IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-1158

EERIEANNA GOOD and CAROL BEAL,
Petitioners-Appellees,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES,
Respondent-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE ARTHUR E. GAMBLE, JUDGE

# APPELLANT'S FINAL BRIEF

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## CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2018, I electronically filed this Brief with the Clerk of the Iowa Supreme Court in accordance with Chapter 16 of the Iowa Rules of Court, which will electronically serve all registered counsel of record in this matter.

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## ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court as it (i) presents substantial constitutional questions as to the validity of an administrative rule; (ii) presents substantial issues of first impression; and (iii) presents substantial questions of enunciating or changing legal principles. Iowa R. App. P. 6.1101(2)(a), (c), (f).

## STATEMENT OF THE CASE

This case is a proceeding from a judicial review of an administrative agency action under the Iowa Administrative Procedure Act, Iowa Code § 17A.19. Plaintiffs claim the Iowa Department of Human Services (the "Department") erred in denying coverage for sex reassignment surgeries to Eerieanna Good and Carol Beal (the "Petitioners") pursuant to Iowa Admin. Code r. 441-78.1(4) (the "Rule").

On March 3, 2017, Ms. Good, one of the Petitioners, filed an appeal from a decision denying her request for coverage for an orchiectomy. (App'x. Vol. II at 362). On March 31, 2017, Ms. Good's managed care organization ("MCO") denied Ms. Good's appeal due to the exclusion of coverage of "procedures related to transsexualism…[and] gender identity disorders" under the Rule. (App'x. Vol. II at 354). Ms. Good then filed an appeal with the Department. (App'x. Vol. II at 375).

Following a contested case proceeding on July 11, 2017, the administrative law judge issued a Proposed Decision on July 25, 2017 affirming the Department's denial of coverage. (App'x. Vol. II at 138). The ALJ's Proposed Decision was affirmed by the Director of the Department on August 25, 2017. (App'x. Vol. II at 69). Ms. Good then filed a Petition for Judicial Review. (App'x. Vol. I at 5).

On July 20, 2017, Ms. Beal, the second Petitioner, filed an appeal from a decision denying her request for coverage for several surgical procedures: a vaginoplasty, a penectomy, a bilateral orchiectomy, a clitoroplasty, a urethraplasty, a labiaplasty, and a perineoplasty. (App'x. Vol. II at 674). On August 14, 2017, Ms. Beal's MCO denied Ms. Beal's appeal due to the exclusion under the Rule. (App'x. Vol. II at 654). Ms. Beal then filed an appeal with the Department. (App'x. Vol. II at 755).

After a contested case hearing, an ALJ issued a Proposed Decision on October 17, 2017 affirming the Department's denial of coverage. (App'x. Vol. II at 537). In his Proposed Decision, the ALJ concluded that, *inter alia*, "the Department correctly point[ed] out that" the Iowa Civil Rights Act ("ICRA") appeared to exclude entitlement programs like Medicaid from its purview. (App'x. Vol. II at 541). The ALJ's Proposed Decision was affirmed by the Director of the Department on November 17, 2018. (App'x. Vol. II at 443). There, the Director concluded that the ICRA "makes clear that Iowa Medicaid was not in-

tended to fall within the scope of [Iowa Code § 216.7(1)]." (App'x. Vol. II at 445). Ms. Beal then filed a Petition for Judicial Review. (App'x. Vol. I at 93).

Ms. Good and Ms. Beal consolidated their cases before the district court. Petitioners have challenged the constitutionality and legality of the Rule under the Iowa Constitution's Equal Protection guarantee, the Iowa Civil Rights Act, and independent grounds under Iowa Code § 17A.19. Lacking jurisdiction, the Department abstained from ruling on both Petitioners' constitutional claims at the administrative appeal stage. *See Soo Line R.R. Co. v. Iowa Dep't. of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994). After briefing on the merits, the district court ruled in favor of the Petitioners on four of five grounds. (App'x. Vol. I at 276). This appeal followed.

## STATEMENT OF THE FACTS

Ms. Good is a 28-year-old transgender woman. (App'x. Vol. II at 105). She is a Medicaid recipient and has been prescribed hormone therapy medication for her gender dysphoria since 2014. (App'x. Vol. II at 113 ¶ 7). At all times relevant to this action, Ms. Good's Medicaid services were managed by an MCO, AmeriHealth Caritas. (App'x. Vol. II at 285).

Ms. Beal is a 42-year-old transgender woman. (App'x. Vol. II at 506). She is a Medicaid recipient and has been prescribed hormone therapy medication for her gender dysphoria since 1989. (App'x. Vol. II at 532 ¶ 5). She is seeking approval for multiple surgeries as part of her treatment: vaginoplasty, penectomy,

bilateral orchiectomy, clitoroplasty, urethroplasty, labiaplasty, and perineoplasty. (App'x. Vol. I at 96 ¶ 3).

## ARGUMENT

### I. Background

Medicaid (also known as "medical assistance" or the "medical assistance program") is a cooperative state and federal aid program that helps states provide medical assistance to the poor. *Lankford v. Sherman*, 451 F.3d 496, 504 (8th Cir. 2006); *see* Iowa Code § 249A.2(3), (6), (7), (10). State participation in Medicaid is voluntary and includes both mandatory and optional service coverage, but states that elect to participate must follow the federal government's statutory and regulatory framework. The Medicaid Act "confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act." *Beal v. Doe*, 432 U.S. 438, 441, 97 S. Ct. 2366 (1977) (quoting 42 U.S.C. § 1396a(a)(17)).

> Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services…[that] has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered—not "adequate health care."

*Alexander v. Choate*, 469 U.S. 287, 303, 105 S. Ct. 712, 721 (1985).

Iowa Medicaid generally covers medically necessary services provided by physicians. Iowa Admin. Code r. 441-78.1. Prior to 1979, the Department had an unwritten policy of excluding sex reassignment surgeries from covered physician services based on existing exclusions and limitations for "cosmetic surgery" and "mental diseases." *Pinneke v. Preisser*, 623 F.2d 546, 549-50 (8th Cir. 1980). In 1980, this policy was challenged and considered by the Eighth Circuit. *Id.*; (App'x. Vol. II at 281). The court in *Pinneke* struck down the Department's policy due, at least in part, to the Department's failure to: engage in formal rulemaking, consult medical professionals in the development of the policy, and consider the prevailing knowledge of the medical community. *Id.*; *Smith v. Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001) ("*Rasmussen II*").

In 1994, the Department *clarified* its rule excluding surgery performed for primarily psychological purposes to specify that sex reassignment surgery fell within that exclusion, in compliance with the Eighth Circuit's admonition in *Pinneke*. (App'x. Vol. II at 280-84). The Department did so only after a comprehensive review of the prevailing medical knowledge. *Id.* These changes constitute the basis of Petitioners' challenge to Iowa Admin. Code r. 441-78.1(4) (the "Rule"), which provides in relevant part:

> **78.1(4)** For the purposes of this program, cosmetic, reconstructive, or plastic surgery is surgery which can be expected primarily to improve physical appearance or which is performed primarily for psychological purposes…. Surgeries for the purpose of sex reas-

> signment are not considered as restoring bodily function and are excluded from coverage.
>
> > *a.* Coverage under the program is generally not available for cosmetic, reconstructive, or plastic surgery…

*See also* Iowa Admin. Code rr. 441-78.1(4)"b"(2) (excluding surgeries for certain conditions, including "transsexualism" and "gender identity disorder"), 441-78.1(4)"d"(15)-(17) (specifically excluding "sex reassignment," "penile implant procedures," and "insertion of prosthetic testicles").

In 2001, this amended rule was challenged once again in *Rasmussen II*. The Eighth Circuit considered whether the Rule was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Rasmussen II*, 249 F.3d at 760. The court found that the Rule was "both reasonable and consistent with the Medicaid Act." *Id.* at 761. The Rule remains in effect, substantially the same as it was upon enactment in 1994.

## II. Similarly Situated Medicaid Beneficiaries Are Treated Alike Under the Rule.

### A. Preservation of Error.

The Department preserved error on this issue by raising it in briefing to the district court. The district court subsequently decided and ruled upon this issue. (App'x. Vol. I at 216-19); (App'x. Vol. I at 292-97).

### B. Scope and Standard of Review

This Court's review of constitutional issues raised in a Petition for Judicial review is *de novo*. *Tyler v. Iowa Dep't. of Revenue*, 904 N.W.2d 162, 166 (Iowa 2017).

The judicial review provisions of the Administrative Procedure Act are the exclusive means for judicial review of administrative agency action. Iowa Code § 17A.19; *see also Norland v. Iowa Dep't of Job Service*, 412 N.W.2d 904, 908 (Iowa 1987). When exercising the power of judicial review under Iowa Code § 17A.19, the district court functions in an appellate capacity to correct errors of law. *Ludtke v. Iowa Dep't of Transp.*, 646 N.W.2d 62, 64-65 (Iowa 2002). Grounds for relief are specified in section 17A.19(10). The burden is on the petitioner to identify and establish the grounds for relief alleged. Iowa Code § 17A.19(8)(a). Where interpretation of the law has not been vested in the discretion of an agency, legal issues are subject to *de novo* review. *Bearinger v. Iowa Dep't of Transp.*, 844 N.W.2d 104, 106 (Iowa 2014).

### C. Transgender Medicaid Beneficiaries Are Similarly Situated To, and Treated the Same As, All Other Medicaid Beneficiaries.

Transgender Medicaid beneficiaries are given the same access to services, benefits, advantages, and obligations under Iowa Medicaid as non-transgender Medicaid beneficiaries to whom they are similarly situated. For the reasons provided below, the Rule in no way places transgender Medicaid beneficiaries into a

class, nor does the Rule, facially or in practice, disadvantage transgender Medicaid beneficiaries.

Like its federal counterpart, Iowa's constitution promises equal protection under the law, which "is essentially a direction that all persons similarly situated should be treated alike." *Varnum v. Brien*, 763 N.W.2d 862, 878 (Iowa 2009) (internal citation omitted). It is well established that "the constitutional pledge of equal protection does not prohibit laws that impose classifications." *Varnum*, 763 N.W.2d at 882 (internal citation omitted).[1] Indeed, "[m]any statutes impose classifications by granting special benefits or declaring special burdens, and the equal protection clause does not require all laws to apply uniformly to all people." *Id.* (internal citations omitted). Equal protection does, however, "demand that laws treat alike all people who are similarly situated with respect to the legitimate purposes of the law." *Id.* (internal citations and quotation marks omitted). This has led to a "narrow threshold test," which provides that "if plaintiffs cannot show as a preliminary matter that they are similarly situated, courts do not further consider whether their different treatment under a statute is permitted under the equal protection clause." *Id.*

[1] Because the ICRA has never been applied to a state agency in the way proposed by Petitioners and adopted by the district court, there is little authority as to how or if an ICRA discrimination analysis differs from an equal protection analysis. Regardless, because the Rule is not facially discriminatory or discriminatory in effect, the Rule should be found not to violate either the ICRA or the Iowa Constitution.

Thus, identifying the class of people to whom transgender Medicaid beneficiaries are similarly situated is of critical importance to this analysis. Transgender Medicaid beneficiaries, such as the Petitioners, are similarly situated to non-transgender Medicaid beneficiaries in all material ways. The Department's rules reflect this fact: there is no differentiation between transgender Medicaid beneficiaries and non-transgender Medicaid beneficiaries for purposes of eligibility and scope of (and access to) services. Iowa Admin. Code ch. 441-75; Iowa Admin. Code ch. 441-78. As with non-transgender Medicaid beneficiaries, transgender Medicaid beneficiaries are not entitled to surgery "which is performed primarily for psychological purposes." Iowa Admin. Code r. 441-78.1(4). This exclusion includes sex reassignment surgeries for the purpose of treating gender dysphoria—but the Rule, critically, applies equally to both transgender and non-transgender Medicaid beneficiaries. A non-transgender Medicaid beneficiary is no more or less entitled to a surgery "performed primarily for psychological purposes" than a transgender Medicaid beneficiary. The references in the Rule to sex reassignment surgeries and related diagnoses are an extrapolation of the Rule's general prohibition against surgeries performed primarily for psychological purposes. The specific inclusion of these procedures did not stem from discriminatory intent: instead, it was included because the Eighth Circuit *required* its specific inclusion in *Pinneke*. (App'x. Vol. II at 281).

The District Court erred in its analysis of this issue. Although the court correctly noted that "transgender and non-transgender Medicaid recipients are similarly situated for the purposes of the Medicaid program and the Regulation," the court incorrectly conflated Medicaid beneficiaries requesting surgery to treat gender dysphoria (a psychological purpose) with Medicaid beneficiaries entitled to those same services for non-psychological purposes. (App'x. Vol. I at 292, 297, 302-04). In fact, these scenarios illustrate the true nature of the Rule: the Rule distinguishes solely on the basis of the *purpose* of the surgical procedure, not on the basis of transgender status.[2]

For example, in finding that the Rule violated the Iowa Constitution's Equal Protection provisions, the court faulted the Rule for "allow[ing] coverage for the same, if not similar, surgical procedures, provided they are performed for purposes outside of Gender Dysphoria treatment."[3] This was in error. With on-

[2] It is important to note the distinction between "transgender" persons and "gender dysphoria" as a mental health condition. While the definition of the latter is discussed below, Petitioners' expert defines the former more broadly as individuals for whom "their gender identity—the innate sense of being male or female—differs from the category they were assigned at birth." (App'x. Vol. II at 32 ¶ 9).

[3] The apparent significance of this reasoning to the district court's holding cannot be overstated, as this finding was immediately succeeded by: "*Therefore*, Court finds excluding coverage for procedures performed for treating Gender Dysphoria is not substantially related to achieving an important government interest." (App'x. Vol. I at 302) (emphasis added).

ly a few, targeted exceptions,[4] the determinant as to whether a surgical procedure—any surgical procedure—is covered is *not* whether they are "performed for purposes outside of Gender Dysphoria treatment," but rather whether the procedures are "primarily for psychological purposes," without regard for a gender dysphoria diagnosis or gender identity. In this way, the "but for" analysis crucial to sustain a discrimination claim shows the non-discriminatory nature of the rule: a Medicaid beneficiary with gender dysphoria would not, for example, be entitled to a hysterectomy but for their gender dysphoria. *See State v. Mitchell*, 757 N.W.2d 431, 436 (Iowa 2008) (utilizing "but for" analysis in assessing equal protection claim). Instead, the inquiry is simpler: if the hypothetical beneficiary requests the hysterectomy primarily for psychological purposes (such as to treat gender dysphoria, but equally to treat other mental conditions), the request is denied. If, however, the hysterectomy is performed primarily for a non-psychological purpose, the beneficiary is entitled to the services without regard to gender identity.

This hypothetical mirrors the facts of *Rasmussen II*, where the Eighth Circuit upheld the legality of the Rule. In that case, Smith, a transgender male, received a hysterectomy and the removal of an ovary "partly in furtherance of his sex reassignment," but also to alleviate his suffering from endometriosis, fibro-

[4] The Rule permits coverage of certain cosmetic, reconstructive, or plastic surgeries in response to accidental injuries, congenital anomalies, and surgical trauma. Iowa Admin. Code r. 441-78.1(4)"a".

cystic breast disease, and dysmenorrhea. *Smith v. Rasmussen*, 57 F. Supp. 2d 736, 744 (N.D. Iowa 1999) ("*Rasmussen I*"). Those procedures were paid for by Iowa Medicaid. *Id.* Medicaid later paid for the removal of Smith's second ovary, once again in response to "the same abdominal pain that had prompted the first surgery." *Id.* It was only when Smith requested payment for the "final stage of his sex reassignment surgery" that the lawsuit underpinning *Rasmussen* was initiated. *Id.*

This fact pattern is illustrative of the function of the Rule: gender identity, or even a diagnosis of gender dysphoria, plays *no* role in whether an individual will or will not receive a requested procedure. As in *Rasmussen*, even seeking reimbursement for procedures partially for the treatment of gender dysphoria will not preclude receipt of the services; instead, the question becomes whether that, or another psychological purpose, is the *primary* purpose for requesting the procedure. In *Rasmussen*, that meant that the transgender Medicaid beneficiary received the procedures requested as part of his sex reassignment when they also addressed physical comorbidities. When the surgeries no longer addressed those non-psychological purposes, however, Medicaid no longer covered the services. At no point does the beneficiary's gender identity play into the analysis of what services are provided. As a result, the Rule cannot be found to discriminate on the basis of gender identity.

As the district court found, transgender and non-transgender Medicaid beneficiaries are similarly situated. However, Medicaid beneficiaries seeking surgical procedures for psychological purposes (including for treatment of gender dysphoria) and Medicaid beneficiaries seeking surgical procedures for non-psychological purposes are *not* similarly situated. Because the Rule does not hinder access to services on the basis of gender identity, but only as to psychological or non-psychological purpose of the procedure, the Rule is non-discriminatory vis-à-vis gender identity. Thus, the Department's denial should be affirmed.

### D. Surgeries to Treat Gender Dysphoria are Performed Primarily for Psychological Purposes, Irrespective of Biological Bases or Components to Gender Dysphoria Generally.

Regardless of whether (or to what extent) gender dysphoria is rooted in biology, the outcomes and purposes of surgical intervention are undoubtedly psychological in nature and are therefore appropriately excluded by the Rule. Because the record supports this finding, there is no disparity in the treatment of transgender Medicaid beneficiaries and non-transgender Medicaid beneficiaries, as both are excluded from reimbursement for surgeries performed primarily for psychological purposes.

Although the record indicates, and the district court found, that gender dysphoria may have a partly biological basis, this finding is irrelevant under the Rule. (App'x. Vol. I at 278); (App'x. Vol. II at 38 ¶ 33) (studies show

"transgender persons have areas of the brain that differ from the brains of non-transgender individuals.").[5] The Rule does not exclude surgeries based on whether the underlying issue is physical or biological in nature—instead it looks to the "purpose" for the surgical procedure. While not defined, the plain language suggests that this intent of the Rule is not to make determinations based on the biological or psychological *basis* of the issue sought to be addressed, but rather the outcome. *See Purpose*, Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/purpose (last visited August 3, 2018) ("something set up as an object or end to be attained"); *Purpose*, Oxford Living Dictionaries, *available at* https://en.oxforddictionaries.com/definition/purpose (last visited August 3, 2018) ("The reason for which something is done or created or for which something exists."). When viewed through the lens of the "purpose" for surgical in-

[5] Undoubtedly, however, gender dysphoria is significantly, if not primarily, a mental health condition. *See* (App'x. Vol. II at 33 ¶ 11) (noting placement in the "American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders-5th edition"; defining gender dysphoria, in part, as "psychiatric term used to describe… emotional pain associated with the condition."); WPATH, *The Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th Ed.), at 2, 5, *available at* https://www.wpath.org/media/cms/Documents/Web%20Transfer/SOC/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf (last visited August 3, 2018) ("WPATH") (defining gender dysphoria as "discomfort or distress that is caused by a person's gender identity and that person's sex assigned at birth…."; "Some people experience gender dysphoria at such a level that the distress meets criteria for a formal diagnosis that might be classified as a mental disorder.").

tervention, the exclusion of procedures for treatment of gender dysphoria is in perfect alignment with the non-discriminatory intent of the Rule.

Surgical intervention to treat gender dysphoria addresses only the psychological symptoms of gender dysphoria. According to Dr. Ettner, a psychologist and the authoritative expert offered by Petitioners who was heavily relied upon by the district court, surgeries for gender dysphoria are "considered 'effective' from a medical perspective if they 'have a therapeutic effect.'" (App'x. Vol. II at 38 ¶ 36). In steep contrast to non-psychological surgical interventions, Dr. Ettner cites studies that analyze effectiveness of sex reassignment surgery in terms of "satisfaction," prevalence of "regret," "interpersonal relationships," "social functioning," "self-image," "acceptance and integration into the family," activity "socially," adjustment "psychosocially," and "satisfaction with sexual experiences." *Id.* at ¶ 39, 41, 47. While each cited outcome is doubtlessly important, not a single outcome identified by Dr. Ettner could reasonably be described as anything other than primarily psychological.[6] The WPATH standards of care reiterate the psychological nature of outcomes. *See* WPATH at 55 (discussing surgical intervention in terms of "how surgery can alleviate the psychological discomfort and distress of individuals with gender dysphoria…."); *Id.* at 107 (discussing postoperative outcomes as "satisfaction," "subjective well-being," "cosmesis,"

[6] It would be a red herring for the Rule to be read to require that the purposes be *entirely* psychological to be excluded. The insertion of the word "primarily" is of central importance.

and "sexual function."). Again, gender dysphoria itself is defined in terms of *psychological* conditions, not biological components or bases. (App'x. Vol. II at 33 ¶ 11) (defining gender dysphoria in terms of the patient's "emotional pain").

Undoubtedly, mental conditions such as gender dysphoria may have effects on the physical wellbeing of individuals with the condition, such as through "anxiety, depression, mental health issues and suicidality....." (App'x. Vol. I at 279). In fact, the district court identified this as a "biological component" that was "key to the distinction between Gender Dysphoria and purely psychological disorders." *Id.* These "biological components" justified differentiation from surgeries "performed primarily for psychological purposes," according to the court. (App'x. Vol. I at 303-04). This was in error.

Countless indisputably "mental" conditions may result in the "biological components" identified and heavily relied upon by the district court in its order, including depression (which may result in appetite changes, trouble sleeping, fatigue, suicidality), dissociative disorders ("More than 70 percent of outpatients with dissociative identity disorder have attempted suicide."), posttraumatic stress disorder (symptoms include negative thoughts and feelings, irritability, self-destructive actions, problems concentrating or sleeping), and even body dysmorphic disorder ("Body dysmorphic disorder usually doesn't get better on its own, and if untreated, it may get worse over time, leading to severe depression, anxiety…and may lead to suicidal thoughts and behavior."). *What is Depression?*,

American Psychiatric Association, *available at* https://www.psychiatry.org/patients-families/depression/what-is-depression (last visited August 3, 2018); *What Are Dissociative Disorders?*, American Psychiatric Association, *available at* https://www.psychiatry.org/patients-families/dissociative-disorders/what-are-dissociative-disorders (last visited August 3, 2018); *What is PTSD?*, American Psychiatric Association, *available at* https://www.psychiatry.org/patients-families/ptsd/what-is-ptsd (last visited August 3, 2018); *Body dysmorphic disorder*, Mayo Clinic, *available at* https://www.mayoclinic.org/diseases-conditions/body-dysmorphic-disorder/symptoms-causes/syc-20353938 (last visited August 3, 2018).[7] Nonetheless, there is little room to doubt that the ICRA and the Iowa Constitution permit exclusions of coverage for surgeries related to these mental conditions.

In light of the clear psychological purposes that underpin the effectiveness of surgical intervention to treat gender dysphoria, the Rule does not discriminate in its exclusion of coverage for such procedures. Similarly, the fact that gender dysphoria, like any other mental condition, may result in symptoms

[7] In addition to sharing the "biological components" identified by the district court, body dysmorphic disorder, like gender dysphoria, also has some biological causes. *Body dysmorphic disorder*, Mayo Clinic, *available at* https://www.mayoclinic.org/diseases-conditions/body-dysmorphic-disorder/symptoms-causes/syc-20353938 (last visited August 3, 2018). In light of this fact, the district court's order leaves little room for the Department to exclude surgeries for a host of psychological conditions, including Body Dysmorphic Disorder.

with physical components does not support a finding of disparate treatment between gender dysphoria and other mental health conditions urged by Petitioners and adopted by the district court. As a result, the district court erred in finding the Rule to be discriminatory.

## III. The Iowa Department of Human Services is Not a "Public Accommodation" Under the Iowa Civil Rights Act When It Makes Benefits Determinations.

### A. Preservation of Error.

The Department preserved error on this issue by raising it in briefing to the district court. The district court subsequently decided and ruled upon this issue. (App'x. Vol. I at 200-08); (App'x. Vol. I 287-89).

### B. Scope and Standard of Review.

Where interpretation of the law has not been vested in the discretion of an agency, legal issues are subject to *de novo* review. *Bearinger v. Iowa Dep't of Transp.*, 844 N.W.2d 104, 106 (Iowa 2014).

### C. Public Accommodations Are Limited to "Place[s], Establishment[s], or Facilit[ies]," Of Which the Department is None.

The district court erred because the Department does not fall within the meaning of a "public accommodation" under the Iowa Civil Rights Act, without which there cannot be a violation of that Act. Because "public accommodations" are limited to "places, establishments, or facilities," under Iowa Code § 216.2(13), the Department cannot be appropriately considered a "public ac-

commodation" when exercising its authority as the single state agency in charge of medical assistance benefits determinations.

The district court erred in concluding that the Department is a "government unit," as provided in the ICRA, and that, therefore, the Rule violated the prohibition of Iowa Code 216.7(1) against discrimination on the basis of gender identity in places of "public accommodation."

The ICRA defines "public accommodations" in relevant part:

> 13. a. "Public accommodation" means each and every place, establishment or facility … that caters or offers services, facilities, or goods for a fee … provided that any place, establishment, or facility that caters or offers services, facilities, or goods to the nonmembers gratuitously shall be deemed a public accommodation if the accommodation receives governmental support or subsidy ….
>
> b. "Public accommodation" includes each state and local government unit … of whatever kind, nature, or class that offers services, facilities, benefits, grants or goods to the public, gratuitously or otherwise…

Iowa Code § 216.2(13).

The structure of the ICRA's "public accommodation" definition is such that the reference to "government units" is derivative of the general definition of a "public accommodation" as a "place, establishment, or facility." This definition, while it could be inclusive of state agencies in some capacities, clearly excludes the Department in its capacity as the single state agency charged with the administration of Medicaid in Iowa. Nonetheless, the district court incorrectly

concluded that the Department fell within the scope of a "government unit" under Iowa Code § 216.2(13)(b). (App'x. Vol. I 287-90).

The structure and verbiage of the ICRA requires, however, that Iowa Code § 216.2(13)(b) be read as a clarification, not a deviation, of the general "public accommodation" definition in Iowa Code § 216.2(13)(a). Paragraph "b" is phrased entirely in terms of what the general definition of "public accommodation" (as provided in paragraph "a") includes. Iowa Code § 216.2(13)(b). Consistent with Iowa law interpreting similar provisions elsewhere, the inclusion of the word "includes" in paragraph "b" makes clear that the definitions provided therein are entirely dependent on, and derivative of, the broader definition of Iowa Code § 216.2(13)(a). *See State Pub. Defender v. Iowa Dist. Ct. for Black Hawk Cnty*, 633 N.W.2d 280, 283 (Iowa 2001) ("The term 'including' usually is interpreted as a term of enlargement or illustration, having the meaning of 'and' or 'in addition to.'"). As a result, "government units" are only public accommodations if they are *also* "places, establishments, or facilities." The Department, as a state agency administering Medicaid, does not fall within this scope, and therefore Petitioners' ICRA claim cannot be sustained.

The Iowa Supreme Court's analysis in *U.S. Jaycees v. Iowa Civil Rights Comm'n*, is illustrative of the limitations to the ICRA's definition of "public accommodations." *U.S. Jaycees v. Iowa Civil Rights Comm'n*, 427 N.W.2d 450 (Iowa 1988). There, the Court considered the applicability of the ICRA's prohibition

against sex discrimination provisions to U.S. Jaycees, an organization that refused to admit women as "regular members." *Id.* at 451. The Court thus addressed whether "public accommodations" could be inclusive of membership organizations. *Id.* at 453. The Court noted that "[a]bsent a manifest contrary legislative intent…we are bound by such common understands of statutory terms," with the operative terms being "place, establishment, or facility." *Id.* at 454. Consistent with this principle, the Court noted that "by the literal and ordinary definition of the statutory term that the United States Jaycees is not a 'place' within our definition of 'public accommodation.'" *Id.* The Court concluded similarly for 'establishment' and 'facility.' *Id.* "The ordinary usage of these terms connotes a *spatial dimension* which the Jaycees' membership, as such, does not possess." *Id.* (emphasis added). Thus, the Court held that membership organizations like the U.S. Jaycees were not "public accommodations" under the ICRA.

The same logic guides an analysis of whether the Department is a "government unit" under the ICRA. Because a "government unit" is included in the definition of "public accommodations" as "places, establishments, or facilities," the Department can only be a "government unit" under that provision if it qualifies as a "place, establishment, or facility." This it cannot be. The Department is a state agency that, like a membership organization, is not confined to or defined by a physical locale. While, as with members to a membership organization, the Department's employees, agents, and representatives occupy physical

locations throughout the state, the Department as an agency cannot appropriately be considered a "public accommodation." State agencies, like membership organizations, are not "places, establishments, or facilities," as defined in the ICRA.

Regardless, under the doctrine of *noscitur a sociis*, "the meanings of statutory terms are ascertained in light of the meaning of words with which they are associated." *Id.* at 454. Here, even if "government unit" was not merely an elaboration of "places, establishments, or facilities" that qualify as "public accommodations," the inclusion of "government unit" with exclusively physical locations would inform the appropriate definition of the term. For example, in addition to being associated with (and limited to) "places, establishments, or facilities," "government unit" is also associated with the word "district" in Iowa Code § 216.2(13)(b). As both parties have acknowledged, "district" denotes a *physical* locale. *See* (App'x. Vol. I at 241); *District*, Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/district (last visited August 3, 2018) ("a territorial division" or "an area, region, or section with a distinguishing character"). In light of these clear associations, and pursuant to the doctrine of *noscitur a sociis*, "government unit" is appropriately interpreted to similarly refer to a physical location, not any government entity generally.

A reading of "government unit" limited to places, establishments, or facilities is also consistent with the use of the word "unit" throughout the ICRA.

The term "unit," is not defined in the ICRA. *See* Iowa Code § 216.2. "When the legislature fails to define a statutory term, we examine the context in which the term appears and accord the term its ordinary and common meaning." *State v. Pettijohn*, 899 N.W.2d 1, 16 (Iowa 2017) (internal citation omitted). In addition, "[w]hen the same word or term is used in different statutory sections that are similar in purpose, they will be given a consistent meaning." *State v. Richardson*, 890 N.W.2d 609, 619 (Iowa 2017) (internal citation omitted).

The use of the word "unit" throughout the ICRA makes it clear that the term is made with reference to subparts of facilities or buildings. For example, Iowa Code § 216.2(4), in defining a "covered multifamily dwelling," makes reference to buildings "consisting of four or more dwelling *units*," and "ground floor *units of a building* consisting of four or more dwelling *units*." (emphasis added). All three of these references to "units" make clear that the word "unit," whether or not it is preceded by the word "dwelling," refers to physical portions of a larger physical facility. This is consistent with the plain language meaning of a "unit." *See, e.g.*, *Unit*, Oxford Living English Dictionaries, *available at* https://en.oxforddictionaries.com/definition/unit (last visited Feb. 26, 2018) ("A self-contained section in a building or group of buildings" as in "one- and two-bedroom units."). Indeed, the Iowa Supreme Court has clearly indicated that the term "unit," as used within the ICRA, refers not to state agencies, but to subparts of facilities or buildings. *See State ex rel. Claypool v. Evans*, 757 N.W.2d

166 (Iowa 2008) (using the term "unit" in reference to housing units in comprehensive analysis of the ICRA). If the undefined term "unit" is to be viewed in context and consistently throughout the statute, a "government unit" can only refer to government-subsidized housing or, at most, units of a building owned and operated by a government entity. Examples of "government units" and "districts" provided by the Iowa Civil Rights Commission illustratively include "Police Departments, Schools, Mass Transit, [and] Libraries." Iowa Civil Rights Commission, "Sexual Orientation & Gender Identity," *available at* https://icrc.iowa.gov/sites/default/files/publications/2016/2016.sogi_.pa1_.pdf (last visited Aug. 22, 2018). In no circumstances can "government unit" be reasonably read to include state agencies generally or benefits determinations by state agencies specifically.

In its order, the district court cited to several cases and a secondary source to support its expanded interpretation of "government unit." (App'x. Vol. I at 289, n. 48). However, all but one of the court's citations use the term "unit of local government" based on inapposite statutory text. *See Warford v. Des Moines Metro. Transit Auth.*, 381 N.W.2d 622, 624 (Iowa 1986) (citing what is now codified at Iowa Code § 670.1); *Wilson v. Nepstad*, 282 N.W.2d 664, 668 (Iowa 1979) (same); 3 Ia. Prac., Methods of Practice § 45:1 (2017) (referring to same). This statute does include in its implicit definition of "unit of local government" such entities as cities, counties, townships, and school districts. Iowa Code §

670.1(2). However, unlike state agencies, each of these government units are also spatial units, and thus this definition is not inconsistent with the limitations more expressly delineated in the ICRA. Similarly, the district court's final citation seems to *distinguish* between "public agencies" and "governmental units." *Goreham v. Des Moines Metro. Area Solid Waste Auth.*, 179 N.W.2d 449, 455 (Iowa 1970).

In addition, the term "unit" has historically been used to denote physical locales in the ICRA. For example, in 1994, the Legislature amended Iowa Code § 216.2(4)(b) to include the following for the definition of a "covered multifamily dwelling":

> b. The ground floor units of a building consisting of four or more dwelling units.

CODE CORRECTIONS, 1994 Ia. Legis. Serv. 1023 (West) (H.F. 2124). This addition is telling: the pre-1994 version of the ICRA used the unmodified term "units," to refer to segments of a building. Only later did the legislature modify the term "units," but only to clarify that the definition was in reference to "dwelling units," not because the term "units," standing alone, did not refer to physical segments of a building. Thus, if the term "unit" is to be interpreted consistently throughout the ICRA's legislative history, it is clear that "government unit" must be read to refer to sections of "places, establishments, or facilities."

Additional legislative history also buttresses this interpretation. In *U.S. Jaycees*, the Iowa Supreme Court approvingly cited a 1964 article by Professor Bonfield on the purpose of the ICRA. There, Professor Bonfield opined on the expansion of applicable facilities covered by the ICRA's protections. In this article, Professor Bonfield discusses the ICRA purely in terms of "establishments" and "places" meant to be included (or that should have been included) in the ICRA's scope. As noted by the Court in that case, "[n]othing in [Professor Bonfield's] rationale evinces a concern for coverage of membership organizations such as the Jaycees." *U.S. Jaycees*, 427 N.W.2d at 455. The same is true for state agencies administering benefits, like the Department.

Although there is little other legislative history to aid the Court's interpretation, this more textual reading of the ICRA is supported by policy. In the context of the ICRA, it makes sense that Iowa Code § 216.2(13)(b) would have been crafted to ensure that places, establishments, and facilities that otherwise qualified as "public accommodations" (such as a library) would not be excluded from ICRA by virtue of their status as government-run places, establishments, or facilities. This reasoning does not, however, justify an unprecedented and expanded reading of the ICRA's scope to include *all* government activities.

Finally, this reading is supported by both federal and state corollaries. Under state civil rights acts, "the definition of a place of public accommodation is [generally] not so broad as to include the services provided by a state agency;

instead, it refers to facilities maintained for the use of the general public." 14 C.J.S. Civil Rights § 86. Similarly, the federal Civil Rights Act is expressly limited in scope to establishments and places. *See* 20 U.S.C. § 2000a ("Each of the following *establishments* which serves the public is a *place* of public accommodation within the meaning of this subchapter . . . .") (emphasis added). The significance of this similarity is underscored by this Court's longstanding respect of federal case law in interpreting what is meant to be Iowa's corollary. *See Pippen v. State*, 854 N.W.2d 1, 18 (Iowa 2014) (Iowa courts "have traditionally looked to federal law for guidance in interpreting the Iowa Civil Rights Act."). This tradition would be undermined if the ICRA was read to be intended to be so drastically different in scope and purpose, as Petitioners propose.

Put together, these considerations illustrate that the Iowa legislature intended that the ICRA be limited in scope not to all organizations, but only to "places, establishments, or facilities," consistent with federal and state corollaries. As a result, the district court's expanded reading of the definition of a "government unit" to include the Department in this context was in error and should be reversed.

## IV. Iowa Admin. Code r. 441-78.1(4) Does Not Violate the Iowa Constitution's Equal Protection Guarantees Because It Does Not Discriminate Against a Protected Class and Serves Important Government Purposes.

### A. Preservation of Error.

The Department preserved error on this issue by raising it in briefing to the district court. The district court subsequently decided and ruled upon this issue. (App'x. Vol. I at 211-19); (App'x. Vol. I at 295-309).

### B. Scope and Standard of Review

This Court's review of constitutional issues raised in a Petition for Judicial review is *de novo*. *Tyler*, 904 N.W.2d at 166.

### C. The Only Class Identified in the Rule is an Unprotected Class.

For the reasons discussed in Section I, the Court's equal protection analysis need go no further: absent disparate treatment between classes of persons (in this case, transgender and non-transgender Medicaid beneficiaries), there is no discrimination or classification to which to apply scrutiny. Indeed, Petitioners' equal protection claims must fail for this reason.

To the extent that the Rule does differentiate between classes of persons, rational basis review is the appropriate level of scrutiny for this Court to apply.

Although the Rule is blind to distinctions between transgender and non-transgender Medicaid beneficiaries (or even Medicaid beneficiaries with or without gender dysphoria), the Rule does technically "classify" on different grounds:

whether the requester seeks surgical services primarily for psychological purposes. In this way, the only class to be analyzed would be the umbrella class under which Petitioners fall: Medicaid beneficiaries seeking surgical services primarily for psychological purposes. For the reasons discussed below, this classification is only subject to rational basis review.

Throughout the course of this litigation, Petitioners have not endeavored to define a class under the rule other than transgender Medicaid beneficiaries. As a result, the record cannot support a finding that Medicaid beneficiaries seeking surgical services primarily for psychological purposes are entitled to protected or semi-protected class status so as to warrant heightened scrutiny. Indeed, the failure to raise this argument below is preclusive of such a finding here. Regardless, the factors for considering heightened scrutiny do not support such a finding.

The Iowa Supreme Court has looked to four factors in weighing whether a heightened level of scrutiny should be applied under the Iowa Constitution's Equal Protection guarantees: (1) the history of invidious discrimination against the class burdened by the legislation; (2) whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society; (3) whether the distinguishing characteristic is "immutable" or beyond the class member's control; and (4) the political power of the subject class. *Varnum*, 763 N.W.2d at 887-88.

In the absence of any support in the record, there is no basis to find that Medicaid beneficiaries seeking surgical services primarily for psychological purposes generally, rather than the subset of transgender Medicaid beneficiaries specifically, should be subject to heightened scrutiny. For example, although the district court found there was a history of invidious discrimination due to the existence of protections for transgender persons under the ICRA, the Iowa Anti-Bullying and Anti-Harassment Act, and hate crime statutes, there is no like protection that would encompass those seeking surgical procedures primarily for psychological purposes. *See* Iowa Code §§ 216.7 (ICRA); 280.28 (anti-bullying); and 729A.2 (hate crime). In addition, the plain language of the Rule makes clear that it prohibits surgeries for both immutable and temporary or voluntary characteristics. *See* Iowa Admin. Code r. 441-78.1(4) (excluding, *inter alia*, face lifts and tattoo removals). No evidence was submitted pertaining to the political powerlessness of the class. In the absence of any evidence supporting the protected status of the class, rational basis review should be applied.

### D. The Rule Withstands Both Rational Basis Review and Heightened Scrutiny.

In determining whether a rule meets the rational basis test, the courts examine "whether the classifications drawn in a statute are reasonable in light of its purpose." *Residential and Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 50 (Iowa 2016) (internal citation omitted). In making this de-

termination, the courts engage in a three-part inquiry: (1) whether there was a valid, "realistically conceivable" purpose that served a legitimate government interest; (2) whether the identified reason has any basis in fact; and (3) whether the relationship between the classification and the purpose for the classification "is so weak that the classification must be viewed as arbitrary." *Id.* (internal citations and quotation marks omitted). Notably, the Iowa Supreme Court has stated it "will not declare something unconstitutional under the rational-basis test unless it 'clearly, palpably, and without doubt infringe[s] upon the constitution.'" *Id.* (internal citation omitted). "The burden is not on the government to justify its action, but for the plaintiff to rebut a presumption of constitutionality." *Tyler*, 904 N.W.2d at 166.

In contrast, to withstand intermediate scrutiny, "a statutory classification must be substantially related to an important governmental objective." *Varnum*, 763 N.W.2d at 896. Courts evaluated whether the proffered governmental objectives "are important and whether the statutory classification is substantially related to the achievement of those objectives." *Id.* (internal quotation marks and citations omitted).

The district court erred in holding that the Department's cost containment objective was insufficient to meet the burdens under rational basis review and heightened scrutiny. At the time the Department promulgated the Rule it noted that:

> [T]he Iowa Medicaid program does not have sufficient resources to provide all clearly appropriate care to all those who cannot afford the care they need. In light of that fact, the Department does not believe that available resources should be spent on a procedure that is as controversial within the medical community as is sex reassignment surgery.

(App'x. Vol. II at 284). As a result, the Rule was promulgated for the purpose of conserving Iowa Medicaid's limited resources. The same reasoning still applies. *See Guttman v. Khalsa*, 669 F.3d 1101, 1123 (10th Cir. 2012) ("Costs are especially relevant when the state's actions are subject only to rational basis review, given that conserving scarce resources may be a rational basis for state action."). Preserving the fiscal integrity of welfare programs such as Medicaid is a legitimate state interest. *See Ass'n of Residential Res. in Minnesota, Inc. v. Gomez*, 51 F.3d 137, 141 (8th Cir. 1995) (citing *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)). "Our cases uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds." *Maher v. Roe*, 432 U.S. 464, 479, 97 S. Ct. 2376, 2385 (1977).

The state's restriction of benefits to exclude psychologically-motivated surgeries is a rational approach to rationing public funds. Petitioners are being treated for their gender dysphoria in the form of hormone therapy and other services. However, coverage is denied for their requested surgeries due to the excessive cost of the procedure. Such a restriction is rational in the context of limited resources:

> In the area of economics and social welfare the Supreme Court has established that 'a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970). 354 F.Supp. at 459. Moreover, there is related authority to the effect that equal protection is not denied when a legislature in dealing with a social problem chooses to take 'one step at a time,' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955), 'so long as the line drawn' between steps is 'rationally supportable.' *Geduldig v. Aiello*, 417 U.S. 484, 495, 94 S.Ct. 2485, 2491, 41 L.Ed.2d 256 (1974)

*Kantrowitz v. Weinberger*, 388 F. Supp. 1127, 1130 (D.D.C. 1974), *aff'd*, 530 F.2d 1034 (D.C. Cir. 1976) (finding no equal protection violation in the funding of inpatient mental health treatment for those 21 and younger, and those over 65, but not for persons aged 22-64).

As illustrated by the record, "sex reassignment surgery" is a misnomer: instead of being one procedure, oftentimes transitioning requires multiple procedures, not necessarily performed at one time. *See, e.g.,* (App'x. Vol. II at 481) (referencing the seven procedures for which Petitioner Beal was denied coverage). To the extent these surgeries are covered by Medicaid and result in additional complications (as surgeries often can), Medicaid would also be responsible for making payment related to those additional complications. Iowa Admin. Code rr. 441-78.1, 441-73.7. As a result, the Rule not only conserves state resources by not providing coverage for costly surgical procedures, it also conserves resources by preempting the need for subsequent medical coverage relat-

ed to complications from such procedures. These resources may then be used to fulfill Medicaid's purpose of "provid[ing] the largest number of necessary medical services to the greatest number of needy people." *Rasmussen II*, 249 F.3d at 759 (*citing Ellis v. Patterson*, 859 F.2d 52, 55 (8th Cir. 1988)); *see also* Iowa Code § 249A.4(1) (delegating to the director of the Department the responsibility of "[d]etermin[ing] the greatest amount, duration, and scope of assistance which may be provided, and the broadest range of eligible individuals to whom assistance may effectively be provided, under this chapter within the limitations of available funds.").

The district court dismissed this important governmental objective on the basis that it was rejected in *Varnum*. 763 N.W.2d at 902-04. However, in that case the Iowa Supreme Court found that a ban on same-sex marriages was both over- and under-inclusive "if the true goal [were] to conserve state resources," because, *inter alia*, "the two classes [were] similarly situated for the purpose of conserving state resources, yet the classes [were] treated differently by the law. In this way, sexual orientation [was] a flawed indicator of resource usage." *Id.* at 903. Here, however, the relationship between the "class" (Medicaid beneficiaries seeking surgical procedures primarily for psychological purposes) is directly related to the important government objective of conserving resources. Unlike in *Varnum*, the class is requesting direct governmental benefits—reimbursement for surgical services—based on the very characteristics that put them in the

class. Not only will this result in potential payment for multiple costly, invasive surgeries, but it could result in significant expenses for any complications, which are a natural risk to surgery. As a result, the district court's dismissal of this governmental objective was in error.

Second, the district court erred in holding that the Rule's consideration of the "evolving nature of the diagnosis and treatment of gender identity disorder and the disagreement regarding the efficacy of sex reassignment surgery" was not an important governmental objective. *Rasmussen II,* 249 F.3d at 761. As the Department noted in promulgating the Rule, "the medical literature has continued to show controversy within the medical community regarding gender dysphoria and sex reassignment surgery, poor results from surgery, success with psychotherapy, and the need for further study[.]" (App'x. Vol. II at 282). Even the WPATH Standards of Care note that some mental health professionals "object on ethical grounds to surgery as a treatment for gender dysphoria" because these procedures do not "restore disturbed functions" or "improve a patient's self-image." WPATH at 55. The Standards of Care also note controversy in the medical community regarding the extent to which sex reassignment surgery can be considered "cosmetic." *Id.* at 58.

In addition, the same professional associations Petitioners cited in their Petitions to support coverage of these procedures note that such services are frequently excluded by private insurance providers. This supports a finding that

these procedures lack the medical consensus Petitioners ascribe. *Resolution No. 1004*, American Academy of Family Physicians, *available at* https://www.aafp.org/dam/AAFP/documents/about_us/special_constituencies/2012RCAR_Advocacy.pdf (last visited August 7, 2018) ("many insurers specifically exclude transgender care"); *Position Statement on Access to Care for Transgender and Gender Variant Individuals*, American Psychiatry Association, *available at* https://www.psychiatry.org/file%20library/about-apa/organization-documents-policies/policies/position-2012-transgender-gender-variant-access-care.pdf (last visited August 7, 2018) ("[P]rivate and public insurers often do not offer, or may specifically exclude, coverage for medically necessary treatments for gender transition."). The same reasons that underpinned the Eighth Circuit's finding of the Rule's reasonableness in *Rasmussen II* support upholding the Rule under this Court's Equal Protection analysis.

The court's opinion in *Rasmussen II* shows the medical consensus at the time the Rule was made was not substantially different from that posited by Petitioners today. In *Rasmussen II*, the court noted that sex reassignment "surgery can be appropriate and medically necessary for some people and that the procedure was not considered experimental." *Id.* at 760. As a result, the rule, both at the time of its promulgation and now, still serves the legitimate purpose of withholding coverage of procedures which, while not experimental, are not a panacea for everyone with gender dysphoria.

These legitimate and realistically conceivable purposes enjoy the requisite "basis in fact" to survive rational basis review. To show that a realistically conceivable purpose has a "basis in fact," it is unnecessary for there to be "actual proof." *Tyler v. Iowa Dept. of Rev.*, 904 N.W.2d 162, 166 (Iowa 2017). Instead, courts will "examine [the justifications] to determine whether [they are] credible as opposed to specious." *Id.* Nonetheless, this purpose is buoyed by the record, which shows that the lack of clarity on sex reassignment surgery was a significant consideration at the time the specific exclusion was written into the Rule. (App'x. Vol. II at 280-84). The structure of the rule is also informative: Iowa Admin. Code r. 441-78.1 outlines reasonable limitations to what "physician services" will be provided under Medicaid. These reasonable limitations, which go well beyond surgical treatment for gender dysphoria, all serve the same underlying purpose: providing the largest number of necessary medical services to the greatest number of needy people.

The district court erred in ruling otherwise. The district court held that "DHS has not reviewed or studied the language regarding sex reassignment surgery in the [Rule] since its original adoption," a factor the court concluded "weighs heavily" against the Department. (App'x. Vol. I at 303). However, the court did not cite to anything in the record to support the proposition – instead, as the court acknowledged elsewhere, "DHS conducted reviews of the [Rule] in 2010, 2012, 2013, 2015, and 2016." (App'x. Vol. I at 303, 311 n. 142). As a re-

sult, this factor, which the court held weighed heavily against the Department, was based on an incorrect premise as acknowledged by the Petitioners. *Id.* In addition, the court's conclusion that the Rule was based on outdated evidence was in error for the reasons described above. Finally, the court concluded that surgical intervention treated the "biological components of Gender Dysphoria." (App'x. Vol. I at 303). However, for reasons discussed previously, the record actually reflects that sex reassignment surgery addresses only the psychological aspects of Gender Dysphoria. *See* (Discussion at Section II.D.). These three factors, which formed the basis of the district court's finding that the Department's consideration of the lack of medical consensus was not an important governmental objective, were weighed against the Department in error, and should be reversed.

## V. The Rule Does Not Have a Disproportionate Negative Impact on Private Rights.

### A. Preservation of Error.

The Department preserved error on this issue by raising it in briefing to the district court. The district court subsequently decided and ruled upon this issue. (App'x. Vol. I at 200-19); (App'x. Vol. I 309-10).

### B. Scope and Standard of Review

Iowa Code § 17A.19(10)(k) permits reversal of an agency action if the court determines the action was "[n]ot required by law and its negative impact

on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy." The private rights upon which Petitioners claim infringement are the "right[s] to be treated in accordance with the provisions of the ICRA and the Iowa Constitution." (App'x. Vol. I at 115 ¶ 147); (App'x. Vol. I at 27 ¶ 148). Thus, the standard of review mirrors those of the issues above.

This Court's review of constitutional issues raised in a Petition for Judicial review is *de novo*. *Tyler*, 904 N.W.2d at 166.

The judicial review provisions of the Administrative Procedure Act are the exclusive means for judicial review of administrative agency action. Iowa Code § 17A.19; *see also Norland*, 412 N.W.2d at 908. When exercising the power of judicial review under Iowa Code § 17A.19, the court functions in an appellate capacity to correct errors of law. *Ludtke*, 646 N.W.2d at 64-65. Grounds for relief are specified in section 17A.19(10). The burden is on the petitioner to identify and establish the grounds for relief alleged. Iowa Code § 17A.19(8)(a). Where interpretation of the law has not been vested in the discretion of an agency, legal issues are subject to *de novo* review. *Bearinger*, 844 N.W.2d at 106.

### C. Petitioners' Claim Under Iowa Code § 17A.19(10)(k) Fails For the Same Reasons Expressed Above.

Pursuant to Iowa Code § 17A.19(10)(k), an agency action may be reversed if the action was "[n]ot required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy." As pled in Petitioners' Petitions for Judicial Review, the "private rights" Petitioners claim grossly disproportionate negative impact to are the rights "to be treated in accordance with the provisions of the ICRA and the Iowa Constitution." (App'x. Vol. I at 115 ¶ 147); (App'x. Vol. I at 27 ¶ 148). As a result, for the same reasons the district court erred in its analysis under the Iowa Constitution and ICRA, so too did it err in granting relief under this provision.

Regardless, the court additionally erred in granting relief under Iowa Code § 17A.19(10)(k), which requires that the action be "necessarily …deemed to lack *any* foundation in rational agency policy" (emphasis added) while concurrently holding that "there *is at least some* public interest served by denying Iowa Medicaid coverage for sex reassignment surgery based on cost-savings in some amount…." (App'x. Vol. I at 309) (emphasis added). In addition, for all the reasons that the Rule should not be found to be arbitrary nor capricious and sur-

vives even heightened scrutiny by this Court, so too does it contain sufficient rationality to survive Petitioners' claim under Iowa Code § 17A.19(10)(k).

## VI. The Rule Is Neither Arbitrary Nor Capricious, Consistent with the Holding of the Eighth Circuit.

### A. Preservation of Error.

The Department preserved error on this issue by raising it in briefing to the district court. The district court subsequently decided and ruled upon this issue. (App'x. Vol. I at 208-11); (App'x. Vol. I at 310-12).

### B. Scope and Standard of Review.

The judicial review provisions of the Administrative Procedure Act are the exclusive means for judicial review of administrative agency action. Iowa Code § 17A.19; *see also Norland*, 412 N.W.2d at 908. When exercising the power of judicial review under Iowa Code § 17A.19, the court functions in an appellate capacity to correct errors of law. *Ludtke*, 646 N.W.2d at 64-65. Grounds for relief are specified in section 17A.19(10). The burden is on the petitioner to identify and establish the grounds for relief alleged. Iowa Code § 17A.19(8)(a). Where interpretation of the law has not been vested in the discretion of an agency, legal issues are subject to *de novo* review. *Bearinger*, 844 N.W.2d at 106.

An agency action is "unreasonable, arbitrary, or capricious" only if the action was "taken without regard to the law or facts of the case," was "unreasona-

ble or lacked rationality," or if it is "clearly against reason and evidence." *City of Sioux City v. Iowa Dep't of Rev. & Fin.*, 666 N.W.2d 587, 590 (Iowa 2003).

**C. The Department's Application of the Rule was Reasonable.**

The Eighth Circuit's holding that the Rule was reasonable and not arbitrary or capricious should inform this Court's analysis of the Rule's reasonableness under Iowa law. Although raised in the context of federal civil rights claims, the Eighth Circuit's analysis and holding of the Rule's reasonableness in *Rasmussen II* illustrates why Petitioners' final claim for relief must similarly fail.

In *Rasmussen II*, the plaintiff's primary treating psychiatrist made the determination that sex reassignment surgery, a phalloplasty, was a medically necessary treatment for the plaintiff's gender identity disorder. *Id.* at 756-57. Medicaid denied coverage, citing the Rule as the legal basis. *See Rasmussen I*, 57 F. Supp. 2d at 736 (district court opinion). In the context of a Section 1983 claim, the court in *Rasmussen I* noted that the evidence that was before the Department at the time the rule was made "revealed that [sex reassignment] surgery can be appropriate and medically necessary for some people and that the procedure was not considered experimental." *Id.* at 760. In other words, the medical consensus at the time the Rule was made was not substantially different from that posited by Petitioners today. *Compare* (App'x. Vol. II at 282-83) (noting controversy within medical community and lack of coverage by private health insurance because of that), *with* WPATH at 55, 58 (noting professional disagreements surrounding sex

reassignment surgery), *and Resolution No. 1004*, American Academy of Family Physicians, *available at* https://www.aafp.org/dam/AAFP/documents/about_us/special_constituencies/2012RCAR_Advocacy.pdf (last visited August 7, 2018) ("many insurers specifically exclude transgender care"); *Position Statement on Access to Care for Transgender and Gender Variant Individuals*, American Psychiatry Association, *available at* https://www.psychiatry.org/file%20library/about-apa/organization-documents-policies/policies/position-2012-transgender-gender-variant-access-care.pdf (last visited August 7, 2018) ("[P]rivate and public insurers often do not offer, or may specifically exclude, coverage for medically necessary treatments for gender transition."). This demonstrates that the rationale of the Eighth Circuit in *Rasmussen II* is equally applicable in today's medical context.

The Eighth Circuit in *Rasmussen II* determined that, as a matter of law, "the State's prohibition on funding of sex reassignment surgery is both reasonable and consistent with the Medicaid Act." *Rasmussen II*, 249 F.3d at 761. The court reviewed the State's rulemaking processes and the evidence it considered, noting the State commissioned a review and recommendation for coverage of treatment for gender identity disorder from the Iowa Foundation for Medical Care, considered the fiscal impact of coverage, conducted a study of gender reassignment surgery coverage in Medicaid across the states, considered the exist-

ing coverage of alternative treatment options, and engaged in a public rulemaking process. *Id.* at 760-61; *see also* (App'x. Vol. II at 280-84).

Although the holding in *Rasmussen II* was reached in the context of a Section 1983 claim, its conclusions are equally compelling in the context of a Section 17A judicial review. Both inquiries center on the reasonableness and arbitrary or capricious nature of the Rule. Based on the information that was before the Department at the time it created the rule, the Eighth Circuit found that it *could not* conclude as a substantive matter "that the Department's regulation is unreasonable, arbitrary, or inconsistent with the Act, which is designed to provide 'necessary medical services to the greatest number of needy people, in a reasonable manner.'" *Id.* at 761 (internal citation omitted). In light of the fact that the medical literature remains similar, that private insurers continue to exclude transgender care, and that the cost considerations and other policies surrounding surgical intervention for psychological purposes continue unabated, the reasoning in *Rasmussen II* remains as compelling as it was when decided in 2001.

Regardless, the district court ruled that the Department's enforcement of the rule was arbitrary and capricious because it violated the ICRA and the Iowa Constitution and because the Department fails "to keep up with medical science." (App'x. Vol. I at 312). For the reasons discussed above, the Rule is not in conflict with either the Iowa Constitution or ICRA. Similarly, the Department

has not failed "to keep up with medical science"—as the record and documents referred to by Petitioners in their pleadings show, the Department's analysis of the medical consensus in 1994 does not materially differ from the medical consensus of 2001, nor does it materially differ from the medical consensus of 2018.

In addition, an agency action cannot be unreasonable, arbitrary, or capricious when the agency acts out of legal obligation. *See Soo Line R.R. Co v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688-699 (Iowa 1994) (noting an agency action is arbitrary or capricious when taken "without regard to the law."). "Administrative regulations have the force and effect of a statute." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 764 (Iowa 2009) (internal citation omitted). Under Petitioners' theory, the Department's enforcement of the Rule is unreasonable, arbitrary, and capricious, notwithstanding the fact that the Department is *obligated* to enforce the Rule as it has the "force and effect of a statute." *Id.* It would be illogical for the Department to be acting arbitrarily, capriciously, or even unreasonably when performing a function it is mandated to perform. The Legislature could not have intended that the Iowa Administrative Procedure Act would operate in such an illogical fashion. Thus, the district court erred in concluding the Department's enforcement of the Rule was unreasonable, arbitrary, and capricious.

## CONCLUSION

The narrow issue presented to this Court is to what extent permissible limitations that incidentally affect transgender Medicaid beneficiaries are in conflict with the ICRA and the Iowa Constitution. Because transgender Medicaid beneficiaries have the same access to surgical procedures of whatever type as non-transgender Medicaid beneficiaries to whom they are similarly situated, there is no impermissible discrimination under the Rule. For this reason, the Department prays this Court affirm the Department's denial of services.

Respectfully submitted,

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## REQUEST FOR ORAL SUBMISSION

The Respondent-Appellant hereby requests that the matter be submitted for oral argument before the Court.

## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using **Garamond** in **size 14** and contains **10,874** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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