Supreme Court No. 22-0789
Polk County Case No. CVCV062945

IN THE SUPREME COURT OF IOWA

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

Plaintiffs–Appellees,

v.

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

Defendants–Appellants.

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

FINAL BRIEF OF APPELLEES

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ROUTING STATEMENT

This case is one of three pending interlocutory appeals that the Iowa Supreme Court has granted presenting a common question regarding the timeliness of open records request responses and the State's far-reaching assertions of executive privilege and political question doctrine, which, it claims, require dismissal. *See Rasmussen v. Reynolds*, No. 21-2008; *Rasmussen v. Iowa Dep't of Pub. Health*, No. 22-0452. Appellees Laura Belin ("Belin"), Bleeding Heartland LLC ("Bleeding Heartland"), Clark Kauffman ("Kauffman"), Iowa Capital Dispatch, Randy Evans ("Evans"), and Iowa Freedom of Information Council ("FOIC") (collectively "Reporters") agree that this Court should retain this case under Iowa Rules of Appellate Procedure 6.1101(2)(c) if it retains *Rasmussen*, so that it may consider these arguments in the context of the facts of Reporters' claims at the same time.

STATEMENT OF THE CASE

Contrary to what Appellants (collectively the "Governor's Office") argue, this open records case under Iowa Code Chapter 22 is a simple case, not a complex one. Reporters filed suit on December 16, 2021, because the Governor's Office violated Iowa Code Chapter 22 in two respects: (1) it failed to promptly and timely provide the records requested; and (2) it wrongly withheld access to some open records. App. 5, ¶¶ 2, 4, 199, ¶¶ 2, 4. It took

Reporters filing their litigation to prompt the Governor's Office to finally provide most—but not all—of the withheld records. App. 213, ¶ 85. By that time, the Governor's Office's delay exceeded 18 months after the initial request for records at issue in the case, and five months after the most recent request. App. 21, ¶ 99, 216, ¶ 107. During those five to 18 months, Reporters repeatedly tried to follow-up with the Governor's Office regarding their ignored requests. App. 6-7, ¶¶ 8, 12, 16, 200-01, ¶¶ 8, 12, 16. The case asks for the ordinary statutory remedies for violations of Chapter 22—prospective injunctive relief, mandamus relief, attorney's fees, and court costs. App. 24-25, ¶¶ 2)-4), 221, ¶¶ 2)-4).

The Governor's Office moved to dismiss, arguing that the case was moot, presented a nonjusticiable political question, would invade executive privilege, and that Reporters were not entitled to prospective relief. App. 57. The district court denied the motion to dismiss in its entirety. App. 189-96. Instead of filing an answer, the Governor's Office filed an application for interlocutory appeal. *See generally* Defs.' Application for Interlocutory Appeal. On June 9, 2022, this Court granted the State's request for interlocutory appeal. *See* Order Granting Application for Interlocutory Appeal.

In its Statement of the Case, the Governor's Office indicates that its application for interlocutory appeal was unresisted. Appellants' Br. at 10. As clarification, while Reporters believe it is important that their appeal is considered at the same time as *Rasmussen* since they will be impacted by any decision the Court makes in that case, they completely resist the merits of the Governor's Office's arguments on appeal. Reporters did not resist the application because this Court had already granted interlocutory appeal in the *Rasmussen* cases. *See* Resp. to Application for Interlocutory Appeal at 1. Reporters further believe that the facts of their case demonstrate well the significant democratic interests at stake in how the Court resolves the Governor's Office's asserted defenses to a normal, statutorily established judicial enforcement action under Chapter 22. *Id.*

STATEMENT OF THE FACTS

The Governor's Office's brief discusses the procedural history of this case without addressing the relevant facts alleged in the Complaint and Amended Complaint, upon which the district court's judgment denying their motion to dismiss was based. A summary of those facts is set forth below. In addition, Reporters disagree with various representations of fact that the Governor's Office makes in its brief and correct those below.

I. Relevant Factual Background to Reporters' Open Records Claims.

Belin and Bleeding Heartland made repeated requests to obtain public records from the Governor's Office under Iowa's open records law through Michael Boal ("Boal"), the governor's records custodian, from April 27, 2020, until June 16, 2021, on matters of public interest both related and unrelated to the COVID-19 pandemic. App. 6, ¶ 5, 200, ¶ 5. Boal acknowledged receipt of a few of the open records requests. App. 6, ¶ 6, 200, ¶ 6. However, the Governor's Office did not provide Belin and Bleeding Heartland with the requested open records. App. 6, ¶ 7, 200, ¶ 7. Belin and Bleeding Heartland followed up to make clear they were still seeking records, and renewed the requests, numerous times over many months. App. 6, ¶ 8, 200, ¶ 8.

Evans and the FOIC also submitted open records requests to the Governor's Office through Boal from August 10 to August 27, 2021. App. 6, ¶ 10, 200, ¶ 10. Boal acknowledged receipt of the FOIC's open records requests. App. 6, ¶ 11, 200, ¶ 11. However, as with Belin and Bleeding Heartland, the Governor's Office did not provide the FOIC with the requested open records, even after the FOIC renewed its requests. App. 6, ¶ 12, 200, ¶ 12.

Finally, Kauffman and Iowa Capital Dispatch submitted open records

requests to the Governor's Office through Boal, Pat Garrett ("Garrett"), and Alex Murphy ("Murphy") from April 8 to November 3, 2021. App. 6, ¶ 13, 200, ¶ 13. Boal, Garrett, and Murphy eventually acknowledged receipt of these requests. App. 6, ¶ 14, 200, ¶ 14. However, the Governor's Office did not provide Kauffman and Iowa Capital Dispatch with the requested open records except for a few documents. App. 6, ¶ 15, 200, ¶ 15. Kauffman and Iowa Capital Dispatch followed up and continued to seek the records that were not provided several times. App. 7, ¶ 16, 201, ¶ 16.

Due to the substantial delays ranging from five months to over 18 months, the multiple inquiries and renewals of their original requests, and the refusal of the Governor's Office to provide the responsive records, Reporters finally determined they had no choice in seeking compliance with Chapter 22 but to file this lawsuit on December 16, 2021. *See generally* App. 4, 198.

On January 3, 2022, eighteen days after the lawsuit was filed, the Governor's Office provided partial records to Reporters. *See* App. 59-76. However, the Governor's Office redacted and withheld some of the responsive records. *See* App. 125-33. In doing so, the Governor's Office cited exemptions under Iowa Code sections 22.7(5), (18), and (50). *See* App. 126-27, 29-30, 32. Reporters objected to the withholding and redaction of

these records as untimely. *See* App. 125. Reporters also amended their Complaint to add a claim that the redacted and withheld records are not confidential and do not meet the requirements of sections 22.7(5), (18), and (50). App. 218, ¶ 122. However, the Governor's Office indicated that it does not intend to provide the redacted and withheld records. *See* App. 133.

Since the lawsuit was filed, Appellants and their members have continued to submit open records requests to the Governor's Office. *See, e.g.*, App. 134-35.

II. Necessary Corrections of the Governor's Office's Factual Assertions and Characterizations.

This Court has warned against litigants using motions to dismiss as a premature attack on litigation instead of waiting to challenge cases, once a factual record has been developed, through summary judgment or trial. *Benskin, Inc. v. West Bank*, 952 N.W.2d 292, 296 (Iowa 2020). Here, the parties are in the earliest stage of the litigation. They have yet to engage in discovery, to the extent discovery will be needed.[1] A full record has not been

[1] Without any actual discovery requests, objections, or assertions of privilege asserted thereto in the record, the Governor's Office prematurely sought dismissal based on unsupported factual speculation about the nature and scope of the discovery it imagines Reporters *may* seek and hypothetical objections it *may* have based on executive privilege as grounds to protect it from *any* enforcement of Chapter 22. Appellants' Br. at 10, 26-29. *See* Argument, Part I(B), below, at 40-48.

developed. Neither party has filed, and the district court has not ruled on, a motion for summary judgment.

And while all facts must be construed in favor of Reporters at this earliest stage of the case, *Hawkeye Food Service Distrib., Inc., v. Iowa Educators Corp.*, 812 N.W.2d 600, 604 (Iowa 2012), the Governor's Office nevertheless relies on erroneous factual assumptions and assertions in its Statement of the Case and Statement of Facts on appeal. The Governor's Office repeatedly claims throughout its brief that all the records Reporters requested have been provided to them. Appellants' Br. at 9-12. But some of the records were redacted and others were withheld entirely. *See* App. 59-76, 125-33. And as to these records, the Governor's Office concedes that there is a factual dispute as to whether the confidentiality provisions apply in this case. *See* Defs.' Reply in Supp. of Application for Interlocutory Appeal at 2-3.

Moreover, the Governor's Office repeatedly mischaracterizes the facts of Reporters' timeliness claims. Its brief describes the five to over 18 months-long delays in providing partial records, which occurred only after Reporters made multiple ignored efforts to follow up and renew their outstanding requests, and after the filing of this litigation, as merely that Reporters did not receive responses to their requests "as fast as they desired." *See* Appellants' Br. at 9, 11; App. 213, ¶ 85, 216, ¶ 107.

The Governor's Office also claims that Reporters have not argued that the withheld records do not meet the confidentiality provisions. Appellants' Br. at 27. On the contrary, Reporters timely amended their Complaint as of right to add that specific claim, and all parties agree that there is a dispute regarding whether the Governor's Office has appropriately invoked the confidentiality provisions at issue. *See* Defs.' Reply in Supp. of Application for Interlocutory Appeal at 2-3; App. 218, ¶ 122.

Finally, presumably because the Governor's Office thinks it is relevant to the as-yet unadjudicated question of the reasonableness of its delay in providing records, it asserts in its Statement of the Case and Statement of Facts—but not anywhere in its arguments—that its delays in responding to Reporters' requests were due to, or "amid," the "unprecedented COVID-19 pandemic." Appellants' Br. at 9, 11. Indeed, its assertion of facts regarding the impact of the pandemic on Reporters' Chapter 22 claims illustrates that this case should proceed for further factfinding as needed. The Governor's Office will certainly be free to ask the district court to make a factual finding of reasonableness on that basis once the case is permitted to proceed on the merits below. But its arguments regarding executive privilege and political question doctrine are not cabined by any limiting principle, including the COVID-19 pandemic. To the extent that the Governor's Office is asking this

Court to take judicial notice of the pandemic and find that as a factual matter its delays were reasonable under Chapter 22, such an argument is premature and unpreserved for appeal at this stage.

That argument is also belied by the fact that all responsive records at issue in this case are electronic records. *See* App. 59 (acknowledging responsive electronic records that were provided to Reporters). Under Iowa law, the Governor's Office has the authority to follow a prescribed process, if and as warranted by the circumstances, to issue a proclamation suspending the requirements of Chapter 22. *See* Iowa Const. art. IV, §§ 1 and 8; Iowa Code §§ 29C.6(1) and (6). The Governor's Office indeed issued a series of such proclamations forgiving compliance with the examination and copying requirements of Chapter 22 from April 10, 2020, to July 25, 2021, but it expressly created an exception for electronic records like the ones Reporters sought. *See* Proclamation of Disaster Emergency, Apr. 10, 2020, at 9, http://publications.iowa.gov/32378/1/Public%20Health%20Proclamation%20-%202020.04.10%20%282%29.pdf (requiring compliance with chapter 22 "to the extent those records can be examined and copies provided by mail or electronic means").[2] Having not deemed it necessary or appropriate to follow

[2] This initial proclamation expired on April 30, 2020. *See* Proclamation of Disaster Emergency, Apr. 10, 2020, at 9, http://publications.iowa.gov/32378/1/Public%20Health%20Proclamation%2

0-%202020.04.10%20%282%29.pdf. Identical partial suspensions of Chapter 22, again not reaching electronic records, were repeated twice. *See* Proclamation of Disaster Emergency, April 27, 2020, at 24, https://publications.iowa.gov/32389/1/Proclamation04272020.pdf; Proclamation of Disaster Emergency, May 26, 2020, at 28, https://publications.iowa.gov/32446/1/Public%20Health%20Proclamation%20-%202020.05.26.pdf.

The language of the partial suspension of requirements of Chapter 22 as to in-person requests, but exempting electronic records, was tweaked in the fourth proclamation in the series. *See* Proclamation of Disaster Emergency, June 25, 2020, at 22 http://publications.iowa.gov/32812/1/Public%20Health%20Proclamation%20-%202020.06.25.pdf ("I continue to temporarily suspend the regulatory provisions of Iowa Code § 22.4 to the extent those provisions require a lawful custodian of records to maintain office hours to receive in-person record requests, so long as the custodian has posted clear direction for making requests in writing, by telephone, or by electronic means in a prominent place that is easily accessible to the public.").

Monthly proclamations continued this partial suspension of in-person examination only through their expiration on July 25, 2021. *See* July 24, 2020 Proclamation, http://publications.iowa.gov/33099/1/Public%20Health%20Proclamation%20-%202020.07.24.pdf, at 21; Aug. 21, 2020 Proclamation, http://publications.iowa.gov/33531/1/Public%20Health%20Proclamation%20-%202020.08.21_0.pdf, at 21; Sept. 18, 2020 Proclamation, http://publications.iowa.gov/33881/1/Public%20Health%20Disaster%20Proclamation%20-%202020.09.18.pdf, at 23; Oct. 16, 2020 Proclamation, http://publications.iowa.gov/34413/1/Public%20Health%20Proclamation%20-%202020.10.16.pdf, at 20-21; Nov. 10, 2020 Proclamation, http://publications.iowa.gov/34414/1/Public%20Health%20Proclamation%20-%202020.11.10%20%281%29.pdf, at 22-23; Dec. 9, 2020 Proclamation, http://publications.iowa.gov/34731/1/Public%20Health%20Proclamation%20-%202020.12.09.pdf, at 25; Jan. 7, 2021 Proclamation, http://publications.iowa.gov/35076/1/Public%20Health%20Proclamation%20-%202021.01.07.pdf, at 23-24; Feb. 5, 2021 Proclamation, http://publications.iowa.gov/35190/1/Public%20Health%20Proclamation%20-%202021.02.05ocr.pdf, at 16-17; Mar. 5, 2021 Proclamation, http://publications.iowa.gov/35571/1/Public%20Health%20Proclamation%20-%202021.03.05_OCR.pdf, at 17-18; Apr. 2, 2021 Proclamation,

the lawful process in place to pause the statutory duty to timely provide electronic records under Chapter 22 at the time, the Governor's Office cannot now point to the pandemic to require dismissal of legal claims against it based on its failure to timely provide the records at issue in this case.

ARGUMENT

"'Sunlight is said to be the best of disinfectants.' This concept animates state . . . laws allowing public scrutiny of government records—shining the light of day on the actions of our public officials deters misconduct that thrives in darkness." *City of Riverdale v. Diercks*, 806 N.W.2d 643, 645 (Iowa 2011) (quoting Justice Louis Brandeis, *What Publicity Can Do*, Harper's Weekly, Dec. 20, 1913)). Under Chapter 22, Iowa's open records law provides that "[e]very person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record." Iowa Code § 22.2(1). The purpose of Chapter 22 is "to open the doors of government to

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http://publications.iowa.gov/35665/1/PH%20Proclamation%20-%202021.04.02.pdf, at 16; Apr. 30, 2021 Proclamation, http://publications.iowa.gov/35978/1/Public%20Health%20Proclamation%20-%202021.04.30.pdf, at 17; May 27, 2021 Proclamation, http://publications.iowa.gov/36222/1/Public%20Health%20Proclamation%20-%202021.05.27.pdf, at 12; June 25, 2021 Proclamation, https://governor.iowa.gov/sites/default/files/documents/COVID%20Disaster%20Proclamation%20-%206.25.2021.pdf, at 11.

public scrutiny [and] to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." *Diercks*, 806 N.W.2d at 652 (quotation omitted). Under Chapter 22, there is a presumption of openness, and disclosure of open records is the rule. *Gabrilson v. Flynn*, 554 N.W.2d 267, 271 (Iowa 1996).

The district court's ruling denying the motion to dismiss is correct as a matter of law. First, Chapter 22 applies to the Governor's Office. The lawsuit does not involve a nonjusticiable political question, and any executive privilege that the Governor may have also does not bar this lawsuit. Second, Reporters' claims are not moot. Reporters allege two types of Chapter 22 violations—one for unlawfully denying Reporters' right to examine public records, and the other for unlawfully delaying in providing those records which were eventually provided. As to the former, the Governor is still withholding some records. As to the latter, this claim is not mooted by the untimely eventual production of the records. As to both, Reporters' outstanding attorney's fee claims for the required enforcement action under Chapter 22 alone prohibit a finding of mootness. In addition, two exceptions to mootness apply to this case even if, arguendo, they were mooted by the partial and untimely production of records—public interest and voluntary cessation. Further, Chapter 22's requirement that records be provided without

unreasonable delay applies to electronic and non-electronic records alike. Third, contrary to the Governor's Office's strawman argument, the Governor Office's failure to timely assert confidentiality provisions does not mean confidential records must be produced. Rather, this failure constitutes evidence of both types of Chapter 22 violations Reporters assert, demonstrating a failure both to produce and to timely produce.

Preservation of Error:

While the Governor's Office's brief does not comply with the Rules of Appellate Procedure in setting forth the specific parts of the record where it raised, and the district court decided, each argument it makes on appeal, Reporters agree that error is preserved as to each claimed error—except as to the Governor's Office's arguments regarding the first factor of the political question doctrine. Appellants' Br. at 17, 22-24; Iowa R. of App. Proc. 6.903(2)(g)(1).

In its motion to dismiss, the Governor's Office only addressed the first, second, third, and fourth factors of the political question doctrine and did not address the remaining factors. App. 86-87. The district court only ruled on the second, third, and fourth factors, believing those were the issues argued by the State, and did not address the first factor argued by the Governor's Office or the remaining factors. *See* App. 191-93. Because the Governor's

Office did not argue the fifth and sixth factors and did not file a Rule 1.904 motion to reconsider, enlarge, or amend error on the first factor, error is not preserved regarding these applications of the political question doctrine. *See Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751, 766 (Iowa 2019).

Standard of Review:

Iowa is a notice pleading state; therefore, motions to dismiss are generally disfavored. *Benskin, Inc.*, 952 N.W.2d at 296. "Nearly every case will survive a motion to dismiss under notice pleading." *Hawkeye Foodservice Distrib., Inc.*, 812 N.W.2d at 609.

When reviewing a motion to dismiss, the court must accept the facts alleged in the Complaint as true. *Id.* at 604. In addition, the allegations are viewed "in the light most favorable to the plaintiff with doubts resolved in that party's favor." *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004) (quotation omitted). Dismissal of a case is only proper "if the petition shows no right of recovery under any state of facts." *Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192, 194 (Iowa 2007) (quotation omitted). Stated another way, there must be "no conceivable set of facts entitling the non-moving party to relief." *Rees*, 682 N.W.2d at 79 (quotation omitted). If the claim's viability is debatable, then the court should deny a motion to dismiss. *Southard*, 734 N.W.2d at 194.

Reporters agree that the appellate court's review of a ruling on a motion to dismiss is for correction of errors at law. *Riley Drive Ent. I, Inc. v. Reynolds*, 970 N.W.2d 289, 295 (Iowa 2022).

I. Iowa Code Chapter 22 and Its Timeliness Requirement Apply to the Governor's Office.

The Governor's Office argues that Chapter 22's timeliness requirements cannot be enforced against the Governor's Office because it presents a nonjusticiable political question and invades executive privilege. Appellants' Br. at 17. As set forth below, both arguments fail.

A. Reporters' Timeliness Claims Do Not Present a Nonjusticiable Political Question.

This case does not present a nonjusticiable political question as the Governor's Office argues. Appellants' Br. at 17. Chapter 22 expressly empowers the courts to adjudicate public records enforcement claims under Iowa Code § 22.10(1), and in resolving this case, the judicial branch would not be wading into a matter that is exclusively entrusted to the executive branch.

Declining to resolve political questions is prudential, rather than jurisdictional, for the courts. The interests served by the exercise of restraint on political questions are rooted in the separation of powers doctrine, which requires the courts to "leave intact the respective roles and regions of

independence of the coordinate branches of government." *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996). "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the General Assembly] or the confines of the Executive Branch." *King v. State*, 818 N.W.2d 1, 16-17 (Iowa 2012) (quoting *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). Generally, courts apply the political question doctrine to matters that are entrusted exclusively to the legislative branch, executive branch, or both. *Dickey v. Beslar*, 954 N.W.2d 425, 435 (Iowa 2021).

In considering whether there is a nonjusticiable political question, the Court considers the following factors:

> (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 to 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 v. State, 962 N.W.2d 780, 794 (Iowa 2021). Whether a case presents a nonjusticiable political question is determined on a case-by-case basis, based on the nature of the underlying claim. *Dwyer*, 542 N.W.2d at 495-96.

Considering these factors, Reporters' Chapter 22 enforcement action is not barred by the political question doctrine.

The Governor's Office's claim regarding the first factor, Appellants' Br. at 25-26, is not preserved for review because the district court did not rule on it, and the Court should not address it. *See* Argument, above, at 29-30. It also fails on the merits, because there is no "textually demonstrable constitutional commitment" to the executive branch of this issue, and the Governor's Office points to none.

The Governor's Office's reliance on *Dwyer* is misplaced. While *Dwyer* dealt with a Chapter 22 open records issue, it involved the legislative branch, not the executive branch. *Dwyer*, 542 N.W.2d at 496. There, the Iowa Supreme Court held "a textually demonstrable constitutional commitment to the senate render[ed] nonjusticiable the senate's decision to keep specific detailed phone records confidential." *Id.* It reasoned that article III, section 9 of the Iowa Constitution gave the legislature complete control and discretion on whether it will "observe, enforce, waive, suspend, or disregard its own

rules of procedure." *Id.* The senatorial policy in that case concerning phone records constituted a "'rule of proceeding'" under article III, section 9. *Id.* at 501. Therefore, the "release of the phone records by the senate constitute[d] a nonjusticiable political question." *Id.*

Unlike *Dwyer*, here there is no specific Iowa constitutional provision granting the Governor's Office control and discretion over open records requests under Chapter 22. The Governor's Office points to none, and indeed, the Governor's Office apparently does not contest its responsibility to comply with Chapter 22 generally, limiting its argument to a claim that only timeliness violations pose a political question, but not production violations—a distinction present neither in Chapter 22 nor the Iowa Constitution.

And unlike the legislature, which is constitutionally entrusted with the passing of state policies like Chapter 22, Iowa Const. art. III, § 1, the executive branch is constitutionally entrusted with carrying out those laws passed by the legislature. Iowa Const. art. IV, § 9. Indeed, allowing the chief executive to dismiss all the statutorily created judicial enforcement actions against it under Chapter 22 would itself pose a separation of powers problem, in allowing the executive to rewrite the legislature's adopted state policy requiring reasonably timely access to public records. *See id.* art. III, § 1 (stating "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"). Therefore, the first factor does not support the Governor's Office's political question argument.

The second factor does not support the application of political question doctrine because the courts do not lack "judicially discoverable and manageable standards" for reviewing and determining this case. The applicable standards around prompt compliance with public records requests and around "[g]ood faith, reasonable delay" are set forth in the statute, Iowa Code § 22.8(4), and have long been manageably applied by the courts, consistent with *Horsfield Materials, Inc. v. City of Dyerville*, 834 N.W.2d 444 (Iowa 2013).[3]

The Governor's Office's hypothetical scenarios that could come up in some imagined future cases, regarding "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," Appellants' Br. at 21, are academic. Reporters do not seek any remedies requiring extraordinary relief directing the Governor's Office to take any specific action to comply with the law such

[3] *Horsfield Materials, Inc.* is discussed fully below. *See* Argument, Part II(A)(2), at 51-55.

as hiring new staff. Reporters only seek to enforce the law as it exists, seeking the statutorily determined remedies. Indeed, questions along the lines posed by the Governor's Office regarding *how* it decides to go about complying with the law are completely outside of the scope of this case or the remedies that Reporters seek. The only requirement of Chapter 22 that Reporters seek to enforce is *that* it do so.

The legislature could have, but did not, exempt the Governor's Office from Chapter 22. Indeed, the definition of "government body" specifically means, among other things, "this state," and "lawful custodian" means "the government body currently in physical possession of the public record." Iowa Code §§ 22.1(1)-(2). The question at issue here is simple and binary—did the Governor violate the timeliness requirement of the existing law by withholding all records for over 18 months and until a lawsuit was filed, or not?

The cases that the Governor's Office cites from other jurisdictions to support its political question argument, Appellants' Br. at 22, are inapposite. All address legislative actions or inactions, not the executive's actions or inactions. *See Coleman v. Miller*, 307 U.S. 433, 456 (1939) (holding a nonjusticiable political question existed on what constitutes a reasonable time when a state legislature ratified a constitutional amendment thirteen years

after its proposal); *Philpot v. Haviland*, 880 S.W.2d 550, 554 (Ky. 1994) (holding that a political question existed that barred the courts from determining what is a reasonable time for a state legislative committee to retain legislation); *Gilbert v. Gladen*, 432 A.2d 1351, 1358 (N.J. 1981) (finding a nonjusticiable political question concerning the presentment of bills from the legislature to the governor).

The third and fourth factors also do not support the Governor Office's political question argument, because there is no need for an initial policy determination by the executive branch in this case, and this Court's review of the Governor Office's response would not express a lack of due respect to a coordinate branch of government. The Indiana Court of Appeals in *Groth v. Pence*, 67 N.E.3d 1104 (Ind. Ct. App. 2017) is persuasive. In that case, a citizen submitted an open records request under the Access to Public Records Act ("APRA") to the Governor's office. *Groth*, 67 N.E.3d at 1109. Although the Governor's office provided some of the records requested, it redacted and withheld other records. *Id.* at 1110.

On appeal, the Indiana Governor's office argued that the lawsuit was nonjusticiable and violated separation of powers because the judicial branch on review would interfere with the internal functions of the executive branch. *Id.* at 1113. The Indiana Court of Appeals disagreed, stating

> This case is not a challenge to the Governor's core executive functions or his constitutional authority as chief executive to decide whether Indiana should join Texas and other states as a plaintiff in a federal suit against the President. Rather, the APRA requests here are merely requests for access to public records that concern a matter of legitimate public interest. On the issue of justiciability, the Governor does not assert a particular statutory exemption from APRA. . . . The Governor's argument would, in effect, render APRA meaningless as applied to him and his staff. . . . We reject the Governor's assertion that his "own determinations" regarding whether to disclose public records are not subject to judicial review.

Id. at 1115 (citation omitted). The Governor's office relied on exceptions to redact and withhold some records, namely attorney-client privilege, attorney-client work product, and deliberative material. *Id.* According to the Court, to "determine the meaning and apply those exceptions" to an open records act request "does not interfere with a core executive function." *Id.* When the act is "correctly administered," the Governor's executive function "remain[s] intact." *Id.*

This Court should apply the reasoning and holding of the *Groth* case to this case in finding that there is not a separation of powers issue that makes this open records case nonjusticiable. The case does not challenge the Governor Office's core executive functions. Rather, the case involves open records requests that involve a matter of legitimate, significant public concern. The Governor Office's categorical argument would render Chapter 22 meaningless as applied to the Governor and her staff.

Finally, this Court should reject the Governor Office's assertion that her "own determinations" regarding whether to redact, withhold, or disclose open records pursuant to the confidentiality exceptions set forth in Iowa Code section 22.7 is not subject to court review. The determination of the meaning of the exceptions and whether they apply in this case "does not interfere with a core executive function," and the Governor's executive function "remain[s] intact" when Chapter 22 is "correctly administered." *Groth*, 67 N.E.3d at 1115.

The suit would also not require the judiciary to express a lack of respect for the executive branch because courts in Iowa have decided challenges brought under Chapter 22 against executive branch agencies. *See e.g.*, *Iowa Film Prod. Servs. v. Iowa Dep't of Econ. Dev.*, 818 N.W.2d 207 (Iowa 2012); *Gannon v. Board of Regents*, 692 N.W.2d 31 (Iowa 2005); *Northeast Council on Substance Abuse, Inc. v. Iowa Dep't of Pub. Health*, 513 N.W.2d 757 (Iowa 1994); *US West Communications, Inc. v. Office of Consumer Advocate*, 498 N.W.2d 711 (Iowa 1993); *KMEG Television, Inc. v. Iowa State Bd. of Regents*, 440 N.W.2d 382 (Iowa 1989), *abrogated by Gannon*, 692 N.W.2d 31; *AFSCME/Iowa Council 61 v. Iowa Dep't of Pub. Safety*, 434 N.W.2d 401 (Iowa 1988).

As previously stated, the remaining factors—factors (5) and (6)—have not been preserved on appeal. *See* Argument, above, at 29-30.

For these reasons, this lawsuit is not barred by the political question doctrine.

B. Executive Privilege Does Not Require Dismissal.

The Governor's Office's executive privilege arguments are also unavailing. Assuming executive privilege applies to the Governor's Office, which has never been established under Iowa law, executive privilege does not warrant dismissal of this case. First, there is no provision in Chapter 22 granting the Governor's Office immunity from suit. And no caselaw recognizes the Governor's Office's theory of such broad executive privilege that a case would be dismissed outright, rather than a case-by-case adjudication of discovery disputes. Second, the Governor Office's invocation of executive privilege is not relevant at this stage in the proceedings and is premature and speculative. Executive privilege only potentially applies at the discovery stage of the proceedings; it is not a basis to dismiss claims.

First, nothing in Chapter 22 suggests that the Governor's Office is exempt from its requirements or otherwise immune from suit. Chapter 22 grants the right of every person to examine and copy public records, which includes "all records, documents, tape, or other information, stored or

preserved in any medium, of and belonging to this state. . . ." *Id.* § 22.1(3). Chapter 22 also discusses how it applies to government bodies, defined as "this state" as well as "any branch . . . of the foregoing." *Id.* § 22.1(1). Thus, the Governor's Office is covered under Chapter 22.

If the legislature intended that the Governor's Office be exempted from Chapter 22 or otherwise immune from suit, it could have stated as much as it has in other statutes providing immunity from suit. *See id.* § 669.14 (containing exceptions to any claim against the state brought under the State Tort Claims Act); *Nelson v. Lindaman*, 867 N.W.2d 1, 10 (Iowa 2015) (stating that if the legislature intended to exclude from a statute a certain claim, then it would have said so as it has done in other statutes providing immunity).

Since there is no statutory executive privilege at issue in this case, the Governor's Office alleges that a constitutional executive privilege applies to shield it from this lawsuit. Appellants' Br. at 27-29. The Iowa Supreme Court has been presented with this issue but has not decided it. *See State ex rel. Shanahan v. Iowa Dist. Ct. for Iowa Cnty.*, 356 N.W.2d 523, 527 (Iowa 1984) (declining to rule whether executive privilege exists in Iowa, instead disposing of the case on statutory privilege grounds). To support its proposition, the Governor's Office cites to United States Supreme Court case, *United States v.*

Nixon, 418 U.S. 683 (1974). Appellants' Br. at 28. But *Nixon* does not support its argument for dismissal.

In *Nixon*, the President was served a subpoena in a criminal prosecution to produce tape recordings and certain documents. *Nixon*, 418 U.S. at 687-88. The President sought to quash the subpoena based on constitutional executive privilege. *Id.* at 688. The United States Supreme Court rejected the President's claim of an absolute privilege but recognized a qualified executive privilege. *Id.* at 706. The Supreme Court held that "[i]f a President concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege on the return of the subpoena." *Id.* at 713. The Court recognized the role of the judiciary in balancing the "weighty and legitimate competing interests"—the need for the evidence in a criminal prosecution against a constitutional privilege against their release. *Id.* at 709. The Supreme Court balanced these interests by requiring that the federal court treat the subpoenaed material as presumptively privileged and require the prosecution to show the material was essential to justice in the pending criminal case. *Id.* at 713. Following the prosecution's demonstration, the court would then review the material *in camera* to determine whether production would be warranted. *Id.* at 714.

Thus, although the *Nixon* case recognizes a constitutional executive privilege, it at most stands for the proposition that individual discovery requests may be quashed based on privilege, not for dismissal of claims. The case also makes clear this privilege is not absolute and provides for consideration of legitimate competing interests.

The Iowa Supreme Court has addressed other privileges consistently with the *Nixon* approach of weighing competing interests in discovery and evidentiary disputes; in doing so, the Court has cited the *Nixon* case. In balancing those interests, the Court has analyzed whether a compelling need for the evidence overrides the privilege claimed. *See Lamberto v. Brown*, 326 N.W.2d 305, 307-08 (Iowa 1982) (applying a two-part test of necessity and exhaustion, the Iowa Supreme Court held that there had not been shown a compelling need for the evidence, considering the first amendment privilege that was involved in the case); *Brown v. Johnston*, 328 N.W.2d 510, 512 (Iowa 1983) (in considering the constitutional right to privacy of patrons checking out library books, holding "each claim of privilege must be weighed against a societal need for the information and the availability of it from other sources").

Several state courts recognize their state's governor has a constitutional executive privilege.[5] Uniformly, those agree with *Nixon* that the privilege is

[5] *See, e.g.*, *Doe v. Alaska Superior Ct.*, 721 P.2d 617, 625 (Alaska 1986) (holding that the governor is afforded an executive privilege that can bar the production of certain documents); *Mathews v. Pyle*, 251 P.2d 893, 896 (Ariz. 1952) (implying the governor has an executive privilege "if he thinks that the document is privileged or confidential or if he thinks that it would be detrimental to the interests of the state to permit its contents to be known" but leaving the final determination to the state court to make these determinations); *Times Mirror Co., v. Superior Ct.*, 813 P.2d 240, 249 (Cal. 1991) (recognizing the deliberate process privilege for the governor); *City of Colo. Springs v. White*, 967 P.2d 1042, 1050 (Colo. 1998) (same); *Guy v. Judicial Nomination Comm'n*, 659 A.2d 777, 785 (Del. 1995) (establishing an executive privilege for the governor and clarifying the privilege is for the public's benefit, not the executive's benefit); *Hamilton v. Verdow*, 414 A.2d 914, 924 (Md. Ct. App. 1980) (same); *DR Partners v. Board of Cnty. Commissioners of Clark Cnty.*, 6 P.3d 465, 469 (Nev. 2000) (recognizing the deliberate process privilege for the governor); *Nero v. Hyland*, 386 A.2d 846, 853 (N.J. 1978) (establishing that the governor possesses an executive privilege equivalent to the protection granted through presidential communications privilege); *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't,* 283 P.3d 853, 868 (N.M. 2012) (stating "our jurisprudence supports a limited form of executive privilege derived from the constitution. This privilege is similar in origin, purpose, and scope to the presidential communications privilege recognized by the federal courts and the executive communications privilege recognized by some other state high courts."); *Lambert v. Barsky*, 398 N.Y.S.2d 84, 86 (Sup. Ct. 1977) (recognizing an executive privilege for the governor's office in the context of a judicial nominating commission established under executive order to assist the governor in nominating candidates for the judiciary); *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 485 (Ohio 2006) (holding that the governor is afforded a gubernatorial communications privilege that protects the governor when such communications were "made for the purpose of fostering informed and sound gubernatorial deliberations, policymaking, and decisionmaking."); *Vandelay Ent., LLC. v. Fallin*, 343 P.3d 1273, 1277 (Okla. 2014) (recognizing the executive privilege for the governor and stating it is "fundamental to the operation of Government") (quotation omitted); *Office of the Governor v.*

a qualified one, not an absolute one.[6] One state Supreme Court has ruled there is no executive privilege for its governor. *See Babets v. Secretary of Executive Office of Human Servs.*, 526 N.E.2d 1261, 1264 (Mass. 1988) (holding that the governmental communications privilege does not exist and cannot be invoked in a civil action to halt the production of documents).

None of the states that recognize an executive privilege for the governor require dismissal of claims against a governor as the Governor's Office urges

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Scolforo, 65 A.3d 1095, 1100 (Pa. Commw. Ct. 2013) (holding that the governor's deliberate process privilege, a type of executive privilege, exempts the disclosure of certain documents); *Killington, Ltd. v. Lash*, 572 A.2d 1368, 1374 (Vt. 1990) (recognizing the deliberate process privilege for the governor); *Freedom Found. v. Gregoire*, 310 P.3d 1252, 1258 (Wash. 2013) (holding that the state Constitution recognizes "executive communications privilege," which contributes to maintaining the integrity of the executive branch and is rooted in the separation of powers).

[6] *See, e.g.*, *City of Colo. Springs*, 967 P.2d at 1051 (stating that the privilege is qualified and not absolute); *Guy*, 659 A.2d at 785 (same); *Hamilton*, 414 A.2d at 924 (stating that the executive privilege for the governor is qualified because it is the role of the judiciary to decide the validity of the privilege); *Nero*, 386 A.2d at 853 ("A qualified privilege for communications relating to the executive function promotes the effective discharge of these constitutional duties while ensuring that, in appropriate circumstances, disclosure of the privileged material will be forthcoming."); *Lambert*, 398 N.Y.S.2d at 86 (recognizing that the governor's executive privilege is not absolute); *Dann*, 848 N.E.2d at 485 (stating that ultimately it is the court's responsibility "to determine, on a case-by-case basis, whether the public's interest in affording its governor an umbrella of confidentiality is outweighed by a need for discourse"); *Vandelay Ent., LLC.*, 343 P.3d at 1277 (stating the governor's executive privilege is qualified, not absolute, where "the burden falls upon the government entity asserting the privilege"); *Killington, Ltd.*, 572 A.2d at 1374 (stating that the privilege is qualified and not absolute; *Freedom Found.*, 310 P.3d at 1262 (same).

here.[7] Instead, the privilege protects against the requirement to disclose confidential documents during discovery. *See Dann*, 848 N.E.2d at 475 (holding that "a governor of Ohio possesses a qualified privilege by which communications to or from him or her will, under certain circumstances, be accorded confidentiality and deemed beyond the scope of discovery").

Second, it is simply too early in this case to adjudicate hypothetical discovery disputes. The Governor's Office assumes, but doesn't know, how Reporters will seek to prove their claims. It assumes discovery would delve into areas for which the Governor would hypothetically assert executive privilege. Certainly, if that happens, those discovery disputes may be adjudicated at that time, as executive privilege claims normally are. But the Governor's Office would not be required to disclose protected information to defend the lawsuit if they are determined to be privileged.

It may not even face significant discovery, if any, in this case. The substantial delays in producing the records, and the fact that it agreed to do so only once litigation was filed, may be per se unreasonable, and give Reporters

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[7] *See generally Doe*, 721 P.2d 617; *Mathews*, 251 P.2d 893; *Times Mirror Co.*, 813 P.2d 240; *City of Colo. Springs*, 967 P.2d 1042; *Flowers v. Office of the Governor*, 167 A.3d 530 (Del. Super. Ct. 2017); *Guy*, 659 A.2d at 785; *Hamilton*, 414 A.2d 914; *DR Partners*, 6 P.3d 465; *Nero*, 386 A.2d 846; *Republican Party of N.M.*, 283 P.3d at 870; *Vandelay Ent., LLC.*, 343 P.3d 1273; *Scolforo*, 65 A.3d 1095; *Killington*, 572 A.2d 1368; *Freedom Found.*, 310 P.3d at 1258.

all they need to demonstrate a violation of Chapter 22's timeliness requirement.

The district court correctly recognized that "[i]t is not possible at this pre-answer and pre-discovery stage of the proceedings to know what evidence will be sufficient to prove or defend against the alleged violations." App. 193. The ultimate inquiry in this case may very well come down to determining the length of time between the request and production: "communication (or lack thereof) between the Governor and [Reporters] concerning the requests; and whether documents required to be produced were produced." *Id.* Until the lawsuit "gets further down the road and into the discovery and summary judgment stages, determinations, especially blanket ones resulting in dismissal, as to what information is discoverable . . ., are not appropriate." *Id.*

In short, there is simply no basis, in Iowa statutes, Iowa caselaw, or analogous federal or other state caselaw, for dismissal based on executive privilege. If executive privilege exists in Iowa, which has never been established, it is qualified and not absolute, balances the evidentiary need for information against the executive's interest in nondisclosure, and applies at the discovery phase in the context of a case-by-case resolution of discovery disputes—not at the motion to dismiss stage. For these reasons, the

Governor's Office's assertion of executive privilege as a basis to dismiss this case is meritless.

II. Reporters' Case Is Not Moot.

Reporters' case is not moot, as the Governor's Office argues, Appellants' Br. at 30. Governor's Office is still withholding some of the open records, untimely produced other records only after the lawsuit was filed, and Reporters' have attorney's fees claims on both the withholding and delay violations. But even if the Court were to find that Reporters' claims are moot, two exceptions to the mootness doctrine apply—the public interest and voluntary cessation exceptions.

A. Reporters' Claims Are Not Moot.

Contrary to the Governor Office's assertion, Appellants' Br. at 30-33. Reporters' lawsuit is not moot. On their claim that Governor's Office unlawfully withheld records, several records remain outstanding. Although the Governor's Office provided Reporters with many requested open records after the lawsuit was filed, it is still withholding others. Reporters also have a separate claim that the Governor's Office unlawfully delayed providing records, which is also a violation of Chapter 22. In addition, the provision of partial records after months and years of noncompliance is a factual consideration in determining whether the delay was reasonable, which goes

to the merits. But it is insufficient as a matter of law to moot out the separate injury arising from this delay in violation of the statute. Finally, the eventual untimely delay in producing these records further does not moot out Reporters' claim for attorney's fees under Chapter 22.

1. The Governor's Office Is Still Withholding Some Open Records.

The Governor's Office has not provided all the open records that Reporters requested. Instead, it redacted and withheld several of the documents pursuant to Iowa Code section 22.7. But as set forth below, the time to assert a basis to withhold documents under section 22.7 has long passed such that Governor's Office cannot rely on this section to defend against Reporters' withholding and delay claims.

Chapter 22 carves out specific exceptions to the liberal policy of access to public records. *Gabrilson*, 554 N.W.2d at 271; *see* Iowa Code § 22.7. However, section 22.8 contains a deadline for the records custodian to assert such an exception as the basis of withholding records: "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). In *Horsfield Materials, Inc.*, the Iowa Supreme Court stated that this section "imposes an outside deadline for the government entity to determine 'whether a confidential record should be available for inspection and copying to the

person requesting the right to do so.'" *Horsfield Materials, Inc.*, 834 N.W.2d at 461 (quoting Iowa Code § 22.8(4)(d)). This statutory time limit to assert an exception to Chapter 22 is firm, and a separate inquiry from the question of unreasonable delay of the records themselves.

In this case, Governor's Office did not timely assert that an exception applies. It waited until January 3, 2022, which is months and in some cases over a year after the 20-day deadline, after Reporters filed their lawsuit, to first assert any exemptions under sections 22.7(5), (18), and (50).[8]

Moreover, Reporters amended their Complaint to allege that the confidentiality provisions that the Governor's Office relies on do not apply, and the open records should be produced. App. 218, ¶ 122. There is a dispute regarding whether the Governor's Office can invoke these confidentiality provisions, and the Governor's Office agrees that this claim would remain

[8] The requests were originally made on July 3, 2020, July 17, 2020, June 1, 2021, June 16, 2021, and August 10, 2021. App. 12-13, ¶ 46 (records related to House File 2643), 13-14, ¶ 52 (previously provided public records), 14, ¶ 56 (Terrace Hill charitable donation records), 15, ¶ 60 (Senate File 567 records), and 18, ¶ 81 (the deployment of Iowa State Patrol members to Texas records). The Governor's Office redacted and withheld records requested on July 3 and July 17, 2020, and June 1 and 16, 2021, pursuant to Iowa Code section 22.7(18). *See id.* 126-27, 29-30. Further, it redacted and withheld records requested on August 10, 2021, pursuant to sections 22.7(5) and (50). *See id.* 132. Reporters objected to the withholding and redaction of these records as not timely. App. 125. The Governor's Office did not alter its position. *See id.* 133.

pending for consideration for the district court after this appeal is finished. *See* Defs.' Reply in Supp. of Application for Interlocutory Appeal at 2-3; Appellants' Br. at 37 n.4. Thus, Reporters' claim regarding the continued withholding of the confidential records is not moot. *Id.*

2. The Untimely Eventual Provision of Records Does Not Moot the Case.

Chapter 22 contemplates access to public records without unreasonable delay. *Horsfield Materials, Inc.*, 834 N.W.2d at 461. Under Chapter 22, the records must be promptly provided unless the size or nature of the request makes prompt access not feasible; therefore, if the size or nature of the request requires time for compliance, then the record custodian shall comply with the open records request as soon as feasible. *Id.*

A case is moot when it no longer presents a justiciable controversy because the issues have become either academic or nonexistent. *Junkins v. Branstad*, 421 N.W.2d 130, 133 (Iowa 1988). "The test is whether a judgment, if rendered, would have any practical legal effect upon the existing controversy." *Id.*

Here, Reporters' claims regarding unlawful delay are separate from their claims of withholding and are not mooted by eventual untimely production of some of the records. *See Horsfield Materials, Inc.*, 834 N.W.2d 444.

In *Horsfield Materials, Inc.*, as in this case, the defendant provided open records only after the litigation was filed. *Id.* The Court held that Chapter 22 had been violated as a result of unlawful *delay*:

> Although section 22.10(2) speaks in terms of a refusal rather than a delay in production, we think a refusal to produce encompasses the situation where, as here, 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.

Id. at 463 n.6. Assuming without deciding whether the substantial compliance test is the appropriate standard to be applied to claims of violation of Chapter 22, the Court found under the facts of the case that the records custodian did not substantially comply with its obligation to produce the records promptly, subject to the size and nature of the request. *Id.* at 462. In so finding, the Court considered the delay between the request and production was seventy-one days, the records custodian did not produce any documents until the plaintiff filed the suit, and there was a hiatus in communication between the records custodian and the plaintiff. *Id.* In addition, the Court considered the records custodian's efforts to locate and produce the documents as well as the other business it was addressing. *Id.*

The Governor's Office argues that the parties did not raise and the Iowa Supreme Court in did not address or decide the issue of mootness in *Horsfield Materials, Inc.* Appellants' Br. at 32. It is more precise to say that the Court

decided the case based on a claim of unlawful delay, rather than unlawful withholding. On the unlawful delay claim, *Horsfield Materials, Inc.* stands for the proposition that a judiciable controversy remains after records are eventually provided. Further, mootness is different from other types of issues on appeal, in that it can be raised by the Court *sua sponte* even if no party raises the issue, because the Court has the responsibility to police its own jurisdiction. *Bribriesco-Ledger v. Klipsch*, 957 N.W.2d 646, 649 (Iowa 2021). If production of records by the records custodian mooted a lawsuit's claims that the records were provided in an unreasonably untimely way, then it is reasonable to assume the Iowa Supreme Court would have raised and decided that issue in *Horsfield Materials, Inc.*

The Governor Office's reliance on the *Neer* decision is misplaced. Appellants' Br. at 31 (citing *Neer v. State*, 2011 WL 662725 (Iowa Ct. App. Feb. 23, 2011)). First, the decision is an unpublished Court of Appeals decision that is not binding authority. Iowa R. App. P. 6.904(2)(c); *see also State v. Shackford*, 952 N.W.2d 141, 145 (Iowa 2020) (explaining that unpublished decisions are not "precedential"). Two years after *Neer*, this Court decided *Horsfield Materials, Inc.*—which of course *is* precedential. Second, *Neer* is distinguishable. In *Neer*, the Iowa Court of Appeals affirmed the district court's finding that the public interest exception to the mootness

doctrine applied to the open records case; as a result, the court reached the question of whether certain records were confidential under Chapter 22. *Id.* at *2. Neer had filed suit to compel production, *id. at* *1, but there is no mention of a second claim regarding unlawful *delay* in violation of Chapter 22, as Reporters make here. Third, the Court of Appeals in *Neer* declined to address whether remedies under Chapter 22 for prospective injunctive relief, statutory damages, attorney's fees, and costs remained viable after the State voluntarily produced the records in response to the lawsuit because the district court instead applied the public interest exception to overcome mootness. *Id.* at *1. Thus, *Neer* does not speak to those questions at all.

Just like in *Horsfield Materials, Inc.*, Reporters in this case have, *inter alia*, stated claims of a violation of Chapter 22 because of the substantial delay in providing the records. The delay in producing the records in this case ranges from just over one-and-a-half years to almost five months, which is even more than the 71-day delay that occurred in the *Horsfield Materials, Inc.* case. *See* App. 21, ¶ 99, 216, ¶ 107. Moreover, there were substantial hiatuses in communication from just over one-and-a-half years to almost four months where Reporters patiently and diligently followed up and continued to seek records and were typically ignored. *See* App. 12, ¶¶ 43-45; 206, ¶¶ 43-45 (hiatus between May 4, 2020, email from the Governor's Office and January

3, 2022, letter providing the records); 13, ¶¶ 49-51, 207 ¶¶ 49-51 (hiatus between July 28, 2020, email from the Governor's Office and January 3, 2022, letter providing the records); 16, ¶¶ 67-69, 210 ¶¶ 67-69 (hiatus between May 5, 2021, email from the Governor's Office and January 3, 2022, letter providing the records); 17, ¶¶ 77-79, 211, ¶¶ 77-79 (hiatus between September 20, 2021, text messages from the Governor's Office and January 3, 2022, letter providing the records); and 18, ¶¶ 82-84, 212 ¶¶ 82-84 (hiatus between August 20, 2021, email from the Governor's Office and January 3, 2022, letter providing the records).

For the foregoing reasons, the Governor's Office's untimely eventual production of records does not moot Reporters' case.

3. The Untimely Eventual Provision of Records Does Not Moot Reporters' Claim for Attorney's Fees.

Reporters seek remedies other than simply an order for production of the documents. Reporters seek declaratory relief, prospective injunctive relief, an order of mandamus, reasonable attorney's fees, and court costs.

The eventual untimely production of some of the records does not moot out Reporters' claim for attorney's fees, which remain available even after production. Recent Iowa Supreme Court precedent confirms this: Under *Vroegh v. Iowa Dep't of Corr.*, 972 N.W.2d 686, 704-05 (Iowa 2022), the potential for a plaintiff to recover attorney's fees under a fee-shifting statute

in connection with a claim prevents the claim from becoming moot, even if judgment is entered for the plaintiff on a second, related claim. Therefore, even if all the records in this open records case had been produced, which they have not, the production does not moot out Reporters' claim for attorney's fees—for the unlawful withholding claims, the unlawful delay claims, and related Reporters' claims regarding the improper redaction and withholding of records pursuant to asserted confidentiality provisions in section 22.7.

Further, the case the Governor Office's relies on from another jurisdiction, finding that after open records are produced the case is moot, supports Reporters' position that attorney's fees claims remain viable even after all the records have been produced. Appellants' Br. p. 32. In *Cabinet for Health and Family Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375, 388 (Ky. Ct. App. 2016), the court found that the case was moot and an exception to the mootness doctrine did not apply, but the issue of attorney's fees and court costs remained and affirmed the district court's award of fees and costs.

Therefore, Reporters' claims for attorney's fees are not moot.

B. Even if Reporters' Suit Were Moot, Exceptions to the Mootness Doctrine Apply.

Even if this Court were to find that all the records requested have been provided and the case is moot, two exceptions to the mootness doctrine apply to this case—public interest and voluntary cessation. Reporters' claims

present issues of public importance that are capable of repetition but would evade review. The Governor's Office also cannot automatically moot a case simply by ending the unlawful conduct once a lawsuit has been filed to escape liability, considering it could resume the unlawful conduct after dismissal of the case. These are considered in turn below.

1. The Public Interest Exception Applies to This Case.

The public interest exception to the mootness doctrine applies to this case. The exception applies "where matters of public importance are presented and the problem is likely to recur." *Iowa Freedom of Info. Council v. Wifvat*, 328 N.W.2d 920, 922 (Iowa 1983). The court has discretion to hear the appeal under these circumstances. *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 679 (Iowa 1998). An important factor for consideration is whether the challenged action "is such that often the matter will be moot before it can reach an appellate court." *Id.* (quotation omitted). There are four factors a court should consider in determining whether to apply this mootness exception:

> (1) the private or public nature of the issue; (2) the desirability of an authoritative adjudication to guide public officials in their future conduct; (3) the likelihood of the recurrence of the issue; and (4) the likelihood the issue will recur yet evade appellate review.

State v. Hernandez-Lopez, 639 N.W.2d 226, 234 (Iowa 2002).

On the first factor, the timely and complete production of public records as provided for under law from the Governor's Office is a matter of great public importance. Reporters, as well as other journalists and news organizations, struggled during the COVID-19 pandemic to get responses to open records requests fulfilled by the Governor's Office at all, as well as in a timely manner. The people of Iowa rely on robust reporting, government transparency, and accountability in a time of democratic strain, such as the COVID-19 pandemic, more, not less, than at times of ease.[9]

On the second factor, an authoritative decision is desirable in this case given the importance of the plaintiffs, and the defendants, to Iowa's democratic system and institutions. There are no cases presenting facts like these related to over 18 months of sustained disregard for the obligations of the office under Chapter 22. Allowing the violation of the law demonstrated here to be unchecked would set a terrible precedent for the legislature's public policy of accountability and transparency at the highest levels in our state. The impact would be amplified for other state agencies as well as local governmental bodies, who have fewer resources, not more, to comply with

[9] Where suspension of the obligations of Chapter 22 is warranted temporarily due to such a strain, Iowa law provides a mechanism to the Governor to do so—but the Governor must follow that lawful process, not simply act ultra vires outside that process to ignore lawful statutory obligations. *See* Iowa Code § 29C.6(1); *see also* Statement of Facts, Part II, above, at 25-27.

Chapter 22. Absent resolution of the claims in this case, these other entities could point to the Governor's Office, with all the resources and dedicated communications and legal staff at its disposal, and reason that if the Governor's Office can ignore Chapter 22 in times of stress and strain, *for months to years*, surely their offices, with fewer resources, can as well.

The third factor also weighs in Reporters' favor because of the high likelihood of recurrence. This is evident from the positions of the parties themselves. Reporters are prominent journalists and media organizations who fulfill a vital function in the state's democracy by investigating and reporting the news on a daily basis. Access to open records is vital to their ability to do that work. The Governor's Office likewise is a frequent flier when it comes to open records requests. As the head of the executive branch, it is a unique and indispensable source for journalists regarding the direction and execution of statewide policy. There have been, and will continue to be, many more open records requests between these parties. And while the current pandemic will come to an end at some point, there will always be times of extraordinary stress and strain. While no one can predict the future, it is unreasonable to think that the future will not also force the state to contend with floods, drought, public health emergencies, economic hard times, and times of social unrest. It is vital that democratic checks and balances,

including the work done by reporters to inform the public through open records requests, continue in these times.

Finally, as to the fourth factor, adjudication is also desirable because if the Governor Office's interpretation of mootness is accepted, then an aggrieved party would never be able to obtain prospective injunctive relief, attorneys fees, court costs, and other remedies provided for under Chapter 22 for violations of the open records law. The Governor and any future governor would have a blueprint to ignore open records requests and then moot out a subsequent lawsuit by providing the records before the case is finished. Those with the resources to sue might be able to obtain public records, and those without, would have no judicial enforcement remedy despite the plain words of the statute. As a result, the appellate court would never reach the issue.

Based on the foregoing, the public interest exception applies to this case if the court determines the issue is moot.

2. The Voluntary Cessation Exception Applies to This Case.

In addition, the voluntary cessation to mootness exception applies. Under this doctrine, a defendant's voluntary cessation of unlawful conduct ordinarily does not suffice to moot a case. *Friends of Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). "[A] defendant's voluntary cessation of a challenged practice does not deprive a . . . court of its

power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). The exception exists because if a defendant could defeat a lawsuit simply by temporarily ceasing its unlawful conduct, then the defendant could resume the unlawful conduct as soon as the case is dismissed. *Knox v. Service Employees Int'l Union*, 567 U.S. 298, 306 (2012). In other words, the defendant would be free to return to its old ways. *Friends of the Earth, Inc.*, 528 U.S. at 189.

Therefore, the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Exp. Ass'n, Inc.*, 393 U.S. 199, 203 (1968). And the party who asserts mootness bears the "heavy burden" of persuading the court that the challenged conduct cannot reasonably be expected to happen again. *Id.*

The Governor's Office has not sustained its heavy burden in persuading this Court that its violation of Chapter 22 cannot reasonably be expected to happen again. Any claim the Governor's Office may make in this case to suggest it has reformed the open records request responses and permanently

fixed the issues so that it will not happen again is not borne out by past behavior.

The Governor's Office admitted to the past failures in responding to and timely providing open records requests on January 7, 2021, and committed to responding in a timely manner going forward. *See* App. 22, ¶ 107; 217, ¶ 115. Nonetheless, the Governor's Office has not timely provided responsive records to several subsequent requests Reporters made after January 7, 2021. *See* App. 14-15, ¶¶ 56-59, 208-09, ¶¶ 56-59 (Terrace Hill charitable donation records from June 1, 2021), 15 ¶¶ 60-63, 209, ¶¶ 60-63 (Senate File 567 records from June 16, 2021), 15-16, ¶¶ 64-69, 209-10, ¶¶ 64-69 (Terrace Hill charitable donation records from April 8, 2021), 16-18, ¶¶ 70-80, 210-12, ¶¶ 70-80 (termination of Iowa Veteran's Home Director records), and 18, ¶¶ 81-84, 212, ¶¶ 81-84 (deployment of Iowa State Patrol Members to Texas records).

The Governor's Office only provided the records in this case in response to the litigation and after substantial delays of five to 18 months. Besides Reporters, other reporters and news organizations have also had problems getting the Governor's Office to timely provide records. *See* App. 21, ¶ 102, 216, ¶ 110. The *Rasmussen* case provides further illustration of a pattern of failure to timely respond to and provide open records requests. *See*

Rasmussen v. Reynolds, No. 21-2008. There as well the Governor's Office only provided records in response to litigation. *Id.* Finally, the Governor's Office has *still* not complied in providing all the disputed records in this case and have asserted they have no intent to do so. *See* App. 125-33.

Other than the Governor's statement that the office will try to do better, the balance of all other evidence weighs against it in meeting its heavy burden to show that unlawful withholding and delay will not resume if the lawsuit were dismissed. For these reasons, the voluntary cessation exception applies to this case even if the case were moot.

III. Chapter 22's Timeliness Requirement Applies to Both Electronic and Non-Electronic Records.

Chapter 22 requires that open records be timely produced, and this requirement applies to both electronic and non-electronic records. And the Court should decline the State's invitation to overrule *Horsfield Materials, Inc.*

Chapter 22 applies to both electronic and non-electronic open records; it does not exempt electronic records and only cover non-electronic records, as the Governor's Office would have this Court believe. *Horsfield Materials, Inc.* itself was a case involving electronic records. In processing the open records request, the records custodian "had to go through individual employee email accounts," "had to figure out how to get administrative rights," and then

had to "run an appropriate email search." *Horsfield Materials, Inc.*, 834 N.W.2d at 462. The Court in *Horsfield Materials, Inc.* discussed the relevant statutory provisions contained in Chapter 22, did a thorough textual analysis, properly considered administrative guidance, and concluded that the production of the electronic records was unreasonably delayed in violation of Chapter 22. *Id.* at 459-63.

Contrary to the Governor Office's assertion, and as this Court has recently held, "the Open Records Act applies to electronic records. . . ." *Ripperger v. Iowa Pub. Info. Bd.*, 967 N.W.2d 540, 550 (Iowa 2021). The text of Chapter 22 supports, rather than undermines, the requirement of reasonable timeliness to provide both electronic and non-electronic records in response to requests. Public records are specifically defined as "*all* records, documents, tape, or other information, stored or preserved *in any medium*, of or belonging to this state. . . ." Iowa Code § 22.1(3)(a) (emphasis added). And a requestor may examine public records either by in-person or "electronic examination and copying . . . in lieu of . . . in-person examination and copying of a public record." *Id.* § 22.2(3). Under section 23.3A, electronic public records "shall be made available" to the requestor either in the format that is commonly useable or in a different format. *Id.* § 22.3A(2)(d). If the electronic record is contained in data processing software, the "public record shall not be withheld

from the public because it is combined with data processing software" and "[a] governmental body shall not acquire any electronic data processing system for the storage, manipulation, or retrieval of public records that would impair the government body's ability to permit the examination of a public record and the copying of a public record in either written or electronic form." *Id.* § 22.3A(2)(a)-(b). The government body "shall establish policies and procedures to provide access to public records which are combined with its data processing software." *Id.* § 22.3A(2)(a). Thus, the plain language of the statute provides that Chapter 22's timeliness requirement applies to both electronic and non-electronic records.

The Governor's Office makes much of the legislature amending the electronic records provisions in section 22.3A after *Horsfield Materials, Inc.* was decided. Appellants' Br. at 35. Chapter 22 was amended in 1996 to add new provisions, codified in section 22.3A, dealing with access to records on data processing software, which include access to electronic records. 96 Acts, ch. 1099, § 15. But nothing in the changes to section 22.3A dealing with electronic records altered the analysis that electronic records are public records, which are subject to Chapter 22's timeliness requirement.

If the Iowa legislature desired to exempt electronic records from Chapter 22's timeliness requirement, it could have done so at any time,

including when the Chapter 22 was amended in 1996. However, the legislature did not exempt electronic records in 1996 nor did it do so later when it amended section 22.3A several more times. *See* 96 Acts, ch. 1099, § 15; 98 Acts, ch. 1224, § 18; 99 Acts, ch. 207, § 12; 2003 Acts, ch. 35, § 38, 49; 2011 Acts, ch. 127, § 45, 89; 2015 Acts, ch. 42, § 2. In fact, the 1996 amendment does the opposite, recognizing those things about electronic records that facilitate access and requiring public records custodians to have processes in place to facilitate that access—not, as the Governor's Office urges, undermine it. Electronic records are typically easier and faster to produce than non-electronic records, not more difficult. This ease and quickness comes from the ability to index electronic records and utilize search features, which are not likely available for non-electronic records.

If the Iowa legislature truly had a problem with *Horsfield Materials, Inc.*'s holding treating electronic records the same as non-electronic records and applying the normal timeliness requirements, it would have passed an amendment that expressly provided otherwise. The 1996 amendment did not do that nor did any other law. Under the doctrine of legislative acquiescence, the Court "'presume[s] the legislature is aware of [the Court's] cases that interpret its statutes. When many years pass following such a case without a legislative response, [the Court] assume[s] the legislature has acquiesced in

[the Court's] interpetation.'" *State v. Iowa Dist. Ct. for Jones Cnty.*, 902 N.W.2d 811, 818 (Iowa 2017) (quoting *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013)). The Court must presume the legislature was aware of the *Horsfield Materials, Inc.* case, which interpreted Chapter 22. Since many years have passed following the *Horsfield Materials, Inc.* case without a legislative response, the Court should assume that the legislature has acquiesced in the Court's interpretation of the case.

The Governor Office's illogical argument to overrule *Horsfield Materials, Inc.* also conflates the two separate issues of withholding and delay. While producing records is relevant to an unlawful withholding claim seeking production of documents, it has no bearing on the justiciability of an unlawful delay claim.

It would also undermine the purpose of Chapter 22 in requiring timely compliance, and work to read out the timeliness requirements from the statute in contravention of principles of statutory interpretation. *See Johnston v. Iowa Dep't of Transp.*, 958 N.W.2d 180, 190 (Iowa 2021) ("Canons of statutory interpretation require that every word and every provision in a statute is to be given effect, if possible, and *not* deemed mere surplusage.") (emphasis in original). There would be no production requirement if there is no timeliness requirement. The lack of a deadline in which to provide records

means that any delay is permissible, which is not what the legislature intended. Therefore, the district court properly rejected the Governor Office's claim that the production of the electronic records after the lawsuit was filed rendered the case moot. App. 189-90. As the district court reasoned,

> [i]f this was true, then there would be no enforceable obligation to turn over public records until the responsible party or entity is sued. The Act did not intent to require citizens of this State to sue in order to obtain government records. A plain reading of all the remedies beyond compelling compliance that the Act affords, including statutory damages, attorney fees, prospective injunctive relief and removal from office, confirms that the Act's intent was not to moot claims simply by providing the requested documents.

Id.

For these reasons, Chapter 22's requirement of timeliness applies to both electronic and nonelectronic records, and the Court should continue to follow the *Horsfield Materials, Inc.* case.

IV. The Failure to Timely Assert Confidentiality Supports Reporters' Claims.

The Governor's Office misunderstands Reporters' argument concerning the open records that continue to be withheld. As stated above, Reporters argue that the Governor's Office did not timely assert that confidentiality provisions apply to the open records that they continue to

withhold. *See* Argument, Part II(A)(1), above, at 49-51.[10] This is a further instance of the Governor's Office' untimeliness in responding to open records requests, which is a violation of Chapter 22.

This untimeliness does not mean that otherwise confidential records must be produced and made public, as the Governor's Office suggests. Appellants' Br. at 39. Reporters do not seek disclosure of records which are determined to be properly designated as confidential as a form of relief for the timeliness violation.

The Governor Office's confidentiality concerns can be addressed by *in camera* review of the records that the Governor's Office claims are confidential and continue to be withheld. *Press-Citizen Co., Inc. v. University of Iowa*, 817 N.W.2d 480, 483 (Iowa 2012) (recognizing the ability of the district court to utilize in-camera review for open records that had been withheld by the records custodian under one of section 22.7's confidentiality provisions). If they are deemed not to be confidential, then the district court can order that they should be produced in addition to the other remedies Reporters seek on the timeliness violation—including injunctive relief,

[10] Reporters clarified at the motion to dismiss hearing that their position is that "the nonresponse within twenty days is just further evidence that [the Governor's Office] violated the open records act." Mot. to Dismiss Tr. at 39:15-22; App. 182.

mandamus, declaratory relief, reasonable attorney's fees, and costs. If the district court deems them to be confidential, then all those remedies other than production are still available and appropriate. *See Horsfield Materials, Inc.*, 834 N.W.2d at 463; Iowa Code § 22.10.

Following the Governor's Office post-litigation assertion of confidentiality, Reporters timely, as of right, amended their complaint to include a new claim that the withheld records are not confidential under 22.7(5), (18), and (50) and must be produced. *See* App. 218, ¶ 122. The Governor's Office agrees there is a factual dispute as to whether the confidentiality provisions apply in this case. *See* Defs.' Reply in Supp. of Application for Interlocutory Appeal at 2-3. Further, the Governor's Office concedes that the case should be remanded on Reporters' claim in the amended complaint regarding the withholding of confidential records. Appellants' Br. at 41. But its brief fails to appreciate that the untimeliness in asserting confidentiality is itself also a violation of Chapter 22, with remedies other than disclosure of confidential records, even if the records were properly designated as confidential under section 22.7.

For all these reasons, the district court was correct in denying the motion to dismiss and allowing the case to proceed on this issue.

CONCLUSION

For the foregoing reasons, the district court's denial of the Governor Office's motion to dismiss was correct, and this Court should affirm.

REQUEST FOR ORAL ARGUMENT

Reporters respectfully request oral argument.

Respectfully submitted,

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COST CERTIFICATE

I hereby certify that the cost of printing this application was $0.00 and that that amount has been paid in full by the ACLU of Iowa.

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