code § 216.9(2)

Iowa R. Civ. P. 1.925

*McConnell v. Aluminum Co. of America*, 367 N.W.2d 245 (Iowa 1985)

*Willard v. State*, 893 N.W.2d 52 (Iowa 2017)

*State v. Plain*, 898 N.W.2d 801 (Iowa 2017)

*State v. Kingery*, No. 17-1529, 2018 WL 3650352 (Iowa Ct. App. Aug. 1, 2018)

*State v. Smith*, 753 N.W.2d 562 (Iowa 2008)

Black's Law Dictionary 1583 (10th ed. 2014)

American Heritage Dictionary 1605 (5th ed. 2011)

*Conner v. Menard, Inc.*, 705 N.W.2d 318 (Iowa 2005)

**4. Whether the trial court properly allowed Vroegh's benefits discrimination claim to be submitted to the jury.**

**Authorities**

*Shumate v. Drake Univ.*, 846 N.W.2d 503 (Iowa 2014)

Iowa Code § 216.6A(2)

*Good v. Iowa Dept. of Human Servs.*, 924 N.W.2d 853 (Iowa 2018)

*Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018)

*Kadel v. Folwell*, No. 1:19CV272, 2020 WL 1169271 (M.D.N.C. Mar. 11, 2020)

*Flack v. Wisconsin Dep't of Health Servs.*, 395 F. Supp. 3d 1001 (W.D. Wis. 2019)

Iowa Code § 216.7

*Bostock v. Clayton Cnty, Georgia*, 140 S.Ct. 1731 (2020)

*City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978)

*Polk Cnty Secondary Roads v. Iowa Civil Rights Comm'n,* 468 N.W.2d 811 (Iowa 1991)

*Reynolds v. Nichols & Co.,* 12 Iowa 398 (Iowa 1861)

*Miller v. Marshall Cnty*, 641 N.W.2d 742 (Iowa 2012)

*Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)

*Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)

*United States v. St. Louis-San Francisco Ry.*, 464 F.2d 301 (8th Cir. 1972)

*Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1972)

*Schiffman v. Cimarron Aircraft Corp.*, 615 F. Supp. 382 (W.D. Okla. Aug. 8, 1985)

*Taylor v. Armco Steel Corp.,* 373 F. Supp. 885 (S.D. Tex. 1973)

*NOW, Inc., St. Paul Chapter v. Minn. Mining & Mfg. Co.,* 73 F.R.D. 467 (D. Minn. 1977)

*Waterloo Police Protective Ass'n v. Pub. Employment Relations Bd.*, 497 N.W.2d 833 (Iowa 1993)

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*City of Mason City v. PERB,* 316 N.W.2d 851 (Iowa 1982)

*Marshalltown Educ. Ass'n v. PERB,* 299 N.W.2d 469 (Iowa 1980)

## CROSS-APPEAL ARGUMENTS

**1. Whether a reasonable jury could find that Wellmark is liable as a "person".**

### Authorities

*Sahai v. Davies*, 557 N.W.2d 898 (Iowa 1997)

*Beattie v. Wells Fargo Bank, N.A.,* No. 4:09-cv-0037, 2009 WL 10703095 (S.D. Iowa July 2, 2009)

Iowa Code § 216.6

Iowa Code § 216.6A

*Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557 (Iowa 2015)

*Vivian v. Madison*, 601 N.W.2d 872 (Iowa 1999)

Iowa Code § 216.2

*Asplund v. iPCS Wireless, Inc.*, 602 F. Supp. 2d 1005 (N.D. Iowa 2008)

*Johnson v. BE & K Construction Co., LLC*, 593 F. Supp. 2d 1044 (S.D. Iowa 2009)

*Whitney v. Franklin Gen. Hosp.*, No. C 13–3048–MWB, 2015 WL 1809586 (N.D. Iowa 2015)

*Neppl v. Wells Fargo Bank, Nat'l Ass'n*, No. 4:19-CV-00387-JAJ, 2020 WL 3446280 (S.D. Iowa Mar. 27, 2020)

**2. Whether a reasonable jury could find that Wellmark is liable as an "agent".**

### Authorities

Iowa Code § 216.6

Iowa Code § 216.6A

*Boyden v. Conlin*, No. 17-cv-264-WMC, 2017 WL 5592688 (W.D. Wis. Nov. 20, 2017)

*Deeds v. City of Marion*, 914 N.W.2d 330 (Iowa 2018)

Restatement (Third) of Agency § 1.01 (Am. Law Inst. 2006)

*C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC*, 784 N.W.2d 753 (Iowa 2010)

*Pillsbury Co. v. Ward*, 250 N.W.2d 35 (Iowa 1977)

*Metro. Prop. & Cas. Ins. Co. v. Auto-Owners Mut. Ins. Co.*, 924 N.W.2d 833 (Iowa 2019)

*Vischering v. Kading,* 368 N.W.2d 702 (Iowa 1985)

*Frontier Leasing Corps. v. Links Eng'g, LLC,* 781 N.W.2d 772 (Iowa 2010)

*Vivian v. Madison*, 601 N.W.2d 872 (Iowa 1999)

*Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054 (2d Cir. 1982)

*Gulino v. New York State Educ. Dep't*, 460 F.3d 361 (2d Cir. 2006)

*City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978)

*Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994)

*Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995)

*Brown v. Bank of America, N.A.*, 5 F. Supp. 3d 121 (D. Me. 2014)

*Jones v. Montachusset Reg'l Transit Auth.*, No. 4:19-CV-11093-TSH, 2020 WL 1325813 (D. Mass. Feb. 7, 2020)

*Jones v. Montachusset Reg'l Transit Auth.*, No. 4:19-CV-11093-TSH, 2020 WL 1333097 (D. Mass. Mar. 4, 2020)

*Alam v. Miller Brewing Co.*, 709 F.3d 662 (7th Cir. 2013)

*DeVito v. Chicago Park Dist.*, 83 F.3d 878 (7th Cir. 1996)

*E.E.O.C. v. Benicorp Ins. Co.*, No. 00-014, 2000 WL 724004 (S.D. Ind. May 17, 2000)

*EEOC Compliance Manual, Section 2, § III.B.2*, *available at* https://www1.eeoc.gov/policy/docs/threshold.html#2-III-B-2

*Tovar v. Essentia Health*, 857 F.3d 771 (8th Cir. 2017)

*Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018)

David Wahlberg, *Jury awards $780,000 to two transgender women at UW in state ban of health coverage*, Wisconsin State Journal (Oct. 12, 2018), *available at* https://madison.com/wsj/news/local/health-med-fit/jury-awards-to-two-transgender-women-at-uw-in-state/article_b6452d36-c717-5d33-a9f3-298aa4a1689a.html

**3. Whether a reasonable jury could find that Wellmark is liable as an "aider and abettor".**

**Authorities**

Iowa Code § 216.11

Iowa Code § 216.2

*Blazek v. U.S. Cellular Corp.*, 937 F. Supp. 2d 1003 (N.D. Iowa 2011)

*Johnson v. BE & K Construction Co., LLC*, 593 F. Supp. 2d 1044 (S.D. Iowa 2009)

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*Asplund v. iPCS Wireless, Inc.*, 602 F. Supp. 2d 1005 (N.D. Iowa 2008)

*Ezzone v. Riccardi*, 525 N.W.2d 388 (Iowa 1994)

*Tubbs v. United Cent. Bank*, 451 N.W.2d 177 (Iowa 1990)

*State ex rel. Goettsch v. Diacide Distributers, Inc.*, 561 N.W.2d 369 (Iowa 1997)

*State v. Maxwell*, 743 N.W.2d 185 (Iowa 2008)

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*Tovar v. Essentia Health*, 857 F.3d 771 (8th Cir. 2017)

*Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018)

*Neppl v. Wells Fargo Bank, Nat'l Ass'n*, No. 4:19-CV-00387-JAJ, 2020 WL 3446280 (S.D. Iowa Mar. 27, 2020)

*Good et al. v. Iowa Dep't of Hum. Servs.*, 924 N.W.2d 853 (Iowa 2019)

*Sahai v. Davies*, 557 N.W.2d 898 (Iowa 1997)

## ROUTING STATEMENT

The Iowa Supreme Court should retain this case because it presents "substantial issues of first impression," "fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the supreme court," and "substantial questions of enunciating or changing legal principals." Iowa R. App. P. 6.1101(2)(c), (d), (f).

## STATEMENT OF THE CASE

### I. Nature of the Case

In this case, this Court is asked to decide the State Defendant's[1] appeal of a jury verdict finding it liable for sex and gender identity discrimination in employment under sections 216.6 and 216.6A of the Iowa Civil Rights Act ("ICRA"), as well as Plaintiff Jesse Vroegh's cross-appeal of the summary judgment ruling dismissing Wellmark, Inc., the third-party administrator of the State's employer-provided healthcare benefits plan. The State challenges the district court's rulings on jury instructions,

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[1] Plaintiff Vroegh refers to Defendants Iowa Department of Corrections, Iowa Department of Administrative Services, and Wachtendorf collectively as "the State."

admissibility of evidence, and submission of certain claims to the jury. Vroegh in his cross-appeal asserts three bases of liability against Wellmark as the third-party administrator of the State's facially discriminatory plan: (1) as a "person" under Iowa Code §§ 216.6 and 216.6A, (2) as an "agent" of the employer under §§ 216.6 and 216.6A, or (3) as an "aider and abettor" to the employer under § 216.11.

## II. Procedural History

On August 28, 2017, Vroegh sued his former employer, the Iowa Department of Corrections ("IDOC"); Patti Wachtendorf ("Wachtendorf"), the warden at the Iowa Correctional Institute for Women ("ICIW"); the Iowa Department of Administrative Services ("DAS"); and Wellmark, Inc. Vroegh's claims were:

- Discrimination based on gender identity and sex against his former employer, the IDOC, and supervisor, Wachtendorf, for refusing to allow Vroegh to use the restroom and locker facilities consistent with his gender identity;

- Discrimination in the provision and administration of benefits on the basis of gender identity and sex against the IDOC and the IDAS, for denying Vroegh the same level of healthcare benefit coverage that they provide to non-transgender employees; and

- Discrimination in the provision and administration of benefits on the basis of gender identity and sex against Wellmark, Inc.

(App. 51-60).

Following discovery, Vroegh and Wellmark filed cross motions for summary judgment. (App. 982-1013, 103-131, 1405). The State resisted Vroegh's motion for summary judgment but did not file its own summary judgment motion. (App. 1122-23, 1405).

On January 23, 2019, the district court denied Vroegh's motion for summary judgment against the State and Wellmark, and granted Wellmark's motion for summary judgment, finding that, as a matter of law, Wellmark could not be liable for its role in the discrimination in employment and compensation alleged by Vroegh under Iowa Code §§ 216.6, 216.6A, or 216.11. (App. 1426-31). Vroegh filed a notice of appeal from the district court's grant of summary judgment for Wellmark and proceeded to trial against the State. (App. 1509-10).

At trial, the jury found the State liable for discrimination on the basis of sex and gender identity on both of Vroegh's claims. (Supp. App. 4-7; App. 1504-05). The jury awarded Vroegh $100,000

in emotional distress damages resulting from the State denying him the use of the men's restrooms and locker room at work and $20,000 in emotional distress damages resulting from the State's denial of coverage for his medically necessary top surgery. (*Id.*).

On October 21, 2019, this Court entered an order granting Wellmark's motion to dismiss Vroegh's first appeal of the district court order granting summary judgment as interlocutory. (App. 1549). The Court provided that Vroegh could appeal from the final order of the district court following adjudication of the pending post-trial motions. (App. 1550).

On March 4, 2020, the district court entered a final order granting Vroegh's motion for attorney fees and costs and denying the State's motion for a new trial and judgment notwithstanding the verdict. (App. 1553-1620). On March 18, 2020, the State filed a notice of appeal from that final order. (App. 1621-22). Subsequently, on April 2, 2020, Vroegh filed a notice of cross-appeal against Wellmark. (App. 1623-26).

## STATEMENT OF THE FACTS

Vroegh is a man who is transgender. He was assigned the female gender at birth. (Conf. App. [hereinafter "Conf. App."] 497 at 46:8-13); (Tr. Vol. II, 120:14-24). By the third grade, he recognized that his internal knowledge that he is male did not match with his birth-assigned gender. (App. 51; Conf. App. 83, 497 at 46:8-13); (Tr. Vol II, 121:1-4). He felt pressured to play with girls, use the girl's restrooms, wear pink clothes and dresses, and generally "play the role" of a girl when he knew he belonged with the other boys. (Conf. App.498-99 at 53:12-55:20); (Tr. Vol II, 121:5-122:5). This caused him great stress and anxiety throughout his childhood. (*Id.*). In his teen years and as a young adult, Vroegh's struggle with his gender identity led to significant relationship problems with his family and diagnoses of depression and anxiety. (Conf. App. 494-95 at 21:1-23:12, 497-98 at 46:4-53:7); (Tr. Vol II, 122:6-125:19).

In July 2009, Vroegh began working at ICIW as a nurse. (Conf. App. 456-58); (Tr. Vol II, 118:4-119:6). A few years later, Vroegh was diagnosed with gender dysphoria. (Conf. App. 497 at

46:4-7, 408); (Tr. Vol II, 125:11-15; Tr. Vol IV, 134:23-135:135:7); (Ex. App. 510). Gender dysphoria, previously known as "gender identity disorder," is a condition that occurs when there is a difference between a person's experienced/expressed gender and their gender assigned at birth, resulting in significant distress if untreated. (Conf. App. 401-02, 431-32); (Tr. Vol II, 81:10-82:14; Tr. Vol IV, 122:1-122:15); (Ex. App. 7-8, 503-04). The rates of depression, anxiety, and suicide are significantly higher for those with gender dysphoria than for the non-transgender population. (*Id.*). There is medical consensus based on decades of research that hormone therapy and gender-affirming surgery are two medically necessary and effective treatments for gender dysphoria, and the accompanying distress, for many patients. (*Id.*) It is also widely recognized in the medical community that denial of access to this medically necessary treatment, including exclusion of insurance coverage, causes significant damage to mental health and quality of life. (Conf. App. 406-08, 432-33, 459-60, 461-65, 466-69); (Tr. Vol II, 91:13-25; Tr. Vol IV, 130:1-133:23; Tr. Vol II, 91:2-9) (Ex. App. 8-9, 505-10).

Vroegh experienced many serious symptoms of gender dysphoria, including pervasive depression and anxiety. (Conf. App. 494-95 at 20:18-23:12); (Tr. Vol II, 60:10-14). Since 2014, he has been treated for gender dysphoria by Joseph Freund, M.D., who has expertise in treating patients with this condition. (Conf. App. 401-10); (Tr. Vol. IV, 134:9-135:7); (Ex. App. 503-15). Vroegh has followed all medical advice Dr. Freund has given him in treating his gender dysphoria, including undergoing a social transition, which includes using the men's restrooms and locker rooms because they are consistent with his gender identity. (Conf. App. 408-09); (Tr. Vol. IV, 146:14-147:5); (Ex. App. 510-11). Vroegh also began hormone therapy with testosterone in late 2014. (Conf. App. 408-09); (Tr. Vol II, 127:21-128:10; Tr. Vol. IV, 142:16-20; 144:6-145:2); (Ex. App. 510-11). As a result, Vroegh began experiencing physical changes resulting in his body conforming more closely to one typically associated with men. It was a relief for Vroegh to have his physical body finally start to match who he knew he was internally. (Conf. App. 500-01 at 76:11-79:17); (Tr. Vol II, 127:21-128:10; Tr. Vol. IV, 145:4-15).

In accordance with Dr. Freund's treatment plan, by mid-2015 Vroegh was consistently using men's restrooms in public places. (Conf. App. 523 at 180:1-8); (Tr. Vol II, 129:5-24). By 2016, Vroegh's birth certificate and driver's license reflected his male gender. (Conf. App. 97-98); (Tr. Vol II, 131:21-135:25); (Ex. App. 23, 24). In 2016, he legally changed his name to Jesse, a name consistent with his male identity. (Conf. App. 94-96); (Tr. Vol II, 133:2-12); (Ex. App. 25-27). In short, Vroegh is a man and took steps to transition medically and socially to live consistently as a man. (Conf. App. 94-96, 549 at 152:2-7); (Tr. Vol II, 129:5-24; 131:16-135:1; Tr. Vol IV, 23:3-24:16; 145:4-147:8); (Ex. App. 317-18, 503-15).

Vroegh's transition was impeded by discriminatory treatment in his employment at ICIW. (Conf. App. 408-09); (Tr. Vol IV, 147:10-148:15); (Ex. App. 510-11). The State denied him the use of the men's restrooms and locker room at work, and coverage for his medically necessary top surgery under his employee health benefits plan.

At trial, the jury found that the State denied Vroegh the use of men's restrooms and locker room facilities consistent with his

gender identity because he is transgender, while allowing all the non-transgender male staff to use them. (Supp. App. 4-7; App. 1504-5); (Tr. Vol. VII, 135:4-22). The undisputed evidence at trial demonstrated the State's unfavorable treatment of Vroegh: banning him from using the men's restroom, threatening to discipline for doing so, and isolating and stigmatizing him by requiring him to use a separate, single-user "unisex restroom" (Tr. Vol II, 151:5-19); (Ex. App. 319-323). In order to use the unisex restroom, Vroegh was required to travel outside the medical unit of the Health Building where he worked either to a different, secured floor in the Health building or to the Administrative building. (Tr. Vol. II, 152:22-157:20). The other male employees who worked in the medical unit of the Health Building could simply use the men's restroom located there and return to work. (Tr. Vol II, 152:11-20). He was also unable to use the shower facilities, including after a pepper-spray training incident in which Vroegh and other employees doing the training were exposed to the chemical agent, and the other employees were able to shower, while Vroegh was not. (Tr. Vol II, 164:12-169:6); (Ex. App. 516-17).

At trial, the State was unable to provide any lawful basis for their refusal to let Vroegh use the male facilities consistent with his gender identity.[2] Based on the uncontroverted evidence, the jury concluded that the fact that Vroegh was transgender was the basis for the State singling him out and forcing him to use a "unisex restroom" rather than the male restrooms and locker room. (Supp. App. 4-7; App. 1504-5); (Tr. Vol. VII, 134:21-135:10).

Another key part of Vroegh's gender transition was undergoing top surgery to reconstruct his chest to accord more closely with his male gender identity. (Conf. App. 408); (Tr. Vol II, 130:4-22; Tr. Vol IV, 148:16-18); (Ex. App. 510). Typically, a transgender man's body dysphoria centers on his breasts, which are a constant reminder that his body is not "right" or consistent with his male identity, thus contributing to depression and anxiety. (Conf. App. 408); (Tr. Vol II, 90:21-91:6; Tr. Vol. IV, 132:6-11); (Ex. App. 508). Research has shown that gender-affirming surgery reduces or even eliminates symptoms of gender dysphoria in most

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[2] (*See* Part I.A., below.)

individuals, contributing to an improvement in mental health and quality of life. (Conf. App. 401-08, 433-35); (Tr. Vol II, 91:6-12; 92:24-94:6; Tr. Vol IV, 131:9-25; 132:16-144:23; Tr. Vol II, 92:22-94:9); (Ex. App. 9-11, 503-10). Access to needed medical intervention, including insurance coverage, is a critical part of successful treatment for gender dysphoria. (Conf. App. 401-08, 435-36); (Tr. Vol II, 91:13-25; Tr. Vol IV, 133:16-23); (Ex. App. 11-12, 503-15).

Consistent with the consensus of the medical and mental health professional associations, Wellmark's internal "Gender Reassignment Surgery" policy, in place since June 2013, recognized the clinical basis of gender dysphoria, the distress individuals with gender dysphoria suffer, and the medical necessity of gender-affirming surgery for individuals who meet the medical criteria. (Conf. App. 552-56); (Tr. Vol II, 133:3-139:4); (Conf. Ex. App. 16-20). In addition, the Iowa Civil Rights Commission's ("ICRC") guidance to employers states that, as of July 1, 2007, when the ICRA was expanded to include gender identity and sexual orientation, employers were required to provide insurance benefits to employees

in a nondiscriminatory manner. (Conf. App. 543-48; Ex. App. 28-29). Nevertheless, the State and Wellmark denied Vroegh insurance coverage for the gender-affirming surgery he needed.

Vroegh, as a State employee, was covered by the State's Blue Access Plan administered by Wellmark ("Plan") in 2014, 2015 and 2016. (Conf. App. 502 at 82:13-16); (Tr. Vol II, 178:22-179:9). The 2014 Plan contained the following exclusion under "Mental Health Services: **Sexual disorders and gender identity disorders." (**Conf. App. 134; Ex. App. 52). The 2015 Plan had the same "Sexual disorders and gender identity disorders" exclusion from Mental Health Services coverage, and also added the following gender identity-based coverage exclusion under "Surgery: **Gender reassignment surgery." (**Conf. App. 232); (Tr. Vol III, 140:5-142:4); (Ex. App. 151). In the 2016 Plan, the gender identity-based exclusions remained in place; "**Gender identity disorders**" were still excluded from mental health coverage, and "**Gender reassignment surgery**" was excluded from surgical coverage. (Conf. App. 323, 328; Ex. App. 243, 248).

In the fall of 2015, Vroegh sought coverage for top surgery through his Plan. (Conf. App. 562-73, 580-86); (Tr. Vol II, 130:15-22; 177:13-178:13); (Conf. Ex. App. 5-9, 10, 21-27, 28-39). His physicians submitted documentation to Wellmark confirming that the procedure was medically necessary. (Conf. App. 562-73); (Tr. Vol. III, 147:11-148:17; Tr. Vol. IV, 148:16-18); (Conf. Ex. App. 5-9, 10, 28-39). There is no dispute that Vroegh's surgery was medically necessary. (Conf. App. 562-73, 482 at 88:24-89:12, 552-56, 589-90); (Tr. Vol III, 146:9-12; 161:9-163:3; Tr. Vol. IV, 148:16-18); (Conf. Ex. App. 5-9, 10, 28-39, 43-44, 16-20). Nonetheless, Wellmark denied his request for coverage. (Conf. App. 558-561, 484 at 94:12-18); (Tr. Vol III, 145:10-145:15-146:22; Tr. Vol IV, 148:19-21; Tr. Vol II, 182:5-183:8); (Conf. Ex. App. 40-42). Vroegh appealed, and Wellmark upheld the decision to deny coverage. (Conf. App. 574-88); (Conf. Ex. App. 5-9, 10, 11-12, 21-27). The denial was based on one reason only: The Plan expressly excluded coverage for all treatment for gender dysphoria, including gender-affirming surgery, regardless of medical necessity. (Conf. App. 582, 482, 484 at 86:6-87:20; 94:3-18); (Tr. Vol III, 149:13- 150:11); (Conf. Ex. App.

23). The Plan did cover the same procedure for employees who were undergoing the procedure for medically necessary reasons other than as treatment for a gender dysphoria. (Conf. Ex. App. 475 at 49:6-12); (Tr. Vol III, 140:14-142:10). The only identified surgical exclusion in the Plan was for gender-affirming surgery (called "gender reassignment surgery" by the Plan)—surgery that only transgender people with gender dysphoria need. (Conf. App. 478 at 71:7-11; 232, 328); (Tr. Vol III, 140:14-142:10); (Ex. App. 248, 151). The *only* reason Vroegh was treated differently and denied coverage for medically necessary services was because he is transgender. (*Id.*).

Wellmark has never disputed that the Plan contained facially discriminatory language that resulted in the denial of benefits for Vroegh based on his sex and gender identity. It argues instead that it is not liable as a third-party administrator of the Plan. (App. 128, 1421). As explained above, the jury held that the State's denial of insurance coverage for Vroegh violated ICRA's prohibition against sex and gender identity discrimination. The question raised in Vroegh's cross-appeal is whether Wellmark, as a third-party

administrator of the Plan, is liable for its role in creating and administering the discriminatory Plan.

Wellmark first proposed a version of the Plan's discriminatory policy language in response to the State's Request for Proposal ("RFP"). (App. 648-714, 1259 at 19:23-20:14; Conf. App. 600 at 11:11-12:18). That Plan excluded medically necessary *mental health and counseling services* to treat gender dysphoria, but did not exclude *gender-affirming surgery*. (Conf. App. 138; Ex. App. 56). The exclusion for gender-affirming surgery was not added to the Plan until 2015. (Conf. App. 232, 473 at 39:21-41:15, 397; Ex. App. 151, 487).

This change came about because Wellmark, not the State, re-drafted the Plan to add that exclusion. (*Id.*). While Dr. Gutshall, Wellmark's Medical Director, characterized this exclusion as a "clarification" of existing unwritten policy or practice, that assertion does not overcome the genuine issue of material fact on the question of Wellmark's liability for the role it played in changing the plan language. (*Id.*) Moreover, Dr. Gutshall's interpretation of the prior policy, which said nothing about

excluding gender-affirming surgery, is itself an act of discrimination.

Indeed, the insurance billing code for Vroegh's medically necessary gender-affirming chest surgery procedure was one for a covered service, and Wellmark's own claim processing staff determined it was a covered benefit under the Plan. (Conf. App. 580; Conf. Ex. App. 21). Even so, Vroegh was denied the benefit only because of the Plan's bar on gender-affirming surgery. (Conf. App. 397, 473 at 39:21-41:15); (Tr. Vol III, 149:13-150:11); (Conf. Ex. App. 21-27); (Ex. App. 151, 487).

The record shows the State's heavy reliance on Wellmark for guidance on its decisions about which services were covered under the Plan. (Conf. App. 604 at 26:5-27:18; App. 1232-33 at 14:23-15:18, 17:17-18:23, 1272 at 16:10-17:5); (Tr. Vol V, 11:18-12:17; 35:15-36:16). Underscoring this closely intertwined relationship, the State sought advice from Wellmark in construing what benefits should be covered under Iowa Medicaid. (App. 979-81; Ex. App. 452-54).

To support its assertion that it was not responsible for the discrimination Vroegh experienced, Wellmark relied on two emails that Wellmark employee Amanda Nelson sent to State employees in June 2015 and November 2015. The first concerned the terms of Iowa Medicaid and the second responded to Vroegh's email to Wellmark asking if there was an employer-sponsored plan available that would cover his medically necessary care. (App. 128-29, 977, 979); (Tr. Vol. IV, 179:8-184:3); (Ex. App. 452; Conf. Ex. App. 14). These two emails show that Wellmark played a substantial role in denying Vroegh access to medical care, distinct from the functions exercised by the State. The record shows that DAS staff did not understand these emails to mean that Wellmark was offering DAS the option to add coverage; rather, DAS staff reasonably interpreted Amanda Nelson's emails as guidance in how to interpret the State's Plan at that time. DAS staff testified that they understood the email to mean that the Plan only excluded coverage for surgery because of the exclusionary language Wellmark had added to the Plan. (App. 1251-1253 at 33:6-38:12 ("Q: And why would you conclude that none of the plans covered that

treatment? A: Wellmark had indicated it's not currently covered." . . .Q: You didn't look at Ms. Nelson's question to you as seeking guidance as to whether they should go ahead and deny the services or not? A: No.")); (Conf. App. 397, 473 at 39:21-41:15.); (Tr. Vol. IV, 179:8-184:3); (Ex. App. 487).

Consistent with its pivotal role in determining coverage, Wellmark later successfully pushed for a new Plan which took effect in January 2017—after Vroegh's employment with the State ended—based on its determination that the exclusion of gender-affirming surgery violated the federal Affordable Care Act ("ACA") non-discrimination requirements. (App. 958-59, 1262, 1266 at 46:12-24, 48:22-49:1, 70:2-14; Ex. App 458-60).[3] Wellmark's recommended Plan change included specific remedial language removing the prior discriminatory exclusion, which Wellmark had also drafted. (App. 129, 962-63) ("The State, however, never requested to add gender reassignment surgery to its Blue Access

[3] Beyond showing Wellmark's key role in crafting the Plan, this fact also demonstrates that Wellmark and State Defendants had knowledge that the plan terms discriminated against transgender employees.

health benefit plan until after the passage of the ACA guidance in 2016 and a subsequent recommendation from Wellmark that the State add this coverage."); (Ex. App. 456-67). While it was theoretically possible for either Wellmark or the State to suggest changes to the Plan terms, in practice only Wellmark initiated such changes. (App. 1257 at 13:13-23, 1272-73 at 16:10-18:25); (Tr. Vol V, 10:15-12:16; 32:14-36:15; 38:22-39:10).

The State's Request for Proposal ("RFP") to Wellmark summarizing its requested coverage categories contained no request for the exclusion of gender-affirming surgery. (*See* App. 648-568). The RFP specifically provided that the vendor "shall comply with all applicable federal, state, and local laws, rules, ordinances, regulations and orders when performing the services under this Agreement, including without limitation, all laws applicable to the prevention of discrimination in employment . . ." (App. 701). This provision required Wellmark to comply with the ICRA's prohibition against discrimination based on sex and gender identity.

The plain language of the Plans themselves contained no exclusions for gender-affirming surgery until Wellmark added them in 2015. (Conf. App. 138, showing no gender reassignment surgery exclusion); 232, showing newly-added exclusion; 397, 473 at 39:21-41); (Tr. Vol III, 139:20-142:9); (Ex. App. 56, 151, 487).

Additional facts will be discussed as necessary to address the arguments below.

## APPELLEE ARGUMENT

### I. THE TRIAL COURT'S INSTRUCTIONS WERE CORRECT STATEMENTS OF THE LAW AND THE OMITTED INSTRUCTIONS DID NOT APPLY UNDER THE FACTS OF THIS CASE.

#### A. Standard of Review

The denial of a motion for a new trial is reviewed based on the grounds asserted in the motion. *Fry v. Blauvelt,* 818 N.W.2d 123, 128 (Iowa 2012). Review of the denial of a motion notwithstanding the verdict is limited to those grounds raised in the directed verdict motion. *Pavone v. Kirke,* 801 N.W.2d 477, 487 (Iowa 2011). Appellate courts are reluctant to interfere with a jury verdict or the district court's consideration of a motion for new trial made in response to the verdict. *Id.*

Appellate courts review jury instructions for the correction of errors at law. *Rivera v. Woodward Res. Ctr.,* 865 N.W.2d 887, 891 (Iowa 2015). Instructional errors do not merit reversal unless prejudice results. *Id.* "Prejudice occurs, and reversal is required if jury instructions have misled the jury, or if the district court materially misstates the law." *Id.* (citations omitted). Jury instructions must be considered as a whole, and if the jury has not been misled, then there is not reversible error. *Thavenet v. Davis,* 589 N.W.2d 233, 236 (Iowa 1999).

### B. Preservation of Error

The State preserved error on these issues.

### C. The "Business Judgment" Instruction Did Not Apply Because the State Gave No Nondiscriminatory Explanations for its Decisions.

A district court must give a requested instruction if the instruction (1) correctly states the law, (2) has application to the case, and (3) is not stated elsewhere in the instructions. *Weyerhaeuser v. Thermogas Co.,* 620 N.W.2d 819, 823 (Iowa 2000). It is not error for the court to refuse to give an instruction that is correct as a matter of law but not applicable to the evidence in the

case. *Haltom v. Des Moines Area Reg'l Transit Auth.,* No. 9-654/09-0190, 2009 WL 2960400, at *2 (Iowa Ct. App. Sept. 2, 2009) (citing *State v. Taylor,* 596 N.W.2d 55, 56 (Iowa 1999)); *see also Carpenter v. Campbell Auto Co.,* 159 Iowa 52, 65 (Iowa 1913); *Vachon v. Broadlawns Med. Found.*, 490 N.W.2d 820, 822 (Iowa 1992) (the submission of instructions upon issues that have no support in the evidence is error).

As the trial court noted in its Ruling, (App. 1579-82), the "business judgment rule" is inapplicable in this case because the State[4] presented no evidence of nondiscriminatory explanations for its decisions to deny Vroegh's requests to use the men's facilities and to deny him insurance benefits for medically necessary gender confirming surgery. The explanations it gave were themselves discriminatory. The only reason given at trial for denying Vroegh's requests to use the men's facilities was a desire to "balance the

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[4] The State appears to be appealing the verdict holding Wachtendorf liable in both her official and individual capacities. (Appellant Br. at 21 n.5). But the trial court granted the State's judgment notwithstanding the verdict as to Vroegh's claims against Wachtendorf in her individual capacities. (App. 1574).

interests" of other staff who purportedly expressed concerns about it; Warden Wachtendorf could articulate no other reasons. (Tr. Vol. IV, 41:21-42:11; 66:17-67:2; 68:3-70:16). The only staff member Wachtendorf identified as complaining, Chris Wolfe, denied having complained. (Tr. Vol IV, 72:8-77:12; 85:14-86:5). Even if such complaints had been made, concerns others may have about interacting with people different than them—whether it be because of race, sex, disability, gender identity, or any other ICRA-protected group—can never justify discrimination as a matter of law. This is precisely the mindset that the ICRA and other civil rights acts were enacted to combat. *See, e.g., Schroer v. Billington*, 577 F. Supp. 2d 293, 302 (D.D.C. 2008) ("Deference to the real or presumed biases of others is discrimination, no less than if an employer acts on behalf of his own prejudices."); (*Sommerville v. Hobby Lobby Stores*, ALS No. 13-0060C, at 3 (Ill. Hum. Rts. Comm'n 2015) (May 15, 2015 Recommended Liability Determination), at 11 ("the prejudices of coworkers or customers is part of what the [Illinois Human Rights] Act was meant to prevent") (adopted in relevant part by the

Commission, Nov. 2, 2016))[5]; *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (female employee could not lawfully be fired because employer's foreign clients would only work with males); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants); *cf. Cruzan v. Special Sch. Dist.,* No.1, 294 F.3d 981 (8th Cir. 2002) (school's policy allowing transgender female employees to use women's faculty restroom did not create a hostile work environment for other employees).

None of the cases the State cites in support of a "business judgment" instruction involve the facially discriminatory denial of facility access as was the case here. Rather, in each of those cases, employers put forth legitimate, nondiscriminatory reasons for personnel decisions such as deciding which applicant to hire or whether to terminate an employee. For example, in *Woodbury Co. v. Iowa Civil Rights Comm'n*, a Chinese applicant claimed race

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[5] The Recommended Liability Determination is included in the Joint Appendix. (App. 1016, 1024).

discrimination when she was not hired for a position. 335 N.W.2d 161 (Iowa 1983). On appeal, the court noted that there was substantial evidence in the record of "other legitimate reasons" for not hiring her, including differences in education and experience, which should have been considered in assessing the County's reasons. *Id.* at 166. *Woodbury County* explains that to qualify as "business judgment," "[t]he employer's stated legitimate reason must be reasonably articulated *and nondiscriminatory*, but does not have to be a reason that the judge or jurors would act on or approve . . ." *Id.* (emphasis added), citing *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979). *Valline v. Murken* underscores this point:

> The employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, *except to the extent that those judgments involve intentional discrimination.*

No. 3-137/02-0843, 2003 WL 21361344, at *5 (Iowa Ct. App. June 13, 2003) (emphasis added) (citations omitted). This case does not involve a "personnel" decision involving the evaluation of job performance or qualifications. The State presented no evidence at

trial of any *legitimate, nondiscriminatory* reasons for its decision, as its desire to "balance" concerns of others who may be uncomfortable around transgender coworkers does not meet this standard.

The State's complaint that the court's decision to not give a business judgment instruction made it "per se discrimination" for the prison to not allow Vroegh to use the facilities goes too far. Had the State presented evidence that it refused Vroegh's use of a men's restroom for a nondiscriminatory reason, for example, because it was under construction or the toilet had overflowed, the instruction may have been appropriate. But where no such nondiscriminatory reason was given, such as here, the trial court's decision to omit the instruction was correct.

The State then argues that there was a second "business judgment" explanation for its decision: The Warden's alleged belief that she had reached an agreement with Vroegh as to the restrooms he could use. But the Warden never testified that this was a reason for the decision. The only rationale she gave at trial was the need to "balance the concerns" of other staff members. (Tr. Vol. IV, 41:21-

42:11; 66:17-67:2; 68:3-70:16). Moreover, the State conceded that this was the only "judgment" behind the decision in its Motion for New Trial:

> The DOC and Wachtendorf's **articulated legitimate, non-discriminatory reason** for meeting with Plaintiff to come up with a solution to accommodate Plaintiff's request to use the men's restroom and locker room, in a prison setting, **was that they were trying to balance Plaintiff's request with staff concerns**.

(App. 1529). With no evidence of a non-discriminatory explanation for the decision, the court correctly refused to give a "business judgment" instruction. Giving the instruction under these facts would have been error. *Vachon,* 490 N.W.2d at 822.

The State also claims error in Instruction No. 17, which states:

> Employer may not discriminate against an employee based on the employee's sex or gender identity because it receives complaints from other employees or believes that others may be uncomfortable with the employee based on his sex or gender identity.

(App. 1500); (Appellant Br. at 25-26). The State does not articulate how this instruction was erroneous or provide any authority that it misstates the law. As explained above, this *is* the law, and the trial

court was required to instruct the jury accordingly.

The State's efforts to justify its discriminatory conduct in the name of "maintaining order and security" is disturbing.[6] The ICRA contains no exception for an "order and security" concern and it is in no way a legitimate, nondiscriminatory "business judgment" that would justify violating the ICRA. That mindset endorses discrimination rather than prevents it. There is no exception in the ICRA's protection against employment discrimination for the Department of Corrections, and precedent by this Court rejects the State's argument to write one into the Code. *See e.g., Renda v. Iowa Civil Rights Comm'n,* 784 N.W.2d 8, 9 (Iowa 2010) (status as inmate at Mt. Pleasant Correctional Facility did not preclude determination that Complainant was employee of the facility for purposes of her ICRC sexual harassment and retaliation claims).

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[6] One can easily conceive how the State's "maintain order and control" argument, if accepted, could be used to justify excluding inmate-employees from certain work assignments based on race, or staff members from certain prison positions based on religion, under the pretense of "avoiding disruption" and "maintaining order."

The "business judgment rule" is equally inapplicable to Vroegh's claim regarding the State's discriminatory insurance benefits. In denying the State's Motion for New Trial, the trial court correctly held that the record did not support a finding that DAS presented evidence of a legitimate nondiscriminatory purpose for denying Vroegh benefits for gender confirming surgery. (App. 1582). The State directs this Court to no such evidence in the record. Moreover, the jury indicated on the verdict form's special interrogatory that the State failed to prove that the denial of Vroegh's request for benefits was the result of a factor *other* than sex or gender identity. (Supp. App. 5-6). In sum, the business judgment rule was inapplicable in this case and the trial court followed the law in declining to give the jury instruction.

### D. The Trial Court Correctly Declined to Give a "Same Decision" Instruction.

The trial court was correct in declining to give a "same decision" instruction because the State did not plead the same decision affirmative defense and the evidence presented at trial did not support it.

After the verdict in this case was issued, the Iowa Supreme Court held in *Hawkins v. Grinnell Reg'l Med. Ctr.* that:

> In discrimination and retaliation cases under the ICRA, we apply the *Price Waterhouse* motivating-factor standard in instructing the jury and the defendant is entitled to an instruction on the same-decision defense recognized in *Price Waterhouse* **if properly pled and proved**. *See* Iowa R. Civ. P. 1.421 ("Every defense to a claim for relief in any pleading must be asserted in the pleading responsive thereto, or in an amendment to an answer made within 20 days after service of the answer, or if no responsive pleading is required, then at trial").

929 N.W.2d 261, 272 (Iowa 2019) (emphasis added). Thus, while a defendant is entitled to assert and prove a same-decision defense in a motivating factor case, it is only entitled to a same decision instruction at trial if the defense was properly pled and proved. The State has not met either of these requirements. The State never pleaded the same decision defense. (App. 82-89, *passim*; Ex. App. 495-502). The trial court was correct in holding that by failing to amend its Answer to include this affirmative defense, the State waived it. Iowa R. Civ. P. 1.421(4); (App. 1610-11).

The State now appears to argue that the trial court's conclusion that it waived this affirmative defense by failing to plead

it was erroneous but provides no authority holding so and does not explain the basis for its argument. The only clue we have is its bold-faced typography in its brief from *Hawkins,* citing Iowa R. Civ. P. 1.421 ("or if no responsive pleading is required, then at trial"), implying that the State believes this case did not require a responsive pleading. (Appellant Br. at 28). This is clearly incorrect, because a responsive pleading is required in ICRA cases. In short, this argument is completely unsupported and should be disregarded.

The "same decision" instruction was also inapplicable here because the State did not prove it at trial. To prove this defense, the defendant must show "that it would have taken the same action 'in the absence of the impermissible motivating factor.'" 42 U.S.C. §2000e-5(g)(2)(B).[7] In other words, the State would have made the same decision even if Vroegh was not transgender. The State's requested instruction was:

> If you find in favor of the Plaintiff under Instruction No. 13, then you must answer the

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[7] *See also* committee comments, 8th Cir. Model Jury Instruction 5.01, "Explanatory: "Same Decision" (same).

> following question in the verdict forms: Has it been proved by a preponderance of the evidence that Iowa Department of Corrections and/or Patti Wachtendorf would have made the same decision regardless of Plaintiff's [sex and/or] gender identity?

(App. 1387); (Tr. Vol.VI 117:13-20). The State did not dispute at trial that Vroegh is a man and that all of the other men except for Vroegh were allowed to use the men's restrooms and locker rooms. (Tr. Vol. VII, 66:17-67:2). To warrant a "same decision" instruction, the State would have had to present evidence that it would not have allowed Vroegh to use the men's restrooms and locker room even if he was a cisgender man. Not surprisingly, the State has pointed this Court to no such evidence in the record.

## II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE REGARDING VROEGH'S TERMINATION AND HIS ALLEGED "MOTIVE" IN BRINGING THIS ACTION.

### A. Standard of Review

Evidentiary rulings are reviewed on appeal for an abuse of discretion. *Giza v. BNSF Ry. Co.*, 843 N.W.2d 713, 718 (Iowa 2014). "A court abuses its discretion when its ruling is based on grounds that are unreasonable or untenable." *Id.* "A ground or reason is

untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *In re Det. of Stenzel,* 827 N.W.2d 690, 697 (Iowa 2013). Even if a trial court has abused its discretion, prejudice must be shown before the verdict will be reversed on appeal. *State v. Jordan,* 779 N.W.2d 751, 756 (Iowa 2010).

### B. Preservation of Error

The State preserved error on these issues.

### C. The Court did Not Abuse its Discretion in Excluding Evidence Regarding Vroegh's Termination.

The State sought to introduce evidence regarding Vroegh's December 2016 termination, which occurred over a year after the discriminatory acts at issue in this case began. The trial court excluded it, noting that the State had not addressed the balance of its probative value against its potential for prejudice or explained why the information was probative to Vroegh's discrimination claims. (App. 1585). Notably, the State has also failed to address these questions in its arguments to this Court. After careful analysis, the trial court exercised its discretion and held that this

evidence was irrelevant to Vroegh's sex and gender identity discrimination claims. Vroegh did not allege he was wrongfully terminated, and the Defendants did not dispute that he was prohibited use of the men's facilities or their reasons for refusing him the right to use them. Thus, "any inquiry into Vroegh's termination and related alleged dishonesty is irrelevant to this case." (App.158-86).

The State has not met its burden of proving that the court's discretionary decision on this issue was based upon grounds that are unreasonable or untenable. It merely disagrees with the court and makes the same arguments that failed below, without explaining how its probative value outweighs the prejudice to Vroegh or its relevance to the discrimination claims. The State has still not shown how it was prejudiced by the court's decision. Certainly, the jury could not properly have concluded that the decisions to deny Vroegh access to the men's facilities and benefits for medically necessary surgery were not discriminatory, had it heard evidence as to why Vroegh was fired months later. There is

no basis to override the trial court's broad discretion in excluding this evidence.

For the same reasons, the State has not shown that the trial court's decision allowing Vroegh to state that his "employment ended," as opposed to his "employment ended for unrelated reasons," was so untenable or unreasonable to constitute an abuse of discretion or that it so prejudiced the State that a new trial is warranted. The State did not object to the court's decision as to this language when the issue was decided at the pretrial hearing. (*See* Tr. Vol. I, 194:4-197:3). It also never objected to this language during trial. Finally, it is highly unlikely that the jury would have reached a different verdict on Vroegh's discrimination claims had it been told that Vroegh's employment "ended for unrelated reasons" instead of that it "ended."

### D. The Court Did Not Abuse its Discretion in Excluding Alleged Evidence of Vroegh's "Motive" in Bringing this Action.

The trial court also properly exercised its discretion in excluding highly prejudicial statements Vroegh made about Wachtendorf after his termination and a statement Vroegh made

about using damages from his case to visit a friend in Florida. (App. 1587-91; Ex. App. 518-19). The State argued to the trial court, and argues again here, that this evidence was admissible as to Vroegh's "motive" in bringing this action, and that is it somehow evidence of an unpled "abuse of process" counterclaim, with no supporting authority. (Appellant Br. at 35-37). As the trial court noted, it is well-settled that the motive of a party in bringing a claim is immaterial to resolving the merits of a dispute. *See Kobashigawa v. Silva,* 300 P.3d 579, 599-600 (Hawai'i 2013) (citing *Dickerman v. N. Trust Co.,* 176 U.S. 181, 190 (1900) ("If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits."); *Karim v. Gunn,* 999 A.2d 888, 890 (D.C. 2010) ("The motive of a party in bringing an action generally is immaterial to the question whether the action may be maintained."); *Somers v. AAA Temp Servs.,* 284 N.E.2d 462, 465 (Ill. Ct. App. 1972) ("It is generally accepted that where the plaintiff asserts a valid cause of action, [the plaintiff's] motive in bringing the action is immaterial."); (App. 1588).

The State has never argued, nor does it now, that Vroegh's claims were baseless—and such an argument is belied by the verdict below. In short, any evidence of Vroegh's alleged "motive" is irrelevant and the trial court did not abuse its discretion in excluding it.

## III. THE TRIAL COURT PROPERLY SUBMITTED VROEGH'S SEX DISCRIMINATION CLAIMS TO THE JURY.

### A. Standard of Review

Vroegh agrees that the standard of review governing jury instructions is correction of errors at law. (Appellant Br. at 38); *Rivera,* 865 N.W.2d at 891.

### B. Preservation of Error

The State has preserved error on its argument that "Vroegh cannot maintain his sex discrimination claims under the ICRA as a matter of law." (Appellant Br. at 39). The State has also preserved error on its "alternative" sufficiency-of-the-evidence argument regarding the jury's verdict that denying Vroegh use of the men's restrooms and locker rooms at work was unlawful sex discrimination.

However, the State has not preserved error on this "alternative" argument as to the denial of coverage for medically necessary gender affirming surgery because the trial court did not rule on it. (App. 1571-75 (only ruling on Vroegh's sex discrimination claim regarding use of the men's restrooms and locker room)); (Appellant Br. at 41); *see Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (an appellant's argument must both be raised and decided by the district court before the Court will decide it on appeal).

### C. Discrimination Against Someone Because He Is Transgender Is Sex Discrimination.

The State relies on *Sommers* to argue that the ICRA's prohibition of sex discrimination in employment and benefits compensation does not protect an employee from being discriminated against because he is transgender. (Appellant Br. at 39 (citing *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470 (Iowa 1983)); Iowa Code §§ 216.6, 216.6A. However, that holding in *Sommers* was based on federal caselaw which has been wholly superseded. The United States Supreme Court held in *Bostock* that discrimination against someone because they are transgender is

sex discrimination. *Bostock v. Clayton Cnty., Georgia*, 140 S.Ct. 1731, 1741-43 (2020); *see also Vivian v. Madison,* 601 N.W.2d 872, 873 (Iowa 1999) (the "Iowa courts . . . traditionally turn to federal law for guidance in evaluating the ICRA.").

In *Sommers*, this Court held that ICRA's prohibition against sex discrimination did not encompass discrimination based on "transsexualism"[8]. 337 N.W.2d at 473–74. That holding was predicated on a narrow definition of "sex" taken from the Eighth Circuit's decision in *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982), as well as other federal decisions[9] that have

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[8] "Transsexualism" and "gender identity disorder" are the former medical diagnoses used for the condition that is now diagnosed as gender dysphoria.

[9] In addition to *Sommers v. Budget Mktg., Inc.*, the Iowa Supreme Court in *Sommers* cited *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977), *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977), and *Voyles v. Ralph K. Davies Medical Ctr.*, 403 F. Supp. 456 (N.D. Cal. 1975). All cases that were decided prior to *Price Waterhouse* and are no longer treated as authoritative. *See, e.g.*, *Radtke v. Miscellaneous Drivers & Helpers Union Loc. 638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) ("In any case, the 'narrow view' of the term 'sex' in Title VII in . . . *Sommers* [*v. Budget Mktg., Inc.*] 'has been eviscerated by *Price Waterhouse*.'"); *Schwenk v. Harford*, 204 F.3d

been "eviscerated by *Price Waterhouse*" and more recently, directly overruled by *Bostock*. *Bostock*, 140 S.Ct. at 1741-43 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6th Cir. 2004).

In *Bostock*, the U.S. Supreme Court affirmed that Title VII's prohibition against sex discrimination protects a person from discrimination because of transgender status. Justice Gorsuch, writing for the majority, recognized that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 140 S.Ct. at 1741. The Court found that "at bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex." *Id.* at 1743. It was therefore unlawful sex discrimination for a funeral home to fire

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1187, 1201 (9th Cir. 2000); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 714 (D. Md. 2018).

its employee, Aimee Stephens, after she wrote the funeral home a letter explaining her plan to "live and work full-time as a woman" upon her return from her upcoming vacation. *Id.* at 1738. Title VII's "message . . . is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions." *Id.* at 1741. The Court further explained its holding with an example:

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

*Bostock*, 140 S.Ct. at 1741-42.

The Supreme Court squarely rejected the distinction the State now asks this Court to adopt. The fact that it found "transgender status… conceptually distinct from sex" was of no consequence to its holding that Title VII's protection against sex discrimination in employment protects employees from adverse employment actions because they are transgender. *Id.* at 1746-47. The Court likened

that argument to an attempt to treat "sexual harassment" or "motherhood discrimination" as something other than "sex discrimination" merely because they too are conceptually distinct. *Id.* at 1747. In all cases, "Congress's failure to speak directly to a specific case that falls within a more general statutory rule" does not "create[] a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." *Id.*

*Bostock* thus affirmed a long line of federal court cases relied on by the district court in this case, which recognized that discrimination against transgender people is sex discrimination. (App. 1561-67); *See, e.g., Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011); *Rosa v. Park W. Bank & Trust*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk*, 204 F.3d at, 1198–1203; *see also Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017) (assuming, for purposes of appeal, "that the prohibition on sex-based discrimination under Title VII . . .

encompasses protection for transgender individuals"); *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 702 (8th Cir. 2012) (same).

These cases drew on the holding of *Price Waterhouse v. Hopkins*, in which the United States Supreme Court held that sex discrimination encompasses discrimination based on a person's failure to conform to stereotypical gender norms. 490 U.S. at 250–52, 258 (plurality opinion); *see also id.* at 258-61 (White, J., concurring); *id.* at 272-73 (O'Connor, J., concurring). As the district court pointed out, this Court has adopted the *Price Waterhouse* definition of "sex" for cases arising under ICRA. *See Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 71 (Iowa 2013) ("a decision based on a gender stereotype can amount to unlawful sex discrimination.") (cleaned up); (App. 1565). And in the intervening years since *Sommers*, Iowa courts have "distanced themselves" from *Sommers*, and like the federal courts, use "'gender' interchangeably with 'sex'." (App. 1564) (citing *Nelson*, 834 N.W.2d at 74 ("Courts have generally interpreted 'sex' discrimination in the workplace to mean employment discrimination as a result of a

person's gender status") (C.J. Cady, concurring); *Gray v. Kinseth Corp.*, 636 N.W.2d 100, 101 (Iowa 2001).

Put simply, because *Sommers*' narrow definition of "sex discrimination" as excluding discrimination on the basis of transgender status is no longer good law, the State's argument has no merit.

### D. Construing ICRA's Prohibition On Sex Discrimination To Encompass Discrimination Because An Employee Is Transgender Is Required By The Broad Remedial Purpose Of ICRA.

The State attempts to revive *Sommers* despite the subsequent contrary holdings of *Bostock* and *Price Waterhouse* by arguing it would be redundant to read "sex discrimination" to include discrimination because a person is transgender. (Appellant Br. at 40). This argument fails because it contravenes the principle, expressly stated in the ICRA itself, that remedial statutes must be construed broadly to effectuate their purpose. Iowa Code § 216.18(1) (2018); *Pippen v. State*, 854 N.W.2d 1, 28 (Iowa 2014); *Probasco v. Iowa Civil Rights Comm'n*, 420 N.W.2d 432, 435 (Iowa 1988).

Legislatures often enact more specific laws to clarify existing laws of a general nature. *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes,* Inc., 884 F.3d 560, 578-579 (6th Cir. 2018), *aff'd sub nom. Bostock v. Clayton Cty., Georgia,* 140 S. Ct. 1731 (2020) (rejecting argument that passage of later federal statute "expressly prohibit[ing] discrimination on the basis of gender identity[]" meant that Title VII failed to prohibit discrimination based on transgender status since "Congress may certainly choose to use both a belt and suspenders to achieve its objectives") (quotation marks and citations omitted); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 n.12 (D. Conn. 2016) (where Connecticut legislature added language explicitly protecting gender identity to statute in question, its decision did "not require the conclusion that gender identity was not already protected by the plain language of the statute [prohibiting sex discrimination]").

As the district court recognized, this is especially true in the case of laws intended to be construed broadly so as to effectuate their purpose, like the ICRA and Title VII. (App. 1568). To artificially constrain the meaning of overlapping provisions of law

in ICRA by applying an overly stringent understanding of the canon against surplusage would flout the plain language and express purpose of the statute.

This Court has also previously recognized ICRA's overlapping antidiscrimination protections. For example, in *Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1 (Iowa 2009), the Court considered whether a jury properly entered a defense verdict for an employer sued for sex and pregnancy discrimination under the ICRA. *Id.* at 4. In noting that Section 216.2(d) of the Act "deals with pregnancy *directly*," the Court acknowledged that the Act's "general provisions," which include its prohibition against "sex" discrimination, deal with pregnancy, too. *Id.* at 6–7 (emphasis added).

As the district court pointed out, "ICRA already provides seemingly-redundant statutory protections, as does Title VII." (App. 1569-70). It violates no principles of statutory construction to recognize that discrimination against a person because he is Black is both race and color discrimination; to recognize that discrimination against a person because she is Baptist is both

religious and creed discrimination; or that discrimination against a woman because she is pregnant is both sex and pregnancy discrimination. (*Id*.).

Dual coverage is thus permissible under the Act and necessary to effectuate its remedial purpose. Discrimination against a person because he is transgender is both sex and gender identity discrimination. The State's argument to the contrary falls flat.

### E. The Jury's Verdict on Vroegh's Sex Discrimination Claims Was Sustained by Sufficient Evidence.

Devoting only a single paragraph to the argument, the State argues "alternatively" that Vroegh's sex discrimination claims were not sustained by sufficient evidence. (Appellant Br. at 41).

As a preliminary matter, this is not actually an "alternative" argument, because, as the district court recognized, it depends on the State's argument that a transgender person is not protected by ICRA's prohibition on sex discrimination. (App. 1571). Indeed, in explaining its argument, the State says, "Plaintiff did not present *any* evidence that Plaintiff was not permitted to use the men's

restroom and locker room because of his sex or that he was denied gender [affirming] surgery . . . because of his sex. All evidence centered on Vroegh's gender identity." (Appellant Br. at 41). As set forth above, this distinction fails, because discrimination against an employee because of transgender status is by definition discrimination on account of his sex. *See Bostock*, 140 S.Ct. at 1741-43.

In any case, ample evidence was presented to the jury proving that Vroegh was denied access to the men's restrooms and locker rooms on account of sex. It was uncontroverted at trial that the State allowed all male employees assigned the male sex at birth to use the men's restrooms and locker rooms, but never granted Vroegh, a man assigned the female sex at birth, permission to do the same. (Tr. Vol. II, 140:3-21; 145:3-20; 162:18-21; Tr. Vol. II, 173:4-19; 174:10-18; Tr. Vol. III, 174:1-18; 179:22-192:5); (Ex. App. 30, 327-331). Further, an email by Defendant Wachtendorf was submitted into evidence which clearly stated that Vroegh was not to use the male locker rooms or restrooms and would face discipline for using the male facilities. (Tr. Vol. IV, 49:11-23; 53:20-25; 61:14-

24); (Ex. App. 324-26). Vroegh was the only employee singled out in this way. As the district court further noted in its Ruling, "Vroegh provided evidence at trial to prove Defendants' reason for denying him access to the men's restroom was 'because [ICIW] has male staff too'" and "to not make other staff members uncomfortable." (App. 1575). This is sex discrimination because it is "*impossible*" for the State to have made the decision to denying Vroegh the use of the men's restrooms and locker room without regard to his sex.[10] *See Bostock*, 140 S.Ct. at 1741 (emphasis added).

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[10] The State argues that the trial court's JNOV Ruling "allow[s] a 'sex' discrimination claim for a *female* to prevail on a claim for *them* to use the *male* bathroom." (Appellant Br. at 42) (emphasis added). This is incorrect. As the record demonstrates, Vroegh is a man. (*See, e.g.,* Tr. Vol. II, 132:8-12; 134:6-10; 134:11-14); (Ex. App. 23, 24). This case does not in any way challenge an employer's ability to maintain sex-segregated restrooms or locker rooms. The maintenance of sex-segregated toilet facilities presents an entirely different question and has not been found to violate civil rights laws; that understanding is even explicit in some civil rights laws themselves. *See, e.g.,* Iowa Code § 216.9(2). Vroegh merely sought to be treated the same as other employees. The State allowed all employees, except for Vroegh, to use the sex-segregated restrooms and locker room aligned with their gender. But Vroegh, who is a man, was not allowed to use the men's restrooms and locker room, solely because he was transgender.

Even if the State had preserved error on it, the State's sufficiency-of-the-evidence argument regarding the denial of insurance benefits would also fail, because the jury's verdict in Vroegh's favor on this claim was supported by sufficient evidence. The jury heard uncontroverted evidence that the same procedure, when medically necessary to treat conditions other than gender dysphoria, would have been covered. (Tr. Vol. III, 141:7-142:9; 146:4-150:11; 164:8-13). Vroegh's request for pre-authorization was denied solely because it was intended to provide necessary treatment of his gender dysphoria. (*Id.*).

In sum, the jury's verdicts in Vroegh's favor on both of his sex discrimination claims were supported by substantial evidence, and the Court should deny the State's motion for a new trial.

### F. The Court's Response to the Jury's Question Regarding the Definition of Sex was Not Erroneous.

Finally, the State argues that the trial court erroneously instructed the jury as to the definition of "sex". (Appellant Br. at 41-42). The State is not entitled to a new trial on this basis because the Court's response was rooted in the caselaw cited above, was

supported by uncontroverted expert testimony at trial, and was consistent with dictionary definitions.

A trial judge has discretion to further instruct the jury during deliberations. Iowa R. Civ. P. 1.925; *McConnell v. Aluminum Co. of America*, 367 N.W.2d 245, 250 (Iowa 1985). The district court's decision will stand so long it does not rest "upon clearly untenable or unreasonable grounds." *Willard v. State*, 893 N.W.2d 52, 58 (Iowa 2017) (citation omitted). A ruling is untenable when the court bases it on an erroneous application of the law. *See State v. Plain*, 898 N.W.2d 801, 811 (Iowa 2017). In other words, an error of law constitutes an abuse of discretion. *State v. Kingery*, No. 17-1529, 2018 WL 3650352, at *2 (Iowa Ct. App. Aug. 1, 2018) (citing *State v. Smith*, 753 N.W.2d 562, 564 (Iowa 2008)).

The trial court's response to the jury accurately defined "sex" and "sex discrimination" as set forth in the cases cited above. In *Schwenk*, 204 F.3d at 1202, the court held that "under *Price Waterhouse,* 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender"; *see also Smith*, 378 F.3d at 573 (holding that the narrow definition

of sex to exclude gender-based discrimination in earlier cases "has been eviscerated by *Price Waterhouse*."); *Fabian*, 172 F. Supp. 3d at 526 ("[d]iscrimination 'because of sex'" includes the full range of "discrimination because of the *properties or characteristics* by which individuals may be classified as male or female.") (emphasis in the original); *Bostock*, 140 S.Ct. at 1741.

The trial court's definitions of "sex" and "gender identity" are also consistent with how those concepts are understood among medical and mental health professionals with expertise in the field, as shown by the unrebutted expert testimony of Dr. Freund and Dr. Priest. They testified to the underlying causes and effects of gender dysphoria and the interplay between sex assigned at birth, sex-based characteristics associated with a person's body, and gender identity. (Tr. Vol. II, 81:19-82:14; 87:6-8; Tr. Vol. IV, 120:24-122:7; 124:16-125:17; 126:5-131:3). The State presented no evidence at trial to dispute Dr. Freund and Dr. Priest's testimony regarding the meaning of "sex" and "gender identity" and the interplay between them.

The trial court's response was also consistent with dictionary definitions. Black's Law Dictionary, for example, defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender." Black's Law Dictionary 1583 (10th ed. 2014). The American Heritage Dictionary includes in the definition of "sex" "[o]ne's identity as either female or male." American Heritage Dictionary 1605 (5th ed. 2011).

The trial court was well within its discretion to define "sex" in a manner consistent with the law, the evidence the jury heard at trial, and dictionary definitions. No legal error occurred.

### G. The State Was Not Prejudiced by the Instructions Provided to The Jury Regarding Vroegh's Sex Discrimination Claims.

Finally, even if the trial court's instructions to the jury on Vroegh's sex discrimination claim had been erroneous, which they were not, the State was not prejudiced. *See Conner v. Menard, Inc.*, 705 N.W.2d 318, 322 (Iowa 2005) ("[E]rror in giving a challenged instruction will not result in reversal unless the challenging party has been prejudiced."). The State does not challenge the jury's

verdict on Vroegh's gender identity discrimination claim. (App. 1571); (Appellant's Br. *passim*). Because the jury also found in Vroegh's favor on his gender identity discrimination claims, and Vroegh did not claim separate damages on his sex and gender identity discrimination claims, the verdict in Vroegh's favor would still stand. As such, putting the merits of the argument aside, it cannot be the basis for awarding a new trial. This Court should affirm the district court ruling.

## IV. THE TRIAL COURT PROPERLY ALLOWED VROEGH'S BENEFITS DISCRIMINATION CLAIM TO BE SUBMITTED TO THE JURY.

### A. Standard of Review

The Court reviews "a district court's ruling on a motion to dismiss for the correction of errors at law. The purpose of a motion to dismiss is to test the legal sufficiency of the petition. For purposes of reviewing a ruling on a motion to dismiss, [the Court] accept[s] as true the petition's well-pleaded factual allegations, but not its legal conclusions." *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014) (cleaned up).

### B. Preservation of Error

The State only preserved error on its collective bargaining argument at the Motion to Dismiss stage. (App. 72-73; 24-28). After the jury rejected the State's attempt to shift blame to the union at trial, the State did not raise this argument again in post-trial briefing, and the trial court did not rule on that argument. (App. 1553-1620, *passim*; 1513-1536, *passim*). Therefore, the State cannot challenge the jury's rejection of its collective bargaining argument as a factual matter at trial.

The State also did not preserve error on its argument that the exclusion of coverage for gender affirming surgery could not be discriminatory as a matter of law because all employees were subject to the same discriminatory policy. (App. 70-81, *passim*; 1553-1620, *passim*); (Appellant Br. at 43-46). The page of the Ruling which the State cites in asserting error was preserved on this argument actually pertains to an entirely different argument, abandoned on appeal, that the amount of the emotional distress damages awarded by the jury was excessive. (Appellant Br. at 43 (citing App. 1606)).

### C. The Denial of Employee Health Insurance Benefits for Medically Necessary Treatment for Gender Dysphoria Violates ICRA's Prohibition Against Gender Identity and Sex Discrimination.

The State argues for the first time on appeal that because the State's employer-provided health insurance benefit "was provided equally to Vroegh" as all other employees, even though it concedes that it "did not cover gender [affirming] surgery", it could not be discriminatory as a matter of law. (Appellant Br. at 43-45). As set forth above, the State has not preserved error on this argument. Regardless, the argument fails, because the U.S. Supreme Court and this Court have already rejected the argument that a facially discriminatory policy, applied "equally", is lawful.

The ICRA is explicit in barring discrimination in the provision of employee benefits on the basis of gender identity or sex. Iowa Code § 216.6A(2)(a), (b). There was no dispute at trial that the State's employer-provided insurance benefits plan categorically prohibited transgender individuals from receiving insurance benefits for surgical care that was available to non-transgender individuals for conditions other than gender dysphoria. Specifically, the mastectomy procedure for which Vroegh sought coverage pre-

approval, which was denied, was a covered benefit. The undisputed record shows that the only basis for the denial was that his mastectomy procedure was intended to treat his gender dysphoria—a condition only affecting transgender people. (Tr. Vol. II, 182:5-22; Tr. Vol. III, 141:7-142:9; 146:4-150:11; 164:8-13); (Conf. Ex. App. 40-42).

This Court has already determined that such an exception was discriminatory on the basis of gender identity under ICRA.[11] *Good v. Iowa Dept. of Human Servs.*, 924 N.W.2d 853, 862 (Iowa 2018). The exclusion is sex discrimination for the same reason it is gender identity discrimination. *See* cases cited in Section III, above. *See also Boyden v. Conlin*, 341 F. Supp. 3d 979, 982 (W.D. Wis. 2018) (finding State of Wisconsin's denial of healthcare coverage for gender-affirming surgery to transgender state employees violated federal equal protection clause, Title VII, and the Affordable Care

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[11] The legislature's subsequent amendment to ICRA purporting to reauthorize this discriminatory exclusion in Iowa's Medicaid rules was limited to section 216.7, governing public accommodations; the legislature left intact the nondiscrimination requirements in employment, pay and benefits under sections 216.6 and 216.6A. (2019 Iowa Acts, HF766, Division XX).

Act); *Kadel v. Folwell*, No. 1:19CV272, 2020 WL 1169271, at *7 (M.D.N.C. Mar. 11, 2020) (finding state employees have a cognizable claim under federal equal protection clause, Title VII, and the Affordable Care Act for the denial of their gender-affirming surgery); *Flack v. Wisconsin Dep't of Health Servs.*, 395 F. Supp. 3d 1001 (W.D. Wis. 2019) (Wisconsin Medicaid provision denying coverage for gender-affirming surgery and hormones violated federal equal protection clause, Affordable Care Act, and the Medicaid Act).

More generally, the United States Supreme Court has rejected the principle the State advances that a facially discriminatory policy is nonetheless nondiscriminatory because it governs everyone "equally". In *Bostock*, the Court reflected on *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), in which it struck down an employer provided pension fund that required women to make larger contributions than men, even though the rule was based on "a statistically accurate statement about life expectancy." *Bostock*, 140 S.Ct. at 1734. The Court pointed out that "a rule that appears evenhanded at the group level

can prove discriminatory at the level of individuals." *Id.* "The employer violated Title VII because, when its policy worked exactly as planned, it could not 'pass the simple test' asking whether an individual female employee would have been treated the same regardless of her sex." *Id.* (citing *Manhart*, 435 U.S. at 711).

The exclusion at issue facially prohibited coverage for the same procedure that was covered when medically necessary, other than to treat gender dysphoria. The exclusion therefore fails the *Manhart/Bostock* test, because you cannot administer the challenged exclusion of coverage for medically necessary surgery without regard to an employee's sex and gender identity.

The State's argument is thus unpreserved, illogical, and foreclosed by precedent. This Court should affirm the district court.

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

The State's collective bargaining argument fails both as a matter of law, and because the jury subsequently rejected it as a factual matter at trial.

Taking Vroegh's pled facts as true, as required at the motion to dismiss stage, the court determined that Vroegh "established a valid possibility [of recovery] based upon the court's decision in *Polk Cnty Secondary Roads v. Iowa Civil Rights Comm'n* where the court held that 'the arbitration of civil rights violations is against public policy [and] [p]rovisions for arbitration in a collective bargaining agreement do not override statutory civil rights provisions.'" 468 N.W.2d 811, 816 (Iowa 1991); (App. 73).

In that case, Polk County sought to enforce a collective bargaining agreement prohibiting employees from accessing arbitration if the employee had previously taken any action on the matter through any court or governmental agency. *Polk Cnty. Secondary Roads,* 468 N.W. 2d 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 ICRA to preempt his contractual rights to arbitrate as a result of exercising his 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 an ICRA complaint. *Id.* at 816. This Court found that the provision

amounted to illegal retaliation, and that collective bargaining agreements could not override the ICRA. *Id.* To the contrary, the provision of the collective bargaining agreement was null because it violated the ICRA. *Id.* at 817.

Vroegh's statutory right to be free from discrimination on the basis of sex and gender identity likewise may not be bargained away. 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 Cnty.*, 641 N.W.2d 742, 751-52 (Iowa 2012) (remaining portions of an agreement are not invalidated and can be separated from the nullified illegality, so long as the invalid purpose is merely incidental to the purpose of the contract.).

Federal cases interpreting the application of Title VII to issues involving collective bargaining agreements also support this Court's conclusion in *Polk County Secondary Roads*. 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, 97 S. Ct. 2264, 2274, 53 L. Ed. 2d 113 (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, 38, 94 S. Ct. 1011, 1015, 39 L. Ed. 2d 147 (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)).[12]

"[E]mployers 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 VII," regardless of the policy's derivation. *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1089, 1091, 103 S. Ct. 3492, 3502-03, 77 L. Ed. 2d 1236 (1983) ("It would be inconsistent with the broad remedial purposes of Title VII to hold that an employer

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[12] 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)).

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.").

Thus, the State is liable for providing an employee health insurance benefits plan that violates the ICRA's prohibition of discrimination against transgender employees, regardless of any collective bargaining agreement. The trial court's ruling rejecting the State's argument to dismiss DAS defendants on the basis of the collective bargaining agreement was correct as a matter of law. (App. 72-73).

The jury also rejected the State's collective bargaining argument as a factual matter. While the State attempted to shift blame to the union at trial, Vroegh elicited testimony by DAS officials that "the State had the ultimate authority and responsibility to determine the terms and coverage for the health benefit plans." (Tr. Vol. II, 69:4-10; Tr. Vol V, 24:16-20; 35:5-25; 36:1-12; 39:7-11). Vroegh also introduced evidence that the union never agreed to the discriminatory exclusion of coverage for medically necessary gender affirming surgery during collective

bargaining; in fact, such an agreement was not possible because while the State's health plan changed annually, collective bargaining occurred every two years. (Tr. Vol. V, 44:1-45:23; 52:16-57:11; 61:6-13). Dr. Guttshall, Wellmark's Medical Director, also testified that the sole basis for the denial of Vroegh's surgery was the State's exclusion, which the State had authority to change. (Tr. Vol. III, 141:7-142:9; 146:4-150:11; 164:8-13). The State did not challenge the jury's factual finding on this matter after trial, and as such has no factual basis to make its collective bargaining argument on appeal.

Because the State's argument fails as a matter of law and fact, this Court should reject it and uphold the jury's verdict against the State.

## CROSS-APPEAL ARGUMENT

### I. VROEGH WAS ENTITLED TO A JURY TRIAL ON THE MERITS OF HIS ICRA CLAIMS AGAINST WELLMARK.

In resisting summary judgment, Vroegh demonstrated a genuine issue of material fact on the questions whether Wellmark is directly liable to Vroegh (1) as a "person" under sections 216.6

and 216.6A of the ICRA, (2) as an agent of the State under the same sections, and (3) as an aider and abettor of the State under section 216.11. Because Wellmark failed to meet its substantial burden of showing an absence of any material factual disputes, the district court's grant of summary judgment in Wellmark's favor should be reversed and Wellmark's liability under one or more of the theories asserted by Vroegh must be determined by a jury.

### A. Error Preservation

Vroegh preserved error on each of his ICRA claims against Wellmark in his resistance to Wellmark's motion for summary judgment. (App. 1143, *passim*; *see generally* 1420-1430).

### B. Standard of Review

This Court reviews "a decision by the district court to grant summary judgment for correction of errors at law. Summary judgment is proper when the movant establishes there is no genuine issue of material fact and it is entitled to judgment as a matter of law. The burden is on the moving party to demonstrate that it is entitled to judgment as a matter of law." *Goodpaster v. Schwan's Home Servs., Inc.*, 849 N.W.2d 1, 6 (Iowa 2014) (cleaned

up). In determining whether the moving party has met this burden, this Court "view[s] the record in the light most favorable to the nonmoving party. Even if facts are undisputed, summary judgment is not proper if reasonable minds could draw from them different inferences and reach different conclusions." *Id.* (cleaned up).

### C. A Reasonable Jury Could Find that Wellmark is Liable as a "Person".

The trial court determined that Wellmark could not be liable as a person under the ICRA based on its reading of *Sahai* and its erroneous recitation of facts in Wellmark's favor:

> [I]t is undisputed that the State selected the coverage it wished to provide under the plan. Wellmark could not expand the available coverage. It is also undisputed that the State's chosen plan did not provide coverage for care related to gender dysphoria. Therefore, as the administrator of the State's plan, Wellmark had to deny Vroegh's request for care. Wellmark was not in a position to act otherwise.

(App. 1427) (citing *Sahai v. Davies*, 557 N.W.2d 898, 901 (Iowa 1997) and *Beattie v. Wells Fargo Bank, N.A.,* No. 4:09-cv-0037, 2009 WL 10703095, at *5 (S.D. Iowa July 2, 2009)). The court cited no record evidence to support these purportedly "undisputed" facts. Furthermore, it ignored the facts and arguments showing the

important role Wellmark played in denying Vroegh coverage set forth in Vroegh's Resistance to Wellmark's motion. (App. 1427, 1159-60). The court also granted summary judgment based on *its own resolution of a disputed fact* in finding that the State had a policy or practice of denying coverage for gender-affirming surgery prior to the suggestion of Wellmark's medical director, Dr. Guttshall, to add the exclusion of coverage for gender-affirming surgery to the plan language. (App. 1428). The court made this factual determination despite its acknowledgment that there existed a genuine dispute of material fact on that matter and failed to construe these facts favorable to Vroegh as the nonmoving party as required. (App. 1427-28).

To the contrary, viewing the facts in Vroegh's favor, a reasonable jury could find Wellmark directly liable under sections 216.6 and 216.6A as a "person" that discriminated against Vroegh because of its role in designing and administering the discriminatory Plan. The ICRA explicitly bars discrimination in benefits paid to employees on the basis of the employee's gender

identity and sex. Iowa Code §§ 216.6; 216.6A; *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 564 (Iowa 2015).

Under the ICRA, both employers and non-employer "persons" are liable for engaging in employment discrimination. Iowa Code § 216.6(1)(a) ("It shall be an unfair or discriminatory practice for any . . . *person* to . . . discriminate in employment against any applicant for employment or any employee.") (emphasis added); *Vivian*, 601 N.W.2d at 874 (finding that "ICRA is sufficiently distinct from Title VII [with respect to individual liability for employment discrimination] to require an independent analysis" and holding non-employer supervisor directly liable.) "Person" is defined in the ICRA as, "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, and the State of Iowa and all political subdivisions and agencies thereof." Iowa Code § 216.2(2).

Therefore, under the plain text of the ICRA, a party may be liable for employment discrimination even if it is not an employer. *Sahai*, 557 N.W.2d at 901 (finding that illegal discrimination has occurred when any "[p]erson . . . discriminate[s] in employment

based on" a prohibited characteristic under the ICRA, including "some situations in which a person guilty of discriminatory conduct is not the actual employer of the person discriminated against[.]"). The ICRA is therefore different from Title VII, which applies only to employers, employment agencies, and labor organizations. *Id.;* 42 U.S.C.A. § 2000e-2.

Notwithstanding the ICRA's breadth, this Court in *Sahai* found as a factual matter that the third-party physician and clinic were not liable because played no role in the employer's adverse hiring decision. *Sahai,* 557 N.W. 2d at 901. "The clinic's role was advisory" based on "independent medical judgment, whereas the employer decided how to use that advice in making an employment decision." *Id.*

Similarly, in *Vivian,* this Court recognized that liability under ICRA is broader than under Title VII, reaching non-employer "persons," such as supervisors who under § 216.6(1)(a) may be individually liable for employment discrimination. 601 N.W.2d at 874. Giving the word "person" the same meaning as "employer" "would strip the word 'person' of any meaning and conflict with our

maxim of statutory evaluation that laws are not to be construed in such a way as to render words superfluous." *Id.* at 878.

In *Asplund*, the federal district court also recognized that "under ICRA a plaintiff's direct supervisor may be held individually liable for his unfair and discriminatory practices." 602 F. Supp. 2d 1005, 1010 (N.D. Iowa 2008). In denying a motion to dismiss, the court relied on the allegations that the supervisor's name was listed on the letter terminating the plaintiff and had retaliated against the plaintiff for reporting sexual harassment. *Id.* at 1011.

Furthermore, in *Johnson v. BE & K Construction Co., LLC*, the federal district court determined that under both ICRA's direct liability for "persons" provision and its "aiding and abetting" provision, an African American employee could sue her former employer's client for demanding that her employer terminate her for conduct that did not result in termination for white employees. 593 F. Supp. 2d 1044, 1050 (S.D. Iowa 2009). The *Johnson* opinion cited *Sahai* and *Vivian* in reasoning that the plaintiff's complaint had alleged facts, which if true, stated a claim under the ICRA, such that the plaintiff was entitled to discovery to support her claim that

the defendant was "in a position to control [the employer's] hiring decisions." *Id.* at 1049, 1050; *see also Whitney v. Franklin Gen. Hosp.*, No. C 13–3048–MWB, 2015 WL 1809586, at *9 (N.D. Iowa 2015) (unpublished decision) (holding corporations providing management services to hospital could be liable under ICRA for discrimination against hospital employee).

More recently, in *Neppl v. Wells Fargo Bank, Nat'l Ass'n,* the federal district court emphasized that "[t]he Iowa Supreme Court has relied on the ICRA's separate usage of the words "person" and "employer" to find that the Iowa legislature intended to "hold a 'person' subject to liability separate and apart from the liability imposed on an 'employer.' No. 4:19-CV-00387-JAJ, 2020 WL 3446280, at *3 (S.D. Iowa Mar. 27, 2020) (reconsideration denied, No. 4:19-CV-00387-JAJ, 2020 WL 3446174 (S.D. Iowa June 3, 2020)). The court made clear that supervisory status is not a prerequisite for liability, even though it dismissed the individual defendant supervisor, finding that providing a negative employment reference for a former employee who had complained

of discrimination was insufficient "control" over the hiring decision to support liability. *Id.*

A reasonable jury could conclude that Wellmark's role with respect to the discrimination Vroegh experienced far exceeded that of the physician in *Sahai*, or the individual giving a negative reference in *Neppl,* and was at least as substantial as the role of the non-employer defendants in *Vivian*, *Asplund*, and *Johnson*. Viewing the facts in Vroegh's favor, the jury could find that Wellmark was the driving force in excluding gender-affirming surgery from coverage in the 2015 Plan. (Conf. App. 232, 397, 473 at 39:21-41:15); (Tr. Vol. III, 141:7-142:9; 146:4-150:11; 164:8-13); (Ex. App. 151, 487). As well as in denying Vroegh's preauthorization request for his medically necessary mastectomy, despite its own acknowledgement that a medically necessary mastectomy is a covered benefit for conditions other than gender dysphoria. (App. 1244 at 86:6-20; Conf. App. 580-84); (Tr. Vol. III, 135:4-139:6; 163:24-165:11); (Conf. Ex. App. 21-27).

As a factual matter, Wellmark played a critical role in setting the terms of the discriminatory employment benefits policy. What

is more, unlike the physician in *Sahai*, Wellmark's role was at minimum to administer the discriminatory benefits policy with respect to all State employees. Further, unlike the individual defendant in *Neppl,* who only provided a negative employment reference, Wellmark was in a position to effectuate an employment practice. *See Neppl*, No. 4:19-CV-00387-JAJ, 2020 WL 3446280, at *4. A reasonable jury could find that Wellmark was in a position of control in relation to the decision to deny Vroegh coverage under his employer-provided health insurance coverage.

Other record facts, when viewed in Vroegh's favor, also support a finding that Wellmark was a decisionmaker here. Like the non-employer defendant in *Asplund*, Wellmark's name, not the State, was on Vroegh's written claim denials and on the ultimate denial of his appeal. (Conf. App. 558-561, 580-504; Conf. Ex. App. 21-27, 40-41, 11-12). Wellmark's customer service agents, not DAS employees, were Vroegh's point of contact. (*Id.*). And like the non-employer defendant in *Asplund*, both Wellmark and the State, and often Wellmark acting on its own initiative, made the discriminatory decisions against Vroegh. Finally, as in *Johnson*,

Wellmark was in a position to exercise significant control over the design and administration of the discriminatory Plan, and did in fact exercise significant control over the discriminatory provisions governing Vroegh's care. (Conf. App. 600 at 11:11-12:18, 232, 473 at 39:21-41:15, 397; App. 648-714, 1259, at 19:23-20:14; Ex. App. 151, 487).

The trial court ignored all this record evidence showing the substantial control Wellmark had over an essential aspect of Vroegh's employment—his access to medically necessary care under his employee health benefits coverage. A reasonable jury, viewing the facts in Vroegh's favor, could conclude that Wellmark's role in plan design and administration was sufficient to hold Wellmark liable for its discriminatory actions as a "person" under the ICRA sections 216.6 and 216.6A.

Given the genuine dispute of material fact on this issue, the trial court's summary judgment ruling for Wellmark should be reversed to allow Vroegh's claims against Wellmark to be decided by a jury.

### D. A Reasonable Jury Could Find that Wellmark is Liable as an "Agent".

The trial court also erred in granting Wellmark's motion for summary judgment on Vroegh's claims that Wellmark discriminated against him as an *agent* of the State under Sections 216.6 and 216.6A. (App. 1429). It held that "an independent contractor who administers a health plan according to an employer's chosen terms should not be considered 'an agent of [the] employer with respect to employment practices, but rather a provider or vendor of services.'" (*Id.*) (citing *Boyden v. Conlin*, No. 17-cv-264-WMC, 2017 WL 5592688, at *3 (W.D. Wis. Nov. 20, 2017) (hereinafter "*Boyden* MTD Order"). The court labeled this finding an issue of law and failed to identify any record facts to support a ruling under the legal standard set by this Court for determining the existence of an agency relationship.

The district court erred in two ways in rejecting Vroegh's agency claim: (1) it resolved a genuine dispute of material fact against Vroegh in deciding that only the State determined the terms of the discriminatory Plan; and (2) it erred in holding that a third-party administrator of an employer's discriminatory health

care plan cannot act as an employer's agent as a matter of law. Because a reasonable jury could conclude that Wellmark acted as the State's agent in discriminating against Vroegh, the court's grant of summary judgment to Wellmark on this theory of liability should also be reversed.

Under the ICRA, non-employers may be liable as agents of the employer. In setting forth the standard for determining whether an agency relationship existed between an employer and a third-party in ICRA cases, this Court cited the Restatement (Third) of Agency defining agency as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Deeds v. City of Marion*, 914 N.W.2d 330, 349 (Iowa 2018) (citing Restatement (Third) of Agency § 1.01, at 17 (Am. Law Inst. 2006) (quotations omitted)). In *Deeds,* the Court determined that a physician hired by the City, as the employer, to determine medical fitness of its job applicants for an emergency

firefighter position, was not acting as an agent of the employer. *Id.*[13] The Court reasoned that "there [was] no evidence that the City 'controlled' or had a right to control *how* [the third-party physician] performed her physical examinations; rather, she exercised her own independent medical judgment." *Id.*

But in this case, there is record evidence supporting Wellmark's description of itself as acting under the State's control in Plan design and administration and the record supports its claim that it was acting as an agent for the State, as set forth below. Under the agency analysis set forth in *Deeds*, and giving Vroegh all favorable inferences, a reasonable jury could find Wellmark liable as the State's agent.

Wellmark has tried to have it both ways in evading liability for its role in discriminating against Vroegh. It has argued *both* that it cannot be found to be a "person" engaging in a discriminatory employment practice because it was "merely" a third-party

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[13] The Court in *Deeds* addressed the question of whether the physician acted to aid and abet the discrimination separately, which is discussed in I.E of this Argument, below.

administrator acting under the control of the State in the way in which it decided health benefit claims *and* that it is not an "agent" of the State because it was acting independently of the State and was not subject to the State's control. *Compare* (App. 118-19 ("between the State and Wellmark, the State was and is responsible for maintaining, designing, and funding its health benefit plans . . . the State is ultimately responsible for the denial of benefits; it has the right to make final determinations regarding claims, appeals, and claims exceptions")) *with* App. 121 ("the State does not control or have a right to control how Wellmark performs its administrative duties")). But either way—acting independently as a "person" or as the State's agent—a jury could find Wellmark liable for its role in the discrimination.

In support of its argument that it was not an agent of the State, Wellmark relied below on its MSA with the State. It argued that the MSA disclaims an agency relationship between it and the State and that it "[m]erely administer[ed] the State's chosen plan in accordance with its terms." (App. 120-21, 720-27; Ex. App. 332-451). However, agency relationships may arise outside of a formal

contract. *See C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC*, 784 N.W.2d 753, 759 (Iowa 2010) (evidence of agency relationship sufficient to defeat summary judgment motion, despite contract language between presumptive agent and principal disavowing agency). This Court explained that "although the contracts state that Royal Links is not an agent of C & J, such a contractual statement is not necessarily conclusive as to the non-existence of such a relationship." *Id.* at 760 (quotation and citation omitted). Therefore, Wellmark cannot avoid the existence of an agency relationship between it and the State based solely on the language of its written contract.

Moreover, the existence of an agency-principal relationship is typically a factual question. *Pillsbury Co. v. Ward*, 250 N.W.2d 35, 38 (Iowa 1977); *Metro. Prop. & Cas. Ins. Co. v. Auto-Owners Mut. Ins. Co.*, 924 N.W.2d 833, 841 (Iowa 2019) ("Whether an agency relationship exists under these circumstances is a question of fact."). "An agency relationship may be actual (express or implied) or apparent." *C & J Vantage Leasing,* 784 N.W.2d at 759. "For apparent authority to exist, the principal must have acted in such

a manner as to lead persons dealing with the agent to believe the agent has authority." *Id.* (citing *Vischering v. Kading,* 368 N.W.2d 702, 711 (Iowa 1985)); *see also Frontier Leasing Corps. v. Links Eng'g, LLC,* 781 N.W.2d 772, 776 (Iowa 2010) ("Apparent authority is authority the principal has knowingly permitted or held the agent out as possessing."). Thus, while the MSA between the State and Wellmark is one piece of evidence that *the fact-finder*—not the district court on summary judgment—may consider in determining whether an agency-principal relationship existed, it is not determinative.

Here, there is record evidence that the State held Wellmark out as the authority in determining coverage claims and appeals of claim denials. Wellmark alone responded to Vroegh's and other State employees' appeals, and employees who were dissatisfied with Wellmark's decision had no right to appeal that decision to the State. (Conf. App. 278-80, 558-60, 562-57; App. 1260 at 41:1-19, 1240-46 at 24:23-34:10, 87:24-94:18); (Tr. Vol III, 130:13-17; 143:21-22); (Ex. App. 197-99; Conf. Ex. App. 40-42, 5-9, 10). The State relied heavily on Wellmark to act on its behalf both as to Plan

design and administration. (Conf. App. 473 at 39:21-41:15, 397; App. 1273-74 at 18:4-25, 27:22-28:14); (Tr. Vol V, 11:18-12:17; 35:15-36:16); (Ex. App. 487).

The First, Second, and Seventh Circuits have held that a third party such as an insurance company that exercises control over an important employment benefit may be sued as an "employer" even under the narrower statutory language found in Title VII and the ADA. For example, in *Spirt v. Teachers Ins. & Annuity Ass'n*, the Second Circuit held that two independent insurance entities that managed a state university's retirement program could be held liable as an "employer" under Title VII. 691 F.2d 1054, 1062-63 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983). The court held that the definition of an "employer" under Title VII was not limited to the common law definition of that term; rather, "it is generally recognized that the term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved

individual as that term has generally been defined at common law." *Id.* at 1063 (quotation and citation omitted). The court concluded that the defendant insurance companies, "which exist[ed] solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, [were] so closely intertwined with those universities, . . . that they may be deemed an 'employer' for purposes of Title VII." *Id.*[14]

In addition, the *Spirt* court looked to the purpose underlying Title VII of addressing employment discrimination, which is shared by the ICRA. *Id.* Relying on precedent from the United States Supreme Court[15] and other federal courts of appeals, the *Spirt* court

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[14] While subsequent cases in the Second Circuit have cautioned against a "broad reading" of the *Spirt* decision, they have also reaffirmed the decision's core holding that "where an employer has delegated one of its core duties to a third-party that third-party can incur liability under Title VII." *See Gulino v. New York State Educ. Dep't*, 460 F.3d 361, 377 (2d Cir. 2006).

[15] *Spirt* relied on the U.S. Supreme Court's decision in *City of Los Angeles, Dep't of Water & Power v. Manhart*, where the Court stated: "We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer." 435 U.S. 702, 718, n. 33 (1978).

reasoned that allowing employers to delegate the administration of discriminatory programs to third parties, thereby immunizing the employer from liability, would "seriously impair the effectiveness of Title VII." *Id.*

Similarly, the First Circuit held that two independent insurance entities—including the trust that administered the employer's health benefit plan—could be sued under the Americans with Disabilities Act (ADA) for discriminatory healthcare coverage.[16] *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 16-18 (1st Cir. 1994). In that case, an HIV-positive employee of an automotive parts wholesale distributor sued both the company's self-funded medical reimbursement plan, and the trust that administered the plan,

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[16] Although *Spirt* addressed the definition of an "employer" under Title VII, and not the ADA, the First Circuit noted that "[t]here is no significant difference between the definition of the term 'employer' in the two statutes." *Carparts,* 37 F.3d at 16. *see also Williams v. Banning*, 72 F.3d 552, 553-54 (7th Cir. 1995) ("Title VII, the ADA, and the Age Discrimination in Employment Act ('ADEA') use virtually the same definition of 'employer,' and . . . '[c]ourts routinely apply arguments regarding individual liability to all three statutes interchangeably.'") (citation omitted)).

alleging that the plan's limit on benefits for HIV-related illnesses discriminated on the basis of a disability in violation of the ADA. *Id.* at 14-15.

Like the Second Circuit, the First Circuit in *Carparts* rejected a narrow interpretation of the statutory definition of an "employer" under the ADA, explaining that "[t]he issue before us is not whether defendants were employers of [the plaintiff] within the common sense of the word, but whether they can be considered 'employers' for purposes of Title I of the ADA . . ." *Id.* at 16. The entities could qualify as an "employers" if "they functioned as [plaintiff's] 'employer' with respect to his employee health care coverage, that is, if they exercised control over an important aspect of his employment" or they "act[ed] on behalf of the entity in the matter of providing and administering employee health benefits," *Id.* at 17, even if they "did not have authority to determine the level of benefits, and even if [the employer] retained the right to control the manner in which the Plan administered these benefits." *Id.* Like the *Spirt* court, the *Carparts* court reasoned that a contrary rule—*i.e.*, a rule that exempted a discriminatory benefits plan if the

employer delegated responsibility to another entity—would impair the effectiveness of the ADA. *Id.* at 18.

More recently, in *Brown v. Bank of America, N.A.*, 5 F. Supp. 3d 121, 132 (D. Me. 2014), a district court held that an insurance company that administered an employee benefits plan could be held liable as the employer's "agent" under the ADA. *Id.* at 130-35 (citing *Carparts*, 37 F.3d at 17). The court found that notwithstanding more recent First Circuit precedent narrowing the scope of *Carparts*, an insurance company could be liable under the ADA where it "was 'intertwined' with [the employer] with respect to [plaintiff's] employee benefits, and that those benefits were a significant enough aspect of her employment, to meet the first *Carparts* test." *Id.* at 134; *See also, Jones v. Montachusett Reg'l Transit Auth.,* No. 4:19-CV-11093-TSH, 2020 WL 1325813, at *7 (D. Mass. Feb. 7, 2020), *report and recommendation adopted sub nom. Jones v. Montachusett Reg'l Transit Auth.,* No. 4:19-CV-11093, 2020 WL 1333097 (D. Mass. Mar. 4, 2020) (denying defendant's motion to dismiss because "Plaintiff could state a claim by plausibly alleging that CCRD delegated employer functions to

MART such that MART "control[led] *even one* significant aspect of ... [Plaintiff's] employment.") (*citing Carparts*, 37 F.3d at 18).

In *Alam v. Miller Brewing Co.*, 709 F.3d 662 (7th Cir. 2013), the Seventh Circuit also recognized that "Title VII plaintiffs may maintain a suit directly against an entity acting as the agent of an employer if 'the agent exercise[s] control over an important aspect of [the plaintiff's] employment,' 'the agent significantly affects access of any individual to employment opportunities,' or 'an employer delegates sufficient control of some traditional rights over employees to a third-party.'" *Id.* at 669 (quotations omitted). Similarly, in *DeVito v. Chicago Park Dist.*, 83 F.3d 878 (7th Cir. 1996), the Seventh Circuit concluded that under the ADA an employee could sue both his employer (the Chicago Park District)—and the entity that adjudicates employment disputes on behalf of the Park District (the Personnel Board)—since the Personnel Board was the Park District's agent. *Id.* at 881-82. *See also E.E.O.C. v. Benicorp Ins. Co.*, No. 00-014, 2000 WL 724004, at *4 (S.D. Ind. May 17, 2000) (unreported decision); *see also EEOC Compliance Manual, Section 2, § III.B.2, available*

*at* https://www1.eeoc.gov/policy/docs/threshold.html#2-III-B-2. ("Liability of Agents") ("An entity that is an agent of a covered entity is liable for the discriminatory actions it takes on behalf of the covered entity. *For example, an insurance company that provides discriminatory benefits to the employees of a law firm may be liable under the EEO statutes as the law firm's agent.*") (emphasis added).

And in *Tovar*, the Eighth Circuit overturned the district court's dismissal of the non-employer third-party administrators of the health plan named as co-defendants. *Tovar*, 857 F.3d at 775-76 (ACA case) ("If the [third-party administrators] provided [the employer] with a discriminatory plan document, [the employee's] alleged injuries could well be traceable to and redressable through damages by those defendants notwithstanding the fact that [the employer] subsequently adopted the plan and maintained control over its terms.").

These cases applying analogous federal antidiscrimination statutes show that Wellmark may be held liable as an agent of Vroegh's employer under the ICRA for its substantial role in the

design and administration of discriminatory employment benefits. Like in *Spirt* and *Carparts*, the facts when viewed in Vroegh's favor show that Wellmark exercised control over an important aspect of Vroegh's employment—his access to health care through his employer-provided health insurance coverage—and acted on behalf of Vroegh's employer in both the design and administration of employee health benefits. Wellmark's role and actions were "so intertwined" with the employer in regard to this aspect of employment that for the purposes of ICRA, Wellmark acted as Vroegh's employer when it came to his employer-sponsored healthcare plan. But for Wellmark's actions, the Plan would not contain the discriminatory exclusion of gender-affirming surgery at issue in this case, given that the exclusion was added by Dr. Gutshall. App. (Conf. App. 397, 473 at 39:21-41:15; Ex. App. 487). Nor would Vroegh's physician's request for pre-authorization of coverage have been denied. (Conf. App. 580-84; Conf. Ex. App. 21-27).

In granting summary judgment to Wellmark, the district court cited *Boyden,* a Wisconsin federal district court decision.

(App. 1429). But *Boyden* does not support the district court's sweeping determination that a third-party administrator of a discriminatory health benefits plan could never be liable as an agent of the employer under ICRA. In *Boyden*, the judge ultimately determined that the State of Wisconsin was liable under federal equal protection, the ACA, and Title VII for its discriminatory exclusion of gender-affirming surgery on the two transgender plaintiffs' motion for summary judgment, and a jury subsequently awarded the two plaintiffs $780,000 in damages on those claims. *Boyden*, 341 F. Supp. 3d at 982; David Wahlberg, *Jury awards $780,000 to two transgender women at UW in state ban of health coverage*, Wisconsin State Journal (Oct. 12, 2018), *available at* https://madison.com/wsj/news/local/health-med-fit/jury-awards-to-two-transgender-women-at-uw-in-state/article_b6452d36-c717-5d33-a9f3-298aa4a1689a.html.

While the judge dismissed the private third-party insurance administrator from the suit, it did so because of the distinct facts regarding the relationship between a Wisconsin state employer and a private third-party administrator. *Boyden* MTD Order at *3-5.

The *Boyden* court acknowledged that third-party administrators *could* act as agents of the employer in providing discriminatory benefits under Title VII, but determined that on the specific facts of that case there was no agency relationship between the employer and the private third-party administrator there. *Id.* at *4. It did not find, as the district court erroneously did in Vroegh's case, that a third-party administrator could never be liable.

Indeed, the third-party state agency that administered the benefits available to all Wisconsin state employees, ETF, was not dismissed. The court reasoned that "the injury can be fairly traced to ETF," that "ETF's role as *administrator* of the group health program makes it and [the Secretary of ETF] proper defendants," and "there appears no dispute that GIB sets policy, [and] ETF administers it." *Id.* (emphasis added). "If anything, an agency relationship exists between plaintiff's employers and ETF/GIB, as the factual allegations suggest that plaintiff's employers delegated to ETF/GIB the responsibility to determine which services should be covered under all of the offered health insurance plans." *Id.* at *8. Thus, the *Boyden* court refused to dismiss the agencies that

played a role similar to Wellmark's role here since the plaintiffs' injuries could be traced to their role in administering the state employee health plans.

Wellmark's relationship to the State and its role in the challenged discrimination against Vroegh was much more substantial than the private third-party administrator that was dismissed in the *Boyden* case. In *Boyden*, the court relied on the fact that the third-party administrator chosen by the plaintiff was one of several options provided to her, and that the State of Wisconsin set the terms of the state insurance coverage. *Id.* at *3. In contrast, here, Wellmark was the sole third-party administrator of the State employee insurance Plans available to Vroegh. (App. 134; Ex. App. 52). Moreover, viewing the facts in Vroegh's favor, its role in designing and administering the health insurance benefits was a substantial and active one, both in adding the discriminatory exclusion effective in the 2015 Plan, and in denying Vroegh coverage because of its purpose to treat his gender dysphoria. (Conf. App. 580; Conf. Ex. App. 21).

Like in *Spirt*, Wellmark and the State "were so closely intertwined" when it came to the provision of health insurance to public employees, and specifically Vroegh, that Wellmark "could be deemed [an] agent[] of the employer." *Id.* Furthermore, like in *Spirt* and *Carparts*, the State may have set forth broad guidelines as to coverage in its RFP, but a reasonable jury could find that it delegated to Wellmark a central role in drafting of the specific coverage terms, and indeed, it was Wellmark, not the State, that pushed for the addition of the exclusion of gender-affirming surgery to the State's Plan in 2015. (Conf. App. 603 at 26:5-27:18, 397,473 at 39:21-41:15; App. 1272 at 16:10-17:5, 1232-33 at 14:23-15:18, 17:17-18:23; Ex. App. 487).

The record also shows that the State delegated to Wellmark the job of running the State's employer-sponsored health care insurance plan to meet its obligations to its employees. (App. 720-72, 692 at 11:6-11, 705-06 at 16:5-17:5, 18:15-19:6; Ex. App. 332-451). The State further delegated the claims appeals process to Wellmark, as set out for employees in their coverage manuals and in Wellmark's denial of coverage to Vroegh. (App. 1252 at 36:12-18,

1260 at 41:1-19, 1240-43 at 24:23-34:10, 1244-46 at 87:24-94:18; Conf. App. 278-80, 558-60, 562-79); (Tr. Vol IV, 175:1-176:12; 178:14-21); (Ex. App. 197-99; Conf. Ex. App. 5-9, 10, 28-39, 40-42).

Vroegh thus offered ample record evidence showing that the State looked to Wellmark with respect to both plan design and coverage decisions regarding employee health insurance. A reasonable jury could find that Wellmark called the shots when it came to denying Vroegh benefits for his medically necessary care. A jury could find that Wellmark exercised sufficient control and participation in the State's provision of its discriminatory insurance policies to hold Wellmark liable as an agent of the State under the ICRA for its role in the discrimination.

Summary judgment in Wellmark's favor is reversible error for two reasons: first, third-party administrators—including Wellmark—*can* be held liable as agents for employment discrimination under sections 216.6 and 216.6A. Second, the existence of an agency relationship is a fact question for the jury, and the record evidence construed in a light favorable to Vroegh shows a genuine factual dispute as to an agency relationship

between the State and Wellmark in the provision and administration of employee health benefits.

### E. A Reasonable Jury Could Find that Wellmark is Liable as an "Aider and Abettor".

The court also erred in granting summary judgment on Vroegh's claim that Wellmark was liable as an aider and abettor to the State's unlawful discrimination under Iowa Code section 216.11. (App. 1430). Again, stating the facts were "undisputed," the court ignored the facts presented by Vroegh and construed facts in Wellmark's favor. (*Id.*) The court also failed to analyze the facts under the legal standard for determining "aiding and abetting" liability under the ICRA. (*Id.*)

The facts regarding Wellmark's role in the discrimination were more than sufficient for a reasonable jury to find Wellmark liable as an aider and abettor to the State under Section 216.11. As set forth below, a non-employer "person," such as a third-party insurance administrator, may be held liable for aiding and abetting discrimination. Viewed most favorably to Vroegh, the facts show that Wellmark either acted directly in the design and administration of discriminatory benefits, or aided and abetted the

creation and administration of the discriminatory employment condition—or both.

Under ICRA, it is "an unfair or discriminatory practice for . . . any person to intentionally aid, abet, compel, or coerce another person to engage in any of the practices declared unfair or discriminatory by this chapter." Iowa Code § 216.11(1); Iowa Code § 216.2(2). Courts in Iowa have held a range of "persons" subject to aiding and abetting liability under section 216.11(1). *See Blazek v. U.S. Cellular Corp.*, 937 F. Supp. 2d 1003, 1025 (N.D. Iowa 2011) (co-workers may be subject to individual liability under § 216.11(1)); *Johnson*, 593 F. Supp. 2d at 1050 (an employer's client may face individual liability under § 216.11(1)). Indeed, "the plain language of the statute is unambiguous and subjects 'any person' to liability under the ICRA for intentionally aiding, abetting, compelling, or coercing another person to engage in discriminatory practices prohibited by the ICRA." *Id.* at 1052. Further, if the legislature wanted to "limit liability under section 216.11 to employers and their supervisory employees, it easily could have

done so by using terminology other than the broadly defined term 'persons.'" *Id.*

In *Asplund*, the district court found that a non-employer supervisor could be liable for aiding and abetting the underlying employment discrimination. 602 F. Supp. 2d at 1011. The court reasoned that the plaintiff had asserted sufficient facts to show a colorable claim under section 216.11, even though the second level supervisor was not the "employer." *Id.* at 1011. Specifically, the allegations of "the presence of Defendant McCombes's name on the [termination] Letter tend[ed] to show that, at the very least, Defendant McCombes participated in the decision to fire Plaintiff," *id.*, that "*all* Defendants, including Defendant McCombes, 'took adverse action against Plaintiff because he reported Defendant Cochuyt's unwelcome sexual relationship with a subordinate employee'" and "Defendant McCombes's unannounced visit to the store and the hostile questioning of Plaintiff might also qualify as encouraging the commission of an unfair or discriminatory practice." *Id.*

In *Johnson*, the court found the facts alleged sufficient to state a claim against an employer's client for aiding and abetting liability under section 216.11. 593 F. Supp. 2d at 1053. The client had allegedly "demanded that [the employee] be fired" and "discriminated against [her] race by influencing the decision of [the employer] to terminate her." *Id.* at 1053 n.7. If the client were "found to have intentionally aided, abetted, compelled or coerced [the employer] into discharging Plaintiff's employment on the basis of her race, [it] would be in violation of the ICRA pursuant to § 216.11." *Id.* at 1052. "The plain language of the statute is unambiguous and subjects 'any person' to liability under the ICRA for intentionally aiding, abetting, compelling, or coercing another person to engage in discriminatory practices." *Id.*

Likewise, in *Blazek,* the plaintiff could proceed with a sexual harassment claim against non-supervisory coworkers under the ICRA's aiding and abetting provision. 937 F. Supp. 2d at 1023. The plaintiff's assertions that her co-employees harassed her and the investigator accused her of having sexual relations with one of her harassers were sufficient to "plausibly allege[ ] that the conduct of

the individual co-workers did alter the terms of her employment." *Id.* (emphasis omitted).

This Court has set forth alternative tests for aiding and abetting liability under the ICRA, but has not yet decided among them. Wellmark set forth one test, borrowed from the Restatement of Torts, the federal district court in *Asplund* suggested a test borrowed from criminal law, and the plain text of section 216.11 suggests a third. Vroegh prevails under all of these tests.

First, Wellmark cited three business tort cases for its suggested test for aider and abettor liability. (App. 125) (citing *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994), *Tubbs v. United Cent. Bank*, 451 N.W.2d 177, 182 (Iowa 1990), and *State ex rel. Goettsch v. Diacide Distributers, Inc.*, 561 N.W.2d 369, 377 (Iowa 1997). Under Wellmark's suggested test, aiding and abetting liability is established when "there is a wrong to the primary party, knowledge of the wrong on the part of the aider, and substantial assistance by the aider in the achievement of the primary violation." (App. 125).

A second possible test for aiding and abetting liability was set out by the federal district court in *Asplund*. There, the court suggested drawing upon the definition of aiding and abetting from criminal cases as laid out in *State v. Maxwell*, 743 N.W.2d 185, 197 (Iowa 2008), that "aiding and abetting occurs under ICRA when a person actively participates or in some manner encourages the commission of an unfair or discriminatory practice prior to or at the time of its commission." *Asplund*, 602 F. Supp. 2d at 1011 (citing Maxwell, 743 N.W.2d at 197).

This Court in *Deeds* referred to both of these tests, without expressly adopting either. *See Deeds*, 914 N.W.2d at 350.

A third possible test includes those elements set out in the plain text of the ICRA: "It shall be an unfair or discriminatory practice for . . . [a]ny person to intentionally aid, abet, compel, or coerce another person to engage in any of the practices declared unfair or discriminatory by this chapter." Iowa Code § 216.11(1). By its own terms, the elements appear to be (1) an intentional act; (2) aiding, abetting, compelling, or coercing another (3) to engage in any of the practices declared unfair or discriminatory by this

chapter. *Id.* This is the test used by the federal district court in *Johnson*, 593 F. Supp. 2d at 1051, although the court also referenced favorably the standard taken from criminal law as laid out in *Asplund*. *See id.* n.7.

Viewing the facts in Vroegh's favor, a reasonable jury could conclude that Wellmark's conduct met all three of these tests for aiding and abetting liability under Iowa Code section 216.11. Under the test proposed by Wellmark, the discrimination against Vroegh in denying him compensation in the form of health care benefits because of his gender identity and sex was the "wrong." Wellmark's "knowledge of the wrong" was demonstrated by the fact that it crafted the discriminatory exclusion at issue in this case and applied it to Vroegh, even though it knew that Vroegh's treating physicians had found the surgery was medically necessary for him. (Conf. App. 138, 232, 478 at 70:3-71:11, 482 at 86:21-87:20, 89:4-12, 484 at 94:1-18, 580-84; Ex. App. 56, 151; Conf. Ex. App.16-20, 21-27). Finally, Wellmark provided "substantial assistance" by proposing and drafting the discriminatory exclusion, denying Vroegh's inquiry regarding coverage, acting as the intermediary

between Vroegh and DAS with respect to his coverage, denying his initial claim for coverage, and upholding the denial upon appeal. (Conf. App. 138, 232, 478 at 70:3-71:11, 482 at 94:1-18, 558-61, 580-84; App. 976-977; Ex. App. 56, 151; Conf. Ex. App. 11-12, 13-15, 21-27, 40-42).

Likewise, under the second test, Wellmark actively participated in and encouraged the discrimination against Vroegh. It did so by promulgating the design of discriminatory benefit provisions and by denying him coverage for medically necessary care. (Conf. App. 397, 473 at 39:21-41:18; Ex. App. 487). Wellmark—not the State—took the initiative to redraft the State's benefit Plan to specifically add the exclusion of gender-affirming surgery to the 2015 Plan where it had not been before, and Wellmark officials directed its claims staff to deny coverage of Vroegh's surgery, despite the fact that the mastectomy procedure for which he sought coverage was a covered benefit, if medically necessary, to treat for conditions other than gender dysphoria. (Conf. App. 138, 232, 478 at 70:3-71:11, 484 at 94:1-18, 580-84; Ex. App. 56, 151; Conf. Ex. App. 21-27). Wellmark concedes that

gender-affirming surgery is medically necessary for individuals such as Vroegh in its own "Gender Reassignment Policy." (Conf. App. 482 at 86:21-87:20, 89:4-12, 552-56; Conf. Ex. App. 16-20).

Finally, a reasonable jury could find that Wellmark is liable under the third potential test, because it acted intentionally to aid the State in unlawful employment discrimination on the basis of Vroegh's gender identity and sex. It did so through its exclusion of gender-affirming care, even though it understood that gender-affirming surgery can be medically necessary to treat gender dysphoria. (App. 1165-66; Conf. App. 482 at 86:21-87:20, 89:4-12, 552-56; Conf. Ex. App. 16-20). Vroegh notified Wellmark that denying him coverage violated his rights under federal and State civil rights law, and Wellmark had been on notice since at least 2010 when the ACA took effect that such exclusions discriminated against transgender people on the basis of sex. (App. 977, 979; Ex. App. 452; Conf. Ex. App. 14; Tr. Ex. 49[17]); *Tovar*, 857 F.3d at 778; *see also Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953 (D.

[17] Trial Exhibit 49 appears to have been inadvertently omitted from the exhibit appendices.

Minn. 2018) (determining that defendants were on notice in 2010 that exclusion of gender-affirming surgery was illegal sex discrimination since the ACA was adopted in 2010).

Thus, like the defendants in *Asplund*, 602 F. Supp. 2d at 1011, a jury could find that Wellmark "participated" in the discriminatory practice at issue in this case and "took adverse action" against him, in taking the initiative to develop the discriminatory exclusion, in applying it to deny Vroegh's claim, and in denying his appeal. Wellmark "influenced the decision" of, and often took a leadership role in the employer's discriminatory practice. *See Johnson*, 593 F. Supp. 2d at 1053; *see also Blazek*, 937 F. Supp. 2d at 1023; *Neppl*, No. 4:19-CV-00387-JAJ, 2020 WL 3446280, at *4. As in *Blazek, Asplund, Johnson*, Wellmark's actions were active and participatory. But for Wellmark's actions, there would have been no exclusion of gender-affirming surgery in the State's employer-sponsored health insurance ban when Vroegh sought coverage, and his physician's request for pre-approval of the surgery would have been granted.

Wellmark's actions are easily distinguished from those of the defendant in *Neppl,* who did nothing further than provide a negative job reference. Wellmark intentionally pushed the State to clarify its discriminatory coverage policy in 2015 and actively participated in the discrimination by applying it to Vroegh even though it knew the medical consensus supported the treatment. (Conf. App. 478, 484, at 70:3-71:11, 94:1-18, 580-84; Conf. Ex. App. 21-27).

Vroegh's claim is easily distinguishable from the argument for aider and abettor liability rejected by this Court in *Deeds*. There, an applicant for a firefighter position argued that the physician who concluded that he was not medically fit for duty should be found liable for aiding and abetting an employer's discriminatory decision not to hire him. *Deeds*, 914 N.W.2d at 350. This Court rejected the argument because "the plaintiff could not prove the City discriminated against him *because* of his MS when the City was unaware he had MS." *Id.* at 334. "The physician, in turn, is not liable for providing her independent medical opinion or for aiding and abetting without proof the City intentionally discriminated

against the plaintiff." *Id.* In other words, if there is no discriminatory employment practice, there is nothing discriminatory to aid and abet. *Id.* at 350 ("We agree with the court of appeals that a plaintiff must first establish the employer's participation in a discriminatory practice before a third-party can be found liable for aiding and abetting.").

In contrast, the record plainly shows that Vroegh was subject to unlawful employment discrimination when he was denied coverage for gender-affirming surgery. The jury has already determined that the denial of coverage for Vroegh's medically necessary mastectomy pursuant to the exclusion in the Plan was discriminatory under both sections 216.6 and 216.6A. (App. 1504-1505; Supp. App. 4-7). That result is also required by this Court's decision in *Good*, determining that the same exclusion in Iowa Medicaid was unlawful discrimination on the basis of gender identity under ICRA's protections against discrimination in public accommodations. *Good,* 924 N.W.2d at 862.

*Deeds* is also distinguishable because here, unlike in *Deeds* and *Sahai*, Wellmark was not providing an independent medical

opinion or denying coverage to Vroegh based on its independent medical expertise. Wellmark does not contest the medical necessity of Vroegh's surgery. (App. 122); (Tr. Vol III, 146:9-12; 147:11-14; 148:11-150:17; 161:9-163:3); (Conf. Ex. App. 5-9). *Deeds* did not address the question presented in this case of whether third-party administrators can be liable as persons or as aiders-and-abettors under ICRA, but limited its holding to medical "clinic[s] and . . . doctors when (1) the clinic plays an advisory role in the employer's hiring decision and (2) [t]he advice being sought was an independent medical judgment." *Deeds*, 914 N.W.2d at 350.

Viewed in Vroegh's favor, the record evidence shows that Wellmark was not simply a passive conduit in the design and administration of the State's discriminatory insurance policy and the subsequent denial of Vroegh's benefits for medically necessary care. Indeed, a jury could find that Wellmark did more than just provide substantial assistance, it played a primary role in creating the discriminatory policy and in administering it. Those are fact questions for the jury, so this Court should reverse the district court's grant of Wellmark's motion for summary judgment.

## CONCLUSION

For the foregoing reasons, Vroegh respectfully seeks an order upholding the jury's verdict against the State, and reversing and remanding the district court's grant of summary judgment in favor of Wellmark to allow Vroegh's claims against Wellmark to proceed to trial.

## STATEMENT ON ORAL ARGUMENT

Plaintiff respectfully requests oral argument.

Respectfully submitted:

/s/ Rita Bettis Austen
Rita Bettis Austen, AT0011558
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: (515) 207-0567
Fax: (515) 243-8506
Email: Rita.Bettis@aclu-ia.org

/s/ Shefali Aurora
Shefali Aurora, AT0012874
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: (515)243-3988
Fax: (515) 243-8506
Email: Shefali.Aurora@aclu-ia.org

/s/ John A. Knight

John A. Knight, PHV001725
ACLU Foundation
Lesbian Gay Bisexual Transgender Project
160 North Michigan Avenue, Suite 600
Chicago, Illinois 60601
Telephone: (312) 201-9740
E-mail: JAKnight@aclu.org

/s/ Melissa C. Hasso
Melissa C. Hasso, AT0009833
SHERINIAN & HASSO LAW FIRM
111 E. Grand Ave., Ste 212
Des Moines, IA 50309
Telephone: (515) 224-2079
Facsimile: (515) 224-2321
E-mail: MHasso@sherinianlaw.com

**ATTORNEYS FOR APPELLEE/CROSS APPELLANT**

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/s/ Shefali Aurora
SHEFALI AURORA (AT0012874)
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317