IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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

COME NOW Respondents Kim Reynolds and Iowa Department of Human Services, and in support of their Resistance to Petitioners' Motion for Temporary Injunctive Relief state as follows:

INTRODUCTION

Petitioner Mika Covington became a Medicaid member in 2012. Ms. Covington has received female hormones since August 2016 and mental health therapy from January 2017 to October 2018, paid for by Medicaid. Ms. Covington has not submitted requests for recent mental health therapy appointments. No requests for preauthorization for transition surgeries or exceptions to policy have been submitted to Medicaid.

Petitioner Aiden Vasquez became a Medicaid member in 2011, with a period of ineligibility from March 2012 to July 2014. Mr. Vasquez has received testosterone since 2016. He received mental health therapy April 2016 to July 2018. Mr. Vasquez has not submitted

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

requests for recent mental health therapy appointments. No requests for preauthorization for transition surgeries or exceptions to policy have been submitted to Medicaid.

ARGUMENT

A. The Petitioners Have an Adequate Remedy at Law

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

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

> One requirement for the issuance of a temporary injunction is a showing of the likelihood or probability of success on the merits of the underlying claim. *See*

> *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001); *Kent Prods.*, 245 Iowa at 212, 61 N.W.2d at 715. Here, the plaintiff's underlying claim is an equitable action for permanent injunctive relief. *See* Iowa R. Civ. P. 1.1501 ("An injunction may be obtained as an independent remedy by an action in equity, or as an auxiliary remedy in any action."). Permanent injunctive relief is an extraordinary remedy that is granted only when there is no other way to avoid irreparable harm to the plaintiff. *See Planned Parenthood of Mid–Iowa v. Maki*, 478 N.W.2d 637, 639 (Iowa 1991); *Myers v. Caple*, 258 N.W.2d 301, 304–05 (Iowa 1977).

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

Medicaid Appeals Process

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

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

This appeal process to judicial review is precisely the path taken by the petitioners in *Good* and *Beale*. It allows for the development of the record with respect to medical need and allows the decision-makers within the MCO and the Department of Human Services to weigh individual circumstances and information while applying the administrative rule.

Exceptions to Policy

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

Petition for Rulemaking.

To change the rule itself, Petitioners have an adequate remedy at law by petitioning for rule-making. The statutory change in question does not require or preclude coverage of surgical transitions for transgender Iowans. It merely provides that the Iowa Civil Rights Act does not require such surgical transitions to be funded. Should the Petitioners disagree with the administrative rule currently in effect, the Petitioners can petition for rule-making under Iowa

Code § 17A.7. "An interested person may petition an agency requesting the adoption, amendment, or repeal of a rule." Iowa Code § 17A.7(1).

B. The Dispute is Not Ripe

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

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

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

Here, the administrative processes have not even begun. The petitioners may intend surgeries in the future, but they have not requested pre-authorization. Nothing in the pleadings suggests that the procedures are scheduled or that there are medical limitations on when the surgery could be scheduled. Should the court weigh in on the medical coverage decision before requests are made, the court risks pre-empting the administrative process as a whole. It will always be to a person's benefit to rush to the courthouse with their medical information in hand rather than work through the process – a process that allows the insurer (here, Medicaid) to gather sufficient facts to make an informed decision which can then be defended in the administrative process. Judicial review is available for adverse administrative decisions. By their own pleadings, each of these petitioners has lived for years as transgender without gender affirming surgery. If an imminent need arises, expedited review is available through the administrative process.

C. Standard of Review for Temporary Injunction

The court must "carefully weigh the relative hardship which would be incurred by the parties upon the award of injunctive relief." *Maki*, 478 N.W.2d at 639 (citing *Green v. Advance Homes, Inc.*, 293 N.W.2d 204, 208 (Iowa 1980)). The Iowa Supreme Court has "repeatedly emphasized that the issuance or refusal of a temporary injunction is a delicate matter—an exercise of judicial power which requires great caution, deliberation, and sound discretion." *Kleman v. Charles City Police Dept*., 373 N.W.2d 90, 96 (Iowa 1985). Perhaps most important, "[a]n injunction will not issue where the right of the complainant, which it is designed to protect, depends upon a disputed question of law about which there may be doubt, which has not been settled by the law of this state." *Iowa State Dept. of Health v. Hertko*, 282 N.W.2d 744, 751 (Iowa 1979) (quoting *Kent Products v. Hoeph*, 61 N.W.2d 711, 714-15 (Iowa 1953)).

A court may issue a temporary injunction when "the petition, supported by affidavit, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably injure the plaintiff." Iowa R. Civ. P. 1.502(1). The party requesting the injunction has the burden to establish a factual basis for its issuance. *Kleman*, 373 N.W.2d at 95.

The standards for considering a request for a temporary injunction are similar to those for permanent injunctions. *Max 100 L.C. v. Iowa Realty Co., Inc.*, 621 N.W.2d 178, 181 (Iowa 2001). To prove that they are entitled to a temporary injunction, Petitioners must show (1) that in the absence of the injunction they will suffer irreparable harm, (2) that they are likely to succeed on the merits, and (3) that injunctive relief is warranted considering the circumstances confronting the parties and "balance[ing] the harm that a temporary injunction may prevent against the harm that may result from its issuance." Id. The showing that Petitioners must make here is especially onerous, as a strong presumption of validity protects statutes from constitutional challenges. *Miller v. Iowa Real Estate Commission*, 274 N.W2.d 288, 291 (Iowa 1979).

A temporary injunction is not warranted in this case because the petitioners have not established that they are likely to succeed on the merits of their claims. They have not established a likelihood that Division XX of House File 766 violates the Equal Protection Clause of the Iowa Constitution. Nor have they established a likelihood that the challenged provision violates the Iowa Constitution's single-subject rule or the inalienable-rights clause.

1. Division XX of House File 766 does not violate the Equal Protection Clause of the Iowa Constitution.

a. Division XX of House File 766 does not facially discriminate against transgender Iowans.

The petitioners in this case argue that Division XX of House File 766 violates the Equal Protection Clause of the Iowa Constitution by facially discriminating on the basis of a person's transgender status. *See* (Brief in Support of Motion, §II(B)(1)). However, the substance of the challenge asks the question left open in *Good*—whether the Department of Human Services violates the Equal Protection Clause of the Iowa Constitution by denying petitioners coverage for their desired surgical procedures. This question, as discussed above, is not ripe for review. The question presented in this litigation is whether the Iowa legislature violated the Equal Protection Clause of the Iowa Constitution when it amended the Iowa Civil Rights Act to clarify that there is no *statutory requirement* that the government pay for "sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." House File 766, § 93 (2019).

The challenged provision does not violate the Equal Protection Clause for a number of reasons which will be discussed below. First, the legislature has the authority to define the scope of the civil rights legislation they enacted. Second, Division XX of House File 766 does not treat similarly situated individuals differently. Third and finally, the Iowa legislature was not motivated by animus but rather a desire to balance the needs of the many Iowans who rely on Medicaid with the realities of limited governmental resources.

1. The legislature may properly clarify application of Iowa statutes through amendments to the Code.

In 1965 the Iowa legislature passed the Iowa Civil Rights Act, which provided protections above and beyond those which were granted by the Iowa Constitution to various groups of people. *See* Iowa Code Chapter 216. Specifically, "the Iowa Civil Rights Act was enacted 'in an effect to establish parity in the workplace and market opportunity for all.'" *Pippen v. State*, 854 N.W.2d 1, 9 (Iowa 2014) (quoting *Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999)). In 2007 the legislature further expanded the Act to include sexual orientation and gender identity as classifications upon which discrimination in public accommodations was prohibited. *See* 2007 Iowa Acts ch.191 (codified as amended at Iowa Code Chapter 216 (2008)).

The passage of this civil rights legislation was not constitutionally mandated but, rather, was an expression of legislative intent and authority. *See Hill v. Miller*, 64 Cal. 2d 757, 759, 415 P.2d 33, 34 (Cal. 1966) (explaining that the U.S. Constitution, through the Fourteenth Amendment, "does not impose upon the state the duty to take positive action to prohibit a private discrimination"). Given that the protections provided by the Iowa Civil Rights Act are entirely legislatively created, it follows that the legislature has the power to define their scope. It is the legislature, and not the courts, which has the final say on legislative intent. *See Taft v. Iowa Dist. Court ex rel. Linn County*, 828 N.W.2d 309, 317 (Iowa 2013) (citing *Bob Zimmerman Ford, Inc. v. Midwest Auto. I, L.L.C.*, 679 N.W.2d 606, 610 (Iowa 2004)) ("When a statute is amended soon after controversy has arisen as to the meaning of ambiguous terms in an enactment, the court has reason to believe the legislature intended the amendment to provide clarification of such terms."). To conclude otherwise—thereby limiting the legislature's power to control the application of their legislation once passed—threatens to stifle future expansion of legal protections.

The legislature exercised appropriate power in the first instance by drafting Iowa's civil rights legislation. They continued to exercise this same power when amending the legislation to clear up confusion which arose about its intended application. Such clarification of statutory rights does not impede, limit, or in any way disturb the substantive constitutional protections of any person or group. For instance, in this case, the statutory clarification of the Iowa Civil Rights Act does not prevent the Iowa Medicaid program from covering sex reassignment surgery or any other surgical procedure if the program so chooses, or if it is determined that the Iowa Constitution so requires, and it certainly does not authorize any governmental entity to violate any citizen's constitutional rights. The current legislation no more violates the Equal Protection Clause of the Iowa Constitution than the original Civil Rights Act of 1965 did when it excluded sexual orientation and gender identity from the legislation altogether.

2. Division XX of House File 766 does not treat similarly situated individuals differently.

The Iowa Constitution's Equal Protection Clause provides: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. art. I, § 6. This constitutional mandate does not preclude classifications in the law. To the contrary, "Iowa's tripartite system of government requires the legislature to make difficult policy choices, including distributing benefits and burdens amongst the citizens of Iowa. In this process some classifications and barriers are inevitable." *Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009). In providing all citizens equal protection of the laws, the Iowa Constitution simply "requires that similarly situated persons be treated alike under the law[.]" *Nguyen v. State*, 878 N.W.2d 744, 757 (Iowa 2016) (internal citations omitted). More

specifically, it "requires that laws treat all those who are similarly situated with respect to the purposes of the law alike." *Id.*

"The first step in [an] equal protection analysis under the Iowa Constitution is to determine whether there is a distinction made between similarly situated individuals." *Id.* at 758 (citing *Varnum*, 763 N.W.2d at 882). This is a "narrow threshold test" such 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.* In this case, the petitioners cannot meet this threshold test. Even if transgender and non-transgender Iowans receiving Medicaid are similarly situated as the petitioners allege, the statute does not treat these two groups differently. The distinction made by the statute merely treats differently situated persons differently and this does not violate the Iowa Constitution.

Iowa Code section 216.7(3) does not treat transgender and non-transgender Iowans eligible for Medicaid differently. The statute simply clarifies that the Civil Rights Act does not require the government "to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." House File 766, § 93 (2019). While some of these procedures, such as sex reassignment surgery related to transsexualism or gender identity disorder, affect only transgender individuals, these are not the only procedures covered by the statutory change. Procedures related to hermaphroditism and body dysmorphic disorder are not related to a person's transgender status. Furthermore, "only a subset" of those transgender individuals seeking treatment for gender dysphoria seek surgical intervention. *Good v. Iowa Dept. of Human Services*, 924 N.W.2d 853, 857 (Iowa 2019),

Transgender individuals fall both inside and outside the application of the statutory change and non-transgender individuals likewise fall both inside and outside its application. All individuals remain protected by the Iowa Civil Rights Act in the same manner and to the same extent and petitioners' Equal Protection claim cannot survive. *See Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification ...[.] The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."). The statutory provision at issue here, rather than being aimed at a person's transgender status, is aimed at a court decision that, in the view of the legislature, erroneously interpreted the Iowa Civil Rights Act.

In passing House File 766, the Iowa Legislature said that the Iowa Civil Rights Act does not require the government to pay for "sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." House File 766, § 93 (2019). As such, the statue may be said to treat people who desire to assert their rights under the Civil Rights Act in order to oblige the government to pay for one of these medical procedures differently than those people who desire to assert their rights under the Civil Rights Act in other contexts and for other purposes. However, these two groups of people are not similarly situated with respect to the purpose of the Civil Rights Act, which was designed to prevent discrimination based on various specified classifications such as race, gender, sexual orientation, and gender identity.

One might also see the distinction made by this statute as being between those requesting Medicaid funding for one the specified medical treatments prior to the change to Iowa Code section 213.7(3) and those requesting such funding after the change. These two groups, however, are not similarly situated. *See Nguyen v. State*, 878 N.W.2d 744, 758 (Iowa 2016) (holding that criminal defendants' whose convictions are final before a law change and those whose convictions become final after are not similarly situated).

As discussed above, the first step in any equal protection analysis is to determine whether there is a distinction being made between similarly situated individuals. This is a threshold test that the petitioners in this case have not met. As such, this Court need not "further consider whether [the] different treatment under [the] statute is permitted under the equal protection clause" and should instead simply conclude the petitioners have not established a likelihood of success on the merits of their constitutional claims. *Nguyen v. State*, 878 N.W.2d 744, 757 (Iowa 2016).

b. Division XX of House File 766 was not motivated by animus but rather by a desire to balance the needs of the many Iowans who rely on Medicaid with the realities of limited government resources.

The Equal Protection Clause ensures "that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534-34, 93 S.Ct. 2821, 2826 (1973). Consequently, a purpose to discriminate "cannot, in and of itself and without reference to (some independent) considerations in the public interest, justify" a legislative action. *Id.* However, "[p]roving discriminatory purpose is no simple task. It requires a showing that the law or practice in question was implemented at least in part because of, not merely in spite of, its adverse effects

upon an identifiable group." *Villanueva v. City of Scottsbluff*, 779 F.3d 507, 511 (8th Cir. 2015) (internal quotation marks and citations omitted).

In this case, the legislative amendment to the Iowa Civil Rights Act was passed to clarify that the legislature did not intend the Civil Rights Act to *require* state governmental funds to be used to pay for various surgical treatments as had been held to be the case in *Good. V. Iowa Dept. of Human Services*. 924 N.W. 2d 853 (2019). This statutory clarification was not implemented for the purposes of discriminating against transgender Iowans but rather for the purpose of ensuring Medicaid continues to be able to "provide the largest number of necessary medical services to the greatest number of needy people" in the manner the director of the Department of Human Services believes best. *Smith v. Rasmussen*, 249 F.3d 755, 759 (8th Cir. 2001) (citing *Ellis v. Patterson*, 859 F.2d 52, 55 (8th Cir. 1988)); *see* 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.").

Medicaid was designed to "provide the largest number of necessary medical services to the greatest number of needy people." *Smith v. Rasmussen*, 249 F.3d 755, 759 (8th Cir. 2001) (quoting *Weaver v. Reagan*, 886 F.2d 194, 200 (8th Cir. 1989), and *Ellis v. Patterson*, 859 F.2d 52, 55 (8th Cir. 1988)). "'Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular need,' as long as the care and services that the statute provide 'are provided in the best interests of the recipients.'" *Id.* at 761 (quoting *Alexander v. Choate*, 469 U.S. 287, 303, 105 S. Ct. 712, 721 (1985)).

The administrative rule considered in *Good* serves legitimate, nondiscriminatory government interests. Specifically, the rule serves the purpose of conserving limited state resources. *See Guttman v. Khalsa*, 669 F.3d 1101, 1123 (2012) ("conserving scarce resources may be a rational basis for state action"). Medicaid recipients receive treatment for their gender dysphoria in the form of hormone therapy and other services. However, under the rule, coverage is denied for related surgeries due to the excessive cost of the procedures. Not only are surgeries themselves expensive but they may lead to medical complications which can require further costly follow up treatment. As such, the administrative rule not only conserves state resources by not providing coverage for costly surgical procedures, it also conserves state resources by preempting the need for subsequent medical coverage related to complications from such procedures. These reserved 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." *Smith v. Rasmussen*, 249 F.3d 755, 759 (8th Cir. 2001) (citing *Ellis v. Patterson*, 859 F.2d 52, 55 (8th Cir. 1988)). The *Good* Court held that the rule violated the Iowa Civil Rights Act. Division XX of House File 766 clarifies that it did not.

Preserving the fiscal integrity of welfare programs such as Medicaid is a legitimate state interest, *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)), and a restriction designed to conserve limited resources is rational:

> 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.
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> 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 ages 22-64). "We certainly are not unsympathetic to the plight of an indigent [individual] who desires" a medical procedure which is not covered under the government's program, "but 'the Constitution does not provide judicial remedies for every social and economic ill." *Maher v. Roe,* 432 U.S. 464, 479, 97 S. Ct. 2376, 2385, 53 L. Ed. 2d 484 (1977) (quoting *Lindsey v. Normet,* 405 U.S. 56, 74, 92 S.Ct. 862, 874 (1972)). "Our cases uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds." *Id.*

Further, if the legislature had not acted to correct its intent for the Iowa Civil Rights Act, it risked a judgment that it had legislatively acquiesced to the Court's ruling in *Good*. *State v. Iowa Dist. Court for Jones Cty.*, 902 N.W.2d 811, 818 (Iowa 2017) (citing *In re Estate of Vajgrt*, 801 N.W.2d 570, 574 (Iowa 2011) (describing legislative acquiescence). "Under the doctrine of legislative acquiescence, '[the courts] presume the legislature is aware of our cases that interpret its statutes. When many years pass following such a case without a legislative response, we assume the legislature has acquiesced in our interpretation.'" *Id*. (citing *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013)); *see also Brewer-Strong v. HNI Corp.*, 913 N.W.2d 235, 249 (Iowa 2018)). Legislative action following judicial construction is intended to change and clarify the law. *Iowa Farm Bureau Fed'n v. Envtl. Prot. Comm'n,* 850 N.W.2d 403, 434 (Iowa 2014) (explaining "an amendment to statutory text following our construction of the text raises a presumption that the legislature intended to alter the rights explained by [the court's] cases."); *Colwell v. Iowa Dep't of Human Servs.*, 923 N.W.2d 225,

235 (Iowa 2019) ("when the legislature amends a statute, a presumption exists that the legislature intended to change the law").

The path the legislature chose is instructive. If motivated by animus toward transgender persons, the legislature could have removed gender identity as one of the protected statuses covered by the Iowa Civil Rights Act. It did not do so. Transgender Iowans remain protected if they are the subject to discriminatory treatment with respect to housing, employment, and in broad array of circumstances. The legislature did not act broadly. It acted narrowly to clarify that the protections of the civil rights act did not require expenditure of public funds for surgical transition.

> " 'The legislature is presumed to know the state of the law, including case law, at the time it enacts a statute.' " *Welch v. Iowa Dep't of Transp.*, 801 N.W.2d 590, 600 (Iowa 2011) (quoting *State v. Jones*, 298 N.W.2d 296, 298 (Iowa 1980)).
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> Similarly,
> "The legislature is presumed to know the prior construction of terms in the original act, and an amendment substituting a new term or phrase for one previously construed indicates that the judicial or executive construction of the former term or phrase did not correspond with the legislative intent and a different interpretation should be given the new term or phrase. Thus, in interpreting an amendatory act there is a presumption of change in legal rights. This is a rule peculiar to amendments and other acts purporting to change the existing statutory law."
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> *State ex rel. Palmer v. Bd. of Supervisors*, 365 N.W.2d 35, 37 (Iowa 1985) (quoting 1A Sutherland, *Statutory Construction* § 22.30, at 178 (4th ed.1973)). Thus, an amendment to statutory text following our construction of the text raises a presumption that the legislature intended to alter the rights explained by our cases. *See Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 49 (Iowa 2012).

Iowa Farm Bureau Fed'n v. Envtl. Prot. Comm'n, 850 N.W.2d 403, 434 (Iowa 2014). The Legislature may say what the law shall be. *Richardson v. City of Jefferson*, 257 Iowa 709, 717-18, 134 N.W.2d 528, 533 (1965).

2. House File 766, amending Iowa Code section 216.7 (2019), did not violate the single-subject rule of the Iowa Constitution.

The single-subject rule of the Iowa Constitution is contained in Article III, section 29, which provides in relevant part: "Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title." To avoid running afoul of this constitutional provision, legislative acts must contain "only one subject together with issues germane to it" and must have a title that contains the appropriate subject matter. *Utilicorp United Inc. v. Iowa Utilities Bd., Utilities Div., Dep't of Commerce*, 570 N.W.2d 451, 454 (Iowa 1997). The petitioners in this case claim the Iowa legislature violated both components of this rule, the single-subject provision and the title provision, in passing House File 766 and amending Iowa Code section 216.7 (2019) therein. The State will address each of these issues in turn below.

c. House File 766 does not violate the single-subject provision.

There are several longstanding rules applicable to determining whether this Constitutional provision has been violated. *Id.* "First and foremost, we construe the [act] liberally in favor of its constitutionality." *Id.* (internal citation omitted). An act is only invalid if it "encompass[es] two or more dissimilar or discordant subjects that have no reasonable connection or relation to each other." *Id.* "Even if the 'matters grouped as a single subject might more reasonably be classified as separate subjects, no violation occurs if these matters are nonetheless relevant to some single more broadly stated subject.'" *Id.*

When a legislative act appears to contain dissimilar and distinct subjects, the court is "to search for (or to eliminate the presence of) a single purpose toward which the several dissimilar parts of the bill relate" before it will declare the act unconstitutional. *Miller v. Bair*, 444 N.W.2d 487, 490 (Iowa 1989). The Iowa Constitution does not require that various subjects within a

multifaceted piece of legislation demonstrably relate to one another in isolation. *Id.* at 489. Instead:

> [i]t is only necessary to show that all subjects relate to a single purpose. This is clear from the language of the constitutional clause itself which provides that "[e]very act shall embrace but one subject, a*nd matters properly connected therewith.*" Iowa Const. art. III, § 29 (emphasis added). In interpreting the italicized language, this court recognized early on that the subject of a statute lies in its ultimate objective and not in the detail or steps leading to that objective. *See State ex. rel. Weir v. County Judge of Davis County*, 2 Iowa 280, 283 (1855).

Id. In determining whether various portions of a given piece of legislation relate to a single purpose, the court is to apply a "fairly debatable test[,]" under which "legislation will not be held unconstitutional unless clearly, plainly and palpably so." *Utilicorp*, 570 N.W.2d at 454 (internal citation omitted). "[I]f the constitutionality of an act is merely doubtful or fairly debatable, the courts will not interfere." *Id.* (internal citation omitted). As such, "it is only in extreme cases, where unconstitutionality appears beyond a reasonable doubt, that this court can or should act." *Id.* (internal citation omitted). Moreover, the Iowa Supreme Court has held that the legislature may properly place substantive provisions in a bill that addresses how a state or local government entity uses its finances, without creating an article III, section 29 problem. *See Long v. Bd. of Supervisors*, 142 N.W.2d 378, 383 (1966) (finding a bill addressing county officers' compensation could validly include "a requirement that their offices be open" at certain hours without violating article III, section 29).

It cannot be said that the legislation at issue here is "clearly, plainly and palpably" unconstitutional. *Utilicorp*, 570 N.W.2d at 454. Quite to the contrary, the Act is united by a single purpose. House File 766 concerns itself with monetary issues relating to health, human services, and veterans. The petitioners seem to recognize this at least in part by classifying the subject matter of the legislation as being related to appropriations. *See* Petitioner's Brief in

Support of Motion, section II(B)(3), P.38. The question is not whether in isolation two portions of multifaceted legislation appear to relate to one another, because "the subject of a statute lies in its ultimate objective and not in the detail or steps leading to that objective." *Miller*, 444 N.W.2d at 489. As the above discussion of equal protection makes clear, the amendment to the Iowa Civil Rights Act contained in House File 766 was directed at clarifying what the Iowa Civil Rights Act did and did not require the Iowa Medicaid program to pay for. As such, this amendment is clearly connected to monetary issues relating to health, human services, and veterans, the single subject and purpose of House File 766. Given this logical connection, this is not the kind of "extreme case[] where unconstitutionality appears beyond a reasonable doubt[.]"*Utilicorp*, 570 N.W.2d at 454.

d. House File 766 does not violate the title provision.

The title provision of the single-subject rule generally provides that the single subject matter of the legislation must be expressed in the title of the legislation. *See* Iowa Const. Art. III § 29. As the Iowa Supreme Court has explained:

> Like other constitutional provisions, the title requirement is to "be given a liberal construction to permit one act to embrace all matters reasonably connected with the subject expressed in the title and not utterly incongruous thereto." *Motor Club v. Department of Transp.*, 265 N.W.2d 151, 153 (Iowa 1978). In *Motor Club* we went on to explain that
>
> > the title need not be an index or epitome of the act or its details. The subject of the bill need not be specifically and exactly expressed in the title. It is sufficient if all the provisions relate to the one subject indicated in the title and are parts of it or incidental to it or reasonably connected with it or in some reasonable sense auxiliary to the subject of the statute.
>
> *Id.* (quoting *State v. Talerico*, 227 Iowa 1315, 1322, 290 N.W. 660, 663 (1940)). "The enactment is constitutionally valid as to the title unless matter utterly incongruous to the general subject of the statute is buried in the act." *Western Int'l v. Kirkpatrick*, 396 N.W.2d 359, 365 (Iowa 1986).

Utilicorp United Inc. v. Iowa Utilities Bd., Utilities Div., Dep't of Commerce, 570 N.W.2d 451, 455 (Iowa 1997).

As discussed above, the portion of House File 766 at issue here amends the Iowa Civil Rights Act to clarify what it does and does not require the Iowa Medicaid program to pay for. This subject matter clearly relates to the Act's overarching subject or purpose of addressing monetary issues relating to health, human services, and veterans. In turn, this subject matter was clearly expressed in the Act's title: "An Act relating to appropriations for health and human services and veterans and including other related provisions and appropriations, providing penalties, and including effective date and retroactive and other applicability date provisions." As such, House File 766 does not run afoul of the single-subject rule's title provision as alleged by the petitioners.

3. Iowa Code section 216.7(3) (2019) does not violate the Inalienable-Rights Clause of the Iowa Constitution.

The Iowa Constitution recognizes "certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." Iowa Const. art. I, § 1. The right to possess property has been extended to include use and enjoyment as well. *See Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 177 (Iowa 2004); *State v. Osborne*, 154 N.W. 294, 301 (Iowa 1915). However, the caselaw addressing article I, section 1 of the Iowa Constitution offers "little about the substance of the constitutional guarantees or how they should be applied in a given case." *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 351 (Iowa 2015).

The Court has generally utilized a two-pronged test to determine whether a statute violates article I, section 1. The test first asks "whether the right asserted by the plaintiffs is protected," and if it is, evaluates whether the statute is a reasonable exercise of the State's police

power. *Gacke*, 684 N.W.2d at 176; *see also Atwood v. Vilsack*, 725 N.W.2d 641, 652 (Iowa 2006) (concluding article I, section 1 "prevents only arbitrary, unreasonable legislative action that impacts an inalienable right"). In this case, the petitioners' claims fail under both prongs.

a. *Petitioners do not have an inalienable right to state funded medical care.*

The Inalienable Rights Clause of the Iowa Constitution delineates "three distinct classes of 'inalienable rights,' namely, (1) the right of 'enjoying and defending life and liberty,' (2) the right of 'acquiring, possessing and protecting property,' and (3) the right of 'pursuing and obtaining safety and happiness.'" *Jacobsma*, 862 N.W.2d at 349. A right to have the state fund an individual's private medical care, necessary or not, is not included.

In support of their claim that they have an inalienable, constitutional right to have the government pay for their medical care, petitioners cite a number of cases involving "property and bodily safety." *See* (Brief in Support of Motion, §II(B)(4), P.41-42). These cases, however, all deal with negative rights—rights to be free from governmental interference or coercion—and many have little or nothing to do with article I, section 1. *See id.* In contrast, the rights the petitioners attempt to assert in this case are positive in nature as they seek the court to order affirmative action by the State in the form of monetary compensation to pay for their health care needs.

The Constitution of the State of Iowa certainly does contain some positive rights. *See King v. State*, 818 N.W.2d 1, 64 (Iowa 2012) ("In Iowa, one of the positive commitments in the Iowa Constitution is to the educational mission."). However, article I, section 1 is not the source of such rights. Article I, section 1 "is not a mere glittering generality without substance or meaning." *Osborne*, 154 N.W. at 300. But, it nevertheless does contain broad, general language which makes quite clear that the provision was not intended to provide all citizens of Iowa with

positive rights to have the government take all affirmative action necessary for them to, for example, "obtain[] safety and happiness." Iowa Const. art. I, § 1. Such a reading would be both impractical and illogical.

Given that the petitioners in this case have not asserted a violation of an inalienable right protected by the Iowa Constitution, "it follows that there can be no inequality or injustice in the statute under consideration, [because] no right protected by the Constitution has been invaded." *Shaw v. City Council of Marshalltown*, 104 N.W. 1121, 1124 (Iowa 1905). As such, this Court's analysis of the Inalienable Rights Clause may end here.

b. *Even if petitioners had asserted an inalienable right, Division XX of House File 766 is a reasonable regulation.*

As mentioned earlier, the State acknowledges that article I, section 1 "is not a mere glittering generality without substance or meaning." *Osborne*, 154 N.W. at 300. Nonetheless, the clause has never been absolute in its provision of rights. *Gacke*, 684 N.W.2d at 176. Instead, "[t]he rights guaranteed by this provision are subject to reasonable regulation by the state."[2] *Id.*; *see also Atwood*, 725 N.W.2d at 652 (concluding article I, section 1 "prevents only arbitrary, unreasonable legislative action"); *May's Drug Stores v. State Tax Comm'n*, 242 Iowa 319, 328, 45 N.W.2d 245, 250 (1950) (noting article I, section 1 "gives no right . . . free from regulation"). Reasonable regulations must only avoid imposing "oppressive burdens." *Osborne*, 154 N.W. at 300; *see Gacke*, 684 N.W.2d at 179 (concluding a statute imposed an oppressive burden because it significantly impaired a protected right "without any corresponding benefit"). In this case, the

[2] That proposition holds true across most if not all states whose constitutions contain an inalienable or natural rights clause. *Morris v. Brandenburg*, 376 P.3d 836, 852 (N.M. 2016) ("[S]ome states, such as Iowa, treat their natural rights clauses as granting judicially enforceable rights. However, those cases generally acknowledge that natural rights provisions do not codify absolute or fundamental rights, but instead recognize that natural rights are still subject to reasonable regulation . . . ." (citation omitted)).

legislature passed such a reasonable regulation in clarifying the meaning of the Iowa Civil Rights Act.

A constitutional analysis under article I, section 1 "is grounded on a presumption that the statute is constitutional." *Gacke*, 684 N.W.2d at 176. A challenger "can rebut this presumption only by negating every reasonable basis upon which the [statute] may be sustained." *Gravert*, 539 N.W.2d at 186. Furthermore, a law does not violate article I, section 1 just because it imposes *some* hardship or adverse effect. *Steinberg-Baum*, 247 Iowa at 932, 77 N.W.2d at 20; *May's Drug Stores*, 242 Iowa at 329, 45 N.W.2d at 250.

In this case, Division XX of House File 766, which simply clarifies that the Iowa Civil Rights Act does not *require* Medicaid to pay for specifically enumerated surgical procedures, is reasonable regulation and does not impose oppressive burdens. As discussed at length in section above, the purpose of the legislation was to ensure Medicaid continues to be able to "provide the largest number of necessary medical services to the greatest number of needy people" in the manner the director of the Department of Human Services believes best. *Smith v. Rasmussen*, 249 F.3d 755, 759 (8th Cir. 2001) (citing *Ellis v. Patterson*, 859 F.2d 52, 55 (8th Cir. 1988)).

"'Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular need,'" and neither does the Constitution. *Id.* at 761 (quoting *Alexander v. Choate*, 469 U.S. 287, 303, 105 S. Ct. 712, 721 (1985)). The legislative action here serves a legitimate, nondiscriminatory governmental interests in conserving limited state resources. *See Guttman v. Khalsa*, 669 F.3d 1101, 1123 (2012) ("conserving scarce resources may be a rational basis for state action"). Medicaid recipients receive treatment for their gender dysphoria in the form of hormone therapy and other services. However, coverage is denied for related surgeries due to the excessive cost of the procedures. These reserved 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." *Smith v. Rasmussen*, 249 F.3d 755, 759 (8th Cir. 2001) (citing *Ellis v. Patterson*, 859 F.2d 52, 55 (8th Cir. 1988)).

As Justice Waterman aptly explained:

> The inalienable rights clause should be read together with the clause that immediately follows it in the Bill of Rights. According to article I, section 2,
>
> > All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it.
>
> Iowa Const. art. I, § 2. Thirteen years after our constitution was ratified, our court discussed this clause and noted the people "have vested the legislative authority, inherent in them, in the general assembly." *Stewart v. Bd. of Supervisors*, 30 Iowa 9, 18 (1870) (emphasis omitted). Thus, we concluded,
>
> > [I]t seems clear by logical deduction, and upon the most abundant authority, that this court has no authority to annul an act of the legislature unless it is found to be in clear, palpable and direct conflict with the written constitution.
>
> *Id.* at 18–19; *see also Knorr v. Beardsley*, 240 Iowa 828, 842–44, 38 N.W.2d 236, 244–45 (1949) (discussing *Stewart* and subsequent cases).
>
> We need to be cognizant of the right of Iowans to govern themselves through laws passed by their chosen representatives, a right recognized explicitly in article I, section 2.

Honomichl v. Valley View Swine, LLC, 914 N.W.2d 223, 240 (Iowa 2018) (J. Waterman concurring).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Motion for Temporary Injunction be denied.

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