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

SHAMROCK HILLS, LLC, a Kansas limited liability corporation d/b/a SHAMROCK ROOFING AND CONSTRUCTION, Plaintiff, v. THE STATE OF IOWA; THE IOWA INSURANCE DIVISION; DOUG OMMEN, in his official capacity as Insurance Commissioner of the Iowa Insurance Division; and DAVID SULLIVAN, in his official capacity as Assistant Bureau Chief of the Iowa Insurance Division Market Regulation Bureau, Defendants.	Case No. 4:24-cv-00340-RGE-HCA **PLAINTIFF'S RESISTANCE TO DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION AND BACKGROUND

Four defendants—the State of Iowa, an agency, and two individuals (collectively, "the State")—seek dismissal of Shamrock's Complaint alleging constitutional violations. The Court should deny the State's motion.

Shamrock Hills, LLC is a residential contractor that conducts business in several states, including Iowa. On July 2, 2024, the State served Shamrock with a "Warning Notice" letter stating that the Iowa Insurance Division believed that Shamrock was acting as an unlicensed public adjuster in violation of Iowa Code §§ 103A.71(3) and 522C.2(7). ECF No. 13-1. The letter did not specify any of the alleged improper conduct, so Shamrock sent a letter seeking clarification. On September 5, 2024, the State responded with a list of online activity that allegedly triggered the initial warning letter. ECF No. 13-2. There has been no further agency action since then.

On September 25, 2024, Shamrock filed this action. Shamrock claims that Iowa Code §§ 103A.71(3) and 522C.2(7), both facially and as applied to Shamrock, infringe speech protected by the First Amendment, and are void for vagueness under the Fourteenth Amendment. The laws are impermissible content-based and speaker-based restrictions, they fail to give proper notice of proscribed conduct, and they invite arbitrary enforcement. Shamrock had no obligation to adhere to the Iowa Administrative Procedure Act because its claims challenge only the constitutionality of the statutory scheme. The Court should deny the State's motion to dismiss.

ARGUMENT

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Goldfinch Lab'y, P.C. v. Iowa Pathology Assocs., P.C.*, No. 4:24-CV-00168-RGE-HCA, 2024 WL 5205936, at *3 (S.D. Iowa Dec. 13, 2024) (citation omitted). Shamrock's Complaint meets that test.

I. The State and the Division Are Immune, But the Individual Defendants Are Not.

The State and the Division correctly argue that they are immune from suit under the Eleventh Amendment. *See PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 499 (2021) ("[S]tates retain their immunity from suit regardless of the citizenship of the plaintiff."). As the State concedes, however, "Shamrock's claims against Insurance Commissioner Doug Ommen and Employee David Sullivan are not barred by the Eleventh Amendment." ECF No. 10-1 at 4.

II. Shamrock Is Not Limited by the Iowa Administrative Procedure Act.

Shamrock is not required to follow the procedural requirements of the Iowa Administrative Procedure Act (APA) because it is not challenging any agency action under Iowa law. It is challenging the statutory framework's constitutionality under the U.S. Constitution. The APA cannot limit the jurisdiction that federal courts have over federal constitutional questions. *See Wong v. Minn. Dep't of Human Servs.*, 820 F.3d 922, 931 (8th Cir. 2016) (confirming that "a state statute cannot proscribe or limit federal jurisdiction in that manner"). "In determining its jurisdiction a federal court 'must look to the sources of its power and not to acts of states which have no power to enlarge or to contract the federal jurisdiction.'" *Thompkins v. Stuttgart Sch. Dist. No. 22*, 787 F.2d 439, 441 (8th Cir. 1986) (citation omitted). When "a party claims that his federal constitutional rights have been abridged by State administrative action or by those claiming to act under authority of State law, he is not required to exhaust judicial remedies in the State courts before resorting to federal courts for vindication of his rights." *Mini Cinima 16 Inc. of Fort Dodge v. Habhab*, 326 F. Supp. 1162, 1164 (N.D. Iowa 1970). This court has jurisdiction over Shamrock's federal constitutional claims.

The State misplaces reliance on *Climbing Kites LLC v. Iowa*, 739 F. Supp. 3d 742, 760–61 (S.D. Iowa 2024). There, the plaintiffs argued that federal law preempted the state agency's rules, and that the agency failed to follow the proper rulemaking procedures under Iowa law. *Id.* at 754.

They made no claims under the federal constitution. The court explained that "any challenge to an action by a state agency *under Iowa law* must be brought in state court." *Id.* at 761 (emphasis added). The State uses this quote to support its proposition that "[j]udicial review under chapter 17A is not proper in federal court." ECF No. 10-1 at 4-5. There are several problems with this argument. First, Shamrock is not challenging any specific state agency action. Second, Shamrock is not bringing claims under Iowa law. The State's reliance on *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1333 (S.D. Iowa 1997), faces similar problems. The plaintiff in that case was seeking a declaratory action allowing it access to the defendant's land under Iowa law. *Id.* The court decided that the plaintiff had an opportunity to exhaust its administrative remedies to obtain the easement but had not yet done so. *Id.* Yet as in *Climbing Kites*, there was no federal constitutional challenge.

The State also argues that if a party's claims require exhaustion via an administrative agency and the party also has constitutional claims, the party must raise the constitutional claims before the agency. *See* ECF No. 10-1 at 6; *Soo Line R.R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994). That may well be true, but Shamrock's claims never required exhaustion in the first place. The cases the State cites deal only with alleged violations of the Iowa constitution, and they assume that the state constitutional issues are coupled with other issues properly before the agency. *See Soo Line R.R. Co.*, 521 N.W.2d at 688; *Shell Oil Co. v. Bair*, 417 N.W.2d 425, 429–30 (Iowa 1987). Iowa Code § 17A.19 is thus inapplicable because Shamrock need not exhaust state administrative remedies to make a federal constitutional claim against a statutory framework in federal court.

III. The Court Should Deny the Motion to Dismiss Shamrock's First Amendment Claims.

The Free Speech Clause of the First Amendment to the United States Constitution, applicable to the State of Iowa through the Fourteenth Amendment, prohibits laws "abridging the

freedom of speech." U.S. Const. amend. I. "Above all else the First Amendment means that government generally has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 618 (2020) (cleaned up). While there are, of course, exceptions, the State does not claim any such exceptions exist in this matter. Absent historical exception, "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). "[L]aws favoring some speakers over others" likewise "demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Barr*, 591 U.S. at 619–20; *see also Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 777–78 (2018) ("*NIFLA*") ("This Court's precedents are deeply skeptical of laws that 'distinguis[h] among different speakers, allowing speech by some but not others.'" (citation omitted)). As detailed below, because, in Iowa, a person can be deemed to be an unlicensed public adjuster by virtue of only the message communicated, Iowa improperly regulates speech, which must meet the onerous demands of strict scrutiny.

A. Shamrock's First Amendment Claims Implicate Speech, Not Conduct.

The State does not even argue that its statutory scheme can survive strict scrutiny. Instead, the State argues that Iowa Code §§ 103A.71(3) and 522C.2(7) do not regulate speech or expressive conduct. According to the State, those statutes regulate "commercial and professional conduct" and thus the statutes need only survive rational-basis review. ECF No. 10-1 at 9. The State is incorrect.

"The law here may be described as directed at conduct . . . but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). Iowa's public adjuster law "regulates speech

on the basis of its content. [Residential contractors] want to speak to [clients and insurance companies], and whether they may do so under [Iowa law] depends on what they say." *Id.* at 27. And although the First Amendment does not prevent restrictions "directed at commerce from imposing incidental burdens on speech," the "First Amendment requires heightened scrutiny *whenever* the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Sorrell*, 564 U.S. at 566 (emphasis added; citation omitted). Expressive conduct is also entitled to such heightened scrutiny. *See Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.").

Iowa Code §§ 103A.71(3) and 522C.2(7) regulate speech, not conduct. For its part, the State fails to identify any authority where a court held that restrictions based upon aid or advice to an individual regulates conduct, not speech. The only apparent reported decision where a public adjuster law has been challenged on grounds that it violates the First Amendment plainly reveals that Iowa improperly regulates speech, not conduct. *See generally Texas Dep't of Ins. v. Stonewater Roofing, Ltd.*, 696 S.W.3d 646 (Tex. 2024). The State meekly references this decision, ECF No. 10-1 at 13, but neglects the glaring differences between Texas and Iowa's public adjusting laws.

In *Stonewater Roofing*, the Texas Supreme Court evaluated the constitutionality of Texas's public adjuster laws. Just as the State frames its motion to dismiss here, the constitutionality of the Texas public adjuster laws depended on whether the laws were directed at speech or conduct. *Stonewater Roofing*, 696 S.W.3d at 654. That question, in turn, depended on the scope of what the state of Texas considered to be a public adjuster. *Id.* at 656 ("The nub of the dispute concerns the scope of the defined profession itself, which in turn determines whether the licensing and dual-

capacity laws apply to a commercial engagement."). There was no genuine dispute in that action, nor is there a genuine dispute in this action, that a state has the right to require a license to practice a profession and that a state can similarly restrict the ability for non-licensees to falsely advertise as licensees. *Id.* at 655–56.

The Texas law, as interpreted by the Texas Supreme Court, defined "the *role* a person *plays* in a *nonexpressive* commercial transaction, not what anyone may or may not *say*." *Id.* at 656. More specifically, under Texas law, "[a]s defined, the profession's actuating activity and dominant focus is employment in a representative (or agency) capacity." *Id.* "Under state law, assuming authority to act 'on behalf of' someone else gives rise to a status of legal significance that carries material consequences for the principal and imposes corresponding burdens on the agent. Status and capacity are not speech." *Id.* Accordingly, because the Texas laws only restricted one's ability to act as an agent for insureds, and not what speech may have been uttered incidental to the agency relationship, Texas's public adjuster laws were found to be constitutional. *See id.* at 655.[1]

Iowa's public adjuster laws differ fundamentally from those of Texas. To be sure, Iowa Code § 522C.2(7), like the Texas statute at issue in *Stonewater Roofing*, uses the phrase "on behalf

[1] The concurring opinions in *Stonewater Roofing* underscored the limited nature of the majority's holding and the unconstitutionality of a broader application of the public-adjuster laws. Justice Blacklock reasoned that Texas's statute "regulates only the agency relationship between parties in a commercial transaction," observing that "the contractor and the insurance company are free to talk all day long about the negotiation and settlement of an insured's claim, as long as the contractor does not '*act[ ] on behalf of* an insured in negotiating for or effecting the settlement.'" *Stonewater Roofing*, 696 S.W.3d at 664 (Blacklock, J., concurring) (citation omitted). Similarly, Justice Young explained that the decision's "narrow construction avoid[ed] serious constitutional problems," permitting a contractor "to do quite a lot that the government may want to forbid—including discussing, in detail, the damage and costs of repair with the insurance company." *Id.* at 668 (Young, J., concurring).

of." *Compare* Iowa Code § 522C.2(7), *with Stonewater Roofing*, 696 S.W.3d at 650 (quoting statute). Yet under the Texas statute, "status and capacity" were the "actuating activity and dominant focus," meaning that "speech [was] not remotely the defining characteristic of the insurance adjuster's job." *Stonewater*, 696 S.W.3d at 656. Not so under Iowa's scheme.

Under Iowa Code § 522C.2(7)'s plain terms, speech is at the heart of the insurance adjuster's job. Unlike the Texas statute, Iowa Code § 522C.2(7) defines a public adjuster as a person who for compensation "acts on behalf of an insured *by* [among other things] . . . aiding an insured in negotiating . . . advertising . . . or advising an insured." Iowa Code § 522C.2(a)–(c) (emphasis added). In other words, under Iowa law, one becomes an agent not by conduct, but by "aiding," "advertising," or "advising an insured"—by "what a person *says* about property subject to an insurance claim or to whom they *say* it." *See Stonewater Roofing*, 696 S.W.3d at 658 (emphasis added). Unlike Texas's law, Iowa law thus restricts "what a person may or may not say or to whom they may or may not speak." *Id.*

True, Iowa Code § 103A.71(3) differs from section 522C.2(7), restricting residential contractors from "represent[ing] or negotiat[ing] *on behalf* of insureds." (emphasis added). But as the State underscores, ECF No. 10-1 at 10, the Iowa Supreme Court has interpreted the statute to forbid residential contractors from acting like public adjusters, as defined in § 522C.2(7). *See 33 Carpenters Constr., Inc. v. State Farm Life & Cas. Co.*, 939 N.W.2d 69, 79–81 (Iowa 2020). Accordingly, as interpreted by the Iowa Supreme Court and the State, § 103A.71(3) also broadly, and unconstitutionally, restricts residential contractors like Shamrock from exercising their First Amendment rights through "aiding" or "advising" an insured. The State readily admits as much. *See* ECF No. 10-1 at 10 ("residential contractors are forbidden under Iowa Code section

103A.71(3) from engaging in the various forms of conduct described in Iowa Code section 522C.2(7). . . . [T]he latter statute informs the proscriptions of the former statute . . . .").

By defining public adjuster based upon whether a person aids or advises homeowners, Iowa regulates speech, not conduct.[2] And because those statutes impose a burden "based on the content of the speech," they impose "more than an incidental burden on protected expression." *Sorrel*, 564 U.S. at 567. Heightened scrutiny thus applies. *See id.* at 566–67.

The conclusion that Iowa law restricts speech, not conduct, is highlighted by the Insurance Division's Warning Notice to Shamrock. For example, the State's September 5, 2024, letter asserts that the following customer reviews contain "concerning statements" about Shamrock's status as a public adjuster: "Helped up [sic] navigate the insurance red tape"; "Helped me start the claims process with my insurance company."; "They helped me with the insurance claim"; "Helped us navigate the insurance requirements"; "Helped us navigate the red tape"; "Shamrock walked me through everything with insurance reimbursement"; "They helped me with my insurance claim". ECF No. 13-2 at 1-2. Each of these statements involve assistance or advice that primarily involves speech. By attempting to regulate this "conduct," the State attempts to regulate Shamrock's speech. "If speaking to clients is not speech, the world is truly upside down." *Otto v. City of Boca Raton*, 981 F.3d 854, 866 (11th Cir. 2020).

B. If Aiding or Advising an Insured Were Conduct, They Qualify as Protected Expressive Conduct.

Because the public adjuster laws directly implicate speech, not conduct, the Court need not evaluate whether any alleged conduct is expressive. *Cf. Black*, 538 U.S. at 358. But even if aiding

[2] Shamrock does not challenge the State's ability to generally regulate and require licensure for "public adjusters." Nor does Shamrock challenge Iowa's ability to restrict unlicensed persons from advertising as though they are licensed. Rather, it is the way Iowa defines "public adjuster" that renders its public adjuster laws unconstitutional.

or assisting an insured could be construed as "conduct," and it cannot, the State is wrong that "[n]o reasonable person could believe, for example, that advocating for a homeowner in their insurance claim is a form of expression." ECF No. 10-1 at 12. Justices Blacklock and Boyd of the Texas Supreme Court plainly disagreed: "Negotiation of a settlement is surely expressive." *Stonewater Roofing*, 696 S.W.3d at 663 (Blacklock, J., concurring). And that makes sense.

A contractor can aid or advise a homeowner in several ways that involve expression. For example, when a contractor advises a homeowner on the full nature or cause of damage to their property, which necessarily implicates an insured's claim, a contractor is expressing an idea about that property. A contractor is similarly expressing an idea about the same issue when it speaks to the insurance company about the nature and extent of the damage. Whether defined as actual speech or expressive conduct, then, the regulations impose "more than an incidental burden on protected expression," dictating the application of heightened scrutiny. *Sorrel*, 564 U.S. at 567.

C. The State Cannot Evade Heightened Scrutiny by Labeling the Statutes as Professional or Commercial Regulations.

The State relies on the Supreme Court's decision in *NIFLA* to suggest that Iowa's public adjuster law is an innocuous regulation of professional conduct. ECF No. 10-1 at 10–12. It is true that the Supreme Court has upheld regulations of professional conduct that incidentally burden speech. But the Supreme Court expressly refused to adopt a doctrine that "treat[s] professional speech as a unique category that is exempt from ordinary First Amendment principles." *NIFLA*, 585 U.S. at 773. Indeed, the Supreme Court rejected the idea that to make something a profession, it must simply "involve[] personal services and require a professional license from the State." *Id.* That, according to the Supreme Court, would "give[] the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Id.* "States cannot choose the protection that speech receives under the First Amendment, as that would give them a

powerful tool to impose 'invidious discrimination of disfavored subjects.'" *Id.* (citation omitted). Courts have recognized that "*NIFLA* rejected the proposition that First Amendment protection turns on whether the challenged regulation is part of an occupational-licensing scheme." *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 932 (5th Cir. 2020). Yet this is precisely what the State is attempting with its public adjuster laws.

After mischaracterizing *NIFLA*, the State erroneously claims that "[i]f banning certain unlicensed persons from engaging in conduct requiring licensure immediately raised the specter of a First Amendment violation, then a state's police power to regulate professional occupations would be nullified." ECF No. 10-1 at 12. Of course, states are permitted to implement professional licensing regulations, but they must do so within the confines of the Constitution. States do not have *carte blanche* authority to regulate speech by calling that speech a professional regulation. Texas Supreme Court Justice Young's concurrence in *Stonewater Roofing* thoroughly outlines the Constitutional problems with the theory of absolute regulatory power the State apparently posits in this matter:

> Legislation must satisfy not only due process, of course, but also every other constitutional requirement. And with the expansion of professional licensing to a greater number of professions, challenges like this one increasingly sound in free speech. *Asserting* that a licensure requirement burdens protected speech does not make it so, but neither is it inherently implausible. Imagine licensing not just the structural engineer who will ensure that a new cathedral does not collapse, but also the bishop who will preach in it. Or not just the truck driver who transports stacks of hot-off-the-press newspapers, but the journalists who write the articles printed in them. Likewise for poets, painters, political consultants, and on and on. Would such licenses satisfy the free-speech clause (and perhaps other clauses)?
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> The scope of the State's theory is not entirely clear. But, as I understand it, that theory encompasses examples like these by converting speech into conduct, much as nominalizations convert verbs into nouns: the "act" of doing a job that involves speech, especially when it is a *paid* "act." Under this view, only "conduct" is reached—"journalism" becomes the "act" of taking money from employers to produce news articles for those employers, for instance. The State's theory seems to be that it gets to decide who is competent to undertake *conduct* and can impose a licensure requirement without offending—or even implicating—the free-speech

> clause. The State's argument appears to at least agree that "pure speech" cannot be nominalized into mere conduct to evade First-Amendment review—but I am not sure the State truly concedes that any profession involves "pure speech." It describes "prototypical professional conduct" as "taking defined *actions* on behalf of a client in exchange for payment."
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> The problem, therefore, is not that the State denies that expression is protected. Rather, it is how broadly the State may seek to define "conduct." And the more broadly one defines "conduct"—using the formula "*acting* as [fill-in-the-blank]"—the less room there is for speech. The less speech, the less likely that any regulation is subject to an exacting judicial inquiry. Thus, even accepting the true rule that the First Amendment permits only incidental burdens on speech without heightening the scrutiny, the effect of that rule depends entirely on what we *classify* as speech, conduct, expressive, non-expressive, and the like.

Stonewater Roofing, 696 S.W.3d at 666–67 (Young, J., concurring).

In short, the First Amendment does not permit states to evade its protections through wordplay. *See Nat'l Inst. of Fam. & Life Advocs.*, 585 U.S. at 773 ("State labels cannot be dispositive of the degree of First Amendment protection." (cleaned up)); *NAACP v. Button*, 371 U.S. 415, 429 (1963) ("[A] State cannot foreclose the exercise of constitutional rights by mere labels."). A state may not regulate speech by calling it conduct. Nor is it sufficient to merely brand a legislative scheme a regulation of commercial or professional speech. That is because even such regulations may impose no more than "incidental burdens on speech." *Sorrell*, 564 U.S. at 567. The statutes here regulate speech or expressive conduct, regardless of how the State brands them.

D. The Statutes Are Content- and Speaker-based Restrictions, Making Them Presumptively Invalid, and the State Does Not Argue Otherwise.

In the end, the Iowa public adjuster laws restrict speech or expressive conduct. Sections 103A.71(3) and 522C.2(7) are clearly content- and speaker-based restrictions, and the State does not attempt to assert otherwise. *See Sorrell*, 564 U.S. at 564 (2011). To regulate content- or speaker-based speech, the State must show that the laws are narrowly tailored to serve compelling state interests. *See Reed*, 576 U.S. at 163; *Sorrell*, 564 U.S. at 565 (reasoning that where a statute

was "designed to impose a specific, content-based burden on protected expression," "[i]t follows that heightened judicial scrutiny is warranted"). The State does not defend its laws under strict scrutiny (nor could it) and, as such, the motion to dismiss the First Amendment claims should be denied. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 ("Content-based regulations are presumptively invalid.").

IV. The Court Should Deny the State's Motion to Dismiss Shamrock's Vagueness Claims.

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The "[v]agueness doctrine is an outgrowth of the Due Process Clause." *United States v. Williams*, 553 U.S. 285, 304 (2008). Under the Fourteenth Amendment, a statute may be unconstitutionally vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). In other words, a vague law may fail to provide adequate notice of what is proscribed and thus "'may trap the innocent man.'" *Vill. of Hoffman Ests. v. Flipside*, 455 U.S. 489, 498 (1982) (citation omitted). A vague law also "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis.'" *Id.* (citation omitted).

A. A Facial Vagueness Challenge Is Permissible Regardless of Whether a Law Is Unconstitutional as Applied.

Vagueness challenges come in two forms. *See United States v. Stupka*, 418 F. Supp. 3d 402, 405 (N.D. Iowa 2019). One is an as-applied challenge. *See id.* at 406. In such a challenge, "the court may 'leav[e] aside any concerns about facial invalidity,' and asks only whether the law in question is impermissibly vague as to the conduct of the specific challenger." *Id.* (citation omitted). The second is a facial challenge. *See id.* at 405. In a facial challenge, the statute is

"vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *accord Stupka*, 418 F. Supp. 3d at 405.

The State claims that the United States Supreme Court has required a party facially challenging a statute to show that it "'is impermissibly vague in all of its applications.'" ECF No. 10-1 at 16 (citation omitted). And at times it has. "More recently, however, the Supreme Court has clarified that a law may still be unconstitutionally vague on its face even if 'there is some conduct that clearly falls within the provision's grasp.'" *Stupka*, 418 F. Supp. 3d at 405 (citation omitted). In other words, even when some conduct is clearly proscribed, "vagueness that may lead to arbitrary enforcement—i.e., vagueness in the process of how a law is applied—can render a statute unconstitutionally vague." *Id.* at 411. In such a case, a facial challenge is "permissible . . . regardless of whether the law would be found unconstitutional as applied." *Id.*

Yet another circumstance exists in which a direct facial challenge is permitted. Where—as here—"an allegedly vague statute impacts a fundamental right," courts should "give[] special consideration" to a direct facial challenge. *Id.* at 408. Indeed, the Supreme Court has observed that "[a]lthough ordinarily '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,' we have relaxed that requirement in the First Amendment context." *United States v. Williams*, 553 U.S. 285, 304 (2008); *see Copeland v. Vance*, 893 F.3d 101, 111 (2d Cir. 2018) ("[A]lthough the matter is not entirely settled, the proponent of a facial vagueness claim may not need to show that a statute was unconstitutionally applied to the challenger if the statute 'reaches a substantial amount of constitutionally protected conduct,' particularly rights protected by the First Amendment."

(citation omitted)). The State may disagree that the statutes at issue violate the First (or Fourteenth) Amendment, but they cannot seriously contest that Shamrock's arguments implicate First Amendment interests.

"In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Vill. of Hoffman Ests.*, 455 U.S. at 494. "In making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'" *Id.* at 494 n.6 (cleaned up). "[T]he most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.* at 499. Under those standards, Iowa Code §§ 103A.71(3) and 522C.2(7) are unconstitutionally vague.

B. Iowa's Public-Adjuster Statutes Are Impermissibly Vague.

The State suggests that the public adjuster laws are only economic in nature, and impose only civil fines, not criminal penalties. ECF No. 10-1 at 17. This is inaccurate. Section 522C.6(2) provides that "[a] person acting as a public adjuster without proper licensure . . . is guilty of a serious misdemeanor." "To defeat a vagueness challenge, a penal statute must pass a two-part test: The statute must first provide adequate notice of the proscribed conduct, and second, not lend itself to arbitrary enforcement." *Nygard v. City of Orono*, 39 F.4th 514, 519 (8th Cir. 2022) (quoting *United States v. Barraza*, 576 F.3d 798, 806 (8th Cir. 2009)).

Here, as a penal statute that threatens to inhibit the exercise of First Amendment rights, as detailed above, Iowa's public adjusting laws face a stringent test. Iowa's laws fail that test

spectacularly. Iowa's public adjusting laws fail to give fair notice and invite arbitrary or discriminatory enforcement and are unconstitutionally vague on their face and as applied.

In defending the public adjuster laws as clear and unambiguous, the State misstates the scope of the laws. Specifically, the State claims that the public adjuster laws forbid residential contractors from "representing or negotiating on behalf of an insured party, or advertising to do so, for insurance claims arising from residential repairs." ECF No. 10-1 at 18. As detailed above, that is not what the statute restricts, nor is it what the State claims the statute covers in their warning letter or in other portions of the brief. *See* ECF No. 10-1 at 11 ("The scheme authorizes licensed public adjusters to aid, advise, and represent owners . . . ."); at 13 ("Iowa Code section 522C.2(7) prescribes the conduct which can only be performed by a public adjuster, which includes aiding, advising, and representing property owners . . . ."). No ordinary person exercising common sense can sufficiently understand the scope of the law's restrictions on "aiding an insured" or "advising an insured."[3]

The State's September 5, 2024, letter highlights the vagueness found in the statute. The State takes issue with customer reviews stating that "They helped me with the insurance claim" and "Shamrock walked me through everything with insurance reimbursement." ECF No. 10-1 at 19. These generic statements could cover any range of activities. The State does not articulate the manner in which Shamrock allegedly unlawfully helped with these insurance claims. Did Shamrock explain to the homeowner that he or she had a right to submit an insurance claim? Did

[3] This Court need not give deference to the Iowa Supreme Court in its analysis of vagueness. In *33 Carpenters Constr., Inc.*, the Iowa Supreme Court did not interpret the language that Shamrock principally challenges. *See 33 Carpenters Constr., Inc*, 90 N.W.2d at 79–81. Rather, the Court concluded that 33 Carpenters unlawfully "*acted* on behalf of the Clausens in negotiating their claim." *Id.* at 81 (emphasis added). The decision therefore evaded any analysis of the phrases "aiding an insured" or "advising an insured" as found in the statute.

Shamrock explain to the homeowner how best to fill out paperwork for the insurance claim? Doing any of those things would have surely "aid[ed]" or "advis[ed]" the insured. Yet the State in its own briefing disclaims any regulatory power over "how best to fill out paperwork for a homeowner's insurance claim." *See* ECF No. 10-1 at 11. Does a person improperly act as a public adjuster if they provide a quote for repairs? By providing a quote for repairs, the person clearly aids the insured in their ability to negotiate the amount of the settlement of a first-party claim and potentially advises the insured about first-party claims.

Simply stated, one can only be left to guess as to the scope of Iowa's regulatory scheme and is at the whims of the Department of Insurance's interpretation of the statute. The restrictions on aiding and advising an insured are so vague and indefinite as really to be no rule or standard at all. The State's motion to dismiss Shamrock's vagueness claim under the Fourteenth Amendment should be denied.

V. The Court Should Not Abstain From Deciding These Constitutional Questions.

The State invokes two abstention doctrines, urging this Court not to address Shamrock's claims. ECF No. 10-1 at 21–29. The Court should not abstain.

A. Abstaining Under *Younger v. Harris* Would Be Inappropriate.

Abstention is not applicable under *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* abstention doctrine is a "narrow exception" to the well-established principle that federal courts have "a virtually unflagging obligation to decide cases that fall within their discretion." *Wassef v. Tibben*, 68 F.4th 1083, 1086 (8th Cir. 2023) (internal quotation omitted). The doctrine applies only in "exceptional circumstances." *See New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 368 (1989). A facial challenge to an allegedly unconstitutional statute, for example, is not one of those circumstances. *Id.* at 372. Nor is abstention appropriate "simply

because a pending state-court proceeding involves the same subject matter." *Sprint Comms. v. Jacobs*, 571 U.S. 69, 72 (2013).

There is no ongoing civil enforcement proceeding that justifies abstention. Specifically, the State argues that the "Iowa Insurance Division's action against Shamrock falls squarely in the second *Younger* category," which prohibits federal courts from interfering with certain civil enforcement proceedings. ECF No. 10-1 at 23. To fit in this category, there must be a state proceeding that is "akin to a criminal prosecution" and "quasi-criminal in nature." *375 Slane Chapel Rd., LLC v. Stone Cnty., Mo.*, 53 F.4th 1122, 1128 (8th Cir. 2022) (internal quotation omitted). But here, there has been no "enforcement action" against Shamrock. The only agency action that has occurred consists of a warning letter and a response letter after Shamrock inquired the agency for more details. ECF Nos. 13-1, 13-2. This situation is quite different from that in *Wassef*, where the Iowa Board of Medicine filed a formal "Statement of Charges" against the plaintiff and conducted "substantial discovery." *See Wassef*, 68 F.4th at 1085. There has been no formal complaint against Shamrock, and the only evidence of further agency investigation was a result of Shamrock's inquiry.

Even if this case could fall into a *Younger* category, it could not satisfy each *Middlesex* factor. *See Middlesex Cnty. Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 433–35 (1982). There is no judicial-like state proceeding, the investigation does not implicate important state interests, and there has been no opportunity in the state proceeding to raise constitutional challenges because there has been no actual state proceeding. *See id.* The State must show that each factor favors abstention, and it fails to do so.

First, this case does not involve a proceeding that is judicial in nature because, as already explained, there has been no proceeding. A mere warning letter is not enough to constitute a

judicial-like action that strips a federal court of its jurisdiction. And as previously noted, the APA does not apply, so its framework is immaterial. The cases that the State relies on involve formal disciplinary actions regarding licensure statuses with explicit procedures, which differ starkly from this case which involves only ambiguous allegations in two warning letters. *See* ECF Nos. 24, 25. Second, the State's framing of its state interests as it relates to this case is overly broad. Shamrock does not contest that the State has a general interest in insurance regulation. The State cannot show, however, that it has an *important* state interest in regulating the speech of those uninvolved in the insurance industry. Again, Shamrock does not take issue with any public adjustor licensing requirements. It takes issue with the state laws that improperly prohibit certain speech. Third, the State again incorrectly invokes the APA to argue that Shamrock has an adequate opportunity to raise constitutional issues in state court. Shamrock's claims address federal constitutional issues only, and though it could challenge the agency's accusations and raise constitutional issues before the agency, it need not go through the agency to challenge only the constitutionality of the statutory scheme.

B. Abstaining Under *Pullman* Would Be Inappropriate.

The State next urges the Court to abstain under the *Pullman* doctrine. Under that doctrine, a federal court abstains "when the challenged state statute is susceptible of a construction by the state courts that would avoid or modify the federal constitutional question." *Beavers v. Arkansas State Bd. of Dental Exam'rs*, 151 F.3d 838, 841 (8th Cir. 1998) (cleaned up). Yet as the State acknowledges, "*Pullman* abstention has generally been disfavored in the context of First Amendment claims where state statutes have been facially challenged under the federal constitution." ECF No. 10-1 at 28; *accord Beavers*, 151 F.3d at 841. "Abstention is, of course, the exception and not the rule . . . ." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 467 (1987).

Under *Hill*, the Court should not abstain here. First, Shamrock alleges that the statutory scheme violates the First Amendment, and "abstention is inappropriate for cases where statutes are justifiably attacked on their face as abridging free expression." *Id.* (cleaned up). Even putting aside the First Amendment challenge, *Hill* makes clear that abstention here would be inappropriate. After all, the State argues that "[t]he challenged laws are not unclear." ECF No. 10-1 at 28. Because the statutes are, according to the State, unambiguous, this Court "'should not abstain but should proceed to decide the federal constitutional claim.'" *Hill*, 482 U.S. at 468 (citation omitted) ("In cases involving a facial challenge to a statute, the pivotal question in determining whether abstention is appropriate is whether the statute is 'fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question.'" (citation omitted)).

CONCLUSION

For the reasons stated, the Court should deny the Motion to Dismiss.

February 10, 2025.

By: */s/ Brandon R. Underwood*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 10, 2025, she filed the foregoing document with the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all persons registered to receive electronic notice in this docket.

/s/ Kelly L. Lovett