IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Fort Des Moines Church of Christ, a nonprofit religious corporation, Plaintiff, vs. Angela Jackson, Patricia Lipski, Mathew Hosford, Tom Conley, Douglas Oelschlaeger, Lily Lijun Hou, and Lawrence Cunningham, each in his or her official capacity as Commissioners of the Iowa Civil Rights Commission; Kristen H. Johnson,[1] in her official capacity as the Executive Director of the Iowa Civil Rights Commission; Tom Miller, in his official capacity as the Attorney General of the state of Iowa; and the City of Des Moines, Iowa, Defendants.	Case No. 4:16-cv-00403-SMR-CFB **STATE DEFENDANTS' MOTION TO DISMISS** **ORAL ARGUMENT REQUESTED**

COME NOW Defendants Angela Jackson, Patricia Lipski, Mathew Hosford, Tom Conley, Douglas Oelschlaeger, Lily Lijun Hou, and Lawrence Cunningham, all in their official capacities as Commissioners of the Iowa Civil Rights Commission; Kristin H. Johnson, in her official capacity as the Executive Director of the Iowa Civil Rights Commission; and Tom Miller, in his official capacity as the Attorney General of the State of Iowa (collectively the "State Defendants"), and move the Court to Dismiss Plaintiff's Verified Complaint for Declaratory and Injunctive Relief as against the State Defendants pursuant to Federal Rule of Civil Procedure 12(b)(1), and in the alternative, Rule 12(b)(6) and *Younger* abstention. The

[1]The correct spelling of Ms. Johnson's name is Kristin H. Johnson.

State Defendants are also filing a Brief in support of this motion. The motion is based upon the following grounds:

1. The Court lacks federal subject matter jurisdiction as against the State Defendants because no Article III case or controversy exists. *See* Fed. R. Civ. P. 12(b)(1).

2. The State Defendants have Eleventh Amendment sovereign immunity.

3. Plaintiff failed to exhaust its administrative remedies.

4. Plaintiff fails to state a claim upon which relief can be granted against the State Defendants. *See* Fed. R. Civ. P. 12(b)(6).

5. If the circumstances are considered a state proceeding, the Court should abstain under the *Younger* abstention doctrine.

WHEREFORE, the State Defendants respectfully request that the Court grant their Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), and in the alternative, pursuant to Rule 12(b)(6) or *Younger* abstention. The State Defendants also request that oral argument on this motion be held during any hearing scheduled on Plaintiff's Motion for Preliminary Injunction. It would serve the interests of the Court and the parties to argue both motions at the same time.

Respectfully submitted,

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Proof of Service

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on July 28, 2016.

☐ U.S. Mail ☐ FAX
☐ Hand Delivery ☐ Overnight Courier
☐ Federal Express ☐ Other
X Electronically

Signature:/s/ Molly M. Weber

IN THE UNITED STATES DISTRICT COURT
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Fort Des Moines Church of Christ, a nonprofit religious corporation, Plaintiff, vs. Angela Jackson, Patricia Lipski, Mathew Hosford, Tom Conley, Douglas Oelschlaeger, Lily Lijun Hou, and Lawrence Cunningham, each in his or her official capacity as Commissioners of the Iowa Civil Rights Commission; Kristen H. Johnson,[1] in her official capacity as the Executive Director of the Iowa Civil Rights Commission; Tom Miller, in his official capacity as the Attorney General of the state of Iowa; and the City of Des Moines, Iowa, Defendants.	Case No. 4:16-cv-00403-SMR-CFB **STATE DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS** **ORAL ARGUMENT REQUESTED**

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COME NOW Defendants Angela Jackson, Patricia Lipski, Mathew Hosford, Tom Conley, Douglas Oelschlaeger, Lily Lijun Hou, and Lawrence Cunningham, all in their official capacities as Commissioners of the Iowa Civil Rights Commission; Kristin H. Johnson, in her official capacity as the Executive Director of the Iowa Civil Rights Commission; and Tom Miller, in his official capacity as the Attorney General of the State of Iowa (collectively the "State Defendants"), and submit this Brief in support of their Motion to Dismiss Plaintiff's Verified Complaint for Declaratory and Injunctive Relief pursuant to Federal Rule of Civil Procedure 12(b)(1), and in the alternative, Rule 12(b)(6) and *Younger* abstention.

Plaintiff states that this is a civil rights action to stop the Iowa Civil Rights Commissioners and the Executive Director of the Iowa Civil Rights Commission (ICRC), the Iowa Attorney General, and the City of Des Moines[2] "from compelling an Iowa church to communicate government messages to which it objects and from forcing the church to use its

[2]Plaintiff asserts that the City of Des Moines "enacted a nearly identical provision to Iowa Code § 216.7, prohibiting discrimination by public accommodations." Compl. ¶ 5. It is not clear, however, that the City of Des Moines is properly joined as a defendant. *See* Fed. R. Civ. P. 20(a)(2) (stating that persons may be joined in one action as defendants if (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action).

building in violation of its religious beliefs." Compl. ¶ 1. Plaintiff makes this statement despite no allegation of an enforcement action against it. Plaintiff's Complaint should be dismissed as against the State Defendants for lack of subject matter jurisdiction because no Article III case or controversy exists. The State Defendants also have Eleventh Amendment sovereign immunity. Plaintiff failed to exhaust its administrative remedies, and if the circumstances are considered a state proceeding, the Court should abstain under the *Younger* abstention doctrine. In the alternative, Plaintiff's Complaint should be dismissed as against the State Defendants for failure to state a claim upon which relief can be granted.

BACKGROUND

Plaintiff Fort Des Moines Church of Christ filed the present Complaint on July 4, 2016. Compl. (ECF No. 1). Plaintiff challenges as unconstitutional the following provisions of the Iowa Civil Rights Act (ICRA): Iowa Code §§ 216.2(13) and 216.7, and of the Des Moines City Code, §§ 62-1, 62-136, and 62-137(1). *Id.* ¶ 109. The Complaint alleges as a First Cause of Action: Violation of the Free Speech Clause of the First Amendment to the United States Constitution; Second Cause of Action: Violation of the Religion Clauses of the First Amendment to the United States Constitution; Third Cause of Action: Violation of the Right to Expressive Association of the First Amendment to the United States Constitution; Fourth Cause of Action: Violation of the Right to Peaceably Assemble of the First Amendment to the United States Constitution; and Fifth Cause of Action: Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* ¶¶ 110-197.

LEGAL STANDARDS

The United States Constitution limits the jurisdiction of federal courts to "cases" or "controversies." U.S. Const. art. III, § 2; *Raines v. Byrd*, 521 U.S. 811, 818 (1997) ("No

principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." (quotation marks and citation omitted)). As relevant here, both standing and ripeness are requirements for Article III subject matter jurisdiction. *Kennedy v. Ferguson*, 679 F.3d 998, 1001 (8th Cir. 2012) (citation omitted). Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a complaint for lack of subject matter jurisdiction. "As a threshold matter, the Court must address Defendants' claim under Rule 12(b)(1) that this Court lacks subject matter jurisdiction." *Charleston v. McCarthy*, No. 4:15-cv-00372-SMR-HCA, 2016 WL 1370263, at *3 (Mar. 30, 2016).[3]

To survive a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim, "a complaint must contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Mills v. Iowa Bd. of Regents*, 770 F. Supp. 2d 986, 991 (S.D. Iowa 2011) (quoting Fed. R. Civ. P. 8(a)(2)). "In reviewing a complaint, a court must 'accept as true all of the factual allegations contained in the complaint,' and must draw 'all reasonable inferences . . . in favor of the plaintiff.'" *Id.* (quotation omitted). To be viable, a complaint must contain enough facts to state a claim to relief that is plausible on its face. *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678).

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[3]"In addition to these constitutional requirements, courts must also consider a prudential component to standing." *Knapp v. City of Coeur D'Alene*, No. 2:14-cv-00441-REB, 2016 WL 1180168, at n.9 (D. Idaho Mar. 25, 2016). "[P]rudential standing . . . embodies judicially self-imposed limits on the exercise of federal jurisdiction," including "the general prohibition on a litigant's raising another person's legal rights." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (additional citation omitted); *see also Glickert v. Loop Trolley Transp. Dev. Dist.*, 792 F.3d 876, 880-81 (8th Cir. 2015) (explaining prudential standing). For example, Fort Des Moines Church of Christ appears to be raising the legal rights of its pastor, Michael Demastus, who is not a named plaintiff.

ARGUMENT

I. THE COURT SHOULD DISMISS THE COMPLAINT AS AGAINST THE STATE DEFENDANTS FOR LACK OF SUBJECT MATTER JURISDICTION.

A. Plaintiff Lacks Standing to Sue.

To demonstrate Article III standing, Plaintiff Fort Des Moines Church of Christ must show: (1) it has suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Balogh v. Lombardi*, 816 F.3d 536, 541 (8th Cir. 2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these requirements. *See id.* (quoting *Lujan*, 504 U.S. at 561). Standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record. *Iowa Right to Life Comm., Inc. v. Smithson*, 750 F. Supp. 2d 1020, 1029-30 (S.D. Iowa 2010) (quotation omitted). Plaintiff must establish standing for each type of remedy sought, including declaratory and injunctive relief. *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 956 (8th Cir. 2015) (citations omitted).

1. Injury in Fact

Regarding the first requirement of an injury in fact, a plaintiff who challenges a statute must demonstrate "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Knapp*, 2016 WL 1180168, at *14 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). The injury must be "*certainly* impending," and allegations of "*possible* future injury" are not sufficient. *Balogh,* 816 F.3d at 541 (quotations omitted) (emphases in original). Although a chilling effect on speech protected by the First

Amendment can constitute an injury in fact, allegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm. *Id.* at 542 (quotation omitted). The equitable remedy of an injunction is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again (or wronged at all)—a "likelihood of substantial and immediate irreparable injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (quotation omitted).

Plaintiff alleges that the law's prohibitions cause it "to self-censor and chill its speech." Compl. ¶ 21; *see also id.* ¶¶ 76, 98-100, 107, 140, 192; *id.* ¶ 143 ("Fort Des Moines is objectively, reasonably chilled from exercising its First Amendment right to free speech due to the risk of the Commissions' enforcement . . . ."). Plaintiff also alleges that it "reasonably fears" its desired conduct will violate the law. *Id.* ¶¶ 19, 25, 30, 76, 141, 192. In support of its Motion for Preliminary Injunction, Plaintiff included a declaration stating that Pastor Demastus has not delivered a sermon on "A Biblical View of Human Sexuality," fearing that to do so may expose the church to liability for violating Iowa state law. Decl. of Michael Demastus at ¶ 2 (ECF No. 9-2). Plaintiff's self-censorship and belief that its speech has been chilled are objectively unreasonable, however, because it has not shown that it faces a credible threat of an enforcement action by any State Defendant. Similarly, fears of an enforcement action by a third party complainant are speculative, not actual or imminent. *See Balogh*, 816 F.3d at 541 (citations omitted). Plaintiff references the YMCA, Compl. ¶ 105, but has not alleged that any complaint against any church as a public accommodation has been considered by the ICRC in the nearly ten years since "sexual orientation" and "gender identity" were added to the statute as protected classes. Plaintiff appears to be seeking an impermissible advisory opinion.

Plaintiff has not demonstrated that it is even subject to the ICRA's prohibition against unfair or discriminatory practices in accommodations and services. To be subject to the prohibition, a place must first be a "public accommodation." Iowa Code § 216.7(1). The definition of "public accommodation" is set forth in Iowa Code § 216.2(13).[4] Even if a place is a public accommodation covered by § 216.7(1), there is an exemption for bona fide religious institutions. *See* Iowa Code § 216.7(2)(a) ("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."). In other words, Plaintiff would need to meet the threshold definition for a "public accommodation," and also fail to satisfy the religious exemption, to come within the reach of the statute.

In *Knapp v. City of Coeur D'Alene*, a federal district court recently held that the plaintiffs lacked standing to bring a pre-enforcement challenge to a City of Coeur D'Alene anti-

[4]According to the definition:

> 13. a. "Public accommodation" means each and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods for a fee or charge to nonmembers of any organization or association utilizing the place, establishment, or facility, provided that any place, establishment, or facility that caters or offers services, facilities, or goods to the nonmembers gratuitously shall be deemed a public accommodation if the accommodation receives governmental support or subsidy. Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the nonmembers for fee or charge or gratuitously, it shall be deemed a public accommodation during such period.
>
> b. "Public accommodation" includes each state and local government unit or tax-supported district of whatever kind, nature, or class that offers services, facilities, benefits, grants or goods to the public, gratuitously or otherwise. This paragraph shall not be construed by negative implication or otherwise to restrict any part or portion of the preexisting definition of the term "public accommodation".

Iowa Code § 216.2(13) (emphases added).

discrimination ordinance. 2016 WL 1180168, at *14-16. The Ordinance at issue made it a misdemeanor crime to deny to or to discriminate against any person because of sexual orientation and/or gender identity/expression the full enjoyment of any of the privileges of a place of public accommodation. *Id.* at *3 (citations omitted). Similarly, in *Temple v. Abercrombie*, the plaintiffs claimed that Hawaii's Civil Unions Law was unconstitutional because it did not exempt religious organizations for refusing to rent their facilities for same sex unions and/or marriage ceremonies. 903 F. Supp. 2d 1024, 1026 (D. Haw. 2012). The court dismissed the action for lack of subject matter jurisdiction, because the plaintiffs did not demonstrate that they had standing or that the action was ripe. *Id.* at 1027. As the court explained, whether plaintiffs would face a realistic danger of sustaining a direct injury as a result of enforcement of the statute "is wholly contingent upon the occurrence [of] a number of unforeseeable events." *Id.* at 1034 (quotation omitted). Notably, (1) a couple would have to ask plaintiffs to use their facility for a civil union, (2) the plaintiffs would have to refuse a request based upon a protected ground, (3) the facility would have to fail to satisfy the newly added religious exemption, (4) the couple would have to file a complaint with the Hawaii Civil Rights Commission, and (5) authorities would then have to decide to proceed against the plaintiffs. *Id.* "None of this has occurred, and without some indication of the parameters of such a hypothetical violation . . . a 'dispute is not justiciable, because it is not ripe for court review.'" *Id.* (quotation and citations omitted). The same is true here. Plaintiff has not proved an injury in fact.

As the source of its fears, Plaintiff appears to be relying on a brochure entitled "Sexual Orientation & Gender Identity: A Public Accommodations Provider's Guide to Iowa Law," as well as a recent revision to the document. Because standing depends on the facts as they existed when the complaint was filed, Plaintiff cannot rely on the revised guidance document for

standing. *See Lujan*, 504 U.S. at n. 4 (quotation omitted). The guidance document is not the law. It also clearly states: "This guidance document is designed for general educational purposes only and is not intended, nor should it be construed as or relied upon, as legal advice." https://icrc.iowa.gov/sites/default/files/publications/2016/2016.sogi_.pa1_.pdf (last visited July 27, 2016). It cannot be taken as the official legal position of the ICRC. The brochure does not generate an injury in fact.

If Plaintiff seeks further guidance and clarity as to its particular circumstances, there is a procedure to obtain a declaratory order from the ICRC. *See* Iowa Admin. Code r. 161—1.4(216). "Any person may file a petition with the commission for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the commission . . . ." Iowa Admin. Code r. 161—1.4(1). Regarding its effect,

> A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the commission, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the commission. <u>The issuance of a declaratory order constitutes final agency action on the petition.</u>

Iowa Admin. Code r. 161—1.4(12) (emphasis added). Although the ICRC may refuse to issue a declaratory order on whether a statute is unconstitutional on its face, Iowa Admin. Code r. 1.4(9)(a)(10), such a question could be preserved for judicial review.

2. Traceability and Redressability

On the second requirement for standing, the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. *Balogh*, 816 F.3d at 543 (quoting *Lujan*, 504 U.S. at 560) (additional citation omitted). "'[W]hen a plaintiff brings a pre-enforcement challenge to the

constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision.'" *Id.* (quoting *Digital Recognition Network, Inc.*, 803 F.3d at 957-58). Plaintiff alleges that Defendant Tom Miller has the power under state law to initiate complaints, and that the ICRA empowers him to enforce the ICRA by bringing a complaint. Compl. ¶¶ 40, 103 (citing Iowa Code § 216.15(1)). In essence, he becomes a litigant. Anyone can bring a complaint, however, and Plaintiff has not shown that Attorney General Miller's initiating authority constitutes enforcement authority as to the ICRA public accommodations law. Consequently, Plaintiff has not established that any injury is fairly traceable to Attorney General Miller. For the same reasons, Plaintiff has not shown that as to Attorney General Miller, it is likely that any injury will be redressed by a favorable decision. *See Balogh*, 816 F.3d at 541.

B. The State Defendants have Eleventh Amendment Sovereign Immunity.

The Court lacks subject matter jurisdiction[5] on Plaintiff's claims as against the State Defendants for an additional reason: the Eleventh Amendment generally bars suits by private citizens against a state in federal court. *See Balogh*, 816 F.3d at 544 (citing *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 267-68 (1997)). A suit against a public employee in his or her official capacity is merely a suit against the public entity (here, the State of Iowa). *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (quotation and citation omitted); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (citations omitted); *see also Digital Recognition*

[5]The United States Supreme Court has stated that whether Eleventh Amendment immunity is a matter of subject matter jurisdiction is "a question we have not decided." *Wisc. Dep't of Corr. v. Schacht*, 524 U.S. 381, 391 (1998); *see also Balogh,* 816 F.3d at n.1 (stating that while the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, it is not coextensive with the limitations on judicial power in Article III (quotation omitted)); *Harris v. Oliver*, No. 4:06CV3017, 2007 WL 1456212, at n.1 (D. Neb. May 16, 2007) (citations omitted). Even if Eleventh Amendment sovereign immunity is not jurisdictional, it still means that Plaintiff fails to state a claim upon which relief can be granted against the immune defendants. *See* Fed. R. Civ. P. 12(b)(6).

Network, Inc., 803 F.3d at 956 (noting that the Eleventh Amendment also bars suits against state officials if the state is the real, substantial party in interest (quotation omitted)).

Although *Ex parte Young* created an exception to sovereign immunity for claims seeking declaratory and prospective injunctive relief, the exception is limited. Individuals who, "as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court." *Ex parte Young*, 209 U.S. 123, 155-56 (1908). In other words, state officers may be sued to prevent enforcement of an unconstitutional state law if such officers have enforcement authority <u>and</u> are threatening and about to commence proceedings. *See Balogh*, 816 F.3d at 540, 544 (quoting *Ex parte Young*, 209 U.S. at 155-56).

The State Defendants do not meet this test. Again, anyone can bring a complaint, so Plaintiff has not shown that Attorney General Miller has enforcement authority as to the ICRA public accommodations law. Even assuming that the State Defendants all have enforcement authority, Plaintiff has not shown that they are threatening and about to commence proceedings against Plaintiff. The State Defendants have Eleventh Amendment sovereign immunity.

C. Plaintiff's Claims are Not Ripe.

"The ripeness doctrine is aimed at preventing federal courts, through 'premature adjudication, from entangling themselves in abstract disagreements.'" *North Dakota v. Heydinger*, No. 14-2156, No. 14-2251, 2016 WL 3343639, at *4 (8th Cir. June 15, 2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). A party seeking federal court review must show (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration, and both factors must exist to at least a minimal

degree. *Id.* (quotations omitted); *see also Parrish v. Dayton*, 761 F.3d 873, 876 (8th Cir. 2014) (holding, in a First Amendment challenge to a Minnesota statute, that plaintiffs' claims were not ripe for review).

For the same reasons as above regarding lack of standing, the issues are premature and not fit for judicial decision. Plaintiff also cannot establish any hardship from withholding court consideration when no enforcement action is pending or threatened against it, and it has not shown that it is even subject to the ICRA's prohibition against unfair or discriminatory practices in accommodations and services. This case is not ripe for review.

D. If the Brochure Generates an Injury in Fact, Plaintiff Failed to Exhaust its Administrative Remedies.

If Plaintiff is relying on the guidance document as "agency action," then the Iowa Administrative Procedure Act (IAPA), Chapter 17A of the Iowa Code, provides the exclusive remedy for Plaintiff's claims. In that event, dismissal is warranted to the extent Plaintiff has not exhausted its Chapter 17A administrative remedies. *See Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 329 (Iowa 2015) (affirming that district court lacked authority to hear the case because plaintiffs failed to exhaust Chapter 17A administrative remedies). Plaintiff has not alleged exhaustion.

A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by final agency action may seek judicial review. Iowa Code § 17A.19(1). Except as expressly provided otherwise, "the judicial review provisions of this chapter shall be 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 § 17A.19 (emphasis added). There must first be "an adequate administrative remedy . . . for the claimed wrong, and the governing statutes must expressly or impliedly require the remedy to be

exhausted before allowing judicial review." *Riley v. Boxa*, 542 N.W.2d 519, 521 (Iowa 1996) (citations omitted). Constitutional issues may be raised and preserved at the agency level and then addressed on judicial review under Iowa Code § 17A.19. *See* Iowa Code § 17A.19(10)(a) (stating that the court shall reverse, modify, or grant other appropriate relief if it determines that substantial rights of the person have been prejudiced because the agency action is unconstitutional on its face or as applied, or is based upon a provision of law that is unconstitutional on its face or as applied).

II. THE COURT SHOULD DISMISS THE COMPLAINT AS AGAINST THE STATE DEFENDANTS FOR FAILURE TO STATE A CLAIM.

Plaintiff also fails to state a claim upon which relief can be granted against the State Defendants. *See* Fed. R. Civ. P. 12(b)(6). For the reasons explained here and in the State Defendants' Resistance to Plaintiff's Motion for Preliminary Injunction, Plaintiff's Complaint does not contain facts stating a claim to relief – a violation of either the First Amendment or the Fourteenth Amendment of the United States Constitution – that is plausible on its face. *See Mills*, 770 F. Supp. 2d at 991.

III. IF THE ICRC'S DISSEMINATION OF THE BROCHURE IS A "STATE PROCEEDING," *YOUNGER* ABSTENTION APPLIES.

If the ICRC's dissemination of the brochure is considered a state proceeding, the Court should abstain from hearing this case pursuant to the *Younger* abstention doctrine. *See Younger v. Harris*, 401 U.S. 37 (1971). "Fidelity to that doctrine requires federal courts, in the absence of extraordinary circumstances, to refrain from interfering with certain state proceedings." *Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 189 (1st Cir. 2015) (citing *Younger*, 401 U.S. at 43-45); *cf. Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 622, 625 (1986) (holding that district court should have abstained under *Younger* from adjudicating a school's

federal action to enjoin an agency proceeding on First Amendment grounds); *Ocean Grove Camp Meeting Ass'n of the United Methodist Church v. Vespa-Papaleo*, 339 Fed. App'x 232, 234 (3d Cir. 2009) (unpublished) (holding that *Younger* abstention applied to claims concerning boardwalk pavilion when discrimination complaints were pending).

CONCLUSION

WHEREFORE, the State Defendants respectfully request that the Court grant their Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), and in the alternative, pursuant to Rule 12(b)(6) or *Younger* abstention. The State Defendants also request that oral argument on this motion be held during any hearing scheduled on Plaintiff's Motion for Preliminary Injunction. It would serve the interests of the Court and the parties to argue both motions at the same time.

Respectfully submitted,

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Proof of Service

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on July 28, 2016.

- ☐ U.S. Mail ☐ FAX
- ☐ Hand Delivery ☐ Overnight Courier
- ☐ Federal Express ☐ Other
- X Electronically

Signature:/s/ Molly M. Weber