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

Fort Des Moines Church of Christ, a nonprofit religious corporation, Plaintiff, v. 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; Kristin H. Johnson, 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 **PLAINTIFF'S RESISTANCE TO STATE DEFENDANTS' MOTION TO DISMISS** **Oral Argument Requested**

PLAINTIFF'S RESISTANCE TO
STATE DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

***Cases*:**

***Statutes and Regulations*:**

INTRODUCTION

The Iowa Civil Rights Act, Iowa Code § 216.1 *et seq*. (hereinafter, the "Act"), compels Plaintiff Fort Des Moines Church of Christ (the "Church") to censor its religious teaching and use its house of worship contrary to its faith. The Act makes it illegal to indicate, in any way, that persons might be unwelcome or objectionable based on their gender identity. The Church fears that even communicating its theological beliefs about human sexuality and gender identity in worship services, Bible studies, church facility policies, and various church events open to the public subjects it to intrusive investigations and substantial penalties. So the Church has chilled its speech. It has refrained from constitutionally-protected conduct out of the reasonable fear that these religiously-informed communications could trigger an enforcement action. This harm is current, ongoing, and irreparable.

Despite the Church's clear allegations about what it wants to do and when, the State Defendants have refused to affirmatively plead that the Act would *not* apply to the Church when preaching a sermon, publishing its facility use policy, communicating its beliefs about biological sex, hosting a Bible study, or any of the other myriad activities the Church undertakes. Silence speaks volumes. If there were truly no credible threat of enforcement, then the Defendants could have readily pled to the Court that churches are not subject to the Act.[1]

Despite both the Act's application to churches and the Iowa Civil Rights Commission's (the "Commission") clear intent to apply the law to churches, the State Defendants assert that the Court lacks jurisdiction because the Commission has not initiated an enforcement proceeding

[1] State Defendants being 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.

against the Church. Defendants misunderstand the purpose of a pre-enforcement challenge. An aggrieved plaintiff need not wait for an intrusive investigation and substantial penalties prior to seeking judicial protection of its most basic freedoms.

In fact, the Eighth Circuit "encourage[s] a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution." *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 488 (8th Cir. 2006).

The jurisdictional standard is quite low for pre-enforcement challenges to protect First Amendment rights. The Church need only plead sufficient facts—taken as true, as the Court must assume at this procedural stage—to plausibly show that it has chilled its speech or intends to engage in constitutionally-protected conduct that is arguably proscribed by law, and that there is a credible threat of enforcement. *See Missourians for Fiscal Accountability v. Klahr*, --- F.3d. ---, 2016 WL 4056057, at *2 (8th Cir. July 29, 2016); *see also Susan B. Anthony List v. Driehaus* (*SBA List*), 134 S. Ct. 2334, 2342 (2014) (stating same). The Church easily satisfies this standard. The State Defendants' motion to dismiss should be denied.

ARGUMENT

I. The Church has satisfied Article III's subject matter jurisdiction requirements.

Because the State Defendants offered no materials outside the pleadings, their 12(b)(1) motion to dismiss mounts a facial attack to the complaint. *See Branson Label, Inc. v. City of Branson, Mo.*, 793 F.3d 910, 914 (8th Cir. 2015) (distinguishing facial and factual attacks). As a result, the Court must accept as true all facts alleged in the complaint and draw all reasonable inferences in the Church's favor. *See id*. at 915.

A. The Church sufficiently alleged standing to bring its pre-enforcement challenge.

The Church has standing because State Defendants and the Act have chilled the Church's speech and threatened to violate the Church's constitutional rights. *See* Ver. Compl. ¶¶ 110-197; *see also Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) ("[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing."); *see also Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1241 (11th Cir. 2015) ("When First Amendment protections are implicated, we apply "most loosely" the injury-in-fact requirement "lest free speech be chilled"). The Church pled sufficient facts to affirmatively and plausibly suggest that it suffers an injury in fact that is fairly traceable to the State Defendants, and is likely to be redressed by a favorable decision. *See 281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) (stating test for Article III standing).

1. The Church suffered an injury in fact.

"In the First Amendment context, two types of injuries may confer Article III standing to seek prospective relief." *Missourians for Fiscal Accountability*, 2016 WL 4056057, at *2 (emphasis added). First, a plaintiff bringing a pre-enforcement case "could establish standing by alleging an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id*. (internal quotation marks omitted); *see also SBA List*, 134 S. Ct. at 2342 (stating same). Second, a plaintiff can establish injury "by alleging that it self-censored. A First Amendment plaintiff who faces a credible threat of future prosecution suffers from an ongoing injury resulting from the statute's *chilling effect* on his desire to exercise his First Amendment rights." *Missourians for Fiscal Accountability*, 2016 WL 4056057, at *2 (emphasis original) (internal citation, quotation marks, and brackets omitted).

Both types of First Amendment injury employ essentially the same three-part test, with a slight difference in the first prong: (1) an intent to engage in constitutionally-protected conduct *or* a desire to engage in constitutionally-protected conduct that results in chilled speech; (2) the law arguably proscribes that conduct; and (3) a credible threat of enforcement. *See Missourians for Fiscal Accountability*, 2016 WL 4056057, at *2. As a result, both tests for First Amendment injury will be discussed together. The Church meets this three-part standard.

a. The Church alleges an intent to engage in constitutionally-protected conduct and its speech is chilled.

Under the first type of First Amendment injury, the Church alleges an intent to engage in four specific activities protected under the First Amendment. First, the Church wants its pastor to preach a sermon explaining the church's religious beliefs about human sexuality and "gender identity."[2] *See* Ver. Compl. ¶¶ 19, 74, 115, 140. The sermon, entitled "A Biblical View of Human Sexuality," is available in its entirety. *See* Decl. of Michael Demastus Exhibit A (ECF No. 9-2). Second, the Church wants to publicly communicate its beliefs about human sexuality and gender identity during its Sunday worship services, Bible studies, and other events or activities, as well as educational speeches and newsletters. *See* Ver. Compl. ¶¶ 9, 12-13, 99, 115, 140. Third, the Church wants to publish its restroom and shower policy on the church website and as an insert in the weekly Sunday bulletin. *See id.* ¶¶ 20, 25, 73-76, 141. The policy is attached as Exhibit A to the Verified Complaint and discusses the Church's theological beliefs regarding the use of the Church's showers, changing facilities, and restrooms. Fourth, the Church wants to enforce its facility use policy to ensure that only biological men use the facilities designed for biological men, and that biological women use the facilities designed for

[2] State Defendants question whether the complaint raises the legal rights of its pastor, Michael Demastus, who is not a named plaintiff. *See* Brief in Support of Motion to Dismiss (hereinafter, "Motion to Dismiss") at 4 n.3. It does not. The Church has raised only its legal right to have its pastor preach and communicate doctrine consistent with the Church's faith.

biological women. *See* Ver. Compl. ¶¶ 25-27, 55-56, 59-69, 72-73, 95, 135-36, 149, 191. The Church has pleaded the specific statements it wants to communicate to eliminate any doubt as to what the Church wants to say, and how it wants to say it. *See SBA List*, 134 S. Ct. at 2343 (finding sufficient intent because "petitioners have pleaded specific statements they intend to make in future election cycles").

The Church's intended speech and conduct are religious communications. Private religious speech, "far from being a First Amendment orphan," enjoys full and robust First Amendment protection. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). And the Defendants' motion does not argue otherwise. The Church's intent to engage in constitutionally-protected speech and conduct provides a sufficient basis for each claim raised in the Church's complaint: violation of free speech, the religion clauses, expressive association, the right to peaceably assemble, and due process. *See* Ver. Compl. ¶¶ 110-197.

Importantly, the Church has also pled a second First Amendment injury for its speech and due process claims: chilled speech. The State Defendants admit that chilled speech is a First Amendment harm. Motion to Dismiss pp. 5-6; *see also Missourians for Fiscal Accountability*, 2016 WL 4056057 at *2 (a plaintiff demonstrates First Amendment injury "by alleging that it self-censored" due to a "credible threat of future prosecution"); *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004) (a plaintiff demonstrates an actual injury if she is objectively and reasonably chilled from exercising her First Amendment right to free expression to avoid enforcement consequences). Indeed, "[f]ederal courts most commonly find preenforcement challenges justiciable when the challenged statutes allegedly 'chill' conduct protected by the First Amendment." *Navegar, Inc. v. U.S.*, 103 F.3d 994, 999 (D.C. Cir. 1997);

see also Dana's R.R. Supply, 807 F.3d at 1241 (finding standing because litigants who are chilled from engaging in constitutionally-protected activity suffer a discrete harm).

The Church has pled ample evidence of chilled speech. The Church wants its pastor to preach the sermon on human sexuality, but has refrained out of fear that the sermon will violate the Act. *See* Ver. Compl. ¶ 140; Decl. of Michael Demastus at ¶ 2. The Church wants to publicly proclaim its beliefs about human sexuality and gender identity, but has refrained out of fear that such proclamation will violate the Act. *See* Ver. Compl. ¶ 140. And the Church wants to publicly communicate its written facility use policy, but has refrained because it fears such publication will violate the Act. *See id*. ¶ 141. All of these First Amendment expressive activities have been chilled because the Church reasonably fears that its communications will violate the law. This is no abstract fear of future harm. The Church wants to speak now but refrains from doing so because of the Iowa Civil Rights Act. That harm is continual, irreparable, and will not stop until this Court issues a preliminary injunction.

b. The Act "arguably proscribes" the Church's conduct.

State Defendants try to skirt the second "injury" factor by asserting that the Church has not proven that it is subject to the Iowa Civil Rights Act. But the Church does not have to definitely or conclusively prove that it is subject to the Act. It need only demonstrate that the Act *arguably* applies to the Church's conduct. *See SBA List*, 134 S. Ct. at 2344 (petitioners in a pre-enforcement challenge needed only to show that their intended speech is "arguably proscribed" by the law). The Church easily meets this standard.

The Church, like all houses of worship, invites nonmembers to its services and activities, and thus fits within the Act's broad definition of a public accommodation: "distinctly private place(s)" that offer services, facilities, or goods "<u>to nonmembers</u> for a fee or charge <u>or</u>

gratuitously." Iowa Code § 216.2(13)(a) (emphasis added). The Act applies to the Church, unless it is a "bona fide religious institution" and imposes "qualifications … related to a bona fide religious purpose." *Id*. § 216.7(2)(a). Neither of these crucial terms is defined.

Instead, the Act empowers the Commission—on a case-by-case basis and without any objective standard—to determine whether a church's services, speech, and activities have a "bona fide religious purpose." *See id*. § 216.5; *see also Rent-A-Ctr., Inc. v. Iowa Civil Rights Com'n*, 843 N.W.2d 727, 730 (Iowa 2014) ("The ICRC is entrusted by the legislature with interpreting, administering, and enforcing the Iowa Civil Rights Act"). The Act is to be construed broadly. *See* Iowa Code § 216.18. The Commission can interpret the religious purpose exemption as it chooses absent any statutory definitions or settled legal meaning. As a result, the Church does not know for any given event, activity, or communication whether the Commission would apply the law to its conduct or not.

But the Church has even greater reason to fear that the Act proscribes its activities: the Commission itself believes the Act applies to churches. The Commission published a brochure entitled "Sexual Orientation & Gender Identity: A Public Accommodation Provider's Guide to Iowa Law" and specifically addressed the circumstances in which ***churches*** are public accommodations and are excluded from the religious institution exemption.[3] The brochure asks: "Does this Law Apply to Churches?" It answers the question as follows:

> ***Sometimes***. Iowa law provides that these protections do not apply to religious institutions with respect to any religion-based qualifications when such qualifications are related to a bona fide religious purpose. ***Where qualifications are not related to a bona fide religious purpose, churches are still subject to the***

[3] The Commission has now published two different versions of its "Sexual Orientation & Gender Identity: A Public Accommodation Provider's Guide to Iowa Law" to address when "churches" and "places of worship" are public accommodations. But, as the State Defendants noted on page 8 of their brief, standing depends on the facts as they existed when the complaint was filed, so the Court cannot consider the most recent publication when evaluating standing.

> ***law's provisions.*** *(e.g. a child care facility operated at a church or* ***a church service open to the public****).* (emphasis added.)

In the Commission's own words, public church services trigger the Act's application to churches. At minimum, the brochure demonstrates that the Church's interpretation of the Act is reasonable and coincides with that of the Commission: the Act arguably applies to the Church.

Not only does the Act arguably apply to the Church, but it arguably prohibits the Church's desired conduct. First, the Church wants its pastor to preach a sermon about God's design for human sexuality and "gender identity," but the Act's speech ban (Iowa Code § 216.7(1)(b)) prohibits any communications that "indicate" that "persons of any particular … gender identity" are "unwelcome, objectionable, not acceptable, or not solicited." Similarly, the Church wants to publicly express its religious beliefs about human sexuality, but such views are unlawful if they could indicate that persons are unwelcome or objectionable based on gender identity. Third, the Church wants to publish its changing facility, shower, and restroom policy on the church website and as an insert in the weekly Sunday bulletin, but the Act's speech ban (Iowa Code § 216.7(1)(b)) and facility use mandate (Iowa Code § 216.7(1)(a)) prohibit any communications which would make a person feel unwelcome or objectionable, and also prohibit restricting use of facilities based on gender identity. Finally, the Church wants to enforce its facility use policy to ensure that only biological men use the facilities reserved for biological men, and that biological women use the facilities reserved for biological women. But this, too, is prohibited by both the speech ban and facility use mandate. In fact, the Church's shower and restroom policy arguably violates the facility use mandate *on its face*. Thus, in light of the law's plain language and the Commission's own interpretation, the Church's intended conduct is arguably proscribed by the Act.

Finally, an intent to engage in conduct arguably proscribed by the law is not required for the Church's due process vagueness claim. For this claim, the Church need only allege that the Act is unclear and that it cannot know with any certainty whether the Act applies to its conduct. *See Harrell v. The Fla. Bar*, 608 F.3d 1241, 1254, 1256 (11th Cir. 2010) (requiring litigant to prove that he "would *arguably* be affected by the rules, but the rules are *at least arguably vague* as they apply to him") (emphasis original). The fact that the Act is vague does not foreclose the Church's argument that the Act arguably applies to it and the Church is entitled to pursue both theories. *See id.* at 1264 n.8 ("[W]e recognize that there is a measure of tension between Harrell's two constitutional theories—one claiming that the rules lack a meaningful standard, the other claiming that they plainly and specifically prohibit what he wishes to do. Harrell is entitled to pursue both of these theories…"). The Act arguably applies to the Church's conduct, but it cannot know for certain. Absent "statutory definitions, narrowing context, or settled legal meanings," the Church is left without adequate warning as to when or whether its constitutionally-protected conduct violates the law. *U.S. v. Williams*, 553 U.S. 285, 306 (2008).

c. The Church faces a credible threat of prosecution.

Finally, the Church's chill and fear of engaging in its constitutionally-protected conduct is objectively reasonable because there is a credible threat of enforcement. While Defendants argue that the Church must show past or ongoing threat of prosecution, *see* Motion to Dismiss at 6-8, this is not the legal standard for a First Amendment violation. Courts routinely find standing in pre-enforcement challenges without plaintiffs identifying a prior threat made against them or anyone else. *See 281 Care Comm.*, 638 F.3d at 627 ("To establish injury in fact for a First Amendment challenge to a state statute, a plaintiff need not have been actually prosecuted or threatened with prosecution").

The standard for credible threat "is quite forgiving" and sets a "low threshold." *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 14-15 (1st Cir. 1996); *see also Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003) ("As to whether a First Amendment plaintiff faces a credible threat of prosecution, the evidentiary bar that must be met is extremely low"). Indeed, courts assume a credible enforcement threat when a non-moribund law facially restricts a party's desired activities.[4] "[F]ear of prosecution under a viable state statute is objectively reasonable." *St. Paul Area Chamber of Commerce*, 439 F.3d at 487. The Supreme Court has repeatedly found that plaintiffs have standing to bring pre-enforcement challenges to laws that have *never* been enforced. *See 281 Care Comm.*, 638 F.3d at 628 (stating same).[5] Only "in extreme cases approaching desuetude" will total lack of enforcement potentially undermine the reasonableness of chill. *Id.* (noting that a moribund statute that had been enforced only once in 80 years no longer presented a credible threat of prosecution).

The Iowa Act is far from moribund. The State Defendants admit that the Act was amended relatively recently. *See* Motion to Dismiss at 6 (sexual orientation and gender identity were added less than 10 years ago). And the Defendants have not—via official policy or long

[4] *U.S. v. Sup.Ct. of N.M.*, No. 14-2037, 2016 WL 3166830, at *8 (10th Cir. June 7, 2016) ("The threat of prosecution is generally credible where a challenged 'provision on its face proscribes' the conduct in which a plaintiff wishes to engage, and the state 'has not disavowed any intention of invoking the…provision' against the plaintiff."); *Hedges v. Obama*, 724 F.3d 170, 200 (2d Cir. 2013) (noting that in credible threat analysis "we have presumed that the government will enforce the law."); *Act Now to Stop War & End Racism Coal. v. D.C.*, 589 F.3d 433, 435 (D.C. Cir. 2009) (noting that "standing to challenge laws burdening expressive rights requires only 'a credible statement by the plaintiff of intent to commit violative acts and a conventional background expectation that the government will enforce the law.'"); *N. C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) ("A non-moribund statute that 'facially restrict[s] expressive activity by the class to which the plaintiff belongs' presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary."); *Gardner*, 99 F.3d at 15 ("[W]hen dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence.").

[5] In fact, courts hear pre-enforcement challenges to laws enacted long ago and never enforced. *See, e.g., Epperson v. State of Ark.*, 393 U.S. 97, 98 (1968) (entertaining challenge to 40-year-old statute that had never been enforced); *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 32 (1st Cir. 1999) (finding credible threat of prosecution under a statute that had never been enforced, in part because it was enacted "only twenty years ago").

history of disuse—refused to enforce the Act. *See 281 Care Comm.*, 638 F.3d at 628. In fact, the Commission admits that it enforced the Act against a religious nonprofit just three years ago. *See* Motion to Dismiss at 6; *see also* Ver. Compl. ¶ 105 n.4 (citing 2013 news article). And, since the Church plainly alleges that the Act restricts its desired activities, it satisfies the threshold for a credible threat of prosecution.

Other factors bolster the credibility of this threat. First, the State Defendants did not disavow enforcement in response to this litigation. *See Wersal v. Sexton*, 613 F.3d 821, 829-831 (8th Cir. 2010) (noting that case was ripe because state authorities did not disavow enforcement in response to plaintiff's pre-enforcement challenge). At no point in this litigation have Defendants affirmatively pled that the Act would *not* apply to the Church when preaching a sermon, publishing its facility use policy, communicating its beliefs about biological sex, hosting a Bible study, or any of the other myriad activities the Church undertakes. Silence speaks volumes. If there were truly no credible threat of enforcement, then the Defendants could have readily pled to the Court that churches are not public accommodations and therefore not subject to the Act. *See Presbytery of N.J. of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 58-61 (3d Cir. 1994) (court found no credible threat of prosecution after state defendants filed an affidavit stating that churches were not public accommodations and were not subject to the nondiscrimination law). But the State Defendants have made no such assurances.

Second, the State Defendants are actively defending the Act on the merits and affirmatively arguing that they *can* constitutionally apply the Act to the Church's conduct. *See* State Defendants' Resistance to Plaintiff's Motion for Preliminary Injunction at 6-8 (ECF No. 24); *see also Krantz v. City of Fort Smith*, 160 F.3d 1214, 1217 (8th Cir. 1998) (finding standing because the city "has vigorously defended the ordinance and has never suggested that it would

refrain from enforcement."); *Harrell*, 608 F.3d 1257 ("[I]f the enforcing authority is defending the challenged law or rule in court, an intent to enforce the rule may be inferred.").

Third, any person claiming to be aggrieved by the Church's actions can file a complaint, in addition to the enforcement power wielded by the commission, any commissioner, and the attorney general. *See* Iowa Code § 216.15(1). As the Supreme Court has noted, the enforcement threat increases when "any person" can file a complaint, not just "state officials who are constrained by explicit guidelines or ethical obligations." *SBA List*, 134 S. Ct. at 2345; *see also Balogh v. Lombardi*, 816 F.3d 536, 542 (8th Cir. 2016) (noting that "a credible threat that private parties will enforce a statute may also satisfy the injury-in-fact requirement").[6]

Defendants ignore this precedent. Instead, the State Defendants rely on two district court cases from another circuit for the proposition that the Church cannot face a credible threat of enforcement because the Church's violation of the law depends on a third party asking to use the Church's facilities in a way that violates its beliefs. *See* Motion to Dismiss at 7-8 (relying on *Knapp v. City of Coeur D'Alene*, 2016 WL 1180168 (D. Idaho March 25, 2016) and *Temple v. Abercrombie*, 903 F.Supp.2d 1024 (D. Haw. 2012)). But that is not the standard. The Eighth Circuit assumes a credible enforcement threat when a non-moribund law restricts a plaintiff's desired activities—even if the law has never been enforced. *See St. Paul Area Chamber of Commerce*, 439 F.3d at 487 ("[F]ear of prosecution under a viable state statute is objectively reasonable."); *see also 281 Care Comm.*, 638 F.3d at 628 (noting that the Supreme Court has repeatedly found that plaintiffs have standing to bring pre-enforcement challenges to laws that

[6] The Defendants mistakenly cite *Balogh* for the proposition that "fears of an enforcement action by a third party complainant are speculative." Motion to Dismiss at 6. But *Balogh* held the exact opposite: "[O]ur recent decision in *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957 (8th Cir. 2015), suggests that a credible threat that private parties will enforce a statute may also satisfy the injury-in-fact requirement." 816 F.3d at 542 (internal quotation marks omitted).

have *never* been enforced). Because the Act was amended relatively recently and the Commission is actively enforcing the law, there is a credible threat of enforcement.

Thus, the Church alleges an injury in fact. It alleges an intent to engage in constitutionally-protected conduct that is arguably proscribed by law and carries a credible threat of enforcement, which provide a sufficient basis for each claim raised in the Church's complaint: violation of free speech, the religion clauses, expressive association, the right to peaceably assemble, and due process. The Church also alleges that its speech is objectively and reasonably chilled, which supplies an independent basis for injury in fact to the Church's free speech and due process rights.

2. The Church's injuries are traceable to the State Defendants and redressable by the Court.

Not only is the Church suffering an injury, but that injury is traceable to and redressable by the State Defendants. As the Defendants noted, causation "requires the named defendants to possess authority to enforce the complained-of provision." *Balogh*, 816 F.3d at 543. Both the Commissioners and Attorney General Miller can file a complaint to enforce the law. *See* Iowa Code § 216.15(1). Enforcement power is the power to initiate prosecution. *Cf. Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015) (finding the governor and attorney general lacked enforcement power because they could not initiate a complaint). Moreover, Iowa courts have noted both the Commission's and the Iowa Attorney General's enforcement power. *See, e.g, Rent-A-Ctr.*, 843 N.W.2d at 730 ("The ICRC is entrusted by the legislature with interpreting, administering, and enforcing the Iowa Civil Rights Act."); *id.* at 731 ("The Iowa Attorney General's criminal justice bureau prosecutes the charges on behalf of the ICRC.").

As for redressability, "a party satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself." *281 Care Comm.*, 638 F.3d at 631. Because both the Commissioners and Attorney General Miller are authorized to institute a complaint, granting the requested declaratory and injunctive relief against these defendants would redress a discrete injury to the Church. *See id.* (finding standing where the defendants, including the attorney general, were authorized to institute a complaint in addition to any other individual or organization).

B. Eleventh Amendment sovereign immunity is inapplicable.

Contrary to the State Defendants' posture, the Defendants—not the Church—bear the burden of proving they are entitled to immunity. *See, e.g., Nair v. Oakland Cnty. Cmty. Mental Health Auth.*, 443 F.3d 469, 474 (6th Cir. 2006) ("[T]he entity asserting Eleventh Amendment immunity has the burden to show that it is entitled to immunity."); *see also ITSI T.V. Prods., Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1292 (9th Cir. 1993) (holding that the state defendant had the burden of proving Eleventh Amendment immunity).

But the State Defendants have not—and cannot—establish any immunity because federal suits against state officials in their official capacities may proceed under the *Ex Parte Young* exception to Eleventh Amendment immunity when the plaintiff seeks prospective relief against an ongoing violation of federal law.[7] *See 281 Care Comm.*, 638 F.3d at 632. To determine

[7] Circuit courts have consistently concluded that Eleventh Amendment immunity is properly characterized as an affirmative defense, not a jurisdictional bar. *See Aholelei v. Dep' of Public Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007) ("Eleventh Amendment immunity is an affirmative defense"); *Christy v. Penn. Tpk. Comm'n*, 54 F.3d 1140, 1144 (3d Cir. 1995) ("whatever its jurisdictional attributes, [Eleventh Amendment immunity] should be treated as an affirmative defense"); *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 237–39 (2d Cir. 2006) (treating Eleventh Amendment immunity "as akin to an affirmative defense"); *Sung Park v. Ind. Univ. Sch. of Dentistry*, 692 F.3d 828, 830 (7th Cir. 2012) ("sovereign immunity is a waivable affirmative defense."); *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 147 (4th Cir. 2014) (noting approvingly that other circuits have concluded Eleventh Amendment immunity is an affirmative defense). As such, Eleventh Amendment immunity is not the proper basis for a 12(b)(1) motion.

whether this exception applies, a court conducts "a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id*.

The Church plainly seeks prospective relief. *See* Ver. Compl. Prayer for Relief. The State Defendants also have enforcement authority, as discussed above, which is a connection "strong enough to bring this suit under the *Ex Parte Young* exception." *281 Care Comm.*, 638 F.3d at 632.

C. The Church's claims are ripe because the issues are fit for judicial decision and the Church is suffering ongoing harm.

Article III standing and ripeness issues "boil down to the same question." *SBA List*, 134 S. Ct. at 2347 n.5. Because the Church has shown constitutional standing, *supra*, there are no genuine prudential ripeness concerns. *See id*. at 2347 (calling into question the continuing vitality of the prudential ripeness doctrine).

Regardless, the fitness and hardship factors are easily satisfied. First, the Church's claims present issues that are "purely legal, and will not be clarified by further factual development." *Id.* The State Defendants have not suggested that the issues warrant further factual development. Additionally, denying prompt judicial review will impose a substantial hardship on the Church, forcing it to choose between not speaking, or risking Commission proceedings and substantial penalties. *See id*.

D. The Church is not required to exhaust administrative remedies when there is imminent threat to loss of constitutional rights.

The Church is not required to exhaust administrative remedies because it brought this lawsuit under 42 U.S.C. § 1983 for deprivation of its civil rights. *See* Ver. Compl. ¶ 31; *see also Porter v. Nussle*, 534 U.S. 516, 523 (2002) ("[P]laintiffs pursuing civil rights claims under 42

U.S.C. § 1983 need not exhaust administrative remedies before filing suit in court."); *see also Gerlich v. Leath*, 2015 WL 4097755, at *11 (S.D. Iowa January 6, 2015) ("[T]here is generally no requirement under § 1983 that Plaintiffs must exhaust all administrative remedies before bringing suit."). Moreover, the Church has not claimed that the Commission's brochure is an "agency action" under the Iowa Administrative Procedures Act. Rather, the Commission's publication simply illustrates the constitutional flaw with the religious institution exemption that gives the Commission unfettered discretion to determine what activities of a church are sufficiently "religious."

II. The Church has stated a claim upon which relief can be granted.

The Church has stated multiple grounds upon which relief can be granted. "In deciding a motion to dismiss under Rule 12(b)(6), a court assumes all facts in the complaint to be true and construes all reasonable inferences most favorably to the complainant." *U.S. ex rel. Raynor v. Nat'l Rural Utils. Co-op. Fin., Corp.*, 690 F.3d 951, 955 (8th Cir. 2012). As explained in the Church's memorandum in support of its motion for a preliminary injunction (ECF No. 9-1) and reply in support of that motion (ECF No. 27), the Church's complaint states plausible claims for relief.

III. *Younger* abstention does not apply because there is no concurrent state proceeding.

The State Defendants' argument that *Younger* abstention applies is simply wrong. The Commission's brochure posted on its website does not constitute a "state proceeding" in any sense of the term. *See Banks v. Slay*, 789 F.3d 919, 923 (8th Cir. 2015) (*Younger* abstention is only warranted during parallel "state criminal proceedings, civil enforcement proceedings, and civil proceedings involving certain orders"). The Defendants are unable to identify any legal

authority that would bolster such a contorted interpretation. Absent a state court or administrative proceeding, *Younger* abstention does not apply and no such proceeding exists here.

CONCLUSION

The State Defendants have conceded that the Iowa Civil Rights Act applies to churches, and the Act plainly chills the Church's protected First Amendment activity. The Church is in an impossible position: violate its religious beliefs to avoid punishment, or adhere to its religious beliefs and risk punishment. Pre-enforcement challenges are intended to remedy this constitutional predicament by removing the chill on constitutionally-protected speech. The Church has pled sufficient facts to meet Article III's jurisdictional requirements. Accordingly, the Motion to Dismiss should be denied.

Dated: August 15, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on, I electronically filed the foregoing paper with the Clerk of Court by using the CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Date: August 15, 2016

/s/ Steven O'Ban
Steven O'Ban