IN THE SUPREME COURT OF IOWA

No. 22–0005

POLLY CARVER-KIMM,

Appellee,

vs.

KIM REYNOLDS, PAT GARRETT, GERD CLABAUGH, SARAH REISETTER, SUSAN DIXON, and STATE OF IOWA,

Appellants.

Appeal from the Iowa District Court for Polk County
Lawrence P. McLellan, District Judge

APPELLANTS' FINAL BRIEF

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II. Does section 669.14A provide qualified immunity to a wrongful-discharge claim in violation of an alleged public policy of transparency when that public policy has never been recognized as sufficient to support a wrongful-discharge claim and that tort has never been extended to cover a claim against the Governor by an employee who she has no authority to discharge?

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Iowa Code § 22.8(3)
Berry v. Liberty Holdings, Inc., 803 N.W.2d 106 (Iowa 2011)

ROUTING STATEMENT

The Supreme Court should keep this case. It presents at least three issues of first impression. *See* Iowa R. App. P. 6.1101(2)(c). First, it asks whether common-law and statutory wrongful-discharge claims can be brought against the Governor and her staff by an agency employee who the Governor had no authority to discharge. Second, it seeks to interpret and apply a new statute—Iowa Code section 669.14A—to decide whether the Governor and her staff are entitled to qualified immunity for a wrongful-discharge claim based on a public policy not previously recognized by this Court and brought in an amended petition filed after the enactment of the statute. And third, it presents the issue of whether Iowa Code chapter 22 should be recognized to support a wrongful-discharge claim.

These are also fundamental and urgent issues of broad public importance that should be promptly resolved by this Court. *See* Iowa R. App. P. 6.1101(2)(d). Parties are raising section 669.14A and its companion for local governments in many cases across Iowa. The courts would thus benefit from guidance now. And if the district court is correct that any state employee can sue the Governor for a wrongful-discharge claim merely by alleging that she somehow influenced their discharge, such an expansive interpretation could cause a surge in public litigation.

STATEMENT OF THE CASE

Plaintiff Polly Carver-Kimm was asked to resign as communications director of the Iowa Department of Public Health in July 2020. She believes that Governor Kim Reynolds, the Governor's communication's Director, Pat Garrett, and certain leaders of the Department illegally terminated her employment. So she sued.

She seeks damages and other relief under two legal theories. First, she brings a whistleblower discharge claim under section 70A.28 of the Iowa Code against the State, the Governor, Garrett, and the Department leaders. App. 36–37 ¶¶ 30–34. Second, she brings the common law tort of wrongful discharge in violation of public policy against the State, the Governor, and Garrett. App. 37–38 ¶¶ 35–41.

Defendants moved to dismiss the whistleblower claims against Governor Reynolds and Garrett because the Governor and her staff lacked the legal authority to discharge an executive agency employee—like Carver-Kimm—who wasn't appointed by the Governor. *See* App. 51–56, 66. They also argued that the whistleblower claim against the State failed because it is not a "person" that can violation section 70A.28. *See* App. 56–57. But Defendants did not seek to dismiss the whistleblower claims against the Department leaders. *See* App. 44.

Defendants also moved to dismiss Carver-Kimm's claim of wrongful discharge in violation of public policy. They argued that her alleged public policy—Iowa's open-records laws in chapter 22—isn't a clearly defined and well-recognized public policy that protects her alleged activity as needed to support such an implied wrongful-discharge claim. They contended that Carver-Kimm's resignation wouldn't undermine that public policy. And they urged that the tort shouldn't be extended to Governor Reynolds and Garrett because they lacked authority to discharge Carver-Kimm and have qualified immunity under section 669.14A of the Iowa Code.

The district court denied Defendants' motion. App. 180. It held that wrongful-discharge claims under section 70A.28 and the common law aren't limited to the final decision-maker. App. 166–67. And it thus concluded that Carver-Kimm had sufficiently alleged that the Governor and Garrett "effectuated" Carver-Kimm's discharge. App. 167. And it declined to rule on whether the section 70A.28 claim could apply against the State since the State would be defending and indemnifying the Department leaders regardless. App. 165.

The court also held that chapter 22 established a clearly defined and well-recognized public policy that was undermined by Carver-Kimm's resignation. App. 176. And it denied Governor Reynolds and Garrett qualified immunity under section 669.14A,

reasoning that applying the statute would be an improper retroactive application of a new substantive law. App. 177–79.

Because the court's decision denied Governor Reynolds and Garrett qualified immunity, they appealed it under Iowa Code § 669.14A(4). App. 182. Carver-Kimm moved to dismiss the appeal, arguing that "Defendants do not have an appeal as of right." Br. in Supp. of Mtn. to Dismiss Appeal at 1 (Jan. 10, 2022). But this Court denied her motion. Order of Feb. 13, 2022. And the appeal has proceeded.

STATEMENT OF THE FACTS

Polly Carver-Kimm was an employee of the Iowa Department of Public Health. App. 31 ¶ 5.[1] She served as the Department's communications director. *Id.* And as a Department employee, she was appointed by the Director of the Department and performed duties assigned by the Director. *See* Iowa Code § 135.6. The Director is appointed by—and serves at the pleasure of—the Governor. *See id.* § 135.2. At all times relevant to this lawsuit, the Director of Public Health was Defendant Gerd Clabaugh. App. 31 ¶ 3A.

[1] These facts come from the allegations in the Second Amended Petition. When considering a motion to dismiss, a court must assume the factual allegations are true but owes no deference to the petition's legal conclusions or bare recitations of elements of a cause of action. *Benskin, Inc. v. West Bank*, 952 N.W.2d 292, 299 (Iowa 2020).

When the COVID-19 pandemic reached Iowa in March 2020, Carver-Kimm's job transformed. With the Department at the center of responding to an unprecedented public health disaster emergency, the Department's deputy director—Defendant Sarah Reisetter—directed Carver-Kimm "that all press releases should go through the Governor's office." App. 32 ¶ 10. And the Governor's communications director—Defendant Pat Garrett—started giving direction on the timing of the release of open-records requests, telling her to "hold" on producing records she believed were otherwise ready to release. App. 31–32 ¶¶ 8–9. The Department moved responsibility for responding to media inquiries about the pandemic to another employee. App. 32 ¶ 13. And it required Carver-Kimm to work from the State Emergency Operations Center instead of her normal office. App. 33 ¶ 14. Carver-Kimm believes that the Department took these or some other unspecified actions "to slow, stifle and otherwise divert the free flow of information" about the pandemic and the State's response to it. App. 32 ¶ 8A.

The pandemic also resulted in some confusion for Carver-Kimm about how to handle open-records requests for emails. During the public health disaster, emergency command center ("ECC") email addresses were sometimes used for certain communications about the pandemic. App. 31 ¶ 7. Carver-Kimm received open-records requests to search other specific email addresses for certain

records about COVID-19. App. 33 ¶ 15. She was uncertain whether the ECC email addresses should also be searched. App. 33 ¶ 16. And after receiving legal advice from an assistant attorney general that she should search the ECC emails, she did so and produced the records. *Id.* But Carver-Kimm alleges that she continued to email the assistant attorney general about whether ECC emails should be searched for other open-records requests and never received an email response, and thus she never searched ECC emails again. *Id.*

As the pandemic grew, so did concerns about Carver-Kimm's job performance. In April 2020, Garrett complained that Carver-Kimm posted new COVID-19 case numbers to the Department's website before the Governor's press conference. App. 33 ¶ 17. Carver-Kimm denied that she did so—while admitting that she had made that error several weeks before. *Id.* But soon after, Director Clabaugh moved responsibility for updating the website to another employee and told her that she couldn't update the website any longer. App. 33 ¶ 18.

When she shared that a journalist had complained to her about "unsanitary working conditions and lack of social distancing" at the State Emergency Operations Center, Director Clabaugh and several others requested that she share the name of the journalist. App. 33 ¶ 19. She refused. *Id.* The Department later moved

responsibility for handling its social media and coordinating communications with local governments to another employee. *Id.*

And in late May, the Department raised questions to Carver-Kimm about how a New Yorker reporter had obtained certain documents about the State Hygienic Lab. App. 34 ¶ 22. The reporter was asking questions critical of the Lab based on the documents. *Id.* It turned out that Carver-Kimm had provided the documents to the New Yorker reporter after suggesting that she could do so immediately without following the normal internal review and notification processes if the reporter merely requested records already approved for release to Iowa Public Radio. App. 34 ¶ 20–21. She also agreed to send the reporter copies of all responses to other news agencies. App. 34 ¶ 21. Soon after, the Department moved responsibility for responding to open-records requests to another employee. App. 34 ¶ 23. And eventually after the publication of the New Yorker article, the Department allegedly further removed any responsibility for media inquiries "involving COVID-19 or any other infectious disease." App. 34 ¶ 24.

Carver-Kimm claims to have had regular conversations with a Department human resources employee from March to June complaining that the reassignment of responsibilities to other employees and changes in her duties "amounted to mismanagement, abuse of authority and a specific danger to public health." App. 34 ¶ 25.

In early July, Carver-Kimm gave a Des Moines Register reporter updated statistics about the number of abortions in Iowa. App. 35 ¶ 26. The newspaper then published an article reporting that abortions had increased 25% in 2019 after regularly decreasing in previous years. App. 35 ¶ 27. The article attributed the increase to the State's decision create a state-financed family planning program that excluded abortion providers rather than participating in a federally funded family planning program. App. 35 ¶ 27–28. Carver-Kimm alleges this article "was likely embarrassing" to the Governor because the Governor supported the change in financing. App. 35 ¶ 28.

After all this, Carver-Kimm alleges that on July 15, 2020, she "was told . . . that she could either resign or be terminated due to 'restructuring.'" App. 35 ¶ 29. And she eventually "agreed to an involuntary resignation." *Id.* Carver-Kimm does not allege that either Governor Reynolds or Garrett made these statements or that they had any contact with her about her termination or resignation. *See* App. 30–38 ¶¶ 1–41.

Instead, Carver-Kimm recognizes that she was terminated by the Department. App. 35 ¶ 29. And she alleges it was "under the authority and/or at the direction of" the Department's Director (Clabaugh), its Deputy Director (Reisetter), or its Bureau Chief for Policy and Workforce Services (Defendant Susan Dixon). App. 31

¶ 3B; App. 35 ¶ 29. Carver-Kimm also alleges "[u]pon information and belief" that the Governor and Garrett "directed, influenced, authorized and/or had input into the decision [sic] terminate" Carver-Kimm. App. 35 ¶ 29B. And she asserts her "information and belief" that they had this "ability to effectuate the decision to terminate" Carver-Kimm and "considerable sway over Director Clabaugh's decisions" because he served at the pleasure of the Governor and that Reisetter and Dixon "were obliged to follow the decisions" of Director Clabaugh. App. 35 ¶ 29A.

This lawsuit followed. Carver-Kimm at first brought only a statutory whistleblower wrongful-discharge claim under section 70A.28 against the State, the Governor, and Garrett. *See* App. 9 ¶¶ 30–35. The same day, she filed tort claims asserting a wrongful-discharge-in-violation-of-public-policy tort and a free-speech constitutional tort with the Director of the Department of Management, as required by the Iowa Tort Claim Act. App. 11 ¶ 2; *see also* Iowa Code § 669.5(1); *Wagner v. State*, 952 N.W.2d 843, 847 (2020). And after six months, she requested that the claims be withdrawn from the Board and amended her petition to add them here. App. 11 ¶¶ 3–4.

Carver-Kimm bases her wrongful-discharge claim on the allegation that she was discharged in violation of public policy "after she made repeated efforts to comply with Iowa's Open Records law

(Chapter 22) by producing documents and information to local and national media." App. 37 ¶ 36. She asserts that her compilation and production of records "was in furtherance of the clear public policy of the State of Iowa to free and open examination of public records even if such examination may cause inconvenience or embarrassment to public officials." App. 37 ¶ 37. She cited only "Iowa Code Chapter 22," and one specific provision governing court injunctions, "Iowa Code § 22.8(3)," as the source of this policy. App. 37 ¶ 37.

The State, the Governor, and Garrett moved to dismiss the Amended Petition. App 24. They argued, among other things, that Carver-Kimm had sued the wrong parties to bring a whistleblower wrongful-discharge claim and that the free-speech tort had to be dismissed because no such tort exists and, even if it does, they are immune. *See* App. 24–25 ¶¶ 2, 4. Rather than resisting that motion, Carver-Kimm successfully moved for leave to file a Second Amended Petition, apparently attempting to remedy some defects identified in the motion to dismiss. *See* App. 27–28. She removed the free-speech tort. *See* App. 28 ¶ 6. And she now asserts the whistleblower wrongful-discharge claim against three Department leaders—Clabaugh, Reisetter, and Dixon—but did not remove the State, the Governor, or Garrett as defendants to that claim. *See* App. 27–28 ¶ 4. She did not amend or add parties to her common-law wrongful-discharge claim.

In response to this petition, Defendants didn't seek dismissal of the whistleblower wrongful-discharge claim against the newly named Department leader Defendants. App. 44. But they once more moved to dismiss all the other claims. They again argued that all the claims against the Governor and Garrett failed as a matter of law because neither the Governor nor her staff had legal authority to discharge an executive agency employee—like Carver-Kimm—who wasn't appointed by the Governor. *See* App. 51–56, 66.

And Defendants moved to dismiss Carver-Kimm's claim of wrongful discharge in violation of public policy because it failed against any Defendant. They argued that her alleged public policy—Iowa's open-records laws in chapter 22—isn't a clearly defined and well-recognized public policy that protects her alleged activity as needed to support such an implied wrongful-discharge claim. *See* App. 58–64. They contended that Carver-Kimm's resignation wouldn't undermine that public policy. *See* App. 64–66. And they argued that qualified immunity under section 669.14A—which was enacted and became effective about two months before Carver-Kimm filed her Second Amended Petition—barred the wrongful-discharge claim. *See* App. 66–67. They reasoned that it isn't clearly established that chapter 22 could support the tort of wrongful discharge or that it could extend to Governor Reynolds and Garrett when they lacked authority to discharge Carver-Kimm. *See id.*

The district court denied Defendants' motion. App. 180. Without discussing the Governor or Garrett's authority to discharge Carver-Kimm, it held that "Carver-Kimm set forth sufficient allegations in her petition that defendants Reynolds and Garrett effectuated her termination." App. 167; *see also* App 180. It did so after accepting a broad interpretation of individual liability based on cases interpreting the Iowa Civil Rights Act and recognizing individual liability for wrongful discharge of corporate employees. *See* App. 165–66. The court ignored the constitutional concerns raised by this broad interpretation of liability for the Governor's actions. *See* App. 164–68; *see also* App. 55 n.2., 66 (highlighting those concerns to the court). And it didn't analyze the pleading of the common law wrongful-discharge claim any differently than the statutory claim, despite the applicable heightened pleading standards. App. 180.

The court also denied Governor Reynolds and Garrett qualified immunity under section 669.14A for the wrongful-discharge-in-violation-of-public policy claim. *See* App. 179. It reasoned that because the statute was enacted after the alleged conduct giving rise to Carver-Kimm's claim and it imposes new and higher standards to prove her claim, applying the statute here would be improper retroactive application of the statute. *See* App. 178–79.

And on the merits of Carver-Kimm's wrongful-discharge-in-violation-of-public-policy claim, the district held that chapter 22 does establish a clearly defined and well recognized public policy that can support the tort. *See* App. 169–76. The court didn't conduct the proper analysis of how defined and recognized Carver-Kimm's identified statute is. *See* App. 169–76. Instead, it reasoned that "chapter 22 plays an integral role in the oversight of our state government and its actors." App. 170. And it concluded that "providing the citizens of Iowa with information on the activities of their government furthers the welfare of the citizens of Iowa as a whole." App. 171. And without explaining why it was rejecting Defendants arguments that the remedies in chapter 22 sufficiently protected any potential public policy, the court held that Carver-Kimm's resignation undermined the public policy of chapter 22. App. 176.

This timely appeal under section 669.14A(4) of the Iowa Code followed.

ARGUMENT

The district court should have dismissed all Carver-Kimm's claims against Governor Reynolds and Garret and her common-law claim of wrongful discharge in violation of public policy. The claims fail against the Governor and her staff because Carver-Kimm wasn't their employee. So they didn't have the authority to discharge Carver-Kimm—as required for both the statutory and common-law wrongful-*discharge* claims. And they have qualified immunity under Iowa Code section 669.14A for the common-law wrongful-discharge claim because it's not clearly established that chapter 22 supports a wrongful-discharge claim or that the tort could cover a claim against the Governor or her staff by an employee who they have no authority to discharge.

Even setting asides these defects, the wrongful-discharge-in-violation-of-public-policy claim fails as a matter of law. Chapter 22 doesn't establish a clearly defined and well-recognized public policy that can support the claim. And if it does, Carver-Kimm's petition doesn't allege that her resignation undermined the policy.

Each of these intertwined arguments was presented to—and rejected by—the district court, thus preserving error. And reviewing to correct legal error, *see Meade v. Christie*, 974 N.W.2d 770, 774–75 (Iowa 2022), this Court should reverse the district court's denial of the motion to dismiss based on any of them.

I. Carver-Kimm cannot bring a common-law wrongful-discharge claim or a whistleblower wrongful-discharge claim under section 70A.28 against the Governor or her staff because they have no authority to discharge an employee of the Iowa Department of Public Health.

Even though the Governor and her staff didn't employ Carver-Kimm or have authority to discharge her, the district court held that Carver-Kimm properly alleged statutory and common-law wrongful-discharge claims against them. App. 167, 180. It improperly reasoned that neither section 70A.28 nor the common law limited liability to the final decision-maker. App. 166–67, 180. It overlooked the serious constitutional problems with this expansive interpretation of liability on the Governor. *See* App. 164–68, 180. And it held that Carver-Kimm's conclusory pleading of the Governor's influence satisfied even the heightened pleading standards required by section 669.14A(3) for the wrongful-discharge-in-violation-of-public-policy claim. *See* App. 180. The district court erred and should be reversed.

A. Wrongful-discharge claims in violation of section 70A.28 or in violation of public policy both require a defendant to "discharge" the Plaintiff.

Carver-Kimm brings two wrongful-discharge claims: one under the whistleblower statute and one under the common law. *See* App. 36 (alleging as Count I, "wrongful discharge in violation of Iowa Code section 70A.28"); App. 37 (alleging as Count II, "wrongful

discharge in violation of public policy"). Both claims require her to allege—and eventually prove—that the defendants she is suing *discharged* her. The claims thus can't reach defendants who had no authority to discharge her.

Section 70A.28 provides:

> "[a] person shall not discharge an employee from . . . a position in a state employment system administered by . . . a state agency as a reprisal for . . . a disclosure of information to a person providing human resource management for the state . . . if the employee, in good faith reasonably believes the information evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

Iowa Code § 70A.28(2).[2] A violation of this provision may be enforced through a civil action for certain limited damages and equitable relief. *Id.* § 70A.28(5); *see generally Walsh v. Wahlert*, 913 N.W.2d 517, 521 (Iowa 2018) (parsing the "linguistic jungle" of an earlier version of section 70A.28(2)).

Section 70A.28 contains no provision making it illegal to provide "input into or influence" another person's decision to discharge an employee. App. 35 ¶ 29A; *see* Iowa Code § 70A.28. Nor does it

[2] The statute also prohibits reprisals in hiring, promotion, demotion, and other employment actions. *See* Iowa Code § 70A.28(2). But Carver-Kimm hasn't advanced such a claim here. *See* App. 36, 77–81. And regardless—like discharges—the statute only imposes liability on a person who actually "take[s] or fail[s] to take" those actions as well. Iowa Code § 70A.28(2).

impose liability for aiding and abetting like the Iowa Civil Rights Act. *Compare* Iowa Code § 70A.28, *with* Iowa Code § 216.11(1) ("It shall be an unfair or discriminatory practice for . . . [a]ny person to intentionally aid, abet, compel, or coerce another person to engage in any of the practices declared unfair or discriminatory by this chapter.").

The wrongful-*discharge*-in-violation-of-public-policy tort—as should be clear by its name—also requires a defendant to discharge the plaintiff. *See Ferguson v. Exide Techs., Inc.*, 936 N.W.2d 429, 432 (Iowa 2019) (including as one element of the tort that the employee's conducted protected by a public policy "was the reason the employer *discharged* the employee" (emphasis added)). And since this Court first recognized the tort 35 years ago in *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 590–60 (Iowa 1988), the Court has never extended it to include liability to those who haven't discharged the plaintiff employee. Indeed, the Court has declined to even extend the tort from the employer–employee relationship to independent contractors. *See Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 683–86 (Iowa 2001).

Yet the district court accepted Carver-Kimm's arguments 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*. App. 167, 180; *see also* App.

73, 78–81, 92. The district court agreed with her that this Court "rejected the final decision-maker test" for the wrongful-discharge tort in *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 775–76 (Iowa 2009). App. 167. And it reasoned that this Court's rejection of a strict limitation for individual liability under the Iowa Civil Rights Act should likewise apply to section 70A.28 and the wrongful-discharge tort. *See* App. 166–67. Both legal conclusions are wrong.

This Court didn't "reject[] the final decision-maker test" in *Jasper*. App. 167. Rather, it declined "to decide how deep the tort could reach in the corporate chain of management." *Jasper*, 764 N.W.2d at 776. The fighting issue actually decided in that case was whether the wrongful-discharge tort imposes individual liability against corporate decisionmakers—or if it could be brought only against the corporation. *See id.* at 775–76. And the Court decided that the tort does impose individual liability on those "who act in the name of the corporation" because "the corporate structure will not insulate individual officers and employees authorized to make discharge decisions from liability for the underlying tortious conduct in exercising that authority." *Id.* at 766.

That question of individual liability isn't at issue here. Defendants haven't argued that wrongful-discharge claims under section 70A.28 or the common law can't be brought against individuals. *See* App. 100–01. In fact, Defendants haven't moved to dismiss

Carver-Kimm's individual-liability claims against the Department leaders who allegedly discharged her. *See* App. 44. But acknowledging that Carver-Kimm may sue *some* individual who discharged her, doesn't mean that she can sue Governor Reynolds and Garrett.

And *Jasper* offers Carver-Kimm no help in imposing liability on individuals who didn't have authority to discharge her and thus *couldn't* discharge her. Again, *Jasper* didn't have to address the scope of individual liability because the individual defendant there "was essentially" the corporation and "authorized and directed the decision making, including the decision to terminate." *Jasper*, 764 N.W.2d at 776–77. In other words, he *was* the final decision-maker for the discharge and all other corporate decisions. There was thus no question that the individual defendant in *Jasper* discharged the plaintiff, as required for the wrongful-discharge tort. And the Court explained narrowly, "we only hold that liability for the tort can extend to individual officers of a corporation who authorized or directed the discharge of an employee for reasons that contravene public policy." *Id.* at 777. In context, it makes no sense to read this explanation as an extension of the tort to individuals who lack authority to discharge an employee.

Nor did Carver-Kimm's invitation to look to cases interpreting the Iowa Civil Rights Act ("ICRA") to guide an expansive interpretation of section 70A.28 and the wrongful-discharge tort lead the

district court to any stronger footing. That analogy is inapt because the two statues are materially different.

For starters, ICRA makes it illegal to "aid, abet, compel, or coerce another person to engage in" a direct violation. Iowa Code § 216.11(1). This expressly expands the scope of liability from just the person with authority to take the discriminatory employment action to others only indirectly involved. Section 70A.28 has no 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(1); *Rumsey v. Woodgrain Millwork, Inc.*, 962 N.W.2d 9, 34–37 (Iowa 2021). Given this range of direct and indirect conduct, this Court has rejected a per se rule that only supervisors could *ever* be liable under ICRA. *See Rumsey*, 962 N.W.2d at 35–36. But even so, an individual defendant must still "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.

Here—unlike the broad range of discriminatory conduct that could support a claim under ICRA—Carver-Kimm brings discrete claims of wrongful discharge. And unlike the many individuals—

coworkers, human resources staff, supervisors, middle management, or senior leadership—who could be "personally involved" engaging in an ICRA violation, only an individual with authority to discharge Carver-Kimm could do the same here. So even assuming the Court would apply the ICRA standard from *Rumsey*, individual liability could only attach for someone "personally involved" in discharging her and who had "the ability to effectuate" the discharge. This standard too wouldn't extend liability to an individual who doesn't have authority to discharge the employee.

B. Governor Reynolds and her communications director lacked the authority to discharge an agency employee that wasn't appointed by the Governor, and Carver-Kimm's contrary pleading can't overcome this matter of Iowa law.

Carver-Kimm was the Iowa Department of Public Health's communication director. App. 31 ¶ 5. The Department is a creature of statute. *See* Iowa Code ch. 135 (establishing the Department). It's headed by the Director of Public Health, who is appointed by—and serves at the pleasure of—the Governor. *See* Iowa Code §§ 135.2(1)(a), 135.11. And the Director "shall employ such assistants and employees as may be authorized by law, and the persons appointed shall perform duties as may be assigned to them by the director." *Id.* § 135.6. The Director likewise has the power to remove Department employees. *See LaPeters v. City of Cedar Rapids*, 263

N.W.2d 734, 736 (Iowa 1978) ("[A]n appointing power has removal authority unless the law provides otherwise.").[3] But no statute or constitutional provision gives the Governor or her communications director authority to appoint or remove Department employees like Carver-Kimm.[4]

While Carver-Kimm brings her statutory and common law wrongful-discharge claims against Governor Reynolds and Garrett, neither of them could have discharged Carver-Kimm because they did not have the power to do so as a matter of law. She's not their employee. Only the Director of Public Health had the power to appoint or remove Carver-Kimm since she was an employee of the Department. Because it was legally impossible for Governor Reynolds and Garrett to discharge Carver-Kimm, neither could violate section 70A.28 or commit the wrongful-discharge tort. Carver-Kimm's wrongful-discharge claims thus fail as a matter of law.

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[3] The Director's authority to remove certain Department employees covered by the State's merit personnel system is restricted. *See* Iowa Code §§ 8A.411, 8A.412, 8A.413(19), 8A.415(2). But Carver-Kimm was an at-will, "non-merit employee." App. 30 ¶ 1. So the merit system's restrictions on that authority don't apply here.

[4] The Governor does have authority to appoint other officers—members of boards and commissions—within the Department. *See, e.g.*, Iowa Code § 135.62(2) (health facilities council); *id.* § 136.2(1) (state board of health); *id.* §§ 147.12–.13 (health profession licensing boards).

Because of this fatal legal defect, any other legal or factual allegations about the Governor or Garrett's purported discharge of Carver-Kimm are irrelevant. But in any event, Carver-Kimm presents only bare conclusory legal allegations. She never alleges that they asked her to resign in the face of termination—instead presenting that allegation in the passive voice. App. 35 ¶ 29. Nor does she allege that they had any contact with her about her termination or resignation. *See* App. 30–38 ¶¶ 1–41. Instead, Carver-Kimm summarily claims that Governor Reynolds and Garrett made a decision to "terminate her employment," App. 36 ¶ 32, and that their "actions and conduct . . . in terminating Polly's employment constitutes a simple misdemeanor." App. 36 ¶ 33. Yet she also makes the contradictory claim that she was terminated by the Department "under the authority and/or at the direction of" Director Clabaugh or other Department leaders. App. 35 ¶ 29.

The district court found special import in Carver-Kimm's allegation "that Governor Reynolds and Garrett had the 'ability to effectuate the decision to terminate Plaintiff's employment and had input into or influence over the decision to terminate Plaintiff.'" App. 166–67 (quoting App. 35 ¶ 29A). But the Governor's ability to cause an employee's termination—her legal authority—is a question of law. No deference is owed to a pleading making such a legal conclusion. *See Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa

2014). Particularly when the pleading conflicts with an Iowa statute. And the conclusory and speculative assertions that the Governor and her staff somehow influenced the discharge decision don't have any bearing on their legal authority.

At bottom, it's irrelevant what Carver-Kimm alleges about any involvement of Governor Reynolds or Garrett in her discharge. She wasn't their employee. It was a legal impossibility for Governor Reynolds or Garrett to discharge her. The wrongful-discharge claims against them should have been dismissed.

C. Interpreting section 70A.28 or the wrongful-discharge tort to reach a Governor's indirect influence over discharge of an agency employee would violate the seperation of powers by infringing on the Governor's executive power.

Courts should interpret statutes "to avoid constitutional infirmities." *Roth v. Evangelical Lutheran Good Samaritan Soc.*, 886 N.W.2d 601, 611 (Iowa 2016) (rejecting an interpretation of a statute that "would raise serious questions as to its validity under the Supremacy Clause of the United States Constitution"); *see also* Iowa Code § 4.4(1) ("In enacting a statute, it is presumed that . . . [c]ompliance with the Constitutions of the state and of the United States is intended."). And it makes sense to apply the same principle to common-law causes of action implied from the public policy of statutes. Yet the district court's ruling permits statutory and

common-law wrongful-discharge claims that sweep so broadly that they would impose liability on the Governor and her staff for performing her constitutional duties. This should be avoided.

Carver-Kimm alleged that the Governor and her staff "directed, influenced, authorized and/or had input into the decision [sic] terminate" Carver-Kimm. App. 35 ¶ 29B. And the district court relied on this allegation, and its broad interpretation of individual liability, in permitting her claim to proceed. App. 166–68. But again, the Governor doesn't have the power to directly carry out such a directive. So any influence could be carried out only by exercising her constitutional powers—such as removing a department head not accepting her input or managing the department's budget to try to force the action. And such powers "exercised wholly at the discretion of the governor . . . cannot serve as grounds for a claim" against the Governor under a statute. *See Godfrey v. State*, 962 N.W.2d 84, 112 (Iowa 2021) (holding that "the Governor's management of the budget of a department of the executive branch and the exercise of the line-item veto exercise of line-item veto . . . cannot serve as grounds for a claim under the" Iowa Civil Rights Act).

"The supreme executive power of this state shall be vested in a chief magistrate, who shall be styled as the governor of the state of Iowa." Iowa Const. art. IV, § 1. This power includes the "manage-

ment of the budget of a department of the executive branch." *Godfrey*, 962 N.W.2d at 112. The Iowa Constitution also orders the Governor to "take care that the laws are faithfully executed." Iowa Const. art. IV, § 9. The charge is hers alone. *Id.* art. III, § 1 ("The powers of the government of Iowa shall be divided into three separate departments—the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.").

The power of removal of a department head is essential to the Governor's ability to fulfill her obligation to faithfully execute the laws. *Myers v. United States*, 272 U.S. 52, 117 (1926). If an appointee is not executing the laws to her satisfaction, the Governor must be able to demand his or her resignation. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020). Without the power to remove those helping the Governor carry out her duties, the Governor "could not be held fully accountable for discharging [her] own responsibilities; the buck would stop somewhere else." *Id.* (quoting *Free Enter. Fund. v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 514 (2010)). Such control over appointees is "essential to subject Executive Branch actions to a degree of electoral accountability." *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021).

This Court has also recognized the importance of the Governor's appointees in carrying out her constitutional duties. "The responsibilities and duties of the Governor of the State are many and burdensome and important. [Her] days are full. While [s]he is the chief executive officer of the State, [her] job isn't a one-[wo]man job." *Ryan v. Wilson*, 300 N.W. 707, 712 (1941). And in the performance of her duties, the Governor "is required to call for and to rely on the assistance of many other officers and employees of the State." *Id.*

And courts have interpreted other State constitutions to prohibit undue influence of a governor's ultimate control over the selection and retention of superior executive officers. *See, e.g.*, *State ex rel. McCrory v. Berger*, 781 S.E.2d 248 (N.C. 2016) (holding that the "take care" clause of North Carolina Constitution required the governor to "have enough control over [commissioners] to perform his constitutional duty" to faithfully execute the laws, and such control includes appointment, supervision, and removal); *Pievsky v. Ridge*, 98 F.3d 730, 737 (3d Cir. 1996) (holding that Pennsylvania governor's inability to remove commission members interfered with his constitutional duty to ensure the laws of the state are faithfully executed); *Tucker v. State*, 35 N.E.2d 270, 281–91 (Ind. 1941) (holding appointment and removal power to be a "necessary incident to the power to execute the laws").

The indirect influence of the Governor and her staff alleged by Carver-Kimm implicates conduct—removal of a department head or management of a department budget—that would fall within the exercise of these core constitutional duties. And extending tort or statutory liability for wrongful discharge to the Governor for this conduct—as Carver-Kimm successfully urged the district court to do—would thus infringe on the Governor's "supreme executive power." Iowa Const. art. IV, § 1. That would violate the separation of powers. *See* Iowa Const. art. III, § 1; *Godfrey*, 962 N.W.2d at 112; *Weldon v. Ray*, 229 N.W. 2d 706, 710 (Iowa 1975) (recognizing the legislature cannot "violate the separation of powers by invading the Governor's authority to exercise executive functions," such as by making "an appropriation to a department conditional upon the Governor's appointing a specified individual to be head of the department"); *Bynum v. Strain*, 218 P. 883, 886–89 (Okla. 1923).

The Court need not reach these constitutional questions. Under a proper interpretation of section 70A.28 and the common law wrongful-discharge tort, neither imposes liability on the Governor or her staff because they lacked authority to discharge Carver-Kimm. The Court should thus avoid these "constitutional icebergs," *Simmons v. State Pub. Def.*, 791 N.W.2d 69, 74 (Iowa 2010), by

applying that proper interpretation and dismissing the claims against Governor Reynolds and Garrett.

D. Even if merely influencing a discharge could incur liability for the tort of wrongful discharge, Carver-Kimm has not properly pleaded a plausible claim with particularity as required by section 669.14A(3).

Even if the district court were correct in its expansive interpretation of the scope of individual liability for wrongful discharge, Carver-Kimm faces another hurdle for her wrongful-discharge-in-violation-of-public-policy claim. Because that claim is brought under the Iowa Tort Claims Act, *see Rivera v. Woodward Res. Ctr.*, 830 N.W.2d 724, 732 (Iowa 2013), it is subject to the heightened pleading requirements of Iowa Code section 669.14A(3).

Section 669.14A(3) requires Carver-Kimm to "state with particularity the circumstances constituting the violation." 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, Carver-Kimm must clear two thresholds. First, she must set forth specific, particular facts to support her claim, rather than relying on mere generalizations or recitations of elements. Second, she must show 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)).

This statute was enacted and went into effect two months before Carver-Kimm filed her second amended petition. *See* Act of June 17, 2021 (Senate File 342), ch. 183, § 12, 2021 Iowa Acts 715, 719 (codified at Iowa Code § 669.14A (2022)); App. 30. And regardless whether its other provisions establishing qualified immunity can apply here, the new pleading rules do. The pleading was filed after its effective date, so applying the new procedural pleading requirements to this event of legal consequence isn't improper retroactive application. *See Hrbek v. State*, 958 N.W.2d 779, 783 (Iowa 2021). And changes to pleading requirements, have long been held to apply to pending proceedings. *See Dolezal v. Bockes*, 602 N.W.2d 348, 351–52 (Iowa 1999); *Schultz v. Gosselink*, 148 N.W.2d 434, 436 (Iowa 1967), *vacated in part on other grounds by Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982); *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))). [5]

Under the statute's heightened pleading requirements—and assuming that the tort can reach conduct merely providing input and influencing someone else to discharge an employee—Carver-Kimm was thus required to allege particular facts showing precisely how Governor Reynolds and Garrett caused Carver-Kimm to be terminated. And she needed to allege enough facts to make this claim plausible rather than pure speculation.

Despite these heightened pleading requirements, the district court didn't analyze the pleading of this claim any differently than

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[5] 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 statutory wrongful-discharge claim. *See* App. 180. The court was again satisfied that "Carver-Kimm has set forth sufficient allegations in her petition that Defendants Reynolds and Garrett effectuated her termination." *Id.*

But Carver-Kimm just alleges "[u]pon information and belief" that the Governor and Garrett "directed, influenced, authorized and/or had input into the decision [sic] terminate" Carver-Kimm. App. 35 ¶ 29B. And she asserts her "information and belief" that they had this "considerable sway over Director Clabaugh's decisions" because he served at the pleasure of the Governor. App. 35 ¶ 29A. These bare allegations don't 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.

Carver-Kimm's pleading itself recognizes she doesn't have any factual basis for this purely speculative assertion. "'Upon information and belief' is a lawyerly way of saying that the [Plaintiff] does not know that something is a fact but just suspects or has heard it." *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 F. App'x 377, 387 (3d Cir. 2020); *see also 16630 Southfield Ltd. P'ship. v. Flagstar Bank, F.S.B.,* 727 F.3d 502, 506 (6th Cir. 2013) (affirming dismissal of complaint stating key allegations

"upon information and belief," reasoning that they "are precisely the kinds of conclusory allegations *Iqbal* and *Twombly* condemned and thus told us to ignore"). And she offers no other particular facts giving a basis for her belief that would make the belief reasonable and her claim plausible.

A federal court considered and dismissed similar claims—with similar pleading defects—against the Kentucky Governor in *Cooke v. Bevin*, Civ. No. 3:19-031-DCR, 2019 WL 3211894, at *2 (E.D. Ky. July 16, 2019). There, a paralegal for a workers' compensation administrative law judge in the Kentucky Labor Cabinet filed a wrongful-discharge claim, alleging the labor secretary terminated her because she engaged in protected political activity. *Id.* Despite being terminated by the labor secretary, the employee also sued the governor, alleging "upon information and belief" that the governor directed the labor secretary to terminate her employment. *Id.* The court granted the governor's motion to dismiss, finding there was no statutory requirement for the governor to approve any of the secretary's personnel decisions and the mere fact that the secretary served at the pleasure of the governor was per se insufficient to state a claim against a person who could not have discharged the plaintiff. *Id.* at 4.

Since the federal court in *Cooke* applied the same heightened *Iqbal/Twombly* pleading standard adopted by the Legislature in

section 669.14A(3), it's instructive as to how the district court should have analyzed Carver-Kimm's petition here. Her bald conclusory assertions cannot give rise to a plausible claim that Governor Reynolds and Garrett had anything to do with the discharge of a Department employee. Even if Carver-Kimm is correct that her wrongful-discharge claims can be brought against individual defendants that didn't actually discharge her, this claim must be dismissed because it failed to pass the Iowa Tort Claims Act's heightened pleading requirements.

II. Section 669.14A provides qualified immunity to Governor Reynolds and Garrett for Carver-Kimm's wrongful-discharge claim because that tort has never been extended to cover a claim against the Governor by a Department employee that she has no authority to discharge and chapter 22 has never been recognized as a sufficient public policy to support the tort.

Almost two months before Carver-Kimm filed her second amended petition, the Iowa Legislature enacted section 669.14A. *See* Act of June 17, 2021 (Senate File 342), ch. 183, § 12, 2021 Iowa Acts 715, 719 (codified at Iowa Code § 669.14A (2022)). That section gives state employees qualified immunity from claims under the Iowa Tort Claims Act if the claim alleges a deprivation of a "right, privilege, or immunity secured by law" that "was not clearly established at the time of the alleged deprivation" or if "the state of the law not sufficiently clear that every reasonable employee would

have understood that the conduct alleged constituted a violation of law." Iowa Code § 669.14A(1)(a). When an employee is protected by qualified immunity, both the employee and the State are not liable for monetary damages. *See* Iowa Code § 669.14A(1), (3). And when a plaintiff's petition shows that the law wasn't clearly established, the claim must be dismissed at the motion-to-dismiss stage. *See* Iowa Code § 669.14A(3) ("[F]ailure to plead that the law was clearly established at the time of the alleged violation shall result in dismissal with prejudice.").

This statute grants Governor Reynolds and Garrett—and thus the State too—qualified immunity from Carver-Kimm's wrongful-discharge-in-violation-of-public-policy claim. The claim isn't clearly established because this Court has never extended the wrongful-discharge tort to cover a claim against the Governor by a department employee that she has no authority to discharge. Nor has it ever recognized chapter 22 as a public policy supporting the tort. But the district court denied Governor Reynolds and Garrett qualified immunity because it concluded that applying section 669.14A here would be an improper retroactive application of the statute. App. 177–79. The district court was wrong.

E. Applying section 669.14A here isn't improper retroactive application because the statute was effective before the filing of the current petiton.

Applying "a statute to conduct occurring after the effective date is in fact a prospective and not retroactive application." *Hrbek*, 958 N.W.2d at 783. 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 is the availability of a qualified-immunity defense for individuals sued in district court under the Tort Claims Act. *See* 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 the statute has no force at the administrative stage. Nor could the event be merely filing a *motion* to amend a petition to include a 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 potential tort liability. Indeed, only after a petition is filed in district court do State defendants get to assert defenses like qualified immunity or challenge the adequacy of a petition's allegations. *See* Iowa R. 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. *See* App. 30. That 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 that claim is thus a prospective application of a statute 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 that applying PCR statute enacted two days before the applicant filed PCR application was not retroactive, despite applicant being convicted and sentenced before the statute's enactment and all conduct giving rise to PCR application occurred before 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 *before* the filing of the governing petition, contradicts 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 have a right to utilize all statutes in effect, which includes the qualified-immunity defense provided in section 669.14A.

But the district court disagreed, instead holding that the event of legal consequence governed by section 669.14A was when Carver-Kimm was forced to quit her job in July 2020, which happened before section 669.14A took effect. *See* App. 178. The court reasoned her wrongful-discharge tort accrued on that date. *See id.* And it thus refused to apply the statute retroactively because it held that it gave new rights to State employees and lacked any text requiring retroactive application. Yet it didn't explain how the statute in any way governed that event or would have affected the parties' conduct then. *See id.*

This is the fatal missing link in the district court's logic. Despite having immunity in its name, section 669.14A doesn't change the substantive law to make any new conduct legal. Nor does it make any new conduct illegal. It's merely a rule of decision

that governs consideration of petitions containing judicially created torts. And it provides that such petitions can only proceed if they allege conduct that violates clearly established law; if this Court hasn't yet extended a tort to cover the alleged conduct, it directs the court not to apply that newly imposed liability for the first time to conduct occurring before the decision. But the statute doesn't regulate the conduct occurring when the potential tort happens. Neither Carver-Kimm nor Governor Reynolds and her staff would have been affected by the statute being in effect at the time the potential tort occurred. Nor could they have had any need to change their conduct accordingly.

But the statute *does* regulate what Carver-Kimm should have put in her petition. And it regulates how a district court must consider a motion to dismiss and the validity of judicially created tort claims against State defendants. Thus, it makes more sense to consider the filing of the operative petition to be the event of legal consequence. And applying the qualified immunity protections section 669.14A to Carver-Kimm's Amended petition filed after the statute took event isn't retroactive application at all.

But even if this Court decides that the event of legal consequence for section 669.14A occurred in July 2020 or some other date before the filing of the Second Amended Petition, section 669.14A

still applies 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)).

Section 669.14A(1) creates an adjudicative procedural 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 for suits against government employees, not the employee's past conduct itself or plaintiff's rights. Qualified immunity "is *conceptually distinct from the merits of the plaintiff's claim* that [her] rights may have been violated." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (emphasis added).

When litigation arises, the qualified-immunity defense eliminates 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, before the adoption of the event-of-legal-consequence test, that amendment to Chapter 669 that wholesale prohibited claims against entire class of defendants was substantive). Here, the legislature expressly stated that applying the new provision was of "*immediate* importance," and thus took "effect upon enactment."

Act of June 17, 2021 (Senate File 342), ch. 183, § 16, 2021 Iowa Acts 715, 719 (emphasis added). Refusing to apply the qualified-immunity provision to claims (like Plaintiff's) filed *after* the statute took effect conflicts with the legislature's clear intent that this provision is crucial 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. United States*, 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* aimed 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.

F. Carver-Kimm's claim isn't clearly established because the wrongful-discharge tort has never been extended to reach indirect influence by the Governor over the discharge an agency employee and chapter 22 has never been recognized as a public policy supporting the tort.

Section 669.14A(1) provides employees qualified immunity to a claim alleging a deprivation of a "right, privilege, or immunity secured by law" that "was not clearly established at the time of the alleged deprivation" or if "the state of the law not sufficiently clear that every reasonable employee would have understood that the conduct alleged constituted a violation of law." Iowa Code § 669.14A(1)(a). This "clearly established" requirement hasn't yet been interpreted by this Court. But it makes sense to look to federal qualified immunity law for guidance since it also provides immunity for an employee whose conduct doesn't violate "clearly established statutory or constitutional rights of which a reasonable person would have known" is entitled to qualified immunity from any liability for damages. *Harlow*, 457 U.S. at 818. Under federal law, "[w]hether a legally protected interest is clearly established turns on the objective legal reasonableness of an official's acts." *Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1997) (cleaned up). Put another way, could the official "be expected to know that certain conduct would violate statutory or constitutional rights"? *Id.*

Qualified immunity balances the need to hold public employees accountable for their conduct with the need to shield public servants from harassment, distraction, and liability when their conduct has been reasonable. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Government employees who meet the above criteria are protected by qualified immunity whether the alleged error in conduct is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Id.* at 231 (citing *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 507 (1978), for the proposition that qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law")). Further, a qualified immunity defense "may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1988).

Because of the potentially lost benefits of qualified immunity, including "the costs and expenses of litigation, and discovery in particular, which is a type of burden distinct from appeals and other lawyer-driven aspects of a case," qualified immunity questions should be resolved "at the earliest possible stage in litigation." *Payne v. Britten*, 749 F.3d 697, 701 (8th Cir. 2014). The Court has

discretion whether to decide the constitutional question or the qualified-immunity question first. *See Pearson*, 555 U.S. at 236–42 (reasoning that requiring courts to determine difficult constitutional questions when "it was plain that constitutional right is not clearly established, but far from obvious whether in fact there is such a right" was an unwise use of scarce judicial resources).

The test is easy to apply here. This Court has never extended the wrongful-discharge-in-violation-of-public-policy tort to cover a claim against the Governor by a department employee that she has no authority to discharge. Indeed, it hasn't even decided how far individual liability extends at all, beyond an individual defendant who essentially *was* the corporation. *See Jasper*, 764 N.W.2d at 775–76. And this Court has never recognized chapter 22 as a public policy supporting the tort.

So Carver-Kimm's claim isn't clearly established now or at the time of her alleged deprivation. Nor would every reasonable employee have understood that chapter 22 provided Carver-Kimm rights protecting her from wrongful discharge. Governor Reynolds, Garrett, and the State are protected by qualified immunity. *See* Iowa Code § 669.14A(1), (2). The district court should have dismissed this claim. *See* Iowa Code § 669.14A(3).

III. Carver-Kimm's wrongful-discharge claim also fails because Iowa Code chapter 22 doesn't establish a clearly defined and well-recognized public policy that could be undermined by Carver-Kimm's resignation.

Carver-Kimm alleges that she was wrongfully discharged in violation of public policy "after she made repeated efforts to comply with Iowa's Open Records law (Chapter 22) by producing documents and information to local and national media." App. 37 ¶ 36. She asserts that her compilation and production of records "was in furtherance of the clear public policy of the State of Iowa to free and open examination of public records even if such examination may cause inconvenience or embarrassment to public officials." App. 37 ¶ 37.

An at-will employee, like Carver-Kimm, may generally bring a wrongful-discharge claim by proving these elements:

> (1) the existence of a clearly defined and well-recognized public policy that protects the employee's activity; (2) this public policy would be undermined by the employee's discharge from employment; (3) the employee engaged in the protected activity, and this conduct was the reason the employer discharged the employee; and (4) the employer had no overriding business justification for the discharge.

Ferguson, 936 N.W.2d at 432 (quoting *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W. 2d 293, 300 (Iowa 2013)). The first two elements—"the existence of a public policy" and "whether that policy is undermined by a discharge from employment"—present

"questions of law for the court to resolve." *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 282 (Iowa 2000); *see also Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 108 (Iowa 2011) (affirming grant of motion to dismiss wrongful-discharge claim because petition didn't allege "a clearly defined and well-recognized public policy").

Carver-Kimm's wrongful-discharge-in-violation-of-public-policy claim fails to satisfy either of these elements as a matter of law. The district court thus erred in not dismissing this claim.

A. Chapter 22 doesn't establish a clearly defined and well-recognized public policy that can support a claim for wrongful discharge in violation of public policy.

The tort of wrongful discharge is a "narrow public-policy exception to the general rule of at-will employment" in Iowa. *Berry*, 803 N.W.2d at 109. To succeed on such a claim, Carver-Kimm "must identify a clearly defined and well-recognized public policy that would be undermined by [her] termination from employment." *Id.* at 110. Because of the need to ensure this narrow exception "is a product of the balancing by our legislature of the competing interests of the employer, employee, and society," such a claim must be based on the constitution, a statute, or certain administrative rules. *Jasper*, 764 N.W.2d at 762–65. But merely identifying a statute is insufficient—it "must relate to the public health, safety, or welfare

and embody a clearly defined and well-recognized public policy that protects the employee's activity." *Berry*, 803 N.W.2d at 110.

Applying these principles, this Court has held that many important, longstanding public policies still cannot give rise to a wrongful-discharge claim. For example, the court has held Iowa's criminal laws do not establish a clearly defined and well-recognized public policy against crime and in favor of the protection of the public. *See Lloyd v. Drake Univ.*, 686 N.W.2d 225, 229–230 (Iowa 2004) (rejecting claim by private security guard fired after attempting to arrest a suspected criminal). Nor does Iowa's Comparative Fault Act establish a clearly defined and well recognized public policy protecting against filing a personal injury action against an employer. *See Berry*, 803 N.W.2d at 110–12. And though Iowa's workers' compensation statutes do establish some clearly defined public policies, *see Springer*, 429 N.W.2d at 559, they do not establish such a policy protecting coworkers or supervisors that express concerns internally about whether their employer is properly compensating injured workers. *See Ballalatak v. All Iowa Agric. Ass'n*, 781 N.W.2d 272, 277–78 (Iowa 2010); *see also Fitzgerald*, 613 N.W.2d at 284–85 (holding that Iowa Civil Rights Act and other statutes did not create clearly established and well-recognized policy in favor of opposing unlawful terminations of coworkers).

Carver-Kimm alleges that chapter 22 establishes a "clear public policy of the State of Iowa to free and open examination of public records even if such examination may cause inconvenience or embarrassment to public officials." App. 37 ¶ 37. But this is the sort of general, vague and amorphous concept that is neither clearly defined nor well-recognized for creating an implied common law wrongful-discharge cause of action. *See Berry*, 803 N.W.2d at 110–12; *Lloyd*, 686 N.W.2d at 230. Such a vague and general assertion of public policy also fails to "state with particularity the circumstances constituting the violation" as required by the heightened pleading requirement applicable when this claim is brought against State defendants. Iowa Code § 669.14A(3).

The only specific statutory provision that Carver-Kimm references in support of her assertion that this is a clearly defined and well-recognized policy is section 22.8(3) of the Iowa Code. App. 37 ¶ 37. Yet that provision does not impose any mandates on employers, employees, or even government agencies. It provides a general statement of factors that *courts* must consider when exercising their broad equitable discretion to issue injunctions to keep records confidential, and some specific limitations on the issuance of such

injunctions. *See* Iowa Code § 22.8(3).[6] By its text, this vague standard—that applies "generally" and is subject to a court's discretion—is not clearly defined or well-recognized enough to be a basis to put employers on notice that the narrow public policy exception has expanded somehow to limit their authority to terminate at-will employees.

Despite this pleading defect first being raised in the State's motion to dismiss her First Amended Petition, Carver-Kimm didn't plead her alleged public policy with any more particularity in her Second Amended Petition. She's still relying just on a generalized

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[6] Section 22.8(3) states in full:

> In actions brought under this section the district court shall take into account the policy of this chapter 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. A court may issue an injunction restraining examination of a public record or a narrowly drawn class of such records, only if the person seeking the injunction demonstrates by clear and convincing evidence that this section authorizes its issuance. An injunction restraining the examination of a narrowly drawn class of public records may be issued only if such an injunction would be justified under this section for every member within the class of records involved if each of those members were considered separately.

Iowa Code § 22.8(3)

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 discharged for complying with or refusing to violate—it's not directed to State agency employees at all. To be sure, 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*, 686 N.W.2d at 229–30 (holding that the entire criminal code doesn't create a clearly defined and well-recognized public policy), *with Fitzgerald*, 613 N.W.2d at 286 (holding that perjury criminal statute created a clearly defined and well-recognized public policy). But Carver-Kimm hasn't pleaded such a clearly defined and well-recognized public policy with particularity here.

Chapter 22 and section 22.8(3) also cannot support the tort of wrongful discharge because they do not relate to "health, safety, or welfare." *Berry*, 803 N.W.2d at 110. Chapter 22 sets up a comprehensive scheme for public access to government records—specifying those that are confidential, creating procedures for access, avenues of judicial review and enforcement. *See generally* Iowa Code ch. 22. While public access to records is no doubt important, this does not rise to the level of a protection of public health, safety, or welfare like other statutes that have been recognized as supporting the tort.

See., e.g., *Springer*, 429 N.W.2d at 559 (filing worker's compensation claim); *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994) (filing unemployment benefits claim); *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 300 (Iowa 1998) (reporting child abuse); *Jasper*, 764 N.W.2d at 767 (complying with appropriate childcare staffing ratios).

Rejecting Carver-Kimm's claim based on chapter 22 tracks courts in other states that have held their open-records statutes cannot give rise to a wrongful-discharge claim. *See Watson v. Cuyahoga Metro. Hous. Auth.*, No. 99932, 2014 WL 1513455, at *10–11 (Ohio Ct. App. April 17, 2014) (holding that the Ohio open-records statute did not establish public policy for wrongful-discharge claim by government employees who were fired after providing government records to member of the public without charge or legal review while on duty); *Kiefer v. Town of Ansted*, No. 15-0766, 2016 WL 6312067, at *2–3 (W. Va. Oct. 28, 2016) (unpublished) (holding that the West Virginia open-records statute did not establish public policy for wrongful-discharge claim by a town's police officer terminated after filing an open-records request with the town); *cf. Shero v. Grand Sav. Bank*, 161 P.3d 298, 300–03 (Okla. 2007) (holding that the Oklahoma open-records statute did not establish public policy for wrongful-discharge claim by bank employee terminated

after he refused to drop an open-records counterclaim against a bank customer).

In holding that chapter 22 and 22.8(3) do establish a clearly defined and well recognized public policy, the district court didn't conduct the proper analysis of how defined and recognized Carver-Kimm's identified statute is. *See* App. 169–76. Instead, it reasoned that "chapter 22 plays an integral role in the oversight of our state government and its actors." App. 170. And it then concluded that "providing the citizens of Iowa with information on the activities of their government furthers the welfare of the citizens of Iowa as a whole." App. 171.

Defendants don't dispute that Chapter 22 is important and has played a significant role in ensuring that state and local government remains accountable. But that doesn't make it a "health, safety, or welfare" protection as required to support the tort. All other previously recognized public policies have directly offered those protections to Iowans. And none of this gives rise to an implication that the chapter as a whole—or section 22.8(3)—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. App. 37 ¶ 37 (citing Iowa Code § 22.8(3)).

Of course, chapter 22—like all statutes governing state agencies—affects the public interest. But it would be particularly problematic if every statute governing a state agency is considered to establish a public policy supporting the wrongful-discharge tort. There are hundreds—if not thousands—of pages of the Iowa Code that authorize or restrict the actions of state government and its officers and employees. State government employers would be subject to having employment decisions challenged on a plethora or bases buried throughout the code.

Such a lax standard of accepting public policies to support the wrongful-discharge tort would eviscerate at-will employment within state government. The Legislature has already set up a comprehensive personnel scheme that provides significant protections from improper terminations for most employees. *See* Iowa Code §§ 8A.411, 8A.412, 8A.413(19), 8A.415(2). But the Legislature also explicitly excluded certain state employees from these protections with precision, reflecting a legislative determination that the proper functioning of government requires those employees to be at will. *See* Iowa Code § 8A.412(1)–(24). The Court should not second-guess those policy choices under the guise of concluding that the Legislature implicitly authorized those same employees to bring wrongful-discharge claims for every alleged violation of state law. *Cf. Walsh v. Wahlert*, 913 N.W.2d at 526 (holding that wrongful-

discharge claim in violation of public policy is unavailable for state employee covered by the merit system).

And don't forget Carver-Kimm's expansive view on *who* can be sued. Or the minimal allegations she believes can be pleaded to survive the heightened pleading standards of section 669.14A(3). Taken together with her broad view of what's a clearly defined and well-recognized public policy to support the tort, the result of all Carver-Kimm's argument is rather extraordinary. Any discharged state agency employee whose job involves performing duties mandated or regulated by the statutes governing the agency—which is most employees—could sue, alleging that she was fired for following the law governing her job. And she could sue not just the department director, but the Governor. Based on her belief that the Governor must have had some involvement. This cannot be the law.

Carver-Kimm has failed to identify a clearly defined and well-recognized public policy, that is related to health, safety, or welfare, and expressly or impliedly provides employment protections, to support her wrongful-discharge claim. This dooms her claim.

B. Even if chapter 22 provides a public policy that is sufficiently defined and well-recognized to support the wrongful-discharge tort, Carver-Kimm's resignation did not undermine the policy.

Carver-Kimm's claim also fails because even if chapter 22 could be considered a clearly defined and well-recognized public policy, her resignation from the Department did not—and could not—undermine that policy. The district court held—without any detailed reasoning—that the "public policy under Iowa's open records laws" would be "undermined if State employees, designated as law custodians under chapter 22, were forced to quit when they complied or attempted to comply with the provisions of chapter 22." App. 176. But given the comprehensive enforcement scheme established in chapter 22, any public interest in open and transparent records is sufficiently protected so as not to jeopardize the policy.

The chapter can be enforced by "[a]ny aggrieved person, any taxpayer to or citizen of the state of Iowa, or the attorney general or any county attorney." Iowa Code § 22.10(1). A court may issue an injunction, award personal civil damages of up to $2,500, and assess costs and attorney fees. *Id.* § 22.10(3) (a)–(c). A court may even remove a person from public office for repeated violations. *Id.* § 22.10(3)(d). Violations can also be addressed through judicial review proceedings or actions seeking mandamus or injunction. *See*

id. § 22.5. And even those who want to ensure records are *not* released can seek the issuance of an injunction to protect their interests. *Id.* § 22.8. Chapter 22 can also be enforced by an independent agency—the Iowa Public Information Board—that provides the public "an alternative means by which to secure compliance" in an "efficient, informal, and cost-effective" manner. Iowa Code § 23.1.[7]

Given this robust enforcement scheme, the termination of an employee allegedly in connection with some interest protected by chapter 22, does not jeopardize the enforcement of the chapter. *See Watson*, 2014 WL 1513455, at *11 (concluding that public policy was not jeopardized by termination where "formal pursuit of public records is protected by the remedies" of the open-records statute). Unlike situations where an employee is improperly forced to choose between filing a workers compensation claim and continued employment—where the policy is clearly undermined by denying employees their statutory right to worker's compensation—Carver-Kimm's reassignment or resignation in no way undermines the production of nonconfidential records. If requested records are erroneously or improperly withheld, the requestor may *always* seek their

[7] Notably absent from this comprehensive scheme in either Chapter 22 or 23 is any express employment protections for government employees. That absence further counsels against implying the Legislature's intent to provide such a protection through the wrongful-discharge tort.

production through chapter 22 or chapter 23, regardless of the specific department personnel assigned to respond to the request. *See id.* at (11 ("Given the court oversight and the penalties for failure to produce public records and for failing to provide exculpatory evidence, we conclude that Ohio's public policy is not jeopardized by plaintiffs' discharge.").

CONCLUSION

For these reasons, the district court's decision denying the motion to dismiss Carver-Kimm's wrongful-discharge-in-violation-of-public-policy claim and all claims against Governor Reynolds and Pat Garrett should be reversed. The case should proceed against only the potentially proper parties—the Department leaders for whom she actually worked—and under only the statutory wrongful-discharge claim that the Legislature expressly created to protect at-will State employees like herself.

REQUEST FOR ORAL SUBMISSION

Appellants request to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COST

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

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 12,694 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 10, 2022, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

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