No. 21-1977

IN THE SUPREME COURT OF IOWA

AIDEN VASQUEZ and MIKA COVINGTON,
Appellees/Cross-Appellants
v.
IOWA DEPARTMENT OF HUMAN SERVICES,
Appellant/Cross-Appellee

Appeal from the Iowa District Court for Polk County
Hon. William P. Kelly

BRIEF AMICI CURIAE OF IOWA LAW PROFESSORS IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

Melissa C. Hasso
Iowa Bar No. AT0009833
Sherinian & Hasso Law Firm
111 E. Grand Ave. Ste 212
Des Moines, IA 50309
Phone: 515-224-2079
FAX: 515-224-2321
E-mail:mhasso@sherinianlaw.com

Steve Sanders *
Maurer School of Law
Indiana University
211 S. Indiana Ave.
Bloomington, IN 47405
Phone: 812-855-1775
FAX: 812-855-0555
E-mail: stevesan@indiana.edu

* Application pending for admission *pro hac vice*

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Administrative Codes

Rules

Other Authorities

INTEREST OF THE AMICI

Amici curiae are scholars and teachers affiliated with Iowa law schools who hold expertise on constitutional law. They submit this brief to assist the Court in assessing the constitutionality of the Legislature's action to nullify a previous decision of this Court so that the Department of Human Services ("the Department") could continue denying Medicaid coverage to certain transgender people.

The amici are Steven J. Burton, John F. Murray Professor Emeritus of Law at the University of Iowa College of Law; Mark Kende, Director of the Constitutional Law Center, James Madison Chair in Constitutional Law, and Professor of Law at Drake University Law School; and David S. Walker, Professor of Law Emeritus at Drake University Law School. Institutional affiliations are supplied for the purpose of identification only, and the positions set forth below are solely those of amici.

No party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than amici and amici's counsel contributed money to fund the preparation or submission of the brief.

INTRODUCTION

In 2019, the Legislature amended the Iowa Civil Rights Act ("ICRA") to authorize state and local government units to deny funding "for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." Iowa Code § 216.7(3). (Petitioners refer to this provision as "Division XX" in reference to its section in 2019 Iowa House Acts, House File 766, Division XX (codified at Iowa Code § 216.7(3)(2022)).

In its brief to this Court, the Department attempts to characterize Division XX as a benign and routine modification of ICRA, an exclusion "right in line with other carve-outs and exemptions to the scope of the Act." Dept. Br. at 40. But that description is disingenuous because, as we will discuss, it glosses over the actual reasons why Division XX was enacted, its harsh and targeted effects on a vulnerable population, and the highly unusual circumstances of its passage.

Out of respect for other branches, courts do not lightly condemn legislative acts as the products of animus against marginalized or misunderstood populations. But at the same time, as this Court has

stated, "The idea that courts, free from the political influences in the other two branches of government, are better suited to protect individual rights was recognized at the time our Iowa Constitution was formed." *Varnum v. Brien*, 763 N.W.2d 862, 875-76 (Iowa 2000) (citations omitted). "We have a constitutional duty to ensure equal protection of the law." *Id.* at 906.

The animus doctrine is built on the foundation of key equal protection decisions by the U.S. Supreme Court. It recognizes that there are times when "a legislative body might target a group of people for insult or injury and be literally thoughtless about their interests." Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 187. Unfortunately, that description perfectly fits Division XX.

This Court has explained that the federal Constitution's Equal Protection Clause and the Iowa Constitution's equal protection guarantees, found in Article I, Sections 1 and 6, flow from the same fundamental principle: "that all persons similarly situated should be treated alike." *Varnum*, 763 N.W.2d at 878 (citation and internal quotation marks omitted). When discrete groups are singled out for

disfavored treatment based on legislative animus, the equality commanded by both constitutions is denied.

For the reasons stated herein, this Court should invalidate Division XX as a violation of the equal protection guarantees of the Iowa Constitution.

ARGUMENT

I. Far From Being an Ordinary Statutory Updating, Division XX Enacts Targeted Discrimination Against a Particularly Vulnerable Group

Division XX authorizes facial discrimination by the state. It creates a precisely targeted deprivation aimed at one particular – and particularly vulnerable – group of transgender Iowans: those who are poor enough to qualify for Medicaid and who seek medically necessary surgeries as part of their treatment for gender dysphoria. The Department concedes in this appeal that it cannot deny Medicaid benefits for such surgeries without violating the equal protection guarantees of the Iowa Constitution. Dept. Br. at 25.

Division XX was hastily enacted in response to this Court's decision in *Good v. Iowa Dept. of Human Servs.*, 924 N.W.2d 853 (Iowa 2019). In *Good*, this Court held that the Department's policy

prohibiting use of Medicaid funds for gender-affirming surgeries[1] violated ICRA's prohibition against gender-identity discrimination. *Id.* at 856.

Upset with that decision, a legislative majority rushed through Division XX for the sole purpose of nullifying this Court's decision and restoring the *status quo ante* under which medically necessary surgeries would continue to be denied. It was done in a matter of only 32 hours, with no public debate, and in violation of legislative germaneness and single-subject rules.

In our federal constitutional system, states generally are free to adopt or not adopt statutory civil rights protections as they see fit, and to determine what human characteristics should be covered and what exclusions should apply. Fifteen years ago, Iowa lawmakers added gender identity to the Iowa civil rights law. Iowa thus joined almost two dozen other states in determining that it is appropriate for state law to prevent discrimination against transgender people in both the private and public sectors. No one would argue that, once adopted, a civil rights statute could never be modified. But that does not mean

[1] Iowa Admin. Code r. 441.78.1(4).

that, under the guise of amending policy on civil rights, a state is free to target particular populations for government-sponsored harm.

For example, in two major equal protection cases, the U.S. Supreme Court has invalidated measures that repealed or forbade civil rights protections, because the measures' effects or the circumstances surrounding their approval demonstrated that they were designed to inflict harm by *promoting* discrimination.

In *Reitman v. Mulkey*, 387 U.S. 369, 374-76, 87 S. Ct. 1627 (1967), the Court held that a ballot initiative repealing state-law fair housing protections violated the 14th Amendment, because careful judicial examination of its "purpose, scope, and operative effect" revealed that the measure would "authorize," "encourage," and "significantly involve the State in private racial discrimination."

In *Romer v. Evans*, 517 U.S. 620, 634, 116 S. Ct. 1620 (1996), the Court held that a ballot initiative forbidding the enactment of any civil rights protections for gays and lesbians violated the Equal Protection Clause because, among other things, its harsh effects and the state's failure to provide legitimate reasons for its enactment "raise[d] the

inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."

As with the laws invalidated in *Reitman* and *Romer*, Division XX is especially repugnant to constitutional values because it authorizes specific discrimination not by private actors but *by the state itself*. And like the law invalidated in *Romer*, it is a "status-based enactment," 517 U.S. at 635, targeting a small category of economically disadvantaged transgender people who are defined by their Medicaid eligibility and their need for medically necessary surgeries.

Contrary to the Department's suggestion, Division XX is not like other carve-outs or exemptions to the ICRA. Most notably, none of those other carve-outs or exemptions authorize a state agency to deny benefits in a way that violates the Iowa constitution, which the district court held was the effect of the Department's administrative rule and which the Department does not deny.

Owing to transgender people's vulnerability to harmful legislation and their inability to protect their interests through the ordinary political process, numerous courts have held that public policies negatively affecting transgender people must receive heightened

judicial scrutiny. *See*, *e.g.*, *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586, 610 (4th Cir. 2020) (applying heightened scrutiny and collecting cases). Indeed, "one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people." *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018)

This Court should do the same by examining with special care the circumstances surrounding Division XX. Such an examination demonstrates that Division XX is a "discrimination[] of an unusual character," that "seems inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632-33.

II. Objective Evidence Demonstrates that Division XX Was Impelled by Animus

In assessing a law for animus, a court must give close attention to the surrounding facts and circumstances in order to make a principled determination whether a seemingly ordinary legislative act represents an effort to inflict invidious discrimination on a particular group.

The district court declined to find that Division XX was the product of unconstitutional animus, observing that this Court "has repeatedly held that the views of an individual legislator are not persuasive in determining legislative intent." Dist. Ct. Op. at 43. But the district court erred by performing a cursory and superficial analysis that ignored key facts about Division XX that had been presented by Petitioners.

An inquiry into whether a law was impelled by animus does not hinge merely on the expressed views of a bill's supporters or opponents. Rather, the U.S. Supreme Court's decisions "suggest that the inquiry into legislative motive—or more often, purpose—is not a subjective one. Determining whether animus materially influenced the government's act rests on a variety of considerations that are objective in the sense that they do not depend on discovering subjective legislative intent." Carpenter, *Windsor Products*, at 189-190.

Accordingly, "[t]he inference that animus was a material influence in the government's decision is drawn from a totality of the evidence rather than from a mechanical rule." *Id*. at 245. Key considerations for a court's inquiry include "the political and legal context of passage"; "the

legislative proceedings, including evidence of animus that can be gleaned from the sequence of events that led to passage"; "the law's harsh real-world impact or effects, including injury to the tangible or dignitary interests of the disadvantaged group"; and "the utter failure of alternative explanations" other than animus to explain the decision. *Id.* at 245-246 (citing, *inter alia*, *Romer*, 517 U.S. at 623-24; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 536-37, 93 S. Ct. 2821 (1973); *United States v. Windsor*, 570 U.S. 744, 770, 133 S. Ct. 2675 (2013); *City of Cleburne v. Cleburne Learning Ctr.*, 473 U.S. 432, 448, 105 S. Ct. 3249 (1985); and *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 257-59, 97 S. Ct. 555 (1977)). These factors, all drawn from landmark U.S. Supreme Court equal protection cases, "constitute a set of commonsense indicators to help courts discover when a … law … reflects potentially invidious discriminatory intent." William D. Araiza, *Animus: A Short Introduction to Bias in the Law* 103 (2017).

These considerations – its political and legal context, the unconventional legislative process through which it was approved, its harsh and targeted effects, and its absence of a legitimate government

purpose – all point toward the conclusion that Division XX was impelled by unconstitutional animus.

A. Political and legal context

First, consider *why* Division XX came to be. In its decision in *Good*, this Court ruled that the Department's policy denying gender-affirming surgeries violated ICRA. Division XX was enacted for one purpose: to nullify that ruling and assure that medically necessary surgeries would continue to be denied to transgender patients. As Governor Kim Reynolds explained, "This [legislation] takes it back to the way it's always been." Caroline Cummings, *Governor Reynolds Stands By Signing Bill with Medicaid Coverage Ban on Transgender Surgery*, CBS2 IOWA, May 7, 2019, at https://tinyurl.com/awfwnr5k. The lawmakers who approved Division XX intended to take away Medicaid coverage that this Court said was required by Iowa law.

While it is not unusual for legislatures to clarify statutes in response to court decisions interpreting them, Division XX was not a run-of-the-mill statutory revision. Contrary to the Department's characterization, there was nothing "cautious" about it, and the haste with which it was pushed through belies the idea that it represented a

"'difficult policy choice[]'" reached after a careful process of balancing the "'benefits and burdens amongst the citizens of Iowa.'" Dept. Br. at 39 (quoting *Varnum,* 763 N.W.2d at 878).

In fact, the Legislature exploited and abused the judicial restraint this Court exercised when it declined to reach the constitutionality of the Department's policy denying gender-affirming surgeries – a policy the district court has now found, in a ruling the Department does not challenge, to violate the equal protection guarantees of the Iowa Constitution. In other words, the Legislature's sole purpose with Division XX was to perpetuate and give cover to a policy the Department itself now concedes is unconstitutional.

"Under the anti-animus principle," the constitutional guarantee of equal protection "is understood to 'guard one part of the society against the injustice of the other part' by checking the tendency of legislative majorities to be vindictive. The animus doctrine addresses this systemic problem by scrutinizing the reasons for government action." Carpenter, *Windsor Products*, at 185-186 (quoting Federalist 51 (Madison) in Jacob E. Cooke, ed, *The Federalist Papers* 347 (1961)).

Such scrutiny is justified here. The political and legal context of its passage provides persuasive evidence that Division XX was motivated by unconstitutional animus.

B. Legislative process

In addition to the political and legal context, in evaluating a law for animus a court also examines "the legislative proceedings, including evidence of animus that can be gleaned from the sequence of events that led to passage, the legislative procedure, and the legislative history accompanying passage." Carpenter, *Windsor Products*, at 246 (citing *Moreno*, 413 U.S. at 536-37, and *Windsor*, 570 U.S. at 770-75). That is because "[s]ometimes the best indicator of a decision's legitimacy is how normally or abnormally it was reached. A decision that is rushed through [or] exempted from normal deliberative procedures … naturally raises suspicions that something nefarious is going on." Araiza, *Animus*, at 97.

Division XX is a quintessential example of a law that was "rushed through" and "exempted from normal deliberative procedures": it was pushed through the Legislature as a last-minute addition to an appropriations bill, even though legislators acknowledged it was not

germane to the appropriations bill, Iowa House Journal 1064 (Apr. 27, 2019), *available at* https://tinyurl.com/yckrexp2, and legislators had to suspend House rules to get it done. This process also violated the Iowa constitutional rule that a bill must be limited to a single subject.[2]

The legislative history of Division XX is devoid of any normal bill-filing, subcommittee, or committee processes. (Admin. Record 900–01, ¶¶ 7–8; 905, ¶ 10.) Members of the public had no opportunity to submit input or share their concerns. (Admin. Record 900–01, ¶¶ 7–8; 905–07, ¶¶ 10–11, 12–14, 16.) In contrast to the typical timeframe of several weeks to months that usually accompanies the lawmaking process, the time between filing the amendment containing Division XX, on the one hand, and passing the final legislation in both chambers, on the other, was a *mere 32 hours*. (Admin. Record 900–01, ¶ 8; 906, ¶ 12.) Even as it declined to reach a conclusion of animus, the district court's opinion discussed at length the unusualness and irregularity of Division XX's passage, citing facts that contributed to its conclusion that the

[2] It is no response to this point that the district court held that the single-subject violation was cured by subsequent codification. The fact remains that the violation demonstrates how determined the Legislature was to push through Division XX by any means necessary.

Department's policy enabled by Division XX lacked even a rational basis. Dist. Ct. Op. at 44-47.

In short, the hasty, slapdash, and unusual legislative process through which it became law provides persuasive evidence that Division XX was motivated by unconstitutional animus.

C. Harsh impact or effects

Another factor in animus analysis is "the law's harsh real-world impact or effects, including injury to the tangible or dignitary interests of the disadvantaged group." Carpenter, *Windsor Products*, at 246 (citing *Romer*, 517 U.S. at 627-28, and *Windsor*, 570 U.S. at 770-75). The Supreme Court's animus cases underscore the principle that "[l]egal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" *Lawrence v. Texas*, 539 U.S. 558, 583, 123 S. Ct. 2472 (2003) (O'Connor, J., concurring in the judgment) (quoting *Romer*, 517 U.S. at 633).

Division XX imposes harsh, real-world injuries on certain transgender Iowans who seek medically necessary surgeries. According to Dr. Randi Ettner, whom this Court in *Good* acknowledged as "a specialist and international expert in the field of gender dysphoria," the

policy against gender-affirming surgeries that Division XX sought to perpetuate was "'not reasonably supported by scientific or clinical evidence, or standards of professional practice, and fail[ed] to take into account the robust body of research that surgery relieves or eliminates Gender Dysphoria.'" *Good*, 924 N.W.2d at 857 (quoting affidavit of Dr. Ettner). "'Without treatment, gender dysphoric individuals experience anxiety, depression, suicidality, and other attendant mental health issues.'" *Id.*

Besides these serious medical consequences, Division XX also imposes dignitary harms. For example, the Petitioner in this case, Aiden Vasquez, described the impact of Division XX on him shorly after it was enacted: "I had been in a dark depression for about six months, but when I left [my doctor's] office with that referral, it felt like she had taken my hand and pulled me out of this hole I had been living in. Now, it's like they shoved me back in and threw dirt over top of me. It just feels like I've been kicked in the face." Courtney Crowder and Tony Leys, *"Kicked in the face": Transgender Iowans in Pain After Amendment Bans Public Funds for Transition Care*, THE DES MOINES REGISTER, April 30, 2019, at https://tinyurl.com/hv9jy9h4.

In its brief to this Court, the Department attempts to put a benign face on Division XX by arguing that it is not a "prohibition" on any surgical procedures. Dept. Br. at 38. But that is not how its supporters understood it. The context described above makes clear that legislators who voted for Division XX *intended to prohibit* funding for gender-affirming surgeries by nullifying this Court's ruling in *Good*. Because this Court had declined to hold the Department's policy unconstitutional, its supporters knew that as soon as Division XX became law, the Department would go right back to enforcing its policy of categorically denying such surgeries.

The Department suggests that the Legislature "could have responded by clarifying that Medicaid wasn't a public accommodation – removing all statutory civil rights protections for any protected class." Dept. Br. at 35. But that argument makes a different point than the Department thinks it does. Whatever the merits of such a move, depriving *all* persons on Medicaid of the protections of ICRA would at least have appeared more like a principled change in civil rights policy, and would have been less vulnerable to animus attack, because it would have been a *general* law. That stands in contrast to what the

Legislature actually did, which was to authorize discrimination against a small and defined group of transgender Iowans. As Justice Robert Jackson once observed, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112, 69 S. Ct. 463 (1949) (Jackson, J., concurring). On the other hand, "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation, and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Id*.

In sum, Division XX's harsh real-world effects, including injury to transgender people's tangible and dignitary interests, provide yet more objective evidence that Division XX was motivated by unconstitutional animus.

D. Lack of legitimate justification

Finally, a government policy can become constitutionally suspect when there is an "utter failure of alternative explanations" for it other than animus. Carpenter, *Windsor Products*, at 245 (citing *Moreno*, 413

U.S. at 537; *Cleburne*, 473 U.S. at 449-50; *Romer*, 517 U.S. at 635; and *Windsor*, 570 U.S. at 770-73). That is the case with Division XX.

In the proceedings below, the Department defended its policy excluding gender-affirming surgeries solely on the basis of government interests in conserving financial resources, "protecting public funds," and ensuring that "the greatest number of needy people receive Medicaid coverage." *See* Dist. Ct. Op. at 33-41. When the Legislature sought to codify the Department's ability to continue discriminating after *Good* by passing Division XX, the measure's supporters cited the same reasons. Its sponsor, State Sen. Mark Costello, said the surgeries were "not a proper use of our state monies." Crowder and Leys, "'Kicked in the face,'" *available at* https://tinyurl.com/hv9jy9h4. A spokesperson for the political group Family Leader went further, saying that "taxpayers should not be compelled to fund potentially harmful procedures that seek treatment options outside of God's design." *Id*.

In fact, as the district court concluded in holding the Department's policy unconstitutional, arguments in defense of Division XX based on the cost of gender-affirming surgeries collapse under any level of judicial scrutiny. The Department did not even attempt to rebut the

Petitioners' evidence that "providing insurance coverage for transgender patients has been shown to be affordable and cost-effective, and has a low budget impact." Dist. Ct. Op. at 37 (citations and internal quotation marks omitted). The district court also relied on Petitioners' unrebutted evidence "revealing that there are greater medical costs associated with denying transgender people access to medically necessary transition related care and procedures." *Id.* at 38.

Indeed, the district court found the Department's policy – a policy whose only legal authority rests on Division XX – could not withstand even minimal judicial scrutiny under rational basis review, because "[t]he percentage of Iowans who are on Medicaid, identify as transgender, and qualify as candidates for gender-affirming surgery is incredibly small and the costs are negligible." *Id.* at 41. Moreover, unrebutted evidence showed "that there are greater medical costs associated with denying transgender individuals access to transition-related care and necessary surgical procedures." *Id.*

When concern for costs and public resources is eliminated as a plausible justification for Division XX – and that is the only justification that has been cited for a policy denying gender-affirming surgeries – the

necessary conclusion that must be inferred from all the other evidence is that Division XX was motivated not by legitimate reasons of public policy but by unconstitutional animus.

CONCLUSION

For the foregoing reasons, this Court should hold that Division XX violates the equal protection provision of the Iowa Constitution.

Dated: June 24, 2022

Respectfully Submitted,

/s/ Steve Sanders
STEVE SANDERS *
MAURER SCHOOL OF LAW
INDIANA UNIVERSITY
211 S. Indiana Ave.
Bloomington, IN 47405
Phone: 812-855-1775
FAX: 812-855-0555
E-mail: stevesan@indiana.edu
* Application pending for admission *pro hac vice*

/s/ Melissa C. Hasso
MELISSA C. HASSO
SHERINIAN & HASSO LAW FIRM
111 E. Grand Ave., Suite 212
Des Moines, IA 50309
Phone: (515) 224-2079
Fax: (515) 224-2321
E-mail: mhasso@sherinianlaw.com
Attorneys for Amici Curiae Iowa Law Professors

CERTIFICATE OF COMPLIANCE WITH TYPEFACT REQUIREMENTS AND TYPE-VOLUME LIMITATION

I, Melissa C. Hasso, hereby certify that:

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) because this This brief has been prepared in a proportionately spaced typeface using Century Schoolbook in 14 point and contains 3,649 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

/s/ Melissa C. Hasso June 24, 2022

Melissa C. Hasso
Sherinian & Hasso Law Firm
111 E. Grand Ave., Suite 212
Des Moines, IA 50309
Phone: (515) 224-2079
Fax: (515) 224-2321
mhasso@sherinianlaw.com