IN THE SUPREME COURT OF IOWA

No. 22-0005
Polk County No. LACL148599

POLLY CARVER-KIMM, Plaintiff/Appellee

v.

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

APPEAL *from the* IOWA DISTRICT COURT
in and for POLK COUNTY

Honorable DISTRICT COURT JUDGE LAWRENCE P. MCLELLAN, *Presiding*

Conditional AMICUS BRIEF of the IOWA FREEDOM OF INFORMATION COUNCIL

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2022, I electronically filed this document with the Clerk of the Iowa Supreme Court using the Appellate EDMS system which will serve the following parties or their attorneys:

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IDENTITY & INTEREST OF AMICUS CURIAE

As stated in the Iowa Freedom of Information Council's (hereinafter "FOIC") Motion for Leave to File Amicus Curiae Brief filed contemporaneously with this brief, incorporated herein by reference, the FOIC is an organization comprised of several mass media organizations including newspapers, television stations, radio stations, lawyers, educators, and other persons concerned with ensuring a robust First Amendment in the State of Iowa.

For nearly fifty years, FOIC has worked tirelessly to ensure strong protections for open meetings, open records, and the First Amendment. FOIC has participated in cases as intervenor, as amicus, and even as a party on behalf of the public. FOIC is also responsible for publishing the Iowa Open Meetings, Open Records Handbook, a publication which has been distributed tens of thousands of times across Iowa and cited by the Iowa Supreme Court in its open records and open meetings cases.

FOIC advocates for the protection of Iowa's open meetings and open records statutes because they are fundamental prerequisites to the exercise of our other inalienable, constitutional

rights. Iowa Code chapters 21 and 22, particularly, are foundational components to a well-functioning constitutional republic and a well-*informed* polity. Therefore, FOIC must ensure that every effort by executives, administrative officials, the legislature, and others, to water down the express and implied protections of those chapters is met with rigorous scrutiny, challenge, and debate. And where, as here, the State fires a records custodian *merely for producing records lawfully*, the FOIC must advocate for the protection of that employee by urging this Court to recognize the firing as a wrongful termination in violation of public policy.

CERTIFICATE OF COMPLIANCE-AUTHORSHIP

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), counsel herein authored this brief in whole for the Iowa Freedom of Information Council. No party's counsel contributed money to fund the preparation or submission of this brief. No other person contributed money to fund the preparation or submission of this brief.

/s/ Jessica A. Zupp. 8/9/22
Jessica A. Zupp, Attorney, FOIC, Date

CERTIFICATE OF COMPLIANCE- BRIEF REQUIREMENTS

Pursuant to Iowa Rule of Appellate Procedure 6.906(4), the undersigned states that this brief complies with rule 6.903(1)(g) as cross-referenced by Iowa Rule of Appellate Procedure 6.906(4). This brief is prepared in Times New Roman, a proportionally spaced typeface, and contains 5,449 words, which is less than one-half the length permitted for Appellant's brief. See Iowa R. App. P. 6.903(1)(g) (permitting 14,000 words for a proportionally spaced typeface).

/s/ Jessica A. Zupp. 8/9/22
Jessica A. Zupp, Attorney, FOIC Date

ARGUMENT

I. POLLY CARVER-KIMM PROPERLY STATED A CLAIM FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY PURSUANT TO IOWA CODE CHAPTER 22.

A. Iowa Code Chapter 22 Sets Forth a Clearly Defined, Well Recognized Public Policy On Its Face.

1. Chapter 22's public purpose is clear on its face.

The State is correct in its appellate brief that the first element of a wrongful discharge claim is to identify a clearly defined, well recognized public policy by pointing to the Constitution, a statute, or some other rule. The State is wrong, however, that Iowa Code chapter 22 contains no such clear policy. Iowa Code section 22.8(3) contains an express purpose on its face: "In actions brought 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…*". Iowa Code § 22.8(3) (emphasis added). According to Iowa Code section 22.2, the policy is government-wide and gives rights to everyone: "Every person shall have the right to examine and copy a public record…". Iowa Code § 22.2(1). The legislature doubled-down on the importance of open records by also forbidding the government from trying to "prevent the examination or copying of a public record" by farming out production to third parties. Iowa Code § 22.2(2). Thus, no good faith reader can reasonably conclude that Chapter 22 has no clearly defined, well recognized public policy when the statute contains a "policy" statement expressly, and on its face.

Beyond the text, the Iowa Supreme Court has also already interpreted chapter 22 and gleaned its clear purpose. In 2016, the Iowa Supreme Court declared that the purpose of "the Iowa Open Records Act" is to "open the doors of government to public scrutiny [and] to prevent the government from secreting its decision-making activities from the public, on whose behalf it

is its duty to act." In re Langholz, 887 N.W.2d 770, 776 (Iowa 2016). Langholz was quoting *older* cases, one from 2011 and one from 2012, which recognized the same purpose. In re Langholz, 887 N.W.2d 770, 776 (Iowa 2016) (citing Iowa Film Production Services v. Iowa Dept. of Economic Development, 818 N.W.2d 207, 217 (Iowa 2012) and City of Riverdale v. Diercks, 806 N.W.2d 643, 652 (Iowa 2011)). Actually, Langholz cited cases even further back than that, including Gabrilson v. Flynn, 554 N.W.2d 267, 271 (Iowa 1996) and Gabrilson v. Flynn, in turn, went back to the 1980s and cited Iowa Civil Rights Comm'n v. City of Des Moines, 313 N.W.2d 491, 495 (Iowa 1981) and City of Dubuque v. Telegraph Herald, Inc., 297 N.W.2d 523, 526 (Iowa 1980) for purpose analysis. While one could probably go back to the late 1960s when the Act was first passed to find more cases on the topic of purpose, suffice it to say that the Act's relevant language has not changed, and the precedents cited have never been overturned on that ground. And, in any event, the Iowa legislature has already decreed that ignorance is no excuse. Iowa Code § 22.10(4) ("Ignorance of the legal requirements of this chapter is not a defense…"). Therefore, the Iowa Supreme Court should hold that the district court was correct to conclude, as a matter of law, that Iowa Code chapter 22 contains a clearly defined and well recognized public policy.

2. Carver-Kimm is not limited to relying only upon Iowa Code section 22.8.

The State wrongly claims in its appellate brief, starting at page fifty-nine, that Carver-Kimm should only be allowed to cite to Iowa Code section 22.8, and not the rest of the chapter in order to support her claim, because section 22.8 is the only subsection in Chapter 22 which Carver-Kimm particularly set forth in her petition. This attempt by the state to limit justice should be rejected.

First, notably, section 22.8(3) is the section containing the clearest expression of purpose, so even if the State is right, it doesn't matter: Carver-Kimm identified a public purpose. But even if the State is right, the Petition, on its face, cites the *entirety* of Chapter 22, not just section 22.8. For example, paragraph eight cites the whole chapter. Paragraph thirty-six cites the whole chapter and says Carver-Kimm was "terminated after she made repeated efforts to comply with Iowa's Open Records law (Chapter 22) by producing documents and information…". (Second Amended Petition, P. 8, ¶36). Paragraph thirty-seven, again, cited the *whole chapter* and asserted that Carver-Kimm was merely producing records "in furtherance of the clear public policy of the State of Iowa to free and open examination of public records…". (Second Amended Petition, P. 8, ¶37). In paragraph thirty-seven, Carver-Kimm *also* specifically cited Iowa Code section 22.8(3), but that was just surplusage; 22.8(3) is subsumed in the citation to Chapter 22 as a whole, so citing Chapter 22 necessarily included all its subparts. Accordingly, the Supreme Court should determine that the reference to section 22.8 in the Petition was sufficient for notice-pleading purposes, but even if it was not, the citation to the rest of the chapter remedied any defect.

Assuming the State is correct, that a wrongful discharge petition must be hyper-particular, rather than merely give reasonable notice, the State is nonetheless conflating the concepts of particularly *pleading* a statute *in a petition* versus *identifying* a clear policy *in* a statute as part of one's overall case. No wrongful termination case in Iowa has ever held that the clearly defined policy must be expressly delineated in the *petition* only. That might be a qualified immunity requirement under the new statute, but it is not a wrongful discharge pleading element. Even in Berry, the case the State relies upon as setting forth *the test* for recognizing a wrongful termination claim, the Court analyzed the *entirety* of Chapter 668. Berry v. Liberty

Holdings, Inc., 803 N.W.2d 106, 112 (Iowa 2011). If analyzing a *whole chapter* was fine in Berry, there is no reason pleading a whole chapter in the Petition, as Carver-Kimm did here, shouldn't suffice, too. It also should be remembered that in Iowa, the *petition* need not be particularly-pled. Iowa R. Civ. P. 1.402(2) (stating, in part, "No technical forms of pleadings are required.").

Accordingly, the Court should hold that Carver-Kimm's petition properly and particularly identified Iowa Code section 22.8(3), and even if it did not, its reference to the entirety of Chapter 22 was proper under both Berry and Iowa Rule of Civil Procedure 1.402.

3. Lloyd, Berry, and Ballalatak are distinguishable and immaterial.

At page fifty-eight of its brief, the State cites to other Iowa cases involving entirely different code chapters to conclude that since those chapters were held to not contain sufficiently clearly defined public policies, then, apparently, the Open Record Act's policies also must not be clearly defined. The State's logic is strained, though, and the cases are all materially distinguishable. Therefore, the State's analysis and reliance upon those cases should be rejected.

First, the State cites Lloyd v. Drake University, 686 N.W.2d 225 (Iowa 2004). There, Lloyd, a "white" security guard, was fired by Drake University from his security guard job after Lloyd was seen in public using "premature and excessive" force against a "black" student football player during a street-painting event when Lloyd *thought* the black student was assaulting another student. Lloyd, 686 N.W.2d 225 at 227. Lloyd sued Drake University for wrongful discharge and tried to claim that the *criminal law, generally*, should be enforced, and since that is what he was *trying to do* by subduing the black football player, Lloyd shouldn't be fired merely for trying to enforce the law. Id. at 227. In rejecting his "clearly defined" public policy claim, however, the Iowa Supreme Court noted that while the criminal law was important,

Lloyd had utterly failed to identify any *statute or code chapter at all*. The Court said, "Lloyd cites little authority, and his argument mostly consists of vague generalizations about the social desirability of upholding the criminal laws of the state." Id. at 228. The Court continued, "In short, the public policy here is not *clearly defined.* Apart from a vague reference to the whole of the criminal law, Lloyd cites no statutory or constitutional provision to buttress his claim. Divorced from any such provision or equivalent expression of public policy, we cannot find a well-recognized and clearly defined public policy in such vague generalizations." Id. (emphasis added). *Perhaps* if Lloyd had been able to point to the domestic abuse statute, which *requires* the arrest of an apparent aggressor, the result might have been different in his wrongful termination case. Alas, he wasn't thorough enough in his attempt to identify a public policy in a statute, so he lost on the "clearly defined" element. The difference between Lloyd's case and Carver-Kimm's, though, is that she has narrowed her claim to Chapter 22, and section 22.8(3), not the whole Iowa Code. Carver-Kimm is not merely making vague or generalized assertions about open records being "good" for no reason. But *even if she were* making a vague argument like that, still, Iowa Code section 22.8(3) says examination of public records, without specifics, is still in the public interest, so, vagueness actually still would be okay in this case, even if it wasn't acceptable in Lloyd's.

As one aside about the Lloyd case, it is important to note that the Court critiqued Lloyd for not having "cited" authority and that his "argument" was vague. Id at 228. This language in the opinion makes it evident that the Supreme Court delved into the full record in district court, and did not limit its search for a public policy to the face of the petition only. Thus, in addition to conflicting with Berry, the State's attempt to limit this Court's review of the case to Iowa Code section 22.8 only also conflicts with Lloyd.

The second case cited by the State is the case of Berry v. Liberty Holdings, 803 N.W.2d 106 (Iowa 2011). There, an employee, Nathan Berry, worked for Liberty Holdings, a company owned by Brent Voss. Berry, 803 N.W.2d at 108. Voss also owned a company called Premier Concrete Pumping, LLC. Id. Fortuitously, one day a Premier concrete truck injured Berry, so Berry sued Premier for his injuries. Id. at 108-09. About nine months after settling his personal injury case against Premier, *then* Liberty Holdings (i.e. Voss) fired Berry. Id. Berry claimed the discharge violated public policy because he was merely engaged in the protective activity of filing a lawsuit for personal injury (against Premier), and that is why he was fired. Id.

Berry identified the Comparative Fault Act, Chapter 668, as setting forth the allegedly clearly defined public policy. Id. at 111. In rejecting his claim, the Supreme Court held that "[C]hapter 668 more closely resembles a statute that attempts to regular private conduct and imposes requirements that do not implicate public policy concerns." Id. at 112. The Court also noted that Chapter 668 didn't make any policy statements which "implicated" the "health, safety, morals, or general welfare of the citizens of this state." Id. *Nor* did Chapter 668 "protect any specific activities that indicate the presence of an underlying public policy." Id. In short, Berry might have successfully identified a clearly defined *private* policy, but he utterly failed to identify a *public* policy.

By contrast with Berry, in Carver-Kimm's case, Iowa Code Chapter 22 directly impacts the *public* by giving "every person" the right to file a claim under the chapter, whereas Chapter 668 never applies to anyone who isn't otherwise already involved in an underlying tort claim of some kind. Iowa Code § 22.2(1) ("Every person shall have the right"). Chapter 22 also involves *government* records, not private records, and while Chapter 668 can *sometimes* involve balancing the government's fault in a case, Chapter 22, by contrast, *never* authorizes anyone to obtain

private records. Iowa Code § 22.1(3)(a). Chapter 22 is expressly concerned with matters of public importance because section 22.8(3) says that examination is in the "public" interest. And finally, like the aside from the Lloyd case where the Court analyzed the public policy argument by examining the docket beyond the mere face of the petition, so too did the Court in the Berry case look to the parties' motion to dismiss and resistance thereto in trying to find the existence of a clearly defined policy. Berry, 803 N.W.2d at 109. Berry wasn't limited to his petition only. Thus, once again, the State's suggestion that *only* the petition can be reviewed to determine whether a public policy exists is wrong.

Finally, the third case the State cited is the Ballalatak v. All Iowa Agriculture Ass'n, 781 N.W.2d 272 (Iowa 2010) case. There, a man was hurt at work, he filed a worker's compensation claim, and after the employer and its insurance carrier started treating that worker poorly, his co-workers, including Ballalatak, complained to management at All Iowa Ag. Ballalatak, 781 N.W.2d at 274-75. Ballalatak was one of the complainers; he wasn't the injured person. Id. Ballalatak was fired for his outspokenness, he sued for wrongful termination, and he tried to claim that his firing would somehow undermine the worker's compensation system, mostly contained in Chapter 85. Id. at 275.

In rejecting Ballalatak's claim, the Iowa Supreme Court held that while, indeed, there *is* a public policy protecting *employees* who are exercising *their own* worker's compensation rights, there is *no* public policy in the worker's compensation statutes protecting *co-employees* of an injured worker, nor is there any statute giving co-employees the right to complain about others' mistreatment. "Ballalatak was not fired for attempting to secure his own statutory rights nor was he fired for refusing to violate workers' compensation law. Instead, taking the facts in the light

most favorable to Ballalatak, he was fired for his attempt to ensure his employer did not violate the statutory rights of other employees." Id. at 276.

The Ballalatak case is clearly distinguishable from the facts of Carver-Kimm's case because Carver-Kimm *is* the employee. She isn't a disgruntled co-worker who was merely complaining about the real records custodian being mistreated. She *was* the records custodian. She would have been the employee protected under Chapter 85, not the unprotected co-employee like Ballalatak. Thus, Ballalatak is distinguishable because he and Carver-Kimm are not similarly situated in terms of *who* the statutes are designed to protect.

Critically, there is dicta in Ballalatak which applies favorably to Carver-Kimm's case. In Ballalatak, the Court held that it can violate public policy if a person is fired for refusing to violate the law. Ballalatak, 781 N.W.2d at 276. Since Carver-Kimm was fired for complying with the law, i.e. not violating the law, she should be able to state a claim under Ballalatak, just like the district court held. Had Carver-Kimm's superiors told her to *hide* records, or *not* honor a request, and she was fired as a result, she easily could have stated a claim under the Ballalatak dicta. Since producing the records, as opposed to refusing to produce them, is merely the opposite side of the same coin, and fits squarely within the rationale of Ballaltak, it is yet another reason why the district court got it right, and should be affirmed.

4. Teachout supports the claim stated by Carver-Kimm.

Iowa protects employees from being discharged for merely doing something required by statute. In Teachout v. Forest City Community School District, 584 N.W.2d 296, 298-99 (Iowa 1988), the worker, Teachout, was fired for not getting along well with her superior, Fitzgerald. Teachout, 584 N.W.2d at 298-99 (describing acrimonious relationship between co-workers). However, Teachout thought that she really got fired because she had suspected, and then later

reported, child abuse of disabled students by Fitzgerald. Teachout, 584 N.W.2d at 300-01. So, Teachout sued for wrongful discharge claiming that reporting suspected child abuse is a sufficiently protected activity which should support a wrongful discharge claim. The Iowa Supreme Court agreed with Teachout finding that the reporting statute recognized that protection from abuse was a policy goal, it gave immunity to persons who reported, and it criminalized *not* reporting. Id. at 300-01. And, although there was no express mandate for job-protection in the child abuse reporting statute in Chapter 232, the Supreme Court found that the statutory scheme was "forceful" enough that protection could be "implied." Id. at 301.

Applying the Teachout analysis to the case at issue, Carver-Kimm, like Teachout, would have been required to produce records, just like Teachout was required to report abuse. Likewise, whereas Teachout could go to jail for not reporting, which was a crime, Iowa Code Chapter 22 also contains stiff penalties, one of which includes punishment for civil contempt, which, sometimes, can mean jail. Iowa Code § 22.10(3)(a) (stating that the court may enforce a mandatory injunction for production of records by civil contempt). Chapter 22 also includes damages and attorney fees for a successful plaintiff which, arguably, makes Chapter 22 stronger and more "forceful" than Chapter 232's overall scheme at issue in Teachout. Thus, it can be "implied" that Chapter 22 includes protection for records custodians who actually comply with the statute by producing records as required. Afterall, if they persist in not producing required records, they can go to jail, be fined, pay damages, and even be removed from office. That kind of catch-22 scenario is exactly the reason why it is imperative that the Supreme Court affirm the district court's declaration that Carver-Kimm properly stated a cognizable claim.

B. Iowa Code Chapter 22 Promotes Public Health and Safety.

The State argues on appeal that in order to support the tort of wrongful discharge, the applicable statute must concern safety, health, or welfare. That statement is true as far as it goes, however, it doesn't go far enough. The Supreme Court has also included "communal conscience…common sense…" and "morals" as factors to consider in determining whether a public policy exists. Dorshkind v. Oak Park Place of Dubuque II, LLC, 835 N.W.2d 293, 300 (Iowa 2013). "Another definition includes those matters 'fundamental to citizens' social rights, duties, and responsibilities.'" Dorshkind, 835 N.W.2d at 300. Sufficient public policies are those which pertain to "an important or socially desirable act, exercising a statutory right, or refusing to commit an unlawful act." Lloyd, 686 N.W.2d at 229. And even the State agrees in its brief that "public access to records is no doubt important" (Brief, P. 61), it just contends that the Act doesn't pertain to health, safety, and welfare, a claim which fails to appreciate the full scope of what Chapter 22 actually accomplishes in *all* of our lives whether we are the records requester(s) or not.

1. This case concerns the Iowa Department of Public *Health*.

Carver-Kimm's job as records custodian for the Iowa Department of Public Health no doubt pertains to health, safety, and welfare. It says so in the department's name: Iowa Department of Public *Health*. Not only does the name of the department meet the State's narrow test, but by using the word "public" rather than "private", it satisfies the Berry analysis that the statute at issue not merely concern private matters, but that the public be impacted somehow, too. It isn't the Iowa Department of *Private* Health. Indeed, as IDPH's website still reveals, on the home page, at www.idph.iowa.gov, it still says at the top, "Protecting and Improving the *Health*

of Iowans" (site last visited July 26, 2022). Coronavirus information still scrolls across the screen, even. Here is a partial screenshot of the Department's home page:

Clearly then, the Iowa Department of Public Health's records are topically related to health, safety, and welfare. Thus, even if *some other* records custodian might not deal in matters concerning health, safety, or welfare, Polly Carver Kimm's Chapter 22 functions in the Iowa Department of Public Health most certainly meet the test. Her job might meet that test more than any other job in the whole State of Iowa, in fact.

2. Records available from the Iowa Department of Public Health directly impact health and safety.

The petition at issue in this case says that Carver-Kimm was fired after she produced certain Coronavirus and abortion-related data. (Second Amended Petition, P. 5, 6). No one can say Coronavirus information doesn't relate to or affect public health. Speaker of the House of Representatives, Nancy Pelosi, was even still wearing a mask during her trip to Taiwan during the week of August 1, 2022 to protect herself (or others) from disease. Indeed, this very Court issued a plethora of supervisory orders during the Coronavirus pandemic, and expressly found

that it is a "public health emergency." See State v Basquin, 970 N.W.2d 643 (Iowa 2022) (finding Court had "inherent" powers during the Covid-19 pandemic because it was a "public health emergency"). If the Iowa Department of Public Health was in charge of Coronavirus data, as the petition claims, then the records it was collecting and generating, which are supposed to be available to the public, most certainly affect "health".

Likewise, abortion is a general healthcare issue in this state. Planned Parenthood of the Heartland, Inc. v. Reynolds, et al., 962 N.W.2d 37 (Iowa 2022) (determining that abortion is not a fundamental right and so may be regulated like other health matters). While, prior to the Heartland ruling in 2022, some people viewed abortion as a constitutional right, which arguably might warrant protection from wrongful discharge in the right context, too, nonetheless, the most recent precedent on the topic of abortion provides assurances that abortion pertains to *health* matters. Accordingly, to the extent the State argues that Chapter 22 does not pertain to public health, or that the records Carver-Kimm was fired for producing weren't about public health, the State's claim should be rejected.

C. The Foreign Cases Cited by the State Do Not Apply.

Like it did in district court, so too on appeal does the State once again wrongly assert that other states have already held that their Open Records Acts "cannot" generate a wrongful discharge claim. (Brief, P. 62). "Cannot" is a false and misleading term; no court held that, and the only state which came close to holding that did so because *that state*, Oklahoma, requires wrongful discharge protections to be *in the statute*, whereas Iowa recognizes the tort as an express *or* implied one under Teachout. Even a cursory review of each of the cases cited by the State will reveal that they are distinguishable and do not govern any result in this case.

1. The State omitted the real reason Watson was fired.

The first case the State cites is Watson v. Cuyahoga Metro Hous. Auth., No. 99932, 2014 WL 1513455, at *10-11 (Ohio Ct. App. April 17, 2014). According to the State, that case was about "government employees who were fired after providing government records to member of the public without charge or legal review while on duty". (Brief, P. 62). But, the State has over-simplified, and missed important facts. In Watson, Navario Banks was arrested for various crimes. Banks's mom, Kim Watson, worked for the housing authority, so she requested her boss and a camera specialist, Stamper and Lowe, help her retrieve housing authority video which, theoretically, would help provide an alibi for her son. However, rather than requesting these records *properly*, paying the required fees, and having the request go through the legal department as required by code, Watson, Banks, and Stamper instead accessed the cameras while they were "on the clock", they never ran the video past the legal department, and it was produced for *free*. Accordingly, Watson was fired for stealing company time and company records, and ignoring the records-production steps in the code. She wasn't fired merely because she *properly* produced records for someone else, which is what Carver-Kimm did. Thus, it is no surprise then that the Ohio Court of Appeals found that surreptitiously acquiring public records by abusing one's employment in a position of power was *not* one of the purposes of the Open Records Act, and therefore, the Act, under *those facts* could not support the tort.

2. The State omitted the real reason Kiefer was fired.

The Kiefer citation is another mislead by the State. According to the State's brief, the holding of Kiefer is that "West Virginia open-records statute did not establish public policy for wrongful discharge claim by a town's police officer terminated after filing an open records request with the town." (Brief, P. 62). That quote from the State's brief, again, is an

oversimplification which glosses over the *material* facts which distinguish that case from the one at issue.

In Kiefer, John Kiefer was the town Chief of Police who had a mental breakdown one day and stole the town cop car at the end of his shift, and hid it in his back yard, preventing the next officer from coming on duty. *Previous to* that mental breakdown, Kiefer had, in fact, requested some public records, and he claimed the reason he was fired was for requesting records, *not* for stealing the cop car. In rejecting Kiefer's wrongful discharge claim, though, what West Virginia held was that Kiefer made a "less than nominal effort to identify a substantial public policy" and that he failed to cite "any legal authority in support of his contention that FOIA encompasses a substantial public policy for purposes of a *Harless*-type claim." Kiefer v. Town of Ansted, West Virginia, No. 15, 0766, 2016 WL 6312067, at *3 (W. Va. Oct. 28, 216). Essentially, Kiefer "pulled a Lloyd" (like Iowa's Lloyd case) and was too vague about his claim for anyone to actually determine its merit. Additionally, the Court found that the City had an overriding business justification for firing Kiefer—he stole the cop car!

By contrast, Carver-Kimm identified the entirety of Chapter 22 and Iowa Code section 22.8(3) specifically, which, again, contains a purpose statement, something West Virginia's code might not have had; the Court's opinion is unclear about that. Also, Carver-Kimm was *required* to produce records; Kiefer was not *required* to make any records requests. Finally, Carver-Kimm isn't accused of having stolen company property, something which, obviously, would justify terminating any employee, regardless of what records he or she might have been collaterally trying to obtain on the side. So, Kiefer does not apply, and the district court was right to distinguish and reject that case.

3. The State omitted the fact that, unlike Iowa, Oklahoma does not recognize implied wrongful discharge claims.

The State's last attempt to rely on other state cases is its citation to Shero v. Grand Sav. Bank, 161 P.3d 298 (Okla. 2007). According to the State's brief, Shero stands for the proposition that Oklahoma does not recognize wrongful discharge protection for an employee who refuses to retract an open records request. (Brief, P. 62). *If* that were the thrust of the holding, though, it would not apply because Carver-Kimm was not fired for refusing to retract a request. She was fired for producing records pursuant to someone else's request.

In Shero, Shero, a bank employee, filed an open records request with the government. The government also happened to be the bank's customer. When the bank asked Shero to withdraw his records request, and he refused, he was fired. According to Oklahoma law, however, in order to state a claim for a "Burk tort", which is apparently what Oklahoma calls, or called, a wrongful discharge in violation of public policy tort, the statute itself must expressly govern the employee/employer relationship. Shero, 161 P.3d at 301. Iowa, by contrast, contains no such requirement, and as the Supreme Court recognized in Teachout, we provide greater protections for workers than that.

Notably, though, Oklahoma found that its underlying open records statute was a big deal, and contained an important public policy; the Court noted that its statute "expressly sets forth the public policy concerning the people's right to know and be fully informed about their government", but that policy, by itself, was not enough, because it didn't mention an employment relationship, too. So, while Shero is distinguishable because Iowa recognizes implied cognizability, and not just express cognizability, Shero *applies* to the first part of the Berry test in terms of recognizing that open records statutes have important public policies underlying them.

4. Records *producers* have a heightened need for protection.

There are material differences between protecting persons who are *requesting* records as compared to protecting persons who are responsible for *producing* records. First, if a requester fears termination for *requesting* records, he or she can simply ask someone else to submit the records request for him or her and thereby reduce the chance that he or she would be found out and terminated. Afterall, ev*ery person* can request records in Iowa. Thus, firing a requester has less of a chilling effect on open records than firing a producer has.

By contrast, there is (usually) only one person responsible for records *production* in each governmental agency or department, so, when records get released, it is easy to pin-point who is responsible and to fire that person. If the records custodian fears reprisal by his or her superiors for production, there is no alternative person to whom the custodian can delegate production duties; his or her job is always at risk. Thus, there is *more* of a chilling effect on open records if producers can be fired for producing, as opposed to records requesters being fired for requesting. And notably, Watson, Kiefer, and Shero were all requesters, not producers, which is yet another reason to reject those cases in this appeal.

Another difference between requesting and producing is that legally, there is *no choice* for folks like Carver-Kimm to not produce public records. It must be done and the consequences of not doing so include a lawsuit, damages, an injunction, attorney fees, and potential removal from public office. For a records *requester*, however, there is no requirement to request records, nor any consequence to not doing so. You just simply don't make the request, and that's it. Done. There is no lawsuit, no one gets removed from office, no one loses a job. You don't have the information, but at least your job is not at risk. No one is forced to choose between a

paycheck and a records *request*. Carver-Kimm was forced to choose, and that is why her termination was unlawful and deserves remediation.

CONCLUSION

Iowa Code Chapter 22 contains a clear, well-recognized expression of public policy favoring the production of open records. All fifty states have a similar statute, and so does the federal government. Iowa's statute has been interpreted numerous times over the past fifty-plus years, and even the State's top attorney has recognized the statute is clear. Chapter 22 satisfies the clearly defined and well recognized prongs of the Berry test.

Chapter 22 also concerns public health. "Public Health" is contained in the name of the agency, and even today, its own website says the agency is concerned with promoting public health. Of course, its records, likewise, affect public health. Specific to this case, too, is that Carver-Kimm was fired after producing life and death health information: Coronavirus data and abortion statistics. It is hard to imagine any records more affected by "public health" than that. This case, therefore, satisfies the second part of the Berry test, at least according to the State's unduly narrowed version of it anyway.

The Iowa cases cited by the State: Lloyd, Berry, and Ballalatak, are all materially distinguishable. Lloyd was too generic in his pleadings and motions, Berry's citation to the Comparative Fault Act didn't impact the "public", and Ballalatak was a whiny co-employee, not the one who was injured at work nor one whom the statute was designed to protect. The *most applicable* case is Teachout which held that where an employee is fired for doing something he or she is required to do by statute, then he or she can properly state a claim for wrongful discharge. That is what happened to Carver-Kimm: fired for doing what she was required to do.

Finally, the other states' cases cited by the State do not apply. Watson was fired for hacking the system for her son; Kiefer was fired for stealing a cop car, and Oklahoma law doesn't recognize implied protection from wrongful discharge, so Shero doesn't apply either. There is a material difference, legally, between protecting *requesters* verses *producers*, and while they both should be protected in Iowa in order to better achieve the purposes of Iowa Code section 22.8(3), producers need the most protection.

This Court should affirm the district court's ruling that Polly Carver-Kimm properly stated a claim for wrongful discharge in violation of the public policies underlying Chapter 22 in this case. The matter should be affirmed and remanded for trial.