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' REPLY BRIEF

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I. Rasmussen received her requested records, which ended the controversy between the parties.

Rasmussen asserts that despite receiving her requested records, her action is not moot because she is "entitled to statutory damages" and thus still has an interest in obtaining them. Appellee Brief, at 20. But *she* is not entitled to any damages—all damages are paid to the State. Iowa Code § 22.10(3)(*b*).

Rasmussen cites several cases for the proposition that a suit is not moot so long as the plaintiff can recover something from the defendant. But the cases all support the Department.

In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, the Supreme Court rejected the "catalyst theory" for when a party is entitled to attorney's fees in a suit. 532 U.S. 598, 604–05 (2001). There, plaintiffs challenged cease-and-desist orders issued by a state agency. *Id.* at 601. During litigation, the agency rescinded the orders after a change in state law, mooting the case. *Id.* Although the plaintiffs never obtained a court order or consent decree, they still claimed they were entitled to attorney's fees as the "prevailing party" because their suit ultimately led to the defendant changing its conduct, which was the goal all along. *Id.* at 601–02. The Court disagreed, explaining "[n]ever have we awarded attorney's fees for

nonjudicial 'alteration in actual circumstances.'" *Id.* at 606. In response to the concern that a defendant may unilaterally moot a case to avoid attorney's fees, the Court cautioned that plaintiffs who can still obtain even nominal damages from defendants can proceed with their claims because a controversy persists. *Id.* at 604, 609.

Unlike the hypothetical plaintiffs in *Buckhannon*, Rasmussen cannot obtain any damages, nominal or otherwise, from the Department. *Gabrilson v. Flynn*, 554 N.W.2d 267, 276 (Iowa 1996) (characterizing the funds to be paid to the State in section 22.10(3)(b) as a "statutory fine" on the offending state actor). The cause of action under Chapter 22 is not one for damages, but an action to establish a violation of Iowa's open-records laws and, if successful, obtain public records. Iowa Code § 22.10(3)(*a*) (explaining the court will order the "appropriate persons to comply with the requirements of [chapter 22] in the case before it"). And like the actual plaintiffs in *Buckhannon*, Rasmussen's suit did not lead to any "judicially sanctioned change in the parties' legal relationship." *Buckhannon*, 532 U.S. at 598. Instead, the claim was moot, so the case must end.

Rasmussen's remaining cases are similarly distinguishable—they all involve plaintiffs who would financially gain from a damages award against the defendant. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (explaining live

controversy persisted because the plaintiff was seeking lost profits from the defendant); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797, 800 (2021) (holding live controversy remained after university rescinded its restrictive free-speech-zone policies because student was seeking nominal damages from university); *Farrar v. Hobby*, 506 U.S. 103, 112–13 (1992) (holding plaintiff who obtained nominal damages from the defendant in a § 1983 action is a "prevailing party" entitled to attorney fees). Unlike those plaintiffs, Rasmussen has nothing more to gain, rendering the controversy moot.

Rasmussen's next argument that her controversy is still alive because she seeks attorney's fees fares no better. "[A] party's interest in recouping attorney's fees does not create a stake in the outcome sufficient to resuscitate an otherwise moot controversy." *E. Iowa Plastics, Inc. v. PI, Inc.*, 832 F.3d 899, 905 n.4 (8th Cir. 2016) (finding that an "interest in attorney's fees is insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim") (quoting Steel Co. v. Citizens for a Better Env't, 523, U.S. 83, 107 (1998)). Rasmussen conflates the existence of a controversy over the appropriateness of an attorney-fee award with the existence of a controversy over the merits of the action. *Duncan Pub., Inc. v. City of Chicago*, 709 N.E.2d 1281, 1285 (Ill. App. 1999) (holding "[o]nce an agency produces all the records

related to a plaintiff's request, the merits of a plaintiff's claim for relief, in the form of production of information, becomes moot," and the plaintiff's "request for an award of attorney's fees contained in the complaint does not rescue the moot claims for injunctive" relief). While a dispute over the correct amount of attorney fees can persist after the merits are resolved, future interest in attorney fees alone cannot revive an expired controversy. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990).

Rasmussen also argues that if producing records moots a Chapter 22 action, the court in *Horsfield Materials* certainly would have sua sponte said so, and its failure to say so means the court must have concluded the action was not moot. Yet Rasmussen puts the Court in a difficult position. Failing to address an issue that was not raised by any party does not create precedent. *Feld v. Borkowski*, 790 N.W.2d 72, 78 (Iowa 2010) ("Our obligation on appeal is to decide the case within the framework of the issues raised by the parties."). Rasmussen tasks the Court with standing in the position of counsel and issue-spotting every appeal, out of fear that failing to address an issue will result in precedent-by-omission. Instead, Court should find that *Horsfield Materials* did not involve a mootness argument, the Department makes one here, and under these facts, Rasmussen's open-records claim moot.

Finally, Rasmussen argues that even if her claim is moot, it should nevertheless be salvaged by the public-importance exception. But her cited case holds otherwise. In *Duncan*, court declined to apply the public-importance exception when an open-records plaintiff received his requested records several weeks after he filed suit. 709 N.E.2d at 1284–86. "Although there is little question that the production of government records to an individual and, in this case, a publisher of an informational newsletter, is a matter of public concern, there is little likelihood that this issue will recur." *Id.* at 1285. The plaintiff argued, as Rasmussen does here, that the city's history of poor open-records compliance suggested the issue would recur, and nothing stopped the city from ignoring future requests. *Id.* But the plaintiff's "anticipate[d] future wrong and contemplated violations" could not salvage the suit, as "[n]o present effect on the controversy could be achieved by addressing envisaged violations in this decision, which would instead operate as an advisory opinion." *Id.*

So too here. Rasmussen submitted her ultimate request on May 28. She received a portion of the responsive records on June 15. By August 27, she had received her entire request—more than 11,000 pages of emails and attachments, made up of more than 1,500 individual documents. Any adjudication on the merits would operate as an advisory opinion on potential future suits against the

Department.[1] Accordingly, this suit is moot, no exception applies, and it should have been dismissed.

II. Rasmussen still lacks standing to request damages, injunctive relief, and removal of an employee.

Even assuming the case is not moot, Rasmussen still lacks standing to pursue damages, an injunction, and removal of an employee.

First, Rasmussen makes no argument in support of removing Ekstrand from her employment. Failing to offer authority in support of an issue waives the issue on appeal. Iowa R. App. P. 6.903(2)(*g*)(3); 6.903(3). Ekstrand is an employee who did not hold an office, did not have a term, and most importantly, has never been assessed damages by a court upon a finding that she violated Chapter 22. Iowa Code § 22.10(3)(*d*). Rasmussen's groundless effort to force the termination of the Department's employee fails as a matter of law.

And in support of her claim to Chapter 22's monetary and injunctive provisions, Rasmussen overstates the latitudes of

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[1] Rasmussen also points to other open-records suits she filed against another state agency, arguing a controversy persists because future noncompliance is likely. But those suits are against neither the Department nor Ekstrand. Rasmussen's dissatisfaction with how another state agency, operated by other state employees, responds to open-records requests is not evidence that her dispute with *this* agency or *this* employee will recur.

statutory standing. A plaintiff "claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that is no more directly and tangibly benefits him that it does the public at large—does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574 (1992).

Framing the issue within the realm of separation of powers, "[t]he question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure)" can be transformed "into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Id.* at 2145. The answer is "obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Id.* Thus, courts stay within the scope of cases and controversies by enforcing standing requirements, even when adjudicating cases brought under citizen-suit provisions like section 22.10.

Dickey does not change that analysis. *State ex rel. Dickey v. Besler*, 954 N.W.2d 425, 431 (Iowa 2021). *Dickey* turned on the unique (and sometimes contradictory) history of quo warranto actions, which stand apart from "conventional lawsuit[s]." *Id.* at 431. Still, the court required a "colorable interest in the subject matter" to assure itself of a pending controversy, despite citizenship being the only requirement to sue under the statute. *Id.* at 432.

Here, Rasmussen—a Utahn whose open-records request was fulfilled in 2021 and who has not pleaded that she intends to file another request—has no colorable interest in an injunction against the Department ordering it to produce records it has already produced. Nor does she have a colorable interest in Ekstrand or the Department being fined for taking 91 days to produce roughly 11,000 pages of records. Nor can she show an interest in an ongoing injunction, as there "is nothing to show that the future injury is not merely theoretical." *Godfrey v. State*, 752 N.W.2d 413, 423 (Iowa 2008). In the total absence of redress, Rasmussen lacks standing to request damages, an injunction, and an employee's termination.

III. The Department's statutory construction argument is preserved, and even if a timeliness requirement is glossed onto Chapter 22, records were timely produced as a matter of law.

Turning to timeliness, Rasmussen argues that the Department's argument interpreting Chapter 22 was not properly

preserved below. But the Department indeed argued below that Chapter 22 imposes no hard deadline for the production of records, and that because the requested records were email records, "the normal rights to examine and copy records do not apply." *See* Defs. Brief in Support of Motion to Dismiss First Amended Petition, at 7 n.1 (Nov. 1, 2021).

That the specific citation to Chapter 22's electronic-records provisions was set forth in a footnote does not prevent the Department from more expansively discussing the issue on appeal. Rather, parties may provide "additional ammunition" for the "same argument" made below without running afoul of error preservation principles. *Ames 2304, LLC v. City of Ames, Zoning Bd. of Adjustment*, 924 N.W.2d 863, 868 (Iowa 2019) (quoting *JBS Swift & Co v. Ochoa*, 888 N.W.2d 887, 893 (Iowa 2016)). And as in *Ames 2304*, "this case turns on statutory interpretation." *Id.* When interpreting Chapter 22, this Court must consider the statute "in its entirety [and] not just [through] isolated words or phrases." *Id.* (quoting *State v. Romer*, 832 N.W.2d 169, 176 (Iowa 2013) (alterations in original). Thus, the Department's expanded discussion of electronic records tracks its argument below that it was not subject to any hard deadline, and the Court should not be hamstrung in its statutory interpretation through a hyper-technical application of issue-preservation principles.

And on the merits, neither Rasmussen nor the amicus actually cite within Chapter 22 to support their assertions that the chapter contains a definitive "timeliness requirement." Instead, they point to *Horsfield Materials* to supply the nonstatutory deadline requirement, and then assert that the nonstatutory requirement must apply equally to electronic and physical records.

As discussed in the principal brief, electronic records stand on different footing than physical records—not in the ultimate production, but in the means of access. While statutory interpretation strives to give effect to legislative intent, courts are bound by "what the legislature actually said, rather than what it should or could have said." *Stille v. Iowa Dep't of Transp.*, 646 N.W.2d 114, 116 (Iowa 2001). The Legislature could have imposed presumptively reasonable time periods for production, like it did for other open-records functions, but it did not. *See, e.g.*, Iowa Code § 22.8(4)(*d*). Without any statutory language imposing the specific timeline Rasmussen requests, and without a live controversy over the requested records, this case should have been dismissed as moot.

But even if the court does find a timeliness requirement within Chapter 22, the undisputed facts show that the Department provided records within a reasonable time as a matter of law. In *Horsfield*, the court considered the "close question" of whether

taking seventy-one days[2] to produce 617 pages of records amounted to a "refusal" to produce. 834 N.W.2d at 462. Here, the Department asks that the Court find that taking ninety-one days to produce roughly 11,000 pages of records does not constitute a "refusal" as a matter of law.

Contrary to Rasmussen's position, this question can be resolved on a motion-to-dismiss. The material facts of when the request was submitted, when documents were produced, the nature of the request, and the size of the request are all undisputed. Accordingly, considering the "size and nature of the request," as *Horsfield* instructs, this Court should find that ninety-one days is reasonable as a matter of law. 834 N.W.2d at 462.

CONCLUSION

For these reasons, the district court decision should be reversed, and this suit should be dismissed.

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[2] The Court in *Horsfield* started the clock from the date of the refined, final request, not the initial request. 834 N.W.2d at 450, 462. Thus, the Department similarly starts the clock from May 28, the date of Rasmussen's redefined, final request.

CERTIFICATE OF COST

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

/s/ *Samuel P. Langholz*
Chief Deputy Attorney General

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 2,416 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Samuel P. Langholz*
Chief Deputy Attorney General

CERTIFICATE OF FILING AND SERVICE

I certify that on January 23, 2023, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ *Samuel P. Langholz*
Chief Deputy Attorney General