

IN THE SUPREME COURT OF IOWA
No. 22–1995

TERRACE HILL SOCIETY FOUNDATION,
Plaintiff–Appellee,

vs.

TERRACE HILL COMMISSION and
KRISTIN HURD, in her official capacity
as Chairperson of the Terrace Hill Commission,
Defendants–Appellants.

Appeal from the Iowa District Court for Polk County
David Nelmark, District Judge

APPELLANTS' FINAL BRIEF

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ISSUES PRESENTED FOR REVIEW

- I. **The Terrace Hill Society Foundation sued the Terrace Hill Commission—a state agency—and its Chair, seeking declaratory judgment that the Foundation owns historical artifacts on display inside the Terrace Hill mansion. The State has not waived sovereign immunity for suits relating to the ownership of personal property possessed by the State or its agencies. Did the district court err in denying the Commission’s motion to dismiss?**

Cal. v. Deep Sea Rsch., Inc., 523 U.S. 491 (1998)

Ex parte Young, 209 U.S. 123 (1908)

Iowa Code § 8A.326

ROUTING STATEMENT

This case should be retained by the Supreme Court because it presents a fundamental issue of public importance and a substantial issue of first impression. Iowa R. App. P. 6.1101(2)(c)–(d). The Terrace Hill Society Foundation seeks a declaratory judgment establishing its ownership over the Terrace Hill collection. A court ruling that would divest the State of its property interest in the collection interferes with its sovereignty. This case also presents a substantial issue of first impression. No court has been asked to determine the ownership of the items in the Terrace Hill collection.

Because this case presents a fundamental issue of public important and an issue of first impression, the Supreme Court should retain this case.

STATEMENT OF THE CASE

The Terrace Hill Commission (“Commission”) is a state agency responsible for preserving, renovating, landscaping, and administering Terrace Hill, including its historical collections and all related property. Iowa Code § 8A.326. The Terrace Hill Society Foundation (“THSF”) and its predecessor organizations previously worked on behalf of the State to support Terrace Hill. But in 2013, the Legislature amended Iowa law, giving the Commission discretion to contract with nonprofits to support Terrace Hill. Act of June 17, 2013, ch. 135, § 63–65, 2013 Iowa Acts 554, 574–75. When disagreements arose between the Commission and THSF, the Commission decided not to contract with THSF—denying THSF access to Terrace Hill and declining THSF’s support.

A few years later, unhappy that the Commission declined to accept its support, THSF sued. Its first petition named the Commission as sole defendant, seeking a declaratory judgment that THSF “is the sole owner of all of the items in the [Terrace Hill] Collection and has the exclusive right to ownership and control over the items.” App. 6, ¶ 12. And THSF sought an injunction allowing it access to the collection at the Terrace Hill site. App. 6. The Commission moved to dismiss the suit as barred by

sovereign immunity. App. 8. Rather than resist the motion, THSF amended its petition. It now sues both the Commission and its Chair, Kristin Hurd (collectively, the “Commission”). App. 19–21, ¶¶ 14–22.

In its amended petition, THSF still seeks a judicial declaration that it “is the sole owner of all of the items in the [Terrace Hill] Collection and has the exclusive right to ownership and control over the items.” *Id.* ¶ 14. And it still seeks to force the Commission or Chair Hurd to let it continue its support by giving it access to the historical collection of personal property at the Terrace Hill site. *Id.* at 5–6. THSF bases its claims on assertions that it maintained ownership of the personal property it donated to the Commission for display at Terrace Hill. *Id.* ¶¶ 10–11.

The Commission again moved to dismiss, arguing that Count I was barred by sovereign immunity because “the State has not consented to suits about title to personal property in the State’s possession.” App. 25. State also argued that Count II against Chair Hurd could not be maintained because “[t]he Commission Chair has no authority to give [THSF] the relief it seeks” and that its “generalized assertion that the Commission or its members acted ‘in violation of federal . . . and state

law’ doesn’t fit the historical practice of the *Ex parte Young* exception to sovereign immunity.” App. 26.

The district court denied the Commission’s motion to dismiss Count I. App. 78–81. The court found that because the Commission accepted and retained donated property from the THSF, it waived its sovereign immunity and THSF’s assertions of property rights were not barred. App. 81.

The district court granted the Commission’s motion to dismiss Count II without prejudice. App. 82. The court agreed that THSF “has not alleged any specific violations of state or federal law.” *Id.* Rather, THSF only sued Chair Hurd “because she *might* do something adverse to THSF in the future.” *Id.*

The Commission sought interlocutory review, which was granted. The district court should be reversed and the Commission’s motion to dismiss both Counts should be granted with prejudice.

STATEMENT OF THE FACTS

I. Terrace Hill, the Society, the Foundation, the THSF, and the Commission.

Terrace Hill is the Governor of Iowa’s official residence. Built in 1869, it was gifted to the State in 1971 and has served as the Governor’s residence since 1972. House Joint Resolution of May 7, 1971, ch. 293, § 1, 1971 Iowa Acts 559, 559–60; Act of April 18, 1972, ch. 1132, § 1, 1971 Iowa Acts 517, 517. And the “primary function” of its lower floors is “use by the governor for official state functions.” *Id.*

When the State took ownership of Terrace Hill in the 1970s, the property needed significant repairs. To complete those repairs, two private organizations were established to act for the benefit of the State in making necessary improvements.

The Terrace Hill Society (“Society”) was organized as an Iowa nonprofit corporation in 1972 for the exclusive purpose of restoring and preserving the Terrace Hill site on behalf of the State.¹ In 1975, the

¹ See Article III of the Articles of Incorporation for the Terrace Hill Society (filed June 22, 1972). Because the Society’s articles of incorporation are a matter of public record, the Court may take judicial notice of their contents. See *Meade v. Christie*, 974 N.W.2d 770, 776 (Iowa 2022) (taking judicial notice of articles of incorporation).

Terrace Hill Foundation (“Foundation”) also incorporated as an Iowa nonprofit to “receive and maintain a fund or funds of real or personal property . . . exclusively for charitable . . . purposes.”²

Two years later, Governor Robert D. Ray signed Iowa Executive Order No. 26, establishing the Terrace Hill Authority (“Authority”). The Executive Order granted the Authority the legal duty to maintain the Terrace Hill property, and it obligated the Authority to confer with the Society and Foundation in that process. So under Executive Order 26—later codified by the 69th General Assembly in 1982—the Society and the Foundation operated for the benefit of Terrace Hill and its governing body. Act of April 9, 1982, ch. 1078, § 1, 1982 Iowa Acts 155, 155–56.

In 1986, the Legislature replaced the Authority with the Terrace Hill Commission—an official state agency responsible for preserving, renovating, landscaping, and administering Terrace Hill. Act of May 29, 1986, ch. 1245, § 1316, 1986 Iowa Acts 458, 601. The new legislation

² See Article III of the Articles of Incorporation for the Terrace Hill Foundation (filed Oct. 13, 1975). Because the Terrace Hill Foundation’s articles of incorporation are a matter of public record, the Court may take judicial notice of their contents. *See Meade*, 974 N.W.2d at 776.

authorized the Commission to “consult with the Terrace Hill society [and] Terrace Hill foundation.” *Id.*

Today, the Commission has nine members, each appointed by the Governor. Iowa Code § 8A.326(1). The Governor also appoints one of those members to serve as the chair. *Id.* The chair’s only additional authority is to call commission meetings and appoint committees of the commission. *See* Iowa Admin. Code r. 11-114.3(2), (3); *see also* Iowa Code § 8A.326(1) (giving the chair no individual or unilateral duties or authority over Terrace Hill property). Kristin Hurd currently serves as chair. App. 17, ¶ 3.

In 1996, the Commission entered into an operating agreement with the Society and the Foundation to formalize the relationship between the State and the non-profits who work on its behalf. The Agreement clarified the relationship between the organizations: “the Society and the Foundation each perform functions *on behalf of the State* and hold money *on behalf of the State*, all for Terrace Hill.” App. 58 (emphasis added).

Significantly, the Agreement also clarified: “[t]he Society activities are on behalf of the State of Iowa, and its control and supervision are *vested in public authority*; therefore, *the Society is a wholly-owned*

instrumentality of a political subdivision and, is a part of the operation of State government.” App. 60 (emphasis added). Thus, all property or money donated to the Society and the Foundation to benefit Terrace Hill is property collected on behalf of, and necessarily owned by, the State of Iowa. Although the Agreement expired, THSF alleges it continued to act in accordance with the “commitments” of the Agreement, which necessarily includes the Society operating as part of state government. App. 19, ¶ 12.

In 2012, the Society and Foundation merged to form the Terrace Hill Society Foundation. The merged organization was created “[t]o receive money and other property and to maintain a fund or funds and . . . to use such monies and other property . . . *exclusively for the benefit of the State of Iowa*” and the Terrace Hill property.³

In 2013, the Legislature amended the law so that the Commission no longer needed to consult with the Society or the Foundation. Act of June 17, 2013, ch. 135, §§ 63–65, 2013 Iowa Acts 1, 21. Instead, the

³ See Terrace Hill Foundation Articles of Merger (filed July 5, 2012) (emphasis added). Because the articles of merger are publicly filed, the Court may take judicial notice of their contents. See *Meade*, 974 N.W.2d at 776.

Legislature authorized the Commission to opt to “enter into . . . contracts with nonprofit organizations acting solely for the benefit and support of the Terrace Hill facility.” Iowa Code § 8A.326(4). The Legislature also clarified the purpose of the Commission “to provide for the preservation, maintenance, renovation, landscaping, and administration of the Terrace Hill facility,” including its historical collections and related property. Iowa Code § 8A.326(3). So under Iowa law, the Commission is the only organization with the statutory authority to preserve, maintain, and renovate Terrace Hill and its historical collection, and it has the discretion to contract with nonprofit organizations. *Id.*

II. The Lawsuit.

When “disagreement . . . developed between the Commission and THSF regarding ownership and control over the [Terrace Hill] Collection,” the Commission exercised its discretion under section 8A.326. App. 19, ¶ 13. The Commission declined to contract with THSF. So THSF sued the Commission, seeking declaratory and injunctive relief. The Commission moved to dismiss, arguing that THSF’s claims were barred by sovereign immunity. Rather than resist the motion, THSF

amended its petition. The new petition names both the Commission and its Chair, Kristin Hurd as defendants.

The Foundation does not seek to take possession of the historical collection from its current location at Terrace Hill. App. 17–22. But it wants “a declaratory judgment . . . that it – and not the Commission – is the sole owner of all items in the Collection and . . . has the exclusive right to ownership and control over the items in the Collection.” App. 21, ¶ 20. THSF also seeks an injunction against the Commission or its Chair forcing the Commission to permit the Foundation to have “reasonable rights of access to the Collection for purposes of documenting, itemizing, insuring, maintaining, and preserving the Collection.” App. 21. And it seeks other unspecified “supplemental orders for injunctive relief” to enforce its “right to control the use of the Collection.” *Id.*

The Foundation asserts its claim against Commission Chair Hurd “in her official capacity, pursuant to *Ex parte Young*, 209 U.S. 123 (1908).” App. 21, ¶ 24. And it bases that claim against the Chair on an allegation that any “assertion of ownership interests” “in the collection” by “the Commission (or any member(s) of the Commissioner [sic]”) would be “invalid and unenforceable, and in violation of federal law (including,

but not limited to, the United States Constitution) and state law (including, but not limited to, the Constitution of the State of Iowa).” App. 22, ¶ 25. Thus, the Foundation alleges that it is entitled to a declaratory judgment against Chair Hurd because the Commission or one of its members has violated some federal or state law.

The Commission moved to dismiss, arguing that the Commission retained its sovereign immunity, that Chair Hurd is not a proper defendant under *Ex parte Young*, and that THSF failed to state a claim upon which relief can be granted. App. 24–36.

The district court denied the Commission’s motion to dismiss Count I, finding that the Commission’s prior conduct waived its sovereign immunity and subjected it to suit by THSF. App. 79–81. The district court granted the motion to dismiss Count II against Ms. Hurd without prejudice because THSF made “no allegation that she has broken any specific state or federal law.” App. 81–82.

The Commission filed a timeline application for interlocutory appeal, which was granted.

ARGUMENT

The district court erred by denying the Commission’s motion to dismiss. The Commission—a state agency—is protected by sovereign immunity. The State has not consented to suits about title to property within its possession, so Count I against the Commission is barred. Chair Hurd is an improper defendant under Count II because she cannot provide the relief the Foundation seeks. And even if she were a proper defendant, the bare assertion that Chair Hurd has violated federal or state law is insufficient to state a claim for relief.

I. THSF’s claims against the Commission are barred by sovereign immunity.

The district court erred by denying the Commission’s motion to dismiss Count I, which THSF brings against the Terrace Hill Commission. The Commission is a state agency. App. 27. ¶ 2. Iowa Code § 8A.326(1) (creating the Governor-appointed commission); *id.* § 17A.2(1) (defining “agency” to mean “each board, commission, department, officer, or other administrative office or unit of the state”). THSF’s claims for declaratory and injunctive relief are both barred by sovereign immunity, and the State did not waive that immunity in its 1996 Agreement with TSHF’s predecessors.

A. THSF’s claim for declaratory judgment is barred by sovereign immunity.

Because the Commission is a state agency, it cannot be sued without the State’s consent. “[T]he States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.” *Alden v. Maine*, 527 U.S. 706, 713 (1999). Sovereign immunity protects states from suits under the U.S. Constitution or federal law—even in State court—absent valid abrogation by congressional statute or waiver by the state. *Id.* at 754–55; *see also Lee v. State*, 815 N.W.2d 731, 737–39 (Iowa 2012).

This Court has repeatedly recognized “that in the absence of specific consent by the State, it *or its agencies* may not be sued in an action to obtain money from the State, or to interfere with its sovereignty or the administration of its affairs.” *Collins v. State Bd. of Soc. Welfare*, 81 N.W.2d 4, 6 (Iowa 1957) (emphasis added); *see also Hoover v. Iowa State Highway Comm’n*, 222 N.W. 438, 440 (Iowa 1928) (describing “the general and well-recognized rule that the state cannot be sued without its consent”). And its immunity includes protecting a State’s property

“possession from disturbance by virtue of judicial process.” *California v. Deep Sea Rsch., Inc.*, 523 U.S. 491, 507 (1998) (quoting *The Davis*, 77 U.S. 15, 21 (1869)).

THSF did not sue under a federal statute, so it cannot contend that Congress abrogated the State’s sovereign immunity. Nor did THSF sue under an Iowa statute that has waived sovereign immunity, such as the Iowa Tort Claims Act or the Iowa Administrative Procedure Act. *See* Iowa Code chs. 669, 17A. And the State did not consent to this suit—it sought dismissal in the district court because it has not waived its sovereign immunity.

THSF seeks a declaratory judgment that it is the owner of personal property in the possession of the State at Terrace Hill. The State has waived its sovereign immunity in Iowa and federal courts in Iowa for suits “involving the title to *real estate*, the partition of *real estate*, the foreclosure of liens or mortgages against *real estate*, or the determination of priorities or liens or claims against *real estate*, for the purpose of obtaining an adjudication touching or pertaining to any mortgage or other lien or claim which the state may have or claim to the *real estate* involved.” Iowa Code § 613.8 (emphases added). But that waiver for cases

involving real estate does not apply to cases—like this one—involving personal property. That the legislature waived immunity for some property disputes, yet did not do so for this dispute, is strong support that immunity is not waived here. *See State v. Hall*, 969 N.W.2d 299, 309 (Iowa 2022) (“Meaning is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.”); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 10 (2012) (“The expression of one thing implies the exclusion of others.”).

Sovereign immunity bars suits “involving property in which the state has an undoubted right or interest, and in which no effective decree can be rendered without binding the state itself.” *State ex rel. Eagleton v. Hall*, 389 S.W.2d 798, 801 (Mo. 1965). A court ruling that divests the State of its property interest in the collection at Terrace Hill interferes with its sovereignty, and thus requires its consent. *Megee v. Barnes*, 160 N.W.2d 815, 818 (Iowa 1968) (overruled on other grounds by *Kersten Co., Inc. v. Dep’t of Soc. Servs.*, 207 N.W.2d 117 (Iowa 1973)) (“The immunity of the state from suit applies where a . . . property interest of the state is involved.”). *See also Valley Gypsum Co., Inc. v. Pa. State Police*, 581 A.2d

707, 710 (Pa. Commw. Ct. 1990) (holding that action of replevin for personal property possessed by the state was barred by sovereign immunity). Here, the legislature has not waived sovereign immunity for suits involving title to personal property held by the State.⁴ And since the State has an undoubted property interest in the collection at Terrace Hill, THSF's claims seeking to divest the State of its property should have been dismissed.

⁴ The district court also erred when it characterized the State's possession of the disputed property as a bailment arrangement. *See* App. 79–81. A bailment requires a contract between the bailor and bailee outlining the responsibilities of each party. *In re Estate of Martin*, No. 11–0690, 2012 WL 1431490, at *4 (Iowa Ct. App. April 25, 2012) (“A bailment denotes delivery of personalty by one person [the bailor] to another [the bailee], for a specific purpose beneficial to bailee or bailor or both, *upon a contract, express or implied*[.]”). Indeed, the district court explained that “this case is not a breach of contract action.” App. 79. Nor did THSF allege a bailment relationship in its Amended Petition. Even if this action presumed that THSF's donation of property to the Commission was a bailment, the express language of the 1996 Agreement forecloses that argument. *See* App. 60 (noting that the Society was a wholly owned instrumentality of the State). And because a bailment action is an action at law, the proper remedy for a breach of bailment is return of the disputed property or money damages in the amount of the property's value—remedies THSF does not seek in this case. *See Morris Plan Leasing Co. v. Bingham Feed & Grain Co.*, 143 N.W.2d 404, 414–15 (Iowa 1966).

B. THSF’s claim for an injunction is barred by sovereign immunity.

THSF also seeks an injunction forcing the Commission to grant it “reasonable rights of access” to the items that it allegedly owns in the Terrace Hill historical collection. App. 18, ¶ 5. It wants access “for purposes of documenting, itemizing, insuring, maintaining, and preserving the Collection.” *Id.* But that is a significant intrusion into both the State’s sovereignty and the administration of its affairs.

The Legislature charged the Commission with the duty “to provide for the preservation, maintenance, . . . and administration” of the historical collection. Iowa Code § 8A.326(3). THSF’s requested injunction would thus interfere with the Commission’s statutory obligation. That intrusion is even more significant because THSF’s remedy seeks access rights to Terrace Hill—the Governor’s residence and location of official State functions. And it would interfere with the Commission’s discretion to contract with nonprofits it chooses. Iowa Code § 8A.326(4).

Despite that interference aimed at the core of the Commission’s legislatively proscribed function, THSF does not bring a judicial review action under chapter 17A. Yet chapter 17A is “the exclusive means” for seeking review of a State agency’s action. Iowa Code § 17A.19.

Because THSF seeks to disturb the State’s actual possession of personal and real property—both the Terrace Hill collection and the Terrace Hill facility itself—the suit strikes particularly close to the core of the State’s sovereignty protections. *Deep Sea Rsch., Inc.*, 523 U.S. at 506–07 (recognizing a State’s sovereign immunity protections for property in its actual possession). Indeed, permitting a plaintiff to pierce sovereign immunity against property possessed by the State “would be to permit him in some degree to destroy the government itself.” *In re State of New York*, 256 U.S. 503, 510 (1921) (quoting *Klein v. New Orleans*, 99 U.S. 149, 150 (1878)). Because an injunction permitting THSF access to Terrace Hill and its historical collection is a significant intrusion into the State’s sovereignty, this Court should reverse and dismiss THSF’s claims.

C. The 1996 Agreement between the Commission and THSF’s predecessor organizations did not waive the State’s sovereign immunity.

THSF seeks to pierce sovereign immunity by arguing that the Commission waived its immunity by memorializing an “Agreement for Operating Procedures” with its two predecessor organizations. *See App.* 42–48. Even if that alleged document could waive sovereign immunity

for a breach of contract claim, it does not provide a pathway for *this* suit because THSF does not assert a breach of contract claim.

While it is true that when the State enters an enforceable contract its counterparties may generally sue for breach of that contract, *Kersten*, 207 N.W.2d at 122, it is not true that, by entering a contract, the State waives its sovereign immunity for all claims ever brought by a party to that contract. *Lee*, 815 N.W.2d at 742 (rejecting applicability of *Kersten* and contract-based waiver of sovereign immunity when no breach of contract claim is asserted). THSF brings declaratory and injunctive claims of ownership and access to property at Terrace Hill. Neither of those claims rises from a purported breach of contract, no contract grants THSF the right to pursue those claims against the State, and thus the 1996 Agreement does not waive sovereign immunity for this suit.

THSF points to no other conduct—aside from entering the 1996 Agreement—as a waiver of sovereign immunity. True, the Court recognized in *State v. Dvorak* that conduct other than forming a contract may waive the State’s sovereign immunity. 261 N.W.2d 486, 489 (Iowa 1978). But because THSF does not allege any conduct aside from forming the Agreement as a waiver of sovereign immunity, *State v. Dvorak* does

not apply here. *Id.* Nor does THSF show that the Commission engaged in conduct that could be understood as voluntarily accepting legal liability in this suit. *See Lee*, 815 N.W.2d at 742–43.

The district court’s initial determination that the 1996 Agreement could not provide the basis for any claim related to the allegations here was correct. First, THSF was not a party to the Agreement. *See App.* 58–60. Second, and as THSF concedes, that Agreement is no longer in effect. *See App.* 46. Indeed, memorialization of “the responsibilities of the three organizations and their interrelationships” was for the purpose of a specific, discrete “multi-million dollar fundraising project” more than 25 years ago. *App.* 58. The 1996 Agreement was not a final enforceable contract with a government agency. *See id.* at 19. By its terms, it recognizes the Commission’s discretion to make requests for the predecessor organizations to help care for the collection and required the Commission’s approval when those organizations sought to initiate such action. *Id.* at 9–10. And in any event, the Agreement clarified that the State owned the property in the Terrace Hill collection. *Id.* at 3.

The Court has “applied [the constructive waiver of sovereign immunity] in other circumstances where the State voluntarily assumes

legal consequences.” *Lee*, 815 N.W.2d at 742 (citing *Dvorak*, 261 N.W.2d at 489). But THSF has not provided evidence of any legal relationship or conduct outside the Agreement to pierce the State’s sovereign immunity.

Finding that the State did not abrogate its sovereign immunity either explicitly or constructively should have ended the analysis, and the motion to dismiss should have been granted. But the district court went further. It found that the Commission accepting and retaining property—acts within its core functions as instructed by the Legislature—was conduct that constructively waived its immunity. As in *Lee*, the State’s acceptance and retention of the property here lacks the intent necessary to constructively waive sovereign immunity. And THSF fails to meet its burden by failing to allege that the Commission’s conduct was for any reason other than carrying out its legislative duty. *Id.* at 742.

At all times, the Commission’s conduct supported its purpose of “implement[ing] the intent of the original gift of Terrace Hill, including “preservation, renovation, and landscaping.” Iowa Code § 7.18(2) (1983). That comports with the intent behind the initial gift, to preserve Terrace Hill’s “beauty, décor, and antiquity.” Iowa Exec. Order No. 26 (July 16, 1977). Accepting possession of items related to Terrace Hill and

preserving those items reflects the Commission's duties under Iowa law and cannot be prima facie evidence of the State voluntarily undertaking a legal relationship of the type that would waive sovereign immunity for this suit.

II. THSF's claims against the Commission's Chair fail because she cannot provide the requested relief and THSF's allegations do not state a claim.

THSF brings Count II against the Commission Chair. But the Commission Chair is not a proper party. The district court dismissed Count II against Chair Hurd without prejudice because THSF identified no state or federal law that she violated. App. 82. But the district court should have dismissed Count II with prejudice. The Commission Chair is an improper party because she lacks any authority to provide THSF with its requested relief: control over and access to the historical collection at Terrace Hill. And even if the Chair were a proper party, THSF's generalized claim that she is violating the law does not state a claim for which relief may be granted.

A. Chair Hurd is not a proper defendant under *Ex parte Young* because she cannot provide the requested relief, and that defect cannot be cured by repleading.

THSF asserts its claim against Commission Chair Hurd “in her official capacity, pursuant to *Ex parte Young*, 209 U.S. 123 (1908).” App. 20, ¶ 15. But one of *Ex parte Young*’s requirements to abrogate sovereign immunity against an official is that the official can give the requested relief through her action or inaction. Otherwise, the requested injunction requiring or prohibiting conduct would have no effect. As the Supreme Court explained, “[i]n making an officer of the state a party defendant in a suit to enjoin the enforcement of an act . . . it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.” *Ex parte Young*, 209 U.S. at 157; *see also Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 534 (2021) (“While *Ex parte Young* authorizes federal courts to enjoin certain state officials from enforcing state laws, the petitioners do not direct this Court to any enforcement authority the [state official] possesses in connection with [the state law] that a federal court might enjoin him from exercising”).

The Commission Chair lacks the authority to provide THSF control over the Terrace Hill collection. She also lacks the authority to provide THSF access to Terrace Hill. Indeed, the Chair lacks any statutory authority. *See* Iowa Code § 8A.326(1). And the only powers granted to the Chair by administrative rule include calling commission meetings and appointing committee commissions. Iowa Admin. Code r. 11-114.3(2), (3). Only the Commission, acting in its discretion under state law, could contract with THSF to give it access to the historical collection. Thus, an injunction against the Chair does not provide the relief THSF seeks. Even if the Chair were enjoined, the Commission could still operate. *See* Iowa Admin. Code r. 11-114.3(2) (noting Commission actions need only a majority vote of members present at meetings). And the Commission, in its operation, could choose to or decline to use THSF’s proffered services. An injunction against the Chair would not provide THSF relief.

The district court ignored that dispositive defect, claiming that looking to the Chair’s legal authority “relies on facts outside the Amended Petition.” App. 82. But in ruling on a motion to dismiss, the court is not prohibited from looking at statutes—the law is not outside of a petition. Indeed, an injunction issued under *Ex parte Young* requires a court to

consider the official's office and duties. What actions a state actor has the legal authority to perform is a question of law, and courts do not presume that a petition's legal conclusions are true. *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2007). *See also Ostrem v. Prideco Secure Loan Fund, LP*, 841 N.W.2d 882, 891 (Iowa 2014) (“A motion to dismiss admits the well-pleaded facts in the petition, but not the conclusions.”).

The district court should have concluded that Chair Hurd lacked the authority to grant the relief sought as a matter of law. The Commission Chair is not an officer who has a “connection with the enforcement of the act” and is therefore an improper party under *Ex parte Young*. 209 U.S. at 157. No matter how many times THSF amends its petition, Chair Hurd will still lack the authority to grant the requested relief. Because the Commission Chair has no power to grant the requested relief, the claims against her are defective and should have been dismissed with prejudice.

B. THSF's allegations that Chair Hurd violated state or federal law are insufficient to state a claim for relief.

The claims THSF alleges against the Commission Chair fare no better than its choice of party. A typical claim under *Ex parte Young* is based on “an allegation of an ongoing violation of federal law.” *Idaho v.*

Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 281 (1997). But here, THSF fails to allege any specific statutory or constitutional violation. Instead, it asserts a generalized claim of a “violation of federal law (including, but not limited to, the United States Constitution).” App. 22, ¶ 25. THSF also alleges a violation of “state law (including, but not limited to, the Constitution of the State of Iowa).” *Id.*

A blanket generalized allegation that the Commission or its Chair is violating *some* federal or state law does not state a claim for relief. See *Bailey v. Iowa Beef Processors, Inc.*, 213 N.W.2d 642, 648 (Iowa 1973) (“General allegations[,] . . . without stating the facts to support such allegations, are usually mere conclusions of law.”). Those general allegations do not meet the pleading requirements for suits in Iowa courts, especially for claims that attempt to interfere with state sovereignty. Pleadings are required to “contain a short and plain statement of the claim showing that the pleader is entitled to relief.” Iowa R. Civ. P. 1.403. While plaintiffs do not have to plead specific facts, a plaintiff must plead “facts sufficient to apprise the defendant of the incident.” *Sulzberger Excavating, Inc. v. Glass*, 351 N.W.2d 188, 193 (Iowa Ct. App. 1984). See also *Schmidt v. Wilkinson*, 340 N.W.2d 282, 283

(Iowa 1983) (“[N]otice pleading requires, at a minimum, fair notice of the claim asserted so the other party can make an adequate response.”).

The bare allegations that the Commission and its Chair violated federal or state law fails to provide fair notice of the claims asserted and therefore fails to state a claim. The allegations do not specify what federal or state laws the Commission or its Chair allegedly violated, nor does the petition allege facts to support a violation of any federal or state law.

At bottom, Count II against the Commission Chair is still just a claim against the Terrace Hill Commission. It is not brought under any state law waiving sovereign immunity, nor is it brought under a federal statute abrogating sovereign immunity. Those defects cannot be cured by repleading. Count II is barred and should have been dismissed with prejudice.

CONCLUSION

The Foundation’s suit against the Commission and its Chair Kristin Hurd is barred by sovereign immunity. The ruling of the district court should be reversed, and the Commission’s motion to dismiss should be granted with prejudice.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

The Commission requests to be heard in oral argument on this matter.

ATTORNEY'S COST CERTIFICATE

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

/s/Andrew Ewing
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 5,503 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 30, 2023 this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/Andrew Ewing
Assistant Attorney General