THE SUPREME COURT OF IOWA

Supreme Court No. 22-0005

Polk County No. LACL148599

POLLY CARVER-KIMM, Appellee

vs.

KIM REYNOLDS, PAT GARRETT, GERD CLABAUGH, SARAH REISETTER, SUSAN DIXON and STATE OF IOWA, Appellants

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APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY

THE HONORABLE LAWRENCE P. MCCLELLAN

APPELLEE'S FINAL BRIEF

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ROUTING STATEMENT

Plaintiff-Appellee agrees that this case presents issues of first impression on the scope of individual liability under Section 70A.28, whether Section 669.14A applies retrospectively, and whether a plaintiff may invoke Chapter 22 as a source of public policy for a common-law wrongful discharge claim. Plaintiff-Appellee agrees that the Supreme Court should retain this case.

STATEMENT OF THE CASE

On September 1, 2020, Plaintiff-Appellee Polly Carver-Kimm ("Carver-Kimm") filed a claim with the State Appeal Board against the State of Iowa and Defendants Reynolds and Garrett alleging wrongful discharge in violation of public policy. The State Appeal Board denied Carver-Kimm's claims on December 6, 2021.

On September 2, 2020, Carver-Kimm filed a Petition in Polk County District Court alleging one count of wrongful discharge in violation of Iowa Code § 70A.28. Defendants filed an Answer to this Petition, but did not assert any affirmative defenses under Chapter 669. (Defendants' Answer) On June 4, 2021, Carver-Kimm moved for leave to file her first Amended Petition. (App. 11) The district court granted Carver-Kimm's Motion to Amend on June 22, 2021. (App. 13) Carver-Kimm's First Amended Petition

alleged an additional count of wrongful discharge in violation of public policy against Defendants State of Iowa, Reynolds, and Garrett. (App. 15). Defendants never filed an answer to the First Amended Petition.

Instead, Defendants Moved to Dismiss Carver-Kimm's First Amended Petition July 1, 2021. Carver-Kimm moved to amend her Petition a second time on July 28, 2021. The Second Amended Petition did not add any new claims, but added additional factual allegations. (App. 30) The district court granted Carver-Kimm's motion to amend on August 11, 2021. (Order re Second Motion to Amend) Because the Second Amended Petition addressed the issues in Defendants' Motion to Dismiss, Defendants withdrew that motion. Defendants never filed an Answer to Carver-Kimm's Second Amended Petition.

On August 26, 2021, Defendants filed a Motion to Dismiss the Second Amended Petition. The dispositive motion was resisted. A hearing was held before the Honorable Lawrence P. McLellan on October 1, 2021. Judge McLellan issued an Order dated December 22, 2021 denying Defendants' Motion to Dismiss in its entirety. Defendants filed the present appeal on December 30, 2021.

STATEMENT OF THE FACTS

Plaintiff Polly Carver-Kimm ("Carver-Kimm") was the Communications Director for the Iowa Department of Public Health ("IDPH") for thirteen years. (App. 31, ¶ 5) One of her core responsibilities was responding to public information requests pursuant to Chapter 22 of the Iowa Code. (*Id*. at ¶ 6) At the direction and behest of Defendant Reynolds and her Communications Director (Pat Garrett), IDPH sought to slow, stifle and otherwise divert the free flow of information to the media (and public) concerning the spread of COVID-19 and the State of Iowa's response to the ongoing pandemic. (*Id*. at 8A) Carver-Kimm complied with the statutory mandates of Chapter 22 which ran head long into the Defendants' desire to suppress and bury unfavorable or unflattering information.

Beginning in March of 2020 the normal procedures for responding to public information requests were dramatically changed. Suddenly, all media inquiries concerning COVID-19 were routed to the Governor's office and/or Deputy Director Reisetter. (*Id* at ¶ 8-10) Carver-Kimm later offered to reassume the duty of responding to COVID-19 media inquiries stating that it would "easier for her to reassume this responsibility." (*Id*. at ¶ 12) The offer was rebuffed and met with open hostility by Deputy Director Reisetter

who told her that Carver-Kim reassuming those duties "was not easy 'for other people.'" (*Id* at ¶ 13)

In April 2020, Defendant Garrett complained that Carver-Kimm was posting the new daily COVID-19 case numbers on the IDPH website before the Governor's press conference. (*Id*. at ¶17) Carver-Kimm emailed Reisetter stating this only happened once several weeks before and that she was being accused of something she didn't do. (*Id*. at ¶17) Shortly thereafter, additional duties were taken from Carver-Kimm. (*Id*. at ¶ 18) In April 2020, Carver-Kimm informed her supervisors that a news reporter had brought to her attention the unsanitary working conditions and lack of social distancing at the State Emergency Operations Center ("SEOC"). Rather than addressing the problem, Gerd Clabaugh (Director of IDPH) and others demanded the name of the journalist. Carver-Kimm refused and more duties were taken from her. (*Id*. at ¶ 19)

In May 2020, Carver-Kimm responded to open records requests from various media outlets as required by law. (*Id*. at ¶ 20-21) At no time did Carver-Kimm produce information or documents outside of the normal procedures or in violation of the law. (*Id.*) The New Yorker began asking questions critical of the State Hygienic Lab referencing documents produced pursuant to the open records request. (*Id*. at ¶ 22) Deputy Director Reisetter

wanted to know how the New Yorker received the documents and whether producing it "was even legal." (*Id*.) Shortly thereafter, Carver-Kimm was no longer allowed to respond to any open records requests including those dealing with COVID-19. (*Id*. at ¶ 23) After the New Yorker ran an article critical of the company running "Test Iowa" Carver-Kimm was not allowed to respond to any media inquiries regarding COVID-19 or any other infectious disease. (*Id*. at ¶ 24)

During the months of March, April, May and June of 2020, Carver-Kimm had regular conversations with Karla Dorman (Human Resources) about the ongoing removal of her duties. (*Id*. at ¶ 25) In those conversations she expressed that the removal of her duties and responsibilities amounted to mismanagement, abuse of authority and a specific danger to public health given the ongoing state-wide pandemic. (*Id*.)

In July 2020, Carver-Kimm released to the Des Moines Register publicly available information regarding pregnancy termination statistics for the State of Iowa. (*Id*. at ¶ 26) The Des Moines Register ran an article showing that the number of pregnancy terminations increased and attributed that increase to Defendant Reynold's decision to cease participation in a federally funded family planning program. (*Id*. at ¶ 27) The article was "likely embarrassing" to Defendant Reynolds who promoted and supported

the plan to expel Planned Parenthood and other abortion providers from family planning programs and replace it with a state financed program. (*Id*. at ¶ 28)

Carver-Kimm was terminated within days of this politically embarrassing news story in the Des Moines Register. (*Id*. at ¶ 29) She was unceremoniously told by Director Clabaugh, Deputy Director Reisetter and Bureau Chief Susan Dixon that she could resign or be terminated due to "restructuring." (*Id*. at ¶29) Carver-Kimm chose resignation rather than losing her accumulated vacation time. (*Id*.) She did not voluntarily resign her employment. She was not the party that initiated the discussion about ending the employment relationship. Any insinuation that Carver-Kimm voluntarily resigned her employment is not supported by the record before this Court.

Although Clabaugh, Reisetter and Dixon were the persons who told Carver-Kimm that she was fired, it is alleged that Defendants Reynolds and Garrett had the ability to effectuate the decision to terminate Carver-Kimm's employment and had input into or influence over that decision. (*Id.* at ¶ 29A-B) Defendant Clabaugh (and by extension Defendants Reisetter and Dixon) served at the pleasure of Defendant Reynolds, giving Reynolds—and Garrett as a member of Reynolds' cabinet—considerable sway over Clabaugh's,

Reisetter's and/or Dixon's decisions. Reynolds and Garrett directed, influenced, authorized and/or had input into the decision terminate Carver-Kimm's employment. (*Id*.)

ARGUMENT

BRIEF POINT I – DEFENDANTS REYNOLDS AND GARRETT ARE INDIVIDUALLY LIABLE FOR CARVER-KIMM'S WRONGFUL DISCHARGE CLAIMS

Carver-Kimm agrees that appellant has preserved error on the issue of the scope of individual liability under Section 70A.28 and the tort of wrongful discharge. However, Defendants did not preserve error on their separation of powers argument, as discussed below.

The "standard of review for a district court's ruling on a motion to dismiss is for correction of errors at law." *Hedlund v. State*, 875 N.W.2d 720, 724 (Iowa 2016). Constitutional issues are reviewed de novo. *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017). Because these issues were raised through a motion to dismiss, all allegations in the Second Amended Petition are accepted as true. *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 604 (Iowa 2012) (holding "When reviewing a motion to dismiss, we accept the facts alleged in the petition as true.").

A. Defendants Reynolds and Garrett Fall Within the Scope of Individual Liability for both Wrongful Termination Claims

The scope of individual liability under Iowa Code section 70A.28 has not been addressed by any Iowa appellate court. But given the broad scope of the language and protections found in section 70A.28, the scope of individual liability under this section should be at least as broad as individual liability under the Iowa Civil Rights Act (ICRA"). Applying the standard from the ICRA, Defendants Reynolds and Garrett are individually liable under Carver-Kimm's statutory wrongful discharge claim. Unlike section 70A.28, individual liability for the tort of wrongful discharge is well-established. Applying the existing standard, Defendants Reynolds and Garrett are individually liable for the tort claim, as well. Finally, the Court should reject Defendants attempts to create a new and unique "legal authority" standard for holding a state employee individually liable.

1. Individuals who have the ability to effectuate an employment decision and who have input into or influence over the decision are liable under Section 70A.29

While the scope of individual liability under 70A.28 is largely an issue of first impression, the Court does not need to adopt Defendant's argument and create a new standard out of whole cloth. The recently decided case of *Rumsey v. Woodgrain Millwork, Inc.* provides a clear answer

on the issue of individual liability for a statutory wrongful discharge claims. 962 N.W.2d 9, 36 (Iowa 2021).

a. *Discussion of* Rumsey v. Woodgrain Millwork, Inc.

In *Rumsey* this Court addressed the scope of individual liability under the ICRA. *Id.* at 34-36. The *Rumsey* Court began its analysis with the text of the ICRA, and rejected the defendant's request to limit liability to supervisors. *Id.* at 34-35. Of particular importance, the *Rumsey* Court noted that the statute did not limit liability based on the title or position of an individual. *Id.* at 35 (holding "We reject defendants' attempt to limit individual liability to supervisors. The 'any person' language is not limited by title."). However, it was noted that the statute "also has limiting language." *Id.* at 34.

> With respect to the failure-to-accommodate claim, the individuals must have "otherwise discriminate[d] in employment against ... [the] employee," which means they must have engaged in discriminatory conduct that resulted in an adverse employment action. With respect to the retaliation claim, the individuals must have "retaliate[d] ... in any of the rights protected against discrimination," which means they must have engaged in retaliatory conduct, in response to the plaintiff's protected activity, that materially and adversely injured or harmed the plaintiff.

Id. at 34-35 (internal citations omitted).

Even though the ICRA contains limiting language on the scope of individual liability, the *Rumsey* Court rejected the defendant's attempt to

limit individual liability to supervisors. *Id.* at 35. "The focus is not on the individual's title or generalized authority over employment decisions but on the individual's personal involvement and ability to bring about the challenged discriminatory action." *Id.* at 36. "Rather, it is the individual's ability to effectuate the adverse employment action at issue that can subject them to personal liability." *Id.*

Rumsey ultimately held that individual liability is not limited "to only those with final decision-making authority[.]" *Id.* at 35. "We conclude that an individual who is personally involved in, and has the ability to effectuate, an adverse employment action may be subject to individual liability . . ." *Id.* at 36.

b. *Application of* Rumsey *to Section 70A.28*

Just as in *Rumsey*, the Court should begin with the text of Section 70A.28(2):

> **A person shall not discharge an employee from or take or fail to take action regarding** an employee's appointment or proposed appointment to, promotion or proposed promotion to, or **any advantage in**, a position in a state employment system administered by, or subject to approval of, a state agency as a reprisal for a failure by that employee to inform the person that the employee made a disclosure of information permitted by this section, or for a disclosure of any information by that employee to a member or employee of the general assembly, a disclosure of information to the office of ombudsman, a disclosure of information to a person providing human resource management for the state, or a disclosure of information to any other public

> official or law enforcement agency if the employee, in good faith, reasonably believes the information evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety. However, an employee may be required to inform the person that the employee made a disclosure of information permitted by this section if the employee represented that the disclosure was the official position of the employee's immediate supervisor or employer.

Iowa Code § 70A.28(2) (2021) (emphasis added).

Just like the ICRA, Section 70A.28 applies to a "person" without regard to that person's title or position. *Cf. Rumsey*, 962 N.W.2d at 35 (holding "The 'any person' language is not limited by title."). While Section 70A.28 does not use the term "any" before "person," the rest of the language of Section 70A.28 is far broader than the ICRA. *Compare* Iowa Code Chapter 216 (2021) *with* Iowa Code § 70A.28(2) (2021).

Section 70A.28's limiting language is far less robust than the ICRA's. In addition to a prohibition on retaliatory discharge, 70A.28 prohibits a person from taking action that affects "any advantage in" the employee's position with the State.[1] Prohibiting actions that affect an employee's advantage in their employment is far broader than the prohibitions found in the ICRA. This language makes it expressly illegal to take actions like

[1] Defendants selectively quoted Section 70A.28 to exclude this broad language. (Defendant's Final Brief p. 26)

providing input regarding Carver-Kimm's position or attempting to influence Carver-Kimm's direct supervisor to terminate her. *See* Iowa Code § 70A.28 (2021). In contrast, for an individual to be liable under the ICRA they must have "engaged in discriminatory conduct that resulted in an adverse employment action." *Rumsey*, 962 N.W.2d at 34-35.

Defendants' only attempt to distinguish the holding and rationale of *Rumsey* is by citing the ICRA's aiding and abetting provision, Section 216.11(1). However, the *Rumsey* Court's holding was not based on Section 216.11(1). The only mention in *Rumsey* of this section was in its brief summary of its prior decision in *Vivian v. Madison*, 601 N.W.2d 872 (Iowa 1999).

The standard for individual liability under Section 70A.28 should be at least as broad as the standard under the ICRA. Like the ICRA, Section 70A.28 does not limit "person" to supervisors or other titles. Moreover, the limiting language is narrower and prohibited conduct is far broader under Section 70A.28 than the ICRA.

Because this issue comes before the Court through a motion to dismiss, all allegations in the Second Amended Petition must be accepted as true. *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 604 (Iowa 2012) (holding "When reviewing a motion to

dismiss, we accept the facts alleged in the petition as true."). It is alleged in the Second Amended Petition that Defendants Reynolds and Garrett "had the ability to effectuate the decision to terminate Carver-Kimm's employment and had input into or influence over the decision to terminate Carver-Kimm." (App. 35 ¶ 29A) This allegation is sufficient for liability to attach to those individuals.

2. Individuals who authorize or direct an employee's termination are liable for wrongful discharge in violation of public policy

Unlike the scope of individual liability under Section 70A.28, the question of individual liability for the tort of wrongful discharge is well-settled. This Court directly addressed the issue in *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 776 (Iowa 2009). The *Jasper* court held "that liability for the tort can extend to individual officers of a corporation who authorized or directed the discharge of an employee for reasons that contravene public policy." *Id.* Like a corporate officer's power to manage and direct a corporation, the Governor and her senior staffers have the power to manage and direct the State. Therefore, if Defendants Reynolds and Garrett authorized or directed the discharge of Carver-Kimm, they are individually liable. *Id.*

The rationale behind the *Jasper* decision is enlightening, and shows why Defendants Reynolds and Garrett are individually liable. The *Jasper* Court held that the tort "does not impose liability for the discharge from employment, but the wrongful reasons motivating the discharge." *Id.* The *Japer* Court reasoned:

> the reason for the discharge is the undesirable, injurious act prohibited by the tort. It is this act that gives rise to liability, not the termination of the employment arrangement per se. Since the tort is directed at the reasons behind the discharge, not the discharge itself, **the type of authority exercised by the person who carries out the discharge for violations that violate public policy is largely irrelevant.**

Id.

Jasper also set out sound policy reasons for applying the tort to individuals who authorized or directed the termination. "[T]he very purpose of the tort is designed to alter the dynamics of management of personnel by encouraging management to make decisions consistent with fundamental principles of public policy[.]" The *Jasper* Court rejected the defendant's attempt to "insulate unwanted conduct by individuals based on the legal fiction of a corporation as an independent entity." *Id.*

Applying the well-settled law as set out in *Jasper*, it is clear that Carver-Kimm may maintain her action against Defendants Reynolds and Garrett. She alleged in her Second Amended Petition that Reynolds and

Garrett "directed, influenced, authorized, and/or had input into the decision [to] terminate Polly's employment." (App. 35 ¶ 29B) Taking all facts in the Second Amended Petition as true, Defendants Reynolds and Garrett may be held individually liable for the tort of wrongful discharge.

B. Kim Reynolds and Pat Garrett Have the Authority to Effectuate, Authorize, and Direct Carver-Kimm's Termination

Defendant's argument that Governor Reynolds and her staff lack the legal authority to terminate Carver-Kimm is yet another attempt to impose the incorrect standard for individual liability. No Iowa Court has ever held that "legal authority" is a pre-requisite for maintaining a wrongful discharge action. This Court has expressly laid out two tests for determining individual liability. Under the statutory claim, Defendants Reynolds and Garrett may be individually liable if they have the ability to effectuate the employment decision and have personal influence or input into the decision. Defendants Reynolds and Garrett are individually liable for the tort claim if they authorize or direct the decision. There is no question that the Governor of the State of Iowa and her senior staffers have these powers.

Defendants' argument on this point ignores both the overall power of Governor and otherwise suspends reality. The Iowa Constitution provides that the Governor is the supreme executive power in the State of Iowa and

"may transact all executive business with the officers of government." Iowa Const. Article IV, sections 1 and 8. Moreover, the Iowa code vests the Governor with the power to direct "[t]he efficient and economical administration of all departments and establishments of government." Iowa Code § 8.3(2)(2020).

It is both disingenuous and borderline frivolous for Defendants to argue that, given these broad constitutional and statutory powers, the Governor (and members of her staff) cannot directly order or indirectly influence or persuade a department head to terminate a troublesome employee. The mere fact that a Director of an agency has the ability to terminate employees in their department does not somehow divest the Governor of her supreme executive powers. This is even more true when the Defendants are at the same time arguing that the Governor is so powerful that this Court is constitutionally prohibited from considering employment claims against her. (Defendants' Brief pp. 34-39)

Finally, allowing for the creation of a new "legal authority" requirement would be a serious burden to future courts whenever an employment claim is brought against a state employee. Courts would have to parse whether a specific supervisor has "legal authority" to terminate the plaintiff. Other than vague references to statutes, Defendants give no

guidance on how this standard should be interpreted or applied. Are statutes the only source of "legal authority"? Can the district court look to regulations? Internal policies? The custom and practice of the department or agency in question?

Under Defendants' definition of legal authority, President Richard Nixon was not the individual who fired special prosecutor Archibald Cox. As the Court is likely aware, President Nixon ordered then Attorney General Elliot Richardson to fire Cox. Richardson refused and Nixon fired him. Nixon then ordered the Deputy Attorney General William Ruckelshaus to fire Cox; Ruckelshaus similarly refused and was fired by Nixon. Nixon then ordered Solicitor General Robert Bork to terminate Cox. Bork eventually complied. Under Defendants proposed standard, Nixon could not be held liable for Cox's termination because he ordered someone else to carry out the termination. The argument ignores the practical consequences of the chief executive's power and ability to terminate employees of the executive branch.

C. The Court Should Reject Defendant's Argument that the Separation of Powers Prohibits a Governor from Being Sued for Wrongful Termination

Defendants' argument that Governor Reynolds is constitutionally immune from wrongful termination suits suffers from a number of fatal

flaws. First and foremost, Defendants did not preserve error on this issue. Even if this Court finds error was preserved, the argument still fails.

In support of this argument Defendants rely exclusively on federal cases interpreting the United States Constitution. However, the Iowa Constitution is fundamentally different. The Governor's removal power of subordinate officers is expressly limited in Article III, section 20. Additionally, the Iowa Constitution does not have an appointments clause—one of the two constitutional provisions federal courts have looked to as the source of the President's removal power. Finally, other state courts have generally declined to extend presidential removal powers to governors.

1. Defendants did not preserve error on this issue

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). "The reason for this principle relates to the essential symmetry required of our legal system. It is not a sensible exercise of appellate review to analyze facts of an issue without the benefit of a full record or lower court determination." *Id.* (internal quotations omitted). "When a district court fails to rule on an issue properly raised by a party, the party who raised the

issue must file a motion requesting a ruling in order to preserve error for appeal." *Id.*

While it is questionable whether Defendants' properly raised the issue of separation of powers below[2], it is clear that the District Court never addressed it. The District Court's decision never mentions or rules upon the separation of powers issue or any constitutional defense raised by Defendant. (App. 154-180) Defendant did not file a motion to reconsider asking the district court to rule on this constitutional issue. This is fatal to Defendants' request to have this Court consider the issue.

Defendants may argue that the District Court necessarily decided the separation of powers issue when it overruled their motion to dismiss. This is not the law, and this exact situation was addressed and rejected by this Court in *Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002). In *Meier* the defendant filed a motion to dismiss on several grounds. One of these grounds was that the district court lacked jurisdiction. *Id.* at 537. "The district court denied the motion in a lengthy written ruling, but did not specifically address the

[2] Defendants mentioned this argument only twice in their arguments to the District Court below. First, they raised this issue in a footnote on page 13 of their Brief. (App.55) Second, they referenced this footnote and their argument in passing on page 24-25 of the same brief. (App. 66-67)

jurisdictional issue[.]" *Id.* On appeal, the defendant "claime[d] the district court necessarily decided the issue by overruling the motion to dismiss." *Id.*

The *Meier* Court rejected this argument and expressly held that the rule of error preservation "requires a party seeking to appeal an issue presented to, but not considered by, the district court to call attention to the district court its failure to decide the issue." *Id.* at 540. "The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it." *Id.* The *Meier* Court ultimately held that the defendant "failed to call to the attention of the district court its failure to consider this issue, and to give the court an opportunity to pass upon it. Accordingly, the issue is waived." *Id.* at 541.

Meier s holding on error preservation was neither novel nor an aberration. Rather, it merely reaffirmed and expounded upon the long standing—and currently applicable—rule requiring error preservation for appellate review. *See also State Farm Mut. Auto Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984) (refusing to consider issue that was raised by defendant but not decided by district court); *State v. Krogmann*, 804 N.W.2d 518, 524 (Iowa 2011) (stating that "when a court fails to rule on a matter, a party must request a ruling by some means"); *Fennelly v. A-1 Mach. & Tool*

Co., 728 N.W.2d 181, 187 (Iowa 2007) (finding a claim that was not addressed in the district court's summary judgment order and not subsequently brought to the court's attention had not been preserved for appeal); *Stammeyer v. Div. of Narcotics Enforcement*, 721 N.W.2d 541, 548 (Iowa 2006) (finding an argument not preserved for appeal when there was "nothing indicating the court ruled upon or even considered [it]"); *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 751 n. 4 (Iowa 2006) (stating that "[w]hen a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.").

The procedural facts of *Meier* are virtually indistinguishable from the present case. Defendants arguably raised the issue of separation of powers before the District Court. The District Court did not address the issue it its lengthy written ruling. (App. 154-180) Defendants did not thereafter draw the District Court's attention to this issue and give the lower court the opportunity to rule on it. Defendants did not properly preserve this issue for appeal. *Meier*, 641 N.W.2d at 541.

2. Applying the law to Defendant Reynolds does not offend separation of powers

Assuming *arguendo* that Defendants preserved error on this issue, the Court should nevertheless reject the argument. Defendants' argument is

based on a federal line of cases, beginning with the seminal *Myers v. United States*, holding that the President of the United States has the constitutional power to remove his subordinates without any restrictions from Congress. 272 U.S. 52 (1926). However, this line of cases is wholly inapplicable to the powers of the Governor of Iowa because the Iowa and United States Constitutions differ in substantial and important ways.

a. There is no Federal Counterpart to Article III, Section 20

The most significant distinction between the Iowa and U.S. constitutions is that the Iowa Constitution expressly limits the Governor's removal power through Article III, Section 20. That section states:

> The governor, judges of the supreme and district courts, and other state officers, shall be liable to impeachment for any misdemeanor or malfeasance in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust, or profit, under this state; but the party convicted or acquitted shall nevertheless be liable to indictment, trial and punishment, according to law. All other civil officers shall be tried for misdemeanors and malfeasance in office, in such manner as the general assembly may provide.

Iowa Const. Art. III, sec. 20 (emphasis added). There is no analogous provision in the United States Constitution.

This express grant of power to the legislature includes the power to restrict removal of state employees for making a protected complaint about mismanagement, violations of law, or abuse of power; or by restricting

removal for public policy reasons. *See* Iowa Code § 70A.28 (2021); Iowa Code § 22.8(3) (2021).

State v. Henderson provides valuable insight into the practical implications of this constitutional provision. 124 N.W. 767 (Iowa 1910). In *Henderson*, a mayor challenged his removal from office after the Attorney General and county attorney filed charges of intoxication against him. *Id*. at 768. The mayor was removed pursuant to a statute titled "An act authorizing the district court or judge to remove officers for misfeasance, malfeasance, or nonfeasance in office and providing the method of procedure therefor." *Id*. at 769. The mayor challenged his removal, arguing that Article III, section 20 prohibited his removal from officer except through impeachment. *Id*. at 770. The Supreme Court rejected this argument, holding that the language in the final sentence of Article III, section 20 "expressly confers upon the Legislature to provide the manner of trial for misdemeanors and malfeasance in office."

The Iowa Supreme Court in *Clark v. Herring* further expounded on this rule. 260 N.W. 436 (Iowa 1935). In *Clark* the insurance commissioner challenged his removal from office, arguing he was subject to removal only through impeachment under Article III, section 20. *Id*. at 438. The Court held that he was "not a state officer liable to impeachment by the General

Assembly, but was an officer to be tried for misdemeanor and malfeasance in office in such manner as the Legislature has provided by statute." *Id*. Similar to *Henderson*, the *Clark* Court held that the insurance commissioner could only be removed pursuant to the final sentence of Article III, section 20. The Court ultimately held that the statute allowing an appointive state officer to be removed by majority vote of the executive council was a legitimate exercise of legislative power. *Id*. at 438-39. Under the Iowa Constitution, the legislature may proscribe the circumstances in which the governor may remove officers of the state. See *id*.

The import of the *Clark* and *Henderson* cases is that the Governor is not vested with the sole ability to hire and fire her subordinates. That authority is vested in another branch of government: the legislature. Therefore, bringing a wrongful discharge claim against the Governor cannot offend separation of powers because the Governor does not have the power that she claims.

Given the express limitation in the Iowa Constitution on the Governor's ability to remove her subordinates, rejecting Defendants' unprecedented argument on this issue would *restore* separation of powers principals. By arguing for monarchal removal powers that supersede statutes and this Courts prior rulings, Defendants are invading the authority

of the Legislature and the Courts. The Court should reject Defendants attempt to supplant the powers of the other branches of government.

b. *The Iowa Constitution lacks an Appointments Clause*

The President of the United States has a generally unrestricted power to remove executive officers that serve beneath him or her. The United States Supreme Court first defined this power in *Myers v. United States*, 272 U.S. 52 (1926). The *Myers* court held that the President had the power to remove his subordinates based on two provisions of Article 2 of the United States Constitution. *Id*. The first provision is found in Article 2, Section 1, and states that "The executive Power shall be vested in a President of the United States of America." *Id*. at 108.

The *Myers* Court also found that a second provision was important to their holding that the President has the power to remove inferior officers without judicial review: the appointments clause found in Article 2, Section 2. This clause states:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper,

> in the President alone, in the Courts of Law, or in the Heads of Departments.

The *Myers* Court found the appointments clause essential to their holding that the President had the power to remove officers without restrictions from Congress:

> The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove.

Myers, 272 U.S. at 161 (emphasis added). In short, *Myers* held that the Presidential removal power stemmed from the general vesting of the executive powers in the office of the president, as well as an incident of his express power to appoint. *Id*.

The Iowa Constitution has a similar vesting provision wherein the executive powers of the State are vested in the governor. Iowa Const. Art. IV, sec. 1 (stating "The supreme executive power of this state shall be vested in a chief magistrate, who shall be styled the governor of the state of Iowa."). However, the only mention of the governor's power to appoint pertains to judges and the judicial nominating commissions. Iowa Const. Art. V, secs. 15-16. The Iowa Constitution does not have a textual basis for the governor's appointment power. Therefore, an unfettered removal power

cannot be inferred from such limited appointment power. Cf. *Myers*, 272 U.S. at 161.

The federal courts have placed emphasis on the appointments clause in the federal constitution as an important source of the President's removal power. *Id*. Because the Iowa Constitution does not have a similar or analogous provision, the Governor of Iowa does not have unrestricted removal power similar to the President's. *Cf. id*. Perhaps recognizing this key difference between federal and state constitutions, rarely has a state supreme court implied an unfettered removal power from the state's constitution.

c. *State Courts have consistently held that governors do not have removal powers similar to the President's*

"[A]s noted by one of the leading authorities in statutory interpretation, '[s]tate courts have consistently refused to imply the removal power from the power of appointment, as the federal courts have done.'" *Bribiesco-Ledger v. Klipsh*, 957 N.W.2d 646, 659-60 (Iowa 2021) (Appel, J. dissenting) (quoting 1 Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction § 3.23, at 103 (7th Ed. 2010)). Given Iowa's lack of a textual delegation of appointment authority to the Governor, it is exceptionally likely Iowa would join the growing cadre of states that have rejected the federal courts' decisions in this area.

The Sutherland Treatise on Statutes and Statutory Construction is, as Justice Appel stated, one of the leading authorities on statutory interpretation. This Court has repeatedly cited Sutherland on Statutes over the past four decades. *See*, e.g. *Pfiffner v. Roth*, 379 N.W.2d 357, 359 (Iowa 1985) (favorably citing 1A Sutherland, Statutes and Statutory Construction § 22.30, at 265 (Sands 4th ed. 1985)); *Willard v. State*, 893 N.W.2d 52, 63 (Iowa 2017) (favorably quoting 2A Sutherland, Statutes and Statutory Construction § 47.33 (4th ed. 1984)).

In addition to the conclusion that state courts have consistently refused to imply the removal power from the appointment power, the Sutherland treatise also notes that "The power to appoint does not include the power to remove if there is a statutory declaration of public policy to the contrary." 1 Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction § 3.23, at 103 (7th Ed. 2010).

BRIEF POINT II – SECTION 669.14A DOES NOT APPLY TO PLAINTIFF'S CLAIMS

Carver-Kimm disagrees that Defendants have preserved error on the issue of qualified immunity. Qualified immunity is an affirmative defense that must be plead in Defendants' answer. As discussed below, Defendants

did not plead this affirmative defense or raise the issue through a pre-answer motion to dismiss.

The "standard of review for a district court's ruling on a motion to dismiss is for correction of errors at law." *Hedlund v. State*, 875 N.W.2d 720, 724 (Iowa 2016). Constitutional issues are reviewed de novo. *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017). Because these issues were raised through a motion to dismiss, all allegations in the Second Amended Petition are accepted as true. *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 604 (Iowa 2012) (holding "When reviewing a motion to dismiss, we accept the facts alleged in the petition as true.").

A. Defendants Have Waived Their Right to Assert Qualified Immunity as an Affirmative Defense

Defendants have not preserved error on the issue of whether Section 669A.14 applies to Carver-Kimm's claims, and waived their right to assert the affirmative defense of qualified immunity. "[Q]ualified immunity is an affirmative defense which the defendant official must plead." *Dickerson v. Mertz*, 547 N.W.2d 208, 214 (Iowa 1996) (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Defendant filed an Answer in this case on October 7, 2020. (Defendants' Answer) Defendants asserted six (6) affirmative

defenses. However, Defendants never asserted the defense of qualified immunity. Defendants did not even reference Chapter 669 in general, let alone the specific provisions of Section 669.14A.

Defendants may argue that they could not have pleaded the affirmative defense under Section 669.14A because that section was not yet in effect. However, Carver-Kimm filed two separate Amended Petitions; the first on June 4, 2021, and the second on August 13, 2021. Defendants Answer to the Amended Petitions would have been due after Section 669.14A went into effect. Defendants declined to file an Answer to these Petitions and declined to assert the affirmative defense of qualified immunity.

Under Iowa Law the failure to raise an affirmative defense results in waiver of the defense. Iowa Rule of Civil Procedure 1.421 states: "Every defense to a claim for relief in any pleading must be asserted in the pleading responsive thereto; or in an amendment to the answer made within 20 days after service of the answer[.]" Iowa R. Civ. P. 1.421(1) (2021). Failing to plead an affirmative defense, including an affirmative defense of immunity, waives the defense.

This was the exact holding of this Court in *Smith v. Smith*, 646 N.W.2d 523 (Iowa 2002). In *Smith* the district court granted a motion to

dismiss based on parental immunity. *Id.* at 414. However, the defendant did not plead the affirmative defense of parental immunity. *Id.* at 413. The *Smith* court held that parental immunity was an affirmative defense subject to waiver, in part relying on its prior decisions regarding qualified immunity. *Id.* at 415 (noting that while "this court has [not] directly held parental immunity is an affirmative defense, it has held qualified immunity is.") (citing *Dickerson v. Mertz*, 547 N.W.2d 208 (Iowa 1996). The *Smith* Court ultimately held that "the court erred in sustaining the motion to dismiss on parental-immunity grounds because the defendant, having failed to plead it, has waived this affirmative defense." *Id.* at 416.

The *Smith* holding is consistent with a long line of Iowa cases holding that failure to plead an affirmative defense results in waiver. *See e.g. Dutcher v. Randall Foods*, 546 N.W.2d 889, 893 (Iowa 1996) (holding "Failure to plead an affirmative defense normally results in waiver of the defense . . ."); *Nelson v. Leaders*, 140 N.W.2d 921, 923 (Iowa 1966) (holding "defendant is not entitled to urge the invalidity of the restrictive covenant as a defense because he has failed to plead it . . ."); *Pride v. Peterson*, 173 N.W.2d 549, 553 (Iowa 1970) (holding "[o]f course, being an affirmative defense, the defendant may waive the statute by ignoring it."). This is consistent with federal case law that specifically holds that failing to

plead the affirmative defense of qualified immunity constitutes waiver. *See e.g. Guzman-Rivera v. Rivera-Cruz*, 98 F.3d 664, 667 (1st Cir. 1996) (holding "Qualified immunity is an affirmative defense, and the burden of pleading it rests with the defendant. Since immunity must be affirmatively pleaded, it follows that failure to do so can work a waiver of the defense.").

By failing to plead the affirmative defense of qualified immunity, Defendants waived the issue.

B. Section 669.14A Applies Prospectively Only

Applying the well-established precedents of this Court, Iowa Code section 669.14A operates prospectively only. Section 669.14A does not expressly state that it is retroactive. Additionally, it makes substantive changes to the law which prohibit its retroactive application. Therefore, Section 669.14A has no applicability to Carver-Kimm's wrongful discharge in violation of public policy claim.

The conduct giving rise to Carver-Kimm's public policy wrongful discharge claim all occurred in the spring of 2020. Her termination occurred on July 15, 2020. She filed her claim with the State Appeal Board on September 9, 2020. A motion to amend the Petition to add a public policy claim was filed on June 4, 2021. All of these events occurred before Section

669.14A went into effect on June 17, 2021. Because Section 669.14A cannot be applied retrospectively, Defendants cannot invoke its protections.

"The first step in determining whether a statute has retroactive effect is to assess whether the legislature expressly stated its intent that the statute should apply retrospectively." *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 563 (Iowa 2015). This is so because "A statute is presumed to be prospective in its operation unless expressly made retrospective." Iowa Code § 4.5 (2019). In this case, nothing in Section 669.14A indicates a legislative intent—express or implied—that the section should apply retroactively.

"The next step is to ascertain whether the statute affects substantive rights or relates merely to a remedy." *Id*.

> If the law is substantive, we presume it operates prospectively only. If the statute is remedial, we presume it operates retrospectively. A statute is not remedial merely because one might say, colloquially, that its purpose is to "remedy" a defect in the law. [I]f a mere legislative purpose to remedy a perceived defect in the law made a statute remedial, very few statutes would not fall within this classification. . . . When a statute creates new rights or obligations, it is substantive rather than procedural or remedial.
>
> *Id*.

In *Dindinger*, this Court considered whether an amendment to the ICRA was remedial or substantive in nature. The amendment at issue

created a new cause of action for wage discrimination with a new strict liability standard for employers. *Id*. at 564. These were substantive changes and therefore the ICRA amendment did not operate retrospectively. *Id*. at 566.

Just as in *Dindinger*, the qualified immunity in section 669.14A creates new rights for state employees and limits the rights of a plaintiff bringing suit against the State and its employees. This statute does not provide an additional remedy to a plaintiff or provide a remedy for an existing loss. *See Groesbeck v. Napier*, 275 N.W.2d 388, 390-91 (Iowa 1979). The only procedural component of the statute is section 669.14A(5), which states "Any decision by the district court denying qualified immunity shall be immediately appealable." However, the single procedural component of the statute does not mean the entire statute is applied retroactively. "[W]hen only part of an enactment is remedial or procedural, effect is ordinarily given to that part." State ex rel. *Buechler v. Vinsand*, 318 N.W.2d 208, 210 (Iowa 1982). Because the section Defendants wish to apply is clearly substantive, it cannot be applied retrospectively.

C. Applying Section 669.14A to Carver-Kimm's Claim is Retrospective Application

If the Court applies Section 669.14A to Carver-Kimm's claim, it is applying the statute retrospectively. Defendants argue that because Section 669.14A creates immunity for Defendants this somehow makes application of the statute to Carver-Kimm's case prospective. However, this argument is not supported by the law of this—or any other—state.

This Court previously addressed the issue of application of a newly enacted immunity statute in *Moose v. Rich*, 253 N.W.2d 565 (Iowa 1977). In that case, Moose was injured in September of 1971 due to a co-employee's negligence. Moose sued his co-employee. *Id.* at 567-68. In 1974, after Moose's claim had already accrued, the legislature amended the Workers Compensation Act "to immunize fellow employees from suits for damages unless gross negligence is involved." *Id.* at 571. The defendant argued that this amendment applied to Moose's claim.

The Court rejected the defendant's argument, holding:

> It is obvious the amendment serves to limit the right of an employee to receive compensation from a co-employee. This limitation is substantive, not procedural. Furthermore, it is not remedial, in that it does not provide for redress of wrongs, but rather makes a policy decision to limit the redress available.

Id. at 572. The *Moose* decision has been reaffirmed by this Court on multiple occasions. This Court has consistently "refused to apply a statute retrospectively when the statute eliminates or limits a remedy." *Iowa Beta Chapter of Phil Delta Theta Fraternity v. State*, 763 N.W.2d 250, 267 (Iowa 2009) (discussing *Moose* decision); *see also Anderson Financial Services, LLC v. Miller*, 769 N.W.2d 575, 580 (Iowa 2009).

This Court is not alone in holding that a statute which creates new defenses to a claim cannot be applied to claims that have already accrued. This is a long-standing rule of American jurisprudence. *See e.g. Brookins v. Sargent Industries, Inc.*, 717 F.2d 1201, 1203-04 (8th Cir. 1983) (holding that "the statute creates a new defense that potentially cuts off a plaintiff's right to recover" and therefore the district court erred in applying it to a pending action); *United States v. Williams*, 19 P. 288, 292 (Mont. 1888) (holding "enactments of the legislature creating new exceptions and defenses, or modifying previous remedies, shall be so construed as not to affect rights of action which have attached and become vested under the original law[.]"); *Butler v. Palmer*, 1841 WL 3966 (N.Y. Sup. Ct. 1841) (holding "any enactment of the legislature annulling contracts, or creating new exceptions and defences, shall be so construed as not to affect contracts or right of action existing at the time of the enactment).

Just like in *Moose*, Section 669.14A creates immunity for Defendants. And just like in *Moose*, Section 669.14A cannot apply to claims, like Carver-Kimm's, that accrued prior to the enactment of this section.

Defendants' point to a single case in support of their generally unsupported argument that Section 669.14A can apply to this case without being applied retrospectively: *Hrbek v. State*, 958 N.W.2d 779 (Iowa 2021). In *Hrbek* this Court considered a statute that prohibited a post-conviction-relief applicant, who was represented by an attorney, from filing pro se documents with the court. *Id.* at 781. The statute in *Hrbek* did not make any substantive changes to the applicants' right to post conviction relief or in any way limit the relief he was seeking. *Id.* The *only* change made by the statute was that it restricted the applicants' ability to file pro se documents. The *Hrbek* court concluded that the acts regulated by the statute are the *filing* of pro se documents, not the standards applied to the merits of the application for post-conviction-relief. *Id.* at 782-83.

The statute considered in *Hrbek* is of a wholly different character than Section 669.14A. Section 669.14A does not merely set out a pleading rule, it changes the remedies available to a plaintiff. And in many cases, including this case, it may completely bar a plaintiff's claim.

The final flaw in Defendants argument is their insistence that the date relevant to whether the statute is being applied retrospectively is the date of Carver-Kimm's Second Amended Petition. However, Carver-Kimm's asserted her tort claim in her First Amended Petition, filed on June 4, 2021[3]—thirteen days before Section 669.14A went into effect. Carver-Kimm did not make any changes to her tort claim in her Second Amended Petition (filed after the Section went into effect), but merely asserted additional factual allegations. Defendant has given no reason why the Second Amended Petition is the proper filing to consider. Indeed, none exists because the Second Amended Petition undoubtedly relates back to the date the First Amended Petition was filed. *See* Iowa R. Civ. P. 1.402(5) (2021).

[3] The Court granted Plaintiff's Motion to Amend on June 22, 2021, five days after Section 669.14A went into effect. However, the date the Amended Petition is considered filed is June 4, 2021, not the date of the district court's order. *See Mayes v. AT & T Information Systems, Inc.*, 867 F.2d 1172, 1173 (8th Cir. 1989) (holding that "courts have addressed the situation where the petition for leave to amend the complaint has been filed prior to the expiration of the statute of limitations, while the entry of the court order and the filing of the amended complaint have occurred after the limitations period has expired. In such cases the amended complaint is deemed filed within the limitations period.").

D. Applying Section 669.14A to Carver-Kimm's Claims Offends Principles of Due Process Under the State and Federal Constitutions

By asking the Court to apply Section 669A.14 to Carver-Kimm's claims, Defendants are attempting to take away a cause of action that already accrued. This violates long established and well-settled Iowa and Federal law.

"It is well-settled that the legislature may not extinguish a right of action which has already accrued to a claimant." *Thorp v. Casey's Gen. Stores, Inc.*, 446 N.W.2d 457, 461 (Iowa 1989). "There is a vested right in an accrued cause of action . . . A law can be repealed by the law giver; but the rights which have been acquired under it, while it was in force, do not thereby cease . . ." *Id*. (quoting *Gibson v. Commonwealth*, 415 A.2d 80, 83 (Pa. 1980)).

The *Thorpe* Court also provided a definitive and clear definition on when a right accrues.

> "Accrue" with reference to a cause of action, was defined by the Oregon Supreme Court in *Berry v. Branner*, 245 Ore. 307, 312, 412 P.2d 996, 998 (1966) to mean "when an action may be maintained thereon." In *Blacketer v. State*, 485 P.2d 1069, 1070 (Okla. Ct. Cr. App. 1971) an "accrued" right was defined as a "matured cause of action or legal authority to demand redress.

Id. at 461 (quoting *In re Estate of Hoover*, 251 N.W.2d 529, 531 (Iowa 1977)). "In determining when a statute of limitations begins to run, we held that the cause of action accrues when an aggrieve party has a right to institute and maintain a suit." *Id*.; (citing *Connelly v. Paul Ruddy's Equip. Repair & Serv. Co.*, 200 N.W.2d 70, 72 (1972) (holding that tort actions accrue when all elements of the cause of action have occurred)).

In this case a person's right to bring a public policy wrongful discharge claim dates back to 1998 when the tort was first recognized in *Springer v. Weeks and Leo Co., Inc.*, 429 N.W.2d 558 (Iowa 1988). *See Thorpe*, 446 N.W.2d 460. Carver-Kimm's right to bring her wrongful discharge claim accrued the day she was terminated: July 15, 2020. Therefore, any statute passed after July 15, 2020—including Section 669.14A—which purports to take away Carver-Kimm's right to bring her tort claim violates the due process clauses of the Iowa and United States constitutions. *See Thorpe*, 446 N.W.2d at 463 (holding that applying statute retrospectively to deprive a plaintiff of a right to bring an accrued cause of action violates due process under both the federal and state constitutions).

By attempting to apply Section 669.14A to Carver-Kimm's public policy wrongful discharge claim, Defendants are engaging in a brazen attempt to violate both the Iowa and United States Constitutions.

BRIEF POINT III – IOWA CODE CHAPTER 22 ESTABLISHES A CLEARLY DEFINED AND WELL-RECOGNIZED PUBLIC POLICY THAT DEFENDANT UNDERMINED BY TERMINATING CARVER-KIMM

Carver-Kimm agrees that Defendants have preserved error on the issues discussed in Brief Point III. The "standard of review for a district court's ruling on a motion to dismiss is for correction of errors at law." *Hedlund v. State*, 875 N.W.2d 720, 724 (Iowa 2016).

Carver-Kimm's second claim is for wrongful discharge in violation of public policy. The core of this claim is that she was terminated for complying with Iowa's Open Records law, Iowa Code chapter 22.

In order to establish her claim, Carver-Kimm must prove:

> (1) The existence of a clearly defined and well-recognized public policy that protects the employee's activity; (2) this public policy would be undermined by the employee's discharge from employment; (3) the employee engaged in the protected activity, and this conduct was the reason the employer discharged the employee; and (4) the employer had no overriding business justification for the discharge.

Dorshkind v. Oak Park Place of Dubuque II, L.L.C., 835 N.W.2d 293, 301 (Iowa 2013). "The first two elements constitute questions of law to be determined by the court." *Id.*

A. Carver-Kimm can show a well-established public policy

Iowa Code § 22.8(3) contains a clear statement of public policy: "it is the policy of this chapter that free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others." Applying this Court's precedents, this clear declaration of policy is more than sufficient to support a claim for wrongful discharge in violation of public policy, and terminating a public information officer for complying with chapter 22 would undermine this policy.

1. Iowa law on determining public policy

This Court has traditionally looked to Iowa statutes in determining whether a public policy exists. *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275, 283 (Iowa 2000).

> [W]rongful-discharge cases that have found a violation of public policy can generally be aligned into four categories of statutorily protected activities: (1) exercising a statutory right or privilege, (2) refusing to commit an unlawful act, (3) performing a statutory obligation, and (4) reporting a statutory violation.

Jasper, 764 N.W.2d at 762 (internal citations omitted). In this case Carver-Kimm's conduct—complying with Iowa's Open Records Act—falls into categories (1) and (3).

Unlike other states, Iowa recognizes that public policies can be either express or implied. *Dorschkind*, 835 N.W.2d at 309 (holding the law protects activity "that is either expressly protected by statute, or impliedly protected by public policy.") (Cady, C.J. concurring). "There need not be an express statutory mandate of protection before an employee's conduct is shielded from adverse employment action." *Teachout v. Forest City Community School Dist.*, 584 N.W.2d 296, 300 (Iowa 1998). Additionally, it is not necessary for a statute to specifically apply to employees:

> [W]e do not limit the public policy exception to specific statutes which mandate protection for employees. Instead, we look to other statutes which not only define clear public policy but **imply** a prohibition against termination from employment to avoid undermining that policy.

Fitzgerald, 613 N.W.2d at 283 (emphasis added).

2. Applying Iowa law to Carver-Kimm's claim

In this case, the source of the public policy is Iowa Code Chapter 22. Section 22.8(3) which states, in pertinent part:

> In actions taken under this section the district court shall take into account **the policy of this chapter that free and open examination of public records is generally in the public interest** even though such examination of public records may cause inconvenience or embarrassment to public officials or others.

Iowa Code § 22.8(3) (2019)(emphasis added). This section contains a remarkably clear statement of public policy, expressly addressing and

defining the public policy at issue. This declaration of public policy is far stronger and more direct than other statutes the Iowa Supreme Court has found create well-recognized public policy.

The State argues that because this policy statement is found in the section of Chapter 22 authorizing a district court to issue injunctions that this very specific language is somehow rendered vague and ineffectual. The argument is wholly without merit. Section 22.8 does set out in detail the factors the district court must consider before issuing an injunction. It is noteworthy, however, that in drafting section 22.8 the legislature in no way limited the "policy" language to issuance of injunctions, but instead forcefully declared that it was the "policy of this chapter," meaning the entirety of Chapter 22. The policy of Chapter 22 was stated in no uncertain terms: "the free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others." Iowa Code §22.8(3)(2019). This Court is obliged to follow that very specific directive.

Other provisions of Chapter 22 provide additional clarity on the scope of the public policy. Chapter 22.2(1) states: "Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record."

This is a clear declaration of the policy of this state to allow public to access government records. More specific to Carver-Kimm, this section also establishes that every person has a right to disseminate public records—a right Carver-Kimm was terminated for exercising.

In the seminal public policy case, *Springer v. Weeks and Leo Co., Inc.*, 429 N.W.2d 558 (Iowa 1988), the plaintiff alleged that he was terminated after filing a workers compensation claim and for refusing to sign a document stating that her injuries were not work related. In that case, the Court held that the following statutory language created a clear expression of public policy:

> No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided.

Id. at 560. This statutory declaration of policy is similar to the policy declaration found in Section 22.2(1)—which states every person has the right to examine and disseminate public documents and information. Indeed, section 85.18 is far less clear than the declaration found in Section 22.8(3), which specifically defines the public policy and refers to it as "**the policy** of this chapter." *Compare* Iowa Code § 85.18 (1987) *with* Iowa Code § 22.8(3) (2019) (emphasis added).

In *Lara v. Thomas* this Court held that an employer cannot terminate an employee for filing a claim for unemployment benefits. 512 N.W.2d 777 (Iowa 1994). The *Lara* Court looked to the legislature's declaration that "economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state." *Id.* at 782. The Court also considered portions of the statute which prohibited employers from requiring employees to waive their benefits. *Id.* The ultimate holding was that allowing employers to terminate employees for filing unemployment claims "would create a chilling effect by permitting an employer to indirectly force an employee to give up certain statutory rights." *Id.* at 782.

Just as in *Lara*, allowing state and municipal governments to terminate employees for complying with public information requests would force those employees to forego their statutory right and obligation to disclose public information. And again, the policy declarations in Chapter 22 are as clear—if not clearer—than the policy declarations in Iowa's unemployment compensation statute.

The Court has also found clear and well-defined public policy even where no specific legislative declaration exists. In *Teachout* the Court held that reporting suspected child abuse was a protected activity based on three portions of chapter 232. The first section stated that it was the policy of the

statute to provide the greatest possible protection to victims and potential victims. *Id.* The second provided immunity from civil or criminal liability for making a good faith report. *Id.* The third created a criminal offense for mandatory reporters who failed to report suspected child abuse. *Id.* The *Teachout* court ultimately held "Although chapter 232 does not specifically mandate protection for an employee who in good faith makes a report of suspected child abuse, we think the forceful language of the statute articulates a well-recognized and defined public policy of Iowa from which such protection can be implied." *Id.* at 300-301.

Similar to *Teachout*, Chapter 22 does not specifically protect employees who comply with its provisions. However, the forceful policy language found in Section 22.2(1) and 22.8(3) articulates a well-recognized and defined public policy from which employment protections can easily be implied. In complying with Chapter 22 open records requests, Carver-Kimm was both exercising a statutory right and performing a statutory obligation. *See* Iowa Code § 22.2(1) (2019). Accordingly, her discharge in reprisal for these actions gives rise to a claim for wrongful termination in violation of public policy. *Jasper*, 764 N.W.2d at 762 (holding an employee's termination violates public policy where they were terminated

for exercising a statutory right or privilege, or for performing a statutory obligation).

3. Chapter 22—when applied to the Department of Public Health—directly affects health, safety and welfare

Defendants next argue that Chapter 22 does not affect the health, safety, or welfare of the state. First, it is questionable that this is a requirement for public policy claims. Defendants' argument is premised on a selective quotation from *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 110 (Iowa 2011). The full quotation from *Berry* shows that the scope of the wrongful discharge tort is much broader than Defendants suggest:

> The statute relied upon must relate to the public health, safety, or welfare and embody a clearly defined and well-recognized public policy that protects the employee's activity. **Stated another way, the source from which an employee seeks to derive a public policy "must affect a public interest so that the tort advances general social policies, not ... individual interests."** *Jasper*, 764 N.W.2d at 766.

Berry, 803 N.W.2d at 110 (emphasis added) (internal citations omitted).

Regardless, Chapter 22 clearly relates to the public health, safety or welfare, especially when applied to Carver-Kimm's claims. "The purpose of Chapter 22 is to open the doors of government to public scrutiny and to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." *City of Riverdale v. Diercks*, 806 N.W.2d 643, 652 (Iowa 2011) (quoting *Rathmann v. Bd. Of Dirs.*, 580

N.W.2d 773, 777 (Iowa 1998)). Providing the citizens of Iowa with information on the activities of their government clearly furthers the welfare of the citizens of Iowa. Section 22.8(3) even expressly states that the statute furthers the public interest: "free and open examination of public records is generally in the public interest." Iowa Code § 22.8(3) (2021).

Carver-Kimm was responsible for disseminating documents and information for the Iowa Department of Public Health at the request of media organizations. The vast majority of the requests received in the Spring of 2020 directly dealt with the ongoing COVID-19 pandemic; including requests for infection rates, data on newly diagnosed infections, and the state's procedures and protocols for preventing further spread of the infection. (App. 31-35, ¶6-28) There is simply no reasonable argument to be made that providing or failing to provide this information does not affect public health or welfare.

Recognizing Chapter 22 as a source of public policy would not open the litigation flood gates as Defendants suggest. As the *Fitzgerald* court accurately stated, the "flood gates" argument "can be made to practically every public policy claim which serves as the basis for a wrongful discharge action." 613 N.W.2d 275, 290 (Iowa 2000). Carver-Kimm is not asking that every statute relating to a state agency be recognized as a source of public

policy, only statutes like Chapter 22 which contain a *clear* declaration of public policy. *See* Iowa Code § 22.8(3) (2021) (stating "the district court shall take into account the **policy** of this chapter that free and open examination of public records is generally in the **public interest** . . .") (emphasis added). Carver-Kimm asks this Court to apply existing law, and find that Chapter 22—through its express declaration of policy and its delineation of the rights of Iowa's citizens—is a source of public policy.

4. The Iowa Attorney General's Opinions recognize that Chapter 22 dictates an important policy

As stated in the Iowa Freedom of Information Council's brief at the district court level, even the Iowa Attorney General's office has recognized in its written opinions—which are entitled to "respectful consideration" by the court—that chapter 22 favors robust disclosure of public records. Op. Iowa Att'y Gen. No. 97-10-1(L) (October 22, 1997), 1997 WL 988716, at *3 ("Disclosure of public records is the general rule, with a presumption in favor of disclosure."); *City of Clinton v. Sheridan*, 530 N.W.2d 690 (Iowa 1995) (stating that while attorney general opinions are non-binding, they are entitled to respectful consideration by the court). The State's attorney general has also recognized that any exceptions to openness should be "construed narrowly" to achieve the purpose of openness. Op. Iowa Att'y Gen. No. 97-10-1(L) at *3. The State's top attorney has also agreed that

chapter 22 creates a "strong presumption" in favor of open records. Op. Iowa Att'y Gen. No. 98-4-4 (April 17, 1998), 1998 WL 289859, at *4. The State has also referred to the exceptions in Iowa Code section 22.7 as unambiguous, meaning clearly written. Id. (interpreting Iowa Code section 22.7(27) as unambiguous).

5. Defendants' citations to foreign jurisdictions are distinguishable and unpersuasive

Defendants cite three cases from other states (only one of which was published) in support of their assertion that open records laws cannot support a public policy wrongful discharge tort. All three of these cases are easily distinguishable.

The first case is *Watson v. Cuyahoga Metro. Hous. Auth.*, 2014 WL 1513455 (Ohio Ct. App. April 17, 2014). The *Watson* court did not hold that the Ohio Open Records Law failed to create a clear public policy. *Id.* at *10-11. Rather, it held that plaintiffs' own conduct violated the Ohio Open Records, therefore the law gave them no quarter: "The record supports the conclusion that plaintiffs used their employment in order to provide Watson with an immediate, free record, without review by CMHA legal staff. They acted outside of CMHA's public records policy and inconsistent with the Ohio Public Records Act." *Id.* at *11.

The second case is *Kiefer v. Town of Ansted*, No. 15-0766, 2016 WL 6312067 (W. Va. October 28, 2016). While this case indeed held that the plaintiff failed to establish a public policy, West Virginia's open records law is notably different from Iowa's. West Virginia's law has no code provision similar to Section 22.8(3) that specifically declares the policy of the law.

The final case—and only published decision—is *Shero v. Grand Savings Bank*, 161 P.3d 298 (Okla. 2007). In that case the Oklahoma Supreme Court held that its public records law did not provide plaintiff with a well-defined public policy because nothing in the statute pertained specifically to employment protections. *Id.* at 301 (holding "While the Open Records Act expressly sets forth the public policy concerning the people's right to know and be fully informed about their government; it is silent as to any public policy against conditioning continued employment on the abandonment of claims pursuant to the act.").

The plaintiff in *Shero* was employed by a private bank and refused to drop an open records request after his employer requested it. Unlike Oklahoma law on public policy torts, the Iowa Court has allowed many cases to proceed even though the statute at issue did not specifically apply in the employment context. "[W]e do not limit the public policy exception to specific statutes which mandate protection for employees." *Fitzgerald*, 613

N.W.2d at 283. Simply put, Iowa law on wrongful discharge in violation of public policy is separate and distinct from Oklahoma law.

The case is further distinguishable because Carver-Kimm was a state employee attempting to comply with the statute—not a private employee who refused to drop an open records request. Unlike a requestor of records, Carver-Kimm worked for the government and was attempting to perform a statutory obligation. *See Jasper*, 764 N.W.2d at 762 (noting that public policy claims are allowed where the employee was terminated for performing a statutory obligation).

B. Carver-Kimm's Termination Undermines Clear Public Policy

Because Chapter 22 establishes a clear public policy, the next question is whether Carver-Kimm's termination jeopardizes or undermines that policy. Carver-Kimm must "show the conduct engaged in not only furthered the public policy, but dismissal would have a chilling effect on the public policy by discouraging the conduct." *Fitzgerald*, 613 N.W.2d at 284. "Thus, when the conduct of the employee furthers public policy or the threat of dismissal discourages the conduct, public policy is implicated." *Id.*

In this case, Carver-Kimm alleges that she was terminated for furthering public policy in favor of disclosing public records. She specifically alleges that she was terminated for disclosing information and

data related to the ongoing global COVID-19 pandemic, as well as data regarding abortions performed in Iowa. (App. 31-35) By disclosing and attempting to disclose these important public records Carver-Kimm was furthering this public policy.

Additionally, Carver-Kimm's termination undermines this public policy. If public information officers or communications directors can be terminated for disclosing embarrassing or politically harmful public records, this would logically discourage public employees from voluntarily making such disclosures. "If the dismissal of one employee for engaging in public policy conduct will discourage other employees from engaging in the public policy conduct, public policy is undermined." *Fitzgerald*, 613 N.W.2d at 288. This disincentive flies directly in the face of Chapter 22's directive that it is "the policy of this chapter that free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others." Iowa Code § 22.8(3).

Defendants argue that because Chapter 22 contains an enforcement scheme, Carver-Kimm's termination does not undermine this policy. However, this argument fails for three distinct reasons. First, no Iowa Court has ever held that a separate enforcement mechanism for a public policy

allows employers to terminate employees for acting in furtherance of that policy. The only case Defendants cite in support of this sweeping change in Iowa law is an unpublished Ohio Court of Appeals case.

Second, just because a statute has a separate enforcement mechanism does not mean an employer can terminate employees for complying with the statute. The *Fitzgerald* case provides a perfect example. In that case, the plaintiff was terminated for refusing to lie under oath to protect his employer. 613 N.W.2d at 286-88. The *Fitzgerald* court held that this violated public policy because you cannot terminate an employee for refusing to commit an unlawful act (perjury) or performing a statutory obligation (testifying truthfully). *See id.* There are alternative ways to enforce these statutes—in that case criminal prosecution for perjury or suborning perjury. Criminal prosecution arguably provides a greater disincentive for committing perjury than termination from employment. Conviction of perjury is a class D felony that carries a maximum prison sentence of five (5) years. Despite this alternative enforcement scheme, the *Fitzgerald* Court nevertheless held that terminating plaintiff would undermine the public policy of the state. *Fitzgerald*, 613 N.W.2d 275, 289 (Iowa 2000).

Finally, by threatening public employees with termination for disclosing public records and forcing the requestors to file suit, the value of the records requested is undermined. For example, data and information on COVID-19 infection rates and outbreaks during the Spring of 2020 loses its value if it is not produced until a Court orders such production—possibly months or even years later. Only the prompt and timely production of this vital information allows Iowa's citizens to change or modify their behavior to protect their own health and the health of their loved ones. For example, if the State only discloses that there were COVID outbreaks at specific long-term-care facilities months after the outbreaks have run their course, the passage of time has rendered the information virtually useless. Unjustified delays in producing public records could also be used by incumbent politicians to delay the release of embarrassing or politically harmful records until after an upcoming election.

Given the above, terminating Carver-Kimm for complying with Iowa's open records law clearly undermines the public policy of the state.

CONCLUSION

Applying the existing and well-reasoned standards for individual liability for statutory and tortious wrongful discharge claims, Defendants Reynolds and Garrett are individually liable. The Court should reject Defendants attempt to create a new and unique standard based on the fiction of "legal authority" for individual liability for government employees. Defendants did not preserver error on their separation of powers claim. Even if they did, the claims should be rejected.

Iowa Code section 669.14A, which was passed after Carver-Kimm's cause of action accrued and after she filed her Petition, cannot apply to the present case. In order for this section to apply, it must be applied retrospectively. Retrospective application of 669A.14 violates established precedents regarding due process and retrospective application of statutes in general.

Finally, Iowa Code chapter 22 establishes a clear and well-defined public policy. Carver-Kimm's took actions consistent with that public policy and was terminated. Her termination undermines the public policy of chapter 22. Therefore, Carver-Kimm may maintain her wrongful discharge tort against all Defendants.

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CERTIFICATE OF FILING AND SERVICE

I certify that on **AUGUST 21, 2022** I electronically filed this Final Brief with the Clerk of Court using the ECF system, which sent notification of same to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. of App. P. 6.903(1)(g)(1) because this brief contains 12,263 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) (table of contents, table of authorities, statement of issues and certificates).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 pt.

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