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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INTRODUCTION

Betty and Richard Odgaard presently face a real and actionable harm: government pressure to either forfeit their livelihood or abandon their religious beliefs. The briefs filed by the Iowa Civil Rights Commission and Intervenors do not deny that ongoing pressure. Instead, they attempt to minimize the government's coercion by offering a distorted view of the facts and law. The Commission, for example, accuses the Odgaards of simply refusing to "rent out the Görtz Haus Gallery," "to rent the venue," "to rent the space," or "to rent out their business" for Intervenors' "same-sex wedding," Appellees' Br. at 6-7, as if the Odgaards were engaged in the U-Haul version of hosting weddings.

The government's characterization ignores the reality that the Odgaards purchased an old stone church adjacent to their home, essentially as an extension of their personal residence. JA5. They converted it into an art gallery to display Betty's art in an environment of faith—literally proclaiming "the glory of God" on its walls. JA6-JA7. And they personally host every wedding ceremony that takes place at the Gallery. JA8-JA9. They personally meet with every couple to plan the event: "the schedule, flowers, decor, food, and activities that will best express how the couple wishes to celebrate their wedding." JA8. They personally provide the set-up and take-down, and they personally render ongoing support throughout the event. JA9. They "witness and participate in the entire ceremony." *Id*.

The Odgaards "view wedding ceremonies as religiously significant events that by their very nature communicate specific messages about the meaning of marriage," JA9, and they believe it would be "sinful" for them to facilitate a same-sex wedding. JA10, JA20. Accordingly, being asked to host a same-sex wedding places the Odgaards in an impossible and rending dilemma. They harbor no ill will against anyone making such a request, and abhor any discrimination against individuals *on the basis of their sexual orientation*. JA2, JA15. But at the same time, their faith forbids them from hosting, participating in, or otherwise facilitating *an event* they believe to be at odds with their religious convictions. JA10-JA11, JA15. Yet the Commission's long, unbroken interpretation of the law potentially subjects them to fines and the loss of their business license for making this distinction, Iowa Code § 216.15(9)(b)(1), even though it seeks to balance the rights of persons with religious objectors *and* persons with same-sex orientation, protecting both.

This Court seemingly anticipated that conflict when it held in *Varnum v. Brien* that Iowa's constitution required the State to recognize same-sex marriages but simultaneously warned that "State government can have *no* religious views, either directly *or indirectly*, expressed through its legislation" and that recognizing same-sex marriage would "not disrespect or denigrate the religious views of many Iowans who may strongly believe in marriage as a dual-gender union." 763

N.W.2d 862, 905 (Iowa 2009) (emphases added). It is in reliance on this promise that the Odgaards brought the instant lawsuit, seeking a narrow declaration of their constitutional right not to be forced to personally host wedding ceremonies in violation of their own religious beliefs.

This question deserves the Court's urgent attention. The promise of a pluralistic society, with people of diverse religious backgrounds and sexual orientation, cannot be realized without clear and timely guidance from Iowa courts delineating the boundaries that are essential to protecting both. The Odgaards' own experience proves this point. Since the *Varnum* decision in 2009, they have had to continue hosting weddings "in constant fear" that their live-and-let-live philosophy might not be reciprocated and that at any moment they could "be sued or otherwise prosecuted by the Commission." JA55-JA56. This fear has grown and been confirmed by the Commission's repeated, public, and unwavering legal assertion that running the Gallery as the Odgaards always have may subject them to prosecution by the Commission.

And now that they have been charged with discrimination, the Odgaards' worst fears have been realized and exponentially exacerbated. The Intervenors' complaint against them has lingered for over an entire year while they have been investigated by the Commission. The Commission's own best estimate is that it "[i]n most cases" it will complete an investigation "within 18 months from the date

the complaint is filed." JA67. The probable cause proceeding and public hearing stages that follow presumably could each endure just as long, if not longer. And in the meantime, the Odgaards are experiencing intensely hateful boycotts directed against the Gallery and them personally, just because they seek to ascertain their rights. *See, e.g.*, JA43-JA52. Piling injury atop injury, the Commission procedures subject them to potential liability for Intervenors' attorney fees. It is one thing for parties to seek a declaration of their rights knowing they ultimately might not prevail, but it is quite another to know that the cost of even ascertaining their constitutional rights might be paying the opposing party's potentially sizable legal fees.

The combined weight of the years of uncertainty, the currently and indeterminately lingering charges, the hateful messages and boycotts, plus the knowledge that each new request to host a wedding brings the risk of additional charges of discrimination, imposes significant pressure on the Odgaards to either abandon their faith or quit hosting weddings. If, by way of contrast, the parties had proceeded in the district court on the schedule the Commission initially agreed to, the parties very likely would by now have had a decision from the district court and would be briefing this Court on the merits, rather than merely trying to secure their right to be in court in the first place. *See* JA53-JA54 (providing that merits briefing would conclude by March 5, 2014).

Counsel for plaintiff is unaware of—and neither the Commission nor Intervenors cite—any case where this Court has forced parties to proceed through administrative exhaustion to protect core free exercise and free speech rights under ongoing pressure such as exists here. That should not be surprising. Those rights would be rendered nearly meaningless if, as the Commission and Intervenors would have it, they could be subjected to years of external pressure and delay that threatens their resolution by forfeiture instead of a reasoned judgment. That principle has particular strength in light of Intervenors' revelation in their brief that they never really wanted a wedding at the Gallery in the first place. Intervenors' Br. 7-8, 30. It makes no sense for the courts to refuse to hear the Odgaards' constitutional claims about not hosting same-sex wedding ceremonies to await resolution of an administrative claim that apparently did not involve hosting a wedding at all.

Finally, even if this Court were to deem the Odgaards' complaint as arising strictly from the administrative proceeding, exhaustion would not be required. The purpose of administrative exhaustion is primarily efficiency—allowing agencies with expertise in particular subject matters to thin out disputes that would otherwise clog the courts. *Christiansen v. Iowa Bd. of Educ. Examiners*, 831 N.W.2d 179, 189 (Iowa 2013). But courts, not agencies, are the experts in constitutional law. And the threat of irreparable harm has long been recognized to

create an exception to the exhaustion requirement. *Salsbury Labs. v. Iowa Dept. of Envt'l Quality*, 276 N.W.2d 830, 837 (Iowa 1979). Efficiency alone could never justify thwarting individual rights to free speech and the free exercise of religion. *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 795 (1988) ("[W]e reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency."); *accord McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014) ("[T]he prime objective of the First Amendment is not efficiency.").

Similarly, where there is clear evidence that—as a practical matter—it would be futile to force administrative exhaustion, the requirement is excused. *Salsbury Labs.*, 276 N.W.2d at 836. While that exception might be "rare," it cannot be "never." And it is difficult to imagine circumstances where the futility exception could be more compelling than here. The Commission has statutory duties to educate the public and advise the Iowa Legislature on the purposes and effect of the Iowa Civil Rights Act. *See* Iowa Code § 216.5(3), (8). For more than half a decade, it has continuously and categorically advised members of the public and their legislators that refusing to facilitate same-sex weddings for religious reasons would violate the law, JA55-63, even though—if its position were truly undetermined as it now claims—it *could* have so stated.

The Court should not countenance a system that would allow the Commission to take a definite position in fulfilling some of its statutory responsibilities, but

then refuse to either affirm *or* disavow that position in other contexts where, as here, core constitutional rights are at stake. Thus, even if the Odgaards' claims should be deemed to trigger the exhaustion requirement, the Court should not hesitate to reverse the lower court's order and permit the Odgaards to pursue their claims, because exhaustion would cause irreparable injury and ultimately be futile.

ARGUMENT

I. The Odgaards' claims do not trigger the exhaustion requirement.

The Commission and Intervenors argue that the Odgaards' complaint is purely "***derivative***" of the Commission proceeding, Intervenors' Br. at 14, and that, by bringing this action in state court, the Odgaards are "attempt[ing] to usurp the Commission's fact-finding role." Appellees' Br. at 21. This, they claim, is a challenge to "agency action"—*i.e.*, the Commission's assertion of jurisdiction—that triggers the exhaustion requirement. *Id*. at 21. But this is incorrect, and the admission in Intervenors' brief as to what they were seeking from the Gallery on August 3, 2013, Intervenors' Br. at 7-8, confirms that the Odgaards' complaint is not a challenge to agency action and does not trigger the exhaustion requirement.

In their complaint filed with the Commission, Intervenors stated under penalty of perjury that they approached the Odgaards about arrangements for "our marriage ceremony and reception." *See, e.g.*, JA155 (Commission's summary of complaint); Iowa Code §215.15(1), Iowa Admin. Code §§ 161-2.1(9), 161-3.4(1).

They claimed that Richard Odgaard specifically asked them "Is this for a gay wedding?" and they responded "Yes, it is." *Id*. The Odgaards have never disputed, and in fact agree, that this is what happened. Now, however, in their brief to this Court, Intervenors confess that they had actually "married each other earlier that year" and—despite what they told Richard Odgaard—really only "sought a venue for a party to celebrate with family and friends." Intervenors' Br. at 7-8; *see also id*. at 30 ("Here, the Odgaards were asked to provide publicly-available rental space for a celebration by family and friends of Intervenors' prior wedding.").

This admission that Intervenors misrepresented their needs to Richard Odgaard at the Gallery abolishes their standing to maintain their claim before the Commission. Their complaint is based on sworn testimony, fully consistent with the Odgaards' own account, that they asked the Odgaards to host their "marriage ceremony and reception" when, in fact, they were already married. Because they could not have suffered any injury by Richard Odgaard's refusal to offer them wedding services that they did not need or want, they lack standing to sue for discrimination under the Iowa Civil Rights Act. *Alons v. Iowa Dist. Court for Woodbury Cnty.*, 698 N.W.2d 858, 864 (Iowa 2005) (noting that standing is focused on the party and that "[e]ven if the claim could be meritorious, the court will not hear the claim if the party bringing it" has not actually been injured). Nor could standing be based on some imagined refusal by the Odgaards to host

Intervenors' dinner party, because the Odgaards were never asked to host that party and never refused to provide those services (and Intervenors' complaint does not contend otherwise). Moreover, the Odgaards' Petition is expressly limited to seeking relief from being forced to "plan, facilitate, or host [same-sex] wedding ceremonies," not providing other services to gays and lesbians. JA2 ¶ 12, JA27-28; *see also* JA15 ¶¶ 93-95 (noting that the Odgaards "have hired . . . [and] provided goods and services to gays and lesbians at the Gallery without regard to their sexual orientation").

In sum, Intervenors' complaint apparently is based on a misrepresentation used to generate a possibly fraudulent proceeding before the Commission. Because that complaint—as shown by Intervenors' own admission—is null and void for lack of standing, the Odgaards' Petition cannot be deemed a challenge to agency action that would trigger the exhaustion requirement.[1] Moreover, it would make no sense to stop the Odgaards from obtaining a judicial declaration of their constitutional rights concerning the hosting of weddings simply to await the result of an administrative proceeding that is apparently not about a wedding, but about a party several months later.

[1] This also belies Intervenors' insistence that the Odgaards' action is wholly derivative. If the Intervenors' agency complaint is dismissed, the Odgaards' need for relief from the Commission's chill on their rights will still exist, and their action will still proceed because the Odgaards seek the freedom to earn a living on an ongoing basis without violating their religious beliefs.

Even if Intervenors had standing in the Commission, this proceeding would not trigger the exhaustion requirement because, for the reasons set forth in the Odgaards' opening brief, it is not a direct challenge to the ongoing Commission proceeding, but rather it seeks a broad declaration of their constitutional rights in view of the obligations imposed upon them by the Iowa Civil Rights Act. *See* Appellants' Br. at 13-17. But now that Intervenors' brief confirms that they do not have standing and that there is no legitimate complaint pending in the Commission, the Odgaards' right to be in court is even clearer. *See Baker v. City of Iowa City*, 750 N.W.2d 93, 98 (Iowa 2008) (permitting 42 U.S.C. § 1983 claim against Iowa City Human Rights Commission based on city's "investigation of the complaint, and the commencement of administrative proceedings").

The Commission and Intervenors suggest that, even without the exhaustion requirement, the Odgaards must first seek declaratory judgment in the Commission. Appellees' Br. at 18; *see also* Intervenors' Br. at 18. They fail to note, however, that the Commission's declaratory judgment proceeding was no longer available to the Odgaards once Intervenors filed their complaint. Iowa

Admin. Code § 161-1.4(9)(a)(4). Moreover, pursuing the declaratory judgment action would be futile. *See infra*, Part III.[2]

II. Barring the Odgaards access to court is irreparably harming their constitutional rights.

Exhausting administrative remedies is not required where an interest would be irreparably harmed either via "delay" or because exhaustion inflicts the "very injury" the plaintiff "seeks to prevent." *Salsbury Labs.*, 276 N.W.2d at 837; *Portz v. Iowa Bd. of Med. Exam'rs*, 563 N.W.2d 592, 594 (Iowa 1997). The Odgaards made two arguments for irreparable harm. First, they are suffering irreparable harm to their constitutional rights *right now* from the Commission's numerous legal positions taken against them, while being denied access to the only forum—the Iowa courts—that can adjudicate the chill on their constitutional rights. Appellants' Br. at 19. Second, the Commission's procedures are themselves causing irreparable harm and *increasing* the chill on the Odgaards' religious speech and exercise by (1) forcing them to risk civil liability and attorney fees just to get access to the Iowa courts, and (2) by subjecting them to an intrusive, burdensome, non-voluntary government investigation before accessing Iowa courts. *Id.* at 23.

[2] Should the Court deem § 17A.9 exhaustion necessary, it should remand to the district court with directions for that court to stay this matter for the necessary sixty days.

The Commission's response is most notable for what it does *not* do. First, it does not contest that the Odgaards have legally protectable interests in their constitutional rights to free speech or free exercise. Further, it makes no argument that the Odgaards' allegations of constitutional harm fail to state a claim. Nor could the Commission make that argument now since it was never raised or ruled on below. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). Indeed, *had* the Commission taken a position on the merits, that would have undermined its ability to remain strategically coy (at least in litigation) about its interpretation of the Act.

Intervenors, on the other hand, attempt to raise precisely this merits issue for the first time on appeal. This is ironic because their intervention effort below emphasized that the Odgaards should not receive a hearing on the merits. *See* 11/8/2013 Dist. Ct. Mot. to Intervene at 2. It is also inappropriate because, "[u]nder Iowa law, the only issues reviewable are those presented by the parties," not "argument[s] raised by amici curiae that w[ere] not presented to the district court." *Press-Citizen, Co. v. Univ. of Iowa*, 817 N.W.2d 480, 493-94 (Iowa 2012). Moreover, the only case Intervenors cite to support their tactical maneuver to get a one-sided view of the merits before this Court—*King v. State*, 818 N.W.2d 1, 11

(Iowa 2012)—undermines their argument.[3] *King* was clear that the "fundamental principle" of "fairness" to parties on appeal requires that issues on appeal must have been "presented to the trial court so the trial court had an opportunity to rule on them and the opposing party had an opportunity to counter them[.]" *Id*. Neither is true here.[4]

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[3] Intervenors claim that the law is "well-settled" on whether the government can force an art gallery to personally host and participate in a same-sex wedding ceremony against their religious beliefs. Intervenors' Br. at 20. But they fail to cite a single relevant Iowa case, suggesting that the only relevant jurisdiction's law is not so "settled." And, as the U.S. Supreme Court noted in *Boy Scouts of America v. Dale*, this is an emerging—not "settled"—issue, where ever-broadening public accommodations laws "ha[ve] increased" the "potential for conflict between [those] laws and the First Amendment rights." 530 U.S. 640, 657 (2000). Further, Intervenors fail to admit the existence of cases, including two from the U.S. Supreme Court and two from other state supreme courts, finding that public accommodation laws or anti-discrimination policies must make room for free speech, religious freedom, and related constitutional interests. *See, e.g., id.* (protecting Boy Scouts from application of anti-discrimination public accommodation law); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995) (doing same for parade organizers); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 239 (Mass. 1994); *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990); *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), *rev'd on other grounds en banc*, 220 F.3d 1134 (9th Cir. 2000); *Cradle of Liberty Council, Inc. v. City of Philadelphia*, 851 F. Supp. 2d 936 (E.D. Pa. 2012).

[4] Of course, if this Court *does* want to decide the merits, it can—but it should first "invit[e] supplemental briefing on [that] issue" since the merits "ha[ve] not been raised by either party either below or on appeal." *King*, 818 N.W.2d at 12. Indeed, this case would be an ideal candidate for immediate merits consideration since the issues presented are entirely legal, are issues of first impression that implicate important and sensitive fundamental rights that will ultimately need to be

The second omission in the Commission's response is its failure to contest any of the factual predicates of the Odgaards' arguments. It does not contest the Odgaards' allegation that their religious exercise and speech have been chilled, that its own administrative processes are slow (with just the *initial* phase taking an average of 18 months to resolve), that administrative exhaustion necessarily forces the Odgaards to run the risk of civil liability and attorney fees before even obtaining access to the Iowa courts, or that it "REQUIRED" the Odgaards to produce "thorough" documented responses to thirty-eight intrusive questions, including questions about the sexual-orientation of their employees and customers.

Ultimately, then, the Commission's opposition to the Odgaards' irreparable harm argument boils down to arguing that the admitted chill on the Odgaards' uncontested constitutional rights is not "irreparable." But the Commission does not show that a judicial ruling in the Odgaards' favor, several years from now, after the Commission's process has concluded, could make those rights whole. Nor does the Commission identify a single on-point Iowa case that requires exhaustion in the face of an ongoing chill on First Amendment rights. Rather, it provides a series of case studies where it essentially—and unpersuasively—argues that the Odgaards' supporting cases are limited to their facts and offer no guiding legal principles.

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decided by this Court, and it would allow the quickest possible resolution of the urgent constitutional chill claims.

A. The Commission has failed to show that delaying relief of the chill it has put on the Odgaards' constitutional rights does not cause irreparable harm.

The Commission does not contest any necessary fact supporting the Odgaards' chill claim:

- The Commission or agents of the Commission have repeatedly communicated to the Odgaards and others that declining to host a same-sex wedding ceremony:
    - "would be considered a civil rights violation," JA59;
    - is prohibited by two specific sections of the ICRA that ban "refus[ing] or deny[ing]" or "advertis[ing] that [a public accommodation] would refuse or deny . . . facilities or services to a wedding couple because of . . . . their sexual orientation," JA63;
    - violates ICRA provisions that "**require**[]" provision of wedding services, except for "religious institutions, or businesses which are not open to the general public," JA75 (emphasis in original);
    - "violates not only the language but the spirit of the Iowa Civil Rights Act that specifically prohibits discrimination based on sexual orientation," JA85, 91; and
    - is contrary to the ICRA's "purpose," which bans "discriminatory acts regarding the facilitation of same-sex marriage ceremonies," JA158;
- Since the issue became relevant post-*Varnum*, the Commission has never issued contrary legal guidance about the application of the Act, or even any statement that the Act's application to the context of same-sex wedding ceremonies is undecided;
- The Odgaards personally plan, host, and facilitate wedding ceremonies at the Gallery and "witness and participate in the entire ceremony," JA9, ¶ 53;

- As a matter of faith, the Odgaards cannot knowingly host wedding ceremonies that violate their faith, including same-sex wedding ceremonies, JA17 ¶ 103;

- The Odgaards can be requested to host a same-sex wedding ceremony every day the Gallery is open, JA56 ¶ 8;

- Every time the Odgaards receive this request—as they have several times in the past—they must choose between violating their faith by doing what the Commission has repeatedly and specifically told them they must do to obey the law, or following their faith and risking costly Commission proceedings, *id.*;

- The Odgaards live in fear of receiving such requests, *id.*; and

- This places enormous pressure on the Odgaards religious speech and exercise has severely chilled their religiously motivated actions and statements, *id*.

While the Commission does not dispute these facts, it tries to argue that they are not legally significant. Core to their argument is that the Odgaards *should* not feel a chill on their religious exercise and speech because, despite its many specific, clear statements against that speech and exercise, the Commission has not yet ruled against the Odgaards in a *contested case*. This is an odious argument, and one that has often been rejected by courts.

First, it is odious because it effectively subjects the Odgaards' First Amendment rights to a prior restraint. In the Commission's view, it is free to tell Iowa citizens that they have legal obligations that require abandoning long-held religious exercise and speech, but those same citizens can only find out if that's true by going through a years-long, burdensome, liability-creating contested-case

proceeding. *Citizens United v. FEC*, 558 U.S. 310, 335 (2010) (forcing speaker "who wants to avoid threats of criminal liability and the heavy costs of defending against [agency] enforcement [to] ask a governmental agency for prior permission to speak" is effectively creating a "prior restraint").

Second, courts have long recognized that statements made by governmental authorities—even more infrequent and indirect statements than those made here—can easily chill the rights of the individuals under their control. Statements "coming from an authority figure with tremendous discretionary authority, whose words carry a presumption of legitimacy, cannot help but have a tremendous chilling effect on the exercise of First Amendment rights." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1269 (11th Cir. 2004). In evaluating the reality of a chill on First Amendment rights, "courts must 'look through forms to the substance' of government conduct." *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)). Even absent "criminal or civil sanctions," agency officials that "threat[en] invoking legal sanctions and other means of coercion, persuasion, and intimidation . . . can violate the First Amendment." *Id.*

For instance, where a state college president held a press conference condemning one of his professor's extracurricular racist writings as "offensive to the basic values of human equality" and "simply hav[ing] no place" at the college,

this created an objectively reasonable chill on the professor. *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992). Even though the president "never explicitly stated that disciplinary charges would be brought if [the professor] continued to voice his views," the president had the power to do so, and "it is plain that an implicit threat can chill as forcibly as an explicit threat." *Id.* at 89-90.

Here, the Commission is clearly *the* "authority figure" concerning the Act. *Holloman*, 370 F.3d at 1269. Its legal guidance carries a "presumption of legitimacy," *id.*, a presumption that its agents use to influence private conduct and state policy. And the Commission and its agents operating in its name have repeatedly, unwaveringly, and unabashedly condemned the Odgaards' religious exercise and speech as illegal. They have tailored their guidance both specifically to the Odgaards and others, and have issued very broad guidance to the Iowa Legislature and the public. Indeed, in the legislative hearing where the Commission opposed a bill that would protect the religious exercise the Odgaards assert, the Commission Chairwoman testified that such protection would "drive a Mack truck" through the ICRA and return Iowa "back to the era of Jim Crow laws."[5] In light of such specific, continual, and even harsh legal guidance from the

[5] *See "Religious Conscience Bill" Looks Unlikely to Move Forward*, Lynn Campbell, River Cities' Reader (February 11, 2011), *available at* http://www.rcreader.com/?option=com_content&task=view&id=17566&Itemid=442all/ (last visited July 28, 2014); *Latest bill feeds accusations of bigotry*, Kathie

Commission, it is objectively reasonable that the Odgaards feel a severe chill on their rights.

The Commission complains that it cannot be held responsible for that guidance. But it has not identified a single case where a remotely similar course of condemnation by an agency has been sanctioned by courts, even outside the First Amendment context. And inside the First Amendment context, courts have found far less sufficient to trigger immediate judicial review to an agency's chill on sensitive rights. *Morr-Fitz v. Blagojevich*, 901 N.E.2d 373, 390-91 (Illinois 2008).

Further, this is a situation entirely of the Commission's own creation. Had the Commission issued its guidance with disclaimers that citizens need not feel bound by it, or simply refused to issue advisory opinions at all, then perhaps the chill would have been mitigated. The Commission can (and should) be more careful in the future. But having publicly and repeatedly proclaimed that the Odgaards religious behavior is illegal, the Commission cannot now require the Odgaards to slog through years of burdensome, liability inducing procedures just to before they can seek a judicial assessment of their rights.

Obradovich, Des Moines Register (February 10, 2011), *available at* http://blogs.desmoinesregister.com/dmr/index.php/2011/02/10/latest-bill-feeds-accusations-of-bigotry/article; *Pearce v. Faurecia Exhaust Sys.*, 529 F. App'x 454 (6th Cir. 2013) (listing "newspaper article[s]" among "source[s] typically used for judicial notice); *see also* Iowa R. Evid. 5.801(d)(2) & 5.804(b)(3).

The Commission suggests that the Odgaards could have challenged its position any time after *Varnum* by filing a declaratory judgment action with the Commission.[6] But the question at issue is whether the Commission procedures offer adequate relief *now*, not a year ago.

And the Commission's procedures do not offer an adequate remedy: there is a sufficiently-alleged injury to legal interest; that injury cannot be adequately redressed by after-agency judicial review; and the Commission is causing the injury, exacerbating it, and cannot relieve it with sufficient alacrity. Indeed, the Commission has conceded that:

- The agency process that takes an *average* of 18 months just for the *preliminary* stages;
- It took the Commission *six months* just to finish the process's "first step," concluding a preliminary screening, Appellees' Br. at 9, which is 60 days longer than average, JA67;

Further, the Commission's own rules acknowledge that its procedures can operate too slowly to vindicate at-risk rights, which is why they allow immediate relief *for complainants*. Br. at 19-20. But the Commission has no similar safety valve to protect burdened constitutional rights like the Odgaards'. It cannot be the

[6] Notably, that was not the Commission's position below, where it opposed the Odgaards' petition on the grounds that the Odgaards' case was *still* not yet ripe for review. JA167; *see Sierra Club Iowa Chapter v. Iowa Dep't of Trans*., 832 N.W.2d 636, 648 (Iowa 2013) (noting that an agency can decline to issue declaratory judgment for unripe claims).

law that statutory entitlements *must* receive more protection than fundamental constitutional rights.

In sum, the Odgaards' rights are burdened *right now* by the Commission and the Commission cannot and will not relieve that burden promptly. This Court must allow the Odgaards the opportunity to obtain relief in light of the existing and ongoing irreparable harm that the Commission's slow-walked procedures are inadequate to relieve. *Salsbury Labs.*, 276 N.W.2d at 837 (an agency offers "inadequate" remedies where the "delay" it causes results in "irreparable harm").

B. The Commission failed to show that its procedures are not causing irreparable harm.

In their opening brief, the Odgaards noted that the Commission and the district court had failed to identify "*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." Appellants' Br. at 30. The Commission argues that *Gospel Assembly Church v. Iowa Department of Revenue*, 368 N.W.2d 158, 160 (Iowa 1985), is the missing case, and that it stands for the proposition that the Odgaards must "participate in the [Commission's] investigation before asserting their First Amendment concerns before the district court." Appellees' Br. at 29.

But *Gospel Assembly* held nothing of the kind. It concerned an agency's request that a church voluntarily turn over unspecified documents. *Id.* at 159-60. The

church filed suit because it was concerned the request may be too intrusive. *Id*. In dismissing the suit, this Court stated that it did not rule on "exhaustion of administrative remedies" grounds, but on *ripeness* grounds. *Id*. at 160 Because the agency defendant had "as yet" only asked the plaintiff church to turn over documents "voluntarily" and had not "define[d] precisely the scope of its requests," *no harm had yet occurred to the church, and it was unclear that it ever would*. Moreover, this Court noted that if a formal subpoena ever did issue, the Iowa Administrative Procedure Act provided that it could immediately be challenged in court. *Id*. at 159-61 ("Any such subpoena would be subject to judicial contest before compliance could be exacted from plaintiff.").

This is precisely what the Odgaards argued in their opening brief. Appellants' Br. at 30 ("This Court's prior rulings concern claims where any harm occurs only *after* judicial review is fully exhausted."). And it is precisely the problem with forcing the Odgaards to exhaust administrative remedies: the harm—chilled free speech and free exercise—is occurring *now* and, here, cannot be fully redressed by judicial review a year (or two or three) from now.

This Court recognized the flipside of this point in *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418, 433 (Iowa 1996). There, it stated that "[e]xhaustion in a takings case is necessary because the Fifth Amendment prohibits taking 'without just compensation,' and *no constitutional violation occurs until*

state proceedings have denied just compensation." *Id.* (emphasis added). Thus, exhaustion is required where the claimed constitutional violation will not take place until after review is completed, but *cannot* be required where "full relief cannot be obtained at a postdeprivation hearing." *Bowen v. City of New York*, 476 U.S. 467, 483 (1986).

The Commission's reliance on *Ohio Civil Rights Commission v. Dayton Christian School*, 477 U.S. 619 (1986), founders on this same point. The plaintiffs there did not argue they were suffering a current chill on religious exercise. *See id.* at 623-25. Moreover, *Dayton* "does *not* turn on an analysis of the First Amendment or employment discrimination; rather, it focuses on issues of federalism and comity." *Van Osdol v. Vogt*, 908 P.2d 1122, 1129 n.9 (Colo. 1996) (emphasis in original); *Dayton*, 477 U.S. at 628 (expressly declining to "decide[] . . . the merits" of plaintiff's First Amendment claim).[7]

Liability. The Commission next tries to more specifically distinguish cases holding that the government may not condition vindication of First Amendment rights on exposure to government-imposed prosecution and fees. Appellees' Br. at 34-35. Without offering any cases in support, the Commission argues that

[7] *Dayton* also stressed the agency's history of extending deference to religious organizations in their hiring practices. *See id.* at 629; *see also id.* at 632-33 (Stevens, J., concurring). That is decidedly not the situation here, where the Commission has explicitly taken the position that any expanded religious exception would be directly contrary to the purposes of the ICRA.

"common sense" requires oddly construing those cases as referring only to costs generated during civil or criminal litigation, not defending against "an administrative investigation." *Id.* at 34.

This is incorrect. Courts have repeatedly recognized that defending against administrative proceedings can cause cognizable injuries to free speech and free exercise rights. Thus, in *Susan B. Anthony List v. Driehaus*, the U.S. Supreme Court found that even "*threatened* Commission proceedings" must be weighed by courts in deciding to accept jurisdiction "because administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review." No. 13-193, slip op. at 15 (U.S. June 16, 2014) (emphasis added).[8]

Similarly, as *Driehous* indicates, courts have repeatedly rejected treating criminal penalties as categorically different from civil or administrative ones for purposes of First Amendment injuries. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302 n.13 (1979) (possible administrative and civil sanctions provide "substantial additional support" to hear free speech claim); *281 Care*

[8] The Commission also seeks to distinguish *Driehaus* on the grounds that the agency there had made a "probable cause" finding against the chilled speakers. But (a) that did not control the Court's disposition, and (b) the procedures in that case were, as the Commission admits, "different." Appellees' Br. at 36. There, the "probable cause" determination was a *threshold* issue, one which was "generally within two business days" of a complaint's filing. *Driehaus*, slip op. at 2. Here, the pre-probable cause phase takes an *average* of 18 months after a complaint is filed and comes after the Commission makes jurisdictional and "screen-in" determinations and conducts a lengthy investigation.

Committee v. Arneson, 638 F.3d 621, 630 (8th Cir. 2011) (noting that agency proceedings that required "several months and $1,900 in attorney fees" to defend against gave rise to sufficient injury to First Amendment interests); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) ("The fear of civil penalties can be as inhibiting of speech as can trepidation in the face of threatened criminal prosecution").

The bottom line is that, under the Commission's position, the Odgaards *must risk prosecution* by the Commission, for a period of *years*, in order to get judicial review of their chilled rights claims. This is why, for instance, the Commission's specific response on attorney fees liability is unavailing. The Commission notes that the Odgaards are not *currently* liable for fees. Appellees' Br. at 10. But the point of the Odgaards' argument was not that they *are* liable, but that exhaustion necessarily requires risking that they *will be*. *See* Iowa Code § 216.15(9)(a)(8).

Intrusiveness. The Commission converts the Odgaards' argument here into a straw man, stating that they claim that "the investigation of a complaint brought against them 'even for minimal periods of time' is an irreparable injury." Appellees' Br. at 32. Nonsense. The Commission is conflating two different points.

First, the *loss of First Amendment freedoms* "even for minimal periods of time" unquestionably constitutes "irreparable harm." *Johnson v. Minn. Parks & Rec. Bd.*, 729 F.3d 1094, 1101-02 (8th Cir. 2013). As detailed at length above, the lost

freedom here is the Odgaards' chilled religious speech and exercise. And as also addressed above, the Commission has conceded that, at least for purposes of this appeal, the Odgaards have sufficiently alleged that chill. *That* is the "irreparable harm" which is intolerable "even for minimal periods of time."[9] The Commission's insistence that the Odgaards can only relieve this chill by undergoing an intrusive government investigation, Appellees' Br. at 26-28, exacerbates the already existing irreparable injury caused by the chill.

Further, it is clear that an agency investigation can cause compensable harm. In *Baker v. City of Iowa City*, a plaintiff who alleged to have been unconstitutionally

[9] Even if the Commission had not conceded the chill for this appeal, the Odgaards have met their burden of establishing it for purposes of this appeal. The appeal concerns the Odgaards' "right of access to district court, not the merits of [their] allegations." *Lundy v. Iowa Dep't of Human Srvs.*, 376 N.W.2d 893, 894 (Iowa 1985). At this stage, "'rais[ing] at least a colorable claim'" of injury that—unlike a monetary harm—cannot be redressed later provides "an adequate showing of irreparable injury." *Salsbury Labs.*, 276 N.W.2d at 837 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 331-32 (1976)). Courts have long recognized that "loss of first amendment freedoms" is a sufficient showing of "irreparable injury" to waive "exhaustion of administrative remedies." *West v. Bergland*, 611 F.2d 710, 718 (8th Cir. 1979). At this stage, the Odgaards need not prove that a First Amendment claim will be *successful*, just that the harm will be *irreparable*. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (stating that "*if true*," allegations of impaired freedoms of expression "clearly show irreparable injury." (emphasis added)); *Driehaus*, slip op. at 9 (plaintiff must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest" and "a credible threat of prosecution thereunder"); *see also Caveizel v. Great Neck Public Schs.*, 739 F. Supp. 2d 273, 281 (E.D.N.Y. 2010) (finding irreparable harm sufficient to waive exhaustion because "[s]hould the plaintiffs prevail on their claim at trial, the time that [a student] was excluded from public school will not be readily reparable.").

investigated by a city human rights commission sought "damages" under 42 U.S.C. § 1983 "based on the City's enforcement of the ordinances, *the investigation undertaken*, and the commencement of the administrative proceedings." 750 N.W.2d at 96 (emphasis added). Reversing the lower court's dismissal of his claim, this Court held that the plaintiff had sufficiently alleged that his "civil rights had been violated by the City" by, *inter alia*, the City's "investigation of the complaint" against the plaintiff. *Id.* at 98.

Cognizable "burdens that Commission proceedings can impose" include being forced to divert time and resources into "hir[ing] legal counsel and respond[ing] to discovery requests." *Driehaus* at 16. Without "prompt judicial review," parties suffer "a substantial hardship" because they must "choose between refraining from . . . speech on the one hand, or engaging in that speech and risking costly Commission proceedings and . . . prosecution on the other." *Id.* at slip op. 18; *accord Arneson*, 638 F.3d at 630 (finding that a reasonable likelihood of being "subject to the hassle and expense of administrative proceedings" was sufficient injury to allow immediate judicial review to protect speech rights).

Nor is it necessary for the investigatory burden to have been triggered by a statute making explicit speech restrictions, as in *Driehaus*. In *White v. Lee*, agency officials "unquestionably chilled the . . . exercise of . . . First Amendment rights" by engaging in an investigation of individuals for distributing "discriminatory"

flyers against disabled people. 227 F.3d at 1228. This investigation was impermissibly intrusive because, *inter alia*, it lasted for more than eight months, required production of documents and information about all persons who were involved in the alleged discrimination, allowed the agency to interrogate the individuals involved, and included public statements that the individuals had violated an anti-discrimination law. *Id.* at 1228-29. The Odgaards have faced similar pressures from the Commission.

III. Forcing the Odgaards to exhaust administrative remedies would be futile.

The Commission tries to downplay the clear showing that for nearly half a decade it has consistently opposed religious exemptions for individuals like the Odgaards, suggesting that the evidence comprises merely "hypothetical statements" and "informal actions" issued by some "AG Webteam" and former or lower-level staff at the Commission. *See, e.g.*, Appellees' Br. at 7, 13. But that is all demonstrably false. Each time the Commission has spoken out against religious exemptions, it has been in response to concrete factual circumstances, in an official capacity, as the Commission itself.

Concrete Circumstances: The Odgaard's very first inquiry to the Attorney General and Commission arose because they had already "been approached" to host a same-sex wedding and, because their "beliefs" prevented them from hosting, they specifically sought guidance on their "legal position in this matter." JA59. "A

second inquiry from Representative Wessell-Kroeschell was similarly based on an actual request from an individual photographer who, for religious reasons, was not able to photograph same-sex marriages. JA77. Likewise, the statements to the Iowa Legislature were in response to a specific bill that had been introduced and was under consideration. JA79-JA83. Thus, there was nothing hypothetical about the situations to which the Commission was responding in taking the position it did.

Official Capacity: The Commission's position statements were also all made in the course of performing official duties. The Commission has an express statutory duty to "attempt the elimination of . . . discrimination by education and conciliation," Iowa Code § 216.5(3), and to "make recommendations to the general assembly for such further legislation concerning discrimination," § 216.5(8). Thus, when construing the law for Iowa Citizens or testifying before the Legislature, the Commission was acting in an official capacity.

By the Commission: Finally, contrary to the Commission's insinuation that the "AG Webteam" is something akin to a government webmaster or information technology team, it is actually the official email address for contacting the Iowa Attorney General. *See* http://www.iowa.gov/government/ag/contact_us/ (last visited July 28, 2014). And the response the Odgaards received from that address was specifically from the "attorney who represents the Civil Rights Commission." JA59. Similarly, the response to the Odgaards' state representative, Erik Helland,

was from the then-Executive Director of the Commission, JA62, on the Commission's letterhead, *id*., representing "the views of the Commission," JA 63, as approved by the then-Chair of the Commission, JA151 (May 5 entry). And when the current Executive Director testified before the Legislature regarding House Bill 50, it was again under the direction of the Commission Chair. JA85 (indicating statement was from Commissioner Claypool); JA87 (statement from Commission Claypool that she would "attend to just reinforce the statement" and help "send a powerful message").

If, as the Commission now claims, its interpretation of the law was undecided, it could, and should, have so stated in each of the foregoing situations, advising Iowa citizens, legislators, and the Legislature itself, that the law's meaning was unsettled. Instead, it gave specific legal advice, either directly or through its legal counsel, that refusing to participate in a same-sex marriage ceremony because of a religious objection "would be considered a civil rights violation," JA59 and that "**the person would be required** to provide the same services," JA75; *see also* JA91 (repeating legislative testimony to the general public that religious exemption would violate "not only the language but the spirit of the Iowa Civil Rights Act").[10]

[10] The statement appeared in the online version of the Des Moines Register here: http://blogs.desmoinesregister.com/dmr/index.php/2011/02/09/iowa-civil-rights-director-bill-would-violate-law/article?gcheck=1&nclick_check=1 (last visited July 28, 2014).

The Commission's effort to distinguish the Odgaards' cited cases as having involved policies of a higher "level of formality" must fail for the same reasons: the Commission's adopted positions in this matter *were* concrete positions on a concrete issue, by the Commission itself in an official capacity. The cited cases found futility on nothing more. In *Mental Health Ass'n of Minnesota v. Heckler*, for example, the Court found an agency policy based on the agency's "own documents, agents and witnesses," 720 F.2d 965, 970 n.14 (8th Cir. 1983), just as here. Indeed, the "memorandum" the Commission finds so significant was issued by a six-state Regional Office, not the head of the agency, and stated only that it was "expected" that the challenged policy would apply. *Id*. (emphasis added). The "manual" that "reiterated this policy" was used in only one state. *Id*.

Similarly, just as the court in *Callicotte v. Carlucci* identified "four adverse decisions by the agency," Appellees' Br. at 41 (citing 698 F. Supp. 944, 948 (D.D.C. 1988)), the Commission here has at least four times taken a formal position that refusing to host a same-sex wedding would violate the Iowa Civil Rights Act. JA59, JA63, JA76, JA 85. The Commission's legal position statements to individual legislators and *in testimony to the Iowa Legislature* is surely no less telling here than was the agency's response to a single Congressman in *Etelson v. Office of Personnel Management*, 684 F.2d 918, 925-26 (D.C. Cir. 1982) (finding futility where agency's response to Congressman argued that no studies supported

the Congressman's concerns about challenged policy). So also, the Commission's statement here that religious exemptions would violate "not only the language but the spirit of the Iowa Civil Rights Act" is just definitive as the statements in *Morr-Fitz*, where court found futility based on the governor's statements that the challenged rule would be "vigorously enforced" and that allowing a religious exception would "eviscerate the whole purpose for the rule." 901 N.E.2d at 391.

Finally, the Commission's argument that an independent administrative law judge could still dismiss the agency proceeding before it goes to a public hearing before the Commission, *see* Appellees' Br. at 15, is unavailing. In the extremely unlikely chance that the ALJ, on the undisputed facts, would find that the lower "probable cause" standard is not satisfied, the Odgaards would still be entitled to maintain their suit in court because they continue to be at risk under the Iowa Civil Rights Act as other couples may, at any time, ask to host their same-sex marriage ceremony.[11] And if the judge does find probable cause, the Commission's position on the case is already established.

[11] Notably, the Commission's Case Recommendation has already determined that it is reasonably likely that probable cause *will* be found. The Commission insists that the Case Recommendation decision can also be explained by a need to develop the "legal issues in the complaint." Appellees' Br. at 9-10. That is not only implausible given the Commission's unwavering legal guidance, it also contradicts the Case Recommendation itself, which stated that the screen-in decision was due to its finding that there is "a reasonable possibility of a probable cause determination." JA161.

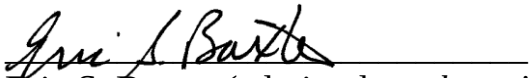
CONCLUSION

For all these reasons, this Court should reverse the district court's order granting the Commissions' motion to dismiss.

REQUEST FOR ORAL SUBMISSION

The Odgaards renew their request, as noted in this Court's order of June 4, 2014, for submission on an expedited oral argument.

Respectfully submitted this 15th day of September, 2014.



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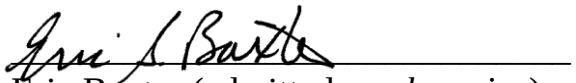

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The undersigned certifies that 18 copies of this Final Reply Brief was filed on September 15, 2015 with the Clerk of the Supreme Court of Iowa, and served upon one of the attorneys of record for each party to the above-entitled cause by enclosing the 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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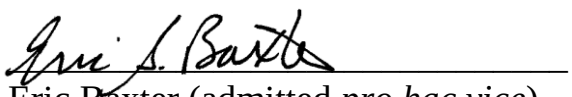

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