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' REPLY BRIEF

THOMAS J. MILLER
Attorney General of Iowa

SAMUEL P. LANGHOLZ
Assistant Solicitor General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
(515) 281-4209 (fax)
sam.langholz@ag.iowa.gov

ATTORNEY FOR APPELLANTS

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I. The Governor does not claim to be exempt from Chapter 22—but merely seeks to ensure that resolution of this suit respects the proper boundaries of Iowa's constitutional structure.

Never—in this case or any of the other related pending appeals—has the Governor argued that she is exempt from Iowa's open record laws in chapter 22. She didn't deny the records requests here; she responded to them and provided all public records that were responsive. And she doesn't contend that the Legislature is prohibited from imposing a deadline on the Governor to respond to open records requests.

But *if* chapter 22 contains an amorphous reasonableness standard for assessing the timeliness of responses to open-records requests, such a standard cannot be applied to the Governor. It would violate the separation of powers by enmeshing the courts in answering a political question. A respect of the proper boundaries of Iowa's constitutional structure requires dismissing the claim.

A. The Governor preserved error on all her arguments that a timeliness claim presents a political question.

The Governor argues here, as she did in the district court, that a timeliness claim against the Governor implicates several of the six independent "considerations" are "present," *Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780, 794 (Iowa 2021),

warranting this Court holding that the claim is barred by the political question doctrine. Plaintiffs contend that she hasn't preserved error on one of these arguments—that there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *id*—because the district court didn't rule on it. *See* Appellees' Br. at 29–30, 33–35.

But the Court *did* reject this argument—just like all of them—in holding that the political question doctrine doesn't bar this suit. And it spent a paragraph discussing the constitutional commitment of powers to the Legislative, Executive, and Judicial branches. *See* App. 192. To be sure, the court did not analyze the issue in the manner urged by the Governor, and it put too much focus on the fact that the Legislature enacted chapter 22 and didn't "exclusively entrust discretion" to the Executive Branch. *Id.* But a district court need not adopt or reject every chain of a party's logic for the party's argument to be preserved for appeal. Adopting such a literalistic preservation rule would bog down the district courts in reconsideration motions with no corresponding benefit to the appellate courts. This argument was preserved.

The district court was not wrong in observing, however, that the focus of the Governor's political-question argument is that applying a reasonableness timeliness standard to the Governor would

be unmanageable. *See* App. 191. Without a doubt, that is the strongest basis for finding a nonjusticiable political question here.

B. Plaintiffs attempt to distinguish persuasive authority based on immaterial differences.

Plaintiffs fail to seriously engage with the precedent from other jurisdictions holding that implying a reasonableness standard to judge the timeliness of government action is an unmanageable political question. *See* Appellants' Br. at 22–24. Plaintiffs brush them aside because they involved "legislative actions or inactions, not the executive's actions or inactions." Appellees' Br. at 36. But they don't even try to explain why that distinction makes any difference. And it doesn't. The political question doctrine is not limited to actions arising from only one of the three branches. *See Iowa Citizens*, 962 N.W.2d at 785 (applying political question doctrine to dismiss suit against the State and many Executive Branch officials); *State ex rel. Dickey v. Besler*, 954 N.W.2d 425, 435 (2021) ("Normally we apply the political question doctrine when a matter is entrusted exclusively to the legislative branch, to the executive branch, or to both of them."). Whether judging the timeliness of actions by a Legislature or a Governor, the reasoning of the Supreme Courts of New Jersey, Kentucky, and the United States holds true. The decisions are not amenable to judicial decision-making and should be left to those two political branches.

C. Considering the conflict between the Governor's executive privilege and the detailed *Horsfield Materials* timeliness analysis is not premature.

Plaintiffs continue to contend that it is "premature and speculative" to consider the Governor's argument that chapter 22 should be interpreted to avoid a conflict with her executive privilege. Appellees' Br. at 40; *see also id.* at 22 n.1, 46–47. But they misunderstand. The Governor isn't making a claim of executive privilege over some discovery dispute. She's making a constitutional avoidance argument about the proper interpretation of chapter 22. *See Simmons v. State Pub. Def.*, 791 N.W.2d 69, 74 (Iowa 2010) (interpreting statute to avoid "constitutional icebergs"). Really, perhaps it's just another flavor of the political question doctrine and a reason to be wary of a coming clash of the separate constitutional powers.

It matters not that Plaintiffs would be perfectly happy winning their claim without engaging in discovery. *See* Appellees' Br. at 46–47. Chapter 22, as interpreted by the Court in *Horsfield Materials* puts the burden on the Governor to prove whether her response was reasonable. *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 463 & n.6 (Iowa 2013); *see also* Iowa Code § 22.10(2). And this isn't speculative. It's erroneous and unconstitutional if it's permitted to extend to the Governor because it would put the Governor in the impossible situation of having to provide

information that is constitutionally protected or withhold her defense and accept statutory liability.

While rare, this argument is not unprecedented. When the United States government determines that a lawsuit cannot be defended without disclosing confidential national security information protected by the state secrets privilege, that doctrine has long permitted dismissal of the suit as a remedy to protect the privilege. *See Fed. Bureau of Investigation v. Fazaga*, 142 S. Ct. 1051, 1056–62 (2022) (discussing state secrets privilege and remedy of dismissal). But here, the Governor doesn't even go that far. She isn't asking to dismiss an otherwise valid claim based on the privilege—just to interpret chapter 22 with the privilege in mind so as not create a claim so broad that it would cause the constitutional dilemma.

II. The moot part of this suit is neither of great public importance nor possible to reoccur.

The procedural posture of this case is admittedly a bit confusing. This comes from the changing facts (properly considered on a mootness claim), the changing arguments from Plaintiffs in trial and appellate briefing, and Plaintiffs' post-appeal amended petition. So it is important to be clear about what claim precisely the Governor argues is now moot: Plaintiffs' claim that the Governor failed to produce *any* records in response to their requests.

Plaintiffs alleged that they made many open-records requests. *See* App. 11–18. And at the time they filed suit, they had not received any responsive records from the Governor. *See* App. 20 ¶ 94; App. 23 ¶ 117, App. 188. They thus sought relief from the Court to obtain their requested records. *See* App. 24–25. This is the claim that is now moot. Because shortly after learning of Plaintiffs' claims, the Governor provided all responsive *public* records. *See* App. 188; *see also* App. 59–76. And that action resolved all controversy between the parties about these records, and any further opinion of the court would have no "force and effect with regard to the underlying controversy." *Women Aware v. Reagen*, 331 N.W.2d 88, 92 (Iowa 1983). There's no need for any further action by the Court

The Governor hasn't disputed that the records she provided in response to the request are public records. It's all a rather run-of-the-mill claim. And it's unlikely that Plaintiffs—or anyone else—will ever request these records again. So there's no reason for a ruling that the Governor was required by chapter 22 to provide the requested records. The public importance exception doesn't apply. *See Riley Drive Entm't I, Inc. v. Reynolds*, 970 N.W.2d 289, 299 (Iowa 2022).

Neither does the voluntary cessation doctrine apply here. The challenged inaction has ended. The requested conduct has been

completed. And the Governor cannot somehow retract her record responses already provided. Because Plaintiffs' failure-to-produce claim by its very nature doesn't involve ongoing conduct, it's not possible for the Governor's voluntary compliance to end and the challenged inaction to reoccur. If the doctrine is even viable in Iowa, *see Riley Drive*, 970 N.W.2d at 297, it is not a reason to reach this moot claim.

To be clear, the Governor is not arguing that Plaintiffs' timeliness claim fails because it is moot. That claim fails because it doesn't exist—at least not for electronic records. Or it fails because it would violate the separation of powers to permit such a claim against the Governor. But that doesn't mean that their failure-to-produce claim isn't still moot and needs to be dismissed.

Plaintiffs also try to rely on their request for attorney fees to avoid the mootness of their claim. But the award of attorney fees still requires a violation of chapter 22. *See* Iowa Code § 22.10(3)(c) (authorizing award of attorney fees only a "plaintiff successfully establishing a violation of" chapter 22). And the Governor did not violate chapter 22. It would be a different case if a governmental agency stubbornly refused to provide records until ordered to do so by a district court. There, the agency violates chapter 22. And a court would be authorized to award fees to the successful plaintiff.

But that's not this case. And Plaintiffs failure-to-produce claim cannot be saved by their desire for attorney fees.

Finally, the Court need not linger long over Plaintiffs' references to their amended petition. *See* Appellees' Br. at 19, 22, 50. The amended petition wasn't before the district court. It's not on appeal here. And the parties don't dispute that the narrow new claim about whether a few documents were properly redacted or withheld remains to be considered by the district court regardless of the outcome of this appeal. *See* Appellants' Br. at 10 n.1, 37 n.4, 42; Appellees' Br. at 70.

III. Plaintiffs misunderstand the Governor's statutory-interpretation argument and overstate its effect; properly holding that chapter 22 contains an no independent timeliness requirement for electronic records does not eliminate the right to obtain those records.

Plaintiffs suggest that the Governor is arguing chapter 22 doesn't apply to electronic records. *See* Appellees' Br. at 63–65. But the Governor has never argued that. Of course, chapter 22 applies to both paper and electronic records. But by its text, the requirements for producing those records varies. And even if some implied timeliness requirement exists for producing paper records, there is even less basis in the text of chapter 22 to imply a similar requirement for electronic records.

What's more, it's not the Governor who "conflate[s] the two separate issues of withholding and delay." Appellees' Br. at 67. Plaintiffs are the ones who boldly say, "[t]here would be no production requirement if there is no timeliness requirement." *Id.* But the two issues are distinct. And holding that Plaintiffs cannot pursue an independent timeliness claim doesn't undermine the robust remedies available to ensure that governments do not violate the actual requirements to produce public records.

The policy choices involved in setting a hard deadline or even a reasonableness standard for responding to records requests are very different than those involved in setting a right to public access to records. Imposing either mandate as a chapter 22 violation would affect the efficiency of government operations and its fiscal and personnel resources. It would also impose liability on governments and its employees and the risks of other consequences like removal from office for certain government officers. Those factors would be weighed against the possible benefits to the public of having easier and quicker access to public records and a vehicle to obtain attorney fees when they decide to go to court to enforce the mandate.

Perhaps the Legislature would choose to enact such a new statutory mandate. Perhaps not. But these are distinct issues. And it's neither "illogical" nor "undermin[ing] the purpose of chapter 22," to properly interpret chapter 22 as currently authorizing no

timeliness claim. The choice to create one should be left to the Legislature.

IV. Plaintiffs have abandoned their claim that the Governor's assertions of confidentiality more than twenty days after their request provide an independent violation of chapter 22; and they fail to show how that timing has any relevance to the rest of their suit.

In the district court, Plaintiffs argued that the Governor "waived the ability to withhold and redact records" under section 22.7 because she did not assert the protections within twenty days. App. 105. And they thus contended "[s]ince Defendants have not provided these records, Plaintiffs' unlawful withholding claim is not moot." *Id.* They now abandon this argument. *See* Appellees' Br. at 68–70. And properly so. Chapter 22 contains no basis for such an extraordinary conclusion. *See* Appellants' Br. at 37–40.

But Plaintiffs still make a curious assertion that this timing is some sort of "further evidence" of untimeliness or an independent violation of chapter 22. Appellees' Br. at 69 & n.10. It's not entirely clear what they mean. But in any event, the Court in *Horsfield Materials* already rejected any expansion of the 20-day deadline in section 22.8(4)(d) beyond its express textual scope. *See Horsfield Materials*, 834 N.W.2d at 461. And the timing of the assertion of confidentiality here did not involved consideration of whether to release

otherwise confidential records. *See* Appellants' Br. at 39. That Governor Reynolds redacted and withheld certain confidential documents has no relevance to the issues on appeal here. Once this appeal has finished, the district court will be able to consider the merits of Plaintiffs substantive confidentiality claims asserted for the first time in their amended petition.

CONCLUSION

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.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

/s/ Samuel P. Langholz
SAMUEL P. LANGHOLZ
Assistant Solicitor General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164

(515) 281-4209 (fax)
sam.langholz@ag.iowa.gov

ATTORNEY FOR APPELLANTS

CERTIFICATE OF COST

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

/s/ *Samuel P. Langholz*
Assistant Solicitor General

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 2,377 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Samuel P. Langholz*
Assistant Solicitor General

CERTIFICATE OF FILING AND SERVICE

I certify that on December 5, 2022, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ *Samuel P. Langholz*
Assistant Solicitor General