

**IN THE SUPREME COURT OF IOWA**  
**Supreme Court No. 26–1597**  
**Polk County No. CVCV069066**

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IOWA ATHEISTS AND FREETHINKERS, INC.,

Plaintiff-Appellee,

vs.

KIM REYNOLDS, in her official capacity as Governor of the State of Iowa,  
MEGAN HALL, in her official capacity as Records Custodian for the Office of the  
Governor of the State of Iowa, STEVEN E. BLANKINSHIP, in his official capacity  
as General Counsel of the Office of the Governor of the State of Iowa, and OFFICE  
OF THE GOVERNOR OF THE STATE OF IOWA,

Defendants-Appellants.

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APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR POLK COUNTY  
THE HONORABLE JUDGE SCOTT D. ROSENBERG

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**RESISTANCE TO APPLICATION FOR INTERLOCUTORY REVIEW OR  
CERTIORARI**

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## **INTRODUCTION**

The Governor's Office laments this "is the third time in two years" it has asked this Court to take up the theoretical existence of executive privilege on interlocutory appeal. Ironically, had the Governor's Office not pursued motions for stay, motions for protective order, premature motions for summary judgment, and repeated applications for interlocutory appeal in this and the similar Des Moines Register case, trial in this case could have been held on the originally agreed trial date two months ago. A ruling fully informed by a developed record and squarely resolving the merits would have been ready for this Court's review. Instead, the Governor's Office gives this Court nothing new and once more demands it reconsider taking up the matter before it is ready. There is no reason it should, and every reason it should not.

All the District Court has done so far is simply and correctly rule that the Governor's Office had not established the absence of any genuine dispute of material fact over whether the documents at issue are exempted from the Iowa Open Records Act. Given that the Governor's Office failed to provide any factual support for its motion except an unexplained privilege log, this is not a controversial or surprising ruling. To grant the Governor's Office's motion would have been to not merely find, as the Governor's Office requests of this Court, that "executive privilege *exists*," but to find that an executive privilege exists uniquely in Iowa as absolute and beyond judicial

review in every instance and as applied to the specific documents at issue in this case. No fault can be found in rejecting this notion.

Separately, the Governor's Office contests the District Court's discovery order. The order is remarkable only in its deference to the Governor's Office, allowing it to decide how it will answer the questions that its defense demands. It is the Governor's Office's burden to square its actions with the Iowa Open Records Act, and a failure to establish the factual basis necessary to do so falls upon its head. But by directing the Governor's Office to the facts and circumstances that, if they exist, must be proven (and offering a menu of options by which to do so), the District Court lends the Governor's Office a hand. There is no prejudice for this Court to relieve.

At bottom, a case is defined by its facts. The dispute between the parties now is not whether executive privilege exists (although they disagree on the point). It is whether the Governor's Office failed its obligations under the Open Records Act by withholding *these* public records. Unless the Governor's Office establishes that these documents would qualify for an executive privilege, the existence of that privilege is not before the Court. Every doctrine of judicial restraint and appellate review warns against granting an interlocutory appeal, as the Governor's Office freely admits, "only to address the existence and scope of executive privilege" in total isolation from "whether it applies." The Governor's Office asks this Court to intervene so it may enter an opinion *on a matter of constitutional law* that will likely prove immaterial to the outcome. It should not.

## **FACTUAL AND PROCEDURAL BACKGROUND**

The Governor's Office ignores the fact that its own actions have made interlocutory review a very bad idea. It has challenged Plaintiff's efforts to understand the factual basis of its claim at every step. Rather than providing requested context, the Governor's Office prefers to invent its own. Take the first line of its "Background" section: "Governors in Iowa have exerted executive privilege over sensitive documents for decades." If that is so, there is literally no support in the record. There is no affidavit or document evidencing a past governor's exertion of executive privilege, at all, and Plaintiff's straightforward request in discovery for that evidence has been refused. (Plf.'s Response to Defs.' Stmt. of Facts at 1-2 (D0038-2)); (Plf.'s Mot. to Compel at ¶¶ 8, 17(f) (D0042-0)). Rather than facts, the Governor's Office offers only summary, recursive assertions, such as the next line of its application: "Following that longstanding tradition, the Governor has sometimes asserted executive privilege over certain documents to ensure that she can receive candid advice from her most senior advisors." Whether accurate or not, there is no evidence in the record to support either proposition that these documents are "sensitive" or that they must be withheld to ensure the receipt of "candid advice." Indeed, available evidence suggests they do not include advice and are not in any way sensitive. (Ruling on Mot. for Summ. J. and Mot. to Compel at 3 (noting admission that "the withheld records contain no advice and reflect no decisionmaking process") (D0058) [hereinafter, "Ruling"]); (Plf.'s Mot. to Compel at ¶ 17(a)(i), n.4 (D0042-0)). Throughout the case, when pressed, the

Governor's Office's answers "are in such broad terms that they are essentially useless." (Ruling at 4). All this to say, the Governor's Office has failed to give this Court much to work with on interlocutory appeal.

It gives the Court only a theoretical conception of executive privilege that is contradictory, self-serving, and intentionally opaque. "Executive privilege" is, without a doubt, a complex topic. This is due in part to the imprecision of the term, which can refer to many distinct and exclusive concepts, all of which require facts to establish. But the procedural history of this case reveals one party is uninterested in establishing those facts. The Governor's Office has made clear that its goal in this litigation has little to do with the facts of this case and everything to do with obtaining a far-reaching order that "executive privilege exists." It has engaged in a bait-and-switch refusal to enter into a trial scheduling and discovery plan, (Attach. A to Disc. Plan at ¶¶ 3–4, 9–10 (D0011-1)), a motion for summary judgment intended to stop discovery from proceeding at all, (Ruling on Defs.' Mot. for Protective Order and Plf.'s Mot. to Continue Summ. J. Proceedings at 3 (D0032)), proffered discovery responses that, like the "more than 600 pages" of initial open records response, (Stmnt. of Add'l Material Facts at ¶¶ 7–8 (noting "520 pages out of 611 . . . consisted of compilations of news clips," with one instance alone being 81 pages) (D0038-3)), use many words to obscure their revelations of nothing, (Plf.'s Mot. to Compel at ¶ 16 (D0042-0)), and claims the sky would fall if it were forced to simply show somebody, anybody, the documents at issue, (App. for Interlocutory Rev. at 23 (arguing that requiring discovery "undervalues the Governor's

constitutionally protected interest in nondisclosure” and “is likely an illegal order”) (26-1597) [hereinafter, “App. for Interloc.”]).

Unabashedly, this is an attempt to obtain an advisory opinion—an advisory opinion, no less, on a political question concerning the respective power and authority of the legislature and executive branch, likely with constitutional ramifications. There can be no more imprudential waters into which this Court might wade, and it should not unless it becomes absolutely necessary.

### **ARGUMENT**

The Governor’s Office’s application for interlocutory appeal should be denied. First, there is no reason to intervene on the District Court’s correct decision not to answer a legal question when the case before it did not call for it. Second, despite the Governor’s Office claim that it “is likely an illegal order,” the District Court was plainly within its discretion to allow the Governor’s Office multiple means by which to answer Plaintiff’s Motion to Compel. Third, under any circumstance, this Court should refuse the Governor’s Office’s call for an advisory opinion.

The current posture of the case does not present the issue the Governor’s Office wants. Instead the Governor’s Office must finally either put up the documents at issue or provide meaningful answers to discovery served over a year ago, in either case providing the context that has been absent for its claim since the very beginning. Only then might this Court have the record and ruling it requires to address the core issue of executive privilege.

## **I. THE DISTRICT COURT CORRECTLY DENIED THE GOVERNOR'S MOTION FOR SUMMARY JUDGMENT.**

Regardless of whether an executive privilege can be found in Iowa's constitution or common law (it cannot),<sup>1</sup> a court that, like this one, adheres to the doctrine of constitutional avoidance would not deign to declare its existence when it would offer no relief. *See Belin v. Reynolds*, 989 N.W.2d 166, 176–78 (Iowa 2023) (declining to opine on existence of executive privilege where unwarranted by the facts of the case); *State ex rel. Shanahan v. Iowa Dist. Ct. for Iowa Cty.*, 356 N.W.2d 523, 527 (Iowa 1984) (“Because the State’s statutory claim of privilege is dispositive of this appeal, we need not reach the constitutional issue of executive privilege.”). Yet this is precisely the Governor’s Office’s complaint with the District Court’s ruling.

To obtain summary judgment in its favor, the Governor’s Office would have needed to show the undisputed facts establishing the withheld records are subject to executive privilege as a matter of law. *See* Iowa R. Civ. P. 1.981(3). For example, if it were assumed a deliberative process privilege of the type recognized under federal common law might also be recognized under Iowa’s common law, the Governor’s Office would have to establish the materials withheld are (1) predecisional, and (2) deliberative. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (examining elements of deliberative process privilege under federal common law); *Gwich’in Steering Comm. v. State*, 10 P.3d 572, 579 (Alaska 2000) (examining elements of deliberative process

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<sup>1</sup> *See* Part III, below.

privilege under Alaska common law). If not through disclosing the documents, then through providing detailed descriptions of them, their subject matter, the deliberative process at issue and the role of the document in that process, and why disclosure would be harmful, all before even getting to the facts regarding the public’s countervailing and potentially overriding interest. *See Vaughn v. Rosen*, 484 F.2d 820, 826–27 (D.C. Cir. 1973) (describing requirements of “*Vaughn* index”); *City of Colorado Springs v. White*, 967 P.2d 1042, 1053–54 (Colo. 1998) (en banc) (requiring *Vaughn* index under Colorado common law); *Gwich’in Steering Comm.*, 10 P.3d at 579 (requiring provision of substantial fundamental information about allegedly privileged material). A *detailed* explanation is required; summary statements are not enough. *See Jud. Watch, Inc. v. U.S. Dep’t of Com.*, 375 F. Supp. 3d 93, 100 (D.D.C. 2019) (finding “general explanations of the possibility of a ‘chilling effect’” insufficient to establish required link between “specified harm and specific information contained in the material withheld”) (quoting H.R. Rep. No. 114-391, at 9 (2016)); *Ctr. for Investigative Reporting v. U.S. Customs & Border Protection*, 436 F. Supp. 3d 90, 106-07 (D.D.C. 2019) (finding statement that “information in the documents is predecisional and deliberative” and “release could chill open and frank discussions” insufficient to establish foreseeable harm requirement). Not even an attempt was made. The evidence Plaintiff was able to gather includes an admission that the executive agency report, for example, consisted of “purely factual” material, which, by definition, does not advise on an upcoming decision, but merely summarizes things

that have already happened. (Stmnt. of Add'l Material Facts at ¶ 19 (D0038-3)); *In re Sealed Case*, 121 F.3d at 737.

If, on the other hand, it were assumed a communications privilege of the type found in the U.S. Constitution in *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977), and later found in some state constitutions in cases such as *Republican Party of N.M. v. N.M. Tax'n & Revenue Dep't*, 283 P.3d 853, 868–70 (N.M. 2012), *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 484–86 (Ohio 2006), and *Freedom Found. v. Gregoire*, 310 P.3d 1252, 1259–61 (Wash. 2013) (en banc), then the Governor's Office would be expected to show the withheld records are communications to or from the Governor, or, at its most stretched, to those in the Governor's organizational and functional close proximity, on a decision that is mandated of the Governor by the Iowa Constitution. *See Republican Party of N.M.*, 283 P.3d at 868–70 (rejecting common law deliberative process privilege but adopting a “limited form of executive privilege derived from the [New Mexico] constitution” for certain gubernatorial communications and explaining requirements of proof); *State ex rel. Dann*, 848 N.E.2d at 485–86 (holding qualified gubernatorial-communications privilege under Ohio constitution requires showing under three-step process; identifying proof required by governor); *Freedom Found.*, 310 P.3d at 1262 (explaining requirements for application of qualified constitutional communications privilege under Washington constitution). A threshold showing would be that the Governor herself reviewed the communication and determined it must be withheld under executive privilege. *State ex rel. Dann*, 848 N.E.2d at 485–86; *see also Republican*

*Party of N.M.*, 283 P.3d at 869–70. Incredibly, the Governor’s Office never even claims this. If it did, Plaintiff would dispute the fact, because the evidence it gathered showed the Governor likely never even knew about the withheld text message exchange. Moreover, even if she read the withheld media prep reports at all (unclear), or if they could be characterized as advice (not likely), then they still do not relate to any constitutionally significant decision of the governorship.

The Governor’s Office proposes a test it claims is “distilled” from persuasive authority (though its test bears no semblance to its purported provenance). But it shies away from the end result of its claim that “[n]o fact development is needed to determine that executive privilege both exists and protects the documents at issue in this lawsuit.” (Mot. to Stay Proceedings at ¶ 7 (D0010)). Absent a factual showing, and thus an opportunity for review, the Governor’s Office would possess “an absolute and unqualified claim to executive privilege” that “[n]ot even the President of the United States” enjoys. (Ruling at 5). *See also United States v. Nixon*, 418 U.S. 683, 706 (1974). This cannot be; the Governor’s Office does not, in so many words, claim it so; and yet it filed a motion for summary judgment without facts. When the Governor’s Office states that “every decision that requires turning over documents and communications sent by the Governor’s senior advisors to advise her on pre-decisional and deliberative matters will impede the Governor and her advisors from doing their jobs and remaining well

informed,”<sup>2</sup> it admits there is an underlying requirement of showing the documents and communications are in fact predecisional and deliberative.

In short, the question the Governor’s Office now asks of this Court—“whether executive privilege exists and what the test for executive privilege is”—was neither “vital” nor a “threshold” to denying the Governor’s Office’s motion. The District Court did not decide whether executive privilege exists. It did not even decide whether such a privilege would apply to the documents at issue. It merely said that the Governor’s Office—the movant for summary judgment—failed to establish the nonexistence of a genuine dispute of material fact that an executive privilege *would* apply. Accordingly, even if this Court were to give the Governor’s Office everything it asks; if it grants the application, answers that executive privilege exists, and declares the test is exactly that proposed by the Governor’s Office (all of which it absolutely should not do), the District Court was *still* correct to deny the motion for summary judgment because of the Governor’s Office’s abysmal failure of proof.

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<sup>2</sup> Curiously, the Governor’s Office has modified this statement in its application to this Court and now chooses to omit the “pre-decisional” requirement. (App. for Interloc. at 23 (“Ultimately, every decision that requires turning over documents and communications sent by the Governor’s senior advisors to advise her on deliberative matters impedes the Governor and her advisors from doing their jobs and remaining well informed.”)). That an essential element might inexplicably disappear on appeal typifies the difficulties Plaintiff has encountered in attempting to understand the Governor’s Office’s conception of an already imprecisely defined “executive privilege.”

## **II. THE DISTRICT COURT ENTERED A WORKABLE AND GENEROUS ORDER REGARDING THE PRESENTATION OF NECESSARY FACTS.**

The Governor's Office refers to the discovery conducted thus far as "open-ended," "extensive," "burdensome," and "significant." (App. for Interloc. at 2, 6, 8, 9, 10, 20). It is none of these things, but if it were, then at least such expansive discovery might have been expected to result in thorough information regarding the context surrounding the documents withheld. Unfortunately, as the District Court recognized, all that has been received are "incomplete responses to basic questions such as the circumstances surrounding the withheld records' creation and what decision or policy they informed." (Ruling at 4). The Governor's Office did not really claim otherwise in response to Plaintiff's motion to compel, instead arguing that a prior order declining to mandate production of the contested records but stating that "some limited discovery should be allowed to provide context" justified its "limited" answers. *Id.* The District Court easily concluded the prior order did no such thing and that the rules of civil procedure do not permit summary, "essentially useless" answers. *Id.* To be clear and respond to repeated references in the Governor's Office's application of the looming threat of "further," "yet more," "still more," and "even more discovery," (App. for Interloc. at 2, 3, 6, 9, 10, 20), the Court should note Plaintiff has not ever sent or suggested additional discovery requests. It has merely moved to compel answers—that is, actual, good faith answers—to the discovery already served, and for leave to conduct the first and only depositions proposed in this case.

Even still, the District Court chose to give the Governor's Office options, noting that the context sought by Plaintiff's discovery requests may also be provided by the documents themselves. Per the ruling, the Governor's Office could answer the discovery already served and sit for the requested depositions; alternatively, it could either file the documents under seal or even just make them available to the Court for in camera review. (Ruling at 5). The Governor's Office decides; and should it honestly believe that disclosing the documents would seriously harm its decisionmaking process (though it has never really explained what or how), the District Court left it with the option not to do so at this stage.

Simply put, there is no error here for this Court to intervene and correct, no prejudice for it to relieve. And, once again, the question the Governor's Office asks this Court to jump in and answer would not change either the District Court's ruling or what must happen next. Even if this Court were to grant the Governor's Office's application, accept its invitation to rule on the existence of executive privilege, and then remand to determine whether the documents enjoy its protection, the District Court's ruling will still have been correct. The Governor's Office would still have failed to answer Plaintiff's written discovery requests and it would still have to, through some means, "resolve the clear knowledge gap" between what the Governor's Office says these documents are and what the available evidence indicates to the contrary. (Ruling at 5).

### **III. IF THE EXISTENCE OF EXECUTIVE PRIVILEGE IN IOWA WERE AT ISSUE, THE GOVERNOR’S ARGUMENTS WOULD FAIL.**

The existence of privilege in Iowa is immaterial if there are no documents before the Court that require its protections. However, if the Court were to pick up the Governor’s Office’s claim and examine it, the Court would find it lacks substance. Plaintiff reserves the right to submit more thorough briefing on the issue if necessary, but offers here a brief overview in response to the claims in the application.

The Governor’s Office points to this Court’s finding of a legislative privilege in *Smith v. Iowa Dist. Ct. for Polk Cty.*, 3 N.W.3d 524, 527 (Iowa 2024), as the basis for its claim for a constitutional executive privilege on grounds of separation of powers. This argument fails for many reasons. First, there are many jurisprudential critiques of the doctrine under the federal Constitution and questions about the underlying theory of *United States v. Nixon*, 418 U.S. 683 (1974). *See generally* Jonathan David Shaub, *Common Law Executive Privilege(s)*, 100 Ind. L.J. 923 (2025) (arguing “the widely accepted foundation in *Nixon* upon which this constitutional doctrine rests is inherently flawed”). Second, there are, of course, myriad distinguishing characteristics between the role of the President of the United States and the Governor of the State of Iowa, such that a privilege created for the unique role of the presidency is ill-fitted to a state governor. *See, e.g., State ex rel. Dann*, 848 N.E.2d at 490 (Pfeifer, 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) (“Sure, the

governor has some dealings with other governments and is the nominal commander-in-chief of the state National Guard, but those responsibilities are wholly different from overseeing the Central Intelligence Agency (CIA) conducting active military missions overseas, or engaging in antinuclear proliferation negotiations with hostile foreign powers.”). Third, there is no evidence that the framers of the Iowa Constitution understood there to be a privilege, and indeed, historically the Iowa executive has exercised transparency rather than broad privilege. *See Ryan v. Wilson*, 300 N.W. 707, 708 (Iowa 1941) (describing the “custom” of reporters being present in the private office of the Governor during a meeting of the executive counsel and how they followed the Governor into his private office where he made sure they all received a copy of an official, “public report” as “no partiality should be shown”). Fourth, the State of Iowa has a longstanding official policy of transparency. Iowa Code § 22.2(1) (“Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record.”). But perhaps the most powerful reason why *Smith* does not therefore translate into a commensurate executive privilege is best stated by another state supreme court considering this “separation-of-powers” claim:

The Public Records Act allows intrusion not by the legislature, or any other branch of government, but by the public. A policy of open government does not infringe on the independence of governmental branches. Statutes affecting other branches of government do not automatically raise separation of powers problems.

*News & Observer Publ'g Co. v. Poole*, 412 S.E.2d 7, 18 (N.C. 1992). The “coequal branches” of government do not have the same constitutional responsibilities. In *Smith* itself, this Court found the legislative privilege based not merely on separation of powers, but on two other constitutional provisions that have no relevance to the Iowa Governor. *See Smith*, 3 N.W.3d at 534 (concluding there are “three provisions of the Iowa Constitution” that support legislative privilege: article III, section 1 (separation of powers), article III, section 11 (legislative privilege from arrest), and article I, section 20 (people’s right to petition their representatives)); *Id.* at 535 (“We conclude from these provisions, *taken together*, that a legislative privilege inherently flows from the Iowa Constitution.” (emphasis added)). While a legislative privilege may flow from the Iowa Constitution, an executive privilege does not.

Separately, as the Governor’s Office continues to claim this Court has previously recognized executive privilege, Plaintiff must continue to call the claim out as false. While the claim can be made in brief, the refutation unfortunately takes more time. To begin: in two, at most three, cases, this Court has expressly declined the invitation to declare a gubernatorial or state executive privilege. *See Belin*, 989 N.W.2d at 176–77 (holding, whether or not an executive privilege exists, resolution of claim would not infringe upon it); *State ex rel. Shanahan*, 356 N.W.2d at 527 (“Because the State’s statutory claim of privilege is dispositive of this appeal, we need not reach the constitutional issue of executive privilege.”); *see also In re D.C.V.*, 569 N.W.2d 489, 494 (Iowa 1997) (finding potential issue of executive privilege was rendered moot and declining to decide the

issue). These cases show only that this Court will not take up the issue when unwarranted by the facts. Next: in two, at most three, cases, this Court has very briefly referenced the presidential executive privilege when discussing the limitations of other privileges before it. *See Brown v. Johnston*, 328 N.W.2d 510, 512 (Iowa 1983) (analogizing U.S. Supreme Court’s rationale in refusing to apply presidential executive privilege in connection with a criminal investigation to Iowa Supreme Court’s decision to refuse to apply First Amendment privilege in connection with criminal investigation); *Lamberto v. Brown*, 326 N.W.2d 305, 309 (Iowa 1982) (similarly comparing procedure adopted for assessing a constitutional claim of First Amendment privilege to procedure adopted by U.S. Supreme Court in assessing executive privilege); *see also AgriVest P’ship v. Cent. Iowa Prod. Credit Ass’n*, 373 N.W.2d 479, 483 (Iowa 1985) (referencing presidential executive privilege in an explanatory parenthetical in a string citation for the proposition that “[p]rivilege is an exception to the discovery rules and, consequently, is to be construed narrowly”). These cases do not purport to say anything about whether the presidential executive privilege might also be enjoyed by the Iowa Governor. Finally: in one 1941 case, this Court discussed a “privilege” of the “executive” against liability for defamation when disclosing official reports. *Ryan*, 300 N.W. at 713. Far from suggesting a gubernatorial prerogative to conceal information, this case illustrates the historical transparency of the executive office, and indeed, stands for the legal framework facilitating and encouraging that transparency.

Neither the Iowa Constitution nor the Iowa common law nor even the two taken together suggest that the Iowa Governor has had or should hereafter have a gubernatorial privilege against disclosure of public records. Nevertheless, this Court has no need to consider the issue in this case.

#### **IV. THE GOVERNOR SEEKS AN ADVISORY OPINION FROM THIS COURT.**

While the answer is “no,” the question the Governor’s Office asks of this Court (I) is not presented by the ruling from which it appeals, and (II) answering it would not change the outcome of the ruling from which it appeals. This Court has a name for an opinion answering such a question: “advisory.” *Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780, 791 (Iowa 2021) (“Think about it this way: If the court can’t fix your problem, if the judicial action you seek won’t redress it, then you are only asking for an advisory opinion.”). This Court does not issue advisory opinions. *Schmidt v. State*, 909 N.W.2d 778, 800 (Iowa 2018) (“We do not issue advisory opinions.”).

There are some instances where this Court might intervene on purely legal issues regardless of whether the resolution would offer relief to the parties before it. *See, e.g., In re Guardianship of Kennedy*, 845 N.W.2d 707, 708–11 (Iowa 2014) (hearing challenge to legality of sterilization of individual under guardianship without court approval even though sterilization already occurred); *Bd. of Dirs. of Indep. Sch. Dist. of Waterloo v. Green*, 147 N.W.2d 854, 856–57 (Iowa 1967) (hearing challenge to school rule prohibiting married students from participating in extracurricular activities even though plaintiff

bringing challenge had graduated prior to arguments on appeal); *Riley Drive Ent. I, Inc. v. Reynolds*, 970 N.W.2d 289, 300 (Iowa 2022) (“*Green* and *Kennedy* are good examples of when the public-importance exception [to mootness] should be applied. Both cases presented individual, discrete points of law that had arisen and were going to arise again.”). However, these are not cases when it is called upon to render “an abstract, advisory opinion on the legal authority of the head of a coequal branch of government.” *Id.* (“That is something we generally try to avoid.”). That is precisely what the Governor’s Office calls for now, with its demand for a privilege unique to it.

In fact, it is worse. The Governor’s Office asks this Court to weigh in on the legal authority of both of its tripartite branches. The Iowa Legislature did not codify or create an executive privilege for the Iowa Governor, whether in the Open Records Act or elsewhere in the Iowa Code. If it is to be found to nevertheless exist, it would be by this Court, which has *never* previously done so.<sup>3</sup> Moreover, the most common flavor of executive privilege, called the “deliberative process privilege,” is not a creature of the Constitution but of the common law. *In re Sealed Case*, 121 F.3d at 737. As a common law privilege for which there is no existing Iowa common law, the judicial creation of the privilege would effectively be a choice amongst competing policies.<sup>4</sup>

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<sup>3</sup> See Part III, above.

<sup>4</sup> It is no surprise that judicial restraint proves to be the reason so many state courts refuse invitations like the Governor’s Office’s. See, e.g., *Rigel Corp. v. Arizona*, 234 P.3d 633, 640–41 (Ariz. Ct. App. 2010) (“Arizona recognizes a legal presumption in favor of disclosing public records. Moreover, we have held that government agencies do not

Still the problems compound. Because if the Governor’s Office cannot obtain and so does not seek a common law privilege, then it must justify its request with the Iowa Constitution. Meaning, in a case where the opinion would be advisory and would go to the powers and authority of the respective branches of state government, the Governor’s Office is asking this Court to take on a constitutional issue. *Cf. State ex rel. Shanahan*, 356 N.W.2d at 527 (“[W]e prefer to address constitutional issues only when other grounds are not dispositive.”). This Court’s precedents and principles counsel strongly against it. *See, e.g., Mormann v. City of Manchester*, 27 N.W.3d 820, 831 (Iowa 2025) (adhering “to the time-honored doctrine of constitutional avoidance”) (quoting *Good v. Iowa Dep’t of Hum. Servs.*, 924 N.W.2d 853, 863 (Iowa 2019)); *Nguyen v. State*, 878 N.W.2d 744, 751 (Iowa 2016) (“Our doctrine of constitutional avoidance instructs us that we should ‘steer clear of “constitutional shoals” when possible.’”) (quoting *State v. Iowa Dist. Ct. for Story Cty.*, 843 N.W.2d 76, 85 (Iowa 2014)); *State v. Williams*, 695 N.W.2d 23, 30

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ordinarily have a privilege to refuse to produce evidence unless a statute has specifically created an exemption. To date, our legislature has not codified any such privilege in the Arizona Public Records statutes. We will not, via decisional law, create this privilege at this time.” (citations omitted)); *People ex rel. Birkett v. City of Chicago*, 705 N.E.2d 48, 53 (Ill. 1998) (noting absence of state deliberative process privilege and “conclud[ing] that in light of the range of competing policies underlying the deliberative process privilege, its adoption should be left to the General Assembly”) (citations omitted); *News & Observer Publ’g Co.*, 412 S.E.2d at 20 (“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.”); *Sands v. Whitnall Sch. Dist.*, 754 N.W.2d 439, 456 (Wis. 2008) (“[N]o such ‘deliberative process privilege’ has ever been recognized by the Wisconsin courts, and we decline the District’s invitation to create a new privilege judicially.”).

(Iowa 2005) (“[W]e are constrained by our principles of self-restraint, including the longstanding rule that we will not decide constitutional questions when a case can be resolved on other grounds.”).

An advisory opinion on the authority of each of the branches of state government that either subverts the legislature’s prerogative over policy matters or constitutionalizes a case that does not call for it—there is no more unworthy a request.

### **CONCLUSION**

The ruling from which the Governor’s Office applies for interlocutory review did not dispose of the Governor’s Office’s claim of privilege. It held only that it had failed to meet its burden on a summary judgment motion filed without adequate factual support, and separately that the Governor’s Office must respond to or resolve by other means Plaintiff’s outstanding discovery requests. The Governor’s Office’s substantial rights are not affected; the ruling will not affect the final decision. *See* Iowa R. App. P. 6.104(1)(f). The ruling does not present the issue of the “existence” of executive privilege, nor would determining that answer before trial serve the interests of justice. *See id.* Unless the Governor’s Office is able to generate substantial proof thus far wholly absent, it very likely will not matter. The District Court did not err, let alone exceed its jurisdiction or act illegally. *See id.* 6.107(1)(a). Thus, neither the requirements for interlocutory review nor writ of certiorari are met, and even if this were disregarded, the request is still for an advisory opinion this Court’s precedents advise against in the strongest possible terms.

Accordingly, Plaintiff respectfully requests this Court deny the Governor's Office's Application for Interlocutory Review or Certiorari, deny the requested stay of the District Court's ruling, and grant all such other and further relief as it deems just.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

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Thomas D. Story

### **CERTIFICATE OF FILING AND SERVICE**

The undersigned certifies that on September 16, 2026, this resistance was electronically filed with the Clerk of the Supreme Court and served upon counsel of record for all parties to this appeal using EDMS.

/s/ Thomas D. Story  
Thomas D. Story