IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN, Plaintiff, vs. KIM REYNOLDS, Governor of the State of Iowa, Defendant.	)	Case No. CVCV061635 **BRIEF IN SUPPORT OF MOTION TO DISMISS**

Defendant Governor Kim Reynolds files the following brief in support of her motion to dismiss this action under Iowa Rule of Civil Procedure 1.421.

INTRODUCTION

This case arises out of a statute the legislature passed in 2020. The relevant provision from that statute reads, in its entirety:

> The department of public health shall request guarantees from the agencies of the federal government providing funding to educational and long-term care facilities that facilities with policies allowing patients to possess medical cannabidiol on the grounds of the facilities consistent with [Iowa Code] chapter 124E or allowing facility staff to administer medical cannabidiol to a patient shall not lose eligibility for any federal funding due to such policies.

2020 Iowa Acts ch. 1116, § 31.

Plaintiff Carl Olsen's lawsuit invoking this statute must fail. He is not the right person to bring it (because he lacks standing); he has chosen the wrong method (because judicial review is exclusive); and he has not sued the right defendant (because the statute does not regulate the Governor). Even if he *has* chosen the right method, his petition still fails to state a claim. The Court should dismiss the case.

STANDARD OF REVIEW

In general, motions to dismiss test "the legal sufficiency of the challenged pleading." *Southard v. Visa U.S.A., Inc.*, 734 N.W.2d 192, 194 (Iowa 2007). A court may grant a motion to dismiss if the petition fails to state a claim. *Turner v. Iowa State Bank & Trust*, 743 N.W.2d 1, 2 (Iowa 2007). A court may also grant a motion to dismiss if "the relief requested [i]s not an appropriate controversy" for judicial resolution. *Olsen v. State*, No. 11–1744, 2013 WL 541636, at *1 (Iowa Ct. App. Feb. 13, 2013). A motion to dismiss "accept[s] as true the petition's well-pleaded factual allegations, but not its legal conclusions." *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014).

With specific respect to mandamus, "[a] mandamus action is a special proceeding authorized by [Iowa Code] chapter 661." *Stafford v. Valley Cmty. Sch. Dist.*, 298 N.W.2d 307, 309 (Iowa 1980). "Mandamus is not available to establish legal rights, but only to enforce legal rights that are clear and certain." *Id.* Just as with any other petition or claim, a defendant may move to dismiss a petition for mandamus. *See id.* (noting the district court dismissed a petition for mandamus "[o]n defendants' motion").

Under these standards, the Court should dismiss Olsen's petition.

ARGUMENT

A. This case is moot because the Iowa Department of Public Health has requested "guarantees" in accordance with the statute.

"Courts exist to decide cases, not academic questions of law. For this reason, a court will generally decline to hear a case when, because of changed circumstances,

the court's decision will no longer matter." *Homan v. Branstad (Homan I)*, 864 N.W.2d 321, 328 (Iowa 2015). The test for mootness is whether a ruling "would be of force and effect with regard to the underlying controversy." *Women Aware v. Reagen*, 331 N.W.2d 88, 92 (Iowa 1983).

A ruling in this case would have no force and effect. The statute upon which Olsen relies states the Iowa Department of Public Health (IDPH) "shall request guarantees" from federal agencies. IDPH has, in fact, requested guarantees from four federal agencies, and expressly cited the statute in those requests. (Exhibits A–D.) When the relief the plaintiff seeks has already occurred, the case is moot and a judgment would have no practical effect. *See Toomer v. Iowa Dep't of Job Serv.*, 340 N.W.2d 594, 598 (Iowa 1983). It is permissible to rely on judicially noticeable facts when deciding a motion to dismiss. *See Southard*, 734 N.W.2d at 194. And each letter IDPH sent to the federal government is judicially noticeable, because each is "a public document duly issued by a state agency." *Salsbury Labs. v. Iowa Dep't of Envt'l Quality*, 276 N.W.2d 830, 835 (Iowa 1979). Each letter also demonstrates this case is moot, so the Court should dismiss it.

B. Olsen lacks standing because he shows no personalized, judicially cognizable interest.

A mandamus petition brought by a private individual—as opposed to by the county attorney, *see* Iowa Code § 661.8—must set forth that the plaintiff "is personally interested therein, and that the plaintiff sustains and may sustain damage by the nonperformance of such duty." *Id.* § 661.9. Olsen's petition does not and cannot do so; he has not suffered and will not suffer any individualized, judicially cognizable

damage from a purported failure to request guarantees from the federal government. Indeed, "[i]t is difficult to understand how plaintiff[] ha[s] or may sustain damage by nonperformance of the claimed duty." *Van Buskirk v. Iowa State Hwy. Comm'n*, 255 Iowa 342, 348, 122 N.W.2d 351, 354 (1963). Frustration that IDPH did not take action as soon as Olsen would have preferred is not judicially cognizable, and mere curiosity about or close attention paid to the general topic of cannabis regulation or legalization is not a legally sufficient interest for standing purposes. Because Olsen lacks standing, the case must be dismissed.

From early in Iowa's history, the Iowa Supreme Court has cautioned that an important threshold question in mandamus cases is "whether [the plaintiff] holds any such relation to the matter as to enable him to sue for the writ." *State ex rel. Weir v. Cty. Judge*, 2 Iowa 280, 285 (1855). As was the case in 1855, the mandamus "statute seems to contemplate, not that every one who pleases may sue out this writ; but that either the public, *through its officers*, for the enforcement of a public duty, or an individual, *having a right to be enforced*, or an interest to be affected," may do so. *Id.* at 285–86 (emphasis added). Olsen is not a public officer, nor does he have a *personal* right to be enforced or interest to be affected. *See id.* at 286 ("The case before us, however, does not show *any* right or interest whatever, in the [mandamus plaintiff], in connection with the object of the writ.").

The sole interest Olsen asserts is an interest in ensuring compliance with a statute. But a "general interest . . . in making sure government acts legally is normally insufficient to support standing." *Godfrey v. State*, 752 N.W.2d 413, 424

(Iowa 2008); *see also Richards v. Iowa Dep't of Revenue & Fin.*, 454 N.W.2d 573, 575 (Iowa 1990) (finding a "general interest in proper application of the property tax exemption statute . . . cannot support standing"). A mandamus plaintiff "must exhibit an interest *independent* of that which he holds in common with the public at large." *Windsor v. Polk Cty.*, 87 N.W. 704, 705 (Iowa 1901) (emphasis added). Here, Olsen does not plead or demonstrate how *he personally* is injured in a judicially cognizable way by the delay he asserts is legally unacceptable. *See Dickey v. Iowa Ethics & Campaign Disclosure Bd.*, 943 N.W.2d 34, 39 (Iowa 2020) (finding a petitioner lacked standing when he "d[id] not suggest that *he personally* [wa]s injured by deficient campaign reporting").

Put another way, the statute forming the basis for Olsen's lawsuit aims only to protect "educational and long-term care facilities" from future denials or revocations of federal funding. 2020 Iowa Acts ch. 1116, § 31. Olsen is plainly not an educational or long-term care facility that is or might be subject to the consequences the statute anticipates. So, as has been the law since 1855, Olsen's attempt to bring this lawsuit to benefit someone else must fail. *See State ex rel. Weir*, 2 Iowa at 286 ("Weir was seeking to enforce the payment to Thomas Davis of the three hundred dollars awarded to him. So far as appears to us now, Davis might make this application, but we do not see upon what ground Weir can make it.").

C. Judicial review under Chapter 17A is the exclusive method to challenge inaction by the Iowa Department of Public Health.

In addition to lacking standing and bringing moot claims, Olsen has also simply brought the wrong case. This dispute must proceed down the exclusive path

of judicial review under Iowa Code chapter 17A, and against only IDPH, not the Governor.

Judicial review under chapter 17A is "the exclusive means by which an aggrieved or adversely affected party may seek judicial review" of agency action or inaction. *Tindal v. Norman*, 427 N.W.2d 871, 872 (Iowa 1988). If a controversy "seeks review of agency action," chapter 17A "must be adhered to." *Id.*; *accord Kerr v. Iowa Pub. Serv. Co.*, 274 N.W.2d 283, 287 (Iowa 1979) (concluding if a person challenges agency action, "the exclusivity of [chapter 17A's] judicial review provisions can not be disregarded"). So a natural question arises: how is the Court to tell if a controversy seeks review of agency action? Fortunately, the answer is straightforward.

Judicial review is an exclusive remedy if "the action or inaction of the agency in question bears a discernible relationship to the statutory mandate of the agency." *Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 328 (Iowa 2015). Here, Olsen seeks mandamus *precisely because* a statute establishes a "statutory mandate" Olsen wants fulfilled. The statute expressly mentions IDPH and contains the phrase "shall request guarantees." 2020 Iowa Acts ch. 1116, § 31. Accordingly, the "action or inaction of the agency in question," *Ghost Player*, 860 N.W.2d at 328, is directly, not merely discernably, related to IDPH's statutory mandate. Therefore, Olsen attacks agency action or inaction, and so judicial review is his exclusive remedy.

Examining the character of the underlying action or inaction means judicial review is the exclusive remedy even if a plaintiff attempts to sue a non-agency. *See Kerr*, 274 N.W.2d at 286 (concluding chapter 17A's exclusivity provision applied even

when the plaintiffs sued only a private organization that had received a certificate from a state agency). Therefore, it does not matter that the Governor is not an agency under section 17A.2(1);[1] if Olsen's petition challenges agency action—and his reliance on a statute expressly mentioning IDPH can leave little dispute that it does—then exclusivity applies and the Court must dismiss Olsen's petition because the only relief he seeks is unavailable as a matter of law.

Furthermore, "mandamus shall not be issued in any case where there is a plain, speedy, and adequate remedy in the ordinary course of the law." Iowa Code § 661.7. Here, because judicial review is available and adequate—and indeed is *exclusive*—mandamus should not issue.

Judicial review is available. A petition for judicial review may challenge any final agency action. *See* Iowa Code §§ 17A.19, 17A.23(2). IDPH is an "agency." *See id.* § 17A.2(1) (defining "agency" to include each department of the state); *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 342 (Iowa 2013) (concluding IDPH is an agency under Iowa Code chapter 17A). Agency action includes agency inaction. *See* Iowa Code § 17A.2(2); *Lewis Cent. Educ. Ass'n v. Iowa Bd. of Educ. Exam'rs*, 625 N.W.2d 687, 692 (Iowa 2001) (concluding an agency's "refusal to act is judicially reviewable"); *City of Waukee v. City Dev. Bd.*, 514 N.W.2d 83, 89 (Iowa 1994) ("[T]he term 'agency

[1] The Governor is not an agency under chapter 17A. Iowa Code § 17A.2(1). However, that does not make judicial review inapplicable. As explained below, the Governor is not a proper defendant in this mandamus action because the relevant statute addresses IDPH, not the Governor. And because the statute addresses IDPH, it is appropriate to consider judicial review naming IDPH as the respondent as an available, adequate alternative remedy that precludes mandamus against any other agency or officer of government.

action' includes a decision not to act or the failure to act or perform a duty."). Accordingly, Olsen's contention that IDPH has not timely acted to his satisfaction is a dispute properly characterized as agency action—and therefore subject to challenge through judicial review under Iowa Code chapter 17A.

Judicial review is also adequate. The Iowa Supreme Court has held certiorari is an adequate remedy "that precludes the use of a mandamus action." *Stafford*, 298 N.W.2d at 309. Certiorari is analogous to judicial review; indeed, "the judicial review provisions of section 17A.19 have," with respect to agency action, "*supplanted* review . . . by common-law writs such as certiorari." *Dawson v. Iowa Merit Emp't Comm'n*, 303 N.W.2d 158, 159 (Iowa 1981) (emphasis added). The Iowa Supreme Court has also held that the right to *appeal* is an adequate remedy that precludes mandamus. *Hewitt v. Ryan*, 356 N.W.2d 230, 233 (Iowa 1984); *Reed v. Gaylord*, 216 N.W.2d 327, 331–32 (Iowa 1974). And "in exercising judicial review of agency action," a district court "acts in an appellate capacity." *Lowe's Home Ctrs., LLC v. Iowa Dep't of Revenue*, 921 N.W.2d 38, 45 (Iowa 2018). Most importantly, the legislature would not logically have created an exclusive judicial review remedy if that remedy would be inadequate for mandamus purposes.

Together, these authorities and principles demonstrate that judicial review is both available in this case and analogous (in terms of adequacy) to certiorari or other appeals that have made mandamus inappropriate over time. "[A]dministrative law-style judicial review is well suited to policing the executive branch's fidelity to law." Peter M. Shane, *Faithful Nonexecution*, 29 Cornell J.L. & Pub. Pol'y 405, 407 (2019)

[hereinafter Shane]. Accordingly, the Court must dismiss the petition for mandamus because another remedy is available, adequate, and exclusive. *See Stafford*, 298 N.W.2d at 309–10.

Moreover, the Governor is not a correct defendant for *any* lawsuit pursuing the statutory action Olsen seeks. Mandamus is "brought to obtain an order commanding" a person "to do or not do an act, the performance or omission of which the law enjoins as a duty resulting from an office." Iowa Code § 661.1. However, the statute upon which Olsen relies does not impose any duty on the party he has sued—the Governor. Instead, it directs the word "shall" only at IDPH. *See* 2020 Iowa Acts ch. 1116, § 31. That means mandamus is unsuitable here.

State ex rel. Johnson v. Allen involved an analogous issue. There, the county attorney plaintiff sought mandamus against a city's mayor, ordering the mayor "to hire a police chief or enter into an intergovernmental agreement" to provide for police services in the city. *State ex rel. Johnson v. Allen*, 569 N.W.2d 143, 144 (Iowa 1997). However, mandamus could not be granted against the mayor, because under the relevant statute, "the manner in which police services are to be provided to a city's residents is left to the judgment of the city council." *Id.* at 147. The Court further explained the plaintiff had named an improper defendant:

> The problem with the mandamus action before us is the identity of the defendant. The county attorney wants an order compelling the mayor to enter into an intergovernmental agreement or to hire a police chief. But the duty to make this decision rests with the city council, not the mayor.

Id. at 148. Accordingly, mandamus was denied "because the city council [wa]s not before" the Court. *Id.*

Similarly here, any purported duty to "request guarantees" rests with IDPH, not the Governor. *See id.* So mandamus relief is not available and cannot be granted against the only party Olsen named. *See id.* Instead, Olsen's exclusive remedy is judicial review naming IDPH as the respondent. The case Olsen brought, however, must be dismissed.

D. Claims directly invoking article IV, section 9 of the Iowa Constitution are not justiciable.

The Iowa Supreme Court has never recognized a justiciable claim under article IV, section 9 of the Iowa Constitution. In a recent case that *raised* article IV, section 9, the Court did not decide whether claims under that provision are justiciable, because it "disagree[d] with the plaintiffs' premise" that the underlying statutes imposed a mandate the Governor would be required to execute faithfully. *Homan v. Branstad (Homan II)*, 887 N.W.2d 153, 165 (Iowa 2016). And in another recent case, the Court noted it had not been "called upon to interpret article IV, section 9" in the Court's "175 years of caselaw." *Homan I*, 864 N.W.2d at 332. The paucity of cases finding Take Care Clause claims justiciable makes sense, because as one commentator explains, "challenges to the non-execution of specific statutes are statutory, not constitutional challenges. They can and should be assessed under ordinary principles of administrative law." Shane, 29 Cornell J.L. & Pub. Pol'y at 411. Administrative law provides an adequate path because the Take Care Clause is not justiciable. *Cf. id.* ("[C]laims that a President is failing to take care that the laws be faithfully executed—for example, that he or she is willfully rendering an agency unable to perform its responsibilities—may be urgent, but they are not justiciable.").

Here, the Court can reach the same result as in *Homan II*; the statute upon which Olsen relies imposes no mandate for *the Governor* to execute in the first place. *See Homan II*, 887 N.W.2d at 165. But if the Court reaches justiciability, it is crucial to recognize that "some nonexecution of the laws is a commonplace—and inevitable—feature of ordinary administration" of government. Shane, 29 Cornell J.L. & Pub. Pol'y at 427. Because it is commonplace, "it is simply not wise to gin up a theory of the Faithful Execution Clause that calls into question the legitimacy of so much routine government business." *Id.* at 432.

Generally, Iowa courts analyze whether a case presents a nonjusticiable question by utilizing the similar framework for determining *political* questions. *See State ex rel. Dickey v. Besler*, 954 N.W.2d 425, 435 (Iowa 2021); *see also id.* at 449–50 (Appel, J., dissenting) ("The notion of nonjusticiability generally overlaps with the political question doctrine . . . . The notion of nonjusticiability is not a concept well developed in Iowa court cases."). There are several factors to analyze in determining whether a political question is presented—and, under Iowa law, whether that question is therefore also nonjusticiable. Three are most relevant here: "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" "a lack of judicially discoverable and manageable standards for resolving the issue;" and "the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due coordinate branches of government." *Des Moines Reg. & Trib. Co. v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996) (en banc).

These three factors are satisfied here, and therefore indicate that the Take Care Clause or Faithful Execution Clause of the Iowa Constitution is nonjusticiable. On its face, the clause textually commits execution of the laws to the executive branch. The analogous federal Faithful Execution Clause's "most robust role in Supreme Court opinions has been to *reinforce* presidential authority." Shane, 29 Cornell J.L. & Pub. Pol'y at 436 (emphasis added). In other words, the Faithful Execution Clause is a grant of enforcement authority to the Governor, not a limit upon the Governor's policy or enforcement choices. *Cf. King v. State*, 818 N.W.2d 1, 13 (Iowa 2012) (noting the State asserted a different clause of the Iowa Constitution, the education clause, "reflects a grant of funding authority to the legislature, not a limit upon legislative policy in the field of education").

Additionally, the Take Care Clause does not generate judicially discoverable and manageable standards for resolving challenges under it, both because of "the vagueness of the 'faithfulness' ideal" and because of "the text's seemingly Janus-faced quality of being both a source of power and a constraint on power." Shane, 29 Cornell J.L. & Pub. Pol'y at 435. The clause "simultaneously communicates too much and too little to be of great use" in judicial determinations. *Id.* at 439. Finally, as long as executive decisions do not rest on *improper* motivations, potential instances of nonexecution "would presumably represent just the kind of decisional exercise" that the separation of powers entrusts to the executive branch without intrusion from the judicial branch. *Id.* at 445; *see also State ex rel. Dickey*, 954 N.W.2d at 434 (finding a nonjusticiable question in part based on "separation-of-powers concerns").

While a nonjusticiable Faithful Execution Clause might in theory risk making all instances of "nonexecution" unreviewable, that fear will not materialize in practice, because court challenges to *arbitrary* nonexecution can flow through "run-of-the-mill judicial review under the ordinary principles of administrative law." Shane, 29 Cornell J.L. & Pub. Pol'y at 439. Because that remedy is available, and because the Faithful Execution Clause is nonjusticiable, mandamus relying upon that clause is inappropriate and the Court should dismiss this case.

CONCLUSION

The Governor respectfully requests that the Court dismiss this case, assess all costs to Plaintiff, and award any other relief appropriate under the circumstances.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
GOVERNOR KIM REYNOLDS

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 April 29, 2021:

☐ U.S. Mail	☐ FAX
☐ Hand Delivery	☐ Overnight Courier
☐ Federal Express	☐ Other
☒ EDMS	

Signature: */s/ Samuel P. Langholz*