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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SUZETTE RASMUSSEN, Plaintiff, v. GOVERNOR KIM REYNOLDS, MICHAEL BOAL, and OFFICE OF THE GOVERNOR OF THE STATE OF IOWA Defendants.	Case Nos. CVCV062318 and CVCV062322 **BRIEF IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED PETITION**

Defendants Governor Kim Reynolds, Michael Boal, and the Office of the Governor of the State of Iowa, file this brief in support of their Motion to Dismiss First Amended Petition under Iowa Rule of Civil Procedure 1.421.

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INTRODUCTION

Plaintiff Suzette Rasmussen made two similar open records requests to Governor Kim Reynolds on two straight days in March 2021. (Am. Pet., Case No. CVCV062318, ¶ 17; Am. Pet., Case No. CVCV062322, ¶ 17)). A few months later in July, the Governor's senior legal counsel, Michael Boal, emailed Rasmussen to clarify the email search she would like performed to locate records potentially responsive to her requests. (Am. Pet. ¶ 18).[1] Rasmussen responded the same day, confirming the search terms. (*Id.* ¶ 19). Less than a month later, when Rasmussen had not yet received any responsive records, she filed these two lawsuits. (*Id.* ¶ 20).

At first, she alleged that Governor Reynolds and Boal violated Iowa's open records laws—chapter 22 of the Iowa Code—by refusing to provide her records. (Pet. ¶ 25). And she sought injunctive and other relief to enforce compliance with chapter 22 and obtain the requested records. (*Id.* ¶¶ A–E). But three weeks later, Boal provided Rasmussen records responsive to her request through counsel in this proceeding. (Am. Pet. ¶ 22; *see also* Exhibit A (Affidavit of Michael Boal and Records Response)).

[1] Rasmussen's two petitions are nearly identical in substance, except for each paragraph 17 alleging each open records request. (*See* Mtn. to Consolidate ¶ 5). Any cite to the Petition thus applies to either petition unless the case number is specified.

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Because Rasmussen has received all the requested records, these suits are now moot. True, Rasmussen has now amended her petitions to seek a declaratory judgment that the timeliness of the production violates the statute. But that is also merely an academic question that need not be answered by the Court.

Even if a timeliness claim under chapter 22 is not moot, it fails as a matter of law. When brought against the Governor, her office, or her staff, such a claim is a nonjusticiable political question because it cannot be decided without making policy and value decisions about the allocation of time and resources within the Governor's Office. Interpreting it to apply would also infringe on the Governor's executive privilege by forcing her to reveal information protected by the privilege to defend the reasonableness of her efforts to respond. And even if the claim can be asserted, Rasmussen has not alleged a violation here because Governor Reynolds, Boal, and the Governor's Office did not refuse to provide Rasmussen's records. These cases should be dismissed.

If this Court still concludes that Rasmussen has a viable claim that can proceed, all her requests for relief except for attorney fees must still be dismissed. She doesn't have standing to seek prospective injunctive relief, statutory damages, or removal of Governor Reynolds or Boal. And the removal-from-office provision can't apply at all because the Governor may only be removed by impeachment and her senior legal counsel is an employee, not a state officer.

STANDARD FOR MOTIONS TO DISMISS

Rule 1.421 of the Iowa Rules of Civil Procedure authorizes a pre-answer motion to dismiss for "[f]ailure to state a claim upon which nay relief may be granted." Iowa R. Civ. P. 1.421(1)(f). Motions to dismiss test "the legal sufficiency of the challenged pleading." *Southard v. Visa U.S.A., Inc.*, 734 N.W.2d 192, 194 (Iowa 2007). A motion to dismiss "accept[s] as true the petition's well-pleaded factual allegations, but not its legal conclusions." *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014). A motion to dismiss must be granted "when the petition's allegations, taken as true, fail to state a claim upon which relief may be granted." *Id.*

Since "a court will generally decline to hear a case when, because of changed circumstances, the court's decision will no longer matter," *Homan v. Branstad*, 864 N.W.2d 321, 328 (Iowa 2015), a motion to dismiss is an appropriate method of alerting the court that a case is moot. *See, e.g.*, *Remer v. Bd. of Med. Examiners*, 576 N.W.2d 598, 599 (1998) (affirming denial of attorney fees in a judicial review proceeding after district court had granted the agency's motion to dismiss on mootness grounds); *Riley Drive Ent. I, Inc. v. Reynolds*, Polk Cty. Case No. CVCV060630, at 7–11 (Iowa D. Ct. Nov. 16, 2020) (granting motion to dismiss on mootness and other grounds); *cf. Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 334 N.W.2d 439, 442 (Iowa 1983) (granting motion to dismiss portion of appeal as moot). This court may consider evidence of mootness outside the existing record when ruling on a motion to dismiss. *Cf. Clarke Cty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 170 & n.3 (Iowa 2015) (considering evidence outside the record submitted with motion to dismiss appeal as moot); *see also Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Cmm'n*, 255 N.W.2d 917, 924 (Wis. 1977).

ARGUMENT

I. Rasmussen's open-record claim under chapter 22 is moot because she has now received the records she requested.

"Courts exist to decide cases, not academic questions of law. For this reason, a court will generally decline to hear a case when, because of changed circumstances, the court's decision will no longer matter." *Homan*, 864 N.W.2d at 328. A case should be dismissed as moot "if it no longer presents a justiciable controversy because the issues involved are academic or nonexistent." *Id.* (cleaned up). Put another way, the "test is whether an opinion would be of force and effect with regard to the underlying controversy." *Women Aware v. Reagen*, 331 N.W.2d 88, 92 (Iowa 1983).

A court may still choose to decide an otherwise moot case under the public-importance exception, when "matters of public importance are presented and the problem is likely to recur." *Homan*, 864 N.W.2d at 330 (cleaned up). Courts consider four factors in deciding whether to exercise discretion to decide a moot case under this exception:

> (1) The private or public nature of the issue; (2) the desirability of an authoritative adjudication to guide public officials in their future conduct; (3) the likelihood of the recurrence of the issue; and (4) the likelihood the issue will recur yet evade appellate review.

Id. (quoting *Maghee v. State*, 773 N.W. 228, 234 (Iowa 2009)).

But even so, the judiciary's "lawgiving function is carefully designed to be an appendage to [its] task of resolving disputes." *Wengert v. Branstad*, 474 N.W.2d 576, 578 (Iowa 1991). "When a dispute ends, the lawgiving function ordinarily vanishes" and a court "certainly should not go out of [its] way to answer a purely moot question because of its possible political significance." *Id.*

Rasmussen filed these suits when she had not received a response to her two back-to-back open-records requests to Governor Reynolds. (Am. Pet. ¶ 20). Those records have now been provided. (Am. Pet., Case No. CVCV062318, ¶ 22; Am. Pet., Case No. CVCV062322, ¶ 22; Exhibit A (Affidavit of Michael Boal and Records Response). This resolved the controversy between the parties and any further opinion of the court would have no "force and effect with regard to the underlying controversy." *Women Aware*, 331 N.W.2d at 92. The issues involved in Rasmussen's two filed petitions are now "nonexistent." *Homan*, 864 N.W.2d at 328.

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

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

And Rasmussen's moot suits here do not satisfy the requirements of the public-importance exception. *See Homan*, 864 N.W.2d at 330. While any claim under chapter 22 presents a public issue, her suits involve relatively routine open-record requests. Unlike the disputed confidentiality issue in *Neer v. State*, 2011 WL 662725, at *2, here, there are no novel issues about whether the records were public records subject to chapter 22 or subject to any confidentiality provisions where authoritative guidance could be useful. As evidenced by the production of the records, *see* Exhibit A (Affidavit of Michael Boal and Records Response), Governor Reynolds and Boal agree that Rasmussen is entitled to the records, and they have been provided to her. While records requests certainly occur with frequency before governmental bodies, including the Governor's Office, it's unlikely that any issue with the production of these particular records will recur.

The Supreme Court's decision in *Horsfield Materials,* 834 N.W.2d 444, is not to the contrary. In that case, the Court did hold that a city violated chapter 22 by its delay in producing requested records. *See id.* at 462–63. But the Supreme Court didn't consider mootness in the decision. Because the issue was not considered and ruled on by the Court, *Horsfield Materials* is not binding precedent on the issue. *See State v. Foster*, 356 N.W.2d 548, 550 (Iowa 1984) ("To sustain a claim of binding precedent a case must be interpreted in reference to an involved question which necessarily must be decided."); Bryan A. Garner et al., *The Law of Judicial Precedent* 84 (2016) ("A decision's authority as precedent is limited to the points of law raised by the record, considered by the court, and determined by the outcome."). Nor did that case—involving a City—have the same constitutional and political-question issues present here against the Governor, one of her staff, and her office. Because Rasmussen's chapter 22 claim is moot, her case should be dismissed.

II. Even if a timeliness claim isn't moot, it fails as a matter of law when brought against the Governor because it's a nonjusticiable political question and would infringe on her executive privilege.

In her amended petitions, Rasmussen alleges that Governor Reynolds, Boal, and the Governor's Office violated chapter 22 by "withholding" or "delaying the production" of her records. (Am. Pet. ¶ 33; *id.* at 5, ¶ A). Chapter 22 contains no hard deadline for responding to a records request. *See Horsfield Materials*, 834 N.W.2d at 461 (rejecting argument that section 22.8(4)(d) imposes "an absolute twenty-day deadline on a government entity to find and produce requested public records, no matter how voluminous the request"). But the Supreme Court has held that some "substantial" delays in producing records may be a "refusal" that could violate the chapter. *Id.* at 463 n.6.

In *Horsfield Materials*, the Court held that a city that hadn't provided requested records for nearly three months didn't substantially comply with chapter 22. *Id.* at 462. It concluded that this delay was a "refusal" to provide records that put the burden on the city to prove compliance. *Id.* at 463 & n.6. And while it was a "close question," whether the delays were reasonable, the Court reasoned that the city hadn't provided enough detailed evidence to support its explanation. *Id.* at 462–63.

The city administrator had testified in some detail about the tasks necessary to produce the records and the other "urgent matters" with which he was dealing. *Id.*at 462. But the Court found it lacking that "his explanations did not include any dates or other time frames." *Id.* And the Court thus could not judge "how much time it really took city officials to work on [the records] request, relate to other demands on city officials' time." *Id*. at 462–63.

Assuming that the *Horsfield Materials* analysis is correct for other governmental bodies, it should not be extended to apply to a claim against the

Governor, her staff, and her office.[2] The Court would be asked to inquire whether the time spent by the Governor and her staff in relation to the time working on Rasmussen's record request was reasonable. Doing so would present a nonjusticiable political question. Such an interpretation of chapter 22 would also unconstitutionally infringe on the Governor's executive privilege by forcing her to disclose protected information to defend the claim. For either of these reasons, the claim must be dismissed.

A. Assessing the timeliness of a response from the Governor is a nonjusticiable political question.

A political question exists when "one or more of the following considerations is present":

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving the issue; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Iowa Citizens for Cmty. Improvement v. State, 962 N.W.2d 780, 794, (Iowa 2021) (quoting *State ex rel. Dickey v. Besler*, 954 N.W.2d 425, 435 (Iowa 2021)).

[2] Without any textual basis in the statute itself for a timeliness claim, the Court based its interpretation that chapter 22 requires prompt provision of records on the Iowa Uniform Rules on Agency Procedures and Fair Information Practices, which were proposed by a task force and have been adopted by many agencies. *See Horsfield Materials*, 834 N.W.2d at 461. But the Governor is not an agency, has not adopted such rules for her office, and is not bound by them. *See* Iowa Code § 17A.2(1). And the rules thus have little weight in interpreting the statute as applied to the Governor. The analysis makes even less sense here for email records that were exclusively extracted from data processing software and thus the normal rights to examine and copy records do not apply. *See* Iowa Code §§ 22.2(4)(b); 22.3A(2).

"Whether a matter involves a "political question" is determined on a case-by-case basis and requires an examination of the nature of the underlying claim." *King v. State*, 818 N.W.2d 1, 17 (Iowa 2012).

The doctrine is grounded in separation-of-powers principles, and counsels that the court must "leave intact the respective roles and regions of independence of the coordinate branches of government." *Des Moines Register & Trib. Co. v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996). Relevant here,

> The political question doctrine excludes from judicial review those controversies which *revolve around policy choices and value determinations* constitutionally committed for resolution to the halls of [the General Assembly] or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as courts are fundamentally *underequipped to formulate [state] policies* or develop standards for matters not legal in nature.

King, 818 N.W.2d at 16–17 (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

As for the first consideration, the Iowa Constitution tasks the governor with executing the state's laws. *See* Iowa Const. art. IV, § 1 (vesting "[t]he supreme executive power of this state" in the Governor); *id.* art. IV, § 8 ("He shall take care that the laws are faithfully executed."). The operations of her office staff that coordinate all these duties are at the core of this constitutional authority. *See Ryan v. Wilson*, 300 N.W. 707, 712 (Iowa 1941) (noting that while the Governor "is the chief executive officer of the State, his job isn't a one-man job" and "[i]n the performance of his manifold duties, he is required to call for and to rely upon the assistance of many other officers and employees of the State"); *Godfrey v. State*, 962 N.W.2d 84, 112 (Iowa 2021) (recognizing Governor's management of the budget of the executive branch was a "constitutional power[] to be exercised wholly at the discretion of the governor" under article IV, section 1 of the Constitution). The tasks that the Governor assigns to the

staff of her office—and the way in which her staff resources are allocated between responding to open records requests and her other "many and burdensome and important" duties, *Ryan*, 300 N.W. at 712—are textually entrusted to the Governor by the Constitution.

And there are not judicially discoverable and manageable standards for resolving whether the timeliness of Rasmussen's response was reasonable. How would a court be expected to assess whether the Governor's senior legal counsel should have been spending more time working on her request rather than, say, drafting a public health disaster proclamation or discussing passed legislation with the Governor as she considers whether to sign it? Or by what standard could a court of law pass judgment on whether the Governor should have hired more staff or allocated more of her staff to work on open records requests instead of duties related to the pandemic, the legislative session, or other operations of state government? Conducting the *Horsfield Materials* analysis to consider the timeliness of the Governor's response to an open records request would be unmanageable.

So too would this assessment be impossible to make without "initial policy determination[s] of a kind clearly for nonjudicial discretion." The allocation of limited time and resources of the Governor's staff, particularly during the current challenges times is at core a policy and political question—not a legal one. And second-guessing whether the Governor has made these decisions properly—when the voters elected her and thereby sanctioned her judgment over precisely these types of policy decisions—would amount to "expressing a lack of respect due [to the] coordinate branches of government."

Rasmussen's claim improperly requires the judiciary to preempt the exercise of discretion by the executive. Because resolving her claim raises a host of political questions, it should be dismissed for lack of justiciability.

B. Interpreting chapter 22 to apply a timeliness claim against the Governor would infringe on her executive privilege by requiring her to disclose protected information to defend the claim.

An interpretation of chapter 22 that permits a timeliness claim to be asserted against the Governor, her staff, and her office would also raise serious constitutional concerns as a violation of the separation of powers because defending the claim would infringe on the Governor's executive privilege. Leaving aside the political-question problems, to conduct the *Horsfield Materials* analysis to determine the reasonableness of the response time, the Court would need substantial details about what the Governor and her staff were spending their time doing in relation to the time on Rasmussen's request and why the Governor decided to allocate her staff resources in that way. And mere summary explanations are apparently insufficient—the Supreme Court demands detailed specific evidence. *Horsfield Materials*, 834 N.W.2d at 462–63. Thus if a timeliness claim against the Governor, her staff, or her office could proceed to discovery or trial, a plaintiff would inquire into these topics. And to properly defend against such a claim, the Governor and her staff would be forced to put forth similar information.

But the Governor's decisionmaking and communications are protected by executive privilege. And absent her waiver, they should generally be kept confidential. Interpreting chapter 22 to require the court to answer such a question would set up a clash between the protections of the privilege and the judiciary's resolution of the lawsuit. That should be avoided.

The Iowa Supreme Court has acknowledged that there is "an executive privilege, derived from the doctrine of separation of powers in both our State and federal constitutions." *State ex rel. Shanahan v. Iowa Dist. Ct.*, 356 N.W.2d 523, 526–27 (Iowa 1984). The Court quoted from *United States v. Nixon*, 418

U.S. 683 (1974), which explained that "[t]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." *State ex rel. Shanahan*, 356 N.W. at 527 (quoting *Nixon*, 418 U.S. at 706). But the Iowa Supreme Court ultimately decided the case on other statutory grounds. And so the Court has not yet fleshed out the full scope of the privilege.

But the starting point—particularly given its favorable citation by the Iowa Supreme Court—is *Nixon*. The issue in *Nixon* was whether a court could enforce a subpoena for Presidential communications for use in a criminal prosecution. More generally, the opinion discusses the two competing interests to be balanced in executive privilege cases: transparency in the disclosure of important documents, and deference by courts to executive decision- and policymaking. A unanimous Court recognized that the "President's need for complete candor and objectivity from advisers calls for great deference from the courts." 418 U.S. at 706. Executive privilege therefore upholds "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* at 708.

Other states have also followed *Nixon* to recognize an executive privilege for their Governor. *See, e.g.*, *Freedom Foundation v. Gregoire*, 310 P.2d 1252 (Wash. 2013) (en banc); *Republican Party of New Mexico v. New Mexico Tax'n & Revenue Dept.*, 283 P.3d 853 (N.M. 2012); *State ex rel. Dann v. Taft*, 848 N.E.2d 472 (Ohio 2006); *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777 (Del. Super. Ct. 1995); *Nero v. Hyland*, 386 A.2d 846 (N.J. 1978).

The states have varied in their precise scope, and how the privilege can be pierced by other interests. But the sorts of communications and decisionmaking that would be put at issue with a wrongful discharge claim like the one here would be at the core of its protections. The Court should be wary of opening the door to the consequences of that confidentiality being lost. *Cf. Ryan*, 300 N.W. at 715 ("In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restrain." (quoting *Spalding v. Vilas*, 161 U.S. 483, 498–99 (1896))). This is particularly so where even if the court received all the confidential information, the claim presents a nonjusticiable political question.

III. Even if a timeliness claim may be asserted against the Governor and her staff, it fails as a matter of law because Governor Reynolds and Boal did not violate chapter 22.

Governor Reynolds, Boal, and the Office of the Governor did not violate chapter 22 because they did not "refuse[] to make [the requested] government records available for examination" or otherwise violate the statute. Iowa Code § 22.10. Chapter 22 contains no hard deadline for responding to a records request. *See Horsfield Materials*, 834 N.W.2d at 461 (rejecting argument that section 22.8(4)(d) imposes "an absolute twenty-day deadline on a government entity to find and produce requested public records, no matter how voluminous the request"). And while the Supreme Court has held that some "substantial" delays in producing records may be a "refusal" under the statute, *id.* at 463

n.6., this Court can conclude that under the unique facts alleged here there was no such delay that rises to a violation.

Rasmussen made her open records requests to Governor Reynolds on two straight days—March 11 and March 12, 2021. (Am. Pet., Case No. CVCV062318, ¶ 17; Am. Pet., Case No. CVCV062322, ¶ 17)). A few months later in July, Boal, emailed Rasmussen to clarify the email search she wanted performed to locate records potentially responsive to her requests. (Am. Pet. ¶ 18). Rasmussen responded the same day, confirming the search terms. (*Id.* ¶ 19). Less than a month later, when Rasmussen had not yet received any responsive records, she sued (*Id.* ¶ 20). And on September 2, 2021, Boal provided Rasmussen her records. This took 175 days from her first request. (Am. Pet., Case No. CVCV062318, ¶ 31).

As this Court can take judicial notice, all of this occurred during an unprecedented public health disaster. *See* Governor's Disaster Proclamations, https://coronavirus.iowa.gov/pages/proclamations (showing that a public health disaster proclamation has been in effect at all operative times). And Rasmussen was seeking these records from the Governor—who was not just directing the State's response to the pandemic and economic recovery, but also managing all state government. And for nearly half of this period, the Legislature was in session or the Governor was in her 30-day period to consider bills passed in the session. *See* Act of June 17, 2021 (H.F. 708), Iowa Acts. ch. 184 (noting that act was approved on June 17, 2021—the final Act signed by the Governor after the session). Under these circumstances, Governor Reynolds, Boal, and the Office of the Governor did not refuse to provide the records to Rasmussen. There's been no violation of chapter 22, and thus she has no right to any further relief. *See* Iowa Code § 22.10(3) (requiring a violation of the chapter for any other relief).

IV. Even if Rasmussen's claim cannot be dismissed entirely, the Court should dismiss all claims for relief except for attorney fees.

If this Court concludes that the entire case cannot be dismissed at this stage, only Rasmussen's claim for attorney fees can proceed. She doesn't have standing to seek prospective injunctive relief, statutory damages, or removal of Governor Reynolds or Boal. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs (TOC), Inc.*, 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."). And the removal-from-office provision cannot apply here because the Governor can only be removed by impeachment and her senior legal counsel is an employee, not a state officer.

A. Rasmussen lacks standing to request injunctive relief.

Rasmussen has received her requested records. She has not pled that she plans to submit any other requests for records to Governor Reynolds or Michael Boal. And as a resident of Draper, Utah, (Am. Pet. ¶ 11), it seems unlikely that she will be a frequent requester of records from the *Iowa* governor. Yet she still seeks prospective injunctive relief ordering Governor Reynolds, Boal, and the Office of the Governor "to refrain for one year from any future violations." (*Id.* ¶ B).

Rasmussen lacks standing to seek prospective injunctive relief. *See Dodge v. City of Council Bluffs*, 10 N.W. 886, 889 (Iowa 1881) (holding that injunction was inappropriate because equitable relief is available "to prevent injuries which are imminent, not merely possible"); *Lessenger v. City of Harlan*, 168 N.W. 803, 807 (Iowa 1918) ("Unless damage to the plaintiff . . . is reasonably apprehended, [s]he has no ground on which to base an injunction."). Be-

cause of this lack of standing—or any basis in the petition to conclude prospective injunctive relief under 22.10(3)(a) is "appropriate"—any request for prospective injunctive relief should be dismissed.

B. Rasmussen lacks standing to request statutory damages.

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

Rasmussen correctly noted in her resistance to the original motion to dismiss that even nominal damages of $1 are sufficient to meet the redressability requirements of standing. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021). But that is because "nominal damages are in fact damages paid to the plaintiff" and thus "they affect the behavior of the defendant towards the plaintiff and thus independently provide redress." *Id.* at 801 (cleaned up). Since statutory damages under § 22.10(3)(b) are not paid to Rasmussen—they just shuffle money to the State—they do not provide any redress to Rasmussen and she lacks standing to seek them.[3] Statutory damages under § 22.10(3)(b) cannot provide a basis to maintain Rasmussen's suit and should be dismissed.

[3] This is not to say that statutory damages can never be assessed. The "attorney general or any county attorney" may also "seek judicial enforcement" of chapter 22. Iowa Code § 22.10(1). And the Attorney General, on behalf of the State, would not have the same standing limitations present here.

C. Rasmussen lacks standing to request removal from office and such a claim fails as a matter of law here because the Governor can only be removed by impeachment and her senior legal counsel is an employee, not a state officer.

Just as with her claims for injunctive relief and statutory damages, Rasmussen has no personal interest that would be redressed by removing Governor Reynolds or Boal from office. Such action would not affect Rasmussen in any way or even prevent any future injury to Rasmussen. And any speculative interest is even more remote since Rasmussen is not an Iowa resident to whom Iowa state officers are accountable—but rather a resident of Utah. (Am. Pet. ¶ 11). But that's not the only defect with her request for this relief.

The removal-from-office provision of chapter 22 cannot apply to the Governor because under the Iowa Constitution, she may only be removed from office by impeachment. True, that statute authorizes "an order removing a person from office if that person has engaged in a prior violation of this chapter for which damages were assessed against the person during the person's term." Iowa Code § 22.10(3)(d). But the Iowa Constitution provides: "The governor, judges of the supreme and district courts, and other state officers, shall be liable to impeachment for any misdemeanor or malfeasance in office." Iowa Const. art. III, § 20.

And while "other civil officers shall be tried for misdemeanors and malfeasance in office, in such manner as the general assembly may provide," *id.*, the Constitution does not permit the Legislature to enact another method of removal for the Governor or other officers subject to impeachment. *See Brown v. Duffus*, 23 N.W. 396, 398 (Iowa 1885) ("When the term of office is fixed by the constitution, and the method of trial and cause of removal is prescribed by the constitution, it is not competent for the legislature to prescribe any other method of cause for removal of such officer." (citing *Brown v. Grover*, 6 Bush 1,

3 (Ky. Ct. App. 1869))); *cf. State v. Henderson*, 124 N.W. 767, 770 (Iowa 1910) (holding that the office of mayor of a city is not a constitutional office so the Legislature could enact statutes providing for other methods of removal); *Clark v. Herring*, 260 N.W. 436, 437–38 (Iowa 1935) (holding that appointed commissioner of insurance is "not a state officer liable to impeachment by the General Assembly, but was an officer to be tried for misdemeanor and malfeasance in office in such manner as the Legislature has provided by statute"). Applying section 22.10(3)(d) to the Governor would thus violate article III, section 20, of the Iowa Constitution. Rasmussen's claim fails.

The removal-from-office provision also cannot apply to Michael Boal because he is an employee of Governor Reynolds, not a state officer. Boal is Governor Reynolds's senior legal counsel. (Am. Pet. ¶ 14). Neither the Iowa Constitution nor any statute creates an office of "senior legal counsel." Boal's employment on Governor Reynolds's staff does not have a fixed term or any statutory or constitutional duties distinct from the Governor's. Only the Governor is the officeholder. The statute only authorizes "removing a person from *office*," and requires a consideration of whether "damages were assessed against the person during the person's term." Iowa Code § 22.10(3)(d). It cannot apply here to an employee of the Governor. The claim for this relief must be dismissed.

CONCLUSION

For these reasons, Rasmussen's open-records claim against Governor Reynolds, Michael Boal, and the Office of the Governor should be dismissed.

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Respectfully submitted,

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ATTORNEY FOR DEFENDANTS

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties of record by delivery in the following manner on October 11, 2021:

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

Signature: */s/ Samuel P. Langholz*