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

BRIEF AMICI CURIAE OF LEE STAFFORD AND JARED ELLARS SUPPORTING APPELLEES AND URGING AFFIRMANCE

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INTEREST OF *AMICI CURIAE*

This case derives in its entirety from a complaint filed by *Amici Curiae* Lee Stafford and Jared Ellars ("*Amici*")[1] before the Iowa Civil Rights Commission ("Commission") for discriminatory refusal to provide services in violation of the Iowa Civil Rights Act ("Act"), Iowa Code § 216.7. Appellants Betty and Richard Odgaard ("Odgaards") responded to that discrimination complaint, which remains pending before the Commission, by filing the instant lawsuit asking the court below to pre-judge the merits of their affirmative defenses to *Amici's* complaint, and seeking an injunction preventing any further investigation of the complaint.

This lawsuit is not a facial challenge to any Iowa law, but instead an as-applied challenge based on the specific facts of a single discrimination complaint filed by *Amici*. Indeed, the claims asserted by the Odgaards comprise in their entirety the Odgaards' affirmative defenses to *Amici's* pending discrimination claim.

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[1] *Amici* have filed a pending motion to intervene in these appellate proceedings, but this Court has not ruled yet on that motion. If *Amici* are subsequently permitted to intervene as additional appellees, they request that this *amicus brief* be considered their party brief.

Accordingly, *Amici* have a direct interest in this appeal and a unique perspective that can assist this Court. Iowa R. App. P. 6.906(4)(a)(2),(3).

Amici agree with Appellee Commission that the district court properly dismissed the Odgaards' Complaint on jurisdictional grounds based on exhaustion and ripeness doctrines, and incorporate by reference the argument and authority in the Brief of Appellee Commission. As the court below concluded, the Odgaards' claims in this suit all properly should have been asserted in response to *Amici's* pending claim before the Commission, *see* Ruling on Defendants' Motion to Dismiss Plaintiffs' Verified Petition ("Dist. Ct. Op."), and not in a collateral attack on the Commission in an attempt to do an end run around the agency process and limit *Amici's* participation. "To allow [the Odgaards] to avoid administrative investigation just because they found the process intrusive would allow any plaintiff to avoid exhausting administrative remedies and make the agency procedures elective." (Dist. Ct. Op. at 14.) While the government undoubtedly will argue the impropriety of forum shopping and

trying to thwart an arm of government, what will be lost, absent *Amici*'s participation, is the effect of discrimination on real people, such as Lee Stafford and Jared Ellars, who not only suffered the stress of being turned away and scrambling at the last minute to find another venue for their reception, but the greater indignity of being treated as something less than full members of society.[2] The

[2] Discrimination hurts people in both tangible and intangible ways. Bias and discrimination against people who are lesbian, gay and bisexual can cause mental health problems due to "minority stress," a psychological process that occurs when people spend time and effort anticipating and compensating for the negative life events commonly caused by discrimination. *See Report of the Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, at 11, 16-17 (2009) ("APA Report"), *available at* http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf (citing statements of the APA, American Psychiatric Association, American Psychoanalytic Association and the National Association of Social Workers). These consequences can begin in adolescence and last into adulthood, when discrimination produces social isolation and economic disempowerment. The APA Report concluded that *any* group facing the degree of stigma imposed on people who are lesbian, gay or bisexual would develop minority stress. APA Report at 16. *See also* Steven A. Safren and Richard G. Heimberg, "Depression, Hopelessness, Suicidality, and Related Factors in Sexual Minority and Heterosexual Adolescents," 67 *Journal of Consulting and Clinical Psychology* 859 (1999) (finding that when certain features of stigma like lack of social support are eliminated as causes, there is no difference in mental health outcomes between heterosexual persons and lesbian, gay or bisexual persons).

Odgaards may not bypass the well-established procedures laid out by the legislature for defending against a pending discrimination complaint, which contemplate and anticipate that defendants may assert constitutional affirmative defenses while plaintiffs develop and assert their statutory claims; these procedures appropriately make no exception to the exhaustion requirement in such cases.[3]

To avoid duplication, *Amici* present here different and alternative arguments for why the court below was correct to dismiss the instant lawsuit. The Odgaards' attempt to recast their defenses as independent constitutional claims must fail, and the Odgaards' Petition warrants dismissal, not only because the Odgaards are required to exhaust their administrative remedies but also because on its face, the Odgaards' Petition fails to state a claim for relief. The law is well-settled that (i) nondiscrimination

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[3] Settled Iowa law precludes such an end-around, requiring the Odgaards to exhaust their administrative remedies. *Shell Oil Co. v. Blair*, 417 N.W.2d 425 (Iowa 1987); *Tindal v. Norman*, 427 N.W.2d 871 (Iowa 1988); *Alberhasky v. City of Iowa City*, 433 N.W.2d 693 (Iowa 1988); *Cota v. Iowa Environmental Protection Com'n*, 490 N.W.2d 549 (Iowa 1992). S*ee also* the district court's excellent discussion in *Board of Regents v. United Electrical, d/b/a Campaign to Organize Graduate Students*, No. LACV068324, 2007 WL 5515242 (Iowa Dist. 2007).

laws constitute neutral laws of general applicability, (ii) enforcement of such laws does not raise First Amendment concerns, either in the context of free exercise claims or as speech or compelled speech claims, and (iii) in any event, government has a compelling interest in preventing discrimination sufficient to justify enforcement of nondiscrimination laws, the least restrictive means for preventing this harm, where a business argues that such enforcement burdens speech or religious exercise. While the district court properly dismissed on jurisdictional grounds, the dismissal can be affirmed as well for failure to state a claim for relief.

STATEMENT OF FACTS

Amici are a married gay couple living in Des Moines. In August, 2013, *Amici* sought a venue for a party to celebrate with family and friends the fact that *Amici* had married each other earlier that year. On August 3, 2013, *Amici* attempted to rent the Gortz Haus Gallery, a commercial rental facility owned and operated by the Odgaards. The Gortz Haus Gallery is a business that generates income through rental of the building (which was

used as a church before the Odgaards bought it) to the public not only for weddings but also other events, and through operation of a bistro, framing shop, and gift shop located in the building. (Petition at ¶¶ 26, 32-36.) As the Odgaards have acknowledged during the Commission proceedings, in their district court Petition, and here on appeal, the Odgaards denied service to *Amici* solely because *Amici* comprise a same-sex couple and the Odgaards object to marriages of same-sex couples (Appellants' Brief at 2, 8; Petition at ¶¶ 85-89).

The day after the Gortz Haus Gallery denied them service, *Amici* filed a complaint before the Commission alleging that the Gortz Haus Gallery discriminated against *Amici* based on sexual orientation in violation of the Act. *See* Exhibit 8 to Plaintiffs' Supplemental Resistance to Defendants' Motion to Dismiss (December 5, 2014). The Odgaards then filed the instant lawsuit directly against the Commission and its members in an attempt to preempt any agency investigation, findings, and enforcement.

The Odgaards' Petition argues: that the Act exempts discriminatory conduct relating to weddings of same-sex couples

as a matter of statutory construction (Counts I and II); and that "[f]orcing the Odgaards to host" wedding ceremonies for same-sex couples would violate the guarantees of religious freedom and free exercise (Counts III and IV), free speech (Count V), and expressive association (Count VI) under the Iowa Constitution. They next argue that the Act chills their speech in violation of the Iowa Constitution by preventing them from placing their objections to weddings of same-sex couples on their website (Count VII). Finally, they make free exercise (Count VIII), compelled speech (Count IX), speech and expressive association (Count X), and chilled speech (Count XI) claims under the First Amendment of the federal Constitution. The Odgaards do not assert a facial challenge to the Act, or allege that the legislature lacked the authority to create the Commission and authorize the process it follows. Nor do they claim the Act, as a whole, does not apply to them.

Amici moved to intervene in the lawsuit below within 30 days of the filing of the Petition (after the State had filed a motion to dismiss the Odgaards' Petition but before the Odgaards had

responded to that motion) and before the Court had taken any other action in the case. *See* Motion to Intervene In Support Of Proposed Intervenors Lee Stafford and Jared Ellars(June 4, 2014). However, because the district court granted the Commission's motion to dismiss and then dismissed the Odgaards' suit, the Court did not reach *Amici's* intervention request. (Dist. Ct. Op; Appellants' Brief at 3.)

On January 30, 2014, the Commission found that *Amici's* complaint warranted further investigation. Screening Data Analysis and Case Recommendation, ("SDA&CR"). The Commission has made no probable cause determination yet.

On April 3, 2014, the district court dismissed the instant lawsuit for lack of jurisdiction. The court below correctly found that *Amici's* pending Commission Complaint "directly affects Counts III through VI and VIII through X" (Dist. Ct. Opn. at 12) and, indeed, that all of the Odgaards' claims are so integrally related to *Amici's* pending proceeding that the Odgaards first must make their claims before the Commission in that agency

proceeding and thereby exhaust administrative remedies. Dist. Ct. Opn. at 15. The Odgaards appealed.

ARGUMENT

I. The Odgaards Have No Independent Claims to Assert in a Separate Lawsuit and, Therefore, the Commission Proceeding Provides the Exclusive Forum For This Dispute and the Exclusive Remedy For Both the Odgaards and For *Amici*.

The Odgaards' lawsuit and this appeal are based on a false premise: that the Odgaards have independent constitutional claims separate and apart from the discrimination complaint filed with the Commission by *Amici*. As a matter of law, they do not for at least two reasons: their Petition does not qualify for any exception to the exhaustion requirement, depriving the court below of jurisdiction to hear the case; and the Petition fails to state a claim for relief.

A. The Odgaards' Petition Does Not Qualify Under Any of the Rare Exceptions to the Exhaustion Doctrine.

First, any defense the Odgaards have to the discrimination complaint before the Commission arises under the Iowa Civil Rights Act, Iowa Code §§ 216.1—.21 (2013), (the "Act"), itself, not from constitutional sources. To be sure, the Odgaards have

attempted to shoehorn their claims into one of the narrow exemptions to the exhaustion requirement. However, as the district court correctly determined, their effort fails.

The Odgaards do not assert a facial challenge to the Iowa Civil Rights Act or allege that the legislature lacked the authority to create the Commission and authorize the process it follows. Nor do they claim the Act, as a whole, does not apply to them. Rather, the Odgaards bring an as-applied challenge based on the specific facts of the discrimination complaint filed by *Amici*. In other words, their claims are ***derivative*** claims based on their asserted defenses to liability under the Act for a specific event, ***not independent*** claims.[4] Thus the district court properly dismissed the Odgaards' Complaint on jurisdictional grounds based on exhaustion and ripeness doctrines. *See, e.g.*, *Sierra Club Iowa Chapter v. Iowa Dept. of Transp.*, 832 N.W.2d 636 (Iowa 2013)

[4] The Odgaards themselves acknowledge that the instant lawsuit is entirely derivative of the pending Commission proceeding. The Odgaards state that they filed this case "in an effort to ascertain their rights, particularly in light of their responsibility for [*Amici's*] attorneys fees," to obtain a declaratory judgment that their decision to refuse service to *Amici* is shielded from liability by the state and federal constitutions. See Appellants' Br. at 2.

(exhaustion doctrine bars litigants from filing declaratory judgment actions in court concerning an agency's administration of a statute without first exhausting administrative remedies because, among other things, the legislature created an administrative procedure for agency-issued declaratory orders and judicial review of such agency orders as a replacement for the court-provided remedy of declaratory judgments); *Shell Oil Co.,* 417 N.W.2d at 429-30.

The cases on which the Odgaards rely do not privilege them to ignore established Iowa law, which makes no exception to the exhaustion doctrine for raising defenses in a collateral lawsuit merely to circumvent the administrative process. The Odgaards do not dispute that the administrative process provides them a remedy, but contend that remedy is not exclusive or, at least, is "excused" because the process is "pressuring them to shut down the Gallery or forfeit their religious beliefs under threat of liability" and because the "commission has already repeatedly issued legal guidance rejecting the Odgaards' legal interpretation

of the Iowa Civil Rights Act" and is unlikely to change its position. Appellants' Br. at 12-13.

As to the first argument, the Odgaards are free to believe what they wish, but when engaging in commerce, they must conform their business conduct to neutral business regulations that legitimately further the State's compelling interest to combat discrimination in the public marketplace, just as other businesses are required to do. *See* Point II.A.2 at 26-27. As to the second argument, the Odgaards must raise their statutory interpretation arguments before the agency and may raise and preserve all their constitutional arguments for judicial review. The process respects this right. *See Sierra Club Iowa Chapter,* 832 N.W.2d at 648 ("[C]ourts should not lightly assume the futility of a party's pursuing an administrative remedy; instead, it is to be assumed that the administrative process, if given the opportunity, will discover and correct its errors") (citations and quotations omitted).

The Odgaards claim they should bypass the Commission because their "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." Appellants' Br. at 16. The statement is misleading. The Odgaards ***absolutely*** challenge the claim brought against them by *Amici* before the Commission. They seek special exemption from that claim (and others like it), not "broad" relief from the entirety of the Act itself. The Petition's as-applied challenge presents a classic example of application of law to facts. The Commission is entitled to weigh, under the facts presented by *Amici* as well as the Odgaards, the Odgaards' defense that certain business conduct (*i.e.*, refusing to rent an event venue and provide party services for wedding receptions of same-sex couples despite providing such services for different-sex couples) "does not constitute discrimination on the basis of sexual orientation." Appellants' Br. at 17. For example, the Commission may conclude, after developing the record, that the Odgaards' claimed religious justification is a mere pretext for discrimination if it becomes evident that the Odgaards consistently rented their facility out for numerous other events inconsistent with Mennonite traditions. Likewise, the Commission is empowered

and entitled to make the record—comprising both sides' evidence—for judicial review. *See Sierra Club Iowa Chapter,* 832 N.W.2d at 647.

Additionally, even if a declaratory judgment action ***were*** appropriate, Iowa Code § 17A.9 requires the Odgaards to petition the Commission for a declaratory order first, before seeking judicial review. *See Sierra Club Iowa Chapter,* 832 N.W.2d at 643. Among other things, this provision protects the interests of necessary parties by mandating that an "agency shall not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding," and permits persons who would qualify under law as intervenors to participate in the agency proceeding seeking a declaratory order. Iowa Code §§ 17A.9 (1) (b) (2); 17A.9 (4); Iowa Admin. Code r.161-1.4(216) (laying out rules for petitioning for declaratory order from Commission).

Interestingly, the ***only*** case cited in Part I of Appellants' Brief that expressly addresses exhaustion in the context of federal

Section 1983 civil rights claims is *Brumage v. Woodsmall*, 444 N.W.2d 68 (Iowa 1989). However, that case is distinguishable. The plaintiffs in that case challenged final agency action taken by the Iowa State Racing Commission and other state defendants (which had already closed plaintiffs' racetrack and suspended their license), arguing that defendants had failed to follow proper procedures in doing so. Additionally, the *Brumage* plaintiffs did not purport to raise claims under the First Amendment akin to the Odgaards' claims here.

B. The Odgaards' Petition Fails to State a Constitutional Claim Under Governing Federal Law.

Second, the Odgaards' attempt to recast their defenses as independent constitutional claims is unavailing because on their face they fail to state a claim for relief. The law is well-settled that neutral laws of general applicability do not raise First Amendment concerns, either in the context of free exercise claims

or compelled speech claims. *See* Part II.A.2.[5] While the district court properly dismissed on jurisdictional grounds, the court also was justified on grounds of failure to state a claim for relief. Although not expressly raised nor considered by the district court, Appellants' arguments pertaining to exhaustion of remedies and chill of First Amendment rights are so intertwined as to necessarily raise the "failure to state a claim" issue as a prerequisite, so it has been briefed. *King v. King*, 818 N.W.2d 1, 11 (Iowa 2012).

II. The Commission Proceeding Provides an Adequate Forum for the Defenses to the Discrimination Charges the Odgaards Seek to Assert.

A. The Administrative Process, Which Includes the Right of Court Review, Protects the Odgaards' Interests.

The Odgaards' defenses to violations of the Act, if any, necessarily must arise under the Act itself. The federal and state constitutions do not help them at all.

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[5] *Amici* address the issues in the order presented by Appellants in their Brief. Accordingly, this dispositive issue is flagged here, although addressed below.

1. The Commission's Lawful Investigation of Discrimination Claims Against the Odgaards Does Not Chill Their Free Speech or Religious Exercise Rights Under the First Amendment.

The cases the Odgaards rely on to frame their argument that the Commission's actions "chill" their constitutional rights are both telling and unpersuasive. The Supreme Court's jurisprudence is clear that no First Amendment free speech or free exercise violation occurs in the context of religiously neutral, generally applicable nondiscrimination rules governing non-expressive business conduct in a public marketplace. *See Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 571-72 (1995) (public accommodations non-discrimination laws, like the Iowa law at issue here, "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments."); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (federal religious free exercise objections to state laws fail if the laws advance a legitimate state interest in a rational manner); *see also* Point

II.A.2.

The protected speech case cited by the Odgaards, *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094 (8th Cir. 2013), deals with governmental interference with protected speech in a public forum, not regulation of non-expressive business conduct. *Compare North Coast Women's Care Medical Group, Inc. v. Superior Court (Benitez),* 189 P.3d 959*,* 968 (2008) (rejecting argument that providing medical services is speech) ("For purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition.") (quoting *Catholic Charities of Sacramento, Inc. v. Superior Court,* 32 Cal.4th 527, 558-559, 85 P.3d 67 (2004)).

Similarly, *Morr-Fitz, Inc. v. Blagojevich*, 901 N.E.2d 373 (Ill. 2008), and *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), on which *Morr-Fitz* relies, are inapposite. In *Morr-*

Fitz, the Illinois Court considered allegations that a legislature's motivation and asserted intent were to target a particular religious viewpoint—not present in the Odgaards' as-applied challenge here. And *Tenafly Eruv Ass'n* involved allegations of targeted and selective enforcement by the government of laws that otherwise would have burdened the Plaintiffs' free exercise of religion only incidentally and would not have been actionable. The Odgaards make no claim like the one in *Tenafly Eruv Ass'n* that the Commission is selectively targeting them for violation of the Act while allowing other businesses to engage in prohibited discrimination. Rather, the Odgaards' claim is the opposite: they ***want*** to be treated by the Commission differently from other businesses engaged in the public marketplace—to be privileged and granted a special exception from the Act.

The prerequisite to a claim that one's free speech rights are chilled is establishing that the Plaintiff would like to engage in conduct protected by the First Amendment—and therefore the Odgaards' chilled speech claims must fail. In the end, the point is best illustrated by the language cited by Appellants themselves

from *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 by the statute.'" (Appellants' Br. at 21-22.) To state the obvious, if the government's conduct itself would not violate the First Amendment, threats of that same conduct cannot be actionable under the chilling effects doctrine.

2. The Commission's Enforcement of Neutral Regulations on Business Conduct in the Public Marketplace Does Not Violate the Odgaards' First Amendment Rights.

The Odgaards are business people. They operate a public event venue and framing gallery in the marketplace. As such, they are a public accommodation within the meaning of the Act. As noted above, it is well-settled that, as a matter of federal and state constitutional law,[6] religious exercise and free speech rights are

[6] Courts perform the same analysis under the federal Constitution for First Amendment claims as under the Iowa Constitution's analogues. *See, e.g., State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1997); *Americans United for Separation of Church and State v. Prison*

—continued

not violated by enforcement of neutral laws of general applicability—such as nondiscrimination laws—that govern non-expressive conduct.

In the context of religious free exercise, the U.S. Supreme Court has determined that the mere rationality standard is appropriate, upholding neutral, generally applicable laws against free exercise challenges irrespective of whether the laws are supported by a compelling governmental interest—even when application of those laws imposes a burden on religious beliefs. *City of Boerne*, 521 U.S. at 507; *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). To hold otherwise would "open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind." *Smith*, 494 U.S. at 888.[7]

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continuation:
Fellowship Ministries, Inc., 509 F.3d 406, 423 (8th Cir. 2007) (courts analyze the federal First Amendment and IOWA CONST. art. I, § 3 "simultaneously").

[7] *Smith* establishes the analysis for purposes of First Amendment challenges to neutral laws of general applicability as a matter of federal constitutional law. The federal government subsequently adopted the Religious Freedom Restoration Act of 1993, 42 U.S.C.
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In free exercise challenges to commercial regulations, courts consistently have held that a decision to engage in for-profit

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continuation:
§ 2000bb *et seq.*, ("RFRA"), which provides additional and more stringent statutory protections than the First Amendment against ***federal*** laws that are neutral toward religion but nonetheless burden religious exercise. While the protections under RFRA are not applicable to this dispute, the Supreme Court's recent observations about the scope and effect of the heightened statutory test under RFRA are instructive in the context of the rational basis analysis under the First Amendment here.

Responding to the concern that RFRA might allow discrimination in a variety of settings that could escape legal sanction by being cloaked as religious practice, the Supreme Court majority stressed that its "decision today provides no such shield" and noted the Government's "compelling interest" in protecting against discrimination. *Burwell v. Hobby Lobby Stores, Inc.*, 2014 WL 2921709 at *26, 573 U.S. — (June 30, 2014). Making a comparison to taxation laws, the Court noted certain legal systems cannot function if individuals and entities can obtain exemptions. It would be similarly untenable to permit ad hoc exemptions in public accommodations that undercut the compelling governmental goal of a discrimination-free marketplace. Indeed, the *Hobby Lobby* majority noted that non-discrimination laws are tailored to that goal; there are no less restrictive ways to achieve it than to prohibit the harmful conduct itself. In addressing the potential conflicts between some religious tenets and non-discrimination protections, Justice Kennedy emphasized the majority's point, noting in concurrence that although RFRA protects one's freedom in exercising his or her religion, that "same exercise [may not] unduly restrict other persons" from protecting their own "interests the law deems compelling." *Hobby Lobby*, at *29 (Kennedy, J., concurring).

activity necessarily accepts certain regulatory constraints, and that therefore burdens imposed by generally applicable marketplace regulations either are insufficiently substantial to support a free exercise claim or are justified by sufficiently compelling, properly tailored interests. *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.,* 493 U.S. 378, 389-91 (1990) (generally applicable sales tax did not impose "constitutionally significant" burden on ministry's sale of religious material because such a tax is "no different from other generally applicable laws and regulations—such as health and safety regulations—to which [the ministry] must adhere," and "is not a tax on the right to disseminate religious information, ideas, or beliefs, *per se*; rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California"); *Benitez,* 189 P.3d 959 (under strict scrutiny, rejecting religious free exercise objection to nondiscrimination rules applicable to for-profit medical practice); *Smith v. Fair Emp't and Hous. Comm'n,* 913 P.2d 909 (Cal. 1996) (under strict scrutiny, rejecting religious

free exercise challenge to fair housing law by landlord with religious objection to unmarried tenants); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (1994) (on similar facts, rejecting federal free exercise claim on rational basis review and state constitutional claim due to the state's overriding interests in ending discrimination); *In re Minnesota ex rel. McClure,* 370 N.W.2d 844, 847 (Minn.1985) (rejecting health club owners' free exercise affirmative defense of refusal to employ "fornicators and homosexuals," anyone cohabiting with a non-marital, different-sex partner, and women working without consent of either her father or her husband), *appeal dismissed*, 478 U. S. 1015 (1986); *Newman* v. *Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 945 (SC 1966) (rejecting restaurant chain owner's free exercise affirmative defense of refusal to serve African American guests based on religious beliefs against racial integration), *aff 'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff 'd and modified on other grounds*, 390 U.S. 400 (1968).

Similarly, as noted above, Supreme Court precedents have

never found a neutral regulation on business conduct to constitute compelled speech in violation of the First Amendment. Rather, the Court has consistently held that businesses operating in the public marketplace must obey anti-discrimination laws and that those regulations of business conduct do not improperly coerce any merchant's expression of agreement with the laws in violation of the First Amendment. The Court, accordingly, has explained that public accommodations non-discrimination laws, like the Iowa law at issue here, "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 571-72.

Here, the Odgaards were asked to provide publicly-available rental space for a celebration by family and friends of *Amici's* prior wedding. The Odgaards were not asked to officiate their marriage (which had already taken place prior to the party) nor were they asked to serve as witnesses or provide any other aspect of the civil marriage proceeding itself. Instead, they were asked simply to

provide space and event services for a party (as they would for anniversary celebrations, birthday celebrations, graduation parties, bar mitzvahs, quinceañeras, and a host of other culturally diverse celebrations).

Providing rental space and event services in the public marketplace in a non-discriminatory manner coerces no agreement with a government message and it involves no discrimination based on the contents of any such message. *See, e.g., Elane Photography, LLC v. Willock,* 309 P.3d 53 (N.M. 2013) (non-discrimination laws that prevent public accommodations from discriminating against same-sex couples in the context of providing wedding-related services do not compel businesses to speak the government's message, do not constitute compelled speech, and also do not raise free exercise concerns) (collecting cases). Indeed, the Iowa Act has nothing to do with messages at all. It is a neutral regulation of commercial conduct, applicable generally to businesses that sell goods and/or services to the public. The law simply says: Whatever services you choose to provide in public commerce, you must provide equally and without

discrimination to customers.

Nothing in the Act prohibits business owners from expressing their own views on whatever subjects they wish to the public at large. When a commercial regulation controls only conduct and permits the regulated entity generally to express its own views, there is no First Amendment violation. *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006); *Benitez*, 189 P.3d at 967 ("Notwithstanding these statutory obligations, defendant physicians remain free to voice their objections, religious or otherwise, to the Act's prohibition against sexual orientation discrimination.").

Just as is true of other nondiscrimination laws around the country, the Act was "adopted to serve compelling state interests, unrelated to the suppression of ideas." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see also id.* at 628 (concluding that "acts of invidious discrimination in the distribution of publicly available goods, services and other advantages cause unique evils that

government has a compelling interest to prevent").[8] They protect the right of individuals to participate in the "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society[,]" *Romer v. Evans*, 517 U.S. 620, 631

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[8] Although many states, including Iowa, apply some level of heightened scrutiny in evaluating laws that classify on the basis of sexual orientation, *see Varnum v. Brien*, 763 N.W.2d. 862, 896 (Iowa 2009), the analysis of the ***government's interest*** here involves a slightly different inquiry. *As* recognized in *Roberts*, the government interest in eradicating discrimination against classes of persons can be "compelling" even if the government's own discrimination based on that characteristic would not necessarily trigger strict scrutiny. *Roberts,* 468 U.S. at 623 (holding that prohibition of sex discrimination is a compelling interest, even though sex-based classifications had not been held to require strict scrutiny). *See also Gay Rights Coal. v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. 1987) (holding that prohibition of sexual orientation discrimination is a compelling interest); *Boy Scouts of America v. Wyman*, 335 F.3d 80, 92 n.5 (2003) (noting that a government body "that has adopted a policy of equal protection with respect to a specific group may have a compelling interest in the enforcement of that policy") (Calabresi, J., concurring); *EEOC v. Miss. College*, 626 F.2d 477, 488 (5th Cir. 1980) ("the government has a compelling interest in eradicating discrimination in all forms."); *Benitez*, 189 P.3d at 969 (state has "compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation"); *Koire v. Metro Car Wash*, 40 Cal.3d 24, 31 fn. 8 (1985) (state has compelling interest in ending all forms of discrimination forbidden by its public accommodations law).

(1996), and also protect basic human dignity. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964).

Courts have recognized with reassuring consistency across generations the public's abiding interests in securing fair access and peaceful co-existence in the public marketplace. *Newman v. Piggie Park Enters.,* 256 F. Supp. at 944-45 (upholding nondiscrimination law against First Amendment challenge by business that justified refusing to serve black customers on religious grounds). Today, these common interests are tested once against as lesbian, gay, bisexual, and transgender people seek full participation in American life. There is growing understanding that sexual orientation and gender expression are personal characteristics bearing no relevance to one's ability to contribute to society, including one's ability to form a loving relationship and build a family together. *Varnum v. Brien*, 763 N.W.2d. 862 (Iowa 2009); *United States v. Windsor*, 133 S.Ct. 2675, 2694-96 (2013); *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). And yet, there remain pervasive and fervent religious objections on the part of many people, including the Odgaards, to interacting with lesbians

and gay men in a variety of commercial contexts, still inspiring widespread harassment and discrimination.

As laws have begun to offer more protections against this discrimination, some who object on religious grounds are asking courts to change course and allow religious exemptions where they have not done so in past cases. For the most part, the past principle has held true and the needs of third parties have remained a constraint on religion-based conduct in commercial contexts. *See, e.g.*, *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (rejecting religious accommodation claim under Title VII)*;* *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (same); *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (same); *Erdmann v. Tranquility, Inc.*, 155 F. Supp. 2d 1152 (N.D. Cal. 2001) (antigay harassment was unlawful discrimination); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528 (W.D. Ky. 2001) *vacated on other grounds by* 53 Fed. Appx. 740 (6th Cir. 2002) (rejecting physician's claim of religious exemption from nondiscrimination law). This Court similarly should reject the Odgaards' invitation and heed Justice Kennedy's caution in

Hobby Lobby that each person's free exercise must not unduly restrict or burden others' interests the law deems compelling.

The lack of a legally-cognizable First Amendment challenge to the general authority of and regulation by the Commission is fatal to any right to maintain a collateral lawsuit like the one attempted below. Any defense the Odgaards have against the discrimination charge filed by *Amici* must be found, if at all, in the language of the Act and asserted in the administrative process. Even if the district court had denied the Commission's jurisdictional challenge based on exhaustion and ripeness, dismissal would have been required because the Odgaards cannot state a claim for relief under the First Amendment.

3. Participating in the Commission Process Does Not Harm Appellants.

Appellants assert that by permitting the Commission to address the Odgaards' statutory defense to *Amici*'s discrimination charge that the Act does not require them to rent their event space and provide party services to gay people who wish to celebrate their weddings, they are denied the opportunity to litigate their First Amendment claims first and, thus, irreparably

harmed. The district court rejected this argument based in part on the doctrine of constitutional avoidance. The Odgaards argue, in essence, that the doctrine should not be invoked when it deprives them of a separate avenue to attack the Commission in an otherwise valid exercise of its authority.[9]

Even if the Court's decision to avoid general constitutional issues in favor of specific statutory defenses to *Amici*'s claims in the Commission was error, it was harmless. As previously noted, preemptive attempts to cut off government investigations and potential prosecutions on First Amendment grounds must be based on legally-cognizable First Amendment rights. The cases cited by the Odgaards are distinguishable for that reason. For example, *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), involved a facial challenge to a law restricting private,

[9] Oddly, the Odgaards' have consistently argued against intervention both here and below, claiming that their Petition is ***not*** about *Amici's* specific complaint against them in the Commission. Yet here they concede the harm they seek to stop is the Commission's "investigation here [that] has 'REQUIRED' the Odgaards to provide 'complete and thorough' personal and private information, and expend significant amounts of time and energy . . . ." Appellants' Br. at 29.

expressive speech through limits on charitable fundraising solicitation. The statute imposed a direct restriction on protected First Amendment activity "that in all its applications . . . create[d] an unnecessary risk of chilling free speech." *Id.* at 949.

The Odgaards also cite the unpublished decision in *Tabbara v. Iowa State Univ.*, 698 N.W.2d 336, 2005 WL 839406 (Iowa Ct. App. 2005). But unlike here, the relief sought by the Tabbara plaintiff in court was distinct and different from the relief the agency proceeding could provide. Here, all of the claims the Odgaards seek to raise can (and should) be raised before the Commission and are subject to judicial review. They seek no remedy that cannot be determined through the administrative and judicial review process.

Finally, the Odgaards concede that they may not win their constitutional claims, but argue that they need not do so now to warrant reversal of the district court's decision below. Appellants' Br. at 32. This general statement reaches too far. In the context of seeking an exception to the requirement to exhaust administrative remedies and seeking preliminary injunctive relief against

investigation in a collateral attack against the Commission under the claim that their First Amendment rights are being chilled, the Odgaards must ***at least*** describe with specificity the First Amendment rights at issue and make colorable claims concerning them.

Here, the Odgaards have cited many cases dealing generally with exhaustion of remedies and identifying numerous examples of protecting First Amendment rights from being chilled under dissimilar facts. But, their utter failure to cite the controlling authority that governs the First Amendment analysis on the merits, *see* Part II.A.2, is telling. The only defenses they have are those available through the Act and given effect through the Commission process.

B. Even if the Commission Outcome Was Sufficiently Certain to Result in a Finding Adverse to the Odgaards, Thereby Justifying Waiver of Exhaustion, Appellants Would Be Entitled to Proceed to Judicial Review, Not to File the Collateral Action Below.

As previously noted, the only remedies the Odgaards have are those available to a respondent under the Act in the Commission proceedings. Although the Commission may assume

the role of prosecutor based upon its investigation, the subsequent determinations (both privately and, if determined to be appropriate, for public hearings are before administrative law judges. At each step, the Odgaards' defenses are given appropriate consideration irrespective of the Commission's policy positions.

The Odgaards argue that because the Commission's determination is all but certain against them, they should be permitted to proceed to directly to court. *Mental Health Ass'n of Minnesota v. Heckler*, 720 F.2d 956 (8th Cir. 1983), *Athone Indust., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485 (D.C. Cir. 1983), and *Callicotte v. Carlucci*, 698 F. Supp. 944 (D.D.C. 1988), indeed are examples where agency action was sufficiently assured to permit waiver of exhaustion. However, the rule applied in those cases permitted judicial review dealing with the agency action presumed to be certain, ***not*** a collateral attack asserting independent claims to receive broader relief against the agency. Moreover, the facts underlying presumed agency action in those cases were known and available for judicial review. That is not the case here.

Futhermore, any decision by the Commission—favorable or adverse—would necessarily include factual findings from its investigation that would bear on any religious objections raised by the Odgaards, including whether such objections were merely pretextual to excuse unlawful discrimination based on sexual orientation. The purpose of the Commission process is not simply to render a decision, but to develop the factual record to support the decision that is sufficient for both parties to obtain meaningful judicial review. For that reason alone, the Commission process is not futile.

Even if the factual record were sufficiently developed and available here, the position taken by the Odgaards below is different. They insist their lawsuit ***is not*** about the specific claim against them filed by *Amici*. They suggest, wrongly, that they could have brought the same action below for declaratory relief any time prior to *Amici's* discrimination complaint in the Commission. Yet, as shown above, First Amendment law supports no such independent claim. For purposes relevant here, *Heckler*, *Athone Indust., Inc.*, and *Carlucci* provide support that, at most,

the Odgaards could have proceeded to judicial review of "presumed" agency action as to *Amici's* complaint. That is not what the Odgaards attempted to do.

Because the Odgaards have not stated independent constitutional claims against the Commission that are justiciable in an original district court action, their exhaustion of the administrative process and access to judicial review is far from futile; it is the only avenue for relief they have. If they are entitled to any relief from a court, it must arrive through judicial review, not a broad collateral attack on the Commission—and certainly not by precluding participation of *Amici*.

CONCLUSION

For the foregoing reasons, the district court's order of dismissal should be ***affirmed***.

Respectfully submitted this 8th day of July, 2014.

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**(Motions for Admission Pro Hac Vice pending)*

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 6898 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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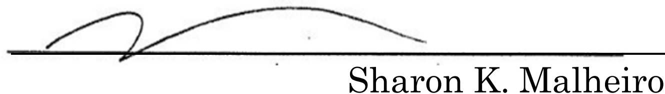

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I hereby certify that on the 8th day of July 2014, eighteen copies of Amici Curiae's Brief were sent to the Iowa Supreme Court, Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, IA 50319.

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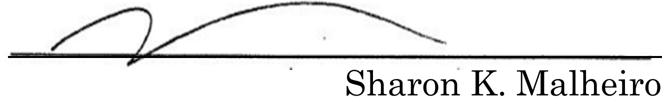

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