IN THE IOWA DISTRICT COURT FOR POLK COUNTY

POLLY CARVER-KIMM, Plaintiff, v. KIM REYNOLDS, PAT GARRETT, GERD CLABAUGH, SARAH REISETTER, SUSAN DIXON, and STATE OF IOWA, Defendants.	Case No. LACL148599 **REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED PETITION**

Defendants Governor Kim Reynolds, Pat Garrett, Gerd Clabaugh, Sarah Reisetter, Susan Dixon, and the State of Iowa (collectively "the State") file the following reply in support of their motion to dismiss.

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INTRODUCTION

Plaintiff Polly Carver-Kimm's claims against Governor Reynolds and the Governor's communications director, Pat Garrett must be dismissed because it is legally impossible that they discharged Carver-Kimm. Carver-Kimm attempts to overcome this defect with conclusory pleadings, but the law controls. And she misconstrues cases about individual liability and those analyzing the Iowa Civil Rights Act to suggest an improperly broad scope for statutory whistleblower discharge claims and the wrongful-discharge tort.

Carver-Kimm and Amicus Iowa Freedom of Information Council attempt to save her wrongful-discharge claim by highlighting the importance of open records and transparency as recognized by many, including the Iowa Attorney General's Office. Indeed chapter 22 has a storied legacy of success in that regard. But Carver-Kimm has not pleaded with particularity a well-recognized and clearly defined public policy that was violated by her discharge, as required to be able to bring this suit for damages. Nor can they save Carver-Kimm's claim by turning an open-records statute into one that relates to public health, safety, or welfare because she happened to work for the Department of Public Health or by improperly arguing that's not a requirement at all.

Carver-Kimm's attempts to deny Governor Reynolds and Garrett qualified immunity under section 669.14A of the Iowa Code also fail. Applying section 669.14A to her wrongful discharge claim is not retroactive application because the statute was in effect at the time of the event of legal consequence—the filing of her amended petition including this claim. But even if it is considered retroactive application, its application is appropriate since it is procedural and consistent with the approach to qualified immunity in other jurisdictions and the legislature's intent to make the statue effective immediately. And applying the statute does not offend due process.

ARGUMENT

I. The legal impossibility of Governor Reynolds or Garrett discharging Carver-Kimm can't be overcome by conclusory pleadings where the whistleblower statute and wrongful discharge tort both require a person to *discharge* an employee to be individually liable.

Governor Reynolds and Garrett did not have the legal power to discharge Carver-Kimm—only the Director of Public Health could do that. *See* Iowa Code § 135.6. Yet Carver-Kimm argues that Governor Reynolds and Garrett can be individually liable under section 70A.28(2) as "[a] person" who "*discharge[d]* an employee" and for the tort of wrongful *discharge*. (Resist. Br. at 3, 8–11, 22).

She reaches this mistaken conclusion by conflating the availability of individual liability with the requirement that the individual must have engaged in the challenged conduct. The State doesn't dispute that a whistleblower claim under section 70A.28 may be brought against an individual rather than the State. And so too may a wrongful discharge claim be brought against an individual rather than just the employing government or corporation. *See Jasper v. H. Nizam, Inc.*, 764 N.W.2d

751, 775–76 (2009) (rejecting argument that corporate structure would insulate corporate officer who "authorized and directed the decision making, including the decision to terminate" from individual liability).

But acknowledging that Carver-Kimm may sue *some* individual who discharged her, doesn't mean that she can sue Governor Reynolds and Garrett. The Court in *Jasper* in no way "rejected the final decision-maker test" for wrongful discharge as asserted by Carver-Kimm. (Resist. Br. at 10). On the contrary, it made clear that it did "not need to decide how deep the tort could reach in the corporate chain of management" because the individual defendant "was essentially" the corporation and "authorized and directed the decisionmaking." There was thus no question that the individual defendant in *Jasper* discharged the plaintiff, as required for the tort. And *Jasper* provides no assistance to Carver-Kimm's attempt to expand liability for the tort to individuals who *couldn't* discharge Carver-Kimm.

Carver-Kimm also points this Court to cases interpreting the Iowa Civil Rights Act ("ICRA") to guide an expansive interpretation of section 70A.28. But the comparison is inapt. The statues are materially different.

Most notably, ICRA makes it illegal to "aid, abet, compel, or coerce another person to engage in" a direct violation. Iowa Code § 216.11. This explicitly expands the scope from just the person engaging in the violation. Section 70A.28 does not have any such provision. The scope of ICRA is also much broader, covering wrongful conduct such as harassment, discrimination, and retaliation in various terms or conditions of employment that can be engaged in by a range of employees. *See* Iowa

Code §§ 216.6, 216.11; *Rumsey v. Woodgrain Millwork, Inc.*, 962 N.W.2d 9, 34–37 (2021). So while the Supreme Court rejected a per se rule that only supervisors could *ever* be liable under ICRA given this range of conduct, the Court still required an individual to "be personally involved in conduct that alters the terms or conditions of employment" and have "the ability to effectuate the particular employment decision at issue." *Rumsey*, 962 N.W.2d at 35–36.

But unlike the range of discriminatory conduct under ICRA that could be directly engaged in by coworkers, human resources staff, supervisors, or senior leadership, Carver-Kimm brings a claim of wrongful discharge under section 70A.28. So even assuming the Court would apply the ICRA standard set forth in *Rumsey*, individual liability could only attach for someone "personally involved" in discharging her and who had "the ability to effectuate" the discharge. Governor Reynolds and Garrett could not have done either because it was legally impossible. The Court's interpretation of ICRA in *Rumsey* doesn't help Carver-Kimm here.[1]

[1] Carver-Kimm also mistakenly relies on *Godfrey v. State*, 898 N.W.2d 880 (Iowa 2017), to distract from the serious constitutional concerns with broadly interpreting section 70A.28 to reach the exercise of the Governor's constitutional executive powers to influence agencies. The 2017 *Godfrey* decision contains no analysis as to whether gubernatorial appointees are "employees" under ICRA or any constitutional problems with such an interpretation. When the case returned to the Supreme Court in 2021, the Court explained the parties in the prior proceeding had *never disputed* whether the appointee could pursue an ICRA claim. *See Godfrey v. State*, 962 N.W.2d 84, 100 (Iowa 2021). Thus, under the law of the case, the Court didn't revisit the issue in the subsequent appeal. *Id.* (Even so, two justices would have still held that ICRA didn't apply. *See id.* at 151 (McDermott, J., concurring in part and dissenting in part). And more importantly, where the Court was not bound by law-of-the-case, it made clear that ICRA could *not* apply to impose liability on the Governor for exercise of "constitutional powers to be exercised wholly at the discretion of the governor." *Id.* at 112 (majority opinion).

Trying to overcome this barrier, Carver turns to the bald, conclusory assertion that "Upon information and belief, Defendants Reynolds and Garrett directed, influenced, authorized and/or had input into the decision [sic] terminate Polly's employment." (2d Am. Pet. ¶ 29B). But this directly contradicts the hiring authority for Carver-Kimm's position set forth in Iowa law. It's also broader than the *Rumsey* standard Carver-Kimm now suggests should be used, by including "influence" and "input." And in any event, the Court is not required to accept such legal conclusions as true. *See Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014).

Count II is also subject to a heightened pleading requirement since it is brought under the Iowa Tort Claims Act. Carver-Kimm must "state with particularity the circumstances constituting the violation." 2021 Iowa Acts ch. 183 (S.F. 342), sec. 12 (to be codified at Iowa Code § 669.14A(3)). "Failure to plead a plausible violation" of the law requires dismissal with prejudice. *Id.* To satisfy this heightened pleading standard, Plaintiff must clear two thresholds. First, she must set forth specific, particular facts to support her claim, as opposed to relying on mere generalizations or recitations of elements. Second, she must demonstrate that those specific facts could give rise to an actionable claim against the defendants. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that the defendant acted unlawfully. Where a complaint pleads facts that are merely

consistent with a defendant's liability, it stop short of the line between possibility and plausibility of entitlement to relief." (cleaned up)).

The bare allegations cannot possibly satisfy this heightened requirement as to how Governor Reynolds or Garrett allegedly caused Carver-Kimm to be fired. And without some further specific facts, the complaint does not give rise to a plausible claim that they personally engaged in any such conduct to do so.

Governor Reynolds and Pat Garrett should be dismissed from this lawsuit.

II. Carver-Kimm's reliance on the importance of chapter 22 and its general policy—without pleading with particularity a clearly defined and well-recognized public policy—cannot save her claim.

Carver-Kimm and Amicus Iowa Freedom of Information Council attempt to save her wrongful-discharge claim by highlighting the importance of open records and transparency as recognized by many, including the Iowa Attorney General's Office. The State doesn't dispute that Chapter 22 has played a significant role in ensuring that state and local government remains accountable. It serves the purpose is transparency, not confidentiality. And indeed, "Disclosure of public records is the general rule, with a presumption in favor of disclosure." *See* Op. Atty' Gen. No. 97-10-1, 1997 WL 988716, at * 3 (Oct. 22, 1997). The statute has robust enforcement mechanisms. *See* Iowa Code § 22.10. But none of that gives rise to an implication that the chapter as a whole gives an employee a right to sue if their termination wasn't in the interest of "free and open examination of records even if such examination may cause inconvenience or embarrassment to public officials," as alleged by Carver-Kimm. (2d Am. Pet. ¶ 37 (citing Iowa Code § 22.8(3))).

Despite this defect being raised in the State's motion to dismiss her first amended petition, Carver-Kimm still hasn't pleaded with any more particularity her clearly defined and well recognized public policy. She's relying on a generalized statement that is guidance to a court considering enjoining the production of public records. *See* Iowa Code § 22.8(3). It's not a provision she could have been asked to violate or could have complied with and then been terminated. Saying that Carver-Kimm hasn't identified a public policy in her petition doesn't mean that there might not be certain specific clearly defined policies that could support a tort. *Compare Lloyd v. Drake Univ.*, 686 N.W.2d 225, 229–30 (Iowa 2004) (holding that the entire criminal code doesn't create a clearly defined and well-recognized public policy), *with Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 286 (holding that perjury criminal statute created a clearly defined and well-recognized public policy). But Carver-Kimm hasn't pled such a clearly defined and well-recognized public policy with particularity here. Her claim must be dismissed.

III. To support the wrongful discharge tort, the public policy must relate to the public health, safety, or welfare—and such a requirement cannot be satisfied merely because the employment itself involved public health.

In *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106 (Iowa 2011), the Iowa Supreme Court affirmed the grant of a motion to dismiss because Iowa's Comparative Fault Act could not support the tort of wrongful discharge. The Court explained that among other requires, to support the tort, "[t]he statute relied upon must relate to the public health, safety, or welfare." Amicus Iowa Freedom of Information Council. Amicus argues *Berry* didn't actually impose this requirement. (Amicus Br. 6–10). But

that's wrong. And the language Amicus quotes from *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 762 (Iowa 2009), isn't a contrary test or requirement but merely a description of how prior cases "can generally be aligned into four categories." *Id.* *Jasper* didn't replace the requirement in *Berry*. In fact, *Jasper* was decided before *Berry* and cited by *Berry* in support of its narrow and cautious approach. *See Berry*, 803 N.W. at 110. Notably, Amicus did not identify a public policy that the Iowa Supreme Court has recognized to support the wrongful discharge tort that *doesn't* relate to public health, safety, or welfare. While important, chapter 22, just regulates the practices of government agencies. It doesn't relate to public health, safety, or welfare.

Carver-Kimm tries another tack. She contends that chapter 22 relates to public health because she worked in the Department of Public Health. (Resist. Br. at 17–18). But that's not the question. By this logic, *any* statute could relate to public health, safety, or welfare, if the plaintiff happened to be employed in a workplace involved in those issues. That can't be. Would an employee who didn't work in such a workplace not be able to bring the wrongful discharge tort? Because chapter 22 doesn't relate to public health, safety, or welfare, even if it would otherwise be a clearly recognized and well-defined public policy it cannot be the basis of a wrongful discharge tort.

IV. Section 669.14A applies to Carver-Kimm's wrongful-discharge claim.

A. Applying section 669.14A here is not retroactive application because the statute was in effect at the time of the event of legal consequence.

First, the Court need not engage in any retroactivity analysis because applying section 669.14A to Carver-Kimm's wrongful-discharge claim is not retroactive

application. Applying "a statute to conduct occurring after the effective date is in fact a prospective and not retroactive application." *Hrbek v. State*, 958 N.W.2d 779, 783 (Iowa 2021). To determine prospective or retroactive application, one must first identify the "specific conduct regulated in the statute," which is the "event of legal consequence," and then determine whether the event of legal consequence occurred before or after the statute's effective date. *Id.* If the event occurred after the statute's effective date, then there is no retroactive application. *Id.*

The specific conduct regulated by section 669.14A at issue now is the availability of a qualified-immunity defense for individuals sued in district court pursuant to the ITCA, as well as specific pleading requirements for plaintiffs to state a claim in district court.[2] *See* 2021 Iowa Acts ch. 183 (S.F. 342), secs. 12, 16 (to be codified at Iowa Code § 669.14A(1), (3)). The event of legal consequence plainly cannot be filing an administrative claim with the state appeal board, as there is no liability or immunity determinations during those administrative proceedings, nor is anything "dismissed with prejudice," and thus statute has no force at the administrative stage. Nor could the event be merely filing a *motion* to amend a petition to include an ITCA-covered claim, as the court could deny that motion and the defendants would never need to assert defenses or challenge the petition, and thus the statute again has no application. Accordingly, the event of legal consequence must be the filing of a valid claim in district court that subjects a state defendant to

[2] The statute also provides an immediate right to appeal "[a]ny decision by the district court denying qualified immunity." 2021 Iowa Acts ch. 183 (S.F. 342), sec. 12 (to be codified at Iowa Code § 669.14A(5).

tort liability. Indeed, only after a petition is filed in district court do state defendants have the opportunity to assert defenses like qualified immunity or challenge the adequacy of a petition's allegations. *See* Iowa Rs. Civ. P. 1.421(1); 1.441(4). Thus, the event of legal consequence occurs when the governing petition is filed, prompting a response from the state defendants who have been made subject to tort liability.

Here, Carver-Kimm filed her Second Amended Petition on August 13, 2021—57 days after the statute took effect. Count II of the Second Amended Petition contains a tort claim—wrongful discharge in violation of public policy—that could subject a state defendant to tort liability, triggering the statute's application. Applying section 669.14A to Count II is therefore a prospective application of a statute that was in effect at the time of the legal event of consequence. *See Boring v. State*, No. 21-0129, 2021 WL 2453045, at *2 n.2 (Iowa Ct. App. June 16, 2021) (holding applying PCR statute enacted two days before the applicant filed PCR application was not retroactive, despite applicant being convicted and sentenced prior to the statute's enactment and all conduct giving rise to PCR application occurred prior to statute's enactment, as the event of legal consequence is the filing of pro se PCR documents).

Carver-Kimm's theory that she can deprive the Defendants of all statutory defenses promulgated after her claim accrued, even if the statute became effective *prior to* the filing of the governing Petition, is directly contrary to recent Iowa Supreme Court precedent, as the court specifically "rejected this trapped-in-amber approach." *Hrbek*, 958 N.W.2d at 784. At the time Governor Reynolds and Garrett

were made subject to tort liability for the specific claim—August 13, 2021—they are entitled to utilize all statutes in effect, which includes the qualified-immunity defense provided in section 669.14A.

B. Alternatively, section 669.14A may be applied retroactively because it is procedural and consistent with the Legislature's intent.

Even if this Court finds that the event of legal consequence for section 669.14A occurred prior to Plaintiff's filing of the Amended Petition, section 669.14A is still applicable to this matter because its provisions can be applied retroactively.

"Statutes which specifically affect substantive rights are construed to operate prospectively unless legislative intent to the contrary clearly appears from the express language or by necessary and unavoidable implication. . . . Conversely, if the statute relates solely to a remedy or procedure, it is ordinarily applied both prospectively and retrospectively." *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 491 (Iowa 1985). A substantive provision is one that "creates, defines and regulates rights." *Id.* A procedural provision, conversely, relates to "the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective." *Id. (quoting State ex rel. Turner v. Limbrecht*, 246 N.W.2d 330, 332 (Iowa 1976)). Plaintiff alleges that the "only procedural component of the statute is section 669.14A(5), which states 'Any decision by the district court denying qualified immunity shall be immediately appealabe.'" (Resist. Br. at 24). Plaintiff is incorrect.

First considering section 669.14A(3), a pleading standard is the quintessential example of a procedural amendment that applies to all pending lawsuits. Section 669.14A(3) provides

> A plaintiff who brings a claim under this chapter alleging a violation of the law must state with particularity the circumstances constituting the violation and that the law was clearly established at the time of the alleged violation. Failure to plead a plausible violation or failure to plead that the law was clearly established at the time of the alleged violation shall result in dismissal with prejudice.

This subsection provides specific pleading requirements for bringing tort claims against state defendants.

Pleading requirements have long been deemed to be procedural, rather than substantive, in nature.[3] For example, in *Dolezal v. Bockes*, the Iowa Supreme Court considered the adoption of a new rule of civil procedure that required applications for default to contain "a certification that written notice of intention to file the written application for default was given after the default occurred and at least 10 days prior to the filing of the written application for default." 602 N.W.2d 348, 350 (Iowa 1999). In *Dolezal*, a plaintiff filed his lawsuit prior to the new rule taking effect, but filed his application for default after the new rule went into effect. *Id.* at 349–350. The plaintiff did not provide the defendants with the requisite notice required under the new rule, nor did his application for default certify that he had done so. *Id.*at 351.

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[3] Even in federal and other state proceedings, new pleading requirements are consistently applied retroactively. *See, e.g.*, *Newsome v. Northwest Airlines Corp.*, 2011 WL 13272178, at *2 (W.D. Tenn. April 18, 2011) ("Though the Second Amended Complaint was filed before *Twombly* and *Iqbal* were decided, the Court applies the pleading standard retroactively."); *Avago Techs. Gen. IP (Singapore) PTE Ltd. v. Asustek Comput. Inc.*, No. 15-cv-4525, 2016 WL 1623920, at *4 (N.D. Cal. Apr. 25, 2016) (recognizing the abrogation of the Form 18 pleading standard for direct infringement patent claims, which was replaced with the Iqbal/Twombly standard, applying the change retroactively to case filed before the Form 18 pleading standard was abrogated, and citing cases doing the same); *Hill v. Thorne*, 635 A.2d 186, 191 (Pa. 1993) (applying new legal malpractice pleading requirements retroactively because such standards were supported by "numerous purposes," including "discourage[ing] frivolous litigation").

The court readily found that the notice-and-certification requirement was procedural in nature and thus applied the plaintiff's default effort: "The rule neither takes away causes of action that previously existed nor crates new rights." *Id.* at 352. Rather, the rule "prescribes the method by which one party to a lawsuit may seek entry of a default against the other party." *Id.* at 351–52. *See also Schultz v. Gosselink*, 148 N.W.2d 434, 436 (Iowa 1967) (holding statute eliminating the burden for tort plaintiffs to prove they were free of contributory negligence and then placing the burden on tort defendants to prove any contributory negligence by the plaintiff was procedural in nature and applied to all pending tort cases, despite statute creating new pleading and evidentiary obligations for the defendant while the case was actively pending), *vacated in part on other grounds by Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982).

So too here. Section 669.14A(3) prescribes the method by which a plaintiff may state a tort claim against a defendant. Just as the new rule in *Dolezal* required plaintiffs to provide notice and allege certain information to obtain a default judgment, section 669.14A(3) requires plaintiffs to allege certain information within a petition filed against a state defendant. The requisite amount of detail needed within a legal petition indisputably relates to "the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective." *Baldwin*, 372 N.W.2d at 491. *See also Smith v. Korf et al.*, 302 N.W.2d 137, 139 (Iowa 1981) ("[W]here a rule of practice is changed by statute without having a savings clause, we have always regarded the new law as applicable to all cases then pending." (quoting

Meigs v. Parke, 1 Morris 378, 380 (Iowa 1844))). Because section 669.14A(3) is procedural in nature, it applies to this proceeding.

Next considering the statutory qualified-immunity defense, section 669.14A(1) creates an adjudicative requirement that is factually prospective, not retrospective, in that it occurs after the filing of a lawsuit. This qualified-immunity provision regulates the litigation process related to past conduct of government employees, not past conduct itself or plaintiff's rights. It is well established that qualified immunity "is *conceptually distinct from the merits of the plaintiff's claim* that his rights may have been violated." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (emphasis added).

When litigation arises, the qualified-immunity defense operates to eliminate insubstantial claims against state officials. The defense is grounded in compelling policy justifications that go beyond merely regulating the use of taxpayer funds to satisfy claims, including "the general costs of subjecting officials to the risks of trial—distraction of officials from their government duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)). It also regulates pretrial matters such as discovery, as "[i]nquiries of this kind can be particularly disruptive of effective government." *Harlow*, 457 U.S. at 817. Thus, the statute is best understood as an adjudicative requirement to prevent tenuous lawsuits from undermining state operations. *Cf. State v. Macke*, 933 N.W.2d 226, 241 (Iowa 2019) (McDonald, J., dissenting) (explaining "the general rule is that statutes eliminating or restricting

the exercise of judicial power after the date of enactment do not raise concerns regarding retroactivity" and collecting cases).

Moreover, "legislative intent determines if a court will apply a statute retrospectively or prospectively." *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State*, 763 N.W.2d 250, 266 (Iowa 2009) (holding amendment to Chapter 669 that wholesale prohibited claims against entire class of defendants was substantive in nature). Here, the legislature expressly stated that applying the new provision was of "*immediate* importance," and thus took "effect upon enactment." S.F. 342, Div. III, § 16 (emphasis added). Refusing to apply the qualified-immunity provision to claims (like Plaintiff's) filed *after* the statute took effect is directly contrary to the legislature's clear intent that this provision is of the utmost importance and must apply immediately.

And the creation of and alterations to qualified immunity are consistently applied retroactively, despite the potential to "work a hardship upon plaintiff[s]." *Druckenmiller v. U.S.*, 553 F. Supp. 917, 918 (E.D. Penn. 1982) (finding "[f]ailure to retrospectively apply *Harlow* would result in a continuance and augmentation of the[] 'special costs'" that *Harlow* was designed to prevent). *See also Alexander v. Alexander*, 706 F.2d 751, 754 (6th Cir. 1983) (reviewing grant of summary judgment and noting "the Supreme Court's recent instruction to this circuit to apply *Harlow* retroactively"); *Finch v. Wemlinger*, 361 N.W.2d 865, 869 n.6 (Minn. 1985) (noting "*Harlow* is to be applied retroactively, and therefore applies to this case even though the trial occurred before" *Harlow* was decided). Accordingly, section 669.14A(1) is an

adjudicative requirement that is factually prospective, and applying the provision to claims filed after its enactment is directly in line with the legislature's intent for the provision to take effect immediately.

C. Applying 669.14A to this suit does not offend due process.

Finally, Plaintiff alleges that Defendants are "attempting to take away a cause of action from Plaintiff that has already accrued." (Resist. Br. at 25). Of course, Plaintiff's position is contrary to the plain language of the statute, as well as settled Iowa law.

First, section 669.14A in no way deprives Carver-Kimm of a cause of action. The statute does not eliminate wrongful-discharge claims, does not change the elements of wrongful-discharge claims, does not statutorily prohibit wrongful-discharge claims against state employers, does not statutorily prohibit wrongful-discharge claims against any class of defendants within state employment, does not narrow the statute of limitations to foreclose Plaintiff's claim, and does not change any exhaustion requirements that would foreclose her claim. Thus, directly contrary to the cases cited by Plaintiff, section 669.14A does not alter the substantive law of Plaintiff's wrongful-discharge claim. *See Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 566 (Iowa 2015) (holding statute created entirely new cause of action and was therefore a substantive change in the law); *Thorp v. Casey's Gen. Stores, Inc.*, 446 N.W.2d 457, 462 (Iowa 1989) (holding statute eliminated plaintiff's cause of action by wholesale exempting an entire class of defendants—sellers of intoxicants who do not also serve intoxicants—from dramshop laws and thus worked a substantive change in the law). In fact, the defense only applies when the court has determined a plaintiff

has no "clearly established" right in the first place—so by its very terms it cannot take away any valid claim.

Second, Carver-Kimm's position that she has a "vested" right to bring her claim free of any statutory defenses or changes in legal schemes is directly contrary to *Baldwin v. City of Waterloo*, 372 N.W.2d 486 (Iowa 1985). In *Baldwin*, a motorcyclist collided with a pole lying in the middle of the road and suffered injuries. *Id.* at 487. The cyclist filed a negligence claim against the City of Waterloo and nearby property owners, alleging they were negligent in allowing the pole to be placed in the road. *Id.* at 488. At the time the cyclist suffered his injuries and filed suit, joint and several liability was governed by common law and "unlimited." *Id.* at 492. However, while the cyclist's suit was pending the legislature promulgated a new statute that altered joint and several liability by narrowing the class of defendants a plaintiff could recover an entire judgment from. *Id.* at 491. The statute applied retroactively, and the cyclist alleged retroactive application violated her due process rights under "both the United States and Iowa Constitutions." *Id.* The Iowa Supreme Court disagreed.

The Court explained "Plaintiff has no vested right in a particular result of this litigation or in the continuation of the principal of unlimited joint and several liability." *Id.* at 492. Specifically, the Court determined "a right is not 'vested' unless it is something *more than a mere expectation, based on an anticipated continuance of the present laws.* It must be some right or interest in property that has become fixed or established, and is not open to doubt or controversy." *Id.* (quoting *Schwarzkopf v. Sac Cty. Bd. of Supervisors*, 342 N.W.2d 1, 8 (Iowa 1983)) (emphasis added). And

"[a]ny *interest that these defendants might have in the continued state of the law* concerning joint and several liability was not a 'vested' right entitled to constitutional protection." *Id.* (emphasis added). Thus, the new statute limiting joint and several liability applied to the pending suit without offending any constitutional principles. *Id.*

So too here. The statutory qualified immunity defense does not in any way alter the substance of Carver-Kimm's claim, which was—and still is—based on the common law principles of wrongful-discharge. A court deciding whether her particular alleged violation is "clearly established" under Iowa law so as to avoid the application of statutory qualified immunity is the "legal machinery by which the substantive law is enforced or made effective" at work. *Id.* at 491.

CONCLUSION

Carver-Kimm's whistleblower claim against the State, Governor Reynolds, and Garrett in Count I of the Second Amended Petition fails. And Count II fails in its entirety. The State respectfully requests that the Court dismiss these claims.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties of record by delivery in the following manner on October 1, 2021:

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ EDMS
- ☐ FAX
- ☐ Overnight Courier
- ☐ Other

Signature: */s/ Samuel P. Langholz*