IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IOWA ATHEISTS AND FREETHINKERS, INC., Plaintiff, v. KIM REYNOLDS, in her official capacity as Governor of the State of Iowa, et al., Defendants.	Case No. CVCV069066 **MEMORANDUM OF AUTHORITIES IN SUPPORT OF RESISTANCE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiff Iowa Atheists and Freethinkers, Inc., by and through undersigned counsel and pursuant to Iowa Rule of Civil Procedure 1.981(3), respectfully submits this Memorandum of Authorities in Support of its Resistance to Defendants' Motion for Summary Judgment.

TABLE OF CONTENTS

INTRODUCTION

The "executive privilege" Defendants propose does not exist anywhere. It shares a few passing characteristics with types of executive privilege that have been allowed for the United States President and federal executive agencies. It borrows the most general language from other state supreme courts recognizing gubernatorial analogues. But in its unlimited scope, ambiguous definition, and unilateral discretion, it is unique. Defendants ask this Court not only to be the first in Iowa to recognize *any* form of executive privilege, but to be the first in the Nation to grant a governor's office unreviewable and unlimited power to conceal acknowledged *public* records without any burden or showing whatsoever. Defendants' Motion should be denied, and the inapplicability of any hypothetical executive privilege borne out through the continued progression of the case.

FACTUAL AND PROCEDURAL BACKGROUND

Defendants are in possession of around 32 pages of emails, reports, and text messages they concede meet the definition of "public records" under Iowa Code chapter 22. (Statement of Additional Material Facts in Support of Resistance to Motion for Summary Judgment ¶ 10 [hereinafter, "SAMF"]). Defendants disclosed the existence of these records in response to Plaintiff's open records request, but refused to produce them without redaction, claiming "executive privilege." (SAMF ¶¶ 4-5). On further demand, Defendants provided a "privilege log" revealing three categories of records withheld on this basis: (1) executive agency reports, (2) so-called "media prep" documents, and (3) text messages between Defendant Governor's Office's

Chief Operating Officer and the Director of the Department of Administrative Services on an unknown subject. (SAMF ¶¶ 12-13, 25-26, 38). After Plaintiff filed this action, Defendants pursued unsuccessful motions to stay the case and later, deny discovery, on the recurring theory that "No fact development is needed to determine that executive privilege both exists and protects the documents at issue in this lawsuit." (Mot. to Stay ¶ 7 (July 24, 2025) (D0010)); (Mot. for Protective Order ¶ 6 (Oct. 15, 2025) (D0020-0) ("[D]iscovery is not necessary *at all* for the Court to resolve the issues raised by Plaintiff's petition."")). They have offered no evidence supporting their motion, and thus this theory, absent any factual basis, forms the sole basis of their Motion for Summary Judgment.

Defendants have pursued the same strategy, also unsuccessfully, in another case they filed on or around the same day Plaintiff filed its action. (Pet. for Injunctive Relief Under Iowa Code § 22.8, *Records Custodian v. The Des Moines Register*, No. CVCV069048 (D0001-0) (April 25, 2025) (Iowa Dist. Ct. Polk Cty.)). In that case, Defendants—as plaintiffs[1]—seek a protective injunction over public records sought by the Des Moines Register. (*See generally id.*). The public records in that case appear entirely unrelated to the public records at issue here. (Defendants' Answer, Affirmative Defenses and Counterclaim, at 12, ¶ 19, *Records Custodian v. The Des Moines Register*, No. CVCV069048 (D0010-0) (May 23, 2025) (Iowa Dist. Ct. Polk Cty.)).

[1] This distinction has proven somewhat unwieldy in Defendants' filings. (Mot. to Stay ¶ 5 (asking "whether Plaintiffs are required by law to disclose certain documents")); (Br. in Supp. of Mot. for Summ. J. under Rule 1.981 at 2 (Oct. 9, 2025) (D0019-2) (asserting "Plaintiffs correctly asserted executive privilege")). However, that Defendants have treated the two cases as the same does not make it so. (Ruling on Defs.' Mot. to Stay at 4 (Oct. 8, 2025) (D0018) ("The facts in the two cases are not the same and a judgment may be different depending on the limits (if any) the supreme court might place on executive privilege.")). The records at issue *are* the issue, and they are different. (*Id.* at 2). Defendants' theory of executive privilege ignores this, illustrating its unlimited scope. Apparently, to Defendants, the records don't matter; it only matters that a court grant them an executive privilege.

Defendants have sought interlocutory appeal in that litigation twice and have been denied twice. (Order at 1, *Records Custodian of the Governor v. The Des Moines Register*, No. 25-1680 (Iowa Dec. 3, 2025)); (Order at 1, *Records Custodian of the Governor v. The Des Moines Register*, No. 26-0074 (Iowa Jan. 16, 2026)). *Records Custodian v. The Des Moines Register* is now also being briefed on a similar motion for summary judgment. (Ruling on Defendant's Second Mot. for Extension of Time to Resist Plaintiffs' Mot. for Summary Judgment at 5-7, *Records Custodian of the Governor v. The Des Moines Register*, No. CVCV069048 (D0048) (Jan. 30, 2026) (Iowa Dist. Ct. Polk Cty.)).

Defendants' Motion for Summary Judgment—in both cases—is premature. Defendants filed it the day after being denied a stay of all proceedings. (Ruling on Defendants' Mot. to Stay (Oct. 8, 2025) (D0018)); (Mot. for Summ. J. under Rule 1.981 (Oct. 9, 2025) (D0019-0)). They seek summary judgment not on the basis that Plaintiff cannot prove its case, but on their own unsupported legal theory. (Br. in Supp. of Mot. for Summ. J. under Rule 1.981 at 29 (D0019-2) (Oct. 9, 2025) ("Documents protected by executive privilege are absolutely protected.") [hereinafter, "Defs.' Br."]). Their "undisputed material facts" are, firstly, disputed, and secondly, submitted entirely without support. (Plaintiff's Response to Defendants' Statement of Facts at 1-7 [hereinafter, "Pl.'s Resp."]); *see also* Iowa R. Civ. P. 1.981(8) (requiring every motion for summary judgment be accompanied by statement of facts with "specific reference to those parts of the pleadings, depositions, answers to interrogatories, admissions on file and affidavits which support such contentions"). The record on which their Motion for Summary Judgment is based consists of, in its entirety: (a) Plaintiff's petition, with exhibits, and (b) two memorandums of understanding by prior administrations with the State Historical Society with fleeting reference to "executive privilege." (App. of Ex. in Support of Mot. for Summ. J. at 4-44 (Oct. 9, 2025) (D0019-1)); (Pl.'s

Resp. at 1-2 (noting "executive privilege" mentioned only once in memorandums' reservation of rights clause)).

What fact development has occurred has been at Plaintiff's initiative and over Defendants' strenuous objection. Prior to Defendants' Motion for Summary Judgment, Plaintiff had served discovery inquiring into the basis of Defendants' assertion of executive privilege over the agency report, media prep documents, and text messages. (Plaintiff's Notice of Service of Written Discovery Requests (Aug. 25, 2025) (D0016)); (Mot. for Continuance of Summ. J. Proceedings to Allow Discovery at ¶ 6 (Oct. 16, 2025) (D0022-0) (describing crucial facts and foundational inquiries sought in discovery)). Defendants' responses to this discovery were deficient, even following their failed motion for a protective order.[2] (Ruling on Defendants' Mot. for Protective Order and Plaintiff's Motion to Continue Summ. J. Proceedings at 4 (Jan. 2, 2026) (D0032)). Yet even this limited information demonstrates material disputes of dispositive facts as to whether, under any reasonable conception of executive privilege these documents would enjoy its protection. .

In short, Defendants support their Motion with nothing more than an unsupported, unexplained assertion of an unrecognized privilege, in contradiction to Plaintiff's acknowledged rights under the Iowa Open Records Act. At a basic level, and despite every opportunity, Defendants have been unwilling or unable to explain why it is that *these* records—an agency report, media prep documents, and some texts—should be secured from the public under executive privilege. The claim was, and remains, "Because." This is not sufficient.

[2] Plaintiff has notified Defendants of this discovery deficiency pursuant to Iowa Rule of Civil Procedure 1.503(4)(b) and will submit appropriate motion if attempts under rule 1.517(5) to resolve the dispute are unsuccessful.

GOVERNING LEGAL STANDARD

In reviewing Defendants' Motion for Summary Judgment, facts and inferences drawn from the facts are viewed in the light most favorable to Plaintiff. *Teig v. Chavez*, 8 N.W.3d 484, 490 (Iowa 2024). Summary judgment is appropriate only if Defendants have *proven* "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). Defendants bear the burden to "affirmatively establish uncontroverted facts that are legally controlling as to the outcome of the case." *McVey v. National Organization Service, Inc.*, 719 N.W.2d 801, 802 (Iowa 2006). As Defendants' rule 1.981(8) "statement of undisputed facts" does not itself "constitute a part of the record from which the absence of genuine issues of material fact may be determined," and as Defendants did not submit any affidavits nor conduct any discovery of Plaintiff, Defendants propose to meet their summary judgment burden in this case relying solely on the contents of the pleadings. *Id.*; *see also* Iowa R. Civ. P. 1.981(3). Even if Defendants' Motion were adequately supported, it must still be denied if Plaintiff has "set forth specific facts showing the existence of a genuine issue for trial" in response. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005).

ARGUMENT

Defendants' attempt to establish an executive privilege through summary judgment in this case fails for three reasons. First, the Iowa Open Records Act does not provide for an executive privilege, nor does any other statute in the Iowa Code afford one. Second, Defendants' goal is unattainable. The privilege they propose is not only baseless in Iowa, but also unprecedented anywhere. In those jurisdictions where an executive privilege exists, it does not exist in the form claimed by Defendants but is much more limited. Third, Defendants cannot establish either that the documents at issue in this case should be covered by such a privilege or, if so, that Plaintiff could not overcome that privilege.

I. DEFENDANTS FAILED TO COMPLY WITH IOWA CODE CHAPTER 22.

Defendants' brief does not begin with executive privilege. Indeed, despite Defendants' claim that the existence of executive privilege is the "threshold question" of the case, (Defs.' Reply in Supp. of Mot. to Stay at 3 (Aug. 12, 2025) (D0015)), that particular threshold is itself behind a series of locked doors. Before anything else, an open records case must start with the Iowa Open Records Act. Because the Act rejects Defendants' theory, Defendants have to convince this Court to override the legislature and do a little code-drafting of its own. Defendants fail to provide the Court with adequate authority to do so.

To start, Defendants must concede that Plaintiff's case *should* prevail under the Act. Defendants are subject to its requirements, these are public records at issue, and they have failed to make them available to Plaintiff. *See* Iowa Code § 22.10(2); *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 460 (Iowa 2013). (SAMF ¶¶ 1-5). They must acknowledge and accept that the burden will shift to them to demonstrate compliance with the Open Records Act notwithstanding. *Horsfield*, 834 N.W.2d at 460 (stating once the party seeking the records makes its initial showing, "the defendant has the burden to show compliance"); *see also* Iowa Code § 22.10(2). While a defendant government body would ordinarily do this by showing the records sought are entitled to confidentiality under one of the many exemptions of section 22.7, *see, e.g.*, *Kirkwood Institute Inc. v. Sand*, 6 N.W.3d 1, 7 (Iowa 2024), Defendants here concede that "executive privilege" is not one of them. (Defs. Br. at 10 ("Just as Chapter 22 does not explicitly acknowledge attorney-client privilege, nor does Chapter 22 refer to . . . executive privilege and deliberative process privilege.")). As public records must be produced unless otherwise subject to an exception, *see* Iowa Code §§ 22.2(1); *Gabrilson v. Flynn*, 554 N.W.2d 267, 271 (Iowa 1996) (stating chapter 22 imposes "a presumption of openness and disclosure"), this *should* be the end of the matter.

However, Defendants urge the Court to do something unusual and recognize this new privilege as a judicially crafted supplement to the Iowa Open Records Act. They point to a recent case, *Teig*, in which the Iowa Supreme Court confirmed that other "specific statutory privileges protecting the confidentiality of documents" outside of chapter 22 remain applicable even if not among those identified in section 22.7. *See Teig*, 8 N.W.2d at 495. Yet this does not help Defendants because "executive privilege" does not have a statutory basis inside *or* outside of chapter 22. Unlike the attorney–client privilege at issue in *Teig*, *see* Iowa Code § 622.10, there is no "specific statutory" executive privilege anywhere in the Iowa Code. *See Teig*, 8 N.W.2d at 495. There has never been.[3]

Without a statutory basis, Defendants must argue the holding of *Teig* can be expanded to authorize the inclusion of privileges found still elsewhere, such as the common law. *But see News & Observer Publ'g Co. v. Poole*, 412 S.E.2d 7, 20 (N.C. 1992) ("We refuse to engraft upon our Public Records Act exceptions based on common-law privileges, such as a 'deliberative process privilege,' to protect items otherwise subject to disclosure."). This would be a new development and one fundamentally at odds with the default rule of public disclosure and the legislature's clearly expressed public policy "that free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others." Iowa Code § 22.8(3). Defendants do not identify any case in which the Iowa Supreme Court has gone so far. As noted, *Teig* relied on a "specific statutory privilege[]," 8

[3] At one point in their brief, Defendants appear to argue that maybe section 622.11, ("A public officer cannot be examined as to communications made to the public officer in official confidence, when the public interests would suffer by that disclosure."), is a stand-in for executive privilege. (Defs.' Br. at 22). The argument is not pursued thoroughly, as the Iowa Supreme Court has long-since identified section 622.11 as analogous to the already-existing exception for investigative reports, *see Shanahan*, 356 N.W.2d at 528; *see also* Iowa Code § 22.7(5), not an executive privilege.

N.W.2d at 495, as did *State ex rel. Shanahan v. Iowa Dist. Ct. for Iowa Cty.*, 356 N.W.2d 523, 528 (Iowa 1984) (citing Iowa Code section 622.11). The other cases cited by Defendants fare no better, as they are not open records cases at all and have nothing to say as to the Court's authority to expand the Act's exceptions. *See Smith v. Iowa District Court for Polk County*, 3 N.W.3d 524, 527 (Iowa 2024) (legislative privilege from civil discovery); *Office of Citizens' Aide/Ombudsman v. Edwards*, 825 N.W.2d 8, 19 (Iowa 2012) (mental process privilege from civil discovery); *Ryan v. Wilson*, 300 N.W. 707, 712 (Iowa 1941) (gubernatorial immunity from damages claims).

In short, while *Teig* establishes chapter 22's exemptions may be supplemented by other "specific statutory privileges," 8 N.W.2d at 495, it goes no further. At times in this case, Defendants have challenged this Court's authority to rule against them as a violation of "separation of powers." (Mot. for Protective Order at 14). Yet, their entire defense represents a seizure of power from the legislative branch, by the judicial, for the benefit of the executive. The first, and simplest, way to resolve this case is to follow those other state courts that have concluded it is not their role to engraft new exemptions onto the legislature's code. *See, e.g.*, *Rigel Corp. v. Arizona*, 234 P.3d 633, 640–41 (Ariz. Ct. App. 2010); *People ex rel. Birkett v. City of Chicago*, 705 N.E.2d 48, 53 (Ill. 1998); *News & Observer Publ'g Co.*, 412 S.E.2d at 20; *Sands v. Whitnall Sch. Dist.*, 754 N.W.2d 439, 458 (Wis. 2008).

II. DEFENDANTS' PROPOSED NEW PRIVILEGE IS UNPRECEDENTED.

As for executive privilege itself, assuming the Court could recognize a new exception from chapter 22 without a statutory basis, what would this privilege be, from where does it come, and how does it compare to what Defendants seek in this case? As a general matter, executive privilege is a categorical term for a number of specific doctrines recognized by the U.S. Supreme Court based on the unique role of the U.S. President and the immense executive bureaucracy they oversee. *See In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997). For purposes of open records

litigation under the federal Freedom of Information Act ("FOIA"), there are basically two types of executive privilege that matter: a common law deliberative process privilege for executive agencies, and a constitutional presidential communications privilege for the President and their close advisors.[4] *See id.* at 737–38. Some state supreme courts have adopted one or both of these, and others have rejected one or both. *See infra.* As for the Iowa Supreme Court: it has never said.

Defendants' tellingly overconfident claim, "The Iowa Supreme Court has long recognized the existence of executive privilege," (Defs.' Br. at 20), is simply incorrect. To support this claim, Defendants cite two cases, *Belin*, 989 N.W.2d 166, and *Shanahan*, 356 N.W.2d 523. (Defs.' Br. at 20). In both cases the Court expressly declined to express an opinion on executive privilege. In *Belin*, the Court found the Governor's arguments on executive privilege were irrelevant, hypothetical concerns that were never likely to materialize. 989 N.W.2d at 176–78 (explaining nothing in the initial showing under chapter 22 would encroach upon whatever privilege in the decisionmaking process might exist, nor would the government body be obligated to present potentially confidential information in defense). In *Shanahan*, the Court declined to discuss the privilege at all under the doctrine of constitutional avoidance, as an alternative ground controlled. 356 N.W.2d at 527 ("We first address and decide the [statutory theory], because we prefer to address constitutional issues only when other grounds are not dispositive."). It is a remarkable

[4] Other privileges held by executive officials in the federal government relate to: military or state secrets, *see United States v. Reynolds*, 345 U.S. 1, 6–8, (1953); *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948); *Totten v. United States*, 92 U.S. 105, 106–07 (1875); government informers, *Roviaro v. United States*, 353 U.S. 53, 59–61 (1957); investigative material, *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341–43 (D.C. Cir. 1984); and immunity from litigation, *see, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (presidential immunity from civil liability); *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (presidential immunity from compulsion to perform discretionary act). Aforementioned Iowa cases like *Ryan*, 300 N.W. at 712 (gubernatorial immunity from damages), and *Shanahan*, 356 N.W.2d at 527 (investigative material, though resolved on statutory grounds), fall in this category, and have no relation to the privilege Defendants assert now.

method of reading a case that can take the sentence, "Because the State's statutory claim of privilege is dispositive of this appeal, we need not reach the constitutional issue of executive privilege," *id.*, and glean from it an affirmative *recognition* of the same privilege not reached. (Defs.' Br. at 20). Outside of caselaw, Defendants make a similarly impressive leap of logic to take a single time when a number of agencies cooperated with the governor's plan to shield budget-cut information from the legislature as a reflection of "longstanding practice, too." (Defs.' Br. at 22-23); (Pl.'s Resp. at 2-3). Beyond stray comments, (Defs.' Br. at 10), the only other historical evidence Defendants' muster is meager, indeed. (Pl.'s Resp. at 1-2). In the end, Defendants must concede, and, contrary to their statements in this Motion, have already conceded, that the Iowa Supreme Court has not recognized executive privilege. (Mot. for Protective Order at ¶¶ 9-10 (describing "the threshold legal question of whether executive privilege exists at all under Iowa law")).

Nevertheless, in order to reach and conclude that the records at issue in this case would not be entitled to an executive privilege, those privileges—assuming for the sake of argument they have a foundation in Iowa's common law or constitution (though they do not)—must be defined. The D.C. Circuit opinion in *In re Sealed Case*, 121 F.3d 729 (1997), is likely the seminal decision laying these issues out.

A. The Deliberative Process Privilege

The deliberative process privilege ("[t]he most frequent form of executive privilege raised in the judicial arena") is a common law privilege allowing the government "to withhold documents and other materials that would reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Id.* at 737 (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir. 1967)). The "ultimate purpose" of the deliberative process privilege

"'is to prevent injury to the quality of agency decisions' by allowing government officials freedom to debate alternative approaches in private." *Id.* (quoting *N.L.R.B. v. Sears, Roebuck & Co.*, 471 U.S. 132, 150 (1975)). In connection with this purpose, there are two "essential" requirements for the privilege to apply: "the material must be predecisional and it must be deliberative." *Id.* Documents "that simply state or explain a decision the government has already made" are not protected, nor is "material that is purely factual." *Id.* The government bears a heavy burden when invoking the privilege, and is required to provide detailed justification, including specific descriptions of each document and their author, recipient, and subject matter; an explanation for why the document is privileged, i.e., what the deliberative process at issue was and the role the document played in it; and a "demonstration of why disclosure would be harmful," among other things. Russell L. Weaver, James T.R. Jones, *The Deliberative Process Privilege*, 54 Missouri L. Rev. 279, 300–303 (1989); *see also Vaughn v. Rosen*, 484 F.2d 820, 826–27 (D.C. Cir. 1973). Crucially, the deliberative process privilege is not absolute; it is qualified, and may be overcome on appropriate grounds. *See In re Sealed Case*, 121 F.3d at 737–38 (identifying various factors, noting privilege routinely denied "where there is reason to believe the documents sought may shed light on government misconduct").

As for state courts, those that have recognized the deliberative process privilege generally follow this framework; they require a detailed showing that meets the two initial requirements and, once established, shift the burden to the requester—though, given the expressed public policy in an open records act, they do so with some expectation the burden will be overcome. *See Gwich'in Steering Comm. v. State of Ala., Off. of the Governor*, 10 P.3d 572, 579 (Ala. 2000) ("We recognize that 'in balancing the interests the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from

unreasonable interference.'" (Citations omitted).); *City of Colo. Springs v. White*, 967 P.2d 1042, 1049–50 (Colo. 1998). They have, however, first found adequate basis in their law to recognize the privilege. For example, in Alaska, the deliberative process privilege was one of the statutory exceptions baked into its open records act. *See Gwich'in Steering Comm.*, 10 P.3d at 578 (citing Alaska Stat. § 09.25.120(a)(4)). In Colorado, the court was able to find a state common law tradition in its prior cases. *See City of Colo. Springs*, 967 P.2d at 1049–50. Other state courts have, looking to their own law, failed to find such justification. *See, e.g.*, *Rigel Corp.*, 234 P.3d at 640–41 (Ariz. Ct. App. 2010); *Birkett*, 705 N.E.2d at 53; *News & Observer Publ'g Co.*, 412 S.E.2d at 20; *Sands*, 754 N.W.2d at 458 (Wis. 2008) ("Wisconsin does not recognize a deliberative process privilege. [State statute] precludes the extension of common law privileges by the court on a case-by-case basis, but rather requires common law privileges not originating in the constitution to be adopted by statute or court rule.").

Iowa, of course, would fall in this category, as it lacks either statute or caselaw that would support a deliberative process privilege.

B. The Presidential/Gubernatorial Communications Privilege

Returning to federal law and *In re Sealed Case*, the second relevant privilege for "presidential communications" differs in many key respects from the deliberative process privilege, including in how less frequently it is invoked. 121 F.3d at 738. Skipping past Aaron Burr's treason charge and 150 years of U.S. Supreme Court silence, it was not until the Watergate scandal that a presidential communications privilege reemerged. *See id.* at 738–40. This privilege does not derive from the common law, but "is rooted in constitutional separation of powers principles and the President's unique constitutional role." *Id.* at 745. As established in the two post-Watergate *Nixon* cases, the privilege's scope "is limited to communications 'in performance of (a President's) responsibilities, of his office, and made in the process of shaping policies and

making decisions.'" *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977) (quoting *United States v. Nixon*, 418 U.S. 683, 708, 711, 713 (1974)) (cleaned up). Critical in the presidential communications privilege is the President; it matters not if the deliberations are one generally entrusted to the executive branch—it must be the President who is personally charged by the Constitution with making the decision, and, though with flexibility, the communication must generally be made *to* the President. *See In re Sealed Case*, 121 F.3d at 745, 747. Like the deliberative process privilege, the government bears the initial burden, and the privilege, if established, may be overcome. *See id.* at 746.

As for the states and the recognition of an analogous "gubernatorial communications privilege," the bag is mixed. State court decisions that adopt an "executive privilege" but fail to distinguish between deliberative process and communications—generally those post-*Nixon* but pre-*Sealed Case, see, e.g.*, *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 785 (Del. Super. Ct. 1995); *Hamilton v. Verdow*, 414 A.2d 914, 925 (Md. 1980); *Killington, Ltd. v. Lash*, 572 A.2d 1368, 1374 (Vt. 1990); *Taylor v. Worrell Enterprises, Inc.*, 409 S.E.2d 136, 138–39 (Va. 1991)—are generally unhelpful due to the amalgamation and the consequent lack of clear basis, purpose, or standard. On the other end of the spectrum, there are state decisions like *Babets v. Secretary of the Executive Office of Human Services*, rejecting any form of an executive privilege. 526 N.E.2d 1261, 1263–66 (Mass. 1988).

That leaves basically three relevant decisions in which a state court has identified a gubernatorial communications privilege arising out of the constitution, distinct from a deliberative process privilege arising from the common law, and then recognized it: *State ex rel. Dann v. Taft*, 848 N.E.2d 472 (Ohio 2006); *Republican Party of N.M. v. N.M. Taxation & Revenue Dept.*, 283 P.3d 853 (N.M. 2012); and *Freedom Found. v. Gregoire*, 310 P.3d 1252 (Wash. 2013). Notably,

two of these decisions came with dissents. *See Dann*, 848 N.E.2d at 487 (Resnick, J., dissenting); *id.* at 489 (Pfeifer, J., dissenting); *Freedom Found.*, 310 P.3d at 1267 (Johnson, J., dissenting). Principally, these dissents criticize the abdication of authority to the governor, *Dann*, 848 N.E.2d at 489 (Resnick, J., dissenting), emphasize the great disparity in power and role between the President of the United States and a state governor, *see id.* at 490–91 (Pfeiffer, J., dissenting) ("We are not dealing with the Presidency and its exceptional privileges. We are dealing with the governorship of Ohio."); *Freedom Found.*, 310 P.3d at 1269 (Johnson, J., dissenting) ("There is little, if anything, that the governor handles that a little more public scrutiny could drastically harm; no death of American citizens or international conflict will result."), and contrast their states' historical commitment to openness of government with the federal tradition of secrecy, *Dann*, 848 N.E.2d at 491 (Pfeiffer, J., dissenting) ("Ohio has a long tradition of open government, dating back to the formation of its Constitution. In *Nixon*, the court speaks of secrecy in [federal] government as mundane . . . ."); *Freedom Found.*, 310 P.3d at 1269 ("[S]ecrecy may be mundane at the federal level, but it is not in Washington."). All these things can be said about Iowa and the role of its governor, and thus it is these dissents—not the majority opinions—that should be given the greatest weight.

Nevertheless, when recognized, a state gubernatorial privilege is weaker than that enjoyed by the U.S. President. Critical requirements and limitations include that the privilege apply only to (a) communications (and not other non-communicative documents) (b) to or from the governor (or those in close organizational and functional proximity to the governor) that (c) are connected to the governor's specific decisionmaking (and not the executive branch's decisionmaking more generally) on (d) constitutionally mandated duties (and not general or less formal responsibilities of office), over which (e) the governor themself (and not staff) expressly invoked the privilege.

See Republican Party of N.M., 283 P.3d at 868–70; *Dann*, 848 N.E.2d at 485–86; *Freedom Found.*, 310 P.3d at 1261–62. Even if all this is met, the privilege is not dispensed blindly: the court must conduct in camera review of the documents to determine whether the public's interest or the requester's specific interest in the documents outweighs the executive's stated need for confidentiality. *Republican Party*, 283 P.3d at 870; *Dann*, 848 N.E.2d at 486; *Freedom Found.*, 310 P.3d at 1262.

C. The Defendants' Proposed Executive Privilege

Defendants refuse to characterize their claimed privilege as either deliberative process or gubernatorial communications. Initially, they ask for "absolute[] protect[ion]," (Defs.' Br. at 29), which would go further in favor of secrecy than any court, state or federal, has gone before. Alternatively, recognizing that "this is an open question in Iowa's courts," they suggest a heavily favored burden-shifting approach, one where they admit "[i]t is hard to foresee a circumstance" where the privilege will be overcome. (Defs.' Br. at 29-30). Such a balancing test is contrary to the ordinary assumption that the public will benefit from disclosure of public records recognized in every other jurisdiction. As for the requirements to meet the privilege, they name only two: (1) "the communications must be communications ultimately intended to give candid advice to the Governor from senior advisors," and (2) "the advice must be deliberative in nature." (Defs.' Br. at 29). These proposed requirements are somehow both redundant and de minimus compared to the detailed showing ordinarily required to invoke a deliberative process privilege, and far removed from that required to invoke the more specifically focused communications privilege. No mention is made of in camera review, to which Defendants object. (Plaintiffs' App. for Interlocutory Rev. at 3, *Records Custodian of the Governor v. The Des Moines Register*, No. 25-1680 (Oct. 9, 2025) (Iowa)).

In summary, the privilege the Governor's Office of the State of Iowa suggests is extreme. Never mind that it lacks any basis in Iowa's common law or constitution. Never mind also that it is in outright conflict with Iowa's statutes and history. The privilege Defendants actually propose that this Court recognize for the very first time would effectively immunize it from Iowa's Open Records Act. It would grant the Iowa Governor's Office the power to decide for itself when and how to comply with the law, with only an illusory prospect the public might successfully challenge the decision. If there is any basis at all to recognize an executive privilege in Iowa, it would look nothing like this.

III. DEFENDANTS' SHOWING ON THESE RECORDS IS INADEQUATE.

Defendants Motion thus relies (I) on this Court exercising the unprecedented authority to amend Iowa Code chapter 22, so that it may (II) recognize an "executive privilege" that (a) has no basis in code, common law, or constitution, and (b) would be astoundingly anti-transparent in any jurisdiction. The question becomes, (III) why? What are these documents that are so sensitive to justify this extraordinary departure from law and tradition, and what showing have Defendants' made in their favor? The answers are: Defendants won't say, and none. Accordingly, this Court need not and should not recognize an executive privilege, because even if such a thing could be found in Iowa's law, it would not apply here. As the Court is receiving this on Defendants' Motion for Summary Judgment, the outcome need not even be so definitive. It is sufficient to conclude that Defendants have failed to establish the nonexistence of a genuine dispute of material fact on their claims.

Thus, for the purpose of analysis only, this section assumes Iowa has or would adopt a deliberative process privilege and a gubernatorial communications privilege. This is not the executive privilege advocated by Defendants, as that has no connection to precedent or reality, but those two privileges as they exist in federal and where they exist in state law.

First, a deliberative process privilege of the type described in *In re Sealed Case*, 121 F.3d at 737, and *Gwich'in Steering Comm.*, 10 P.3d at 579, including the two essential requirements that the material (1) be predecisional and (2) deliberative, and not covering postdecisional or purely factual information. Such a privilege would need to be established by a showing akin to that described in *Vaughn*, 484 F.2d at 826–27, and *City of Colo. Springs*, 967 P.2d at 1053–54, and qualified based on the public's countervailing interest in the material, *see Gwich'in Steering Comm.*, 10 P.3d at 579.

Second, a gubernatorial communications privilege resembling that recognized for the President, *see Nixon*, 433 at 449, as subsequently transposed to certain governors in cases such as *Republican Party of N.M.*, 283 P.3d at 868–70, *Dann*, 848 N.E.2d at 485–86, and *Freedom Found.*, 310 P.3d at 1261. As in those cases, such a privilege would only apply to communications to or from the Governor, or, at a minimum, the Governor's organizationally and functionally close advisors, advising her on a decision she is constitutionally mandated to make. *See Republican Party of N.M.*, 283 P.3d at 868–70; *Dann*, 848 N.E.2d at 485–86; *Freedom Found.*, 310 P.3d at 1261. At minimum, there must be some showing the Governor herself reviewed the communication and invoked the privilege, *Dann*, 848 N.E.2d at 486; *see also Republican Party of N.M.*, 283 P.3d at 869–70, and the privilege would again be qualified, subject to the public's interest in the documents and any particular need of the requester compared to the Governor's need for secrecy of the communications. *Republican Party of N.M.*, 283 P.3d at 870; *Dann*, 848 N.E.2d at 486; *Freedom Found.*, 310 P.3d at 1262–63.

A. The Executive Agency Reports

The executive agency reports at issue consist of an email bearing the subject line, "DAS Department Report – 11/20/2024" and its two attachments: "11.20.24 DAS Department Report.docx" and "Relevant Agency Data Metrics.pdf." (SAMF ¶12). The privilege log states only

that these documents relate to the subject of "DAS Executive Agency Report," which is the total of the facts on which Defendants' Motion relies. (Pl.'s Resp. at 5). According to Defendants' discovery responses, the reports were requested by an undisclosed individual at the Governor's Office "as a mechanism to create an executive level report out to the Governor concerning matters related to the ongoing operation of the department." (SAMF ¶¶ 14, 16). Ten people at the Department of Administrative Services ("DAS") worked on the reports, coordinated by Trisha Quijano, an "Administrative Assistant 2" at DAS who did not report directly to Director Steen. (SAMF ¶¶ 15, 20). The reports prepared contain exclusively factual material. (SAMF ¶¶ 17-19). Once complete, the Administrative Assistant sent the reports to the Chief of Staff and Chief Operating Officer in the Governor's Office. (SAMF ¶ 20). The Governor does not claim to have ever reviewed them or relied on them in making any decision relating to the agency. (SAMF ¶ 21). The executive agency reports are stored on DAS's Google Drive and accessible to anyone with access to that Drive, which may include every employee of DAS. (SAMF ¶ 23).

Based on these facts, it is extremely unlikely Defendants will prevail in establishing either deliberative process or gubernatorial communications privilege over the executive agency reports, assuming such privileges were to exist. As these are reports—not communications—the relevant privilege to examine is the deliberative process.[5] However, the reports are neither predecisional nor deliberative. (SAMF ¶¶ 16-18). Defendants have provided no explanation for why the reports are privileged, nor have they demonstrated why disclosure would be harmful. *See Vaughn*, 484

[5] Even if they could be considered communicative material, the executive agency reports are not made by the Governor or those in her close organizational proximity, but by agency employees several levels removed from the agency director. (SAMF ¶¶ 14-15). They have no relation to any specific decision the Governor was expected, let alone constitutionally mandated, to make, and instead are general reports of the status of an executive agency. (SAMF ¶¶ 16-19, 21). And, as with all the records, if the Governor saw them at all, she has never formally invoked a privilege to secrete them. (SAMF ¶ 22).

F.2d at 826–27; *City of Colo. Springs*, 967 P.2d at 1053. (SAMF ¶ 24). If related to the Governor's or DAS's decisionmaking at all, they "simply state or explain a decision the government has already made," and, by Defendants' own admission, consist entirely of "purely factual" material, (SAMF ¶ 19), which is not entitled to the privilege. *In re Sealed Case*, 121 F.3d at 737. The executive agency reports are simply not the kind of records that would enjoy a deliberative process privilege.

B. The Media Prep Documents

The media prep documents at issue consist of a few emails and their attachments. (SAMF 25). One email has the subject line, "Turkey pardon media prep doc," another the subject, "Media Prep Doc for this week," and another, "2024.12.18 Additional Media prep doc." (SAMF 25). Each includes similarly named Word file attachments of a couple pages. (*Id.*). The privilege log states only that they are "Media Prep Docs," which again is the totality of Defendants' factual showing in support of an executive privilege. (Pl.'s Resp. at 5). Defendants' discovery responses shed a glint of additional light on the documents, at least that they were created by Mason Mauro at his own initiative, without first being directed by the Governor or other Governor's Office staff. (SAMF 27). Defendants state the purpose of the media prep documents was to prepare the Governor to communicate messages at press conferences. (SAMF ¶ 31). Defendants do not disclose the subject matter of the message or messages at issue. (SAMF ¶ 31). Defendants' description of the media prep documents indicates they are summaries of recent news relating to the Governor–not a trusted advisor's recommendations on a decision to be made. (SAMF ¶¶ 28-31). The media prep documents were stored in a folder accessible by anyone in the Governor's Office, and specifically shared with Molly Severn, Deputy Chief of Staff, Lillie Brady, Agricultural Policy Advisor, Jen Green, Director Communications, Taryn Frideres, Chief of Staff,

and Annie Hayes, Executive Assistant to the Governor. (SAMF ¶¶ 32, 36). The Governor states that she personally reviewed some, but not all, of the media prep documents. (SAMF ¶ 33).

Assuming for the sake of argument that deliberative process and gubernatorial communications privileges were recognized, it is again extremely unlikely that the media prep documents would meet either privilege's requirements. From the limited context provided, the deliberative process privilege is inapplicable at the outset, as the media prep documents do not appear to relate to any upcoming agency decision or include a debate of alternative approaches to the same.[6] *See In re Sealed Case*, 121 F.3d at 737. (SAMF ¶¶ 29-30, 34). With respect to a communications privilege, there is initially a complete failure of proof as to the Governor's personal invocation of the privilege, i.e., that "she has reviewed the requested materials and concluded that the materials meet the criteria of the privilege." *Dann*, 848 N.E.2d at 486; *see also Republican Party of N.M.*, 283 P.3d at 869–70 (holding privilege would not allow those "simply under the ultimate control of the Governor" to "protect internal memoranda"). (SAMF ¶ 35). In fact, it appears the Governor did not request them or even review some of them, (SAMF ¶¶ 27, 33), and to say all those involved in the media prep documents are in "very close organizational *and* functional proximity to the Governor" is to severely stretch its meaning. (SAMF ¶ 32). *Republican Party of N.M.*, 283 P.3d at 869.

[6] Even if the disconnect between the media prep documents and the purpose of the deliberative process privilege were ignored, Defendants would still have failed to establish either of the essential requirements that "the material must be predecisional and it must be deliberative." *In re Sealed Case*, 121 F.3d at 737. (SAMF ¶¶ 29-30). Further, Defendants have not even attempted to make the detailed showing required to invoke the privilege by describing the documents' subject matter, their basis for being privileged, the deliberations at issue and the documents' role in those deliberations, or a "demonstration of why disclosure would be harmful." Weaver, *The Deliberative Process Privilege*, 54 Missouri L. Rev. at 300–03; *see also Vaughn*, 484 F.2d at 826–27; *City of Colo. Springs*, 967 P.2d at 1053. (SAMF ¶ 31).

There is, at a minimum, a genuine dispute of fact as to whether the media prep records are "communicative in nature" at all, and as to whether they relate to the Governor's "deliberation or decisionmaking." *Republican Party of N.M.*, 283 P.3d at 868 (quoting *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 592 F. Supp. 2d 1141, 118–19 (D.D.C. 2009)). (SAMF ¶¶ 29-31, 34). They appear to be summaries of current events on which the Governor may receive a question, such as what turkey she will be pardoning, (SAMF ¶¶ 25, 28-30); these are not the candid opinions of top advisors on matters of state that Defendants would make them out as. Preparing for a press conference and communicating the Governor's message, (SAMF ¶ 31), while important, is not a "core," "non-delegable," or "constitutionally-mandated dut[y]" of the office. *Republican Party of N.M.*, 283 P.3d at 868–69 (emphasizing "the privilege derives its force and legitimacy from the constitution," and thus must be reserved for duties specifically imposed by the state constitution); *see also Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004); *Freedom Found.*, 310 P.3d at 1262 ("The privilege does not exist to shroud all conversations involving the governor in secrecy and place them beyond the reach of public scrutiny."). The media prep documents do not resemble the top-secret communications in the executive office that qualify, in some places, for a constitutional privilege.

C. The Text Messages

The final document at issue is a partially redacted copy of a text conversation between Jacob Nicholson, Chief Operative Officer in the Office of the Governor, and Adam Steen, Director of DAS at the time. (SAMF ¶¶ 38-39). Defendants explain only that the text message was related to a recent DAS agency report, which may or may not be the same executive agency report also at issue in this case. (SAMF ¶ 41).

Defendants' fail to show a privilege over the text message. No effort is made to contextualize the redacted message as an advisory opinion, recommendation, or deliberation as to

an upcoming governmental decision or policy. *See In re Sealed Case*, 121 F.3d at 737. (SAMF ¶¶ 42, 46). There is no explanation as to what exactly such a decision might be or why disclosure might be harmful. Weaver, *The Deliberative Process Privilege*, 54 Missouri L. Rev. at 300–03; *see also Vaughn*, 484 F.2d at 826–27; *City of Colo. Springs*, 967 P.2d at 1053. (SAMF ¶ 48). The Governor was not party to the text conversation, does not claim to have directed it, and cannot be said to have ever been made aware of it. *See Republican Party of N.M.*, 283 P.3d at 869. (SAMF ¶¶ 40, 43-45). The Governor does not purport to have reviewed the text message or personally invoked a privilege over it. *Dann*, 848 N.E.2d at 486; *see also Republican Party of N.M.*, 283 P.3d at 869–70. (SAMF ¶ 47). The text message is not said to relate to any constitutionally mandated decision of the Governor. *See Republican Party of N.M.*, 283 P.3d at 868–70; *Dann*, 848 N.E.2d at 378–79; *Freedom Found.*, 310 P.3d at 1261. (SAMF ¶ 46). Almost nothing is known about the text message at all, and in this Motion for Summary Judgment, that failure falls entirely at the feet of Defendants.

D. Summary

Defendants have not shown the undisputed facts establish that any of the withheld records are subject to an executive privilege as a matter of law. *See* Iowa R. Civ. P. 1.981(3). They have not really put forward any facts relating to the records at all, and thus have failed to meet the burden that would be required of them to establish either a deliberative process privilege, *see Vaughn*, 484 F.2d at 826–27; *City of Colo. Springs*, 967 P.2d at 1053–54, or gubernatorial communications privilege, *see Republican Party of N.M.*, 283 P.3d at 868–70; *Dann*, 848 N.E.2d at 378–79; *Freedom Found.*, 310 P.3d at 1261, in any other jurisdiction. Their underlying claim that "no factual development is needed to determine both that executive privilege exists and protects the documents at issue in this lawsuit," (Mot. to Stay ¶ 7), is contrary to the most generous interpretations that can reasonably be given the non-Iowa cases on which they rely. To prevail,

they must at least prove that the privilege they seek would cover the documents they seek to withhold. They have not.

Separately, even if Defendants could demonstrate a "prima facie" case for an executive privilege over these documents as they claim, (Defs.' Br. at 31), they have not reckoned with such privileges' qualification. *See In re Sealed Case*, 121 F.3d at 746; *Republican Party*, 283 P.3d at 870; *Dann*, 848 N.E.2d at 486; *Freedom Found.*, 310 P.3d at 1262. Plaintiff, as a member of the public, has a legislatively recognized interest in the documents, which are, at the end of the day, public records. *See* Iowa Code § 22.8(3); *see also Gwich'in Steering Comm.*, 10 P.3d at 579 (noting "the fundamental right of a citizen to have access to the public records" may overcome a showing of executive privilege). (SAMF 1). If there would be any harm at all, disclosure of the documents would amount to nothing more than "inconvenience or embarrassment to public officials." Iowa Code § 22.8(3). (SAMF ¶¶ 24, 37, 48). That does not outweigh either the public's interest or Plaintiff's particular interest in the records. (SAMF ¶¶ 1, 3). Nor can this balancing be done without knowing more about the documents; the Court, at least, would need to review them in camera. *See Republican Party*, 283 P.3d at 870; *Dann*, 848 N.E.2d at 486; *Freedom Found.*, 310 P.3d at 1262. Plaintiff has established genuine disputes of fact exist as to both the documents' initial entitlement to a privilege and, if so entitled, whether that privilege should be overcome.

CONCLUSION

Plainly, Defendants are claiming an executive privilege over these documents for the sake of claiming an executive privilege. In their desire to obtain an Iowa Supreme Court decision on the issue of executive privilege, they have shown little interest in the documents themselves. But it is the documents that are the core of this case—not the Governor's sought-after power to conceal them. Defendants seek an advisory opinion that executive privilege "exists." But in the alternate reality where Iowa had detailed Iowa Supreme Court precedent recognizing both a common law

deliberative process privilege and constitutionally derived gubernatorial communications privilege, Defendants would still fail to meet the requirements. No court needs to opine that executive privilege exists in Iowa; it is enough to look at the record Defendants have put forward and say, "This ain't it."

Plaintiff respectfully requests this Court deny Defendants' Motion for Summary Judgment in its entirety and grant all such other and further relief as it deems just.

Respectfully submitted,

/s/ Thomas D. Story
Thomas D. Story, AT0013130
Rita Bettis Austen, AT0011558
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: (515) 243-3988
Fax: (515) 243-8506
Email: thomas.story@aclu-ia.org
Email: rita.bettis@aclu-ia.org

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties of record via EDMS on February 20, 2026.

/s/ Thomas D. Story
Thomas D. Story