IN THE SUPREME COURT OF IOWA

NO. 14-0738

BETTY ANN ODGAARD AND RICHARD ODGAARD,

Appellants,

v.

IOWA CIVIL RIGHTS COMMISSION, ANGELA WILLIAMS, PATRICIA LIPSKI, MARY ANN SPICER, TOM CONLEY, DOUGLAS OELSCHLAEGER, LILY LIJUN HOU, AND LAWRENCE CUNNINGHAM,

Appellees.

On Appeal from the District Court for Polk County
The Honorable Richard G. Blane II

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ISSUE PRESENTED

Iowa typically requires plaintiffs to exhaust administrative remedies before bringing certain actions in Iowa courts, but not where those actions concern constitutional matters beyond an agency's competence or where the agency proceedings would cause irreparable harm or be futile. Appellants seek a judicial declaration to relieve a chill on their constitutional rights to freedom of religion and speech, and they will suffer irreparable injury to those rights if they are first required to risk delay and civil liability before an agency that cannot render the requested relief and has already interpreted the relevant law against them. Does Iowa law require administrative exhaustion in this case?

ROUTING STATEMENT

This case should remain in the Supreme Court because it presents an issue of first impression of whether administrative exhaustion can be required where the administrative procedure itself would impose irreparable injury to the petitioning party's fundamental constitutional rights to freedom of speech and freedom of religion.

STATEMENT OF THE CASE

Appellants Richard and Betty Odgaard run a small unincorporated bistro and art gallery called "The Görtz Haus Gallery" in an old church next to their home. For over a decade, they have personally hosted wedding ceremonies in the old

sanctuary of the church. Ever since 2009, when this Court ruled that the State must recognize same-sex marriages, the Odgaards have operated their art gallery in anxiety that they could be sued because their religion forbids them from hosting weddings not between one man and one woman. On August 4, 2013, their fears were realized when a same-sex couple filed a complaint of sexual orientation discrimination against the Gallery in the Iowa Civil Rights Commission the day after the Odgaards declined to host the couple's wedding.

In an effort to ascertain their rights, particularly in light of their potential liability for the complainants' attorney fees, the Odgaards filed a Verified Petition against the Commission in Polk County District Court on October 7, 2013, seeking a declaratory judgment that their "religious decision not to host same-sex wedding ceremonies" is protected by the Iowa and United States Constitutions. JA5. The Petition also seeks to enjoin the Commission from enforcing the Iowa Civil Rights Act against the Odgaards "based on their decision not to host same-sex weddings" and seeks nominal damages against the Commission "for the [Odgaards'] loss of their free speech and free exercise rights." JA28.

Due to the chill imposed by the Civil Rights Act and the Commission on the Odgaards' constitutional rights, they immediately sought and obtained the Commission's consent to move their Petition to a prompt resolution on the merits. Accordingly, on October 22, the parties submitted a joint proposed scheduling

order, setting highly expedited deadlines for discovery and dispositive motion practice. JA53. The proposed schedule required the parties to serve discovery requests by October 25 and respond by November 25, with depositions to conclude by December 8. *Id*. The Odgaards were to file their motion for summary judgment by December 20, with the Commission to resist and file any cross-motion by January 29. *Id*. All briefing was to be completed by March 5. *Id*.

The Commission's answer to the Petition was due by October 31, 2013. *Id*. But instead of filing an answer, the Commission moved to dismiss for failure to exhaust administrative remedies, referring to the complaint of discrimination that had been filed against the Gallery. One week later, the complainants before the Commission moved to intervene in the district court litigation. On December 6, the day after briefing on the motion to dismiss and motion to intervene closed, the district court issued an order denying the stipulated briefing schedule and staying consideration of the motion to intervene until after it ruled on the jurisdictional motion to dismiss. Oral argument on that motion was set for January 31, 2014.

On the day after oral argument, the Odgaards received a letter from the Commission stating that their defenses in the administrative action were "unavailing" as a matter of law. JA159. The letter was dated the day before the hearing and mailed on the day of the hearing. No mention of it had been made to the Odgaards or their counsel to allow them to address it during the hearing. The

Odgaards filed the letter with the district court as supplemental authority on February 5.

The district court issued an order on April 3 dismissing the Odgaards' Petition. While the district court voiced "some concern" about the Commission's having preliminarily rejected the Odgaards' defenses as a matter of law, Op. at 8, it nevertheless concluded that the Odgaards should continue through the administrative process to the end. The court concluded that because the Odgaards had not completed the administrative process, it lacked jurisdiction to hear their Petition.

The Odgaards filed their notice of appeal on May 2. On May 27, this Court issued a Notice of Briefing Schedule. Three days later, the Odgaards filed an unopposed motion to expedite briefing and the appeal; this Court granted the former and has reserved judgment on the latter pending its routing decision. The only question at issue on appeal is the Odgaards' right to access the district court, not the merits of their claims. *See Lundy v. Iowa Dep't of Human Servs.*, 376 N.W.2d 893, 894 (Iowa 1985).

STATEMENT OF FACTS

Betty and Richard Odgaard display and sell art in the 76-year-old church they purchased and converted into an art gallery, called the Görtz Haus Gallery after Betty's maiden name. JA1, 5-6; *id.* at 32-42 (photographs of Gallery). Much of the

art they display in the Gallery is Betty's, with a significant portion of the rest coming from local artists. JA1, 7. The Odgaards' business at the Gallery includes a bistro, flower shop, gift shop, and framing shop. The Odgaards also personally host weddings and other events in the former sanctuary of the Gallery. JA1, 6. As practicing Mennonites (Betty was born and raised Mennonite; Dick was raised Lutheran, but has attended the Mennonite church with Betty since their marriage), they strive to operate the Gallery consistent with their faith. JA1-4, 6-8. Among other things, this means they cannot plan, facilitate, or host a wedding ceremony that contradicts their religious understanding of marriage. JA8-9.

On several occasions, the Odgaards have been asked, and declined, to host wedding ceremonies for same-sex couples. *See, e.g.*, JA14-15, 55-57. They were first asked in 2009 on the day after this Court held that the State must recognize same-sex marriage. JA55. Concerned about their religious freedom, they emailed the Iowa Attorney General's Office for legal guidance, describing the Gallery, their beliefs, and their concern that they "may be targeted with discrimination lawsuits" and "put . . . out of business" for declining to host same-sex weddings. JA55-56, 59. Speaking on behalf of the Commission, the Attorney General's Office responded that the Odgaards were acting in violation of the law:

> [A]fter speaking with our attorney who represents the Civil Rights Commission, if you would choose not to make available a facility based upon a couple's sexual orientation, *that would be considered a civil rights violation*.

JA59 (emphasis added). The Attorney General then referred the Odgaards to the Commission for further details regarding the penalties they would suffer as a result of the violation. *Id*. ("[The Commission's counsel] suggested you direct your concerns to the . . . Commission to see how that decision could affect you and your business.").

Now even more concerned, the Odgaards asked their state representative to contact the Commission on their behalf. He requested that the Commission "specifically" identify "the law that a business would be in violation of if they refused to perform a marriage of a same-sex couple in their facility and the consequences." JA56, 61. The Commission's Executive Director issued a written response on Commission letterhead identifying two specific statutes—Iowa Code sections 216.7(1)(a) and 216.7(1)(b)—that prohibited the Gallery from "refus[ing] or deny[ing]" or "advertis[ing] . . . that it would refuse or deny" the Gallery's "accommodations, advantages, facilities, or services to a wedding couple because of . . . their sexual orientation." JA63.The Executive Director explicitly stated that the letter represented "the views of this Commission" and offered that the Commission would be willing to "train[] and educat[e]" the Odgaards on how to comply with this view "before any discrimination complaints ever surface." *Id.*

The Odgaards were not the only Iowans to seek legal guidance from the Commission on this specific issue. In April 2009, Iowa State Representative Beth

Wessell-Kroeschell also emailed the Commission to inquire whether a photographer with religious objections could be compelled under the Iowa Civil Rights Act to photograph a same-sex wedding ceremony. The Commission responded unequivocally that "**the person would be required**" to provide the photography services. JA75 (emphasis in original). The email further noted that the only exceptions the Commission recognized were for "religious institutions, or businesses which are not open to the general public." *Id*.

In February 2011, the Commission issued public legal guidance about the Iowa Civil Rights Act when it officially opposed Iowa House Study Bill 50, the Religious Conscience Protection Act. As proposed, House Study Bill 50 provided that "an individual . . . shall not be required" to "[p]rovide goods or services that assist or promote the solemnization or celebration of a marriage" if doing so would "violate the individual's . . . sincerely held religious beliefs"—the precise relief sought by the Odgaards here. *See* JA80. In a position statement sent to Iowa State Representative Vicki Lensing, the Executive Director of the Commission, Beth Townsend, stated that the bill "violates not only the language but the spirit of the Iowa Civil Rights Act that specifically prohibits discrimination based on sexual orientation." JA85. The statement emphasized that a business decision to decline providing services to same-sex weddings would be "discrimination that is otherwise prohibited by the Civil Rights Act." *Id*. In an official appearance by Ms.

Townsend the following day, this position was reiterated to the legislative committee considering the bill, JA87, and made public in a statement to the Des Moines Register, JA91.

On or about August 3, 2013, Lee Stafford and Jared Ellars, a same-sex couple from Des Moines, asked the Odgaards to host their wedding ceremony at the Gallery. JA14. In accordance with their religious convictions, the Odgaards declined the request. *Id.* The next day, the couple filed a complaint with the Commission against the Gallery alleging sexual orientation discrimination. JA16.[1] Within the week, the Commission asserted jurisdiction over the Gallery under Iowa Admin. Code § 161-3.9(216) and commenced investigating the Odgaards. JA65. The Commission's Initial Questionnaire to the Odgaards asked them to identify their own sexual orientation and the sexual orientation of their employees and customers. JA68-70. The Odgaards responded with an assertion of their defenses and a copy of their Petition, which was filed in the district court.

In addition to claiming federal and state Constitutional protections, the Odgaards argued that § 216.18(2) of the Iowa Civil Rights Act—which states that the Act "shall not be construed to allow marriage between persons of the same sex"—should be read as allowing a narrow carveout for private citizens declining

[1] The couple found an alternative location for their ceremony just days later. JA15.

to treat same-sex weddings as the equivalent of opposite-sex weddings. JA157. They also argued that declining to host a wedding because of the nature of that wedding did not constitute sexual orientation discrimination, particularly considering that the Odgaards have always gladly hired and served gays and lesbians. *See id*.; *see also* JA15.

At oral argument on the motion dismiss, which was held January 31, 2014, counsel for the Commission tried to downplay the consistent position the Commission had taken regarding religious objections to same-sex weddings for the preceding five years. Without actually disavowing the prior statements, counsel contended that "the Commission has not taken a position on the issues raised by the Plaintiffs" and that "[t]he Commission had not made a determination on the merits of the particular complaint against [the Odgaards]." JA115, 141; *see also id.* at JA115, 121, 146.

Yet the next day, on February 1, 2014, nearly six months after asserting jurisdiction over the Gallery, the Odgaards received the Commission's response to their defenses in a "Screening Data Analysis and Case Recommendation" issued by Director Townsend. JA154. Despite counsel's denials of the day before, the Analysis directly rejected the Odgaards' statutory and factual defenses as a matter of law. JA155-161. First, it concluded that § 216.18(2) only meant that "the 2007 amendments to the [Civil Rights Act, which added sexual orientation as a protected

status] did not alter" the State's then-existing definition of marriage. JA158. The Analysis definitively concluded that § 216.18(2) "does not state nor does it mean—especially given the current state of the law—that discriminatory acts regarding the facilitation of same-sex marriage ceremonies are not prohibited." *Id*. Indeed, the Analysis emphasized that such a reading would be contrary to Act's "purpose." *Id*. Finally, citing United States Supreme Court precedent, the Analysis also rejected any argument "distinguish[ing] between Complainants' status of being homosexual and their conduct in engaging in a same-sex wedding ceremony," concluding that this argument was "not persuasive" and was "unavailing" as a matter of law. JA159.

Meanwhile, the Odgaards remain in a state of anxious uncertainty concerning their constitutional rights. JA56. Facing potential liability for the complainants' attorneys fees in the Commission before they can even have their constitutional arguments heard, they have been experiencing substantial pressure to quit their business so they can abide by their religious convictions without fear of further liability. *See id*. Every phone call or email request to host a wedding could potentially be the source of a new discrimination claim against them, with accompanying fee liability. *See id*. Due to this pressure, they have currently stopped accepting requests to host any wedding ceremonies to avoid the risk of further liability pending resolution of their legal claims.

PRESERVATION OF ERROR AND STANDARD OF REVIEW

The Odgaards raised their arguments concerning the non-exclusivity of the Commission's jurisdiction, the irreparable harm they will suffer via the administrative proceeding, and the futility of proceeding before the Commission in their briefing and at oral argument on the motion to dismiss. *See, e.g.*, Resist. to Mot. to Dismiss at 4-15; Sur-Reply in Resist. to Mot. to Dismiss at 1-3; Suppl. Resist. to Mot. to Dismiss at 2-6; JA122-141, 144-146. The district court ruled on their arguments in its Order of dismissal. Op. at 5-10, 13-15.

In reviewing the district court's ruling sustaining the Commission's motion to dismiss, the Court must "view the allegations of the petition in their light most favorable to [the] petitioner[s]" and resolve all doubts in the petitioners' favor. *Lundy*, 376 N.W.2d at 894; *see also Chiavetta v. Iowa Bd. of Nursing*, 595 N.W.2d 799, 800-01 (Iowa 1999) ("[W]e accept as true all well-pleaded allegations of the petition."). The ruling may be upheld "only if [the petitioners] could not establish [their] right to judicial review under any state of facts provable under the allegations of the petition." *Lundy*, 376 N.W.2d at 894.

ARGUMENT

Exhaustion of administrative remedies cannot be required unless two conditions are met: "[a]n administrative remedy must exist for the claimed wrong" and a statute "must expressly or impliedly require that remedy to be exhausted before

resort to the courts." *Lundy*, 376 N.W.2d at 895 (citation omitted); *see also Jew v. Univ. of Iowa*, 398 N.W.2d 861, 863 (Iowa 1987) ("[E]xhaustion questions are resolved by a two-step analysis: Is an administrative remedy provided? Is it intended to be exclusive?"). It is undisputed that an administrative remedy of sorts is available to the Odgaards via the Commission. But this Court's rulings indicate that the Commission proceeding was *not* intended to be exclusive, at least not where—as here—the core claims at issue are constitutional claims that fall outside the agency's expertise and jurisdiction. Moreover, even when exhaustion is generally required, it must be excused where, under the specific circumstances at issue, the administrative proceeding will be inadequate either because it causes irreparable harm or will be futile.

Here, even assuming that the Commission's proceeding were intended to be exclusive, it must be excused under these exceptions. *First*, the Commission proceeding is imposing irreparable harm on the Odgaards by pressuring them to shut down the Gallery or forfeit their religious beliefs under threat of liability for attorney fees, while simultaneously depriving them of any timely opportunity to obtain relief under the Iowa and United States Constitutions. *Second*, completing the Commission proceeding would be futile, because the Commission has already repeatedly issued legal guidance rejecting the Odgaards' legal interpretation of the Iowa Civil Rights Act and has identified no reason to suggest that it would or could

change course on this purely legal issue now. For these reasons, the district court's order dismissing the Odgaards' complaint for failure to exhaust administrative remedies must be reversed.

I. The Commission proceeding is not an exclusive remedy, because the Odgaards' core claims are strictly constitutional.

The district court held that Iowa Code § 17A.19 is "the exclusive means by which an aggrieved or adversely affected party may seek judicial review of agency action." Op. at 6. But "the doctrine of exhaustion of administrative remedies has never been absolute." *Sioux City Police Officers' Ass'n v. City of Sioux City*, 495 N.W.2d 687, 691-92 (Iowa 1993) (citing *Salsbury Labs. v. Iowa Dep't of Env'tl Quality*, 276 N.W.2d 830, 836 (Iowa 1979); *Matters v. City of Ames*, 219 N.W.2d 718, 719–20 (Iowa 1974) ("Exhaustion is not required before every court challenge.")). Indeed, this Court has long "taken a less rigid view of the exclusivity provisions of chapter 17A." *Maghee v. State*, 773 N.W.2d 228, 239 (Iowa 2009). Not "all challenges to agency action" must "necessarily" be made "within the agency." *Hollinrake v. Monroe Cnty.*, 433 N.W.2d 696, 699 (Iowa 1988). Rather, "the exclusivity of the judicial review procedures of section 17A.19, as a means of assailing acts or omissions of administrative agencies, must necessarily vary, based on the context of the transaction." *Jew*, 398 N.W.2d at 864.

For example, where an agency "is incapable of granting the relief sought . . . , a fruitless pursuit of these remedies is not required." *Sioux City*, 495 N.W.2d at 691-

92 (citing *Salsbury*, 276 N.W.2d at 836; *Matters*, 219 N.W.2d at 719; 3 K. Davis, *Administrative Law* § 20.07 (1958)). Similarly, exhaustion is not required where the state court suit is "simply about . . . a matter not within the agency's exclusive province," *Chiavetta*, 595 N.W.2d at 803, or where the suit addresses the agency's broader conduct, rather than the facts of a single proceeding, *id.* at 801. In such instances, "the lines of exclusivity are not as rigidly drawn." *Hollinrake*, 433 N.W.2d at 699 (citing *Jew*, 398 N.W.2d at 864 ("With respect to judicial review of so-called 'other agency action,' we detect that the lines of exclusivity are not as rigidly drawn as defendants' argument suggests or as the district court found.")).

The supposed exclusivity of 17A.19 is particularly tenuous where a plaintiff's "challenge to [agency] policy is heavily based on . . . constitutional arguments." *Sioux City*, 495 N.W.2d at 693; *see also Tindal v. Norman*, 427 N.W.2d 871, 873 (Iowa 1988) (stating that § 17A.19 "authorizes only [agency] rulings directed at the applicability, and not the constitutionality, of statutes"). Where free exercise or free speech challenges raise issues that are even only "predominantly legal," then "resolution of [those] issue[s] need not await [factual] development." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001) ("The question before us here is purely one of statutory interpretation that would not 'benefit from further factual development of the issues presented.'" (citation omitted)). Indeed,

with regard to federal constitutional claims against state agencies and officers, state exhaustion requirements are "preempted." *Brumage v. Woodsmall*, 444 N.W.2d 68, 70 (Iowa 1989) (citing *Felder v. Casey*, 487 U.S. 131 (1988)).

The circumstances of this case clearly indicate that administrative exhaustion is not required. The Odgaards' federal constitutional claims *cannot* be forced through administrative exhaustion, *see id.*, and the Commission lacks authority to resolve their state constitutional claims, *Shell Oil Co. v. Blair*, 417 N.W.2d 425, 430 (Iowa 1987) (stating that agencies "lack authority to make constitutional determinations"). Nor is there any compelling reason for sending the remaining claims through the Commission. The Odgaards' Petition is not a direct challenge to the ongoing Commission proceeding. Rather, it seeks a broad declaration of their constitutional rights in view of the obligations imposed upon them by the Iowa Civil Rights Act. Moreover, none of the underlying facts are in dispute. The Odgaards concede that they have declined, and wish to continue declining, hosting or otherwise participating in same-sex wedding ceremonies. And the only statutory claims raise purely legal questions of statutory construction, which the Commission has already repeatedly resolved against the Odgaards. In this context, there are no efficiency reasons for requiring administrative exhaustion, and the Commission has no special expertise to offer the Court through its own proceeding.

Thus, because the controlling questions are "heavily based on statutory and constitutional arguments," the courts are best poised and fully equipped to resolve the matter in the first instance, such that administrative exhaustion is not required. *Sioux City*, 495 N.W.2d at 693; *see also Horrell v. Dep't of Admin.*, 861 P.2d 1194, 1197 (Colo. 1993) ("The policies . . . that support the requirement of exhaustion of administrative remedies are not furthered . . . when the matters in controversy consist of questions of law rather than issues committed to administrative discretion and expertise."); *Matters*, 219 N.W.2d at 719 ("[W]here the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right.").

The district court erroneously rejected these arguments, relying on a line of cases suggesting that even constitutional claims may be forced through administrative proceedings where "there is a matter pending before an agency, which can moot the constitutional issue." Op. at 10. Specifically, the court seemed to suggest that the Commission could rule in the Odgaards' favor on their defenses that the Iowa Civil Rights Act does not require businesses to treat same-sex weddings as equivalent to opposite-sex weddings and that declining to host a wedding because of the nature of the wedding does not constitute discrimination on the basis of sexual orientation. But the cases relied upon by the Court are

distinguishable because none of them alleged irreparable harm to core First Amendment freedoms as a result of the administrative proceedings. As discussed below, that is an exception to the exhaustion requirement, even if exhaustion were deemed by the Court to apply.

II. Proceeding before the Commission is not an "adequate" remedy because it imposes irreparable harm and is futile.

The overriding constitutional nature of the Odgaards' claims demonstrate that this case is not subject to the administrative exhaustion requirement under Iowa Code § 17A.19. But even if the Court were to conclude otherwise, § 17A.19 only requires exhaustion of remedies that are "adequate." Iowa Code § 17A.19(1); *Tindal*, 427 N.W.2d at 872. It is well established that a "showing of irreparable injury resulting from following the administrative process would make judicial review of final agency action an inadequate remedy." *Salsbury Lab.*, 276 N.W.2d at 837; *see also Riley v. Boxa*, 542 N.W.2d 519, 522 (Iowa 1996). Similarly, exhaustion is inadequate if the available proceedings would be futile. *Salsbury Lab.*, 276 N.W.2d at 836 ("[A] fruitless pursuit of these remedies is not required."); *Riley*, 542 N.W.2d at 521.

A. The lack of access to the courts is causing irreparable harm to the Odgaards' constitutional rights to free speech and free exercise of religion.

"[A] litigant who would suffer irreparable harm from administrative litigation delay may proceed to court without exhausting administrative remedies." *Salsbury*

Labs., 276 N.W.2d at 837. Similarly, where the "very injury" a plaintiff "seeks to prevent by his petition" is caused by the agency action, administrative exhaustion would cause irreparable injury and, therefore, cannot be required. *Portz v. Iowa Bd. of Med. Exam'rs*, 563 N.W.2d 592, 594 (Iowa 1997). Here, both types of irreparable injury are present: first, because the Commission's lengthy investigatory and prosecutorial process cannot hear or promptly resolve the *existing* chill on the Odgaards' freedom of expression and religion; and second, because the process *itself* irreparably harms those freedoms.

Free speech and religious liberty rights are jealously protected by courts. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 n.12 (1986) (requiring "that the government tread[] with sensitivity in areas freighted with First Amendment concerns"); *see also Varnum v. Brien*, 763 N.W.2d 862, 905 (Iowa 2009) (Iowa courts "have a constitutional mandate to protect the free exercise of religion in Iowa"). This is because those rights are sensitive and, if lost "for even minimal periods of time," citizens "unquestionably [suffer] irreparable injury." *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1101-02 (8th Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Indeed, "courts routinely find not just harm, but *irreparable* harm, where" a plaintiff even "*asserts a chill* on free exercise rights." *Morr-Fitz, Inc. v. Blagojevich*, 901 N.E.2d 373, 387 (Illinois 2008) (first emphasis in original) (citing *Tenafly Eruv Ass'n v. Borough of*

Tenafly, 309 F.3d 144, 178 (3d Cir.2002); *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1266 (W.D. Wash. 2007)). This special solicitude is because protecting such rights is "of transcendent value to all society, and not merely to those exercising their rights." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

1. The chill on the Odgaards' constitutional rights causes irreparable harm.

The Iowa Civil Rights Act bans discrimination on the basis of sexual orientation. Iowa Code § 216.7(1)(a). The Commission has unwaveringly said that this means public accommodations like the Gallery must host same-sex wedding ceremonies. Further, the Iowa Civil Rights Act—and the Commission's construction of it—broadly chills the Odgaards' speech about their religious beliefs on marriage. Iowa Code §216.7(1)(b) prohibits the Odgaards from "directly or indirectly" communicating "in any . . . manner" that the "patronage of persons of any particular . . . sexual orientation . . . is unwelcome, objectionable, not acceptable, or not solicited." And the Commission interpreted this ban to include any public statement evincing an intent to decline to host a "wedding couple" consisting of two men or two women. JA63.

The Odgaards live under this legal shadow. Every day the Gallery is open, the phone can ring or couples can walk through the door and ask the Odgaards to host a same-sex wedding ceremony. And every time they face that question, the Odgaards must either follow their faith and do what the Commission says is illegal,

or violate that faith by personally participating in a religiously significant expressive event to avoid state prosecution and civil liability. *See, e.g.*, JA56. This forced choice has created a severe chill on the Odgaards' religious exercise and expression, *id*.—indeed, so severe that the Odgaards now decline requests to host *any* wedding ceremonies at the Gallery pending adjudication of their rights.

There is no question that, had the Odgaards filed for declaratory relief *before* the Commission "fastened [its] administrative procedure onto the[m]," *Matters*, 219 N.W.2d at 719, they would have been entitled to immediate access to judicial resolution of the chill on their speech. *See Doe v. Bolton*, 410 U.S. 179, 188 (1973) (holding that "physician-appellants . . . should not be required to await and undergo . . . prosecution as the sole means of seeking relief."); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (allowing a challenge if "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.").

Nor would the Commission's new-found (and intermittent) reticence to take a position on the Civil Rights Act's application have stopped the challenge. If anything, the Commission's veiled position "contributes to the uncertainty that [the Act] causes." *Citizens United v. F.E.C.*, 558 U.S. 310, 333 (2010). This uncertainty "abuts upon sensitive areas of First Amendment freedoms," thereby "operat[ing] to

inhibit the exercise of those freedoms." *State v. Bower*, 725 N.W.2d 435, 441 (Iowa 2006) (internal quotation marks and edits omitted). "[U]ncertainty . . . in the realm of free speech" is intolerable "given the danger that vital protected speech will be chilled." *Schirmer v. Nagode*, 621 F.3d 581, 586-87 (7th Cir. 2010). Thus, courts refuse to allow government agencies to suddenly become agnostic about the law's application as a means to avoid judicial review of speech-impinging statutes. Absent a flat "disavow[al]" of enforcement by the state, *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485-86 (8th Cir. 2006), a plaintiff "need[] only to establish that he would like to engage in arguably protected speech, [and] that he is chilled from doing so by the existence of the statute." *281 Care Committee v. Arneson*, 638 F.3d 621, 627-28 (8th Cir. 2011). The Commission never disavowed its many statements against the Odgaards' speech and religious exercise, and the Odgaards have shown that they are chilled by both the statute and the Commission's interpretation of it. This would have been enough to have their case heard in court.

But now that the Commission has received a complaint filed against the Odgaards alleging sexual orientation discrimination for declining to personally host a same-sex wedding ceremony, the Commission insists (and the district court agreed) that the Odgaards must exhaust *the entire Commission process* before they can obtain access to judicial relief. That is not the law.

The chill exists on the Odgaards' religious exercise and expression *now*, inflicting irreparable injury on them *now*. *Johnson*, 729 F.3d at 1101-02; *Morr-Fitz*, 901 N.E.2d at 387. The Commission cannot relieve that chill with the required alacrity. Just the *pre-probable cause* phase of the Commission's processes takes an average of eighteen months, which can be followed by at least two more lengthy administrative phases. JA67. Indeed, the Commission's own rules acknowledge that a *complainant* "may be irreparably injured before a public hearing can be called to determine the merits of the complaint." Iowa Admin. Code § 161-3.15(216). But while the rule allows the Commission's director or staff to unilaterally seek a preliminary injunction against the defendant to protect a complainant from irreparable injury, *id.*, the Commission does not offer *any* similar procedure to quickly ascertain and protect a defendant's constitutional rights. And even if such procedure existed, the Commission "lack[s] . . . authority to make constitutional determinations," *Shell Oil*, 417 N.W.2d at 430—meaning that the chill on the Odgaards' religious speech and exercise will remain both unrelieved and unreviewed until after the Commission's lengthy process ends.

First Amendment rights are too delicate and too important to be allowed to die on the vine. But that is precisely what the Commission's one-sidedly-lengthy and inadequate process will do to the Odgaards' rights. Thus, the "delay" of the

Commission's process causes "irreparable harm," making that process "inadequate." *Salsbury Labs.*, 276 N.W.2d at 837.

2. The Commission's intrusive, liability-threatening process causes irreparable injury to the Odgaards' First Amendment rights.

Beyond the issue of delay, the Commission's decision to "fasten [its] administrative procedure onto the" Odgaards, *Matters*, 219 N.W.2d at 719, has itself caused an ongoing, irreparable injury to the Odgaards' rights to free speech and free exercise. Rights to free speech and free exercise "are fragile and can be destroyed by insensitive procedures," *Hudson*, 475 U.S. at 303 n.12, and the Commission's procedures lack the requisite sensitivity in this case. This is so for two reasons: *first*, because the procedures force the Odgaards to face substantial liability as a precondition to getting a declaration of their constitutional rights; *second*, because the process itself is intrusive and places a chill on their religious expression and exercise. Thus, making the Odgaards proceed before the Commission would inflict the "very injury" they "seek[] to prevent" by their lawsuit. *Portz*, 563 N.W.2d at 594, which means that exhaustion is not required.

Liability. If the Odgaards are permitted access to Iowa courts, they can obtain a prompt declaration of their constitutional rights concerning hosting same-sex wedding ceremonies, a complicated issue of first impression in Iowa and almost everywhere else in the nation. Win or lose, this declaration would neither subject them to liability nor fees. But in the Commission's process, the Odgaards can only

get a judicial determination of their constitutional rights *after* the Commission has ruled against them, thus subjecting them to civil penalties and, among other things, attorney fees for a complainant. *See* Iowa Code Ann. § 216.15(9)(a)(8) (allowing "reasonable attorney fees" to a victorious complainant). This forced risk of liability as a precursor to judicial access creates a severe chill on the Odgaards' religious expression and exercise. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 794 (1988) (forcing speaker to "bear the costs of litigation" will necessarily "chill speech"); *Dombrowski*, 380 U.S. at 487 (holding that "vindication of freedom of expression" cannot be required to "await the outcome" of "protracted," "case-by-case . . . litigation"). Indeed, the chill is so severe that it has forced the Odgaards to cease scheduling to host wedding ceremonies—the primary event hosted at the Gallery and primary source of the Gallery's income, JA6—for fear of liability if they continue to exercise their constitutional rights.

Courts have long rejected procedures that require exposure to liability as the price of ascertaining constitutional rights. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge . . . the constitutionality of a law threatened to be enforced." (emphasis in original)); *accord Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that [the plaintiff] first expose himself to actual . . . prosecution to be

entitled to challenge a statute that he claims deters the exercise of his constitutional rights."). And this is doubly true for First Amendment rights. Government cannot require citizens to "undertake the considerable . . . risk" of "case-by-case litigation" to "vindicat[e] their rights," because most citizens will "simply . . . abstain from protected speech—harming not only themselves but society as a whole." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

The Commission insists that it can force the Odgaards to play Russian roulette with their constitutional rights (and an unusually risky round, given the Commission's numerous statements showing that most of the chambers are loaded against the Odgaards). The First Amendment does not, and this Court should not, tolerate such brinksmanship.

Intrusiveness. This Court has recognized that an agency's "investigation of the complaint" against the plaintiff can cause cognizable injury. *See Baker v. City of Iowa City*, 750 N.W.2d 93, 98 (Iowa 2008) (finding that a plaintiff had a valid claim for damages "based on the defendants' enforcement of the [human rights] ordinances, *their investigation of the complaint*, and the commencement of administrative proceedings." (emphasis added)). The U.S. Supreme Court recently recognized a similar principle, finding that "threatened Commission proceedings" and other "administrative action" is comparable to the "harm" caused to First Amendment rights by "arrest or prosecution." *Susan B. Anthony List v. Driehaus*,

__S. Ct.__, 2014 WL 2675871, at *10 (June 16, 2014). This is particularly true where the outcome of the administrative action can be followed by state "prosecution," whether for criminal liability (as in *Driehaus*) or civil liability (as in *MedImmune*, 549 U.S. at 128-29, and as is the case here). Indeed, *Driehaus* concluded that "denying prompt judicial review would impose a *substantial hardship*" because it would force citizens to "choose between refraining from [First Amendment conduct] on the one hand, or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other." 2014 WL 2675871, at *11 (emphasis added).

Already, the Commission's administrative procedure has been intimidating and intrusive. The Commission has subjected the Odgaards to legal service that made them "Respondents" in an action challenging their religious expression and exercise. JA65. The Commission immediately demanded "complete and thorough" responses to thirty-eight questions, many of which were invasive and irrelevant. *Id.* Among other things, these questions asked the Odgaards to reveal to the Commission their religious beliefs, their sexual orientation, and the sexual orientation of their employees and customers. JA68-70. The Commission warned that the Odgaards were "REQUIRED" to submit documentation in support of this intimate, private information, and placed a legal duty on them to preserve all documents and evidence that could conceivably relate to the complaint filed

against them. JA65 (caps in original). The Commission later followed up with additional demands, including demands for deposition-like interviews of Betty and Richard individually. Due to those and other discovery requests—all prior to any finding that the Odgaards have actually engaged in wrongdoing—the Odgaards produced hundreds of pages in business and personal documents, were subjected to recorded interviews by Commission personnel, and had to engage legal counsel to defend their rights. More of the same will occur as the case proceeds, especially since the case is likely to result in prosecution by the Commission against the Odgaards. This type of intrusive investigation and threatened investigation undoubtedly "constitutes a severe burden" on the Odgaards' religious expression and exercise. *See FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 468 n.5 (2007); *Driehaus*, 2014 WL 2675871, at *10. If the price of religious expression is an intensive, intrusive, and expensive government investigation and prosecution, few would be willing to pay.

3. The district court erred by finding no irreparable harm.

The district court held that the "doctrine of avoidance" requires dismissing the Odgaards' constitutional arguments to learn whether the Commission will "interpret[] the statute in a manner that does not require [them] to host same-sex marriages." Op. at 12, 13. That is not the law for First Amendment claims. "When there is a danger of chilling free speech, the concern that constitutional

adjudication be avoided" can be "outweighed by society's interest in having the statute challenged." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984); *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619, 625 n.1 (1986) (noting that a First Amendment challenge to agency action was ripe for review even when the "administrative body may rule completely or partially in [a plaintiff's] favor"). First Amendment rights cannot be allowed to languish "for even minimal periods of time," much less years. *Johnson*, 729 F.3d at 1101-02; *see also Tabbara v. Iowa State Univ.*, 698 N.W.2d 336, 2005 WL 839406, at *5 (Iowa App. 2005) (where the "administrative procedure" provided to a plaintiff was insufficient to provide relief on his claims, a "district court . . . is best equipped to handle [the] claims").

The district court also rejected the Odgaards' irreparable injury arguments because it construed *Ohio Civil Rights Commission v. Dayton Christian Schools* to mean that "constitutional rights" cannot be "violated" by an agency's "merely investigating" a complaint. Op. at 14. But *Dayton*, a federal abstention case that has no direct application to state court jurisdiction, held no such thing. Instead, it found that the type of investigation at issue *in that case* did not violate First Amendment rights. *Dayton*, 477 U.S. at 624, 628. That case was far different from this one. There, the plaintiff's participation in the investigation consisted solely of being "notified . . . that [the Commission] was conducting a preliminary

investigation into the matter," and the investigation itself was limited "only to ascertain[ing] whether" the plaintiff had, in fact, been motivated by religion. *Id.*

By stark contrast, the Commission's investigation here has "REQUIRED" the Odgaards to provide "complete and thorough" personal and private information, and expend significant amounts of time and energy as just *the initial phase* of an unusually intrusive investigation process. JA65. As the United States Supreme Court more recently explained, forcing plaintiffs to face such "costly Commission proceedings and . . . prosecution" just to get judicial resolution of their First Amendment rights "impose[s] a substantial hardship" on those rights. *Driehaus*, 2014 WL 2675871, at *11. Indeed, even just the "threat" of such proceedings imposes a cognizable hardship. *Id.* And the Odgaards are currently both *in* the proceedings and face the threat of yet more.

The district court also speculated that this Court "would rule in a similar manner" as the district court because this Court's prior case law has allowed "administrative agencies to hear matters which involve constitutional claims." Op. at 15. But neither the Commission nor the district court identified *any instance* in which *any* Iowa court has held that an agency proceeding that itself directly chills First Amendment freedoms must be completed before a court may determine whether the agency's action is constitutionally permissible. That is because there are none. This Court's prior rulings concern claims where any harm occurs only

after judicial review is fully exhausted. *See, e.g.*, *Shell Oil*, 417 N.W.2d 425 (claim to tax deduction).

The district court also worried that allowing the Odgaards access to courts would open the floodgates and "allow any plaintiff to avoid exhausting administrative remedies and make the agency procedures elective." Op. at 14. Not so. Rather, it would allow judicial review for those plaintiffs who (1) make unopposed, well-pled, well-supported claims that their constitutional rights to free speech and free exercise are clearly being chilled, (2) are experiencing that chill as direct result of the Commission's unusually specific statements against them and their claims, (3) are trapped in procedures that cannot promptly relieve the chill on those sensitive rights, and (4) will not be able to alleviate that chill via the available procedures without necessarily risking both civil prosecution and liability. Such a narrow gate can only produce a trickle, not a torrent.

Moreover, allowing the Odgaards access to courts will have minimal effect on most Commission cases, which typically concern factual, he-said-she-said disputes about well-established employment law. *See, e.g.*, Iowa Civil Rights Commission Annual Report, Fiscal Year 2013, at 5 (noting that almost 80% of Commission cases are employment disputes), *available at* https://icrc.iowa.gov/sites/files/civil_rights/documents/Annual%20Report%20FY13%20final.pdf (last visited June 23, 2014). But no such factual disputes are

presented here, and the legal issue is one of first impression. That legal issue, moreover, is one of delicate constitutional law, which is the province of judges, not the Commission. Normal Commission actions simply do not have such direct and obvious free-speech and free-exercise implications as does the question here of whether the government can force private Iowans to violate their faith by personally hosting a same-sex wedding ceremony in their old-stone-church-turned-art-gallery.

* * * *

This is not to say that the Odgaards will win their constitutional claims. But that question is not before this Court. Nor is it an argument the Odgaards need to win now, since "the chilling effect upon the exercise of First Amendment rights . . . derive[s] from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski*, 380 U.S. at 487. The Odgaards have shown all they need: an "*adequate* showing of irreparable injury," making "judicial review of a final agency action inadequate" as a matter of law. *Salsbury*, 276 N.W.2d at 837 (emphasis added). This Court should reverse the district court's erroneous irreparable harm holding.

B. Forcing the Odgaards to undergo further administrative exhaustion would be futile.

Administrative exhaustion also must be excused where "its pursuit would be fruitless." *Riley*, 542 N.W.2d at 521 (quoting *Alberhasky v. City of Iowa City*, 433

N.W.2d 693, 695 (Iowa 1988)). Here, forcing the Odgaards to proceed before the Commission would be fruitless, because the Commission has already repeatedly issued legal guidance that it would reach an outcome against the Odgaards:

1. The Iowa Attorney General's Office responded directly *to the Odgaards* that "our attorney who represents the Civil Rights commission" said that a religiously motivated decision to decline to host same-sex wedding ceremonies "would be considered a civil rights violation." JA59.

2. In direct response to an inquiry from the Odgaards' state representative, the Commission's Executive Director issued a written statement providing the "views of the Commission" that declining to host a same-sex wedding ceremony violates the Iowa Civil Rights Act. JA63.

3. In direct response to a question from another Iowa legislator about whether a religious photographer could decline to shoot a same-sex wedding ceremony, the Commission stated in writing that "the **person would be required**" to provide the services. JA75.

4. The Commission formally opposed Iowa House Study Bill 50, which would have granted the same relief the Odgaards are now seeking, on the ground that the bill would "violate not only the language but the spirit of the Iowa Civil Rights Act." JA85, 87.[2]

5. That position was publicly disseminated in a letter to the Des Moines Register. JA91.

6. The Commission has continued to adhere to that position by asserting jurisdiction over the Odgaards.

[2] The Commission's strong opposition to any broad religious protections was made clear via internal email communications about the bill. *See* JA101-02 ("I can't believe 56 of 60 house republicans signed off on this!"; "As long as Dems keep control of the senate nothing will probably happen. So we just all need to hope when the 2012 election rolls around we don't lose the senate.").

7. The Commission has issued a detailed analysis rejecting as legally "unavailing" the only statutory and factual defenses the Odgaards have raised. JA159.

The district court agreed that the extensive evidence of the Commission's legal positions against the Odgaards "causes some concern" and that the Commission "may be misdirected" in failing to give serious attention "to the Odgaards' individual claim of federal and state constitutional religious freedom rights that may trump discrimination statutes." Op. at 9-10.[3] But the court proceeded to dismiss the Odgaards' claims in favor of the administrative remedy for two reasons, neither of which withstands scrutiny.

First, the district court noted that "this area of [constitutional] law is developing" and it would be inappropriate to presume that the Commission will not address such an issue because it has pre-ordained a decision in regard to the Odgaards." *Id*. at 10. But the Commission, of course, *cannot* address constitutional questions, regardless of whether they are developed or settled. *Shell Oil*, 417 N.W.2d at 430.

[3] The district court quoted this Court's holding in *Varnum*, 763 N.W.2d at 875, that "[a] statute inconsistent with the Iowa Constitution must be declared void, even though it may be supported by strong and deep-seated traditional beliefs and popular opinion." Op. at 9 n.4. The district court further noted that "[t]he same would be true if a provision of the Iowa Civil Rights Act was found to be in conflict with a person's constitutional right regarding religion, even if contrary to popular opinion." Op. at 9 n.4.

Second, the court determined that, ultimately, evidence of the Commission's predisposition is "unconvincing," because the "futility exception is not concerned with the perceived predisposition of the decision maker but rather the adequacy of the remedy." *Id*. Again, however, the Odgaards are not contending that the current members of the Commission are personally predisposed to rule against them. Rather, they are contending that, over the course of more than five years, the Commission has taken a legal position that the Iowa Civil Rights Act prohibits them from declining to host or provide other services to same-sex weddings. There are no factual disputes to be resolved by the Commission. And if the Commission were open to reinterpreting the Act, it could have disavowed the categorical statements it has repeatedly made to religious objectors like the Odgaards, to individual legislators, to the public, and to the Iowa Legislature. As a practical matter, the Commission has nothing to offer to the resolution of this lawsuit, and there is no reason to think that it would abruptly reverse course on the straightforward position it has taken for more than half a decade. Thus, administrative exhaustion should be deemed futile.

Equity also should discourage allowing the Commission to prevent the Odgaards from obtaining prompt relief by playing coy about its interpretation of the Civil Rights Act after claiming for so many years that religious exemptions would violate the very purpose of the Act. In its own words, the Commission's

"mission . . . is to end discrimination within the State of Iowa," by "effectively enforc[ing] the Iowa Civil Rights Act." *General Information about the Commission and Civil Rights*, Iowa Civil Rights Comm'n, *available at* http://icrc.iowa.gov/about-us/general-information-about-commission-and-civil-rights (last visited June 23, 2014). And its officers are obligated to "faithfully and impartially . . . discharge all the duties of [their] office. Iowa Code § 63.10.

Thus, it should be presumed that when the Commission issues legal opinions to citizens and individual legislators seeking guidance about their potential legal liability, it has fully considered the law and its own legal obligations to properly construe and uphold it. *See* Iowa Code § 216.5(10) (stating that the Commission has a duty "[t]o adopt, publish, amend, and rescind regulations consistent with and necessary for the enforcement of" the Iowa Civil Rights Act); *see also Etelson v. Office of Pers. Mgmt.*, 684 F.2d 918, 925 (D.C. Cir. 1982) (futility exception met where "clearest indication of the agency's determination not to change its policies appear[ed] in a 1975 letter to Congressman").

Even more emphatically, it should be presumed that when the Commission testifies to the State Legislature and argues to the public generally that any exemption for religious business owners would "violate[] not only the language but the spirit of the Iowa Civil Rights Act," it is taking a principled position on the meaning of the Act. *See* Iowa Code § 216.5(8) (stating that the Commission has a

duty "[t]o make recommendations to the general assembly for such further legislation concerning discrimination . . . as it may deem necessary and desirable."); *see also Kuhn v. State Dep't of Revenue of State of Colo.*, 817 P.2d 101, 104 (Colo. 1991) (exhausting "would be futile" where agency "has already publicly stated its position").

Finally, it should be presumed that when the Commission issues a Screening Analysis and Case Recommendation about an ongoing matter, it has fully considered the meaning of the law and the opposing arguments presented to it. *See* Iowa Code § 216.5(3) (stating that the Commission has a duty "[t]o investigate and study the existence, character, causes, and extent of discrimination in public accommodations. . . and to attempt the elimination of such discrimination by education and conciliation."); *see also Canel v. Topinka*, 818 N.E.2d 311, 322 (2004) (holding that administrative exhaustion was "unnecessary" where agency had "policy and practice" contrary to the relief being sought).

In every instance, over the course of more than five years, in which the Commission has been called upon to take a position on the Act, it has explicitly, publically, and officially taken a position directly opposite the position now being argued by the Odgaards. Up to this time, the Commission has taken this position in contexts in which it ostensibly is neutral towards the Odgaards. But at the next phase of the proceeding before it, its role will change from that of neutral party to

prosecutor, charged with bringing the force of the law down upon the Odgaards. *See, e.g.*, Iowa Admin. Code § 161-4.1(2)(17A). To allow the Commission to claim it has never taken a position on the meaning of the Act or its application to situations like the Odgaards' would make a mockery of the Commission's legal obligations and would be the height of gamesmanship and abuse of the public trust.

Indeed, it appears that the Iowa courts are the *only* audience to which the Commission is unwilling to reveal the position it has taken for the last five years, even while its current director confirms that position in communications to the Odgaards. In such circumstances, and given that the Commission's position and actions are creating an active, irreparable injury to the Odgaards' constitutional rights, it would be worse than futile to force the Odgaards through an administration proceeding.

Other courts agree that an agency should be bound by the positions it takes concerning the core purposes of the laws it is tasked with administering. In *Morr-Fitz*, 901 N.E.2d 373, for example, the Supreme Court of Illinois addressed whether pharmacists had to exhaust administrative remedies before they could challenge a regulation requiring them to stock the emergency contraceptive Plan B in violation of their religious beliefs. Assuming that an exhaustion analysis applied, *id*. at 389, the court noted that the agency—through statements of the governor—had warned that "the entire point of the rule" was to require pharmacists to stock

Plan B, that the rule would be "vigorously enforced," and that allowing a religious exception would "eviscerate the whole purpose for the rule." *Id*. at 390-91. The Court concluded that the pharmacists' reliance on these statements as evidence of agency bias went beyond "a mere allegation that grievances have 'historically failed.'" *Id*. at 392. Thus, administrative exhaustion was not required to challenge the agency's established understanding about the core meaning of the law it was obligated to enforce. *See id*.

In *Mental Health Association of Minnesota v. Heckler*, the United States Court of Appeals for the Eighth Circuit waived administrative exhaustion in a similar context. 720 F.2d 965 (8th Cir. 1983). There, the plaintiffs brought a court challenge to an agency's determination of their eligibility for disability benefits without first exhausting the administrative remedies. The court excused the omission, however, because the agency, "by the Secretary's own documents, agents and witnesses" had essentially "taken a final . . . position" on the relevant question. *Id*. at 970 & n.14. Thus, exhaustion would have been futile in that it was "not likely to further distill agency policy." *Id*. at 970.

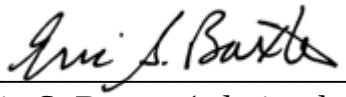
Similarly here, the Commission has repeatedly taken the official position over the course of more than five years to private citizens, individual legislators, the public and the Iowa Legislature that the Iowa Civil Rights Act makes no allowance for religious objections to participating in a same-sex wedding. Having taken such

a firm, consistent, and enduring official position concerning the meaning of the Act, the Commission should be deemed bound to that position as a matter of law, rendering any administrative exhaustion futile. *See Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1489 (D.C. Cir. 1983) ("When resort to the agency would in all likelihood be futile, the cause of overall efficiency will not be served by postponing judicial review, and the exhaustion requirement need not be applied."); *Callicotte v. Carlucci*, 698 F. Supp. 944, 948 (D.D.C. 1988) ("Because the agency will almost surely deny relief, exhaustion is unnecessary.").

CONCLUSION

For all the foregoing reasons, Betty and Richard Odgaard urge the court to reverse the district court's order dismissing their claims for failure to exhaust administrative remedies.

Respectfully submitted this 4th day of August, 2014.



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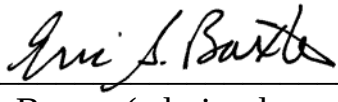

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The undersigned certifies that a copy of this Final Brief was filed on August 4, 2014 with the Clerk of the Supreme Court of Iowa, and served upon one of the attorneys of record for each party to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his/her last known address as shown below, with postage fully paid, and by depositing said envelope in a United States Post Office depository.

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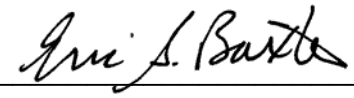

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