IN THE SUPREME COURT OF IOWA

Suzette Rasmussen, Plaintiff/Appellee, **v.** **Governor Kim Reynolds, Michael Boal, and Office of the Governor of the State of Iowa,** Defendants/Appellants.	**Supreme Court No. 21-2008**

Brief of *Amici Curiae* —22 Past and Present Iowa Journalists and Journalism Educators— in Support of Plaintiff/Appellee

Appeal from The Iowa District Court in and for Polk County
The Honorable Sarah E. Crane, Judge

Michael A. Giudicessi, AT0002870
michael.giudicessi@faegredrinker.com
Susan P. Elgin, AT0011845
susan.elgin@faegredrinker.com
FAEGRE DRINKER BIDDLE & REATH LLP
801 Grand Avenue, 33rd Floor
Des Moines, IA 50309-8003
Telephone: (515) 248-9000
Facsimile: (515) 248-9010

Attorneys for 22 Past and Present Iowa Journalists and Journalism Educators as *Amici Curiae*

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

IOWA CASES

CONSTITUTIONAL PROVISIONS

IOWA STATUTES

FEDERAL CASES

U.S. SUPREME COURT

U.S. DISTRICT COURT

FEDERAL STATUTES

OTHER STATE CASES

OTHER AUTHORITIES

STATEMENT OF INTEREST AND IDENTITY OF *AMICI CURIAE*

The 22 past and present journalists and educators comprising the *Amici Curiae* worked in newsrooms and taught in college classrooms across Iowa.[1] As free press leaders, these 22 individuals remain dedicated to preserving an open, accountable government.

Accordingly, they support broad interpretation and enforcement of the Iowa public records act, Iowa Code Chapter 22 (2021). They likewise hold continuing interests in promoting rights of access to government records.

Similarly, the *Amici Curiae* oppose incursions on the power of the independent judiciary to interpret and enforce the public records act.

And they believe the language the General Assembly chose for the public records act means what it says when it states it applies to *all* branches of Iowa's constitutional government and *all* public officials, even governors.

[1] They are John Bachman, Cliff Brockman, Doug Burns, Dave Busiek, Brian Cooper, Art Cullen, John Cullen, Michael Gartner, Diane Graham, Mark Hamilton, Dan Hayes, David Johnson, Alan Mores, Steve Mores, Lyle Muller, Nancy Newhoff, Chuck Offenburger, Kathleen Richardson, Ron Steele, Herb Strentz, Bill Tubbs, and Mark Witherspoon.

STATEMENT PURSUANT TO IOWA R. APP. P. 6.906(4)(d)

No counsel for another party authored this Brief of the *Amici Curiae* in whole or in part. No other party or their counsel contributed money to fund preparation or submission of this brief.

Instead, the undersigned counsel prepared this brief on a *pro bono* basis and submitted it on behalf of the *Amici Curiae* without a contribution of money from any other person.

INTRODUCTION

The *Amici Curiae*'s experience as journalists and educators provides working knowledge of how access to government records elevates understanding of and respect for Iowa's elected and appointed officials.

Additionally, the *Amici Curiae*'s continuing work—as torchbearers for newspapers, broadcasters, and public interest groups—demonstrates their ongoing commitment to preserving competent and clean government staffed by open and accountable public servants.

This experience gives the *Amici Curiae* an independent voice to urge the judicial branch to proceed unabated in interpreting Iowa Code Chapter 22 and enforcing its provisions in this case based on evidence gained in discovery and made of record, not on the conjecture and fear the Defendants/Appellants Governor Kim Reynolds, Michael Boal, and Office of the Governor of the State of Iowa (collectively, the "*Office of the Governor*") promote in their interlocutory appeal.

Therefore, the *Amici Curiae* join in asking this Court to reject the Office of the Governor's contentions that this case presents extraordinary facts (facts, of course, not found in the record considering that appeal occurs from denial of a motion to dismiss), and that this Court cannot proceed without exceeding prudential bounds of judicial authority.

The *Amici Curiae* present a contrary view to that of the Office of the Governor. They believe this case should start and stop with the express words the Legislature used in Iowa Code Chapter 22, which venerate that Iowa's public policy since 1967 remains "that free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others." Iowa Code § 22.8(3).

Further, in securing that public interest and rejecting inconvenience as an excuse, the Legislature embedded broad access rights into its definition of "government body," "public records," and "lawful custodian." Iowa Code § 22.1(1) first states that "*government body*" means "this state . . . *or any branch*, department, board, bureau, commission, council, committee, official, *or officer* of any of the foregoing . . . ." (emphasis added). Next the legislative branch demarcated that a "*lawful custodian*" is "the *government body* currently in physical possession of *the public record*." Iowa Code § 22.1(2) (emphasis added). Then the General Assembly specified that "*public records*" included "*all records*, documents, tape, or other information, stored or preserved in any medium, *of or belonging to this state . . . or any branch*, department, board, bureau, commission, council, or committee . . . ." Iowa Code § 22.1(3)(a) (emphasis added).

With those all-encompassing definitions, the General Assembly took the opposite approach than the judiciary employed when it analyzed and restricted common law and statutory public record access rights in *Linder v. Eckard*, 152 N.W.2d 833 (Iowa 1967).

As one commenter noted, "Although the Iowa General Assembly could not have had *Linder* in mind when it enacted [Chapter 22] it could not have gone further in repudiating that decision or the common law associated with it." *Iowa's Freedom of Information Act: Everything You've Always Wanted to Know about Public Records But Were Afraid to Ask*, 57 Iowa L. Rev. 1163, 1169 (1972) (also noting this statutory design stemmed "from an irate public long denied the right of inspection by custodians of public records").

In *Linder*, this Court had declared that "Not every document which comes into the possession or custody of a public official is a public record" and held that Iowa law at that time did not require "disclosure of *all* records, writings, or reports which are in the files of a public office at any time to any citizen demanding such information." *Id*. at 835-36 (emphasis in original).

In displacing *Linder*, the General Assembly exiled those judicial observations that unfettered access to public records would "impose an intolerable burden on the public officer" and result in "an unreasonable and

harmful interference with the day-to-day conduct of public business just when such officer should, and must, be allowed some discretion in making those decisions and in exercising that judgment." *Id*. at 836.

Thus, the Legislature opted for universal rights of access to *all* records of or belonging to *all* branches of *all* state and local governments, *see* Iowa Code § 22.1, subject to express statutory confidentiality exceptions such as, but not limited to, those codified in Iowa Code § 22.7.

The convenience interests and burden fears of government officials and the individualized discretion that *Linder* exalted (and that the Office of the Governor advances in this appeal) went out the window as the public records act opened the doors of government to public scrutiny. Going forward, Iowa Code § 22.2 mandated that any "person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record."

After *Linder* and the enactment of Iowa Code Chapter 22, Iowa's statutory and case law likewise reinforce that the public records act applies to "all lawful custodians" of government records irrespective of rank, salary, position, and real or perceived power. The Act's penalty provisions reinforce this universal applicability:

> It shall be unlawful for *any person* to deny or refuse any citizen of Iowa any right under this chapter, or to cause any such right

> to be denied or refused. *Any person* knowingly violating or attempting to violate any provision of this chapter where no other penalty is provided shall be guilty of a simple misdemeanor.

Iowa Code § 22.6 (emphasis added).

The General Assembly meant for Chapter 22 to apply evenly and consistently throughout the state—whether the lawful custodian is a court clerk who ends his workday at a diner in Dubuque, or a governor who goes home for her dinner at Terrace Hill.

Remarkably, however, this appeal seeks to upend that—the Office of the Governor claims Chapter 22 does not apply to all public records of the executive branch or to all lawful custodians of public records it employs.

Fortunately, history, text, practice, public interest, and legislative intent demonstrate why those claims are as mistaken as the requested relief is unwise.

The *Amici Curiae* appreciate this opportunity to argue in favor of access to public records, government accountability, and continuation of the Iowa Code Chapter 22 enforcement action initiated by Plaintiff/Appellee Suzette Rasmussen to vindicate her rights, those of the 22 *Amici Curiae*, and those members of the public who do not reside in the Governor's mansion.

ARGUMENT

Defendants' attempt to dismiss Plaintiff's claims by characterizing this lawsuit as a "timeliness action" neither cloaks the Office of the Governor with immunity under the Iowa public records act nor a qualified privilege to avoid providing evidence.

For only the second time in 25 years, a branch of Iowa government asks the judicial branch to avoid deciding a legitimate public records case, to decline interpreting and enforcing Chapter 22, and to recuse itself in subjugation to purported separation of powers constraints. *See generally Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491 (Iowa 1996).

The Office of the Governor's assertion that status and office override the public records law comes despite the fact that Iowa's statutes and cases, governmental practice and procedure, and the declared public policy of the state converge to establish that disclosure of government records and information serves the needs and interests of the State *and its people*.

Moreover, that claim disregards how Iowa Code Chapter 22:

- Starts with "a presumption of openness and disclosure." *Iowa Film Prod. Servs. v. Iowa Dep't of Econ. Dev.*, 818 N.W.2d 207, 217 (Iowa 2012), and
- Favors results that enhance the public's ability to stay informed about governmental activities, to hold officials accountable, and to know how agencies spend taxpayer money. *Id*. at 228.

The power, authority, and proper exercise of judicial branch functions support rejecting the contentions of the Office of the Governor.[2] This is especially true considering that the Governor and her predecessors accepted the public records act as binding on the executive branch by signing it in 1967 and ratifying it with each signed amendment. *See e.g.*, https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=HF2236 (last accessed Oct. 31, 2022) (wherein Governor Reynolds signed HF 2236 into law on June 17, 2020, thereby approving an amendment to Iowa Code § 22.3(2) and ratifying the remainder of the public records act provisions); https://www.legis.iowa.gov/legislation/BillBook?ba=SF2322&ga=89&utm_medium=email&utm_source=govdelivery (last accessed Oct. 31, 2022) (same with respect to SF 2322, an act Governor Reynolds signed on May 2, 2022, amending Iowa Code § 22.3 to specify when a lawful custodian may

[2] These contentions stand in stark contrast to how the Iowa Judicial Branch accords respect to the public records statute as enacted by the General Assembly. *See Estate of Cox by Cox v. Dunakey & Klatt, P.C.,* 893 N.W.2d 295, 304 (Iowa 2017) (noting "[i]n several cases, we have applied the Open Records Act to the judicial branch. *See* Iowa Code § 22.1(3)(a) (2017) (defining 'public records' to include 'all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state ... or any branch [of state government]'"); *In re Langholz*, 887 N.W.2d 770, 776–77 (Iowa 2016); *Judicial Branch, State Ct. Adm'r v. Iowa Dist. Ct. for Linn Cnty.*, 800 N.W.2d 569, 575 (Iowa 2011); *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493, 501 (Iowa 1976)).

assess fees to search for, retrieve, and provide copies of public records, and copying fees and how much).

A. Court interpretation and enforcement of Iowa Code Chapter 22 comport with Iowa constitutional notions of separation of powers and do not engender a non-justiciable political question.

The Iowa public records act "is designed 'to open the doors of government to public scrutiny'" and "to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." *Gannon v. Bd. of Regents*, 692 N.W.2d 31, 38 (Iowa 2005) (citations omitted); *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999). As with all statutes, Chapter 22 carries a presumption of constitutionality and validity. *See Star Equip., Ltd. v. State, Iowa Dept. of Transp.*, 843 N.W.2d 446, 457 (Iowa 2014); Iowa Code § 4.4.

Chapter 22 serves the laudable purpose of providing the public with timely and meaningful access to records and information held by the executive branch, including the Office of the Governor, just as it secures access to information from the judicial and legislative branches. Therefore, the statute embodies "a liberal policy in favor of access to public records." *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 229 (Iowa 2019) (quoting *Hall v. Broadlawns Med. Ctr.*, 811 N.W.2d 478, 485 (Iowa 2012)).

Nevertheless, the Office of the Governor seeks through this appeal to sidestep the duties that Iowa Code § 22.10 imposes on every lawful custodian of public records and to avoid accountability under that section's enforcement provisions. The Office of the Governor frames the appellate issue as one raising separation of power issues and contends a justiciability issue under the political question doctrine bars suit because, as a matter of speculation, a court *might* need to adjudicate any lack of compliance with Chapter 22 by measuring the reasonableness of the Office's actions.

For multiple reasons, the Office of the Governor's attempt to pigeonhole this as a "timeliness case" is incorrect and unavailing.

Initially, as to separation of powers concerns, the context of the underlying access case shows that it poses the unadorned question of whether the defendants complied with the public records act—nothing more and nothing less. The provisions of Iowa Code § 22.10 exclusively govern that question, which raises fact-finding and enforcement matters the courts alone are charged to handle.

Further, the context and scope of Rasmussen's lawsuit present justiciable questions because judicial determination of her Iowa Code § 22.10 claims does not violate Iowa's separation of powers doctrine, which as this Court has summarized is straightforward in approach:

> The Iowa Constitution, like its federal counterpart, establishes three separate, yet equal, branches of government. Iowa Const. Art. III, § 1. Our constitution tasks the legislature with making laws, the executive with enforcing the laws, and the judiciary with construing and applying the laws to cases brought before the courts.

Planned Parenthood of the Heartland v. Reynolds, 915 N.W.2d 206, 211 (Iowa 2018).

However, in this appeal, the Office of the Governor appears to promote a notion of *favored* treatment of the executive branch.

■ ■ ■

While the recent composition of this Court lacked alignment on the factors to consider in a separation of powers challenge, *see State v. Tucker*, 959 N.W.2d 140 (Iowa 2021), irrespective of the test applied Iowa Code Chapter 22 on its face does not impermissibly intrude on the functions of the other two branches created by the Iowa Constitution. Further, Iowa Code § 22.10 as applied accords full respect to the solitary powers of the executive branch, the sitting governor, and the office she holds.

To this point, review of the Office of the Governor's principal reliance on *United States v. Nixon*, 418 U.S. 683, 704 (1974), demonstrates how that briefing disregards a substantial body of state and federal law holding public records access laws can apply to governors and presidents without violating separation of powers grounds or raising political question concerns.

The *Nixon* case the Office of the Governor relies upon through six references in the text of her Proof Brief is commonly referred to as "*Nixon I*" and involved a trial court subpoena that the Watergate special prosecutor directed to the president. While acknowledging that a president's communications with his close advisers are "presumptively privileged," the U.S. Supreme Court rejected the assertion that an executive privilege is absolute and held instead that courts should balance competing interests at stake and weigh the general interest in confidentiality against the judiciary's need for evidence. *Nixon I* at 713; *see also Lamberto v. Bown*, 326 N.W.2d 305, 307 (Iowa 1982) (wherein Justice Larson described *Nixon I* as recognizing an executive privilege but allowing courts to override it upon a showing that the underlying evidence is "essential to the justice").

The Office of the Governor's reliance on *Nixon I* falls short of supporting what this appeal seeks. First, that reliance omitted discussion of *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) ("*Nixon II*"). There, the Court affirmed that *Nixon I* limited the scope of the executive privilege to *communications* made by the president in performing the responsibilities of his office and determining policy.

Notably, the *Nixon II* decision *affirmed* application of the records retention statute to the president based on the "abundant statutory precedent

for the regulation and mandatory disclosure of documents in the possession of the Executive Branch." *Nixon II* at 445.[3] The Court likewise said that the legislative intent expressed in an access statute and the public interests its serves weigh heavily in favor of enforcing records legislation despite existence of a qualified executive branch privilege. *Id.* at 453.

Additionally, the Office of the Governor failed to acknowledge how courts regularly apply public records statutes to governors. *See, e.g.*, *Ritter v. Jones*, 207 P.3d 954 (Colo. App. 2009); *Cowles Publ'g Co. v. Kootenai County Bd. of County Comm'rs*, 159 P.3d 896 (Idaho 2007); *Groth v. Pence*, 67 N.E.3d 1104 (Ind. Ct. App. 2017); *Courier-Journal v. Jones*, 895 S.W.2d 6 (Ky. App. 1995); *Office of Governor v. Washington Post Co.*, 360 759 A.2d 249 (Md. 2000); *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623 (Nev. 2011); *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*,

[3] As supporting authority, the Court cited statutes such as the Freedom of Information Act, 5 U.S.C. § 552; the Privacy Act of 1974, 5 U.S.C. § 552(a); the Government in the Sunshine Act, 5 U.S.C. § 552b; and the Federal Records Act, 44 U.S.C. § 2101 *et seq.* to support that "[s]uch regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy." *Nixon II* at 445-46; *see also Trump v. Vance*, 591 U.S. __,140 S. Ct. 2412, 2427 (2020) (dispelling the claim that compelling a president to disclose records distracts the executive branch because that contention "runs up against the 200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process").

283 P.3d 853 (N.M. 2012); *Herald Association, Inc. v. Dean,* 816 A.2d 469 (Vt. 2002) ("Under the common law executive privilege, documents reflecting communications in the course of the Governor's *decision-making and deliberative process* may be withheld from the public to protect and facilitate the Governor's consultative and decisional responsibilities . . .") (emphasis added and citations omitted); *State Ex Rel. Dann v. Taft*, 853 N.E.2d 263 (Ohio 2006) ("Purely informational communications that serve as status reports for the governor relating to the activities of a subordinate or an executive department do not fall within the scope of the gubernatorial-communications privilege and are thus not exempt from the Public Records Act."); *Freedom Found. v. Gregoire*, 310 P.3d 1252 (Wash. 2013) (noting how a governor can waive executive privilege).

■ ■ ■

Beyond considering textual grounds to reject an executive privilege claim here, under this Court's approach to ruling on separation of powers questions, "particular importance" is placed on custom and practice. *See State v. Thompson*, 954 N.W.2d 402, 410 (Iowa 2021). "[A] history of deliberate practice among the different departments of the government can evidence a constitutional settlement among them regarding the constitutional division of powers." *Id*.

Considering case law, the conduct of prior governors, and the Office of the Governor's own pronouncements regarding public access to gubernatorial records, Iowa's settled practice is to apply and enforce Iowa Code Chapter 22 to the executive branch.

For example, in 1979, this Court affirmed dismissal of an invasion of privacy/private facts lawsuit because public records in the possession of and obtained from Governor Robert Ray's office contained sensitive medical information published by the defendant newspaper. *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 300 (Iowa 1979), cert. denied, 445 U.S. 904 (1980).

The Court ruled that letters disclosing medical information filed in the governor's office "clearly come within the definition of public records" under the Iowa public records act and were "not exempted from disclosure by a specific statutory provision." *Id*. The Court further observed how the records held by Governor Ray were not the subject of an injunction issued under the public records statute and that no statutory exception outside the act appeared to require confidentiality. *Id*.

While indicating its ruling applied to that case only, the Court based its analysis and holding on the precept that the public records act applied to a sitting governor. Further, the plurality opinion in *Howard* implicitly

accepted that the judicial branch could enjoin the governor's office, as a lawful custodian, from releasing information if presented with proof meeting the prerequisites of Iowa Code § 22.8.

Based on application of the public records act to the sitting governor, the *Howard* decision held that the public nature of the records held by and obtained from Governor Ray's office disposed of the plaintiff's invasion of privacy claim: "Because the documents were public, the information which they contained was in the public domain." *Id*. (citing *Des Moines Register and Tribune Co. v. Osmundson*, 248 N.W.2d 493, 503 (Iowa 1976) and its holding that the Iowa public records act applied to judicial records—in that instance, a jury list and juror information).

This application of the Iowa public records act to the executive branch and the governor in *Howard* occurred in 1978, and set the course for the next 45 years such that Iowa's governors have followed the public records law by granting access to executive branch and gubernatorial documents. Governors Ray, Branstad, Vilsack, and Culver routinely granted access to records and information in their offices.

That this remains custom, and practice, is beyond doubt.

Even today, notwithstanding the arguments presented, the Office of the Governor's state-run website boasts, "Governor Reynolds is committed

to honest, open government. To make an open records request for records of the Office of the Governor, please contact a member of our team at records@governor.iowa.gov." *See* https://governor.iowa.gov/open-records (last accessed Oct. 31, 2022).

Nonetheless, the Office of the Governor argues this case is nonjusticiable because it purportedly centers on a "timeliness claim" declared without foundation as requiring the courts "to decide whether the time spent by the Governor and her staff in relation to the time working on Rasmussen's records request was reasonable." Appellants' Proof Brief at 18. Still, the *Amici Curiae* suggest that the single separation of powers ruling of this Court in the public records context shows why that contention fails.

In his prescient dissent from the 4-to-3 decision in *Dwyer*, Justice David Harris argued the public records act applied to the legislature because "Once a statute is lawfully enacted, all members of society, even legislators, must comply with its provisions." 542 N.W.2d at 504.

Justice Harris (joined by Justices Larson and Andreasen) then noted that the majority mistakenly relied on separation of powers grounds to refrain from ruling in that case because it inappropriately allowed the appellants to frame the issue under review. As a result, the *Dwyer* majority fixated on whether a decision of the records access issue would intrude into

the General Assembly's internal rules of proceeding, letting the appellants transform a simple Iowa Code § 22.10 compliance and enforcement question into an issue of constitutional magnitude.

In criticizing this mistaken approach, Justice Harris wrote, "According to a venerable principle of disputation, the power to frame the question includes also the power to control the answer." *Id*. "Although the majority may have employed the proper analysis it has not reached the correct controlling question and has thus reached the incorrect conclusion." *Id*.

Further relevant, Justice Harris appropriately canvassed the separation of powers issue by stating, "We have often expressed our acknowledgment that under the separation of powers doctrine, it is the prerogative of the legislature to declare what the law shall be, but the prerogative of the courts alone to declare what the law is." *Id*. at 299 (citations omitted).

Justice Harris concluded,

> Like my respected colleagues I have a profound reluctance to question the actions of either other branch of state government. It is however no compliment to them, especially when they are confronted by members of the public, to accord other branches more deference than is proper. Neither is it an insult to them to preserve to our branch those responsibilities exclusively entrusted to us.

Id.

As in *Dwyer*, rather than accept this as the Iowa Code § 22.10 enforcement case it is, the Office of the Governor claims a non-justiciable question is raised because the lawful custodians who were sued *might* present a defense of "reasonableness" and thereby assert they substantially complied with the public records act under the relevant factors canvassed by this Court in *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013).

But framing the question that way ignores the three straightforward questions of law and fact that Iowa Code § 22.10 requires a court to decide before a public records act lawsuit may proceed:

- Do the requirements of Chapter 22 apply to the defendant?
- Are the records in question government records?
- Did the defendant fail to make those government records available for examination and copying by the plaintiff?

Those are the elements of a plaintiff's enforcement case under Iowa Code § 22.10 in a nutshell.

Yet, none of those elements in any way *requires* proof or consideration of competing duties, distractions, policy, excuses, post-hoc rationalizations, or feasibility. None implicates questions of timing and unreasonableness as the Office of the Governor wishes to characterize them.

In addition, by framing the question this way, the Office of the Governor asks this Court to overlook how the public records act provides access rights to inspect and copy public records upon request. *See* Iowa Code § 22.2(1) ("Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record"); *see also* Iowa Code § 22.4 ("The rights of persons under this chapter may be exercised under any of the following circumstances: 1. In person, at any time during the customary office hours of the lawful custodian of the records.").[4]

More importantly, the argument that continuation of this case beyond the motion to dismiss stage will *require* a *Horsfield Materials* assessment of "reasonableness" impermissibly relies on assumption and conjecture because this interlocutory appeal lacks *any* record evidence. The procedural setting here dictates an appellate review where the Court must accept Rasmussen's allegations as true, *Meade v. Christie*, 974 N.W.2d 770, 775 (Iowa 2022),

[4] An extended delay in production is tantamount to a failure to produce public records. *See Horsfield Materials*, 834 N.W.2d at 463, n.6 ("Although section 22.10(2) speaks in terms of a refusal rather than a delay in production, we think a refusal to produce encompasses the situation where, as here, a substantial amount of time has elapsed since the records were requested and the records have not been produced at the time the requesting party files suit under the Act.").

and must proceed without any responsive pleadings in the record that articulate answers or defenses.

This Court therefore should refrain from ruling on the hypothetical and speculative justiciability and political question claims presented and the request to create and apply a "reasonableness" affirmative defense.

Instead, considering how the plaintiff's case involves questions of statutory interpretation and enforcement, her lawsuit should proceed to trial so that the judicial branch independently can measure the evidence to adjudicate as a matter of law whether each Defendant violated Iowa Code Chapter 22. Doing that will not involve separation of powers considerations.

B. A lawful custodian bears the burden to show compliance with the public records act, which does not require judicial intrusion into exclusive executive branch functions, determination of a political question, or involuntary disclosure of information covered by a qualified privilege.

The Office of the Governor asserts the Iowa Code § 22.10 enforcement action underlying this appeal will require measurement of the reasonableness of official actions (or, perhaps more accurate, inaction) in an effort to gain immunity from liability and dismissal of this case. The Office of the Governor does so to seek a free pass to avoid any need now or going forward to defend against a public records act enforcement action and to assert affirmative defenses as every other lawful custodian must do.

As explained above however, the enforcement framework that the Legislature established in Iowa Code § 22.10 does not require the courts to exercise gubernatorial or executive branch functions when undertaking a review of statutory compliance.

Beyond that, it is only upon a plaintiff's submission of a *prima facie* case that the lawful custodian will (a) bear the burden of establishing compliance with Chapter 22, and (b) face court-imposition of the mandatory remedies under Iowa Code § 22.10 if a preponderance of the evidence shows the defendant failed to comply with the public records statute. *See* Iowa Code § 22.10(3)(a); *see also City of Riverdale v. Diercks*, 806 N.W.2d 643, 653 (Iowa 2011) (upon making the showing required under Iowa Code § 22.10 that the lawful custodian withheld access to government records, the burden shifts to the government "to demonstrate it complied with the chapter's requirements").

Under this framework, any hint of a separation of powers, justiciability, or the political question doctrine issue could arise *only if* Rasmussen carries her burden and thereafter *only if* the Office of the Governor *elects* to defend its failure to provide Rasmussen with access to the requested records by asserting that compliance was infeasible under the *Horsfield Materials* considerations.

But whether that would happen on remand remains a matter of speculation and conjecture. Nothing in the pleadings compels the conclusion that the Office of the Governor must or will raise a *Horsfield Materials* affirmative defense of infeasibility.

Even if that occurs, the court's inquiry under *Horsfield Materials* is whether "infeasibility" caused undue delay rather than whether—as the Office of the Governor would have this Court believe—a lawful custodian acted reasonably to balance competing job demands or faced circumstances she or he did not foresee.

Regarding this, the *Horsfield Materials* Court wrote:

> Access to an open record shall be provided promptly upon request unless the size or nature of the request makes prompt access infeasible. If the size or nature of the request for access to an open record requires time for compliance, the custodian shall comply with the request as soon as feasible. . . . Under this interpretation, practical considerations can enter into the time required for responding to an open records request, including "the size or nature of the request." But the records must be provided promptly, *unless the size or nature of the request makes that infeasible*.

834 N.W.2d at 461 (internal citations omitted) (emphasis added).

The Court held that considering "the size and nature of the request" it could not find substantial compliance with the public records act considering the lengthy delay by the lawful custodian in responding. *Id.*

Noteworthy here, those *Horsfield Materials* benchmarks for infeasibility relate exclusively to the nature and size of the public records request and the length of the delay—objective calculations that do not require evidence of internal deliberative policy communications. Subjective factors do not come into play under that test, which has guided the courts and lawful custodians alike for nearly 10 years as the factors used to determine compliance with the on-demand access requirements of Iowa Code Chapter 22.[5]

Consideration of those factors would not compel a court to weigh whether the Office of the Governor made good time-management choices. The compliance evaluation instead would only require ascertainment of quantitative facts, which a court could do with exercising any power clearly committed by the Iowa Constitution exclusively to the executive branch and forbidden to the judiciary. This evaluation further aligns with the general notion that office holders and lawful custodians, like presidents and

[5] In the last 10 years, lawful custodians have used those factors as benchmarks for acceptable timeframes to provide access to public records. The General Assembly could have added to, subtracted from, or otherwise modified the *Horsfield Materials* test but has not . As such, those factors stand as powerful precedent—essentially accepted by the Legislature—as a correct statement of the law. *See e.g. Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 234 (Iowa 2019) (discussing the doctrine of legislative acquiescence in the public records act context).

governors, remain obligated to bear the burdens and responsibilities attendant to litigation involving their conduct. *Cf. Trump v. Mazars U.S.*, *LLP*, 591 U.S. __, 140 S. Ct. 2019, 2036 (2020) ("We have held that burdens on the President's time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines.").

Even if the Office of the Governor asserts that competing duties provide an affirmative defense of infeasibility on remand, that assessment would not impair the sitting governor and her staff from performing their constitutional duties. *See Tucker*, 959 N.W.2d at 147.

At best, the weighing of evidence against the constructs of the public records act constitutes the exact power dedicated to the judicial branch, thereby making a separation of powers challenge unavailing. *See id.* at 168 (McDermott, J. concurring) ("Stated simply, the separation-of-powers doctrine is violated if one branch of government seeks to use powers granted by the constitution to another branch.").

To reiterate, even if a feasibility assessment were required (or one of "reasonableness" as the Office of the Governor hypothesizes), that inquiry under Iowa Code § 22.10 would not intrude into the internal workings or private communications of the chief executive's office.

Instead, the measurements to complete a *Horsfield Materials* feasibility analysis would involve objective fact finding based on quantifiable factors such as the size of the public records request; the storage medium for the public records (hard copy or electronic); the steps needed to identify, retrieve, and produce the responsive public records; and the number of such documents produced before and after litigation ensued.

The Office of the Governor argues these assessments would critique policy determinations of the chief executive and second-guess how the Governor and her staff allocated resources. Appellants' Proof Brief at 26 (claiming "The allocation of limited time and resources of the Governor's staff, particularly during the challenging times of a state-managed response to a public health disaster emergency is at core a policy and political question—not a legal one").

In so arguing, the Office of the Governor misstates the issue and misperceives what a court would measure to decide if a lawful custodian met the burden of showing statutory compliance by a preponderance of the evidence, which is all Iowa Code § 22.10 requires.

And, in meeting that burden, even if the Office of the Governor raised a defense under *Horsfield Materials*, the subsequent Iowa Code § 22.10 compliance assessments would not require scrutiny of qualitative judgments

of the executive branch or intrusion into its deliberative processes through a "Monday-morning quarterbacking" of the governor and her staff.

Indeed, the three operative questions set by Iowa Code § 22.10 to prove compliance are perfectly suitable for judicial resolution as justiciable issues that do not implicate separation of powers considerations under the political question doctrine. *See State ex rel. Dickey v. Besler*, 954 N.W.2d 425, 435 (Iowa 2021) (detailing the narrow scope of political question doctrine and stating, "The term 'nonjusticiable' implies that a question is not suitable for judicial resolution."); *see also id*. at 451 (Appel, J. dissenting) (stating that absent a textually demonstrable constitutional commitment to another branch of government, timing questions involving acts or omissions of a governor are justiciable because "It is a conventional interpretive question for the courts. It is what we do."). The section § 22.10 assessments only require a court to do what courts do—receive evidence, find facts, interpret statutes, apply the law to the facts, and order remedial measures required or permitted by the code provisions at issue.

Finally, judicial determination whether a public records act violation occurred will not assess feasibility as an excuse for an untimely public records response *unless* the Office of the Governor raises a *Horsfield Materials* affirmative defense of material compliance. Should the Office of

the Governor *choose* to do that, its lawful custodians of public records would sit before the court just as any other privilege-holder does upon electing to place a protected communication in issue.

Undeniably, the Office of the Governor does not have the right to use executive privilege as a sword *and* a shield. *See Hall v. Jennie Edmundson Memorial Hosp.*, 812 N.W.2d 681, 687 (Iowa 2012) (citing *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 806 N.W.2d 282, 290 (Iowa 2011)).

Instead, the Office of the Governor can choose to:

- Refrain from raising an infeasibility defense potentially to retain a narrowly-defined shield of a qualified executive evidentiary privilege that would limit inquiry through discovery or examination at trial into internal communications resting at the core of the chief executive's decision-making process, or
- Affirmatively assert infeasibility as a defense and thereby open the door to examination about the reasonableness of conduct and choices of the lawful custodians.

She cannot do both, as supported by the above cases.

C. The Office of the Governor's mootness and standing arguments erroneously focus on the status of and remedies available to the named plaintiff as the original records requestor.

The Office of the Governor asserts this underlying enforcement case is moot because Defendants disclosed the requested public records once this lawsuit was filed and that Rasmussen lacks standing to benefit from Iowa Code § 22.10 remedies because she is not an Iowan.

But post-filing actions of a defendant do not remedy whether a violation occurred, nor can a lawful custodian avoid liability and displace the remedies that Iowa Code § 22.10 dictates a court *shall* enter in an enforcement action that establishes that access to public records was not lawfully provided.

Beyond disregarding those common sense considerations on mootness and standing, the Office of the Governor's contentions concerning those prudential (not jurisdictional) questions ignore how the General Assembly dropped citizenship as a prerequisite to exercising rights under the Iowa public records act; granted enforcement rights under the statute to "any aggrieved person"; and instructed that Chapter 22 should receive a broad (and fair) interpretation, which the courts have construed as encouraging enforcement actions by plaintiffs serving in a representative capacity for the public at large.

For example, in a case involving a newspaper's request for police records, this Court clarified how Iowa's public records law serves the community without regard to who serves as the plaintiff: "Release of the report does not depend on the status of the party seeking it. The newspaper has the same right of access as any member of the general public. It is in that

representative capacity that its interest in disclosure must be evaluated." *Hawk Eye v. Jackson*, 521 N.W.2d 750, 754 (Iowa 1994) (citations omitted).

Likewise, in interpreting the federal equivalent of the Iowa public records act, the U.S. Supreme Court has held that "withholding information under [the Freedom of Information Act] cannot be predicated on the identity of the requester." *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 170 (2004); *see also Quad-City Cmty. News Service, Inc. v. Jebens*, 334 F. Supp. 8, 11-15 (S.D. Iowa 1971) (holding that granting public records access based on the status of the requestor constituted a denial of equal protection).

To this end, the General Assembly amended Iowa Code § 22.2(1) so "every person" could exercise access rights instead of "any citizen" as stated in the statute originally enacted as Iowa Code § 68A.2.

Irrespective of that amendment, "The right of persons to view public records is to be interpreted liberally to provide broad public access to public records." *Rathmann v. Bd. of Dir. of Davenport Cmty. School Dist.*, 580 N.W.2d 773, 777 (Iowa 1998) (citing *Howard*, 283 N.W.2d at 299); *see also* Iowa Code § 4.1.

At bottom, this case is not moot—while the applicability of Iowa Code Chapter 22 to all lawful custodians within the executive branch should

constitute settled law, the open and active enforcement issues of fact this lawsuit presents warrant a decision on the merits under Iowa Code § 22.10.

Further, because the courts hold the vested power to impose the Iowa public records act's mandatory remedies, this case and controversy provide a justiciable means to enforce the specific statutory rights of the representative plaintiff *and* to vindicate the interests of the general public that underlie the Legislature's adoption of Chapter 22 and its decision to hold all branches of government accountable under it.

CONCLUSION

For the reasons stated in the District Court's Order, in Rasmussen's Brief, and here, this Court should:

(1) Affirm the District Court's Order;

(2) Dismiss this interlocutory appeal and lift all stays; and

(3) Remand this Iowa Code § 22.10 public records enforcement action to the District Court for further proceedings.

Dated: November 2, 2022. Respectfully submitted,

/s/ Michael A. Giudicessi
Michael A. Giudicessi, AT0002870
michael.giudicessi@faegredrinker.com
Susan P. Elgin, AT0011845
susan.elgin@faegredrinker.com
FAEGRE DRINKER BIDDLE & REATH LLP
801 Grand Avenue, 33rd Floor
Des Moines, IA 50309-8003
Telephone: (515) 248-9000
Facsimile: (515) 248-9010

Attorneys for 22 Past and Present Iowa Journalists and Journalism Educators as *Amici Curiae*

CERTIFICATE OF COMPLIANCE

The undersigned certifies:

1. This **Brief of *Amici Curiae* — 22 Past and Present Iowa Journalists and Journalism Educators in Support of Plaintiff/Appellee** complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because according to the software described below this brief contains 6,770 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g). (This number is within the 7,000 word count permitted for *amicus* briefs under Iowa R. App. P. 6.903(1)(g) and 6.906(4)).

2. This **Brief of *Amici Curiae* — 22 Past and Present Iowa Journalists and Journalism Educators in Support of Plaintiff/Appellee** complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief was prepared using Microsoft Word for Microsoft 365 in 14-point Times New Roman font for its text, which is a proportionately spaced, serif typeface.

3. This **Brief of *Amici Curiae* — 22 Past and Present Iowa Journalists and Journalism Educators in Support of Plaintiff/Appellee** is filed as a searchable document saved in Adobe portable document format (.pdf) pursuant to Iowa R. App. P. 6.903(1)(c).

/s/ Michael A. Giudicessi

CERTIFICATE OF CONDITIONAL FILING AND SERVICE

The undersigned certifies that in compliance with Iowa Rule of Appellate Procedure 6.31, she electronically conditionally filed the foregoing **Brief of *Amici Curiae* — 22 Past and Present Iowa Journalists and Journalism Educators in Support of Plaintiff/Appellee** on November 2, 2022, with the Clerk of the Supreme Court and served it on counsel of record for all parties to this interlocutory appeal using EDMS.

/s/ Trisha Richey

Electronic copies to:

Thomas J. Miller
Samuel P. Langholz
Iowa Department of Justice
Hoover Building
1305 E. Walnut Street
Des Moines, IA 50319
Email: *sam.langholz@ag.iowa.gov*
Attorneys for Governor Kim Reynolds, Michael Boal, and Office of the Governor of the State of Iowa, Defendants/Appellants

Gary D. Dickey
Dickey, Campbell & Sahag, P.L.C., Law Firm
301 E Walnut Street, Suite 1
Des Moines, IA 50309-2032
Email: *gary@iowajustice.com*
Attorney for Suzette Rasmussen, Plaintiff/Appellee

ATTORNEY'S COST CERTIFICATE

The undersigned certifies that no actual out-of-pocket cost of reproducing the necessary copies of the preceding **Brief of *Amici Curiae* — 22 Past and Present Iowa Journalists and Journalism Educators in Support of Plaintiff/Appellee** was incurred because its filing is by electronical means only.

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