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 REPLY 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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ARGUMENT

I. The Rule Does Not Discriminate on the Basis of Gender Identity.

Although Petitioners ostensibly assert five reasons to find the Rule discriminates on the basis of gender identity, the crux of Petitioners' position is this: the Rule specifically identifies sex reassignment surgery for purposes of treating gender dysphoria as excluded under the Rule. This Court should reject this line of reasoning given the plain language and unique history of this Rule.

First, the Rule only specifically identified sex reassignment surgery and gender identity disorder because this was required by the Eighth Circuit in *Pinneke v. Preisser*, 623 F.2d 546, 549-50 (8th Cir. 1980). In that case, the Eighth Circuit ruled that the Department's informal characterization of sex reassignment surgery as "cosmetic surgery," was improper. *Id.* at n.2; *see also* (App'x. Vol. II at 281) (noting the denial in *Pinneke* was based on exclusion of "cosmetic surgery"). The Eighth Circuit further required the Department to fund the requested sex reassignment surgery in *Pinneke* because the denial was based on a non-medical presumption "not promulgated through a proper rulemaking process…." *Smith v. Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001) ("*Rasmussen II*") (discussing decision in *Pinneke*).

Around the time *Pinneke* was decided, but after the plaintiff's requested surgery in *Pinneke* was denied as "cosmetic surgery," the Department changed its rules to exclude coverage of "cosmetic, reconstructive, or plastic surgery," in-

cluding, as the Rule now states, any procedures "performed primarily for psychological reasons." (App'x. Vol. II at 281). As a direct response to the Eighth Circuit's admonition in *Pinneke*, when the issue later arose in the 1990s, the Department initiated rulemaking procedures that were intended to "clarify" that "cosmetic, reconstructive, and plastic surgery (including sex reassignment surgery) for transsexualism, gender identity disorder, or body dysmorphic disorder *are not* covered by the Iowa Medicaid program." (App'x. Vol. II at 281) (emphasis added). In other words, the purpose of the rule was not to specifically exclude coverage of sex reassignment surgery, but rather only to make clear that such surgeries were *already* excluded. However, because the Eighth Circuit in *Pinneke* admonished the Department's lack of formal rulemaking, the Department engaged in such rulemaking to ensure the legal viability of its pre-existing coverage exclusion as it related to surgical procedures for gender identity disorder.[1]

Petitioners now seek to hold this rulemaking against the Department, arguing that the Rule is discriminatory because it "categorically bans coverage for gender-affirming surgery for transgender individuals…." (Appellee Br. at 42). Petitioners seek to place the Department in a Catch-22. On one hand, the De-

[1] The record does reflect that the Department covered one request for sex reassignment surgery prior to clarifying the exclusion. However, this coverage was not based on the text of the Rule, and in light of the Eighth Circuit's *Pinneke* ruling, such coverage can easily be explained as an exception to policy pursuant to Iowa Admin. Code r. 441-1.8.

partment has specifically identified that surgeries for purposes of treating gender identity disorder (now gender dysphoria) are excluded from coverage as admonished by the Eighth Circuit in *Pinneke* and upheld in *Rasmussen II*. *Smith v. Rasmussen*, 249 F.3d 755 (8th Cir. 2001). On the other, Petitioners say that such specific identification is the *basis* for finding discrimination in the Rule, even though the Rule's history shows the specific identification was only a clarification, not an expansion, of the existing rule. Both positions cannot be true at the same time: for this reason, this Court should find that the Department's compliance with the Eighth Circuit's guidance is not a basis to find discrimination in the Rule.

Second, despite superficial rejection of the premise that surgeries to treat gender dysphoria are "primarily for psychological purposes," Petitioners' brief substantively acknowledges this fact. As stated by the Petitioners, untreated gender dysphoria may lead to "psychological distress and dysfunction, debilitating depression, and …suicidality and death." (Appellee Br. at 31). Indeed, Petitioners state untreated gender dysphoria may lead to "acute distress and isolation, impedes healthy personality development and interpersonal relationships, and destroys a person's ability to function effectively in daily life," and that the requested procedures are not for psychological purposes because they "create body congruence and eliminate anatomical dysphoria." (Appellee Br. at 43-44). Each of these outcomes, however, relates to the psychology, or mental health,

of the Petitioners, and thus falls well within the non-discriminatory coverage exclusion in the Rule. Even the "physical pain" upon which Petitioners rely to distinguish the requested procedures is intrinsically psychological. It is not the underlying condition itself that causes the physical pain noted by Petitioners, but Petitioners' voluntary use of a "girdle for up to twelve or more hours each day…." (Appellee Br. at 45). This does not shift the purpose of the requested surgery from a psychological one, in the same way that a treatment for depression is not done primarily for non-psychological purposes if it could reduce the risk of suicidality. In addition, incidental physical benefits from the surgery are inapposite, as the Rule looks only to the *primary* purpose. The mechanism (surgery) is physical: the outcomes (to which the Rule looks) primarily relates to mental health.

Third, the Rule does not base any coverage or exclusion determinations on the gender identity of the requesting party, and thus is not discriminatory. The fact that the procedures requested by Petitioners for their transition are covered in other contexts does not support a finding of discrimination—it contradicts it. As thoroughly addressed in the Department's initial brief, while the Rule excludes coverage of procedures primarily for psychological purposes, it also permits coverage of those same procedures without consideration of irrelevant factors such as gender identity, race, or sex. (Appellant Br. at Sec. II.C-D.). To the extent any Medicaid beneficiary requests surgeries for a non-

psychological purpose, the surgeries are covered on the same basis regardless of gender identity. This is the very definition of a non-discriminatory Rule.

Fourth, there is no evidence in the record to support a finding that the Rule, in effect, treats sex reassignment surgery differently from other, similar procedures. The medical field is constantly changing to account for new treatments, procedures, and methods, particularly as it relates to mental health issues. The Rule was drafted to withstand these changes with a single, governing philosophy: that in light of Medicaid's limited resources, funding for surgeries for "psychological purposes" are prioritized behind surgeries performed for physical purposes. Even today, sex reassignment surgery is not the only procedures to fall within the exclusion identified in Iowa Admin. Code r. 441-78.1(4). Other surgical procedures requested for similar purposes, such as neuromodulation psychosurgery, may also be excluded on those grounds.

II. Petitioners' Reading of the ICRA Ignores Iowa's Rules of Statutory Construction.

The Iowa Civil Rights Act ("ICRA") was not written with the intent of applying to state agencies in their administration of public assistance programs. Nonetheless, Petitioners continue to advance such a reading, contrary to established doctrines of statutory construction and despite a complete absence of legal support for such an expanded reading.

First, contrary to Petitioners' suggestion that "other references to the [undefined] word 'unit'" within the ICRA are "irrelevant," it is well-established in this jurisdiction that "[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); *see* (App'x. Vol. I at 288). Petitioners ignore this judicial guidance because the use of the term "unit" throughout the ICRA invalidates Petitioners' preferred definition of the term. *See* Iowa Code § 216.2(4) (units as units of buildings or dwelling units).

Second, the mere fact that the Department, like all individuals and entities of every type, operates at physical locales is insufficient to form the required nexus contemplated by the ICRA. Although Department employees do operate within Department buildings, Petitioners' claims lack any relationship between their alleged harm and the physical facilities from which the Department operates. The ICRA directly forms this necessary nexus in its definition of "public accommodation" – the public accommodation for which discrimination is prohibited is the "place, establishment, or facility" that offers "services, facilities, or goods," not the "services, facilities or goods" themselves. Iowa Code § 216.2(13)(a). Similarly, under paragraph "b", the "public accommodation" is the government unit (meaning the place, establishment, or facility) that offers "services, facilities, benefits, grants, or goods," *not* the "services, facilities, benefits,

grants, or goods" themselves. Iowa Code § 216.2(13)(b). Here, Petitioners seek to conflate this distinction by defining the "benefits" offered by the Department as the "public accommodation." However, a plain reading of the statute rebuts this. Although the provision of services or benefits is required to be considered a public accommodation, the statute very expressly defines the "public accommodation" in terms of places, establishments, facilities, units, and districts. When read together in this way, it becomes clear that public assistance benefits themselves were not intended to be included in this definition.

The Iowa Supreme Court's ruling in *U.S. Jaycees v. Iowa Civil Rights Comm'n* buoys this understanding. 427 N.W.2d 450, 455 (Iowa 1988). There, the Court found that, although "Iowa Jaycees maintain an office in this state-a physical facility-this case fails to allege discrimination in the use of that facility." *Id.* As a result, the Court in *U.S. Jaycees* acknowledged that there must be some nexus between the "public accommodation" and the discrimination alleged for an ICRA action to be maintained. Petitioners have not alleged (and the record does not support) any such nexus, and thus their ICRA claims must fail.

Third, reading Iowa Code § 216.2(13)(b) ("paragraph 'b'") to be inclusive of § 216.2(13)(a) ("paragraph 'a'") does not render either provision superfluous: paragraph "b" is merely illustrative, as has been repeatedly acknowledged by the Iowa Supreme Court as a valid means of construing provisions preceded by words such as "including." Petitioners suggest that the Department's reading of

paragraph "b," because it functions as a clarification or illustration of the breadth of paragraph "a" in a public context, renders the former superfluous. However, this position ignores the numerous instances in which this Court has interpreted other, similarly clarifying statutory provisions. *See, e.g., 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.'"). Under Petitioners' standard, any time a statute uses the term "including" as a "term of enlargement or illustration," it would necessarily result in the "enlarging or illustrating" portions being impermissibly superfluous. This result is unreasonable, and thus Petitioners' flawed analysis should be ignored.

III. Petitioners Failed to Preserve Review of the District Court's Ruling in Favor of the Department on Sex Discrimination Under the ICRA.

For the first time, Petitioners now raise an objection to the District Court's ruling in favor of the Department on Petitioners' sex discrimination claim under the ICRA. (Appellee Br. at 59-64). The District Court ruled in favor of the Department due to clear precedent from the Iowa Supreme Court on the limits to the ICRA's sex discrimination provisions. (App'x. Vol. I at 290-92). Petitioners did not appeal this ruling. Iowa R. App. P. 6.101(2)(b). As a result, it is improper for Petitioners to raise this claim before the Court for the first time in their Appellee brief.

IV. Briefs of Amici Curiae Cannot Expand This Court's Review.

To the extent Amici Curiae have raised issues not properly preserved by the parties, such arguments are improper. *See Martin v. Peoples Mut. Sav. And Loan Ass'n*, 319 N.W.2d 220, 230 (Iowa 1982) ("Reviewable issues must be presented in the parties' briefs, not an amicus brief."); *accord. Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 493-94 (Iowa 2012); *Rants v. Vilsack*, 684 N.W.2d 193, 199 (Iowa 2004); *Shenandoah Educ. Ass'n. v. Shenandoah Comm. School Dist.*, 337 N.W.2d 477, 483 (Iowa 1983).

CONCLUSION

Petitioners rest much of their claim of discrimination on the Rule's specific exclusion of sex reassignment surgeries or surgeries to treat "gender identity disorder." However, because this specific exclusion was *required* by the Eighth Circuit, this clarifying inclusion should not be read to flag discriminatory intent or effect. Nonetheless, because the Rule is written and enforced without regard to transgender status, this Court should find the Rule to be nondiscriminatory.

In addition, Petitioners' reading of the Iowa Civil Right Act implores this Court to adopt an unprecedented, judicially-expanded reading of that statute without legislative approval. As this reading is unsupported by this Court's longstanding principles of statutory interpretation, and previous interpretations of that very statute, Petitioners' reading should be rejected.

For those reasons previously expressed and stated herein, the Iowa Department of Human Services prays this Court enter an order AFFIRMING the Director of the Department in full, and upholding the constitutionality and legality of Iowa Admin. Code r. 441-78.1(4).

Respectfully submitted,

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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 **2,201** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: October 18, 2018

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