Supreme Court No. 21–1977
Polk County Case Nos. CVCV061729 & CVCV062175

IN THE SUPREME COURT OF IOWA

AIDEN VASQUEZ and MIKA COVINGTON,

Petitioners–Appellees–Cross-Appellants,

v.

IOWA DEPARTMENT OF HUMAN SERVICES,

Respondent–Appellant–Cross-Appellee.

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

REPLY BRIEF OF PETITIONERS–APPELLEES–CROSS-APPELLANTS

Rita Bettis Austen, AT0011558
Shefali Aurora, AT0012874
ACLU of Iowa Foundation Inc.
505 Fifth Avenue, Suite 808
Des Moines, IA 50309-2317
Telephone: 515-207-0567
Facsimile: 515-243-8506
rita.bettis@aclu-ia.org
shefali.aurora@aclu-ia.org

Lisa Nowlin-Sohl
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 206-348-3163
Facsimile: 212-549-2650
lnowlin-sohl@aclu.org

F. Thomas Hecht, PHV001733
Tina B. Solis, PHV001311
Seth A. Horvath, PHV001734
Nixon Peabody LLP
70 West Madison Street, Suite 5200
Chicago, IL 60602
Telephone: 312-977-4443
Facsimile: 312-977-4405
fthecht@nixonpeabody.com
tbsolis@nixonpeabody.com
sahorvath@nixonpeabody.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Constitutional Provisions

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the district court err in concluding that Petitioners were required to assert their Iowa Civil Rights Act claims before the Iowa Civil Rights Commission prior to asserting them before the district court?

Cases

Chiavetta v. Iowa Bd. of Nursing, 595 N.W.2d 799 (Iowa 1999)

Good v. Iowa Dep't of Human Servs., 924 N.W.2d 853 (Iowa 2019)

Hollinrake v. Monroe County, 433 N.W.2d 696 (Iowa 1988)

Vroegh v. Iowa Dep't of Corrections, 972 N.W.2d 686 (Iowa 2022)

Statutes, Rules, and Constitutional Provisions

Iowa Code § 216.6 (2022)

Iowa Code § 216.15 (2022)

II. Did the district court err in declining to enter judgment in Petitioners' favor on their claims for gender-identity discrimination?

Cases

State v. Zarate, 908 N.W.2d 831 (Iowa 2018)

Good v. Iowa Dep't of Human Servs., 924 N.W.2d 853 (Iowa 2019)

III. Did the district court erred in denying Petitioners' requests for attorney's fees under the Iowa Civil Rights Act and the Iowa Equal Access to Justice Act?

Cases

Ackelson v. Manley Toy Direct, LLC, 832 N.W.2d 678 (Iowa 2013)

Ayala v. Ctr. Line, Inc., 415 N.W.2d 603 (Iowa 1987)

Braddock v. Mo. Dep't of Mental Health, 200 S.W.3d 78 (Mo. Ct. App. 2006)

Branstad v. State ex rel. Nat. Res. Comm'n, 871 N.W.2d 291 (Iowa 2015)

Colwell v. Iowa Dep't Human Servs., 923 N.W.2d 225 (Iowa 2019)

Cortaro Water Users' Assn v. Steiner, 148 Ariz. 314 (Ariz. 1986)

Endress v. Iowa Dep't of Human Servs., 944 N.W.2d 71 (Iowa 2020)

Evans v. Jeff D., 475 U.S. 717 (1986)

Good v. Iowa Dep't of Human Servs., 924 N.W.2d 853 (Iowa 2019)

Good v. Iowa Dep't of Human Servs., No. 18–1613, 2019 WL 5424960 (Iowa Ct. App. 2019)

Hollinrake v. Monroe County, 433 N.W.2d 696 (Iowa 1988)

Kent v. Emp't Appeal Bd., 498 N.W.2d 687 (Iowa 1993)

Lee v. State, 906 N.W.2d 186 (Iowa 2018)

Marek v. Chesny, 473 U.S. 1 (1985)

Marlar v. State, 666 P.2d 504 (Ariz. App. Ct. 1983)

O'Bannon v. Town Court Nursing Ctr., 473 U.S. 1 (1985)

Petition of Chapman, 890 N.W.2d 853 (Iowa 2017)

Remer v. Bd. of Med. Exam'rs, 576 N.W.2d 598 (Iowa 1998)

Schuler v. Rodberg, 516 N.W.2d 902 (Iowa 1994)

State v. Vargason, 607 N.W.2d 691 (Iowa 2000)

Statutes, Rules, and Constitutional Provisions

7 U.S.C. § 2012 (2022)

24 C.F.R. § 982 (2022)

Iowa Admin. Code r. 441–65 (2022)

Iowa Admin. Code r. 441–77 (2022)

Iowa Admin. Code r. 441–78.1 (2022)

Iowa Admin. Code r. 441–79 (2022)

Iowa Code § 17A.19 (2022)

Iowa Code § 216.2 (2022)

Iowa Code § 216.7 (2022)

Iowa Code § 216.15 (2022)

Iowa Code § 216.16 (2022)

Iowa Code § 234.12 (2022)

Iowa Code § 625.29 (2022)

Other

Black's Law Dictionary (11th ed. 2019)

Dictionary by Merriam–Webster,
https://www.merriam.webster.com/dictionary

Dictionary.com,
http://www.dictionary.com

Iowa Dep't of Human Servs., Iowa Health & Wellness Plan, "Benefits,"
https://dhs.iowa.gov/IHAWP/benefits

Iowa Dep't of Human Servs., "Provider Enrollment,"
http://dhs.iowa.gov/ime/providers/enrollment

Iowa Dep't of Human Servs., "FAQs,"
https://dhs.iowa. gov/ime/members/member-resources/frequently-asked-questions

Iowa Dep't of Human Servs., Iowa Health & Wellness Plan, "Who Qualifies,"
https: //dhs.iowa.gov/ihawp/who-qualifies

Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 Denv. U. L. Rev. 441, 493 (2014)

Robert V. Percival & Geoffrey Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, L. & Contempt. Probs. (Winter 1984)

Susan M. Olson, *How Much Access to Justice from State "Equal Access to Justice Acts"?*, 71 Chi.–Kent L. Rev. 547, 555 (1995)

U.S. Dep't of Agriculture, *Supplemental Nutrition Assistance Program, What Can Snap Buy?*,
https://www.fns.usda.gov/snap/eligible-food-items

U.S. Dep't of Hous. & Urban Dev., *Housing Choice Vouchers Fact Sheet*,
https://www.hud.gov/program_offices/public_indian_ housing
/programs/hc_housing/programs/hcv/about/fact_sheet

INTRODUCTION

On cross-appeal, Aiden Vasquez ("Mr. Vasquez") and Mika Covington ("Ms. Covington") (together, "Petitioners") have asked this Court to (1) reverse the district court's ruling that Petitioners' Iowa Civil Rights Act ("ICRA") claims were barred because Petitioners did not assert them before the Iowa Civil Rights Commission (the "Commission") (Resp. Br. at 100–07), (2) reverse the district court's ruling dismissing Petitioners' claims for gender-identity discrimination under the ICRA (*id*. at 108–10), and (3) reverse the district court's denial of Petitioners' requests for attorney's fees (*id*. at 111–24).

The Iowa Department of Human Services' ("DHS") response to Petitioners' cross-appeal is noteworthy for what it does *not* argue. DHS does not contend that Petitioners were required to assert their ICRA claims before the Commission. (*See id*. at 100–07.) Nor does DHS dispute that, if Division XX of House File 766 ("Division XX") is unconstitutional, then section 441–78.1(4) of the Iowa Administrative Code (the "Regulation") violates the preamendment version of Iowa Code § 216.7. (*See id*. at 108–10.) In addition, with respect to Petitioners' argument that they are entitled to recover their attorney's fees and costs, DHS does not dispute the broad remedial purpose of the fee-shifting provisions in the ICRA and the Iowa Equal Access to Justice Act ("EAJA"). (*See id*. at 111, 113–14.)

Instead, DHS contends that (1) Petitioners' argument that the Regulation violates the ICRA is moot (Reply Br. at 16–19), (2) Petitioners are not entitled to fee-shifting under the ICRA because they did not bring their judicial-review actions under the ICRA (*id*. at 9–11), and (3) Petitioners are not entitled to fee-shifting under the EAJA because two of the EAJA's exceptions to fee-shifting apply to this case (*id*. at 11–15). These arguments have no merit.

First, Petitioners' argument that the Regulation violates the ICRA is not moot. Under *Vroegh v. Iowa Department of Corrections*, 972 N.W.2d 686, 704–05 (Iowa 2022), the potential to recover attorney's fees in connection with a claim prevents the claim from becoming moot, even if judgment is entered for the plaintiff on a second, related claim. DHS's concession that the Regulation is unconstitutional therefore does not resolve the issue of the Regulation's legality under the ICRA, which is subject to fee-shifting. Indeed, DHS concedes in its own brief that Petitioners' cross-appeal is "proper" with respect to Petitioners' fee-shifting argument (Reply Br. at 8), further supporting the conclusion that Petitioners' appeal from the dismissal of their ICRA claims presents a live, contested issue that is not moot.

Second, contrary to DHS's contentions, section 216.16(6) of the ICRA entitles Petitioners to fee-shifting. Section 216.16(6) states that "[t]he district court may grant any relief in an action *under this section* which is authorized by section 216.15

. . . .” *See* Iowa Code § 216.16(6) (2022) (emphasis added). Petitioners asserted “action[s] under” section 216.16(6) of the ICRA within the procedural framework of the Iowa Administrative Procedure Act (“APA”). They did so by “claiming to be aggrieved by an unfair or discriminatory practice committed by the state or an agency or political subdivision of the state,” as contemplated by section 216.16(6)(1) of the ICRA. *See* Iowa Code § 216.16(6)(1) (2022).

Rather than proceeding directly under the ICRA, however, Petitioners were constrained to follow *Hollinrake v. Monroe County*, 433 N.W.2d 696 (Iowa 1988), which requires civil-rights challenges to proceed under section 17A.19 of the APA when they are “directed at the alleged discriminatory nature” of an agency’s rule. *Hollinrake*, 433 N.W.2d at 699. The fact that Petitioners were required to proceed under the APA in accordance with *Hollinrake* does not negate their ability to recover attorney’s fees under the ICRA.

Third, Petitioners are entitled to fee-shifting under the EAJA. DHS incorrectly asserts that its role in this case was “primarily adjudicative.” (Reply Br. at 11–13.) Iowa Code § 625.29(1)(b) (2022). It was not. DHS did not adjudicate the merits of Petitioners’ statutory and constitutional claims, but rather concluded that it did not have subject-matter jurisdiction to do so after simply reciting a series of undisputed facts. This is not an “adjudication” within the meaning of the EAJA and does not support denying Petitioners’ requests for attorney’s fees.

DHS also incorrectly asserts that its decisions to deny Petitioners' requests for Medicaid preauthorization concerned Petitioners' "eligibility or entitlement . . . to a monetary benefit or its equivalent." (*Id*. at 13–15.) They did not. It is undisputed that that Petitioners are entitled to participate in Iowa Medicaid based on their Iowa residency and income levels. The fact that they were denied medical care within the Iowa Medicaid program based on DHS's decisions not to authorize reimbursement for that care does not convert their medical benefits, which are nonmonetary in nature, into monetary benefits, such as unemployment benefits or social-security income. If this were the standard, then nearly every single decision regarding a government benefit could be construed as a decision regarding an entitlement "to a monetary benefit or its equivalent," given that, by definition, government benefits involve government funding. Iowa Code § 625.29(1)(d) (2022). This broad exclusion plainly is *not* what the legislature intended when it adopted the EAJA.

For these reasons, and as discussed in further detail below, this Court should grant, in its entirety, the relief requested in Petitioners' cross-appeal.

ARGUMENT

I. Petitioners were not required to assert their ICRA claims before the Commission.

As discussed in Petitioners' brief, the district court erred in concluding that Petitioners were obligated to assert their ICRA claims before the Commission. (Resp. Br. at 100–07.) This Court has held that, in a case such as this one, where a

discrimination claim is directed at the substance of an agency regulation, rather than at a discretionary individual decision applying the regulation, review of the regulation is governed by the provisions of the APA, not those of the ICRA. *See Hollinrake*, 433 N.W.2d at 698–99. Under section 17A.19 of the APA, Petitioners properly preserved their ICRA claims for review by the district court by first asserting them before DHS.

DHS does not argue otherwise. In fact, it does not disagree with any of the key assertions regarding administrative exhaustion in Petitioners' brief, including the following:

- The absence of administrative exhaustion before the Commission in *Good v. Iowa Department of Human Services*, 924 N.W.2d 853 (Iowa 2019), combined with the jurisdictional nature of administrative exhaustion, confirms that Petitioners were not required to assert their ICRA claims before the Commission in this case. (Resp. Br. at 101–02.)

- Under principles of judicial estoppel, DHS's admission in the *Good* fee litigation that administrative exhaustion was unnecessary confirms that Petitioners were not required to assert their ICRA claims before the Commission. (*Id*. at 102–03.)

- The language of the APA expressly contemplates that Iowa administrative agencies will interpret statutes such as the ICRA and that their interpretations will be subject to judicial review. (*Id*. at 104.)

- This Court's decision in *Chiavetta v. Iowa Board of Nursing*, 595 N.W.2d 799 (Iowa 1999), further confirms that Petitioners were not required to assert their ICRA claims before the Commission. (*Id*. at 104–07.)

DHS argues that Petitioners' appeal from the dismissal of their ICRA claims is moot and gains Petitioners nothing. (Reply Br. at 16–19.) This is incorrect. The ICRA entitles Petitioners to remedies different from the injunctive relief awarded with respect to the Regulation, including fee-shifting. *See* Iowa Code § 216.15(9)(a)(8) (2022). The ICRA's fee-shifting provision promotes critically important public-policy interests. In particular, it ensures "that private citizens can afford to pursue the legal actions necessary to advance the public interest vindicated by the policies of civil rights acts." *Vroegh*, 972 N.W.2d at 704–05 (internal quotation marks omitted). The availability of fee-shifting in connection with Petitioners' ICRA claims differentiates those claims from their equal-protection claims and mandates independently resolving both. *See id*. at 704–05 (recovery on one civil-rights claim at trial did not moot appeal regarding judgment on a second, related claim given the potential for recovering attorney's fees on the second claim).

DHS argues that "revisiting" the district court's ICRA ruling "wouldn't provide [Petitioners] [with] anything." (Reply Br. at 19.) But reviewing and reversing the district court's decision to dismiss Petitioners' ICRA claims would, in fact, provide Petitioners with significant relief: the attorney's fees and costs incurred in litigating their claims that the Regulation violates the ICRA's prohibition against gender-identity discrimination.

DHS also argues that the district court did not base its denial of Petitioners' requests for attorney's fees on its dismissal of their ICRA claims. (*Id*. at 18.) DHS is wrong. The district court expressly found that "Petitioners did not bring their challenge to the [R]egulation pursuant to the ICRA procedures outlined in Iowa Code section 216.16." (App. I 794.) This ruling—i.e., the ruling that Petitioners' ICRA claims were barred because Petitioners failed to assert them before the Commission—is the very ruling Petitioners have asked this Court to review in their cross-appeal.

DHS also argues that Petitioners "never brought claims under the [ICRA]." (Reply Br. at 18.) DHS is again wrong. Petitioners explicitly pleaded that the Regulation violated the ICRA and sought fees under the ICRA. (App I 30–31, 34, ¶¶ 181–85, 195–99; App I 43; App I 386–87, 390, ¶¶ 164–68, 178–82; App I 399; *see also* App. I 250–53.)

In addition, DHS's argument that a plaintiff cannot "combine an original action" under the ICRA "with a judicial review action under chapter 17A" is misplaced. (Reply Br. at 18–19.) As established in Petitioners' brief (Resp. Br. at 107), and as discussed in further detail below, even though *Hollinrake* requires a civil-rights challenge to proceed under section 17A.19 of the APA when it is "directed at the alleged discriminatory nature" of an agency's rule, *Hollinrake*, 433 N.W.2d at 699, a section 17A.19 action alleging that a rule violates the ICRA also

qualifies as an "action under" section 216.16(6) of ICRA. *See* Iowa Code § 216.16(6) (2022). Here, Petitioners asserted "action[s] under" section 216.16(6) of the ICRA within the procedural framework of the APA. As a result, fee-shifting under the ICRA applies. DHS's argument to the contrary ignores the practical and prudential problems that would result from forcing a party aggrieved by agency misconduct to pursue two parallel, and potentially inconsistent, tracks of administrative exhaustion—one before the Commission and one before the agency whose rule is at issue—in order to receive complete relief.

In sum, none of DHS's arguments establish that Petitioners' appeal from the dismissal of their ICRA claims is moot. The Court should address the issue raised by Petitioners and find that the district court erred in concluding that Petitioners' ICRA claims were barred because Petitioners did not pursue the claims before the Commission.

II. The Regulation violates the ICRA's prohibition against gender-identity discrimination.

The district court should have entered judgment in Petitioners' favor on Petitioners' ICRA claims. (*See* Resp. Br. at 108–10.) Because Division XX is unconstitutional, it is null and void. The preamendment version of section 216.7 of the ICRA, protecting against the discriminatory denial of Medicaid coverage for gender-affirming surgery, therefore remains in effect. *See State v. Zarate*, 908

N.W.2d 831, 844 (Iowa 2018). As recognized by this Court in *Good*, the Regulation violates the preamendment version of the ICRA. *Good*, 924 N.W.2d at 862–63.

DHS does not dispute this position, instead relying on the argument that Petitioners' appeal from the dismissal of their ICRA claims is moot. (Reply Br. at 16–19.) As set forth above, this argument has no merit. Based on this Court's decision in *Good*, the district court should have concluded that the Regulation violates the ICRA. This Court should reverse the district court's failure to do so.

III. Petitioners are entitled to recover their attorney's fees and costs.

Finally, the district court erred in denying Petitioners' requests for attorney's fees. The ICRA and the EAJA authorize fee-shifting in this case. The ICRA—which, by its own terms, must be "broadly" construed—expressly allows fee-shifting. *See* Iowa Code §§ 216.15(9)(a)(8), 216.16(6), 216.18(1) (2022). In addition, EAJA section 625.29 expressly provides for fee-shifting in nonrulemaking cases under the APA in order to facilitate meritorious claims by private parties against unreasonable exercises of administrative authority, and none of the EAJA's exclusions to fee-shifting apply here. Iowa Code § 625.29(1) (2022).

A. The ICRA and the EAJA expressly authorize fee-shifting, and neither the *Good* attorney's-fee decision nor *Hollinrake* prohibit it.

DHS mistakenly claims that Petitioners are not entitled to fee-shifting under the ICRA because they did not bring their judicial-review actions under the ICRA. (Reply Br. at 9–11.) This argument fails.

Section 216.16(6) of the ICRA states that "[t]he district court may grant any relief in an action *under this section* which is authorized by section 216.15 . . . ." *See* Iowa Code § 216.16(6) (2022) (emphasis added). Petitioners asserted "action[s] under" section 216.16(6) of the ICRA within the procedural framework of the APA. They did so by "claiming to be aggrieved by an unfair or discriminatory practice committed by the state or an agency or political subdivision of the state," as contemplated by section 216.16(6)(1) of the ICRA. *See* Iowa Code § 216.16(6)(1) (2022). In particular, they alleged that DHS's conduct violated section 216.7(1)(a) of the ICRA, which makes it discriminatory and unlawful for any agent of a "public accommodation," including a "state government unit" such as DHS, to deny services based on "gender identity." *See* Iowa Code §§ 216.7(1)(a), 216.2(13)(b) (2022). (App I 29–30, 32, ¶¶ 175, 189; App I 386, 388, ¶¶ 158, 172.)

Rather than proceeding directly under the ICRA, however, Petitioners were constrained to follow *Hollinrake*, which requires civil-rights challenges to proceed under APA chapter 17A when they are "directed at the alleged discriminatory nature" of an agency's rule. *Hollinrake*, 433 N.W.2d at 699. The fact that Petitioners were required to proceed under the APA in accordance with *Hollinrake* does not negate their ability to recover attorney's fees under the ICRA.

Interpreting chapter 17A to bar fee-shifting for ICRA claims against administrative agencies is inconsistent with the APA's remedies-saving provision.

Section 17A.19 of the APA states that "[n]othing in this Act shall abridge or deny to any person or party who is aggrieved or adversely affected by agency action the right to seek relief from such action in the courts." Iowa Code § 17A.19 (2022). This relief, in the case of discrimination in violation of the ICRA, includes attorney's fees. Iowa Code §§ 216.15(9)(a)(8), 216.16(6) (2022). There is no exception when the discrimination occurs at the hands of a state agency. *See id. Hollinrake*'s requirement to exhaust administrative remedies in challenging the application of discriminatory agency rules should not be read to abrogate the remedies provided by the ICRA.

This interpretation of chapter 17A is also inconsistent with the ICRA's broad remedial scope. The legislature expressly mandated that the ICRA must be "broadly" construed. *See* Iowa Code § 216.18(1) (2022). Awarding attorney's fees and costs to prevailing plaintiffs under the ICRA is "crucial" to accomplish its legislative purpose. *Ackelson v. Manley Toy Direct, LLC*, 832 N.W.2d 678, 687 (Iowa 2013) (quoting *Ayala v. Ctr. Line, Inc.*, 415 N.W.2d 603, 605 (Iowa 1987)).

The dual functions of fee-shifting provisions, like the one found in the ICRA for violating antidiscrimination laws, are to ensure that (1) claimants are able to secure competent legal representation for meritorious claims and (2) attorneys working on contingency have an incentive to screen out nonmeritorious claims. *See, e.g.*, Robert V. Percival & Geoffrey Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, L. & Contempt. Probs. (Winter 1984); *Evans v. Jeff D.*,

475 U.S. 717, 745 (1986) (Brennan, J., dissenting) (discussing the legislative history of fee-shifting provisions); *see also Marek v. Chesny*, 473 U.S. 1, App. at 44–51 (1985) (Brennan, J., dissenting) (collecting federal statutory fee-shifting provisions); Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 Denv. U. L. Rev. 441, 493 (2014). In cases such as this one, where declaratory and injunctive relief is sought, rather than damages, fee-shifting provisions are especially important to ensure that meritorious claims, like those asserted by Petitioners, are brought. *See Lee v. State*, 906 N.W.2d 186, 201–02 (Iowa 2018) (discussing, in the context of an employment-discrimination and Family Medical Leave Act case, advancing the public interest through nonmonetary forms of relief that go beyond individual litigants and achieve greater nondiscrimination for others).

There is no reason to diverge from these principles here. To do so would undermine the text and legislative purpose of both the ICRA and the APA. *See Schuler v. Rodberg*, 516 N.W.2d 902, 903–04 (Iowa 1994) (statutes related to the same subject matter are "*in pari materia* and must be construed . . . in light of their common purpose and intent so as to produce a harmonious system or body of legislation"); *State v. Vargason*, 607 N.W.2d 691, 697 (Iowa 2000) (same).

Contrary to DHS's assertions (Reply at 9–11), the Court of Appeals' decision in *Good v. Iowa Department of Human Services*, No. 18–1613, 2019 WL 5424960

(Iowa Ct. App. 2019), does not alter this analysis. As noted in Petitioners' brief, the attorney's-fee decision in *Good* is not controlling, because unpublished opinions by the Court of Appeals are not binding legal authority. (Resp. Br. at 112.) Moreover, the Court of Appeals' narrow reading of the ICRA is not well founded.

In *Good*, the Court of Appeals correctly recognized that *Hollinrake* does not preclude an award of attorney's fees for prevailing parties bringing ICRA claims through the APA's procedures. *See Good*, 2019 WL 5424960, at *3 ("[N]othing in *Hollinrake* forecloses fee-shifting in cases such as [the petitioners']."). Despite this, the court ultimately refused to allow the petitioners to recover attorney's fees as prevailing parties. *Id*. The court concluded that the plain language of the ICRA only permits fee-shifting when a complaint is first filed with the Commission and is foreclosed when a litigant instead brings an ICRA claim by exhausting administrative remedies under *Hollinrake*. *See id*.

The Court of Appeals thus found *both* that *Hollinrake* does not foreclose fee-shifting to prevailing parties bringing ICRA claims *and* that following the procedures required by *Hollinrake* will nonetheless always foreclose their ability to seek attorney's fees. The court's narrow reading of the ICRA leads to an absurd result that violates the express legislative directive to construe the ICRA broadly to effectuate its purpose of preventing and remedying discrimination. Reading the ICRA and *Hollinrake* in this manner writes into the statute a court-made exception

to all fee-shifting liability under the ICRA for administrative agencies that illegally discriminate against Iowans in public accommodations through published agency rules. The Court should not adopt this exception, which is nowhere to be found in the statute.

Instead, the Court should allow Petitioners to recover their attorney's fees and costs under the ICRA. To hold otherwise would improperly extend *Hollinrake*'s holding to undermine the legislative purposes of both the ICRA, which is intended to remedy illegal discrimination, and the APA, whose remedies-saving provision is intended to facilitate, not encumber, relief against administrative agencies.

B. The EAJA's exceptions to fee-shifting do not apply to this case.

As discussed in Petitioners' brief, the exclusions on which DHS relies to seek an exemption from the EAJA's fee-shifting provision do not apply here. (Resp. Br. at 114–24.) Nothing in DHS's reply brief establishes otherwise.

1. DHS's role in this case was not "primarily adjudicative."

DHS's role in this case was not "primarily adjudicative." Iowa Code § 625.29(1)(b) (2022). As this Court stated in *Branstad v. State ex rel. Natural Resource Commission*, 871 N.W.2d 291 (Iowa 2015), the term "adjudicate" means "to settle finally (the rights and duties of the parties to a court case) on the merits of the issue raised." *Id*. at 297 (internal quotation marks omitted). In this case, the administrative record reflects that DHS merely fulfilled its statutory obligation to

provide a process for Petitioners to appeal the denial of their benefits, preserving their claims for judicial review without actually adjudicating any of the claims on the merits. (App. II 770, 932; App II. 1523–24, 1526, 1666–67.)

The administrative-law judges' ("ALJ") findings of fact and conclusions of law, which DHS's director adopted, do not support DHS's conclusion that its role was "primarily adjudicative." (Reply Br. at 12–13.) Although DHS argues, without any citation to the record, that it found "as a factual matter that [Petitioners] were Medicaid beneficiaries and that their physicians concluded that the requested procedures were medically necessary" (*id*. at 13), these facts were undisputed (App. II 769; App II. 1519–21). As a result, there were no facts to adjudicate.

In addition, although DHS argues, again without any citation to the record, that it concluded "as a matter of law that the challenged administrative rule barred coverage for the requested services and that *Good* did not apply" (Reply Br. at 12–13), DHS did not actually adjudicate the legal issues raised by Petitioners. With respect to Mr. Vasquez, DHS adopted the ALJ's finding that "deciding whether [DHS's] MCO properly denied [Mr. Vasquez's] request for payment of physician services and payment for gender-affirming surgery" was an issue "preserved for judicial review." (App. II 770, 932.) With respect to Ms. Covington, the ALJ decided, and DHS agreed, that DHS was not bound by the district-court injunction entered in *Good* because the parties to Ms. Covington's proceeding were different

from the parties to *Good*. (App. II 1524–25, 1666–67.) However, neither the ALJ nor DHS decided Ms. Covington's equal-protection challenge to the Regulation, or the equal-protection challenges to Division XX on which her ICRA claims were based, concluding instead that those issues were "preserved" for judicial proceedings. (App. II, 1524, 1526, 1667.)

Colwell v. Iowa Department of Human Services, 923 N.W.2d 225 (Iowa 2019), on which DHS relies (Reply Br. at 12), is distinguishable. *Colwell*, unlike this case, did not involve a challenge to the validity of an agency rule, but rather a fact-based dispute over a medical provider's reimbursement for particular claims submitted to, and rejected by, a managed-care organization ("MCO"). *See id*. at 228–31. As the Court noted, the plaintiff "provided [dental] services to [Iowa Health and Wellness Plan ("Plan")] participants until late 2014. He submitted claims to [the MCO] for Plan patients, and [the MCO] denied reimbursement for a number of those claims in whole or in part for a lack of documentation and other errors." *Id*. at 229–30. When the plaintiff sought a state fair hearing before DHS, DHS *erroneously* determined that it did not have subject-matter jurisdiction over the plaintiff's claims. *See id*. at 234–35. As a result, this Court ordered the district court to remand the case to DHS for a fair hearing. *Id*. at 239.

In *Colwell*, it would have been logically inconsistent for the Court to determine that the plaintiff was entitled to an evidentiary hearing on its factually

disputed reimbursement claims before DHS, but that DHS would not be acting in a "primarily adjudicative" capacity when it decided those claims. The hearing ordered by the Court was a hearing that would address the merits of the plaintiffs' claims for reimbursement. As the Court noted, "had DHS heard the dispute" originally, as it would on remand, the plaintiff would not have been able to ask for fees against DHS because of the nature of the hearing in question, which would "reach[] the merits of the dispute." *See id*. at 238. That is not the case here, where DHS simply acknowledged and preserved Petitioners' legal arguments for subsequent judicial review by the district court.

Endress v. Iowa Department of Human Services, 944 N.W.2d 71 (Iowa 2020), on which DHS also relies (Reply Br. at 12–13), is likewise distinguishable. *Endress* dealt not only with preserving constitutional issues, but also with factual questions requiring agency adjudication regarding the correct computation of overpayments for child-care services. *Id*. at 81–83.

In *Endress*, DHS conducted an investigation finding that the plaintiff, a child-care-services provider, "submitted claims for payment to which she was not entitled." *Id*. at 82. Following the investigation, DHS decided to cancel its agreement with the plaintiff and "recoup overpayments." *Id*. Unlike in this case, when the plaintiff in *Endress* appealed DHS's decision to an ALJ, the ALJ "specifically addressed whether DHS correctly computed and established overpayment." *Id*. In

addition, DHS made its final decision "after it weighed evidence about recoupments, applied rules, and determined the rights of the parties." *Id*. at 83. Thus, although DHS "preserved [the plaintiff's] constitutional arguments for judicial review," DHS also decided certain facts and legal claims on the merits. *Id*.

Here, DHS did not adjudicate any factual dispute and did not adjudicate Petitioners' legal claims. Instead, based on undisputed facts, DHS preserved Petitioners' constitutional challenges to the Regulation and Division XX for judicial review. Under these circumstances, EAJA section 625.29(1)(b)'s exception for cases where an agency's role is "primarily adjudicative" does not apply, and Petitioners are entitled to recover their attorney's fees.

2. DHS's role in this case was not to determine Petitioners' "eligibility" for, or "entitlement" to, "a monetary benefit or its equivalent."

DHS's role in this case also was not to determine Petitioners' "eligibility" for, or "entitlement" to, a "monetary benefit or its equivalent." Iowa Code § 625.29(1)(d) (2022). It is undisputed that Petitioners are entitled to participate in Iowa Medicaid based on their Iowa residency and income levels. (App. II 768, 769; App. II 1519, 1522.) Therefore, Petitioners' "eligibility" for, or "entitlement" to, Medicaid was not at issue before DHS and was never determined by the agency in these proceedings.

In addition, medical benefits are not a "monetary benefit or its equivalent." Iowa Code § 625.29(1)(d) (2022). The legislature did not define the phrase

"monetary benefit or its equivalent" in the EAJA. As this Court has stated, "[a]bsent legislative definition or a particular and appropriate meaning in law, [a court] give[s] words their plain and ordinary meaning," including by looking to dictionary definitions for guidance. *Remer v. Bd. of Med. Exam'rs*, 576 N.W.2d 598, 601 (Iowa 1998).

Merriam–Webster defines "monetary" as an adjective meaning "of or relating to money or the mechanisms by which it is supplied to and circulates in the economy," "of or relating to money," or "of or relating to the money in a country's economy." *Dictionary by Merriam–Webster*, *available at* https://www.merriam webster.com/dictionary/monetary?utm_campaign=sd&utm_medium=serp&utm_so urce=jsonld. In similar terms, Dictionary.com defines "monetary" as an adjective meaning "of or relating to the coinage or currency of a country" and "of or relating to money; pecuniary." *Dictionary.com*, *available at* http://www.dictionary.com/ browse/monetary?s=t.

The distinction between a monetary benefit and a nonmonetary benefit is especially significant in legal terms. Black's Law Dictionary defines "monetary" as an adjective meaning "[o]f, relating to, or involving money," providing the examples of "monetary value" and "monetary damages." *Black's Law Dictionary* (11th ed. 2019). It also defines "monetary" as "financial," providing the examples of "monetary services" and "monetary investments." *Id.*

A "monetary benefit or its equivalent" is thus one in which the benefit is monetary in nature—for example, cash, or income assistance, like social-security benefits or unemployment-insurance payments. Money, or something that is monetary in nature, is characterized, in key part, by its fungibility, a trait that is essential in distinguishing between monetary and nonmonetary benefits and in giving meaning to the term "monetary benefit or its equivalent" as used in the EAJA. Another distinction between monetary and nonmonetary benefits is the discretionary nature of the former, which can be used to purchase or acquire anything of like value, versus, for example, the nondiscretionary nature of medical benefits, which cannot be used to acquire anything other than the prescribed treatment.

Kent v. Employment Appeal Board, 498 N.W.2d 687 (Iowa 1993), supports this distinction and supports awarding attorney's fees and costs in this case. In *Kent*, the issue was the propriety of fees in a case involving unemployment benefits, which are intended to supplant lost income and are clearly monetary. *Id.* at 688. The type of benefit at issue in *Kent* differs from the benefit at issue here. In *Kent*, a specific dollar amount of monetary assistance was sought; here, Petitioners sought preapproval for medically necessary healthcare under Medicaid.

This distinction is a critical one. It cannot simply be written out of the statute. While unemployment-insurance benefits are monetary in nature, medical benefits are not. The benefits Petitioners' sought were neither fungible nor discretionary.

Petitioners cannot transfer their interest in the benefits or use the benefits to acquire any other good or service. As a result of prevailing in this action, Petitioners have obtained access to medical care that DHS discriminatorily and unconstitutionally denied to them based on their gender identity. Medical care is *not* equivalent to monetary damages or a monetary benefit.

The regulatory schemes for Medicaid, and other comparable benefits, further support Petitioners' construction of "monetary benefit or its equivalent." Medicaid benefits are both nonfungible, and nondiscretionary, given that they may only be used to procure medically necessary care from a discrete, preselected group of providers. *See* Iowa Dep't of Human Servs., Iowa Health & Wellness Plan, "Benefits," *available at* https://dhs.iowa.gov/IHAWP/benefits; Iowa Admin. Code r. 441–77 (2022); Iowa Admin. Code r. 441–79 (2022); Iowa Dep't of Human Servs., "Provider Enrollment," *available at* http://dhs.iowa.gov/im/providers/enrollment. They are also not determined by their financial value or monetary amount, but by a recipient's medical need. *See* Iowa Admin. Code r. 441–78.1 (2022); Iowa Dep't of Human Servs., "FAQs," *available at* https://dhs.iowa.gov/ime/members/member-resources/frequently-asked-questions. Additionally, they resemble other nonmonetary welfare benefits, such as housing vouchers and food stamps. *See* 24 C.F.R. § 982 (2022); U.S. Dep't of Hous. & Urban Dev., *Housing Choice Vouchers Fact Sheet, available at* https://www.hud.gov/program_offices/public_indian_ho

using/programs/hc_housing/programs/hcv/about/fact_sheet; Iowa Admin. Code r. 441–65.1 (2022); Iowa Admin. Code r. 441–65.4(4) (2022); Iowa Code § 234.12(3) (2022); 7 U.S.C. § 2012(k) (2022); U.S. Dep't of Agriculture, *Supplemental Nutrition Assistance Program, What Can Snap Buy?, available at* https://www.fns.usda.gov/snap/eligible-food-items. The district court's decision ignores these aspects of Medicaid benefits.

Contrary to DHS's assertions (Reply at 13), the fact that Petitioners' were denied "access" to medical care within the Iowa Medicaid program based on DHS's decisions not to authorize reimbursement for that care does not convert their medical benefits, which are nonmonetary in nature, into monetary benefits, such as unemployment benefits or social-security income. If this were the standard, then nearly every single decision regarding a government benefit could be construed as a decision regarding an entitlement "to a monetary benefit or its equivalent," given that, by definition, government benefits involve government funding. Iowa Code § 625.29(1)(d) (2022). This broad exclusion plainly is *not* what the legislature intended when it adopted the EAJA. *See, e.g.*, Susan M. Olson, *How Much Access to Justice from State "Equal Access to Justice Acts"?*, 71 Chi.–Kent L. Rev. 547, 561 (1995). (Equal Access to Justice Acts are intended to equalize the resources of private parties and the government by shifting fees to the government when a private party prevails in an administrative matter).

Notably, none of the case law cited by DHS supports its interpretation of EAJA section 625.29(1)(d). (Reply at 14–15.) In *Colwell*, the Court held that a judicial-review action by a medical provider seeking compensation from an MCO for services rendered to his patients fell within the exclusion set forth in EAJA section 625.29(1)(d). *Id*. at 238. There, unlike in this case, the provider asked DHS to determine the monetary compensation he was entitled to receive from the MCO. *See id*. at 229–31, 238 ("Colwell asked DHS to determine the monetary *benefit* to which he was *entitled* under the Dental Wellness Program.") (emphasis added). The provider, unlike the patients at issue here, sought to demonstrate his eligibility for actual monetary reimbursement for providing medical benefits under the state's program. *See id*.

Because eligibility for, and entitlement to, explicit monetary reimbursement were central issues in *Colwell*, the situation facing the *Colwell* Court was fundamentally different from this case. Here, there is no question about Petitioners' eligibility for, or entitlement to, Iowa Medicaid program benefits. Instead, this case implicates the legality and constitutionality of DHS's Regulation excluding coverage for gender-affirming surgery.

O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980), is also distinguishable. That case did not involve the provisions of state or federal Equal Access to Justice Acts. Although the U.S. Supreme Court discussed the general

characteristics of the Medicaid program, the Court's holding was that nursing-home residents had no constitutional right to a hearing before an agency revoked the nursing home's authority to provide residents with nursing care at government expense. *See id*. at 786–87.

The Missouri Court of Appeals' decision in *Braddock v. Missouri Department of Mental Health*, 200 S.W.3d 78 (Mo. Ct. App. 2006), is also inapposite. In *Braddock*, the court upheld a denial of fee-shifting under the Missouri EAJA's exemption for proceedings to determine an individual's eligibility for, or entitlement to, a monetary benefit or its equivalent. *Id*. at 81–82. The *Braddock* court held that the funding sought by the plaintiff from Missouri's Medicaid waiver program was "a monetary benefit or its equivalent" under the Missouri EAJA, relying on dictionary definitions of "benefit" and "equivalent." *Braddock*, 200 S.W.3d at 81.

Unlike this case, *Braddock* involved an eligibility determination for Medicaid benefits and was decided correctly to the extent it denied fee-shifting on that basis. But the court in *Braddock* erroneously determined that Medicaid benefits are "a monetary benefit or its equivalent." Its construction of the words "monetary benefit or its equivalent" was inconsistent with long-standing principles of statutory construction to not render any part of a statute (here, the term "monetary") superfluous and to adhere to the plain meaning of a statute's text when its language is not specifically defined. *See Remer*, 576 N.W.2d at 601 (statutory language must

be given "plain and ordinary meaning"); *Petition of Chapman*, 890 N.W.2d 853, 857 (Iowa 2017) (courts "must not construe a statute to make any part of its superfluous").

Iowa Medicaid benefits, like housing vouchers and food stamps, are not "equivalent" to a "monetary benefit." Unlike unemployment-insurance benefits or social-security benefits, these benefits are not *fungible* and may not be used in a *discretionary* manner. *See, e.g.*, *Cortaro Water Users' Assn v. Steiner*, 148 Ariz. 314, 317 (Ariz. 1986) (holding that the Arizona EAJA's "monetary value or its equivalent" language only excluded attorney's fees in cases analogous to those "where an applicant is seeking welfare *payments* or a disability pension *payment*") (emphasis added); *Marlar v. State*, 666 P.2d 504, 513 (Ariz. App. Ct. 1983) (agency's "decision to transfer [the petitioner] to another location was not a determination of his eligibility or entitlement to a monetary benefit or its equivalent," despite the fact that the decision affected the petitioner's salary and livelihood). Therefore, EAJA section 625.29(1)(d)'s fee-shifting exclusion does not apply, and Petitioners are entitled to recover their attorney's fees.

CONCLUSION

For these reasons, on cross-appeal, Petitioners respectfully request that this Court (1) reverse the district court's ruling that Petitioners' ICRA claims were barred because Petitioners did not assert them before the Commission, (2) reverse the

district court's ruling dismissing Petitioners' claims for gender-identity discrimination under the ICRA, and (3) reverse the district court's denial of Petitioners' requests for attorney's fees and remand this matter to the district court with instructions for the district court to allow Petitioners to submit a fee petition.

Dated: September 6, 2022

Respectfully submitted,

/s/ Rita Bettis Austen
Rita Bettis Austen, AT0011558
ACLU of Iowa Foundation Inc.
505 Fifth Avenue, Suite 808
Des Moines, IA 50309-2316
Telephone: 515-243-3988
Facsimile: 515-243-8506
rita.bettis@aclu-ia.org

/s/ Shefali Aurora
Shefali Aurora, AT0012874
ACLU of Iowa Foundation Inc.
505 Fifth Avenue, Suite 808
Des Moines, IA 50309-2316
Telephone: 515-243-3988
Facsimile: 515-243-8506
shefali.aurora@aclu-ia.org

/s/ F. Thomas Hecht
F. Thomas Hecht, PHV001733
Nixon Peabody LLP
70 West Madison Street, Suite 5200
Chicago, IL 60602
Telephone: 312-977-4322
Facsimile: 312-977-4405
fthecht@nixonpeabody.com

/s/ Tina B. Solis
Tina B. Solis, PHV001311
Nixon Peabody LLP
70 West Madison Street, Suite 5200
Chicago, IL 60602
Telephone: 312-977-4482
Facsimile: 312-977-4405
tbsolis@nixonpeabody.com

/s/ Seth A. Horvath
Seth A. Horvath, PHV001734
Nixon Peabody LLP
70 West Madison Street, Suite 5200
Chicago, IL 60602
Telephone: 312-977-4443
Facsimile: 312-977-4405
sahorvath@nixonpeabody.com

/s/ L. Nowlin-Sohl
Lisa Nowlin-Sohl, PHV001725
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 206-348-3163
Facsimile: 212-549-2650
lnowlin-sohl@aclu.org

COST CERTIFICATE

I hereby certify that the cost of printing this brief was $0.00 and that that amount has been paid in full by the undersigned counsel.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 6.903(1)(g)(1) or (2) of the Iowa Rules of Appellate Procedure because:

[x] This brief contains 5,916 words, excluding the parts of the brief exempted by Rule 6.903(1)(g)(1) of the Iowa Rules of Appellate Procedure, or

[] This brief has a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Rule 6.903(1)(g)(2) of the Iowa Rules of Appellate Procedure.

2. This brief complies with the typeface requirements of Rule 6.903(1)(e) of the Iowa Rules of Appellate Procedure and the type-style requirements of Rule 6.903(1)(f) of the Iowa Rules of Appellate Procedure because:

[x] This brief has been prepared in a proportionally spaced typeface using Times New Roman in fourteen-point font, or

[] This brief has been prepared in a monospaced typeface using Microsoft Word 2016 with _____ characters per inch and _____ style.

/s/ Rita Bettis Austen
Rita Bettis Austen, AT0011558
ACLU of Iowa Foundation Inc.
505 Fifth Avenue, Suite 808
Des Moines, IA 50309-2317
Telephone: 515-207-0567
Facsimile: 515-243-8506
rita.bettis@aclu-ia.org