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IN THE SUPREME COURT OF IOWA

No. 22–0789

LAURA BELIN,
BLEEDING HEARTLAND LLC,
CLARK KAUFFMAN, IOWA CAPITAL DISPATCH, RANDY EVANS, and IOWA FREEDOM OF INFORMATION COUNCIL,

Appellees,

vs.

GOVERNOR KIM REYNOLDS,
MICHAEL BOAL, PAT GARRETT, ALEX MURPHY, and OFFICE OF THE GOVERNOR OF THE STATE OF IOWA,

Appellants.

Appeal from the Iowa District Court for Polk County
Joseph Seidlin, District Judge

APPELLANTS' FINAL BRIEF

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ISSUES PRESENTED

I. Would interpreting chapter 22 to permit a timeliness claim against the Governor violate the separation of powers by reaching a nonjusticiable political question and infringing on her executive privilege?

Iowa Citizens for Cmty. Improvement v. State, 962 N.W.2d 780 (Iowa 2021)
Horsfield Materials, Inc. v. City of Dyersville, 834 N.W.2d 444 (Iowa 2013)
Des Moines Register & Trib. Co. v. Dwyer, 542 N.W.2d 49 (Iowa 1996)
Gilbert v. Gladden, 432 A.2d 1351 (N.J. 1981)
Coleman v. Miller, 307 U.S. 433 (1939)
Iowa Const. art. III, div. 1, § 1.

II. Does chapter 22 impose a timeliness requirement for electronic records that can independently support the continuation of an otherwise moot lawsuit after all requested open records have been provided to the plaintiff?

Homan v. Branstad, 864 N.W.2d 321 (Iowa 2015)
Horsfield Materials, Inc. v. City of Dyersville, 834 N.W.2d 444 (Iowa 2013)
Iowa Code § 22.2
Iowa Code § 22.3A
Iowa Code § 22.4

III. Does section 22.8(4)(d) require production of otherwise confidential records just because the records responses were provided more than twenty days after they were requested?

Iowa Code § 22.7
Iowa Code § 22.8(4)(d)

ROUTING STATEMENT

The Supreme Court should keep this case. This is one of three pending interlocutory appeals presenting the common question: Does Iowa Code chapter 22 impose a timeliness requirement for producing electronic records that can support the continuation of a lawsuit after all requested records have been provided? *See Rasmussen v. Reynolds*, No. 21-2008; *Rasmussen v. Iowa Dep't of Pub. Health*, No. 22-0452. This is an urgent issue of broad public importance to state and local governments. *See* Iowa R. App. P. 6.1101(2)(d). Answering it may require limiting or overruling the decision of this Court in *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013). And it makes sense for all three cases to be heard by the Supreme Court at once.

Each case also presents its own issues of first impression. *See* Iowa R. App. P. 6.1101(2)(c). Here, there are two. First, whether applying the timeliness requirement described in *Horsfield Materials* to the Governor would violate the separation of powers by reaching a nonjusticiable political question and infringing on executive privilege. And second, whether the confidentiality protections of section 22.7 vanish if they are not asserted within twenty days of a records request. These issues also warrant Supreme Court review.

STATEMENT OF THE CASE

This is an open-records lawsuit against the Governor and her staff—focused mainly on asking the Judiciary to rule that they did not respond fast enough to open-records requests in the middle of the unprecedented COVID-19 pandemic. The district court agreed that the case should proceed to discovery into whether the Governor's allocation of resources between responding to open-records requests and her other governing responsibilities was reasonable. In doing so, the court rejected the Governor's arguments that such a claim would violate the separation of powers by reaching a non-justiciable political question and infringing on her executive privilege. And the court followed *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013), in reasoning that chapter 22 permits such a timeliness claim even after all requested public records have been provided and without any textual basis for a timeliness requirement for electronic records.

Plaintiffs are three people—and related entities—who requested records from the Governor's Office. *See* App. 7–9 ¶¶ 20–27. When they did not receive responses to their requests as fast as they desired, they sued Governor Reynolds, some of her current and former staff, and the Governor's Office (collectively, "the Governor"). They allege the Governor violated chapter 22 of the Iowa Code by failing to provide them the records. App. 5 ¶ 4. And they

sought injunctive and other relief to enforce compliance with chapter 22 and obtain the requested records. App. 24–25 ¶¶ 1–5.

Shortly after learning of the suit, the Governor provided all responsive public records to Plaintiffs and moved to dismiss the suit as moot. *See* App. 57. The Governor also argued that interpreting chapter 22 to permit a timeliness claim against the Governor would violate the separation of powers by reaching a nonjusticiable political question and infringing on her executive privilege. *See* App. 84–90. And she argued that there is no textual basis in chapter 22 for a timeliness claim for electronic-records responses. App. 80–83.

The district court rejected all the Governor's arguments. *See* App. 189–96. And it thus denied her motion to dismiss. *See* App. 196. The Governor then filed a timely—and unresisted—application for interlocutory appeal, which this Court granted. *See* Order Granting App. for Interloc. App. (June 7, 2022).[1]

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[1] While the application for interlocutory appeal was pending, Plaintiffs filed an amended petition. *See* App. 198–252; *see also* Iowa R. Civ. P. 1.402(4). The amended petition wasn't considered by the district court in ruling on the motion to dismiss, and it isn't before the Court in this interlocutory appeal. In any event, Plaintiffs didn't make any changes materially affecting this appeal. But they did add a new claim that the Governor withheld or redacted documents that don't satisfy the requirements of section 22.7(5), (18), and (50) to be confidential. *See* App. 218 ¶ 3. That claim remains pending until after this appeal concludes.

STATEMENT OF THE FACTS

Amid an unprecedented pandemic, Plaintiffs Laura Belin, Clark Kauffman, and Randy Evans made a series of open records requests to Governor Reynolds from April 2020 to August 2021. App. 11–18 ¶¶ 38–84. When they didn't receive responses to their requests as fast as they desired, they sued. They allege that Governor Reynolds, some of her current and former staff, and the Governor's Office violated Iowa's open records laws—chapter 22 of the Iowa Code—by failing to provide them the records. App. 5 ¶ 4. And they sought injunctive and other relief to enforce compliance with chapter 22 and obtain the requested records. App. 24–25 ¶¶ 1–5.

But less than three weeks later, the Governor provided Plaintiffs all public records responsive to their requests through counsel in this proceeding. *See* App. 59–76.[2] Consistent with chapter 22 and the Governor's typical practice, these responses redacted or withheld any confidential records. *See, e.g.*, App. 62, 75, 125–33; *see also* Iowa Code § 22.7 ("The following public records shall be kept confidential, unless otherwise ordered by a court . . . .").

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[2] Because the Governor seeks to dismiss this case as moot, based on changed circumstances after its filing, this statement of the facts includes—and the Court can consider—evidence beyond Plaintiffs' allegations in their petition. *See Riley Drive Entm't I, Inc. v. Reynolds*, 970 N.W.2d 289, 296 (Iowa 2022); *see also Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Cmm'n*, 255 N.W.2d 917, 924 (Wis. 1977).

Because Plaintiffs obtained all their requested records, Governor Reynolds moved to dismiss their petition. *See* App 56–57. She argued that a timeliness claim against the Governor, her office, or her staff, is a nonjusticiable political question because it cannot be decided without making policy and value decisions about the allocation of time and resources within the Governor's Office, which would be an unmanageable standard. *See* App. 84–87. She also argued that interpreting chapter 22 to permit such a claim would infringe on the Governor's executive privilege by forcing her to reveal information protected by the privilege to defend the reasonableness of her efforts to respond. App. 87–90. And she argued that their claims are moot since she had provided all the requested records and there is no textual basis for a timeliness claim for electronic-records responses. App. 80–83.

In resisting dismissal, Plaintiffs raised a new violation of chapter 22—without amending their petition—claiming that Governor Reynolds couldn't redact or withhold confidential records from her responses if she didn't do so within twenty days of receiving the request. *See* App. 103–05. Because the Governor had redacted and withheld some records in her responses to them, they thus argued that there was still a live dispute over whether she was violating chapter 22 by refusing to provide all the requested records. *See* App. 105. Governor Reynolds countered that nothing

in chapter 22 provided that an otherwise confidential document would become public if confidentiality wasn't asserted within twenty days. *See* App. 137–39.

Plaintiffs also continued to press their request for a declaration that the Governor and her staff "have violated Iowa's Open Records law . . . by failing to provide the records to Plaintiffs in a timely manner as required by Chapter 22, even if they are later provided in response to this litigation." App. 24 ¶ 1. And they continued to seek an injunction against the Governor to "refrain for one year from committing future violations." App. 24 ¶ 2.

The district court disagreed with all the Governor's arguments for dismissal. The court rejected Governor Reynolds's invocation of the political-question doctrine, reasoning that "interpretation of statutes and consideration of defenses is the type of dispute within the judiciary's role to address" and that "judicial power cannot be shared with the Executive Branch." App. 192 (cleaned up). And it refused to "make assumptions that it is not required to make for purposes of a motion to dismiss," App. 191, explaining it was premature "to know what evidence will be sufficient to prove or defend against the alleged violations." App. 193.

The court also didn't consider executive privilege in interpreting the scope of any timeliness claim against the Governor "for the same reasons." App. 195. It added that "determinations, especially

blanket ones resulting in dismissal, as to what information is discoverable or privileged, are not appropriate at this stage of the litigation." *Id.*

Finally, the district court held that the case isn't moot because this Court recognized a timeliness claim in *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013). *See* App. 189–91. And it held that Plaintiffs' contention that the Governor was improperly withholding confidential records was a "fact question not appropriate for decision on a Motion to Dismiss." App. 193. The court thus denied the Governor's motion to dismiss.

This interlocutory appeal followed.

ARGUMENT

Discovery and trial delving into precisely how the Governor and her staff—including her senior legal counsel—were spending their time in the midst of a two-year public health emergency. And then an opinion from the Iowa courts on whether her allocation of resources between responding to open-records requests and her other governing responsibilities was reasonable. All in a case that should be moot because the Governor has now provided all the requested public records. And based on a statute without any textual basis for a standalone timeliness claim for electronic records.

The district court should have dismissed this suit to prevent this coming breach of the separation of powers. But it ruled that Plaintiffs can pursue a claim that the Governor violated chapter 22 by not producing the electronic records they requested fast enough. *See* App. 189–90, 196. The district court based its ruling on this Court's decision in *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013). *See* App. 190; *see also* App. 105–09.

There, the Court held that a city that hadn't provided requested records for nearly three months didn't substantially comply with chapter 22. *Horsfield Materials*, 834 N.W.2d at 462. The Court rejected any absolute deadline for responding to records requests. *Id.* at 461. But it held that this three-month delay was a "refusal" to provide records that put the burden on the city to prove

compliance. *Id.* at 463 & n.6. And while it was a "close question," whether the delay was reasonable, the Court reasoned that the city hadn't provided enough detailed evidence in its defense. *Id.* at 462–63.

The city administrator had testified in some detail about the tasks necessary to produce the records and the other "urgent matters" with which he was dealing. *Id.* at 462. But the Court found it lacking that "his explanations did not include any dates or other time frames." *Id.* And the Court thus could not judge "how much time it really took city officials to work on [the records] request, relative to other demands on city officials' time." *Id.* at 462–63.

Assuming that the *Horsfield Materials* analysis is correct for other governmental bodies, it should not be extended to apply to a claim against the Governor, her staff, and her office. The Court would be asked to decide whether the time spent by the Governor and her staff in relation to the time working on Plaintiffs' record requests was reasonable. Doing so would present a nonjusticiable political question. Such an interpretation of chapter 22 would also unconstitutionally infringe on the Governor's executive privilege by forcing her to disclose protected information to defend the claim. And regardless, the claim is moot since all records have been provided and timeliness claims for electronic records requests lack any statutory basis.

Plaintiffs' attempt to salvage a live controversy by arguing that the Governor couldn't redact or withhold confidential records more than twenty days after the records were requested also fails. Chapter 22's confidentiality protections don't vanish after twenty days. And the statute's text lacks any basis to conclude otherwise.

All the Governor's arguments for dismissal were raised to and rejected by the district court. And the court's rulings are properly reviewed by this Court for corrections of errors at law. *See Riley Drive Entm't I, Inc. v. Reynolds*, 970 N.W.2d 289, 295 (Iowa 2022).

I. Interpreting chapter 22 to permit a timeliness claim against the Governor would violate the separation of powers by reaching a nonjusticiable political question and infringing on her executive privilege.

The political question doctrine—in Iowa and federal courts—is rooted in the separation of powers. *See Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780, 796 (Iowa 2021); *Baker v. Carr*, 369 U.S. 186, 210–211 (1962). Indeed, those roots are more firmly planted in the Iowa Constitution, which expressly provides that "[t]he powers of the government of Iowa shall be divided into three separate departments—the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others." Iowa Const. art. III, div. I, § 1; *see also Iowa Citizens for Cmty Improvement*, 962 N.W.2d at 796.

The doctrine counsels that the court must "leave intact the respective roles and regions of independence of the coordinate branches of government." *Des Moines Register & Trib. Co. v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996). "Whether a matter involves a "political question" is determined case-by-case and requires an examination of the nature of the underlying claim." *King v. State*, 818 N.W.2d 1, 17 (Iowa 2012). This Court has repeatedly followed the analysis first set forth in *Baker v. Carr*, identifying six independent grounds for finding a political question. *See Iowa Citizens for Cmty Improvement*, 962 N.W.2d at 796; *Baker*, 369 U.S. at 217.

As the Court most recently explained in *Iowa Citizens for Community Improvements*, a political question exists when "one or more of the following considerations is present":

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving the issue; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Iowa Citizens for Cmty. Improvement, 962 N.W.2d at 794 (cleaned up); *see also Baker*, 369 U.S. at 217 (describing the same six

"formulations," one of which is found "[p]rominent on the surface of any case held to involve a political question").

Despite only "one" of the six independent "considerations" needing to be "present," *Iowa Citizens*, 962 N.W.2d at 794, the district court seemed to focus on *only* one—the first of the six. *See* App. 191–93. The court reasoned that the Legislature enacted chapter 22 and didn't "exclusively entrust discretion" to the Executive Branch. App. 192. Rather, because "interpretation of statutes and consideration of defenses is the type of dispute within the judiciary's role to address," and such "judicial power cannot be 'shared with the Executive Branch,'" the court rejected the argument that a timeliness claim against the Governor is a political question. *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 704 (1974)).

But recognizing that this case presents a political question isn't sharing judicial power. It's exercising that power to properly decide that the case-specific question presented is not one that the judiciary should attempt to answer. *See Dwyer*, 542 N.W.2d at 496 (rejecting argument that applying the political question doctrine is inconsistent with "the independence of the judiciary in construing and interpreting statutes" because it "inappropriately inverts the legal posture of the case"); *Iowa Citizens for Cmty Improvement*, 962 N.W.2d at 799 (refusing to "go beyond the accepted role of courts").

Indeed, this Court has dismissed claims presenting nonjusticiable political questions even when the claims are authorized by the Legislature. *See Iowa Citizens for Cmty. Improvement*, 962 N.W.2d at 796 (describing *Denny v. Des Moines Cty.*, 121 N.W. 1066 (1909)—which held that Legislature couldn't create a claim to review decisions not to form drainage districts—as "something akin to" a political question case); *Dwyer*, 542 N.W.2d at 501. And that includes a suit under the same statute here—Iowa Code chapter 22—to obtain records from the Legislature that it had decided were confidential. *See Dwyer*, 542 N.W.2d at 494–96, 501.

So as in *Dwyer*, it's appropriate to consider whether the political-question doctrine bars Plaintiffs' timeliness claims under chapter 22. And analyzing all the relevant political-question considerations present in a timeliness claim against the Governor shows that it is a nonjusticiable political question. Plaintiffs' timeliness claims should be dismissed.

First, the statute lacks judicially discoverable and manageable standards for resolving whether the timeliness of the Governor's response was reasonable. *See Iowa Citizens for Cmty. Improvement*, 962 N.W.2d at 796. How would a court be expected to assess whether the Governor's senior legal counsel should have been spending more time working on Plaintiffs' open-records requests rather than, say, drafting a public health disaster proclamation or

discussing passed legislation with the Governor as she considers whether to sign it? Or by what standard could a court *of law* pass judgment on whether the Governor should have hired more staff or allocated more of her staff to work on open-records requests instead of duties related to the pandemic, the legislative session, or other operations of state government?

Just like trying to apply a standard that the Legislature should "pass laws that regulate [navigable] waters in the best interest of the public," assessing the reasonableness of the Governor's response to a records request would involve improper balancing of political questions rather than applying a legal standard. *Iowa Citizens for Cmty. Improvement*, 962 N.W.2d at 796; *see also King v. State*, 818 N.W.2d 1, 17–18 (Iowa 2012) (suggesting concerns with manageability of education clause without ultimately deciding whether a claim under the clause is a political question). In short, conducting the *Horsfield Materials* analysis to consider the timeliness of the Governor's response to an open-records request would be unmanageable.

Saying that it's too early in the case to know if the standard will become unmanageable—as the district court did—isn't the proper analysis. *See* App. 191, 193. Nor is the court's explanation that it's uncertain exactly how the timeliness requirement should apply—or even what threshold of evidence is necessary to prove a

violation. *See* App. 192–93. Such murkiness provides no protection to avoid a constitutional breach.

Other courts have agreed in similar cases that implying a reasonableness standard to judge the timeliness of government action is an unmanageable political question. In *Coleman v. Miller*, 307 U.S. 433 (1939), the U.S. Supreme Court considered a challenge to the Kansas Legislature's ratification of a proposed constitutional amendment 13 years after its proposal. *See* 307. U.S. at 451. Congress had not set a deadline for ratification, but the challengers urged the Court to "take upon itself the responsibility of deciding what constitutes a reasonable time" for ratification." *Id.* at 452–53. But the Court held it was a nonjusticiable political question, reasoning that it involves "an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy." *Id.* at 453–54. These factors were more "appropriate for the consideration of the political departments of the Government." *Id.* at 454.

So too did the New Jersey Supreme Court reject a challenge to claimed unreasonable delays in the presentment of bills to the

governor as a nonjusticiable political question. *See Gilbert v. Gladden*, 432 A.2d 1351, 1358 (N.J. 1981). In New Jersey, despite constitutional and statutory requirements to present passed bills to the governor, the legislature practiced a "gubernatorial courtesy" of waiting to present the bills until requested by the governor—even for as long as 18 months or when it would cause dozens of bills to be pocket-vetoed. *See id.* But because New Jersey's constitution and statutes contained no set deadline, the court refused to imply one. *See id.* at 1355.

The New Jersey Supreme Court also rejected the workability of a reasonableness standard for judging the timeliness of presentment. *See id.* n. 4. It explained, the standard "would obtrude the judiciary into the legislative process in a manner that would do greater violence to the constitutional framework than" the challenged delays. *Id.* And the court reasoned the standard "would require courts to make political value judgments regarding the priority of bills so as to evaluate the order in which the Governor reviews them and the amount of time he should spend studying them." Thus the court aptly concluded: "A more blatant breach of the separation of powers is difficult to imagine." *Id.*

Even when the governing constitutional provision required legislative action within "a reasonable time," the Kentucky Supreme Court held that deciding what constitutes a reasonable

time is a political question. *See Philpot v. Haviland*, 880 S.W.2d 550, 553–54 (Ky. 1994). The court followed the reasoning of the U.S. Supreme Court in *Coleman v. Miller*, explaining that the legislature was best able to make the determination because it "has the full knowledge and appreciation ascribed to the legislature of the political, social and economic conditions which have prevailed since the legislation was introduced." *Id.* at 554 (cleaned up).

The Supreme Courts of New Jersey, Kentucky, and the United States got it right. The wide range of political, social, and economic judgments necessary to make a reasonableness determination about the timeliness of an elected official's actions are not well-suited to judicial fact-finding and determination. This Court should follow them in reasoning that the *Horsfield Materials* timeliness analysis does not provide a judicially discoverable and manageable standard when applied to the Governor.

Second, conducting the *Horsfield Materials* assessment would also be impossible to make without "initial policy determination[s] of a kind clearly for nonjudicial discretion." The allocation of limited time and resources of the Governor's staff, particularly during the challenging times of a state-managed response to a public health disaster emergency is at core a policy and political question—not a legal one. And second-guessing whether the Governor has made these decisions properly—when the voters elected her and thereby

sanctioned her judgment over precisely these types of policy decisions—would amount to "expressing a lack of respect due [to the] coordinate branches of government." *Iowa Citizens for Cmty. Improvement*, 962 N.W.2d at 794.

Finally, like *Iowa Citizens for Community Improvement*, "this case may not involve a paradigm of a textually demonstrable constitutional commitment" to another branch. 962 N.W.2d at 798 (cleaned up). But deciding these questions *would* cause the court to wade into areas textually entrusted to the Governor. The Iowa Constitution tasks the governor with executing the state's laws. *See* Iowa Const. art. IV, § 1 (vesting "[t]he supreme executive power of this state" in the Governor); *id.* art. IV, § 8 ("He shall take care that the laws are faithfully executed.").

The operations of her office staff that coordinate all these duties are at the core of this constitutional authority. *See Ryan v. Wilson*, 300 N.W. 707, 712 (Iowa 1941) (noting that while the Governor "is the chief executive officer of the State, his job isn't a one-man job" and "[i]n the performance of his manifold duties, he is required to call for and to rely upon the assistance of many other officers and employees of the State"); *Godfrey v. State*, 962 N.W.2d 84, 112 (Iowa 2021) (recognizing Governor's management of the budget of the executive branch was a "constitutional power[] to be exercised wholly at the discretion of the governor" under article IV,

section 1 of the Constitution). The tasks that the Governor assigns to the staff of her office—and how her staff resources are allocated between responding to open-records requests and her other "many and burdensome and important" duties, *Ryan*, 300 N.W. at 712—are textually entrusted to the Governor by the Constitution. Plaintiffs' timeliness claims present nonjusticiable political questions.

Requiring the Governor to prove the reasonableness of her response time under *Horsfield Materials* would also infringe on her executive privilege by requiring her to disclose protected information to defend the claim. To conduct the *Horsfield Materials* analysis, the district court would need substantial details about what the Governor and her staff were spending their time doing in relation to their time on Plaintiffs' requests. The court would need to know why the Governor decided to allocate her staff resources in that way. And mere summary explanations are insufficient—this Court has demanded detailed, specific evidence. *Horsfield Materials*, 834 N.W.2d at 462–63. Thus, if a timeliness claim against the Governor could proceed to discovery or trial, Plaintiffs could try to inquire into these topics. And to properly defend against such a claim, the Governor and her staff would be forced to present evidence on them.

But the Governor's decision-making and communications are protected by executive privilege. And absent her waiver, they

should generally be kept confidential. Interpreting chapter 22 to require the court to answer these questions would set up a clash between the protections of the privilege and the judiciary's resolution of the lawsuit. And that's particularly problematic since section 22.10(2), as interpreted by *Horsfield Materials* puts the burden on the Governor to "demonstrate compliance" when "a substantial amount of time has elapsed since the records were requested and the records have not been produced at the time the requesting party files suit under the Act." *Horsfield Materials*, 834 N.W.2d at 463 n.6. This burden-shifting would force the Governor to choose between waiving executive privilege or possibly failing to meet her burden to show the reasonableness of a delayed response. These concerns should be avoided by interpreting chapter 22 not to provide a timeliness claim against the Governor.

This Court has acknowledged that there is "an executive privilege, derived from the doctrine of separation of powers in both our State and federal constitutions." *State ex rel. Shanahan v. Iowa Dist. Ct.*, 356 N.W.2d 523, 526–27 (Iowa 1984). The Court quoted from *United States v. Nixon*, 418 U.S. 683 (1974), which explained that "[t]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." *State ex rel. Shanahan*, 356 N.W. at 527 (quoting *Nixon*, 418 U.S.

at 706). But the Court ultimately decided the case on other statutory grounds. And so, the full scope of the privilege has not yet been fleshed out.

But the starting point—given its favorable citation in *Shanahan*—is *Nixon*. The issue in *Nixon* was whether a court could enforce a subpoena for Presidential communications for use in a criminal prosecution. More generally, the opinion discusses the two competing interests to be balanced in executive privilege cases: transparency in disclosing important documents, and deference by courts to executive decision- and policy-making. A unanimous Court recognized that the "President's need for complete candor and objectivity from advisers calls for great deference from the courts." 418 U.S. at 706. Executive privilege therefore upholds "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* at 708.

Other states have also followed *Nixon* to recognize an executive privilege for their Governor. *See, e.g.*, *Freedom Foundation v. Gregoire*, 310 P.2d 1252 (Wash. 2013); *Republican Party of New Mexico v. New Mexico Tax'n & Revenue Dept.*, 283 P.3d 853 (N.M.

2012); *State ex rel. Dann v. Taft*, 848 N.E.2d 472 (Ohio 2006); *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777 (Del. Super. Ct. 1995); *Nero v. Hyland*, 386 A.2d 846 (N.J. 1978).

The States vary in precisely how they define the scope of the privilege and when it can be pierced by other interests. But the sorts of communications and decision-making in the internal day-to-day operations of the Governor's office that would be necessary to show the reasonableness of the Governor's responses here are at the core of its protections. The Court should be wary of opening the door to that confidentiality being lost. *Cf. Ryan*, 300 N.W. at 715 ("In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint." (quoting *Spalding v. Vilas*, 161 U.S. 483, 498–99 (1896))).

The Governor shouldn't have to choose between claiming the privilege or defending the reasonableness of her responses to open-records requests in this suit. All the more so, where even if the court were presented with this privileged information, it would still be

faced with deciding a nonjusticiable political question. Plaintiffs' timeliness claims should be dismissed.

II. Plaintiffs' claims that the Governor violated chapter 22 by responding too slowly to their open-records requests fail as a matter of law because chapter 22 doesn't permit a timeliness claim based on a delay in producing electronic records.

Alternatively, the timeliness claims against the Governor should be dismissed because there is no textual basis in chapter 22 for a timeliness claim for requests of electronic records. So any claimed violation of chapter 22 should have been dismissed once Plaintiffs received their requested public records. *Horsfield Materials* didn't consider the question of mootness. And it didn't consider the statutory provisions governing electronic records. The Court should do so now.

A. The claims are moot because Plaintiffs have now received all the public records they requested from the Governor.

"Courts exist to decide cases, not academic questions of law. For this reason, a court will generally decline to hear a case when, because of changed circumstances, the court's decision will no longer matter." *Homan v. Branstad*, 864 N.W.2d 321, 328 (Iowa 2015). A case should be dismissed as moot "if it no longer presents a justiciable controversy because the issues involved are academic or nonexistent." *Id.* (cleaned up). Put another way, the "test is

whether an opinion would be of force and effect with regard to the underlying controversy." *Women Aware v. Reagen*, 331 N.W.2d 88, 92 (Iowa 1983). The judiciary's "lawgiving function is carefully designed to be an appendage to [its] task of resolving disputes." *Wengert v. Branstad*, 474 N.W.2d 576, 578 (Iowa 1991). "When a dispute ends, the lawgiving function ordinarily vanishes" and a court "certainly should not go out of [its] way to answer a purely moot question because of its possible political significance." *Id.*

Plaintiffs filed this suit when they had not received a response to their open-records requests to the Governor. App. 188. Those records have now been provided. *Id.* This resolved the controversy between the parties and any further opinion of the court would have no "force and effect with regard to the underlying controversy." *Women Aware*, 331 N.W.2d at 92. The issues involved in Plaintiffs' petition are now "nonexistent." *Homan*, 864 N.W.2d at 328.

The Iowa Court of Appeals has held that an open-records lawsuit becomes moot after the agency provides the records sought in the suit. *See Neer v. State*, No. 10-0966, 2011 WL 662725, at *1 (Iowa Ct. App. Feb. 23, 2011) ("Because the State released the records to Neer, we agree with the district court that this case became moot."). But because that case involved a dispute about the confidentiality of law enforcement investigative files after a criminal case is complete, the court also agreed the exception to mootness

applies because it was an important issue likely to reoccur and deciding the issue would help in future court proceedings. *Id.* at *2.

So too have courts from other jurisdictions agreed. *See Cabinet for Health & Fam. Servs. v. Courier-J., Inc.*, 493 S.W.3d 375, 382–83 (Ky. Ct. App. 2016) (recognizing that many federal and state courts recognize that once a party produced the records, the action for public records becomes moot); John Bourdeau, et al., 37A Am. Jur. 2d Freedom of Information Acts § 473 (Aug. 21, 2021 update) ("Once the records are produced in a case under the Federal Freedom of Information Act (FOIA) or a state counterpart, the substance of the controversy disappears and becomes moot since the disclosure the suit seeks has already been made.").

True, in *Horsfield Materials*, this Court recognized a timeliness claim. *See Horsfield Materials*, 834 N.W.2d at 460–63. But since mootness wasn't ruled on by the Court, *Horsfield Materials* is not binding precedent on the issue. *See State v. Foster*, 356 N.W.2d 548, 550 (Iowa 1984) ("To sustain a claim of binding precedent a case must be interpreted in reference to an involved question which necessarily must be decided."); Bryan A. Garner et al., *The Law of Judicial Precedent* 84 (2016) ("A decision's authority as precedent is limited to the points of law raised by the record, considered by the court, and determined by the outcome."). Indeed, the open-records claim in *Horsfield Materials* was just one claim in a larger

suit focused on many challenges a city's preapproval process for suppliers on a public construction project. *See Horsfield Materials*, 834 N.W.2d at 447. So it makes sense that the parties didn't seek dismissal of that suit as moot.

But here, this is only an open-records suit. Originally it had a viable claim to obtain requested records that hadn't yet been produced. But after the Governor responded with all the records, Plaintiffs try to keep the case alive with claims that the response was untimely and that certain confidential records could no longer be kept confidential because no response was provided within twenty days. Both claims fail. This case is moot.

B. Chapter 22 doesn't impose a timeliness requirement for electronic records; any contrary holding in *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013), should be overruled because it conflicts with the text of chapter 22.

There is no basis in the text of chapter 22 to support a timeliness claim for electronic records. In *Horsfield Materials*, the court acknowledged that "there is no explicit time deadline in chapter 22 for the production of Public records." 834 N.W.2d at 460. But it reasoned that section 22.4 "suggests that our legislature contemplated immediate access to public records." *Id*. at 461. And then it then relied on proposed administrative guidance to construe an

"obligation to produce public records promptly, subject to the size and nature of the request." *Id.* at 462.

But even if chapter 22 can bear the weight of this interpretation for requests for paper records, it doesn't hold up for electronic records. The reasoning of *Horsfield Materials* starts with the suggestion of "immediate access to public records" in section 22.4, because that provision "state[s] that '[t]he rights of persons under this chapter may be exercised at any time during the customary office hours of the lawful custodian of the records.'" *Horsfield Materials*, 834 N.W.2d at 461 (quoting Iowa Code § 22.4). Yet section 22.4 doesn't say what those rights are.

To find the core right to access public records—and its exceptions—one must look at section 22.2. There, "[e]very person" is granted "the right to examine and copy a public record." Iowa Code § 22.2(1). And this right "shall include the right to examine a public record without charge while the public record is in the physical possession of the custodian of the public record" and to "make photographs or photographic copies while the public record is in the possession of the custodian." *Id.* Read together with section 22.4's right to exercise during office-hours, chapter 22 does indeed permit

someone to come to a government office and get immediate access to view, copy, or photograph paper records where they are stored.[3]

But this right to immediate access—or any access at all—doesn't apply to electronic records that must be retrieved from data processing software. *See* Iowa Code §§ 22.2(4)(b), 22.3A. This broad exception was enacted by the Legislature in 1996 as a part of a larger bill dealing with electronic government records. *See* Act of April 15, 1996, ch. 1099 §§ 14, 15, 1996 Iowa Acts 222, 225 (codified at Iowa Code §§ 22.2(4)(b), 22.3A (1997)). Having such an exception makes sense. Otherwise, anyone could come to a government office, demand to sit down at any computer, and browse through the electronic files. Indeed, they could demand to have copies of the software code itself.

Of course, public records don't become permanently off limits just because they are electronic. In section 22.3A, the Legislature crafted an extensive statutory scheme for electronic records. *See* Iowa Code § 22.3A. But section 22.3A doesn't require "immediate access" during office hours. Nor does it set any specific deadline or even a general reasonableness standard for responding to a request

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[3] Even this access is subject to "reasonable rules regarding the examination and copy of the records and the protection of the records against damage or disorganization." Iowa Code § 22.3. And it is to "be done under the supervision of the lawful custodian or the records or the custodian's authorized designee." *Id.*

for access to electronic records. *See id.* The governmental body need only "establish policies and procedures to provide access to public records" in the system. Iowa Code § 22.3A(2)(a). In light of the other regulations—about costs, electronic file formats, and maintaining access to public records—the absence of any timeliness requirement for electronic records is notable. And the Court should not read in such a requirement that the Legislature did not enact.

The Court in *Horsfield Materials* didn't analyze these proper statutory provisions governing electronic government records. And neither did the administrative guidance on which the court then relied to support some timeliness requirement. That's because the guidance was adopted in 1985—11 years before the applicable statute. (And long before electronic records became as prominent as they are now). Without either of these foundations for the Court's ruling able to support a timeliness requirement for electronic records, it shouldn't be extended now.

At bottom, the Legislature knows how to impose a time requirement on a state agency or the Governor if it wants to do so. *See, e.g.*, Iowa Code §§ 22.7(60), 22.8(4)(d), 29C.6(1). Especially, with an issue like public access to electronic records, there are a host of policy factors that could impact how the Legislature would craft such a requirement if it *did* decide to do so. Absent any text to

interpret, this Court cannot impose such a requirement without itself legislating. It shouldn't do so. *See* Iowa Const. art. III, div. 1, § 1; *Coleman v. Miller*, 307 U.S. 433, 453–54 (1939). These policy choices are best left to the Legislature. With no textual basis in the current statute for a timeliness claim based on a request for electronic records—and the records already provided—this case should have been dismissed as moot.

III. Section 22.8(4)(d) doesn't require production of otherwise confidential records just because the records responses were provided more than twenty days after they were requested.

Recognizing that Governor Reynolds has now responded to their records requests, Plaintiffs tried to keep their case alive by contending that Governor Reynolds still violated chapter 22 by redacting and withholding confidential information from her responses to their requests. *See* App. 103. They didn't argue that the redacted or withheld information fails to meet the confidentiality definitions relied on by the Governor. *See* App. 104–05.[4] They

[4] In their amended petition, Plaintiffs added a new claim that—separate from the 20-day-waiver issue—the withheld or redacted documents aren't confidential and fail to satisfy the substantive requirements of section 22.7(5), (18), and (50). *See* App. 218 ¶ 3. But this amended petition wasn't filed until after the application for this interlocutory appeal. So it isn't before this Court now. It remains pending for consideration by the district court after this appeal concludes.

just argued that any confidentiality protections of section 22.7 vanish if a custodian doesn't assert the confidential status of a record within 20 days. *See id.* But this is not the law. And rather than rejecting this legal claim, the court decided it was a "fact question not appropriate for decision on a Motion to Dismiss." App. 193.

Plaintiffs rely on section 22.8(4)(d) as the trigger to extinguish the confidentiality protections of Iowa law. *See* App. 104. But it has no such power. That provision appears in a section of chapter 22 authorizing injunctions preventing the disclosure of public records. *See* Iowa Code § 22.8. And it provides that "[g]ood-faith, reasonable delay by a lawful custodian in permitting the examination and copying of a government record is not a violation of this chapter if the purpose of the delay is . . . [t]o determine whether a confidential record should be available for inspection and copying to the person requesting the right to do so. A reasonable delay for this purpose shall not exceed twenty calendar days and ordinarily should not exceed ten business days." Iowa Code § 22.8(4)(d).

This language doesn't "impose an absolute twenty-day deadline on a government entity to find and produce requested public records." *Horsfield Materials,* 834 N.W.2d at 461. The deadline "is limited to the circumstance in which the custodian needs to determine whether an otherwise confidential record should be made available to a person who claims the right to view it." *Id.* And it

should not be extrapolated "to other contexts, when the legislature chose not even to include that deadline in the other portions of section 22.8(4)." *Id.*

Plaintiffs didn't allege—and the Governor didn't say in any record response—that the delay was caused by her consideration of whether to release otherwise confidential records. *See* App. 5–24 ¶¶ 1–123; App. 59–76. The text of section 22.8(4)(d) is not written so broadly as to set a deadline for all confidentiality determinations outside this limited circumstance. And this Court has made clear that the scope of the deadline cannot be extended beyond its terms. *See Horsfield Materials*, 834 N.W.2d at 461.

But even if Plaintiffs are right that the deadline applies to any response involving a claim of confidentiality, nothing in chapter 22 provides—or even suggests—that the consequence for failing to respond on time would be to make an otherwise confidential document public. That interpretation would be absurd and would eviscerate the many confidentiality protections offered by section 22.7 and other Iowa law. It would mean that a delayed response by a school would leave student records unprotected. *See* Iowa Code § 22.7(1). Or that personal medical and treatment records could be forced into the open. *See id.* § 22.7(2). It's unlikely that the Legislature intended that result. And this Court shouldn't adopt such an interpretation without a clear textual basis for doing so.

In fact, in *Horsfield Materials* itself, the records custodian first asserted the confidentiality of certain records almost three months after receiving an open records request. *See Horsfield Materials*, 834 N.W.2d at 450–51 (discussing production and claim of privilege in April in response to a request received on January 11). And there, the Court raised no concern about the custodian's ability to assert confidentiality. *See id.* at 463.

The timing of the Governor's response doesn't give Plaintiffs a right to receive documents that are confidential under chapter 22. Because Plaintiffs raised no other issue about the claim of confidentiality in their petition or resistance, this asserted violation of chapter 22 fails *as a matter of law* and provides no basis for the district court's denial of the motion to dismiss. This Court should reverse the district court's contrary ruling so that on remand, it can consider Plaintiffs' remaining claim under the proper legal framework.

CONCLUSION

Iowa's open-records laws provide the public access to government records. Plaintiffs used those laws to gain access to their requested records, without the intervention of the court. And after obtaining them, their claims based on those records should end.

Chapter 22 doesn't impose a timeliness requirement for electronic records requests. If there is one, it cannot be enforced here

against the Governor because judging the reasonableness of her response would violate the separation of powers. The district court's contrary ruling should be reversed. The case should be remanded for consideration of only Plaintiffs' challenge in their amended petition to the redactions and withholding of confidential information under section 22.7. The rest of the case should be dismissed.

REQUEST FOR ORAL SUBMISSION

Governor Reynolds requests to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COST

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

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 7,573 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I certify that on October 22, 2022, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

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