IN THE IOWA SUPREME COURT

BETTY ANN ODGAARD and RICHARD ODGAARD, Appellants, v. IOWA CIVIL RIGHTS COMMISSION, *et al.*, Appellees, and LEE STAFFORD and JARED ELLARS, Proposed Intervening Appellees.	DOCKET NO. 14-0738 **MOTION TO INTERVENE ON BEHALF OF PROPOSED INTERVENOR-APPELLEES LEE STAFFORD AND JARED ELLARS** **Pending Hearing(s): None**

Lee Stafford and Jared Ellars move the Court for leave to intervene as additional appellees in this appeal. In support of their motion, Movants further state as follows.

Grounds for Motion

Appellants Betty and Richard Odgaard ("Odgaards") appeal from the district court's ruling granting the motion to dismiss of

Appellee Iowa Civil Rights Commission ("ICRC").[1] The Odgaards commenced this suit after Intervening Appellees, Lee Stafford and Jared Ellars filed a complaint before the ICRC alleging that the Odgaards, through the commercial business they own and operate, discriminated against Stafford and Ellars based on sexual orientation in violation of the Iowa Civil Rights Act ("Act"), Iowa Code § 216.6. The Odgaards then filed the instant lawsuit directly against the ICRC and its members in an attempt to preempt any agency investigation, findings, and enforcement.

The claims the Odgaards assert through this suit are, in essence, their defenses to Stafford's and Ellars' ICRC discrimination complaint. Thus, as the court below concluded, the Odgaards' claims in this suit all properly should have been asserted in response to the claim before the ICRC (Dist. Ct. Opn. at 15) and not in a collateral attack on the ICRC in an attempt to do an end run around the agency process established by the

[1] Pursuant to Iowa R. App. P. 6.1002(1)(c), A copy of the district court's "Ruling on Defendants' Motion to Dismiss Plaintiffs' Verified Petition" (Dist. Ct. Opn.) is attached as Exhibit A.

legislature. Additionally, the Odgaards failed to join Stafford and Ellars, the parties who had filed the discrimination complaint against them.

Stafford and Ellars 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. However, because the district court granted the ICRC's motion to dismiss and then dismissed the Odgaards' suit, the Court did not reach Stafford's and Ellars' intervention request. (Dist. Ct. Opn.)

The court below correctly concluded that the Odgaards' Petition presents serious jurisdictional defects that mandate dismissal of this action. (Dist. Ct. Opn. at 15.) Additionally, although the lower court did not reach this question, Stafford and Ellars are indispensable parties to this action, which means that it would violate due process to grant the Odgaards final relief without Stafford's and Ellars' participation as parties because Stafford and Ellars have interests in this controversy that would

be affected by such an order. *See* Point I, *infra*. Because Stafford and Ellars have interests that would be affected by final relief, they necessarily have an interest in the outcome of this appeal, in which the Odgaards' basis for opposing the ICRC's motion to dismiss assumes and requires that this Court will decide certain questions of law relevant to affirmative defenses in Stafford's and Ellars' pending ICRC proceeding. *Id.* Thus, Stafford and Ellars are indispensable parties[2] and issues reached in this appeal could have a significant impact on their ability to seek relief through the separate pending agency proceeding. Due process requires that they be granted intervention in this appeal. *Id.*

Stafford and Ellars meet the test to intervene as a matter of right pursuant to Iowa R. Civ. P. 1.407(1)(b): they timely have

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[2] The indispensable party doctrine is given effect both through joinder rules, which apply to the named parties, and through intervention rules (applicable here), which protect non-parties such as Stafford and Ellars. Because the doctrine serves as the basis for both rules, it is discussed here as a predicate to the intervention analysis.

moved to intervene, both in the district court below and here;[3] they have an interest in the transaction which is the subject of the action; disposition of the action may as a practical matter affect their ability to protect their interest in challenging the Odgaards' discriminatory conduct against them in the pending agency proceeding; and their interest is not adequately represented by the ICRC's participation as Defendant in these proceedings. *See* Point II, *infra*. Additionally, because the claims and defenses asserted by the Odgaards in this lawsuit are substantially the same as those presented in the ICRC proceeding, permissive intervention under Iowa R. Civ. P. 1.407(2) is justified as well. *See* Point II, *infra*.

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[3] Under the current Notice of Briefing Deadline, Appellants' proof brief and designation of appendix is due to be filed and served on or before July 16, with subsequent deadlines to follow pursuant to Iowa R. App. P. 6.901. Appellants have filed an unopposed motion to expedite the briefing in the case in accordance with Iowa R. App. P. 6.902, which would require Appellants' proof brief and designation of appendix to be filed and served on or before June 23, with expedited response deadlines to follow. Stafford and Ellars do not oppose expedited briefing and, in any event, would comply with either the current briefing deadlines or an expedited briefing schedule.

Points and Authorities

I. Stafford and Ellars Are Indispensable Parties, And Therefore The Court Should Permit Them To Intervene Because To Exclude Them From Participation In This Appeal Would Violate Due Process

At its core, the Odgaards' lawsuit concerns the dispute filed with the ICRC by Stafford and Ellars for discriminatory refusal to provide services in violation of the Iowa Civil Rights Act. Stafford's and Ellars' ICRC Complaint challenges as discrimination based on sexual orientation the Odgaards' refusal to rent them the Gortz Haus Gallery for their wedding. (Ex. B at 8.) The Gortz Haus Gallery is a building (formerly owned by a church) that the Odgaards purchased and now operate as a commercial wedding venue, art gallery, bistro, and gift shop. (Ex. B at 8-9; Dist. Ct. Opn. at 2.) The Odgaards both acknowledged during the ICRC proceedings and admitted in the Petition below that they refused to rent their facility to Stafford and Ellars. (Ex. B at 2, 8-10.) In fact, the Odgaards offered their Verified Petition in the instant action to the ICRC as evidence in connection with the agency's investigation of Stafford's and Ellars' complaint. (Ex. B at 9.) The Odgaards argue before the ICRC and here that their

refusal to rent the facility to Stafford and Ellars was the result of a religious objection to weddings of same-sex couples. (Ex. B at 2, 9-10.)

The Odgaards' lawsuit seeks to litigate the validity of their affirmative defenses to Stafford's and Ellars' ICRC Complaint, but to do so separately and outside the exclusive process provided by the legislature—and without the participation of Stafford and Ellars. The Odgaards argue here: that the Act exempts discriminatory conduct relating to weddings of same-sex couples as a matter of statutory construction (Counts I and II); 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 by preventing them from placing their religious objections to weddings of same-sex couples on their website in violation of the Iowa Constitution (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 court below found that Stafford's and Ellars' pending ICRC Complaint "directly affects Counts III through VI and VIII through X" (Dist. Ct. Opn. at 12) and, indeed, that all of their claims are so integrally related to Stafford's and Ellars' pending proceeding that the Odgaards first must make their claims before the ICRC in that agency proceeding and thereby exhaust administrative remedies. (Dist. Ct. Opn. at 15.) The Odgaards themselves conceded below that if they are successful with their claims in this action that Stafford's and Ellars' ICRC Complaint will fail. (Ex. B at 7 ("If the Commission's interpretation is held to be unlawful [in this lawsuit], then [Stafford and Ellars] never had an interest in its enforcement against [the Odgaards] in the first place.").) Thus, there is no disputing that the Odgaards' claims directly affect Stafford's and Ellars' rights and their pending agency proceeding.

As illustration, the Odgaards' arguments below make additionally evident the way in which this appellate proceeding affects Stafford's and Ellars' interests. The Odgaards argued that

the court should decline to dismiss this action because "[e]xhaustion . . . is not required where forcing a plaintiff to undergo administrative proceedings would impose irreparable harm," and that "the very purpose of the Odgaards' complaint is to protect them from . . . the Commission's intrusive and lengthy administrative proceedings, which themselves violate the Odgaards' right to be free from government pressure to alter their religious convictions or stifle their speech." (Ex. B at 4-5.) The Odgaards further invited the lower court to find, as a matter of law, that the purported "prolonged and invasive scrutiny" of an ICRC proceeding "trampl[es] the Odgaards' rights." Doubtless the court below was correct in determining that the Odgaards do not, in fact, suffer irreparable injury as a result of having to submit to the process of an ICRC proceeding. (Dist. Ct. Opn. at 14 ("To allow Plaintiffs to avoid investigation just because they found the process intrusive would allow any plaintiff to avoid exhausting administrative remedies and make the agency procedures elective.")) But more to the point, the Odgaards may very well raise this same argument on appeal as a basis for reversing the

district court. If this Court were to accept the Odgaards' invitation to hold that the process of an administrative investigation is itself irreparable harm because it infringes on the Odgaards' religious convictions and stifles their speech, such a decision would have significant implications for Stafford's and Ellars' ability to pursue relief from discrimination through their pending agency proceeding below. Briefing and argument on this and other questions—without the participation of Stafford and Ellars—would violate their rights to due process.

"A party is indispensable if . . . notwithstanding the party's absence the party's interest would necessarily be inequitably affected by a judgment rendered between those before the court." Iowa R. Civ. P. 1.234(2). Application of this rule is well-established in similar situations. For example, in *Sear v. Clayton County Zoning Bd. Of Adjustment,* 590 N.W.2d 512 (1999), a landowner (Metzger) filed a mandamus and certiorari action against the county zoning board to void his adjoining neighbors' (the Sears') variance for a mobile home. However, Metzger failed to join the Sears in the mandamus/certiorari action. Even though

the Sears were aware of the proceedings, the Supreme Court affirmed a decision enjoining enforcement of the judgment Metzger obtained against the zoning commission that vacated the Sears' variance. The Court noted that "while the Sears may have had constructive notice of Metzger's certiorari and mandamus proceedings, the Board and the county represented their own interests. The Sears were not afforded the opportunity to appear and be heard in opposition to the proceedings and were denied due process." *Id.* at 516. The Court concluded that because it is proper or necessary to join as defendants all parties who may be adversely affected by the judgment, the Sears were indispensable parties. Thus, the absence of actual notice and joinder in the proceedings resulted in an invasion or threatened invasion of their rights. *Id.* at 517. *See also Wright v. Standard Oil Co. (Indiana),* 234 Iowa 1241, 15 N.W.2d 275 (1944) (in action against oil company to declare and abate a nuisance, tenant who operates the filling station on the property is an indispensable party).

The Constitution abhors end runs that seek to avoid due process constraints. "It is a fundamental principle that a party

cannot be deprived of his . . . civil rights, except by due process of law, or affected by judgments in actions and proceedings to which he is not a party, and of which he has not had his day in court." *Wright,* 234 Iowa at 1244, 15 N.W.2d at 277 (internal quotations and citations omitted). Because Stafford and Ellars are necessary parties, due process requires that they be permitted to participate in this appeal, which concerns questions of law that affect their interests in the ICRC proceeding below, and that are either identical or integrally related to the affirmative defenses the Odgaards have already raised in the pending ICRC proceeding.

II. Stafford and Ellars are Entitled to Intervene as a Matter of Right Pursuant to Iowa Rule of Civil Procedure 1.407(1)(b).

Iowa Rule of Civil Procedure 1.407(1)(b) requires that a non-party be permitted to intervene when a lawsuit threatens to affect that non-party's interests. "The test of right of intervention is 'interest', not necessity." *Rick v. Boegel,* 205 N.W.2d 713, 717 (Iowa 1973). A court must grant intervention as of right when proposed intervenors demonstrate: 1) that their application was timely; 2) that they have an "interest relating to the . . .

transaction which is the subject of the action;" 3) that "the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest;" and 4) that their interest is not "adequately represented by existing parties." Iowa R. Civ. P. 1.407(1)(b). Since Stafford and Ellars satisfy all four conditions for intervention, they have the right to intervene in this appeal.

a. Stafford's and Ellars' Motion to Intervene in this Appeal Is Timely.[4]

Stafford and Ellars bring this motion to intervene within 10 days after the court's notice of briefing schedule and within a week of the Odgaards' unopposed motion to further expedite that schedule. Movants will comply with whichever schedule the Court

[4] Stafford and Ellars timely moved to intervene in the present action when it was before the district court. Their motion was filed on November 6, 2013, well before briefing was concluded on the State's pending motion to dismiss on December 5, 2013. The district court dismissed the Odgaards' lawsuit without ruling on Stafford's and Ellars' motion to intervene. Now that the Odgaards have appealed that dismissal, Stafford and Ellars seek to protect their interests that will be affected by this appeal, and move to intervene in the appeal.

ultimately adopts. Because intervention will not delay this appeal in any respect, Movants' application is timely. *See North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 298 (4th Cir. 2010) (granting leave to the State to intervene on appeal); *Carter v. Welles-Bowen Realty, Inc.*, 628 F.3d 790, 790 (6th Cir. 2010) (holding that the court had the ability to "grant either intervention of right or permissive intervention" on appeal, considering the same factors a district court would under Fed. R. Civ. P. 24); *State v. Belieu*, 288 N.W.2d 895, 897 (Iowa 1980) (finding that where a federal rule and a state rule are similar, federal case law is persuasive authority in the construction and application of the state rule); *Cf. Rick v. Boegel*, 205 N.W.2d at 717 ("An interested party may intervene at any time prior to trial.").

b. Granting Stafford and Ellars Relief in This Appeal Would Directly Affect Their Legally Cognizable Interests.

In order to have an "interest" in a case sufficient for intervention, an applicant must have "a legal right which will be directly affected" or a "legal liability which will be directly

enlarged or diminished" by the litigation. *In re J.R.I.*, 315 N.W.2d 750 752 (Iowa 1982), *overruled on other grounds by In re B.B.M.* 514 N.W.2d 425, 428 n.1 (Iowa 1994). "An indirect, speculative, or remote interest will not provide one a right to intervene." *In re H.N.B.*, 619 N.W.2d 340, 343 (Iowa 2000), citing *In re A.G.*, 558 N.W.2d 400, 403 (Iowa 1997); *see also* 59 Am.Jur.2d *Parties* § 134, at 591-92 (1987) (to have an interest in an action, a person must assert more than a mere general interest in the subject matter of the litigation). Federal courts require a similar "direct, substantial and legally protectable" interest to allow intervention under Federal Rule of Civil Procedure 24, *see, e.g., Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 571 (8th Cir. 1998), which rule is substantially similar to Iowa Rule of Civil Procedure 1.407.

Stafford and Ellars have an interest in the discrimination claim they filed against the Odgaards in the ICRC. As described above, the Odgaards initiated this suit in an effort to cut off any decision being made on Stafford's and Ellars' claim in the ICRC. Dist. Ct. Op. 8. A decision in this appeal reversing the district

court and permitting the Odgaards to proceed with this suit would impair Stafford's and Ellars' protectable interest in their pending ICRC claim. A favorable ruling for the Odgaards in this appeal could also result in legal rulings that could significantly affect Stafford's and Ellars' ability to successfully litigate their claim going forward. *See* Point I, *supra.* Further, if the district court were reversed and the instant suit were to proceed, Stafford's and Ellars' interests would be affected as a practical matter by the existence of dueling fact finders in competing proceedings on shared questions of law and fact. This potentially would deprive Stafford and Ellars of the ability to develop a comprehensive factual record in the place best suited for such a record to be developed, namely, "the agency entrusted with the determination of adjudicative facts," *Shell Oil*, 417 N.W.2d at 430. *See Shell Oil*, 417 N.W.2d at 430. In short, Stafford and Ellars have a significant interest in litigating the Odgaards' affirmative defenses in the context of a well-developed factual record in the appropriate forum established by the legislature.

c. Stafford's and Ellars' Interests Are Not Adequately Protected by the ICRC or the Commissioners.

As to the final factor, the interests of Stafford and Ellars are not adequately protected by the current defendants. Stafford and Ellars have interests that are distinct from the interests of the governmental entity sued (ICRC and its members). While Stafford and Ellars expect they will agree with some of the ICRC's positions as to the Odgaards' contentions in this lawsuit, Movants' interests are not coextensive with those of the ICRC—nor would it be appropriate to expect the ICRC to represent the interests of Stafford and Ellars. The Iowa Civil Rights Commission "is a neutral, fact-finding law enforcement agency that enforces the 'Iowa Civil Rights Act of 1965,' Iowa's anti-discrimination law. The Commission does not provide legal representation." http://www.iowa.gov/government/crc/publications/brochures/english_brochure.html.

The Attorney General's office has appeared on behalf of the ICRC and its members in response to the lawsuit filed by the Odgaards. The duty of the Attorney General's office is to protect the jurisdiction of the agency, advance reasonable construction of

the laws and policies governing the agency, and protect the integrity of the administrative process. The Attorney General cannot simultaneously protect the interests of Stafford and Ellars—the very parties adverse to the Odgaards in that same pending agency investigation that is the subject of this lawsuit — if the ICRC is charged with maintaining neutrality and prohibited from representing either side in the administrative dispute. Any expectation to the contrary is misplaced.

III. Permissive Intervention is Justified Under Iowa Rule of Civil Procedure 1.407(2) Because This Case and Stafford's and Ellars' Pending Agency Proceeding Share the Same Questions of Law and Fact.

Iowa Rule of Civil Procedure 1.407(2)(b) states that "anyone may be permitted to intervene in an action" when "an applicant's claim or defense and the main action have a question of law or fact in common." As described above, Stafford's and Ellars' defense against this appeal would revolve around the exact same questions of law and fact, and to permit this litigation to proceed in their absence would violate due process. Accordingly, even if

this Court does not grant intervention as of right, and it should, permissive intervention is still warranted.

Relief Requested

For the reasons stated, movants Lee Stafford and Jared Ellars should be granted leave to intervene as additional appellees in this appeal.

Dated: June 4, 2014.

Respectfully submitted,

MOVANTS/ PROPOSED INTERVENING APPELLEES
LEE STAFFORD AND JARED ELLARS

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* (Motions for Admission *Pro Hac Vice* filed separately)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this *Motion to Intervene on Behalf of Proposed Intervenor-Appellees Lee Stafford and Jared Ellars* was served on the following persons by enclosing the same in an envelope with appropriate first-class postage, addressed to such party listed below via United States Postal Service on June 4, 2014.

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EXHIBIT A

(Ruling from Which Appellants Seek Review)

"Ruling on Defendants' Motion to Dismiss

Plaintiffs' Verified Petition"

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

BETTY ANN ODGAARD and RICHARD ODGAARD, **Plaintiffs,** **vs.** **IOWA CIVIL RIGHTS COMMISSION, ANGELA WILLIAMS, PATRICIA LIPSKI, MARY ANN SPICER, TOM CONLEY, DOUGLAS OELSCHLAEGER, LILY LIJUN HOU, and LAWRENCE CUNNINGHAM,** **Defendants.**	**Case No. CVCV046451** **RULING ON DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' VERIFIED PETITION**

The Court held a contested hearing on this matter on January 31, 2014. Attorneys Frank Harty, Ryan Koopsman, and Eric Baxter appeared for Plaintiffs. Assistant Iowa Attorney General Katie Fiala appeared for Defendants.

Plaintiffs Betty Ann and Richard Odgaard filed their Verified Petition on October 7, 2013. Defendants Iowa Civil Rights Commission, Angela Williams, Patricia Lipski, Mary Ann Spicer, Tom Conley, Douglas Oelschlaeger, Lily Lijun Hou, and Lawrence Cunningham filed their Motion to Dismiss Plaintiffs' Verified Petition on October 30, 2013. The Plaintiffs filed their Resistance to Defendants' Motion to Dismiss on November 12, 2013. The Defendants filed their Reply to Resistance to Motion to Dismiss Plaintiffs' Verified Petition on November 18, 2013. Plaintiffs filed their Surreply in Resistance to Defendants' Motion to Dismiss on December 5, 2013 and a Supplemental Resistance to Defendants' Motion to Dismiss on February 5, 2014. The Defendants filed their Reply to Plaintiffs' Supplemental Resistance to Defendants' Motion to Dismiss on February 13, 2014.

Based upon a review the motion, resistances, replies to the resistances, briefs and court file, as well as considering the arguments of counsel, the Court enters the following Ruling:

RULING

Standard

In assessing a motion to dismiss, courts must "accept as true well-pleaded facts of the petition." *Gospel Assembly Church v. Iowa Dep't of Revenue,* 368 N.W.2d 158, 159 (Iowa 1985). However, when considering a motion to dismiss the court does not need to accept legal conclusions as true. *Monson v. Iowa Civil Rights Com'n*, 467 N.W.2d 230, 233 (Iowa 1991). Dismissal is permissible "only if [the court] can conclude that no set of facts is conceivable under which a plaintiff might show a right of recovery." *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994). Courts "construe the petition in the light most favorable to the plaintiff" and resolve "all doubts...in the plaintiff's favor." *Id.* Where relevant facts are in dispute, the motion must usually be denied. *Pa. Life Ins. Co. v. Simoni,* 641 N.W.2d 807, 810 (Iowa 2002).

Findings of Fact

Plaintiff Betty Ann Odgaard is a Mennonite. (Verified Petition ¶ 19.) Plaintiff Richard Odgaard was baptized a Lutheran but has attended the Mennonite Church with his wife from the time they were married and considers himself a Mennonite. (Verified Petition ¶¶ 1 and 21.) Since 2002, Plaintiffs have run The Görtz Haus Gallery ("Gallery"), which is an art gallery in a former church building that they purchased to display and sell art. (Verified Petition ¶ 2.) The Plaintiffs host activities at the Gallery, such as a lunch bistro, a flower shop, a gift shop, and a framing shop. But the primary activity that they do is plan, facilitate, and host wedding ceremonies in the former sanctuary of the church building. (Verified Petition ¶ 3.) The Plaintiffs are intimately involved in the day-to-day operations of their business particularly the wedding ceremonies they host. (Verified Petition ¶ 50.)

On August 3, 2013, a same-sex couple ("the couple") from Des Moines requested that the Plaintiffs host their wedding ceremony at the Gallery. (Verified Petition ¶ 85.) The Plaintiffs declined the request because their religion forbids them from personally planning, facilitating or hosting wedding ceremonies not between one man and one woman. (Verified Petition ¶¶ 86, 87.) On August 4, 2013, the couple filed a complaint against the Plaintiffs with the Iowa Civil Rights Commission ("ICRC"). (Verified Petition ¶ 97.) The complaint alleged that the Plaintiffs discriminated against the couple based on the couple's sexual orientation. (Verified Petition ¶ 100.)

In the Verified Petition, the Plaintiffs say they currently have a reasonable expectation that the legal action filed against them will force them to either stop hosting weddings or violate their religious convictions. (Verified Petition ¶ 104.) Also in this Petition, the Plaintiffs say they are already experiencing a chill on their private religious speech and expressive conduct as the Plaintiffs want to make positive statements about the belief that marriage is a union between a man and woman on the Gallery's website, on the Gallery's Facebook page, and by means of the art in the Gallery; however, they fear that such statements may be deemed a violation of the Iowa Civil Rights Act ("ICRA"). (Verified Petition ¶¶ 106-107.)

The Plaintiffs filed their Verified Petition on October 7, 2013, which has 11 counts. Counts I and II claim that the ICRA cannot be interpreted or applied to find that the Plaintiffs have discriminated on the basis of sexual orientation by declining to plan, facilitate, or host a same-sex wedding ceremony because of sincerely held religious beliefs.

Counts III through VI and VIII through X are predicated on the assumption that the Plaintiffs will be forced to host a same-sex wedding ceremony or face government coercion. Under this assumption, the ICRA is alleged in Count III to prohibit the free exercise of religion

in violation of the Iowa Constitution, Article 1, § 3; in Count IV to punish the Plaintiffs for their religious beliefs in violation of the Iowa Constitution, Article I, § 4; in Count V to prevent the Plaintiffs from expressing their artistic and religious values in violation of the Iowa Constitution, Article I, § 7; in Count VI to compel Plaintiffs to host an expressive event which contradicts their religious beliefs in violation of the Iowa Constitution, Article I, § 7; in Count VIII to force the Plaintiffs to host same-sex weddings in violation of the Free Exercise Clause of the First Amendment of the United States Constitution; in Count IX to force them to plan, facilitate, sponsor, and host a ceremony that violates the Free Speech Clause of the First Amendment of the United States Constitution; and in Count X to force them to associate with and promote a message with which they disagree in violation of the Plaintiffs' right of expressive association secured to them by the First Amendment of the United States Constitution.

Counts VII and XI state that the Plaintiffs want to express their religious beliefs regarding marriage on the Gallery's website, Facebook page, and through appropriate artwork and scripture references on the walls of the sanctuary in the Gallery. However, they reasonably fear that the ICRA will interpret these views as advertising, indicating, or publicizing that they object to the patronage of some persons based on their sexual orientation. According to these counts, this fear chills their speech in violation of the Iowa Constitution, Article I and the Free Speech Clause of the First Amendment to the United States Constitution.

Analysis

The Court is mindful that in ruling on the Defendants' Motion to Dismiss, it must apply procedural rules to determine whether this Court has jurisdiction to address Plaintiffs' constitutional claims at this stage, or must first allow the ICRC to exercise its administrative

agency authority under the statutory scheme of the Iowa Administrative Procedure Act ("IAPA").

The Defendants make two main arguments for the dismissal of all counts. First, they contend the IAPA provides the exclusive means by which an aggrieved or adversely affected party may seek judicial review of agency action and the Plaintiffs have not exhausted these procedures. Second, Defendants argue that all of the claims in the Plaintiffs' counts are not ripe. The Plaintiffs argue that no administrative remedies need to be exhausted as they are not adequate, that forcing administrative exhaustion would cause irreparable harm, and that the claims are ripe. Because the Court decides in favor of the Defendants on all counts under the logic of their first argument, the Court will not discuss whether these claims are ripe.

I. Whether Exhaustion of Administrative Procedures is Required

In analyzing whether the Plaintiffs need to exhaust administrative procedures, the Court will divide the counts in the Verified Petition into three groups for purposes of organization. The first group, Counts I and II, consists of claims involving the adequacy of administrative remedies that the Plaintiffs may utilize to respond to the ICRC's actions. The second group, Counts III through VI and VIII through X, consists of constitutional challenges that are based on the assumption the ICRA will be interpreted by the ICRC in a way that is adverse to the Plaintiffs and force the Plaintiffs to change their current operation of the Gallery. Finally, the third group, Count VII and XI, consists of anticipatory constitutional challenges, which are based on the same interpretative assumption and that this interpretation will negatively affect the Plaintiffs' future plans for the Gallery.

Iowa's three branches of government are established by the Iowa Constitution. As society became more complex, the Iowa legislature, as did the federal government, established within

the executive branch various agencies to implement the laws passed by the legislative branch. One of these agencies is the Iowa Civil Rights Commission. *See* Iowa Code chapter 216. However, to fulfill due process in matters addressed by the agency, it was determined that the executive branch agency could not have the final say. A citizen or party aggrieved by an agency decision is entitled to appeal the decision to the third branch, the court – this is called "judicial review." The Iowa legislature enacted the IAPA, Iowa Code chapter 17A, that provides the procedures for the appeal process from an executive agency decision to the district court.

Defendants contend that Plaintiffs' current Verified Petition does not follow this process and should therefore be dismissed. Plaintiffs claim their Verified Petition falls within certain recognized exceptions to the process and therefore should be allowed to proceed. Applying the law, this Court must decide which position is correct. Thus, the issue for the Court here is not the conflict of religious freedom versus same-sex marriage, but rather, whether the Plaintiffs' filing of their Verified Petition in district court, before the ICRC looks into the complaint that has been filed, is procedurally permitted.

a. Whether Count I and II Should Be Dismissed Because Administrative Remedies Were Not Exhausted?

Agency action is defined, in part, as "the performance of any agency duty or the failure to do so." Iowa Code § 17A.2. The IAPA provides the exclusive means by which an aggrieved or adversely affected party may seek judicial review of agency action. Iowa Code § 17A.19. "The act's procedures must be adhered to in order for the district court to obtain jurisdiction." *Tindal v. Norman,* 427 N.W.2d 871, 872 (Iowa 1988). One reason behind this requirement is to promote orderly procedures within the judicial system. *Charles Gabus Ford, Inc. v. Iowa State Highway Commission*, 224 N.W.2d 639, 648 (Iowa 1974).

The requirement to follow the act's procedures before the district court may obtain jurisdiction is not absolute. *Salsbury Labs. v. Iowa Dep't of Environmental Quality*, 276 N.W.2d 830, 836 (Iowa 1979)(citation omitted). If an agency is "incapable of granting the relief sought during the subsequent administrative proceedings, a fruitless pursuit of these remedies is not required." *Id.* However, to bypass the requirement a party needs more than a "bare assertion that an agency is predisposed to reach a certain conclusion" as the "futility exception is concerned with the adequacy of the remedy, not a perceived predisposition of the decisionmaker [sic]." *City of Iowa City v. Hagen Electronics, Inc.*, 545 N.W.2d 530, 535 (Iowa 1996); *Christensen v. Iowa Civil Rights Commission,* 292 N.W.2d 429, 431 (Iowa 1980)("a claim of bias is insufficient to avoid an exhaustion requirement").

The Defendants argue that Counts I and II challenge the ICRC's performance of a statutory duty, which means these counts are directed at "agency action." Therefore, the Defendants maintain that the Plaintiffs must follow the exclusive means provided by the IAPA to seek judicial review and bring this claims in front of the ICRC. The Defendants further contend that the ICRC can provide an adequate remedy.

The Plaintiffs argue there is no adequate administrative remedy available to them. The Plaintiffs contend that the ICRC has already construed the ICRA to prohibit places of public accommodation from declining to host a same-sex wedding ceremony, regardless of any religious prohibitions. The Plaintiffs make these allegations in their Verified Petition in paragraph nine[1] which says the ICRC "is now seeking to force the Odgaards to plan, facilitate, and host same-sex wedding ceremonies at the Gallery" and paragraphs 104 to 105 which state:

[1] "9.The Iowa Civil Rights Commission ("ICRC") is now seeking to force the Odgaards to plan, facilitate, and host same-sex wedding ceremonies at the Gallery."

> 104. [t]he Odgaards currently have a reasonable expectation that the legal action filed against them will force them to either stop hosting weddings or violate their religious convictions.
>
> 105. On information and belief, the Iowa Civil Rights Commission interprets the sexual orientation non-discrimination law to ban their religious decision not to host same-sex wedding ceremonies

The Court agrees that Counts I and II challenge the ICRC's performance of a statutory duty as the ICRC is an agency and exercising its statutory power "to determine the merits of complaints alleging unfair or discriminatory practices" by interpreting and applying the ICRA. Iowa Code § 216.5(2). See *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10 (Iowa 2010) (referring to the Commission as an administrative agency). The Court further finds that the Plaintiffs need to exhaust administrative remedies and procedures before the Court is able to exercise jurisdiction over the counts they allege in their Verified Petition.

The Plaintiffs rely on the declarations of Richard Odgaard and Eric Baxter and their attached exhibits to support their position that the ICRC has predetermined this issue and it would be fruitless to require exhaustion of the administrative agency process. The Court has reviewed these.[2] The Plaintiffs submit the ICRC's Screening Data Analysis and Case Recommendation (SDA&CR)[3] issued on January 31, 2014, in support of their position that the ICRC has already made a decision adverse to the Odgaards. This SDA&CR causes some concern. First, the Respondent before the ICRC is identified as Görtz Haus Gallery, Inc., (emphasis added) and not Richard and Betty Ann Odgaard as individuals, who are the Plaintiffs in this district court action. A reading of the SDA&CR focuses solely on whether this

[2] Plaintiffs submit a Declaration of Richard Odgaard and his correspondence with the ICRC as well as a letter from Odgaards' state representative to the ICRC on their behalf inquiring as to the ICRC's position whether declination by their *business* to accommodate same-sex weddings would be considered a violation of the ICRA. The letter from the state representative and the ICRC's response do not raise or address the possible impact of Odgaards' religious beliefs regarding same-sex marriage and their constitutional right of individual free exercise of religion. Thus, the latter correspondence cannot be considered as evidence of the ICRC's pre-disposition toward finding in favor of the presently pending complaint before the ICRC since they did not address the First Amendment issue.

[3] Exhibit 8 of Eric Baxter's Declaration filed on February 5, 2014.

Respondent as a "public accommodation" as defined in Iowa Code §216.2(13)(a), would be exempted from the ICRA as meeting the definition of a "bona fide religious organization." At page 7 of the SDA&CR, the ICRC concludes:

> Here, it is unlikely that Respondent meets the definition of a "bona fide religious organization," exempting it from the provisions of Iowa Code §216.7. The sincerity of the religious beliefs of the Odgaards is not in doubt. But, as in *Townley*, the belief of the owners and operator of Respondent are not enough in themselves to make Respondent "religious" within the meaning of Iowa Code §216.7.

On page one of the SDA&CR, the ICRC states: "Respondent states that it is an unincorporated entity owned and operated by Richard and Betty Ann Odgaard." (Emphasis added). The Court is aware that Iowa Code §216.7(1) proscribes discriminatory practice of any public accommodations to include any "owner, lessee, sublessee, proprietor, manager, or superintendent,..." Even so, the ICRC in its SDA&CR does not address whether the Odgaards, as individuals, have any federal Constitution First Amendment religious rights, or Iowa Constitutional religious rights under Art. I, sec.3, which may provide them constitutional protection from ICRC action beyond the statutory analysis the ICRC applied.[4] It is this constitutional protection that they raise in the district court action.

Although the Court has concern that the ICRC may be misdirected when considering the Respondent as a corporation, and that the ICRC has not focused on the Odgaards' individual claim of federal and state constitutional religious freedom rights that may trump discrimination statutes, the Court is mindful that since the Iowa *Varnum*[5] decision in 2009, and similar issues involving same-sex marriages around the country, state and federal agencies and courts have

[4] As found in Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009): "A statute inconsistent with the Iowa Constitution must be declared void, even though it may be supported by strong and deep-seated traditional beliefs and popular opinion." The same would be true if a provision of the Iowa Civil Rights Act was found to be in conflict with a person's constitutional right regarding religion, even if contrary to popular opinion.

[5] Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

been faced with determining and balancing conflicting constitutional religious and non-discriminatory rights. While this motion has been pending, a similar issue involving owners of a business challenging the Affordable Care Act (ACA) based upon First Amendment freedom of religion legal principles was argued before the United States Supreme Court on March 25, 2014, in the cases of *Hobby Lobby v. Sebelius* (13-354) and *Conestoga Wood Specialties Corp. v. Sebelius* (13-356). The opinions in those cases may well impact the substantive legal contentions of the parties in the case at bar. As this area of the law is developing, it would be inappropriate to presume that the ICRC will not address such an issue because it has pre-ordained a decision in regard to the Odgaards.

The Court finds Plaintiffs' argument that the exhaustion of the administrative procedure is futile unconvincing as the futility exception is not concerned with the perceived predisposition of the decision maker but rather the adequacy of the remedy. Consequently, the large amount of evidence that the Plaintiffs offered, which includes the petition, e-mails of the ICRC concerning civil rights legislation, and relevant correspondence from the attorney general's web team, that shows that the ICRC is predisposed to rule against them is not relevant to the futility analysis. The agency is capable of granting the relief the Plaintiffs seek as they can interpret and apply the statute to find that the Plaintiffs did not discriminate. *See* Iowa Code § 216.15.

b. Whether Count III through VI and VIII through X Should Be Dismissed Because Administrative Remedies Were Not Exhausted?

The test for whether a constitutional challenge first needs to exhaust administrative remedies depends on whether there is a matter pending before an agency, which can moot the constitutional issue. This rule was described in *Alberhasky v. City of Iowa City,* 433 N.W.2d 693, 695 (Iowa 1988)(quotation omitted):

> [i]n administrative law cases generally there is some lingering confusion as to whether exhaustion will be required when the constitutionality of a statute is challenged on its face rather than as applied. However, the emerging rule would appear to be that since the administrative remedy cannot resolve a constitutional challenge, exhaustion will not be required unless the administrative action might make judicial determination of the constitutional question unnecessary.

See also Shell Oil Co. v. Bair, 417 N.W.2d 425, 429 (Iowa 1987) (the Iowa Supreme Court held that "where the constitutional issue sought to be raised directly affects a matter pending before an agency, administrative exhaustion should ordinarily precede a judicial inquiry into the statute's validity"); *Salsbury Laboratories v. Iowa Dept. of Environmental Quality,* 276 N.W.2d 830, 836 (Iowa 1979)(the Iowa Supreme Court held that unless it is the only issue raised, a facial constitutional challenge must exhaust administrative remedies where the constitutional challenge "may be mooted by a favorable agency adjudication of fact or law").

The policy behind requiring administrative exhaustion if a matter pending before the agency can moot the constitutional issue is threefold. The first reason behind this ruling is that "permitting the administrative process to first run its course may eliminate the need for reaching potential constitutional claims." *Shell Oil Co.,* 417 N.W.2d at 430 (citation omitted). The second reason is that constitutional issues, even those considering facial challenges, are more effectively presented for adjudication based upon a specific factual record. *Id.* at 430. The last reason for this rule is it is more efficient as "it can be expected that facial constitutional challenges will be coupled with claims that the legislation is unconstitutional as applied to the litigant." *Id.* at 430.

The parties argue whether these counts are "as applied" or "facial." The Court finds that such a determination is unnecessary to the analysis of whether administrative exhaustion is required.

More relevant to the analysis is Defendants' stance regarding the effect the ICRC's decision on the matter involving the Plaintiffs' wedding services will have on the constitutional

claims. The Defendants argue that it is possible the ICRC's decision regarding matters of statutory construction and application might render a judicial determination of its constitutional questions unnecessary. The Plaintiffs argue that the claims in Counts III through VI and VIII through X are not affected by the matter pending before the ICRC.

The Court finds that the matter before the ICRC dealing with the Plaintiffs' marriage services directly affects Counts III through VI and VIII through X. If the ICRC interprets the statute in a manner which does not require the Plaintiffs to host same-sex marriages then the Plaintiffs constitutional claims are mooted as all these claims are predicated on the ICRC interpreting the ICRA in a manner that will force the Plaintiffs to host same-sex marriages.

c. Whether Counts VII and XI Should Be Dismissed Because Administrative Remedies Were Not Exhausted?

Wholly anticipatory constitutional claims do not need to be initiated in front of the affected agency. *Shell Oil Co. v. Bair,* 417 N.W.2d at 429 (citation omitted). The Supreme Court of Iowa in *Tindal,* 427 N.W.2d at 874, found that this exception to administrative exhaustion applied to an action challenging the constitutionality of an enabling statute when there was no matter pending before an agency making it wholly anticipatory.

The Defendants argued against considering Count XI under this exception as it is against the policy articulated in *Shell Oil* that "facial constitutional challenges will probably be coupled with claims that the legislation is unconstitutional as applied to the litigant." The Defendants further say that the Plaintiffs' Count XI needs a more developed record before being considered as the Court needs to know how the ICRC interprets the ICRA before proceeding.

The Plaintiffs argue that Count XI falls well within the established exception for waiving exhaustion. The Plaintiffs contend that the facts are as plead, the ICRC raised no disputes to these facts, and the facts do not need to be further developed. Last, the Plaintiffs argue against

the efficiency argument as "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of the Blind of N.C.,* 487 U.S. 781, 795 (1988).

The Plaintiffs and Defendants do not argue that Count VII should or should not have to utilize administrative remedies because of its anticipatory nature. Rather, they group Count VII with Counts III through X. The Court finds that Count VII is more appropriately grouped with Count XI and consequently, will address them together.

The Court finds that while these counts do have anticipatory elements as the Plaintiffs plans to publish their beliefs are forward looking, the Court finds that these counts will be potentially resolved when the ICRC considers the matter: if the ICRC decides that the Plaintiffs legally can refuse to host same sex marriages, it follows that they can legally advertise this practice and their reasoning for it. In making this decision the Court is guided by the policy of the doctrine of avoidance.

II. Whether Requiring Exhaustion Will Irreparably Harm the Plaintiffs

Any "litigant who would suffer irreparable harm from administrative litigation delay may proceed to court without exhausting administrative remedies." *Salsbury Labs.*, 276 N.W.2d at 836. This is because "an adequate showing of irreparable injury...would make judicial review of final agency action an inadequate remedy for purposes of section 17A.19(1)." *Id.* It is well established that the "loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Johnson v. Minneapolis Park & Recreation Bd.,* 729 F.3d 1094, 1101-02 (8th. Cir. 2013).

In *Ohio Civil Rights Commission v. Dayton Christian Schools*, Inc., 477 U.S. 619 (1986), the United States Supreme Court considered whether a religious school could enjoin an administrative agency from asserting jurisdiction over it and investigating a claim of sex

discrimination on First Amendment grounds. In this case, the defendant, a religious school, put a provision in its teachers' contracts to forbid teachers from bringing a Christian to court; this provision was an attempt by the defendant to further its belief that no Christian should bring another Christian to court. The defendant discharged a teacher because she threatened to sue the school in court. Subsequently, the Ohio Civil Rights Commission investigated the school as they found that there was probable cause that the school discharged the teacher for discriminatory and retaliatory reasons. The defendant religious school said that the investigation of this discharge violated its First Amendment religious rights. The Supreme Court held that no constitutional rights were violated by merely investigating the circumstances of the discharge.

The Plaintiffs claim that the ICRC's interpretation of the ICRA is placing substantial pressure on them to abandon their religious convictions and freedom of speech as they are concerned about being penalized if they decline to plan, host, or facilitate same-sex wedding ceremonies or speak about their religious beliefs concerning same-sex weddings. They further believe irreparable injury exists as the pre-hearing procedures are intimidating and intrusive.

The Court finds that the Plaintiffs will not suffer irreparable injury because of the intimidating nature of the pre-hearing procedures. To allow Plaintiffs 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.

The Court finds that the Plaintiffs will not suffer irreparable injury as their First Amendment rights are not being violated. The Court is aware that the alleged violation of the First Amendment in *Ohio Civil Rights Commission* is distinguishable from the case *sub judice: Ohio Civil Rights Commission* was concerned about the investigation of an act that already occurred while this case involves a concern that the threat of punishment by the ICRC will

prevent the Plaintiffs from exercising their First Amendment rights in the future. However, the Court finds it logical that if the Supreme Court of the United States found it constitutional to investigate a past allegedly discriminatory act involving religious beliefs, it would not stop the investigation because the school wanted to continue to practice the allegedly discriminatory act. Put another way, if it is constitutional to investigate an allegedly discriminatory act, it stands to reason that the chill that the investigation will have on performing that same allegedly discriminatory act does not make the investigation unconstitutional.

The Court further finds that the Iowa Supreme Court would rule in a similar manner, as it has consistently allowed administrative agencies to hear matters which involve constitutional claims if the agency could possibly moot the constitutional claims by deciding the matter on non-constitutional grounds. If the Court held that any investigation of a matter which involved constitutional issues violated the individual's constitutional rights or irreparably harmed the individual, the Court would be nullifying the Supreme Court's holdings in such cases. Therefore, the Plaintiffs argument of irreparable injury fails.

Conclusion

Because the Court concludes that the Plaintiffs' claims must first be heard and their administrative remedies exhausted before the ICRC, this Court does not presently have jurisdiction to address the Plaintiffs' Verified Petition and it must be dismissed without prejudice.

ORDER

IT IS THEREFORE ORDERED that the Defendants' Motion to Dismiss Plaintiffs' Verified Petition is GRANTED. Plaintiffs' Verified Petition is DISMISSED WITHOUT PREJUDICE.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV046451	BETTY ANN ODGAARD AND RICHARD ODGAARD V. ICRC

So Ordered

Richard G. Blane II, District Court Judge,
Fifth Judicial District of Iowa

EXHIBIT B

Relevant Portions of the Record

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY IOWA

BETTY ANN ODGAARD and RICHARD ODGAARD, *Plaintiffs*, v. IOWA CIVIL RIGHTS COMMISSION, *et al.*, *Defendants.*	Civil Action No. _____ **VERIFIED PETITION** Jury Demanded

INTRODUCTION

1. Betty Ann and Richard Odgaard are Mennonites.

2. Since 2002, they have run The Görtz Haus Gallery, which is an art gallery in a church building that they purchased to display and sell Betty's and others' art. The name of the Gallery references Betty Ann's family name ("Görtz") and her German-Mennonite ancestry ("haus" is German for "house").

3. The Odgaards also host other activities at the Gallery, such as a lunch bistro, a flower shop, a gift shop, and a framing shop. But the primary thing that they do is plan, facilitate, and host wedding ceremonies in the former sanctuary of the church building.

4. The Odgaards consistently strive to operate the Gallery in a manner consistent with their faith.

5. Indeed, as an expression of their faith, they have intentionally maintained and enhanced the church building's religious character.

6. Almost all of the original stained glass windows remain in place, depicting the Gospels and various religious symbols. Latin crosses and memorial plaques adorn the walls inside and

outside the church building. The Odgaards have had a scriptural verse painted in a prominent location across the back of the old sanctuary. Many of the artworks in the Gallery also express the Odgaards' faith.

7. The Odgaards welcome all customers into the Gallery, regardless of their race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability.

8. The Odgaards cannot, however, host activities or display art that would violate their religious beliefs.

9. The Iowa Civil Rights Commission ("ICRC") is now seeking to force the Odgaards to plan, facilitate, and host same-sex wedding ceremonies at the Gallery.

10. But although the Odgaards have willingly hired and served gays and lesbians throughout the Gallery's history, their religious beliefs prevent them from planning, facilitating, or hosting same-sex wedding ceremonies at the Gallery.

11. The Odgaards may be exposed to financial punishment and other forms of official coercion for refusing to abandon their religious convictions to comply with the ICRC's dictates. The ICRC's attempt to force the Odgaards to host events in violation of their religious beliefs is a violation of the Iowa Civil Rights Act and infringes rights protected by Free Exercise, Free Speech, and Equal Protection provisions of the Iowa and United States Constitutions.

12. Accordingly, the Odgaards seek a declaratory judgment that the ICRC lacks authority to force them to plan, facilitate, or host wedding ceremonies that violate their religious beliefs.

IDENTIFICATION OF PARTIES

13. Plaintiffs Betty Ann ("Betty") and Richard Odgaard are the sole proprietors of The Görtz Haus Gallery, an unincorporated business.

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY IOWA

BETTY ANN ODGAARD and RICHARD ODGAARD, *Plaintiffs*, v. IOWA CIVIL RIGHTS COMMISSION, *et al.*, *Defendants.*	Civil Action No. CVCV046451 **PLAINTIFFS' RESISTANCE TO DEFENDANTS' MOTION TO DISMISS** **(Oral Argument Requested)**

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plaintiff's pleadings as true for purposes of a motion to dismiss for lack of subject matter jurisdiction); *accord Citizens for Responsible Choices*, 686 N.W.2d at 473.

ARGUMENT

The Commission moves to dismiss the Odgaards' complaint on the alleged ground that they have failed to exhaust their administrative remedies under Iowa Code § 17A.19(1). But exhaustion is not required where the available administrative remedies are inadequate and would be futile. Exhaustion also is not required where forcing a plaintiff to undergo administrative proceedings would impose irreparable harm. Either of these exceptions is alone sufficient to excuse exhaustion, and both exceptions are satisfied here.

The Commissions' alternative ground for dismissal for lack of ripeness is also unavailing. The Odgaards daily face the risk of liability under the ICRA, and dismissing their complaint would impose a substantial hardship upon them. Thus, they have a substantial controversy with the Commission of sufficient immediacy and reality to warrant their complaint.

For these reasons, the Commission's motion to dismiss should be denied.

I. The Odgaards are not required to exhaust administrative remedies because the remedies are inadequate and would impose irreparable harm.

Iowa Code § 17A.19 sets forth the "exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action." Iowa Code Ann. § 17A.19. Subpart (1) of § 17A.19 provides that judicial review is available once an aggrieved party has "exhausted all *adequate* administrative remedies." Iowa Code Ann. § 17A.19(1) (emphasis added). But these provisions are inapplicable for two reasons. First, there are no *adequate* administrative remedies available to the Odgaards. The Commission has already confirmed its view that the Odgaards' decision not to plan, host, or facilitate wedding

ceremonies against their religious beliefs is a violation of the ICRA. Thus, forcing them to proceed through the full administrative proceeding would be futile. Moreover, the administrative proceeding is itself a violation of the Odgaards' state and federal constitutional rights. Forcing them to undergo the Commission's protracted and invasive proceedings, all while under the chill of the Commission's promised enforcement, imposes irreparable harm against their rights to the free exercise of religion and the freedom of speech.

A. The available administrative remedies are inadequate, making exhaustion futile.

"The doctrine of exhaustion of administrative remedies has never been thought to be absolute." *Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 836 (Iowa 1979) (citations omitted). If an agency is "incapable of granting the relief sought during the subsequent administrative proceedings, a fruitless pursuit of these remedies is not required." *Id.* (citations omitted). Rather, "for the exhaustion doctrine to apply, . . . an *adequate* administrative remedy must exist[.]" *Tindal v. Norman*, 427 N.W.2d 871, 872 (Iowa 1988) (emphasis added).

Here, the very purpose of the Odgaards' complaint is to protect them from the Commission's chill on their constitutional rights and the Commission's accompanying intrusive and lengthy administrative proceedings, which themselves violate the Odgaards' right to be free from government pressure to alter their religious convictions or stifle their speech. The Commissions' circular argument that the Odgaards must first undergo invasive administrative proceedings to be protected from those proceedings is self-defeating. Moreover, the administrative proceedings cannot result in any outcome different from the status quo. The Commission has already confirmed that it construes ICRA against the Odgaards—a position it has not backed away from in its filings to this Court—and there are no factual disputes that could be meaningfully expounded or resolved by the Commission. And nothing prevents this Court from fairly and

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY IOWA

BETTY ANN ODGAARD and RICHARD ODGAARD, *Plaintiffs*, v. IOWA CIVIL RIGHTS COMMISSION, *et al.*, *Defendants.*	Civil Action No. CV046451 **PLAINTIFFS' RESISTANCE TO MOTION TO INTERVENE** **(Oral Argument Requested)**

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2. Petitioners are not "so situated" that disposition of this action will impair cognizable interests.

Petitioners again point to their separate proceeding against the Odgaards to argue that their ability to protect their interests in that action will be impaired if the Court does not permit them to intervene here. But as explained above, this cannot be true because Petitioners have no cognizable interest at issue in this proceeding. If the Commission's interpretation of the law against the Odgaards is held to be lawful, Petitioners' interest in the proceeding before the Commission will not be hindered. If the Commission's interpretation is held to be unlawful, then Petitioners never had an interest in its enforcement against them in the first place. *See Odebrecht Const., Inc. v. Secretary, Fla. Dept. of Transp.*, 715 F.3d 1268, 1290 (11th Cir. 2013) ("[T]he public has no interest in the enforcement of . . . an unconstitutional statute."); *accord Brody*, 957 F.2d at 1124 ("[A]n applicant for intervention can have no interest in assuring the perpetuation of unconstitutional conditions." (internal citation and edits omitted)).

3. Petitioners' interests are adequately represented by the existing parties.

Intervention as of right also must be denied because, even if Petitioners had a cognizable interest in the present case, that interest is "adequately represented by existing parties." *Gordon Mosher v. Dewaay Financial Network LLC*, LACV 6033/6034, 2012 WL 8880694, at *1 (Iowa Dist. Ct. May 3, 2012) (**Exhibit C**). Adequate representation is the "most important factor" in determining whether to allow intervention. *Varnum*, 2006 WL 4826212 (quoting *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006)). Here, adequate representation is presumed because Petitioners have "the same ultimate objective" as the defendants. *Rants*, 2003 WL 25802812.

That presumption is stronger yet because the Commission is the government agency charged with enforcing the ICRA. In *Varnum*, this Court held that the defendant county recorder and registrar adequately represented the interests of a group of legislators seeking to intervene in the

SCREENING DATA ANALYSIS
AND
CASE RECOMMENDATION

CP# 08-13-64618

Area: Public Accommodation Basis: Sexual Orientation

Complainants: [redacted]

Respondent: Görtz Haus Gallery, Inc.

Complainant's allegations:

Complainants [redacted] and [redacted] allege Respondent denied them service based on their sexual orientation (homosexual).

Complainants state that during their search for a venue to hold their wedding ceremony and reception, they began communicating with Respondent. Complainants found that Respondent's facility was large enough for and was available on the date of their event. Respondent is known for hosting many weddings and receptions at its establishment and even has a pricing structure for such events. Complainants asked one of Respondent's owners, Dick Odgaard, to give them a tour of the facility and he seemed more than willing to do so.

Complainants state that on August 3, 2013, they arrived at Respondent at approximately 2:30 p.m. They spoke with Mr. Odgaard, who showed them the facility and answered their questions about the arrangements for their marriage ceremony and reception. They went over details regarding the menu, number of guests, arrangement of tables, serving staff, etc. At the completion of the tour, Mr. Odgaard began taking notes regarding questions he had (e.g., regarding the menu) that he needed to go over with his wife. At no time was the date of the ceremony mentioned, nor did Mr. Odgaard check any calendar to verify that any date was available. After Mr. Odgaard wrote down the questions, he asked, "Is this for a gay wedding?" [redacted] responded, "Yes, it is." Mr. Odgaard said, "I cannot take your money and I don't do anything for free." [redacted] asked for clarification by asking, "You can't take our money?" Mr. Odgaard stated, "I cannot take your money." Complainants promptly ended the conversation and left the facility.

Respondent's reasons:

Respondent states that it denied Complainants use of its facility for a wedding because of its owners' sincerely-held religious beliefs.

Respondent states that it is an unincorporated entity owned and operated by Richard and Betty Ann Odgaard. Respondent displays and sells art, including Mrs. Odgaard's art. Respondent also

personally plans, facilitates, and hosts events such as wedding ceremonies, and runs a small bistro, flower shop, and frame shop.

Respondent states that one of the Complainants sent an email arranging to come in on August 3 with his fiancée to tour the facility. When Complainants arrived that day, they met with Mr. Odgaard. The bistro was busy when they arrived, and so while Mr. Odgaard was concerned that they may have wanted him to host a same-sex wedding at the facility, he did not immediately have a private location to confirm that. Once Mr. Odgaard was able to find a moment to do so privately, he asked whether they wanted him to host a same-sex wedding ceremony at the facility. They said yes. Mr. Odgaard said he could not do that. Complainants left.

Respondent states that Mr. Odgaard's decision was based upon his and his wife's sincerely-held religious conviction that knowingly planning, facilitating, or hosting a wedding ceremony that violates their beliefs would be morally wrong.

Respondent provides a copy of a 29-page Verified Petition it filed against the Iowa Civil Rights Commission and its Commissioners in the Iowa District Court for Polk County. In summary, it states:

> The Odgaards are Mennonites. Both of Mrs. Odgaard's parents were Mennonites, and her father was an ordained Mennonite Brethren minister. She spent much of her childhood at church or otherwise engaged in religious activity. Mr. Odgaard was baptized a Lutheran, but has attended the Mennonite Church with his wife from the time they were married. The Odgaards' church is part of the Mennonite Church USA, which is one of several Mennonite denominations in the United States.
>
> Since 2002, the Odgaards have run Respondent, which is an art gallery in an old stone Lutheran church building they purchased to display and sell Mrs. Odgaard's and others' art. From 1937, when it was built, until 2001, the building served as the home of St. Peter Lutheran Church. The building was put up for sale after St. Peter's outgrew it and moved to a new location. The name of the Respondent—Görtz Haus Gallery—references Mrs. Odgaard's family name ("Görtz") and her German-Mennonite ancestry ("haus" is German for "house.") The Odgaards also host other activities at Respondent's facility, such as a lunch bistro, a flower shop, a gift shop, and a framing shop. But the primary thing Respondent does is plan, facilitate, and host wedding ceremonies in the former sanctuary of the church building.
>
> The Odgaards live next door to the facility and spend much of their time there. With a staff of fewer than four full-time employees, they are directly responsible for and involved in all the day-to-day operations of Respondent. Either Mr. or Mrs. Odgaard personally meets with every couple that wishes to have a wedding at the facility, sitting down with the couple to plan their event—the schedule, flowers, décor, food, and activities that will best express how the couple wishes to celebrate their wedding. On the day of the wedding, the Odgaards walk over from their house early in the morning to personally set up the sanctuary for the ceremony. Mrs. Odgaard helps plan and provide the food and wedding décor. Mr. Odgaard typically oversees the entire ceremony while

running the sound system. They both clean up the sanctuary after each ceremony. On a number of occasions they have recommended a pastor to officiate at weddings performed at the facility.

The Odgaards consistently strive to operate Respondent in a manner consistent with their faith. As an expression of their faith, they have intentionally maintained and enhanced the church building's religious character. Almost all of the original stained glass windows remain in place, depicting the Gospels and various religious symbols. Latin crosses and memorial plaques adorn the walls inside and outside the building. The Odgaards have had a scriptural verse painted in a prominent location across the back of the old sanctuary. Many of the artworks in the facility also express the Odgaards' faith. The Odgaards view wedding ceremonies as religiously significant events that by their very nature communicate specific messages about the meaning of marriage. The Odgaards' religious beliefs forbid them from planning, facilitating, or hosting wedding ceremonies that contradict their religious understanding of marriage. The Odgaards adhere to the "traditional Mennonite belief" that marriage is a religious covenant ordained by God that can only exist between a man and a woman.

People often visit the facility to reminisce about childhood experiences or family events that took place there, to find the names of loved ones on the memorial plaques that still adorn the walls, or to see their old Sunday School room. Many local families have chosen to have family pictures taken at the facility because they wanted to have the facility's religious symbols as the backdrop. The congregation of St. Peter Lutheran Church held a worship service at the facility in 2009 as part of their celebration of the church's 125th anniversary.

Respondent states that the Odgaards have never discriminated against anyone at its facility because of his or her sexual orientation. Its decision not to host same-sex wedding ceremonies is based solely on the Odgaards' religious beliefs that do not permit them to personally plan, facilitate, sponsor, or host a wedding ceremony between any persons other than one man and one woman. The Odgaards welcome all customers into the facility, regardless of their sexual orientation. The Odgaards have willingly hired and served gays and lesbians throughout the facility's history. However, the Odgaards do not host activities or display art that would violate their religious beliefs.

Respondent also provides pictures of the facility as described above.

Analysis:

Complainants claim they suffered discrimination in public accommodation based on their sexual orientation.

The Iowa Civil Rights Commission issues screening decisions based on the information collected to date. If the information indicates a "reasonable possibility" of discrimination, the Commission will "screen in" a case for further investigation. Iowa Admin. Code, ICRC Rule 161-3.12(1)(f). During the screening stage, the Commission draws all "rational, reasonable, and otherwise

permissible" inferences in Complainant's favor. *Manning v. Wells Fargo Financial, Inc.*, 756 N.W.2d 480, 2008 WL 2902057, *2 (Iowa Ct. App. 2008) (unpublished) (citing *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994)); *see also Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011). Importantly, the Commission does not evaluate credibility at the screening stage, and instead evaluates only whether the stated facts create a "reasonable possibility" for a probable cause finding. The Commission relies in part on its own experience and expertise with the Iowa Civil Rights Act, while remaining mindful that many cases turn on circumstantial – rather than direct – evidence of discrimination. *Ritz v. Wapello County Bd. of Sup'rs*, 595 N.W.2d 786, 791 (Iowa 1999); *see also Peterson v. Scott County*, 406 F.3d 515, 520 (8th Cir. 2005) (abrogated on other grounds by *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011)) *and Haas v. Kelly Services, Inc.*, 409 F.3d 1030, 1034-35 (8th Cir. 2005) (abrogated on other grounds by *Torgerson*, 643 F.3d 1031).

I. Denial of Service

The Iowa Civil Rights Act (ICRA) prohibits discriminatory practices in the provision of public accommodations based on defined classes of people. In 2007, the ICRA was amended to include "sexual orientation" as one of those classes. In its current form, Iowa Code § 216.7(1) states:

> It shall be an unfair or discriminatory practice for any ... proprietor ... of any public accommodation or any agent or employee thereof: (a) to refuse or deny to any person because of ... sexual orientation ... the accommodations, advantages, facilities, services, or privileges thereof, or otherwise to discriminate against any person because of ... sexual orientation ... in the furnishing of such accommodations, advantages, facilities, services, or privileges.

In 2007, when the ICRA was amended to include sexual orientation as a protected class, the law did not permit same-sex couples to marry in Iowa. Iowa Code § 595.2(1) provided that, "Only a marriage between a male and a female is valid."[1] The ICRA accordingly clarified that, "This chapter shall not be construed to allow marriage between persons of the same sex, in accordance with chapter 595." Iowa Code § 216.18(2). On its face, subsection 216.18(2) only means that the 2007 amendments to the ICRA did not alter subsection 595.2(1), which at that time, prohibited same-sex marriage. Subsection 216.18(2) does not state nor does it mean—especially given the current state of the law—that discriminatory acts regarding the facilitation of same-sex marriage ceremonies are not prohibited. The ICRA must be construed broadly to effectuate its purpose. Iowa Code § 216.18(1).

Here, Respondent admits that it denied Complainants services because of their sexual orientation. Respondent's primary business is hosting weddings and wedding receptions. It hosts weddings for heterosexual couples, but it refuses to host weddings for homosexual couples under equivalent circumstances.

[1] In 2009, the Iowa Supreme Court held that subsection 595.2(1) violates the Equal Protection Clause of the Iowa Constitution. *Varnum v. Brien*, 763 N.W.2d 862, 785 (Iowa) (2009) ("A statute inconsistent with the Iowa Constitution must be declared void, even though it may be supported by strong and deep-seated traditional beliefs and popular opinion.").

Any attempt to distinguish between Complainants' status of being homosexual and their conduct in engaging in a same-sex wedding ceremony is not persuasive. On numerous occasions, the United States Supreme Court has rejected similar attempts to distinguish conduct from status. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."); *id.*, at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, __ U.S. __, __, 130 S.Ct. 2971, 2980 (2010) (refusing to distinguish between status and conduct where a Christian organization of students requiring its members to refrain from "unrepentant homosexual conduct" argued it did not exclude individuals because of sexual orientation); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

Respondent's assurance that it does not discriminate based on sexual orientation when hiring employees and providing services other than hosting a wedding is likewise unavailing. When deciding whether a wedding photographer violated the New Mexico Human Rights Act by refusing to photograph a same-sex couple's wedding, the New Mexico Supreme Court analogized:

> If a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers. The New Mexico Human Rights Act does not permit businesses to offer a 'limited menu' of goods or services to customers on the basis of a status that fits within one of the protected categories. Therefore, Elane Photography's willingness to offer some services to [the plaintiff] does not cure its refusal to provide other services that if offered to the general public.

Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2012), *petition for cert. filed* (U.S. Nov. 8, 2013) (No. 13-585).

The section of the ICRA prohibiting discrimination in public accommodation includes an exception for, "Any bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose." Iowa Code § 216.7(2)(a). The determination of whether a respondent qualifies as a "bona fide religious institution" is to be done on a case-by-case basis by weighing all significant religious and secular characteristics to determine whether the respondent's purpose and character are primarily religious. *See, e.g., Saeemodarae v. Mercy Health Svcs.*, 456 F. Supp. 2d 1021, 1025 (N.D.Iowa 2006).

In *Saeemodarae*, the plaintiff, a practicing Wiccan, brought claims of religious discrimination and retaliation against a medical center claiming to have a Roman Catholic identity. The defendant medical center moved to dismiss on the ground that it was a bona fide religious institution under Title VII and the Iowa Civil Rights Act. In determining the defendant qualified

for a religious exemption under Title VII,[2] it recognized that it was founded by the Sisters of Mercy; it was supported and controlled by a Catholic institution; and its purpose was making the interrelated religious/service mission of the Catholic Church. The atmosphere of the medical center was "permeated with religious overtones," as demonstrated by religious decoration and iconography throughout the Hospital; handbooks and orientation materials for employees that inform them of medical center's religious mission and religious foundation; an initiative which reaffirmed the religious values of the institution; the regular practice of religious ceremonies, such as prayers and devotions broadcast on the hospital speaker system; and the well-developed pastoral care program with a staff of on-site chaplains.

Respondent states that it was founded by the Odgaards, who are devout Mennonites. The facility in which Respondent is located is a former church building, and appears to be, similar to the medical center described above, permeated with religious overtones. However, Respondent is an art gallery that also hosts weddings and receptions and runs a lunch bistro, a flower ship, a gift shop, and a framing shop. Respondent does not state what its mission is or that it is a non-profit organization. Although the Odgaards are Mennonites, it is not clear what religious denomination Respondent is aligned with—if any. Respondent states that the Odgaards occasionally recommend pastors to couples using its facility for a wedding venue. However, Respondent does not seem to suggest it has any requirements regarding the choice of pastor. Respondent does not indicate that it is financially supported by or financially supports a particular church or religious denomination, other than its relationship as a buyer of a building from the St. Peter Lutheran Church.

Based on the information provided, it seems that this situation might be more akin to the one faced by the Ninth Circuit Court of Appeals in *E.E.O.C. v. Townley Engineering & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988). In that case, Townley Manufacturing Company (Townley) was a closely held corporation that manufactured mining equipment. It was founded by J.O. and Helen Townley, who still owned 94 percent of the stock at the time the events in question occurred. When they founded the company, the Townleys made a covenant with God that their business "would be a Christian, faith-operated business." The Townleys were "born again believers in the Lord Jesus Christ" who were "unable to separate God from any portion of their daily lives, including their activities at the Townley company." Townely reflected its founders' covenant with God in several ways. The company enclosed a Gospel tract in every piece of outgoing mail; it printed Biblical verses on all company invoices, purchase orders, and other commercial documents; it gave financial support to various churches and missionaries; and it held a devotional service once a week during work hours. In finding the business did not qualify for the "religious exemption" under Title VII, the court noted:

> On the secular side, the company is for profit. It produces mining equipment, an admittedly secular product. It is not affiliated with or supported by a church. Its articles of incorporation do not mention any religious purpose. Against these elements are the facts that Townley encloses Gospel tracts in its outgoing mail,

[2] The court declined to exercise supplemental jurisdiction over remaining ICRA claims of religious discrimination and thus did not decide whether the defendant met the religious exemption under the ICRA.

> prints Bible verses on its commercial documents (such as invoices and purchase orders), financially supports churches, missionaries, a prison ministry, and Christian radio broadcasts, and, of course, conducts a weekly devotional service. Underlying these facts, of course, is 'the discipleship Jake and Helen Townley have for the Lord Jesus Christ.' When viewed together, we have no difficulty in holding that these characteristics indicate that Townley is primarily secular. We do not question the sincerity of the religious beliefs of the owners of Townley. Nor do we question that they regard the conduct of their company as subject to a compact with God. We merely hold that the beliefs of the owners and operators of a corporation are simply not enough in themselves to make the corporation 'religious' within the meaning of [Title VII].

Here, it is unlikely that Respondent meets the definition of a "bona fide religious organization," exempting it from the provisions of Iowa Code § 216.7. The sincerity of the religious beliefs of the Odgaards is not in doubt. But, as in *Townley*, the beliefs of the owners and operators of Respondent are not enough in themselves to make Respondent "religious" within the meaning of Iowa Code § 216.7.

Recommendation:

Pursuant to Iowa Code § 216.16(6) and Iowa Civil Rights Commission Rule 161-3.12, this case has been preliminarily screened and it has been determined that the following action will be taken:

SCREENED IN FOR FURTHER INVESTIGATION

Iowa Civil Rights Commission Rule 161-3.12(1)(f) provides the *standard* for screening. A case will be screened in when further processing is warranted. Further processing is warranted when the collected information indicates a reasonable possibility of a probable cause determination.

Based on a review of the information provided by the parties as outlined above, it is determined that this complaint warrants further investigation.

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