IN THE SUPREME COURT OF IOWA
No. 22–0452

SUZETTE RASMUSSEN,

Appellee,

vs.

IOWA DEPARTMENT OF PUBLIC HEALTH and SARAH EKSTRAND,

Appellants.

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

APPELLANTS' FINAL BRIEF

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Iowa Code § 22.2
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III. Does Iowa Code section 22.10(3)(d) permit a claim to remove a state employee "from office" when she does not hold an office and has not previously been found to violate chapter 22?

State v. Pinckney, 276 N.W.2d 433 (Iowa 1979)
Olinger v. Smith, 892 N.W.2d 775 (Iowa Ct. App. 2016)
Iowa Code § 22.10(3)(d)

ROUTING STATEMENT

The Supreme Court should retain this case. This is one of three pending interlocutory appeals presenting the common question: Does Iowa Code chapter 22 impose a timeliness requirement for producing electronic records that can support the continuation of a lawsuit after all requested records have been provided? *See Rasmussen v. Reynolds*, No. 21-2008; *Belin v. Reynolds*, No. 22-0789. This is an urgent issue of broad public importance to state and local governments. *See* Iowa R. App. P. 6.1101(2)(d). Answering it may require limiting or overruling the decision of this Court in *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013). And it makes sense for all three cases to be heard by the Supreme Court at once.

Each case also presents its own issues of first impression. *See* Iowa R. App. P. 6.1101(2)(c). Here, there are two. First, whether the redressability requirement of standing limits the statutory remedies available in a private action under Iowa Code chapter 22 to those that would provide the private plaintiff some relief. And second, whether Iowa Code section 22.10(3)(*d*) permits a claim seeking to remove a state employee "from office" when she does not hold an office and has not previously been found to violate chapter 22.

STATEMENT OF THE CASE

This is one of two open-records suits by Utahn Suzette Rasmussen against the State of Iowa and its employees. Both are now before the Court on interlocutory appeal. *See Rasmussen v. Reynolds*, No. 21-2008. As in that case, Rasmussen seeks to pursue this suit even after she has received all her requested records—just because she didn't receive them fast enough. And she seeks to impose statutory damages and prospective injunctive relief even though neither remedy will give her any redress. What's more, Rasmussen is trying to remove Defendant Sarah Ekstrand "from office" because of Ekstrand's involvement in responding to Rasmussen's record request, even though Ekstrand is an employee—not an officer—and Rasmussen hasn't alleged that Ekstrand has previously violated chapter 22.

Rasmussen sued the Iowa Department of Public Health and a Department employee, Sarah Ekstrand, under Iowa Code chapter 22 to obtain records she had requested but not yet received from the Department. She alleged that the Department and Ekstrand violated chapter 22 by refusing to provide her records. *See* App. 6 ¶¶ 21–26. She thus sought injunctive and other relief to enforce compliance with chapter 22 and obtain the requested records. App. 6.

The Department provided the records that she requested and then moved to dismiss her case as moot. *See* App. 8–9. In response, Rasmussen amended her petition to claim that the Department violated chapter 22 by failing to produce her records fast enough. App. 14 ¶¶ 29, 34. She also added requests for other more aggressive remedies, including prospective injunctive relief, statutory damages, and the removal of Ekstrand "from office." And she contended that one provided record shouldn't have been redacted. App. 14 ¶¶ 30–33.

The Department again moved to dismiss her amended petition. *See* App. 19–21. It continued to argue that the case is moot. *See* App. 31–34. And the Department reasoned that even if not moot, her claim fails as a matter of law because there is no textual basis for a timeliness claim for the retrieval of electronic records and Rasmussen's pleaded facts don't give rise to a violation anyway. *See* App. 34–35 & n.1.

The Department alternatively argued that even if the court didn't dismiss the entire case, it should dismiss all Rasmussen's requested relief except for attorney fees because she lacked standing to seek statutory damages, prospective injunctive relief, or removal of Ekstrand. *See* App. 36–38, 53–55. And it asserted that the removal-from-office provision can't apply because Ekstrand is an

employee—not a state officer—and Rasmussen hasn't alleged that Ekstrand has previously violated chapter 22. *See* App. 38.

The district court rejected all the Department's arguments and denied the motion to dismiss. *See* App. 82–85. The Department moved to reconsider the ruling to ensure all it's arguments for dismissal were properly preserved for appeal after it appeared that some had not been considered by the court. *See* App. 88–93. But the district court denied this motion as well. App. 95.

The Department then filed a timely application for interlocutory appeal, which was granted by this Court. *See* Order Granting App. for Interloc. App. (Apr. 8, 2022).

STATEMENT OF THE FACTS

In the middle of a public health disaster emergency, Plaintiff Suzette Rasmussen made an open-records request to the Iowa Department of Public Health in March 2021. *See* App. 12 ¶ 9. The Department's public information officer, Sarah Ekstrand, engaged with Rasmussen on her request. *See* App. 12 ¶¶ 9–16. And two months after first contacting the Department, Rasmussen redefined the request. *See* App. 12 ¶¶ 13–14. The Department provided some of the responsive documents 18 days later. App. 22 ¶ 6.[1] But when Rasmussen had not received all the responsive documents after another six weeks—two months after she made her redefined request—she sued. *See* App. 13 ¶ 17.

At first, Rasmussen alleged that the Department and Ekstrand violated Iowa's open records laws—chapter 22 of the Iowa Code—by refusing to provide her records. *See* App. 6 ¶ 21–26. And she sought injunctive and other relief to enforce compliance with chapter 22 and obtain the requested records. App. 6.

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

But the Department continued its efforts to review and produce responsive records to Rasmussen throughout August—providing one batch on August 19 and completing its response on August 27. *See* App. 13 ¶¶ 19–20. In total, the Department reviewed and provided more than 11,000 pages of emails and attachments, made up of more than 1,500 individual documents. *See* App. 13 ¶¶ 19–20; App. 23 ¶¶ 7–12. And it did so within three months of Rasmussen's redefined request.

Because Rasmussen obtained all her requested records, the Department moved to dismiss her petition as moot. *See* App. 8–9. Rasmussen then amended her petition. She now claims that the Department violated chapter 22 by failing to produce her records fast enough. App. 14 ¶¶ 29, 34. She also contends that one record that had been redacted to protect confidential pricing information as a trade secret under Iowa Code § 22.7(3) should have been provided in unredacted form. App. 14 ¶¶ 30–33. The Department later provided this unredacted record to Rasmussen as well—after confirming that the protected party consented to releasing the information. App. 23 ¶ 13.

Thus, the Department again moved to dismiss her amended petition. It continued to argue that the case is moot. *See* App. 31–34. And the Department reasoned that even if not moot, the claim

fails as a matter of law because there is no textual basis for a timeliness claim for the retrieval of electronic records and Rasmussen's pleaded facts don't give rise to a violation in any event. *See* App. 34–35 & n.1.

The Department alternatively argued that even if the court didn't dismiss the entire case, it should dismiss all Rasmussen's requested relief except for attorney fees because she lacked standing to seek statutory damages, prospective injunctive relief, or removal of Ekstrand. *See* App. 36–38, 53–55. And it asserted that the removal-from-office provision can't apply because Ekstrand is an employee—not a state officer—and Rasmussen hasn't alleged that Ekstrand has previously violated chapter 22. *See* App. 38.

The district court rejected all the Department's arguments. The court held that the case isn't moot because this Court recognized a timeliness claim in *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013). *See* App. 83–84. It also rejected the Department's arguments that Rasmussen lacked standing to seek prospective injunctive relief, statutory damages, or removal of Ekstrand. *See* App. 83–85. The court didn't analyze whether the remedies would provide redress to Rasmussen. Instead, it held that Rasmussen was "an aggrieved person" under chapter 22 and thus could seek any of the remedies available under the statute. *See* App. 84–85.

The district court appeared to construe all the Department's arguments against the removal-from-office claim as a question of standing. *See* App. 85 ("Finally, IDPH and Ekstrand argue that Rasmussen lacks standing to remove Ekstrand from office because Ekstrand is not a state officer."). And it rejected that claim as well, reasoning, "Whether Ekstrand is such a person has nothing to do with Rasmussen's standing, and is a factual determination to be made by the court." App. 85.

Because the district didn't appear to address all the Department's arguments for dismissing Rasmussen's request for relief, the Department moved to reconsider the ruling. *See* App. 88 ¶¶ 1–2. The Department sought a ruling on its arguments that the removal-from-office claim failed as a matter of law because Ekstrand is an employee rather than officer and because Rasmussen hadn't alleged that Ekstrand had violated chapter before 22. *See* App. 89–91 ¶¶ 3–10. And it sought a ruling on its argument that Rasmussen failed to meet the redressability requirement of standing. *See* App. 92–93.

The district court also denied the Department's reconsideration motion. It "disagree[d] that it did not address these two issues." App. 95. The court reasoned that it "directly addressed the Defendants' claim that Plaintiff failed to state a claim that Defendant Ekstrand can be removed from office on page 5 of its ruling when the court stated, '[w]hether Ekstrand is such a person has nothing

to do with Rasmussen's standing, and is a factual determination to be made by the court.'" *Id.* And it explained that it "also directly addressed the Defendants' redressability argument on page 5 of its ruling, discussing the remedies (redress) available for injunction, statutory damages and officer removal." *Id.*

On the Department's timely application, this Court then granted interlocutory review of the district court's rulings. *See* Order Granting App. for Interloc. App. (Apr. 8, 2022).

ARGUMENT

Rasmussen sues the Department and Ekstrand for a claimed violation of Iowa's open record laws because she did not receive the records she requested fast enough. *See* App. 13–14 ¶¶ 26–29, 34–35; App. 15 ¶ A. And she seeks to require the Department to pay statutory damages to the State, to enjoin the Department to follow the law for a year, and to remove Ekstrand "from office." *See* App. 15 ¶¶ B–D. But the district court should have dismissed this suit because it is moot after Rasmussen received her requested records, chapter 22 doesn't impose a timeliness requirement for electronic records, and any requirement was satisfied by the Department.

Even if the suit can proceed, the court should have dismissed Rasmussen's requests for statutory damages, prospective injunctive relief, and removal of Ekstrand. Rasmussen lacks standing to seek this relief that won't redress her alleged harm. And the removal-from-office claim fails as a matter of law because Ekstrand is an employee—not an officer—and Rasmussen hasn't alleged that Ekstrand has previously violated chapter 22. Thus, the only relief Rasmussen might seek is an award of attorney fees.

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

I. Rasmussen's claim that the Department violated chapter 22 by responding too slowly to her open-records request fails as a matter of law and should have been dismissed before opening the gates to discovery and trial.

Rasmussen asserts—and the district court ruled that she can pursue—a claim that the Department violated chapter 22 by not producing the electronic records she requested fast enough. *See* App. 82–83, 85–86. Both Rasmussen and the district court relied on this Court's decision in *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013).

There, the Court held that a city that hadn't provided requested records for nearly three months didn't substantially comply with chapter 22. *Horsfield Materials*, 834 N.W.2d at 462. The Court rejected any absolute deadline for responding to record requests. *Id.* at 461. But it held that this three-month delay was a "refusal" to provide records that put the burden on the city to prove compliance. *Id.* at 463 & n.6. And while it was a "close question," whether the delay was reasonable, the Court reasoned that the city hadn't provided enough detailed evidence in its defense. *Id.* at 462–63.

But *Horsfield Materials* didn't consider the question of mootness. What's more, there is no textual basis in chapter 22 for a timeliness claim for requests of electronic records. And the Department's response satisfies any requirement. So this case should have been dismissed once Rasmussen received her requested records.

A. This case is moot because Rasmussen has now received all the records she requested from the Department.

"Courts exist to decide cases, not academic questions of law. For this reason, a court will generally decline to hear a case when, because of changed circumstances, the court's decision will no longer matter." *Homan v. Branstad*, 864 N.W.2d 321, 328 (Iowa 2015). A case should be dismissed as moot "if it no longer presents a justiciable controversy because the issues involved are academic or nonexistent." *Id.* (cleaned up). Put another way, the "test is whether an opinion would be of force and effect with regard to the underlying controversy." *Women Aware v. Reagen*, 331 N.W.2d 88, 92 (Iowa 1983). The judiciary's "lawgiving function is carefully designed to be an appendage to [its] task of resolving disputes." *Wengert v. Branstad*, 474 N.W.2d 576, 578 (Iowa 1991). "When a dispute ends, the lawgiving function ordinarily vanishes" and a court "certainly should not go out of [its] way to answer a purely moot question because of its possible political significance." *Id.*

Rasmussen filed these suits when she had not received a response to her open-records request to the Department. App. 81–82. Those records have now been provided. App. 82. This resolved the controversy between the parties and any further opinion of the court would have no "force and effect with regard to the underlying controversy." *Women Aware*, 331 N.W.2d at 92. The issues involved

in Rasmussen's petitions are now "nonexistent." *Homan*, 864 N.W.2d at 328.

The Iowa Court of Appeals has held that an open-records lawsuit becomes moot after the agency provides the records sought in the suit. *See Neer v. State*, No. 10-0966, 2011 WL 662725, at *1 (Iowa Ct. App. Feb. 23, 2011) ("Because the State released the records to Neer, we agree with the district court that this case became moot."). But because that case involved a dispute about the confidentiality of law enforcement investigative files after a criminal case is complete, the court also agreed the exception to mootness applies because it was an important issue likely to reoccur and deciding the issue would help in future court proceedings. *Id.* at *2.

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

True, in *Horsfield Materials*, this Court recognized a timeliness claim. *See Horsfield Materials*, 834 N.W.2d at 460–63. But since mootness wasn't ruled on by the Court, *Horsfield Materials* is not binding precedent on the issue. *See State v. Foster*, 356 N.W.2d 548, 550 (Iowa 1984) ("To sustain a claim of binding precedent a case must be interpreted in reference to an involved question which necessarily must be decided."); Bryan A. Garner et al., *The Law of Judicial Precedent* 84 (2016) ("A decision's authority as precedent is limited to the points of law raised by the record, considered by the court, and determined by the outcome."). Indeed, the open-records claim in *Horsfield Materials* was just one claim in a larger suit focused on many challenges a city's preapproval process for suppliers on a public construction project. *See Horsfield Materials*, 834 N.W.2d at 447. So it makes sense that the parties didn't seek dismissal of that suit as moot.

But here, this is only an open-records suit. Originally it had a viable claim to obtain requested records that hadn't yet been produced. But after the Department responded with all the records, Rasmussen tries to keep the case alive solely with a claim that the response was untimely. This case is moot.

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

There is no basis in the text of chapter 22 to support a timeliness claim for electronic records. In *Horsfield Materials*, the court acknowledged that "there is no explicit time deadline in chapter 22 for the production of Public records." 834 N.W.2d at 460. But it reasoned that section 22.4 "suggests that our legislature contemplated immediate access to public records." *Id*. at 461. And then it then relied on proposed administrative guidance to construe an "obligation to produce public records promptly, subject to the size and nature of the request." *Id*. at 462.

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

To find the core right to access public records—and its exceptions—one must look at section 22.2. There, "[e]very person" is granted "the right to examine and copy a public record." Iowa Code § 22.2(1). And this right "shall include the right to examine a public record without charge while the public record is in the physical possession of the custodian of the public record" and to "make photographs or photographic copies while the public record is in the possession of the custodian." *Id.* Read together with section 22.4's right to exercise during office-hours, chapter 22 does indeed permit someone to come to a government office and get immediate access to view, copy, or photograph paper records where they are stored.[2]

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

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

demand to sit down at any computer, and browse through the electronic files. Indeed, they could demand to have copies of the software code itself.

Of course, public records don't become permanently off limits just because they are electronic. In section 22.3A, the Legislature crafted an extensive statutory scheme for electronic records. *See* Iowa Code § 22.3A. But section 22.3A doesn't require "immediate access" during office hours. Nor does it set any specific deadline or even a general reasonableness standard for responding to a request for access to electronic records. *See id.* The governmental body need only "establish policies and procedures to provide access to public records" in the system. Iowa Code § 22.3A(2)(*a*). In light of the other regulations—about costs, electronic file formats, and maintaining access to public records—the absence of any timeliness requirement for electronic records is notable. And the Court should not read in such a requirement that the Legislature did not enact.

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

ruling able to support a timeliness requirement for electronic records, it shouldn't be extended now.

At bottom, the Legislature knows how to impose a time requirement on a state agency if it wants to do so. *See, e.g.,* Iowa Code §§ 22.7(60), 22.8(4)(*d*). Especially, with an issue like public access to electronic records, there are a host of policy factors that could impact how the Legislature would craft such a requirement if it *did* decide to do so. Given the lack of any text to interpret, this Court cannot impose such a requirement without itself legislating. It shouldn't do so. *See* Iowa Const. art. III, div. 1, § 1. These policy choices are best left to the Legislature. With no textual basis in the current statute for a timeliness claim based on a request for electronic records—and the records already provided—this case should have been dismissed as moot.

C. Regardless, Rasmussen has not alleged an untimely response by the Department here in the midst of a public health disaster emergency.

Alternatively, the Court could dismiss this case without deciding the exact scope of any timeliness requirement. Because under the unique facts here, the Department *of Public Health*'s response during an unprecedented *public health disaster emergency* was not a delay that rises to be a refusal to produce records or other violation of chapter 22.

Rasmussen's first record request—made on March 11, 2021—had no responsive records. *See* App. 12 ¶¶ 9–12; App. 22 ¶ 4. So it's not at issue. Her second "redefined" request was made on May 28. App. 12 ¶ 13; App. 22 ¶ 5. A portion of the request was responded to in less than a month on June 15. App. 22 ¶ 6. About two months after the redefined request, Rasmussen sued. App. 13 ¶ 17.

But less than a month later (or three months from the redefined May 28 request), the Department provided Rasmussen the remaining responsive documents, totaling about 11,000 pages. App. 13 ¶¶ 19–20; App. 23 ¶¶ 7–12. It did so voluntarily without any intervention of the court.

As this Court can take judicial notice, all of this occurred during an unprecedented public health disaster. *See* Proclamation of Disaster Emergency (Mar. 5, 2021), *available at* https://perma.cc/4QQE-9BHA; Proclamation of Disaster Emergency (Aug. 19, 2021), *available at* https://perma.cc/B7GG-BPTN (showing that a public health disaster proclamation has been in effect at all operative times); *see also Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 835–36 (Iowa 1979) (holding that judicial notice of "a public document duly issued by a state agency" could "supplement" a petition in considering a motion to dismiss).

Rasmussen was seeking these records from the Department of Public Health—the center of the State's response to the pandemic

and a significant object of attention from the media and records requesters. *See* App. 11–12 ¶¶ 2, 10. And her request wasn't minimal—it led to the production of more than 1,500 documents and 11,000 pages. *See* App. 13 ¶¶ 19–20; App. 23 ¶¶ 7–12. Under these circumstances, the Department and Ekstrand did not refuse to provide the records to Rasmussen. Any delay was reasonable as a matter of law. There's been no violation of chapter 22, and thus she has no right to any further relief. See Iowa Code § 22.10(3) (requiring a violation of the chapter for any other relief).

II. Even if Rasmussen's claim cannot be dismissed entirely, the court should have dismissed the requests for statutory damages, prospective injunctive relief, and removal of Ekstrand because Rasmussen lacks standing to seek relief that won't redress her alleged harm.

Even if a timeliness claim for electronic records may be brought under chapter 22, the district court still should have dismissed Rasmussen's claims for statutory damages, prospective injunctive relief, and removal of Ekstrand. Only her claim for attorney fees can proceed. She lacks standing to seek the other remedies.

Standing—including redressability—is a jurisdictional requirement in Iowa. *Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780, 794 (Iowa 2021). Iowa courts don't give advisory opinions. *Id.* at 791 (citing *Schmidt v. State*, 909 N.W.2d 778, 800

(Iowa 2018)). And "[i]f the court can't fix your problem, if the judicial action you seek won't redress it, then you are only asking for an advisory opinion." *Id.* at 791. "[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

Over the years, this Court has sometimes referred to standing as "'a self-imposed rule of restraint.'" *Iowa Citizens for Cmty. Improvement*, 962 N.W.2d at 790 (quoting *Hawkeye Bancorp. v. Iowa Coll. Aid Comm'n*, 360 N.W.2d 798, 802 (1985)). "But that doesn't make the standing requirement any less real." *Id.* Indeed, the Court has recognized that standing has a constitutional dimension in Iowa—just like federal standing is rooted in Article III. *See id.* The Court pointed to article V, section 6 of the Iowa Constitution, which requires "that Iowa courts operate as 'court[s] of law and equity.'" *Id.* (quoting Iowa Const. art. V, § 6) (alterations in original). And it cited Iowa's express separation-of-power provision, article III, section 1. *See id.*; *see also* Iowa Const. art. III, div. 1, § 1 ("The powers of government of Iowa shall be divided into three separate departments—the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.").

Rasmussen seeks to have the district court assess damages of $500 to $2500 dollars against both the Department and Ekstrand under section 22.10(3)(b) of the Iowa Code. *See* App. 15 ¶ C. That provision requires the Court to assess damages in that range to a person who "knowingly participated" in a violation of chapter 22 unless certain exceptions are satisfied. Iowa Code § 22.10(3)(*b*). But the assessed damages wouldn't be paid to Rasmussen. Since the Department is a state government body, "[t]hese damages shall be paid by the court imposing them to the state of Iowa." *Id.*

Because statutory damages under section 22.10(3)(*b*) are not paid to Rasmussen—they're paid to the State—they don't provide any redress to Rasmussen and she lacks standing to seek them. The U.S. Supreme Court agreed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). There, the Court held that a private plaintiff lacked standing to seek imposition of civil penalties that would be paid to the United States—just like the damages here would be paid to the State. *See id.* at 106–07. The Court reasoned that with such a request, the plaintiff "seeks not remediation of its own injury—reimbursement for the costs it incurred as a result of the late filing—but vindication of the rule of law—the undifferentiated public interest." *Id.* at 106 (cleaned up).

True, even nominal damages of $1 can be sufficient to meet the redressability requirements of standing. *See Uzuegbunam v.*

Preczewski, 141 S. Ct. 792, 802 (2021). But that is because "nominal damages are in fact damages paid to the plaintiff" and thus "they affect the behavior of the defendant towards the plaintiff and thus independently provide redress." *Id.* at 801 (cleaned up). *Uzuegbunam* thus doesn't undermine the U.S. Supreme Court's prior holding in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83.

This Court has often looked to federal standing authority as persuasive. *See Iowa Citizens for Cmty. Improvement*, 962 N.W.2d at 791. So too here. The Court should follow the U.S. Supreme Court and hold that private plaintiffs cannot seek to obtain statutory damages that are not paid to the plaintiffs.

Applying this standing requirement wouldn't render section 22.10(1) a nullity. The "attorney general or any county attorney" may also "seek judicial enforcement" of chapter 22. Iowa Code § 22.10(1). And the Attorney General, on behalf of the State, would not have the same standing limitations present here because the State *would* be receiving the statutory damages. *See* Iowa Code § 22.10(3)(*b*). And the State has an interest in the enforcement of its laws. *See* Iowa Code §§ 13.2(1)(*b*), 331.756(1); *State ex rel. Johnson v. Allen*, 569 N.W.2d 143, (Iowa 1997) (holding that county attorney has standing to bring action on behalf of the State in the public interest when authorized to do so by statute).

In any event, even if the statute is given less breadth than intended, the Legislature can't extend the power of the courts beyond their judicial function. *See Denny v. Des Moines Cty.*, 121 N.W. 1066, 1068 (Iowa 1909) (holding unconstitutional a statute providing for review of board of supervisors' decisions about forming drainage districts based on article III, section 1, and article V, sections 1 and 6); *cf. Western Int'l v. Kirkpatrick*, 396 N.W.2d 359, 363–64 (Iowa 1986) (holding unconstitutional a statute that provided for direct appeal of administrative hearing to the Iowa Supreme Court because it was an unconstitutional expansion of the Court's appellate jurisdiction). Statutory damages under § 22.10(3)(b) cannot provide a basis to maintain Rasmussen's suit and should be dismissed.

Rasmussen also seeks prospective injunctive relief ordering the Department and Ekstrand "to refrain for one year from any future violations." App. 15 ¶ B. But Rasmussen has received her requested records. *See* App. 13 ¶¶ 19–20; App. 22–23 ¶¶ 6–12. She has not pled that she plans to submit any other requests for records to the Department. *See* App. 11–13 ¶¶ 1–20. And as a resident of Draper, Utah, App. 11 ¶ 1, it seems unlikely that she will be a frequent requester of records from the *Iowa* Department of Public Health.

She thus lacks standing to seek prospective injunctive relief. *See Dodge v. City of Council Bluffs*, 10 N.W. 886, 889 (Iowa 1881) (holding that injunction was inappropriate because equitable relief is available "to prevent injuries which are imminent, not merely possible"); *Lessenger v. City of Harlan*, 168 N.W. 803, 807 (Iowa 1918) ("Unless damage to the plaintiff . . . is reasonably apprehended, [s]he has no ground on which to base an injunction."). Because of this lack of standing—or any basis in the petition to conclude prospective injunctive relief under 22.10(3)(a) is "appropriate"—any request for prospective injunctive relief should be dismissed.

Finally, Ekstrand seeks removal of Ekstrand "from office" under section 22.10(3)(d). App. 15 ¶ D. But removing Ekstrand from her employment wouldn't provide any redress to Rasmussen. Ekstrand's employment doesn't affect Rasmussen in any way. *Cf. State ex rel. Dickey v. Besler*, 954 N.W.2d 425, 432 (Iowa 2021) (holding—even under the looser standing requirements for a quo warranto action—that a plaintiff must be a citizen and "articulate a colorable interest in the subject matter," such as practicing before the challenged judge). Even if some speculative future interaction with Ekstrand's replacement could be considered redress, that is too remote here given that Rasmussen is a Utahn who has made no allegations she would ever have another reason to request records

from Department. Similarly, any generalized accountability of Iowa public officers to the citizens of Iowa couldn't stretch further to a Utahn. Rasmussen's request to remove Ekstrand should also be dismissed for lack of standing.

The district court didn't engage with this proper redressability analysis for any of Rasmussen's requests for relief. *See* App. 83–85. It didn't explain why the relief would redress an injury of Rasmussen. *See id.* Nor did it explain why this normal standing analysis shouldn't apply here. *See id.* Instead, the district court reasoned that Rasmussen's petition alleges that she is an "aggrieved person" under chapter 22 and thus entitled to seek the relief available or mandated under that chapter. *See id.*

When the Department alerted the district court to its lack of any analysis of the redressability requirement of standing, the court reasoned that it did so by "discussing the remedies (redress) available for injunction, statutory damages and officer removal." App. 95. The district court erred in refusing to consider the redressability requirement of standing and in failing to limit Rasmussen's requested relief. If this suit proceeds at all, Rasmussen should only be able to seek attorney fees.

III. Rasmussen's request to remove Ekstrand "from office" should also have been dismissed because Ekstrand is an employee rather than an officer and she hasn't previously violated chapter 22.

Beyond her lack of standing, Rasmussen's request to remove Ekstrand from office also fails to state a claim at all. Upon a finding of a violation of Iowa Code chapter 22, section 22.10(3)(*d*) authorizes the court to remove "a person from office if that person has engaged in a prior violation of this chapter for which damages were assessed against the person during the person's term." Iowa Code § 22.10(3)(*d*). By its express text, this provision thus only applies to a person who holds an "office" for a "term." *Id.* And it applies only if the person had a "prior violation" for which a court assessed damages against them. *See id.*; *see also Olinger v. Smith*, 892 N.W.2d 775, 786–87 (Iowa Ct. App. 2016) (rejecting authority to remove where there was no prior judicial determination of a prior violation). Accepting all the allegations in Rasmussen's complaint as true, neither requirement can be met.

First, Ekstrand doesn't hold an office. She's merely a state employee. "[T]here is a clear distinction between a 'public officer' and an 'employee.'" *Francis v. Iowa Emp't Sec. Comm'n*, 98 N.W.2d 733, 735 (Iowa 1959). Rasmussen doesn't allege otherwise. *See* App. 11–14 ¶¶ 1–35. Indeed, Rasmussen's only allegation about Ekstrand's position is that she was the person with the Department

of Public Health to whom Rasmussen sent the records request and received responses. *See* App. 12 ¶¶ 9, 12–16.

But it wouldn't matter what she alleges because whether a position is a public office is a question of law. *McKinely v. Clarke Cty.*, 293 N.W. 449, 450 (Iowa 1940) (holding question of whether county engineer was an "official" or "employee" is question of law and specifically rejecting that the issue "was, or could have properly been, a finding of fact"). And unlike allegations of fact, legal conclusions aren't assumed to be true in ruling on a motion to dismiss. *See Schumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014).

"A public office is de jure in its creation. It is not established by de facto operation." *State v. Pinckney*, 276 N.W.2d 433, 436 (Iowa 1979). "The focal question is whether or not the statutes delegate to the (person in question) sovereign powers, to be exercised by him, independently, for the benefit of the public." *Hutton v. State*, 16 N.W.2d 18, 19 (Iowa 1944). "[F]ive essential elements are required by most courts to make a public employment a public office," all of which focus on statutes creating and defining the position, rather than an individual's particular performance: (1) "The position must be created by the Constitution or legislature or through authority conferred by the legislature"; (2) "A portion of the sovereign power of government must be delegated to that position"; (3) "The duties and powers must be defined, directly or impliedly, by the legislature

or through legislative authority"; (4) "The duties must be performed independently and without control of a superior power other than the law"; and (5) "The position must have some permanency and continuity, and not be only temporary and occasional." *Pinckney*, 276 N.W.2d at 435–36. Thus, whether a position constitutes public office or public employment is a question of statutory interpretation. *McKinely*, 293 N.W. at 450.

Here, none of the elements are present, demonstrating Ekstrand doesn't hold an office. The absence of the first is dispositive—no constitutional provision or statute creates the position of public information officer for the Iowa Department of Public Health. *See* Iowa Code ch. 135; Iowa Admin. Code ch. 641-170. Indeed, there is no statutory office created in the Department of Public Health aside from the Director (and appointed members of attached boards and commissions). *See* Iowa Code ch. 135. Ekstrand is an employee. *See* Iowa Code § 135.6 (providing that the Department director "shall *employ* such *assistants* and *employees* as may be authorized by law").

It follows that neither the Constitution nor any statute could delegate any sovereign power to Ekstrand. And her duties aren't defined by the Legislature or even administrative rule; they're just assigned by the Department Director or other leadership. *See* Iowa

Code § 135.6 (providing that "assistants and employees" in the Department "shall perform duties as may be assigned to them by the director"); *Pinkckney*, 276 N.W.2d at 435–36 (holding that liquor manager was an employee, not officer, in part because his position was created and defined by administrative rule, not statute). Likewise, she cannot perform her duties independently; she's always under the control and supervision of the superior power of the Director or other Department leadership.

Finally, the position isn't continuous or permanent. The Director could structure the Department's employees however she sees fit. And Ekstrand has no term—which is "usually, though not necessarily, attached to a public office." *Francis*, 98 N.W.2d at 735. But this absence of a term has greater weight here because the statute also requires "a prior violation" by the officer "during the person's term." Iowa Code § 22.10(3)(*d*). Because Ekstrand isn't a public officer, section 22.10(3)(*d*) doesn't authorize her removal. And Rasmussen's request to do so should have been dismissed.

Second, Rasmussen has not alleged that Ekstrand has had "a prior violation of [chapter 22] for which damages were assessed against the person during the person's term." Iowa Code § 22.10(3)(*d*). Even if Rasmussen added the allegation without a factual basis, this is not merely a factual question. The statute requires that a prior court found a violation and assessed damages.

See Iowa Code § 22.10(3)(*d*); *Olinger*, 892 N.W.2d at 786–87. This Court can—as the district court should have done—take judicial notice that no other open-records case against Ekstrand exists in the dockets of any county in Iowa. It is a legal impossibility for this requirement to be met here.

Rasmussen didn't make *any* argument against dismissal of this claim for removal in her resistance. *See* App 41–52. Nor did she offer any substantive argument at hearing aside from suggesting—without authority—that the "doctrine of abstention" warrants avoiding the issue for now. App. 75 (Tr. at 16:4–18). Even assuming she could make a new argument for the first time at hearing, there's no basis—like a constitutional issue to avoid—for not deciding whether Rasmussen's removal-from-office claim fails as a matter of law.

Since she offered no legal support for her claim in the district court, she effectively abandoned it. It should have been dismissed on that basis alone, as the district court considering her other case did when she made a similar half-hearted attempt to remove an employee of the Governor's Office. *See Rasmussen v. Reynolds*, Nos. CVCV062318 & CVCV062322 at 12 (Iowa Dist. Ct. Dec. 21, 2021) (dismissing Rasmussen's attempt to removal the Governor's senior legal counsel from office when she also made no counterargument as to how he could be a state officer).

But the district court didn't address these legal defects with Rasmussen's claims aside from properly reasoning that they have "nothing to do with Rasmussen's standing" and improperly terming them a "factual determination." App. 85. In response to the Department's motion seeking a ruling on the issues, the court pointed to the same language and said it had ruled. *See* App. 95. The court didn't provide any other reasoning as to why Rasmussen's allegations were legally sufficient. *See id.*

This Court should correct that error. Rasmussen's claim seeking to remove Ekstrand from office fails as a matter of law and should be dismissed. State employees who are not appointed or elected officers shouldn't have to wonder whether a court could really order them to be fired from their employment while a lawsuit against them winds its way through the courts—especially where this is the first time any allegation of a violation of chapter 22 has been raised. Chapter 22 doesn't provide that authority.

CONCLUSION

Iowa's open record laws provide the public access to government records. Rasmussen used them to gain access to her requested records, without the intervention of the court. And after obtaining those records, her suit should end.

Chapter 22 doesn't impose a timeliness requirement so this suit should be dismissed as moot. If there is a requirement, it's met here. And if the suit must proceed, the only remedy that Rasmussen has standing to pursue is her request for attorney fees. The district court's contrary ruling should be reversed.

REQUEST FOR ORAL SUBMISSION

The Department and Ekstrand request to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COST

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

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 7,100 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 8, 2022, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

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