IN THE SUPREME COURT OF IOWA
Supreme Court No. 14-0738

BETTY ANN ODGAARD AND RICHARD ODGAARD,
Plaintiff-Appellants,

vs.

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

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE RICHARD BLANE II, JUDGE

APPELLEE'S BRIEF

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FINAL

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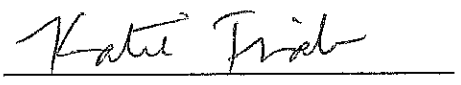

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ROUTING STATEMENT

This case should be transferred to the Court of Appeals because it involves the application of existing legal principles. See Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Plaintiffs Betty and Richard Odgaard appeal from the grant of the Iowa Civil Rights Commission's ["the Commission"] Motion to Dismiss their Verified Petition, the Honorable Richard Blane II presiding.

Course of Proceedings

On October 7, 2013, Plaintiffs filed a Verified Petition against the Commission raising claims under the Iowa Civil Rights Act as well as various constitutional claims. The Commission filed a Motion to Dismiss the Verified Petition on October 20, 2013. After extensive briefing, the district court held a hearing on January 31, 2014. After the hearing, Plaintiffs filed additional exhibits and briefing, and the Commission filed a responsive brief. The district court granted the

Commission's Motion on April 3, 2014. Plaintiffs filed a Notice of Appeal on May 2, 2014.[1]

Facts

Due to the procedural posture of this case, all facts come from Plaintiffs' Petition, as well as various exhibits filed by Plaintiffs with the district court. Plaintiffs own a business named the Görtz Haus Gallery. Petition ¶ 2; App. 1. Plaintiffs rent out space in their building for events including weddings. Petition ¶ 3, 35; App. 1,6.

Plaintiffs state that due to their religious beliefs, they will not rent out the Görtz Haus Gallery to couples for the purpose of a same-sex wedding. Petition ¶ 10; App. 2. They allege that in August 2013, a same-sex couple requested to rent out the venue for the couple's wedding. Petition ¶ 85; App. 14. Plaintiffs refused to rent the space to the couple. Petition ¶ 86; App. 14. After the refusal, Plaintiffs state the same-sex couple filed a civil rights complaint against them. Petition ¶ 97; App. 16. Plaintiffs deny that they have ever discriminated against

[1] Two individuals claiming to have filed the complaint against Plaintiffs filed a Motion to Intervene on November 6, 2013 and a Supplemental Motion to Intervene on November 8, 2013. In a December 6, 2013 order, the district court stated it would not consider the Motion to Intervene until after ruling on the Commission's Motion to Dismiss. Because the district court granted the Motion to Dismiss, it never ruled on the Motion to Intervene.

a person because of his or her sexual orientation, apparently including their decision to refuse to rent out their business for same-sex weddings. Petition ¶ 93; App. 15.

Plaintiffs did not allege the Commission made a probable cause finding that discrimination had occurred, nor do they allege the Commission has issued any notice of public hearing. See Petition. Rather, Plaintiffs simply allege a complaint was filed against them. Petition ¶ 97; App. 16.

After the Commission filed its Motion to Dismiss identifying the deficiencies in Plaintiffs' Petition, Plaintiffs filed additional documentation. Plaintiffs still did not identify any action the Commission had taken towards them, but rather tried to argue the Commission had somehow taken a position against them through various hypothetical statements and informal actions. First, Plaintiffs relied on an email from "AG Webteam" on April 13, 2009. Plaintiffs' Resistance to Motion to Dismiss, Exhibit I; App. 58. In response to Plaintiffs' statement that "we may be targeted with discrimination lawsuits," the "AG Webteam" directed Plaintiffs to contact the Commission to see how a decision not to make their facility available

to a couple based on their sexual orientation would affect the business.

On April 28, 2009, Plaintiffs took the "AG Webteam" up on its suggestion, and contacted the Commission through State Representative Erik Helland. Resistance to Motion to Dismiss, Exhibit J; App. 61. The Commission's former Executive Director, Ralph Rosenberg, responded to Representative Helland's letter and wrote that if a business did not meet certain exceptions, exclusion of same-sex couples based on their sexual orientation "*could* constitute a violation of Iowa Code §216.7 (1)(a) (2009)." *Id.* at p. 3; App. 63 (emphasis added). Former Director Rosenberg further stated:

> Please remember that any charges (or complaints/ allegations) of discrimination filed at the Commission are investigated to determine the facts in the specific situation. If the question you pose came up in a charge, there would likely be additional facts; answers may turn out differently where there are different facts.

Id.; App. 63.

Plaintiffs' last attempt to claim the Commission has somehow determined the merits of a complaint against them is a statement made by current Executive Director Beth Townsend in February 2011. Director Townsend responded to a broadly written House Study Bill titled the Religious Conscience Protection Act. Plaintiffs' Surreply to

Defendants' Motion to Dismiss, Ex. 3-5; App. 84-92. Director Townsend specifically stated her concern that the early version of the bill was "broadly written" and "with regard to the affect [sic] of the bill in public accommodations, I think it's overly broad as well." Plaintiffs' Surreply in Resistance to Defendants' Motion to Dismiss; Exhibit 3, 4; App. 84-89. These statements were not made in connection with any particular facts or any particular complaint. Additionally, Director Townsend's statement does not mention sexual orientation in the context of same-sex weddings. *Id.*

Finally, Plaintiffs allege they received a Screening Data Analysis from the Commission on February 1, 2014, well after they filed their Petition against the Commission. Plaintiffs' Supplemental Resistance to Defendants' Motion to Dismiss, Ex. 8; App. 153-161. After the Commission receives a verified complaint, it is required by statute to "make a prompt investigation" and "issue a recommendation to an administrative law judge." Iowa Code § 216.15(3)(a) (2013). The first step in this process is "preliminary screening," which includes sending questionnaires to parties to a complaint. Iowa Admin. Code 161—3.12(1). After receipt of the questionnaire responses, the Commission will "screen in" a complaint for further investigation

"when the collected information indicates a reasonable possibility of a probable cause determination *or the legal issues in the complaint need further development.*" Iowa Admin. Code 161—3.12(1)(e)-(f) (emphasis added).

As a point of clarification, the alleged complainants are not entitled to attorney fees at this point. Appellant's Br, p. 11. To be entitled to attorney fees, a complainant must be successful at public hearing. Iowa Code § 216.15(9) and (9)(a)(8). Plaintiffs have not alleged there has even been a probable cause finding, a prerequisite to a public hearing; let alone a notice of public hearing issued by the Commission. Iowa Code § 216.15(3) and (6); Iowa Admin. Code 161—4.2.[2]

ARGUMENT

Plaintiffs have failed to exhaust their administrative remedies, have failed to show they will suffer or are suffering irreparable harm, and have failed to show the Commission has construed the Iowa Civil

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[2] There is absolutely no support in the record for Plaintiffs' allegation on appeal that they have ceased renting out their event venue due to their fear of being asked to rent the space to same-sex couples for weddings. Appellants' Br., p. 11. The inclusion of material outside the record is improper under Iowa Rule of Appellate Procedure 6.801. The Court should not consider this improper, unsupported statement.

Rights Act against them. For all of these reasons, the district court's ruling should be affirmed.

Preservation of Error

In Plaintiffs' Motion to Dismiss, they argued they were not required to exhaust the available administrative remedies and claimed those remedies were inadequate and would impose irreparable harm. Motion to Dismiss Tr. p. 13, l. 16-23; App. 122. Plaintiffs received an adverse ruling when the district court granted the Commission's Motion to Dismiss. Ruling on Motion to Dismiss (4/3/14); App. 163-178.

Standard of Review

The Court reviews a motion to dismiss for errors at law. *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009) (citing *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724, 728 (Iowa 2008)).

I. Plaintiffs Failed to Exhaust Their Administrative Remedies Before Suing The Commission, And Exhaustion Is Required By Law.

Plaintiffs' Verified Petition contains eleven separate claims. The district court succinctly described Plaintiffs' claims as:

> 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 [Iowa Civil Rights Act] 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.
>
> Ruling on Motion to Dismiss, p. 5; App. 167.

Plaintiffs have failed to exhaust their administrative remedies regarding their statutory construction claims as required by Iowa Code § 17A.19(1). Section 216.17(1)(a) of the Iowa Civil Rights Act specifically provides "[j]udicial review of the actions of the commission may be sought in accordance with the terms and the Iowa administrative procedure Act, chapter 17A." The Iowa Civil Rights Commission has not construed the Iowa Civil Rights Act to "authorize legal action" as alleged in Count I of the Petition nor has it made any determination that Plaintiffs have engaged in sexual orientation discrimination as alleged in Count II of the Petition. Additionally, administrative exhaustion is required before the court has jurisdiction over Plaintiffs' as-applied constitutional challenges to

the Iowa Civil Rights Act, contained in counts III-VI and VIII-X. Plaintiffs' challenges are as-applied challenges because they assert "applying the Iowa Civil Rights Act to [Plaintiffs]" would be unconstitutional in numerous respects. Petition ¶ 131; See *War Eagle Village Apts. v. Plummer*, 775 N.W.2d 714, 722 (Iowa 2009) (stating "[a] facial challenge asserts that the statute is void for every purpose and cannot be constitutionally applied to any set of facts.") (internal citation omitted).

A. The Commission Has Not Determined The Merits Of Any Complaint Filed Against Plaintiffs

In an attempt to avoid the fact that Plaintiffs are simply unable to state the Commission has made any final determination on any complaint filed against them, Plaintiffs point to several unrelated statements made by the "AG Webteam," a former Executive Director, and a comment made by the Commission's current Executive Director. Plaintiffs attempt to suggest these unrelated comments, not made about them or any complaint filed against them, prove the Commission has predetermined the merits of the complaint Plaintiffs state was filed against them.

To begin, the Commission follows an administrative process set out by the Iowa Civil Rights Act and Iowa Administrative Code

establishing how the Commission will process non-housing complaints. The filing of a complaint with the Commission does not initiate any sort of contested case proceeding. *Compare* Iowa Admin. Code r. 161—3.12(1) (setting forth the rules governing the Commission's preliminary screening process under the Iowa Civil Rights Act (hereinafter "ICRA")) *with* Iowa Admin. Code ch. 4 (setting forth the rules governing a contested case proceeding under the ICRA). Rather, the first step in the Commission's administrative process is the issuance of a preliminary screening decision. *See* Iowa Admin. Code r. 161—3.12(1). Under the Commission's rules, the Commission will "determine whether the case will be 'screened in' as warranting further processing or 'screened out' as not warranting further investigation." Iowa Admin. Code r. 161—3.12(1)(e). "A complaint determined not to warrant further processing shall be administratively closed." Iowa Admin. Code r. 161—3.12(1)(g). Further processing is warranted when the collected information indicates a reasonable possibility of a probable cause determination or *the legal issues in the complaint need development.* Iowa Admin. Code r. 161—3.12(1)(e) (emphasis added).

After the Commission investigation is completed, the investigator may decide to administratively close the complaint. *See* Iowa Admin. Code r. 161—3.13(5). The Commission investigator may alternatively recommend to an administrative law judge that a probable cause or no probable cause determination be made. *See* Iowa Code § 216.15(3)(a); *see also* Iowa Admin. Code r. 161—3.13(1).

After the Commission investigator recommends probable cause or no probable cause, an independent administrative law judge is required to review the case file and make his or her own determination regarding the case. *Id.* A determination of probable cause is not vested in the Commission investigator. Rather, the Commission investigator can only make a non-binding recommendation. The decision rests solely with an administrative law judge not employed by the Commission. *See* Iowa Admin. Code r. 161—3.13(1) (stating "Where the administrative law judge rejects the recommendation of the staff, the reasons shall be stated in writing and placed in the case file.") Last, the Commission cannot issue a notice of public hearing until the administrative law judge has issued a probable cause determination and a minimum of 30 days of

conciliation efforts have been made. *See* Iowa Admin. Code r. 161—3.13(1), (6) and (8).

Plaintiffs filed their Petition before the Commission had taken any of these investigative steps. After the Commission completed its preliminary screening decision, Plaintiffs filed the screening decision with the district court. Plaintiffs' Supplemental Resistance to Defendants' Motion to Dismiss, Ex. 8; App. 153-161. As specifically stated in the Commission's administrative rules, a screening decision is not a final determination, and complaints will be screened in when the legal issues in the complaint need development. Iowa Admin. Code r. 161—3.12(1)(e). Plaintiffs have not alleged the Commission has made a probable cause recommendation; that an administrative law judge has made a probable cause finding; or that the Commission has engaged in the necessary conciliation efforts before it could issue a notice of public hearing. In the absence of the completion of these steps, Plaintiffs simply cannot argue the Commission has determined the merits of any complaint filed against them.

In the absence of evidence that the Commission has found against them, Plaintiffs point to the unrelated statements referenced above. The "AG Webteam" statement is very broad and general, and

refers Plaintiffs to the Commission for more information. Plaintiffs' Resistance to Defendants' Motion to Dismiss, Ex. I; App. 58-59. Plaintiffs then requested the assistance of a state representative to contact the Commission. Former Director Ralph Rosenberg provided a thoughtful response, and ended his letter with the reasonable conclusion that reinforced to Plaintiffs that each complaint is investigated according to the circumstances of that particular complaint, and he in no way suggested any predetermined findings regarding Plaintiffs. Indeed, Plaintiffs were not even mentioned in the state representative's letter. Plaintiffs' Resistance to Defendants' Motion to Dismiss, Ex. J; App. 60-63.

Plaintiffs next claim a statement made by former Director Rosenberg regarding a photographer with religious objections to a same-sex wedding ceremony's options to provide services somehow controls the complaint Plaintiffs state was filed against them. Plaintiffs' Surreply to Defendants' Motion to Dismiss, Ex. 1; App. 74-77. A former Director's statements are not binding on the Commission with a regard to a complaint filed four years after the statement and three years after that Director left the Commission.

Further, there is no indication the Commission has ever taken any action against any similarly situated wedding photographer.

Finally, Plaintiffs point to Director Townsend's comments in February 2011 about proposed House Study Bill 50, the Religious Conscience Protection Act, in which she stated concern the bill as drafted was overly broad. Plaintiffs' Surreply to Defendants' Motion to Dismiss, Ex. 3-5; App. 84-92. The statement were not made in connection with any particular facts or in reference to any particular complaint. Additionally, Director Townsend's statement does not mention sexual orientation in the context of same-sex weddings. *Id.*

As established by the record, the Commission has not made any determination on the complaint Plaintiffs state was filed against them. Additionally, the Commission's rules specifically set out a procedure for obtaining a declaratory order from the Commission, which Plaintiffs never utilized. Iowa Admin. Code r. 161—1.4. Instead, Plaintiffs filed suit after a complaint was filed against them. If Plaintiffs had concerns about their stated intention to deny service for same-sex weddings, they could have taken advantage of the declaratory judgment process at any time in the four and a half years after the *Varnum* decision. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa

2009). Therefore, Plaintiffs are required to exhaust their administrative remedies and have failed to show the existence of any evidence that would relieve them of their duty to exhaust their administrative remedies under the Iowa Civil Rights Act. See Iowa Code § 17A.19.

B. Plaintiffs' Statutory Interpretation Claims (Counts I and II) Require Administrative Exhaustion

The first two counts of Plaintiffs' Petition are not constitutional claims. Rather, Plaintiffs' first claims are claims that the Commission will interpret the Iowa Civil Rights Act incorrectly. Plaintiffs argue on appeal that their "core claims" are constitutional and the alleged "overriding constitutional nature" of their claims should somehow mask the fact that the first two counts of their Petition are decidedly not constitutional in nature. Appellant's Br., p. 12, 17.

The Iowa Administrative Procedure Act provides the exclusive means by which an aggrieved or adversely affected party may seek judicial review of agency action. Iowa Code § 17A.19 (2013). "Accordingly, if this controversy seeks review of agency action, 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) (citing *Benson v. Fort Dodge Police Pension Bd. of Trustees*,

312 N.W.2d 548, 548–49 (Iowa 1981)); see also generally *Shell Oil Co. v. Bair*, 417 N.W.2d 425 (Iowa 1987). The Iowa Civil Rights Commission is an administrative agency. 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 Iowa Legislature specifically gave the Commission the power to "receive, investigate, mediate, and finally determine the merits of complaints alleging unfair or discriminatory practices." Iowa Code § 216.5(2). This necessarily requires the Commission to determine whether it has jurisdiction over civil rights complaints. Iowa Admin. Code 161-3.9 (explaining jurisdictional review). Therefore, as the district court correctly found, Counts I and II of Plaintiffs' Petition challenge the Commission's performance of a statutory duty, which means these counts are directed at "agency action," not any constitutional claim. *Tindal*, 427 N.W.2d at 871; Ruling on Motion to Dismiss, p. 8; App. 170. Judicial review provides the exclusive means for review of agency action. Iowa Code § 17A.19.

Case law does provide for an exception to the exhaustion requirement where an agency would be unable to voice an opinion on the issues raised by a plaintiff. See, e.g., *Tindal v. Norman*, 427

N.W.2d 871 (Iowa 1988). This is not the case before this Court. As discussed above, the Commission is specifically authorized to determine the merits of complaints alleging unfair or discriminatory practices in the area of public accommodation. See Iowa Code § 216.7. Therefore, the Commission can voice an opinion on the construction and elements of a claim under the Iowa Civil Rights Act. Neither Count I nor Count II of Plaintiffs' Petition fits the exception to the exhaustion requirement, nor is the Commission incapable of rendering an opinion in this case.

Additionally, Counts I and II of the Petition are premature. In Count I, Plaintiffs asked the court to find that "legal action against persons for refusing on religious grounds to plan, facilitate, host, or otherwise personally participate in a same-sex wedding ceremony would violate the plain terms of the Iowa Civil Rights Act." In Count II, Plaintiffs asked the Court to find they "have not engaged in sexual orientation discrimination." Plaintiffs attempt to usurp the Commission's fact-finding role and make the court the fact-finder contrary to the legislatively prescribed process for handling discrimination complaints in Iowa. See *Alberhasky v. City of Iowa City*, 433 N.W.2d 693, 695 (Iowa 1988).

C. The Commission's Determination May Make Judicial Determination of Plaintiffs' As-Applied Constitutional Claims (Counts III-VI, VIII-X) Unnecessary

In addition to its statutory interpretation challenges, Plaintiffs assert numerous as-applied constitutional challenges. These challenges are based on Plaintiffs' assertions that the Commission will find their actions violated the Iowa Civil Rights Act when they refused to rent their wedding venue to a same-sex couple. As stated above, Plaintiffs have not properly alleged the Commission has issued any opinion on this issue.

In *Shell Oil Co. v. Bair*, the Iowa Supreme Court was presented with the question of when a party challenges the constitutionality of a statue affecting agency action; whether proceedings before the involved agency may be bypassed in favor of bringing an original action in district court. 417 N.W.2d 425, 429 (Iowa 1987). This is what Plaintiffs have attempted to do in the case before this Court. In *Shell Oil*, the Court held "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." *Id.* Plaintiffs' constitutional claims involving free exercise, "punishment" for religious beliefs, free

speech, expressive association, chilled speech, and compelled speech all involve a matter pending before an agency, namely the complaint Plaintiffs state was filed against them.

The Court has drawn a distinction between the constitutional applicability of legislation to particular facts and the constitutionality of legislation. *Id.* The Court held, "[n]otwithstanding the agency's lack of authority to make constitutional determinations, the authorities suggest that, unless the matter is entirely anticipatory, the case or controversy utilized for purposes of challenging the constitutionality of the statute should be initiated before the affected agency." *Id.* (citing *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); *A Quaker Action Group v. Morton*, 460 F.2d 854 (D.C. Cir. 1971)).

The Court expanded its analysis the next year, in *Tindal v. Norman*. 427 N.W.2d 871 (Iowa 1988). In *Tindal*, "the plaintiff challenge[d] the *facial* constitutional validity of the statue under which the defendant was proceeding." *Id.* (emphasis added). The Court acknowledged its precedent stating because agencies cannot decide issues of statutory validity, administrative remedies are inadequate within the meaning of section 17A.19(1) when such a

statutory challenge is made. *Id.* (citing *Salsbury Laboratories v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 836 (Iowa 1979)). In *Tindal*, there was no action pending before an agency, which allowed the case to avoid the application of *Shell Oil*'s holding regarding administrative exhaustion when a constitutional question affects a matter pending before an agency. Here, Plaintiffs' challenge differs from the challenge in *Tindal* in that: 1) they allege there is a matter pending before the Commission; and 2) they present as-applied constitutional challenges.

In *Alberhasky*, decided shortly after *Tindal*, the Court cited the "emerging rule" established in *Matters v. City of Ames*:

> [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.

433 N.W.2d at 695 (citing *Matters*, 219 N.W.2d 718, 719 (Iowa 1974)).

Even with the approval of this rule, the *Matters* court still held the plaintiff was required to exhaust his administrative remedies

because he had challenged the applicable ordinance "as applied," not "on its face." 219 N.W.2d at 720. In this case, Plaintiffs have challenged the Iowa Civil Rights Act as applied to them, thus *Matters* applies.

The *Shell Oil* court explained its adoption of the rule in three ways: 1) final agency action may "eliminate the need for reaching potential constitutional claims;" 2) "facial constitutional issues are more effectively presented for adjudication based upon a specific factual record;" and 3) "facial constitutional challenges will probably be coupled with claims that the legislation is unconstitutional as applied to the litigant. Efficient and effective judicial administration is more likely to occur if the entire proceeding is first determined by the agency." 417 N.W.2d at 425. From review of the Court's decisions, it appears as-applied challenges are *always subject* to administrative exhaustion requirements, while facial challenges are not subject to exhaustion unless the administrative action might make judicial determination of the constitutional question unnecessary. See generally *Tindal*, 427 N.W.2d 871; *Alberhasky*, 433 N.W.2d 693; *Matters*, 219 N.W.2d 718; *Shell Oil*, 417 N.W.2d 425.

In this case, as Plaintiffs allege, there has been no final agency action. This case presents an as-applied challenge that is subject to administrative exhaustion requirements. It is possible the Commission's decision regarding matters of statutory construction might render a judicial determination of its constitutional questions unnecessary. If the Iowa Civil Rights Commission determines that a correct interpretation of the Iowa Civil Rights Act does not give it jurisdiction over Plaintiffs' business then there is no reason to explore the constitutional challenges to the ICRA. Similarly, allowing the Commission's administrative process to proceed will allow for more effective adjudication of this issue based a specific factual record in the event of a Commission decision as predicted by Plaintiffs.

D. Efficient and Effective Judicial Administration Requires Plaintiffs' Anticipatory Advertising Claims (Counts VII and XI) To Be Heard By the Commission in Connection With Plaintiffs' Other Claims

The district court properly dismissed Counts VII and XI of the Petition. Counts VII and XI anticipate that Plaintiffs' "statements of their religious beliefs" would be viewed by the Commission as "'directly or indirectly' advertising, indicating, or publicizing that they object to the patronage of some persons based on their sexual orientation." Petition, ¶¶ 149, 180; App. 23, 27. Count VII speculates

this interpretation would violation Article I, § 7 of the Iowa Constitution. Petition, ¶ 149; App. 23. Count XI speculates that this interpretation could chill Plaintiffs' speech and would violate the First Amendment. Petition, ¶ 181; App. 27. While it is arguable that this constitutional question may be settled without disrupting "a matter pending before the agency," judicially determining this question could also be rendered unnecessary by final agency action. Furthermore, the Iowa Supreme Court has noted that "ruling on [a] purely hypothetical set of facts" such as this one is a reason for Iowa Code Section § 17A.9(1). See *Tindal*, 427 N.W.2d 873. If there was any doubt that Counts VII and XI should proceed on their own, it is defeated by the third justification for the rule articulated in *Shell Oil* that "facial constitutional challenges will probably be coupled with claims that the legislation is unconstitutional as applied to the litigant. Efficient and effective judicial administration is more likely to occur if the entire proceeding is first determined by the agency." *Alberhasky*, 433 N.W.2d at 696. Plaintiffs' claims require a more developed record because they contemplate how the Iowa Civil Rights Act will be "applied" or "construed" against them. For these reasons the Iowa Supreme Court clearly requires administrative exhaustion in

this case, and as determined by the district court, the present action must be dismissed.

II. Plaintiffs Have Failed To Show They Will Suffer Irreparable Harm During The Commission's Administrative Process, And Their Cited Authority is Not Persuasive.

As discussed above, Plaintiffs' claims are subject to administrative exhaustion. As the district court found, Plaintiffs cannot show they will suffer or are suffering irreparable harm from the Commission's neutral investigative process and they cannot show administrative exhaustion is futile. Plaintiffs' allegation of irreparable harm is not supported by the record or the applicable law.

A. Participation in the Commission's Neutral Investigative Process Is Not Irreparable Harm

Plaintiffs have failed to show they will suffer or are suffering irreparable harm by participating in the Commission's neutral investigative process. Plaintiffs contend there are no Iowa Supreme Court cases requiring them to participate in the Iowa Civil Rights Commission's investigation before asserting their First Amendment concerns before a district court. However, in *Gospel Assembly Church v. Iowa Dept. of Revenue*, the Department of Revenue asked a church to provide "all books and records" from roughly a five-year period

voluntarily or the records would be subpoenaed. 368 N.W.2d 158, 160 (Iowa 1985). In an action very similar to Plaintiffs' suit in this case, the church filed a petition stating that the Department of Revenue's request for documents would violate its rights under the First, Ninth and Fourteenth Amendment of the United States and Article I of the Iowa Constitution and requested declaratory and injunctive relief. *Id.*

The Iowa Supreme Court dismissed the petition stating, "Even if taken as true, plaintiff's allegations about what the Department intends to do at some unspecified future time cannot obscure the fact that as yet the Department has taken no formalized, legally enforceable action such as the issuance of a subpoena duces tecum . . ." *Id.* at 161. The Iowa Supreme Court further stated, "Nor do we find that withholding judicial consideration of this case will work a hardship on plaintiff sufficiently great to justify judicial intervention at this time." *Id.* Plaintiffs cited this very case in their Resistance to the Commission's Motion to Dismiss, and it is curious they now claim there is no Iowa case law requiring them to participate in the Iowa Civil Rights Commission's investigation before asserting their First Amendment concerns before the district court.

Plaintiffs initially relied on *Ohio Civ. Rights Commn. v. Dayton Christian Schools, Inc.* 477 U.S. 619, 628 (1986). Plaintiffs now attempt to distance themselves from the case by saying the Iowa Civil Rights Commissions' procedures are more extensive than those utilized by the Ohio Civil Rights Commission in *Dayton*, and the Commission's procedures cause irreparable harm. A review of *Dayton* and the lower courts' holdings in that case belie Plaintiffs' assertion. In *Dayton*, the Ohio Civil Rights Commission used a more extensive document request than the request utilized by the Commission and objected to by Plaintiffs.[3] The Ohio Civil Rights Commission requested the production of extensive records including: Dayton's policies, lists of every employee discharged or suspended over a several year period, lists of every employee who had become pregnant over a seven-year period, minutes from two board meetings, and the complete personnel file of the complainant and other specified employees. *Dayton Christian Schools v. Ohio Civ. Rights*

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[3] In their appellate brief, Plaintiffs claim they "produced hundreds of pages in [sic] business and personal documents, were subjected to recorded interviews by Commission personnel, and had to engage legal counsel to defend their rights." Appellant's Br. p. 28. Appellants fail to cite where in the appendix this information is located. In fact, this information is not included in the record and is another violation of rule 6.801.

Commn., 578 F. Supp. 1004, 1014 (S.D. Ohio 1984) rev'd sub nom. *Dayton Christian Schools, Inc. v. Ohio Civ. Rights Commn.*, 766 F.2d 932 (6th Cir. 1985) rev'd, 477 U.S. 619 (1986). The Ohio Civil Rights Commission also "advised that [it] wanted to interview" three employees and "any other witnesses [Dayton] wished to use to respond" to the complaint. *Id.* The Ohio Civil Rights Commission also determined there was probable cause of discrimination in the case and attempted to conciliation. In *Dayton*, after the Ohio Civil Rights Commission determined that conciliation had failed, it attempted to bring the complaint to public hearing. *Id.* at 1016.

Again, Plaintiffs have not alleged the Iowa Civil Rights Commission has made a probable cause recommendation; that they have received a probable cause finding made by an administrative law judge, or engaged in conciliation efforts. Rather, Plaintiffs only allege they were sent questionnaires and asked to provide answers. Appellant's Br., p. 27. Plaintiffs' remaining allegations that they have been the subjects of "deposition-like interviews" and required to produce "hundreds of pages in [sic] business and personal documents" have no support in the record. The inclusion of material outside the record is improper under Iowa Rule of Appellate

Procedure 6.801. The Court should not consider these improper, unsupported statements.

The claims in *Dayton* are also very similar to the Plaintiff's claims in the case before this Court. The United States Supreme Court stated, "Dayton claimed that the mere exercise of jurisdiction over it by the state administrative body violates its First Amendment rights." *Dayton*, 477 U.S. at 628. Here, Plaintiffs also claim that the mere exercise of jurisdiction causes irreparable injury. Appellants' Br., p. 33. The United States Supreme Court rightly held, "Even religious schools cannot claim to be wholly free from some state regulation." *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972)).

Plaintiffs abandon this common sense holding in *Dayton* and argue that under *Johnson v. Minneapolis Park and Recreation Board*, 729 F.3d 1094 (8th Cir. 2013) the investigation of a complaint brought against them even for "minimal periods of time" is an irreparable injury. In *Johnson*, the Eighth Circuit Court of Appeals quoted *Elrod v. Burns*, 427 U.S. 347, 373, holding, "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." It is noteworthy that *Elrod* preceded *Dayton* and had the United States Supreme Court

shared the view of the Plaintiffs, it would have prevented the Ohio Civil Rights Commission's investigation in *Dayton*. In *Elrod*, a sheriff admitted that he terminated all employees of the opposing political party but one because of their political views. The termination of the final employee of the opposing party was imminent. Based on these facts, the United States Supreme Court noted, "It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought." *Id.* This sentence immediately precedes the sentence quoted in *Johnson*.

In *Johnson*, the Eighth Circuit noted that the plaintiff had been barred from having a booth at a fair in previous years. When the plaintiff attempted to distribute literature outside of a booth he was arrested for trespassing. Subsequently, the fair banned distribution of literature anywhere but in a booth that was designated as not "support[ing] the message" of the fair. *Johnson*, 729 F.3d at 1098. In *Johnson*, the fair had promulgated a rule specifically to abridge his message before he asked for a declaratory order. As a result, it was clear that his speech was "being impaired at the time relief was sought." *Elrod*, 427 U.S. at 373. The Third Circuit expressed this

concept most concisely in *Anderson v. Davila*, 125 F.3d 148, 164 (3d Cir. 1997) with the following statement:

> Nothing in [*Elrod*] suggests that the Court meant to do away with the traditional prerequisites for injunctive relief simply because First Amendment freedoms were implicated. To the contrary, the Court concluded that injunctive relief was warranted because the plaintiffs' First Amendment injuries were "both threatened and occurring at the time of respondents' motion."

Plaintiffs also argue that *Riley v. National Federation of the Blind of North Carolina, Inc.* 487 U.S. 781 (1998) suggests bearing the costs of an investigation "chill[s] speech." In *Riley*, the agency told the plaintiffs that ambiguous terms would be "judicially defined over the years." *Riley*, 487 U.S. at 794. It was in this context the United States Supreme Court said, "This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates." *Id.* Common sense and this greater context suggest that when the justices of the United States Supreme Court said "bearing the costs of litigation" they used the term as it is defined in the dictionary and were not referring to an administrative investigation. See also *Dombrowski*, 380 U.S. at 487 (referring to litigation of criminal statutes in court.)

In another attempt to show irreparable harm, Plaintiffs equate the Commission's administrative process with criminal liability. In their appellate brief, Plaintiffs contend the Iowa Civil Rights Commission's procedures are similar to the Ohio Elections Commission's procedures in *Susan B. Anthony List v. Driehaus*, 13-193, 2014 WL 2675871 (U.S. June 16, 2014). In *Driehaus*, the plaintiffs wished to display a billboard critical of a congressman in order to influence an election. *Id.* at *3. The congressman filed a complaint under a statute that prohibited false speech concerning the voting record of a candidate in an attempt to block the billboard. *Id.* Violation of the statute in *Driehaus* could have subjected the plaintiffs to "punishment by up to six months of imprisonment, a fine up to $5,000 or both." *Driehaus*, 2014 WL 2675871, at *3. The Ohio Elections Commission issued a probable cause determination and "set a hearing date 10 days after" the complaint had been issued. *Id.* The Supreme Court noted that the burdens of these proceedings were "of particular concern" because a political opponent could "time their submissions to achieve maximum disruption of their political opponent's" message by forcing the plaintiffs to "divert significant time and resources to hire legal counsel and respond to discovery

requests in the crucial days leading up to an election." *Id.* at *2. The Supreme Court also noted the Ohio Elections Commission had issued a probable cause determination and that a violation of the statute could result in criminal prosecution. *Id.* at 11.

These procedures are nothing like the procedures of the Iowa Civil Rights Commission. First, violations of the Iowa Civil Rights Act do not result in criminal prosecution. The case before this Court does not involve politically timed activities meant to influence elections. There is no issue of diversion of resources by which responding to an investigation somehow "diverts significant time" away from an upcoming election. Finally, even though the procedures are different, the Ohio Elections Commission had actually made a merits determination through a probable cause finding.

Plaintiffs also cite *Sec. of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984) and *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) as support for their contention that merely being subjected to the Iowa Civil Rights Commission's investigation causes irreparable injury. Both of these cases involved facial challenges to statutes. In *Munson*, the Supreme Court noted, "Where, as here, a statute imposes a direct restriction on protected First Amendment

activity and where the statute's defect is that the means chosen to accomplish the State's objectives are too imprecise, *so that in all of its applications* the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack." *Joseph H. Munson Co., Inc.*, 467 U.S. at 948. Plaintiffs in this case do not contend that all of the applications of the Iowa Civil Rights Act chill speech. Indeed, Plaintiffs' Petition suggests just the opposite. See Petition, Prayer for Relief, p. 27 ("[Plaintiffs] respectfully request that the Court . . . declare that the Iowa Civil Rights Act, as applied by the Defendants against [Plaintiffs], violates the Iowa and United States Constitutions.") App. 27.

Similarly, the statute in *Dombrowski* was facially attacked on overbreadth grounds. The Supreme Court noted, "A criminal prosecution under statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights." 380 U.S. at 486. "The overbreadth claimant bears the burden

of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003). Again, the Plaintiffs have not made any showing that overbreadth exists from the text of the Iowa Civil Rights Act or from actual facts.

This case is also not analogous to *Baker v. City of Iowa City*, 750 N.W.2d 93 (Iowa 2008). In *Baker*, "the [local civil rights] Commission's staff found probable cause existed that discrimination had occurred based upon race and marital status, both in the area of employment and housing." Shortly before Baker filed his action against the City and the Commission, "Efforts at conciliation were unsuccessful, so the matter was set for hearing." *Id.* at 96. Plaintiffs have not alleged the Commission has set any complaint against them for public hearing. Indeed, a probable cause determination of discrimination has not even been issued. At the time Baker filed his action, the local commission was seeking to enforce its statute against him in a public hearing. Rather than acknowledging the situation before the Court in *Baker*, Plaintiffs simply point to an isolated statement that the civil rights complaint had been investigated before

the commencement of the administrative proceeding to claim irreparable harm.

Finally, Plaintiffs also misconstrue *Portz v. Iowa Board of Medical Examiners*, 563 N.W.2d 592, 594 (Iowa 1997). In *Portz*, the Board of Medical Examiners sought confidential records of the plaintiffs' patients and issued a subpoena duces tecum to obtain the confidential records. *Id* at 593. An administrative law judge rejected a motion to quash the subpoena. *Id.* In finding irreparable harm, the Iowa Supreme Court emphasized that the administrative law judge's rejection of Portz's motion to quash the subpoena "constituted final agency action" and Portz had no other opportunity for relief other than review by the district court. *Id.* at 594. (citing *Christensen v. Iowa Civil Rights Commission*, 292 N.W.2d 429, 431 (Iowa 1980)).

This case is distinguishable from *Portz* in several important ways. Unlike the plaintiff in *Portz*, Plaintiffs are not seeking to prevent the disclosure of confidential information. Indeed, Plaintiffs have voluntarily revealed their religious beliefs and the sexual orientation of their employees and their customers in their petition. Petition ¶¶ 1, 19, 21, 94, 95; App. 1, 3, 15. Unlike the plaintiff in *Portz*, Plaintiffs never assert in their petition that the disclosure of this

information is "the very injury [they seek] to prevent." *Id.* at 594. Instead, Plaintiffs seek to prevent the enforcement of the ICRA as applied to their business. The Commission's actions to date do not constitute final agency action regarding its enforcement of the ICRA in this case. As a result, Plaintiffs are required to exhaust their administrative remedies.

Taking all of these cases together, Plaintiffs cannot show they are suffering irreparable injury by mere participation in the Commission's statutorily mandated investigatory process.

B. Plaintiff's Claims Are Not Futile and Exhaustion is Required

On appeal, Plaintiffs argue advancing their claims before the Commission would be futile. Appellants' Br., p. 17. This argument is unavailing, and their cited cases are not analogous to the case presented to this Court. The district court found, "t]he 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." Ruling on Motion to Dismiss, p. 10 (citing Iowa Code § 216.15); App. 172.

In *Mental Health Ass'n of Minnesota v. Heckler*, the Eighth Circuit found the agency at issue had taken a final position because it

issued a memorandum stating a presumption against eligibility for benefits for the claimants. 720 F.2d 965, 970 (8th Cir. 1983). Furthermore, a manual at one of its buildings said eligibility "cannot be made for younger individuals." *Id.* at 971, n.14. The Eighth Circuit relied on *Jones v. Califano*, 576 F.3d 12, 19 (2d Cir. 1978) which found the Secretary "declin[ed] to alter his regulations in spite" of several successive reversals. In *Califano*, the court found that where claimants had similar claims to the ones where "eligibility was conceded" exhausting their claims on a case by case basis was futile. *Id.* The various statements relied up by Plaintiffs in this case are certainly not the level of formality of memoranda or manuals.

Plaintiffs also claim this case is similar to *Callicotte v. Carlucci*, 698 F. Supp. 944, 948 (D.D.C. 1988). In *Callicotte*, the court noted the agency at issue had "established a very clear policy of upholding waivers of one's appeal rights irrespective of whether the challenge is based on substantive statutory rights." *Id.* at 949. It listed four adverse decisions by the agency in virtually identical circumstances. Plaintiffs do not point to any adverse decisions made by the Iowa Civil Rights Commission with substantially similar circumstances and as a result, *Callicotte* is unavailing.

Unlike the decisions in *Callicotte*, the screening decision is similar to the "reason to believe" notice in *FTC v. Standard Oil Co.*, 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980). The Supreme Court noted the FTC's "reason to believe" notice was not a definitive statement of position in the following way:

> It represents a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings. To be sure, the issuance of the complaint is definitive on the question whether the Commission avers reason to believe that the respondent to the complaint is violating the Act. But the extent to which the respondent may challenge the complaint and its charges proves that the averment of reason to believe is not "definitive" in a comparable manner to the regulations in *Abbott Laboratories* and the cases it discussed.
>
> *Id.* at 241.

In a similar way, the screening decision only signals that further investigation is warranted. Many cases in the investigation stage of the Commission's process are either administratively closed or are closed as "no probable cause."

Plaintiffs also attempt to equate statements made by Director Townsend with a letter sent by an agency to a Congressman in *Etelson v. Off. of Personnel Mgt.*, 684 F.2d 918, 925-26 (D.C. Cir. 1982). In *Etelson*, the agency responded to his concerns by stating the program had been subject to several "broad studies" which do not

"provide any support for the concern expressed by Mr. Etelson." *Id.* This definitive statement referred to the particular plaintiff in the case before the agency, at the time the case was pending before the agency. Director Townsend's statements were made in regards to a House Study Bill proposed three years prior to the complaint in this case, and unrelated to Plaintiffs.

In *Morr-Fitz, Inc. v. Blagojevich*, 901 N.E.2d 373 (Illinois 2008) the plaintiffs stated they had a moral objection to dispensing Plan B contraceptives because they believed them to be abortifacients. *Id.* at 378-79. The court found exhaustion futile because the Governor had publicly stated that "pharmacists with moral objections should find another profession" and that they "must fill prescriptions without making moral judgments." *Id.* at 391. As explained above, none of the statements Plaintiffs have provided as evidence of an agency bias definitively stating that they will be subject to an adverse decision in a similar way in the case before this Court.

Nor is *Athlone Industries, Inc. v. Consumer Prod. Safety Commn.*, 707 F.2d 1485, 1489 (D.C. Cir. 1983) availing. In *Athlone*, the court noted that the Commission brought the complaint and defended its position to the court hearing it and other courts.

Furthermore the court noted, "And, after oral argument in this case, the Commission unanimously ruled that it had the authority to assess civil penalties in an administrative proceeding." *Athlone Industries*, 707 F.2d at 1489.

Canel v. Topinka, 818 N.E.2d 311, 322 (2004) is similar to Athlone in that the agency stated as another ground for dismissal that the plaintiffs were "not entitled" to what they sought under the Act. Plaintiffs do not contend that the Iowa Civil Rights Commission has made similar definitive statements in its Motion to Dismiss or during oral argument. None of the cases cited by Plaintiffs support their position that the limited investigatory actions taken by the Commission demonstrate futility. Plaintiffs are not entitled to avoid administrative exhaustion.

CONCLUSION

For all of these reasons, the Court should affirm the district court's order dismissing Plaintiffs' Verified Petition.

REQUEST FOR NONORAL SUBMISSION

Notice is hereby given that upon submission of this cause, and in the event that appellant is granted oral argument, counsel for appellee hereby desires to be heard in oral argument.

COST CERTIFICATE

We certify that the cost of printing the Appellee's Brief and Argument was the sum of $57.50.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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August 4, 2014

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