SUPREME COURT NO. 23–0833
LINN COUNTY CASE NO. CVCV098833

IN THE SUPREME COURT OF IOWA

Robert Teig,

Plaintiff–Appellant,

v.

Vanessa Chavez, Alissa Van Sloten, Patricia G. Kropf, Elizabeth Jacobi, Brad Hart, and Teresa Feldmann,

Defendants–Appellees.

APPEAL FROM THE LINN COUNTY DISTRICT COURT
HONORABLE LARS G. ANDERSON, CHIEF DISTRICT COURT JUDGE

AMENDED CONDITIONAL BRIEF OF *AMICI CURIAE* IOWA FREEDOM OF INFORMATION COUNCIL AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF IOWA, INC.

IN SUPPORT OF PLAINTIFF–APPELLANT

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Neither party nor their counsel participated in the drafting of this brief, in whole or in part. Neither party nor their counsel contributed any money to the undersigned for the preparation or submission of this brief. The drafting of this brief was performed *pro bono publico* by counsel for amici curiae.

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

The Iowa Freedom of Information Council ("Iowa FOIC"). The Iowa FOIC is a nonprofit organization of newspapers, radio and television stations, media associations, educators, publishers, broadcasters, and others interested in openness of government and First Amendment rights. For nearly fifty years, the Iowa FOIC has worked tirelessly to ensure strong protections for open meetings, open records, and the First Amendment. The Iowa FOIC has participated in cases as intervenor, as amicus, and even as a party on behalf of the public. The Iowa FOIC is also responsible for publishing the *Iowa Open Meetings, Open Records Handbook*, a publication which has been distributed tens of thousands of times across Iowa, cited by the Iowa Supreme Court, *see Tel. Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 533 n. 1 (Iowa 1980) (including parenthetical quoting *Handbook*'s guidance on an exception to the definition of "meeting" for gatherings of less than a majority of members), by appellate advocates, *see* Appellees' Final Brief and Request for Oral

Argument, *Mason v. Vision Iowa Bd.*, No. 04-0491,2004 WL 4907482 (Sept. 3, 2004), and even used in an Iowa district court order, *see Olinger v. Smith*, 889 N.W.2d 476, 477–78 (Iowa Ct. App. 2015) ("The [district court], apparently sua sponte, supplemented its order . . . by . . . providing that '[i]n lieu of the fine' the trustees purchase an 'Open Meetings, Open Records' handbook from the Iowa Freedom of Information Council for two dollars."). As the author of one law review article described, "One group that was instrumental in getting the law revised in 1978 and retains a strong interest in scrutinizing it to this day, is the Iowa Freedom of information Council . . . ." Steve Stepanek, *The Logic of Experience: A Historical Study of the Iowa Open Meetings Law*, 60 Drake L. Rev. 497, 554, n. 313 (2012).

The Iowa FOIC advocates for the protection of Iowa's open meetings and open records statutes because they are fundamental prerequisites to the exercise of our other inalienable constitutional rights. Iowa Code chapters 21 and 22 particularly are foundational components to a well-functioning constitutional republic and a well-informed polity. Therefore, the Iowa FOIC must ensure that every effort by executives, administrative officials, the legislature, and others, to water down the express and implied protections of those chapters is met with rigorous scrutiny, challenge, and debate.

The American Civil Liberties Union of Iowa Foundation, Inc. ("ACLU of Iowa"). The ACLU of Iowa is a statewide nonprofit and nonpartisan organization with thousands of Iowa members. It is dedicated to the principles of liberty and equality embodied in the United States and Iowa Constitutions. Founded in 1935, the ACLU of Iowa is the fifth oldest state ACLU affiliate. The ACLU of Iowa works in the courts, legislature, and through public education and advocacy to safeguard the rights of everyone in our state.

As part of its mission, the ACLU has long worked to preserve the First Amendment and Article I, section 7 freedom of speech of speech and expression, as well as safeguard the principles of accountability and transparency necessary to the integrity of our democratic system of governance. This requires Iowans to have the ability to participate in government meetings and obtain public records. The ACLU of Iowa has represented itself and its clients as plaintiffs and amici in many cases brought under chapter 22 and has been active in the legislature and community as an advocate for open government.

ARGUMENT

The imposition of costs and fees is, inherently, a limitation on access. The Iowa FOIC and the ACLU of Iowa respectfully submit this amici brief in support of the Plaintiff–Appellant, Robert Teig, with focus on the third

issue identified for appeal: "May a city refuse to disclose public records unless a requester first agrees to pay inferred retrieval fees not specifically authorized in chapter 22 when chapter 22 says there is a presumptive 'right to examine a public record without charge' unless fees are 'provided for by law'?" As Mr. Teig thoroughly explains in his Appellant's Brief, the statutory language compels the answer, "no," and Iowa caselaw does not prompt a different result. Thus, the District Court erred by concluding Defendant–Appellees' policy of charging a $20-per-hour fee for "retrieving records, supervising the examination and copying of requested records, and for other necessary activities undertaken to make records available," described by Appellees as "[g]eneral search and retrieval fees," was permissible under chapter 22. The Iowa FOIC and ACLU of Iowa highlight this issue for the Court because of its centrality to the effectuation of chapter 22's purpose to "open the doors of government to public scrutiny—to prevent the government from secreting its activities from the public, on whose behalf it is its duty to act." *Iowa Civil Rights Comm'n v. City of Des Moines*, 313 N.W.2d 491, 495 (Iowa 1981). Because, in Amici's experience, the cost imposed by a lawful custodian is the number one factor in determining whether a citizen or journalist follows through on a request for public records.

As the experiences and stories of Amici shared below will demonstrate, not only is charging for "general search and retrieval" unauthorized, but it also often appears "calculated to hinder access to information." John Bender, *Solid-Gold Photocopies: A Review of Fees for Copies of Public Records Established Under State Open Records Laws*, 29 Urb. Law. 81, 81 (1997). This is not a new tactic, but it is one that has taken increasing prominence—and absurdity—in the information age, when computers have replaced the four-drawer files and virtually every government record is readily, easily retrievable in digital form. And it is not copying charges, but soft costs like search and retrieval fees, which can serve to stifle public inquiry. *See* Nick Grube, *Many States Charge Insane Fees for Access to Public Records*, HuffPost, Oct. 17, 2013, https://tinyurl.com/bbfjunxp (noting "open-ended fees," like search and retrieval fees, "tend to present more of a problem for affordability than those associated with hard costs for copying). These were the fees the District Court approved as a matter of law, despite the absence of an express statute or controlling precedent. Because these fees can be used to deny access, are unsupported by the statutory text and Iowa caselaw, and have persuasively been rejected by other state courts to have reviewed the issue, Amici urge this Court to reverse and find the City of Cedar Rapids' policy of charging general search and retrieval fees violates Iowa Code chapter 22.

I. "Search and Retrieval" Fees Can Be Used to Deny Access.

"Many States Charge Insane Fees For Access To Public Records" reads the headline of a 2013 article from HuffPost, which highlights cases from Wisconsin, Idaho, and Hawai'i.[1] A 50-state guide prepared and maintained by the Reporters Committee for Freedom of the Press finds that government transparency advocates and attorneys in Alabama, Alaska, California, Colorado, Maine, Michigan, Montana, Ohio, Tennessee, Utah, and Virginia all struggle with agencies imposing prohibitive fees to discourage their requests, "especially with respect to database files, e-mail archives, or other digital or electronic records," with some noting the "practice appears to be on the rise" or is "growing trend."[2] Reassuringly, advocates from other states noted their agencies had tried to make requesting open records prohibitively expensive, but state courts, or state attorneys general, rebuffed the attempts.[3] Unfortunately, the State of Iowa is presently in the former category, as despite

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[1] Nick Grube, *Many States Charge Insane Fees For Access To Public Records*, HuffPost, Oct. 17, 2013, https://tinyurl.com/bbfjunxp.

[2] Reporters Committee for Freedom of the Press, *Have agencies imposed prohibitive fees to discourage requesters?*, accessed July 18, 2023, https://tinyurl.com/2tnduj56 (quoting advocates from Colorado, Alabama, then Alaska).

[3] *Id.* For example, the advocates from Georgia state, "When challenged, agency attempts to impose prohibitive fees have been struck down by the courts." *Id.* Or the advocates from North Carolina, who cite cases providing examples of the "rare *and futile*" attempts by some agencies in their state. *Id.*

the language of the existing law, the problem has grown exponentially in recent years. The following stories from members of the Iowa FOIC illustrate that Iowa is, in fact, one state where open government advocates have often struggle with lawful custodians who attempt to "charge insane fees for access to public records."

$9,000 for Emails. In 2021, as COVID-19 case numbers were rising dramatically, Iowa's meatpacking plants were being hit hard.[4] The U.S. Centers for Disease Control and Prevention twice reached out to the Iowa Department of Public Health, offering its expertise to Iowa officials who were trying to get the outbreak under control in a key segment of the state's economy.[5] Iowa officials declined each offer.[6]

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[4] *See* Hans R. House, MD, MACM, et al., *Agricultural Workers in Meatpacking Plants Presenting to an Emergency Department with Suspected COVID-19 Infection are Disproportionately Black and Hispanic*, 28(9) Acad. Emerg. Med. 1012–18 (July 2, 2021), https://tinyurl.com/4hjw4hwh ("Workers in meatpacking plants in Iowa had a higher rate of testing positive for COVID-19 . . . ."); Des Moines Register, *COVID Infections among Meatpacking Workers Much Higher than Previously Reported, New Report Says*, Oct. 27, 2021, https://tinyurl.com/48vy4ek4 ("44% of employees at National Beef's Iowa Premium plant in Tama caught COVID-19 from April 2020 to February 2021.").

[5] Clark Kauffman, *Why Didn't Iowa Accept CDC's Offer to Help with Meatpacking Plant Infections?*, Iowa Capital Dispatch, July 7, 2020, https://tinyurl.com/34yzkwwy.

[6] *Id.*

Clark Kauffman, a reporter at Iowa Capital Dispatch, an online source of Iowa government news, asked for the emails that were exchanged between State Medical Director Caitlin Pedati and officials at the CDC during a key period surrounding the federal government's offer. Kauffman's inquiry came to an abrupt end when state health department officials told him it would cost $9,000 to retrieve and review those emails. The price was too high for the nonprofit news organization—although the subject was one of high interest in communities with meatpacking plants across Iowa.

Meatpacking plants in Iowa were hit harder by the disease than similar plants in other states, involving nearly 1,800 Iowans.[7] But the cost of retrieving the emails put important information out of the reach of Iowa Capital Dispatch and its readers. The real-world consequence of these retrieval costs deprived citizens who were hungering for information of statistics and strategies and possible solutions the federal government's top experts were offering to Iowa.

Access to such information was what Iowa lawmakers had in mind when the public records law was first crafted in 1967. *See* Note, *Iowa's*

[7] *See* Sydney Czyzon, *Iowa Meatpacking Plants Put Lives on the Line in the COVID Pandemic*, The Gazette, Mar. 15, 2021, https://tinyurl.com/ye64xxbm.

Freedom of Information Act: Everything You've Always Wanted to Know About Public Records but Were Afraid to Ask, 57 Iowa L. Rev. 1163, 1166 (1972) [hereinafter "Note, *Iowa's Freedom of Information Act*"] (noting the enactment of Iowa's public records law "stemmed . . . from numerous complaints from an irate public long denied the right of inspection by custodians of public records").

$58 for a sheet of paper. In 2021, a member of the Iowa Freedom of Information Council, the Iowa Local for the Bricklayers and Allied Craftworkers Union, asked for the Iowa FOIC's assistance in making a simple request for documents in the possession of the Fayette County Roads Department. The union wanted a copy of any document that identified the masonry subcontractor hired to construct a new building for the roads department. Instead of paying 50 or 75 cents for that document, the union was told it owed the county $58.50—based on a quarter-hour of retrieval work, payable at the rate of $104 per hour, by a Project Support Specialist 3 who worked for the project construction manager, and another quarter-hour of review work, payable at $130 per hour, by a Licensed Architect 1.

Fifty-eight dollars for one sheet of paper that supposedly required 30 minutes of time to retrieve from the computer and route to the printer.

$100 for a Settlement Agreement. Last year, Kirkwood Community College negotiated an out-of-court settlement of a copyright infringement lawsuit filed against the college by an East Coast sculptor who designed, crafted, and installed a 14-foot-tall glass and metal sculpture in the atrium of the college convention center and hotel.[8] Iowa Code section 22.13 makes it crystal clear that such settlement documents involving government entities are public records. *See* Iowa Code § 22.13 ("The settlement agreement [with a government body] and any required summary shall be a public record."). The Iowa FOIC submitted a formal request to Kirkwood College President Lori Sundberg asking for a copy of the settlement agreement.

President Lori Sundberg could have given the task of retrieving the document to her administrative assistant, since President Sundberg signed the document on behalf of the college a couple of weeks earlier. Instead, though, Kirkwood College Vice President Jon Neff was given the task. He advised the Iowa FOIC that it would cost $100 for the two-page agreement. That included one hour of an employee's time, charged at $50 per hour (or the equivalent of $104,000 per year), for "data location services." It would take another $50 per hour for "processing, formatting and data transfer."

[8] Randy Evans, *When "Reasonable" Becomes Unreasonable*, The Gazette, Jan. 15, 2023, https://tinyurl.com/4w8df6v8.

In plain language, Kirkwood's fees were outlandish. The college did not need to have a clerk spend an hour or more flipping through file drawers to find the settlement agreement. Instead, a clerical staff member in President Sundberg's office could locate the document and route it to a printer in a matter of two or three minutes—if the college were so inclined.

$2,500 for Credit Card Statements. Rich Knowles, a retired businessman in Denison, sees it as his civic responsibility to closely monitor the use of government credit cards by key staff at the Crawford County Memorial Hospital there. He is concerned, because he regularly reads newspapers articles from around Iowa about local government officials misusing similar government credit cards to charge tens of thousands of dollars in personal expenses.[9]

Knowles's concern grew when he learned that the county hospital's board of directors does not see an itemized bill from the financial services company that provides hospital executives with credit cards. Instead, the hospital board only sees the lump sum they are asked to pay each month. Knowles's concern spiked when he heard rumors around town that top

[9] *See, e.g.*, Madison McAdoo, *Former Eldridge City Clerk Pleads Not Guilty to Theft, Other Charges*, KWQC, July 14, 2023, https://tinyurl.com/2y3wmzu4 (citing Iowa State Auditor report finding $76,717.90 in unauthorized payments charged to city-owned credit card).

hospital executives were using their hospital credit cards to pay for meals, as well as alcoholic beverages, in town.

Chapter 22 gives any interested person access to all manner of government documents so they can monitor what their government is doing and spending money on. *See Belin v. Reynolds*, 989 N.W.2d 166, 173 (Iowa 2023) ("The Act gives '*[e]very* person [a] right' to examine, copy, and publish 'a public record.' Section 22.1 defines '[p]ublic record[ ]' to include '*all* records, documents, and other information . . . of or belonging to this state' or 'any' of its 'branch[es]' or 'department[s].'" (First quoting Iowa Code § 22.2(1) (emphasis added), then quoting Iowa Code § 22.1(3)(*a*) (emphasis added).). That is the intention of the law. *See, e.g.*, Iowa Code § 22.8(3) ("[T]he policy of [chapter 22 is] 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."); *see also* Note, *Iowa's Freedom of Information Act*, 57 Iowa L. Rev. at 1167 ("Any . . . theory of unexposed decisionmaking is inconsistent with the values of a democratic society where governmental interests must coincide with public requirements."). But the reality that Mr. Knowles encountered is different.

He called the Iowa FOIC out of frustration when hospital executives told him he would have to pay an estimated $500 for an employee to retrieve

and copy the monthly credit card statements for the past couple of years. And if he wanted copies of all statements going back to when the credit cards were first issued to key employees, the cost would be about $2,500, he was told.

Those cost estimates ended his quest to examine how these credit cards were being used. He could not afford to pay $2,500 for the records, or even $500, from his retirement income.

$604,000 for Emails and Texts. Jacob Hall of Sioux Center publishes the well-known Iowa Standard. He turned to the Iowa FOIC in 2021 for assistance after he asked the Linn-Mar School District for emails and text messages exchanged by Linn-Mar school administrators about a Transgender Week observance at Linn-Mar High School in Marion.[10]

The public records law speaks of the importance of free and open examination of records for citizen participation in their governments. *See* Iowa Code § 22.8(3); *see also City of Riverdale v. Diercks*, 806 N.W.2d 643, 645 (Iowa 2011) ("'Sunlight is said to be the best of disinfectants.' This concept animates state . . . laws allowing public scrutiny of government records—shining the light of day on the actions of our public officials deters

[10] *See* Gillian Brooks, *Linn-Mar High School's Spectrum Students Respond to Negativity during Transgender Week*, Nov. 17, 2021, https://tinyurl.com/bdd3ar5b.

misconduct that thrives in darkness." (Quoting Justice Louis Brandeis, *What Publicity Can Do*, Harper's Weekly, Dec. 20, 1913)); Brenna Findley, *Practical Observations on Politics and the Constitution*, 61 Drake L. Rev. 1085, 1087–88 (2013) [hereinafter, "Findley, *Practical Observations*"] ("Only an informed public can perform its role in the constitutional framework: holding government accountable. Transparency of government functions and processes is essential.").

Hall was surprised when the Linn-Mar communications coordinator informed him he would have to pay $504 to receive the records he sought. The official explained it would take two hours of a computer technology employee's time to retrieve the emails and text messages and another hour and a half for an attorney to examine those communications for confidential details.

The IT worker's time would be charged to Hall at the rate of $57 per hour—meaning the worker makes $118,000 annually. The attorney's time would be charged at $260 per hour.

At $500, the Linn-Mar records would be out of reach financially for most people in Iowa. But Hall and the Iowa Standard were willing to pay the cost, and he asked the communications official how to make the payment. He also asked how many pages of emails and text messages he would receive.

Hall was not expecting what he heard next: "In reviewing the information that I provided to you, the amount quoted is the rate to access each employee record," the official wrote. "The total amount for staff time to retrieve the records and attorney time to review/redact confidential information for the entire district would come to approximately $604,000."

The costs Linn-Mar quoted to Hall mean, in effect, it would take 2,400 hours to retrieve the emails and text messages containing the keywords "Trans Week." That is 60 weeks of full-time work by the school's information technology employee. And it would require 45 weeks of a $260-an-hour attorney working full-time looking for confidential information in those emails and text messages.

It is immaterial whether Jacob Hall's publication—or any requester—is neutral, liberal, conservative, or somewhere in between. *See* Findley, *Practical Observations*, 61 Drake L. Rev. at 1090 ("Transparency is a valuable good that both parties can embrace. There is nothing inherently Republican or Democratic about transparency. Negative and positive news stories relate to both parties."). For purposes of compliance with chapter 22, it doesn't matter what motive the Iowa Standard has for writing about Transgender Week—$600,000 does not meet most people's definition of reasonable.

$1,260 for 134 Pages; and $25,000 for Emails. "Unreasonable" was a word that was frequently mentioned in 2017 by another case two television stations brought to the attention of the Iowa FOIC as they sought the organization's assistance.

During the prolonged controversy in Muscatine over the impeachment of new Mayor Diana Broderson,[11] television stations WQAD in Moline, Illinois, and WHBF in Rock Island, Illinois, sought access to public records to show how much tax money Muscatine city officials were spending in their quest to remove the mayor from office.

WQAD asked the city administrator how much the city had spent in legal fees to the law firm representing the city. The administrator demurred, saying the lawyers' bills are not recorded by individual cases. WQAD then asked for copies of all invoices the law firm had submitted for payment since the controversy over the mayor began. The city administrator said it would cost the station $412 to retrieve the records, review the bills and make the copies. The station paid, but when the work was completed, the administrator

[11] *See* John Tomasic, *Small Town Mayor Impeached, Kicked Out of Office, Then Reinstated and Reelected*, Route Fifty, Nov. 9, 2017, https://tinyurl.com/mukeufmc.

informed the station the work had taken longer than expected and it would cost WQAD an additional $848.

The 134 pages of documents were useless. It was impossible to calculate how much the law firm had billed the city during the period covered by the invoices or how much time the law firm spent on the impeachment matter. The justification for the $1,260 in fees that WQAD paid was astonishing: The city claimed it took the city administrator's secretary 8 hours of time—one full workday—to retrieve the lawyer's bills. The city also claimed it took the city administrator 12 hours to review and redact portions of the 134 pages.

WHBF, meanwhile, asked the city administrator for copies of emails he and the council members exchanged concerning their complaints with Mayor Broderson. The city administrator said it would cost $25,000 for those emails. Not surprisingly, the station said, "no thanks," and let the matter drop then and there.

Summary. These stories show that abuse of general "search and retrieval" fees is not a rare or isolated occurrence. It is not something that only occurs in other states. It is in Iowa, and it will be attempted regularly so long as lawful custodians are interpreting chapter 22 to allow it. When it does

occur, it can effectively be used to impede access to records that belong to the public.

II. Chapter 22 Does Not Authorize General "Search and Retrieval" Fees.

Arguing chapter 22 allows general "search and retrieval" fees shows a misunderstanding of the duties of public officers and of the status of public records. Chapter 22 recognizes that, as much as creating public records is a function of government work, so too is providing those records to the public. *See* Note, *Iowa's Freedom of Information Act*, 57 Iowa Law Rev. at 1169 (arguing chapter 22 "can be viewed as a return to and an improvement upon the doctrine that public officers should be trustees of public documents for the beneficial interests of the citizenry"); *see also* Richard J. Peltz-Steele, Robert Steinbuch, *Transparency Blind Spot: A Response to Transparency Deserts*, 48 Rutgers L. Rec. 1, 9 n. 10 (2020–2021) (identifying state court precedents concluding "that personnel costs effectively charge a taxpayer a second time for records already maintained at public expense"). Like other public works, such as parks, roads, or buildings, Iowans have already secured for themselves a right to access and examine public records simply by their status as a member of the body politic. The people of Iowa have already determined, through their elected representatives, that such things belonging to and for the

benefit of the public should be made available to all, ordinarily without charge.

As Mr. Teig points out, the plain text of chapter 22 requires access-without-charge. *See Beverage v. Alcoa, Inc.*, 975 N.W.2d 670, 680 (Iowa 2022) ("As with all cases involving statutory interpretation, we start with the language of the statute to determine what the statute means."). Further, the legislative history and timing of amendments supports this interpretation. *See* Iowa Code § 4.6(3) (providing for the consideration of legislative history in determining legislative intent); *Postell v. American Family Mut. Ins.*, 823 N.W.2d 35, 49 (Iowa 2012) (noting "when the legislature amends a statute, it raises a presumption that the legislature intended a change in the law," and finding legislative amendments to statute were intended to narrow acts compensable under insurance policy and overrule prior holding of court providing broader coverage). In a 1998 opinion reviewing the law as of its 1995 codification, the Iowa Supreme Court concluded the statute was ambiguous but the repeated use phrase "all expenses of such work" could be interpreted to authorize reimbursement of "costs incurred in retrieving public records." *See Rathmann v. Bd. of Dirs.*, 580 N.W.2d 773, 778 (quoting Iowa Code § 22.3 (1995)). The legislature promptly eliminated the phrase by subsequent amendments. *See* 2001 Ia. Legis. Serv. Ch. 44, § 2 (S.F. 372)

(amending section 22.3 to replace "such work" with "the work," thus connecting "work" strictly to the qualifying terms "examination and copying"); 2005 Ia. Legis. Serv. Ch. 103, § 1 (S.F. 403) (in "An act providing for the receipt of and costs relating to public records requests" further clarifying the statute by removing the phrase "the work" entirely and replacing each instance with "the examination and copying of the records"); 2006 Ia. Legis. Serv. Ch. 1010, § 14 (H.F. 2543) (code corrections bill replacing two remaining uses of the phrase "the work" with "the examination and copying"). Given the court had found "the phrase 'all expenses of such work' to be especially significant and indicative of the legislature's intent" to allow retrieval fees, *Rathmann*, 580 N.W.2d at 778, the legislature's complete removal of the phrase is a clear rebuttal of this interpretation, evidence of its intent to narrow reimbursable expenses to those incurred for "examination and copying" and to supersede this aspect of the court's holding in *Rathmann*.

In short, the ambiguity in the statute that led the *Rathamnn* court to conclude Iowa's open records law authorized "retrieval" fees was swiftly resolved. Indeed, it is questionable whether the statute as a whole ever supported the *Rathmann* Court's reading. *See Story County Wind, LLC v. Story County Board of Review*, 990 N.W.2d 282, 286 (Iowa 2023) ("We must consider the statute as a whole, 'not just isolated words and phrases.'"

(Quoting *In re J.C.*, 857 N.W.2d 495, 500 (Iowa 2014)).). As Mr. Teig points out, on the day *Rathmann* was published another legislative change went into effect, this one stating expressly, "Unless otherwise provided for by law, the right to examine a public record shall include the right to examine a public record *without charge* . . . ." 1998 Ia. Legis. Serv. Ch. 1224, § 17 (S.F. 2418) (emphasis added). And in 2005, the section following this pronouncement was amended as well, to affirm that recoverable "actual costs" "shall include only those expenses directly attributable to *supervising the examination* of *and making and providing copies* of public records," and "shall not include charges for *ordinary expenses or costs* such as employment benefits, depreciation, maintenance, electricity, or insurance *associated with the administration of the office of the lawful custodian*." 2005 Ia. Legis. Serv. Ch. 103, § 1 (S.F. 403) (emphases added) (amending Iowa Code section 22.3(1)–(2)).

Yet, until potentially this case, the Iowa Supreme Court has not had occasion to revisit this aspect of its *Rathmann* ruling. In fact, the only appellate court to have done so is a panel of the Iowa Court of Appeals, in an unpublished opinion, not on general search and retrieval fees, but, on legal fees. *See Hackman v. Kolbet*, No. 16-2063, 2017 WL 3065168, *2 (Iowa Ct. App. July 19, 2017). Such fees are now better addressed by the statute

separately and expressly, leaving *Hackman* with little further persuasive relevance. *See* Iowa Code § 22.3(2) ("Costs for legal services should only be utilized for the redaction or review of legally protected confidential information."). The fees sought by the Defendants–Appellees in *this* case, the same category of search and retrieval fees that have proven to be so ripe for abuse, cannot reasonably be characterized as legal fees, nor as time spent supervising Mr. Teig's examination of the records, nor certainly as copy costs. They are overhead; they are additional compensation for the employee time already budgeted for and paid by the taxpayers as part of the administration of their office. Iowa Code chapter 22 does not allow their recovery.

III. Other State Courts that have Reviewed the Issue Deny Such Fees.

The Iowa legislature has established a rule pursuant to which only certain, enumerated costs may be charged, as exceptions to the default rule of free access. *See* Iowa Code § 22.2 (establishing right to examine public records without charge); *id.* § 22.3(1) (providing for expenses "of providing a place for the examination and copying" if "it is impracticable to do the examination and copying of the records in the office of the lawful custodian"); *id.* § 22.3(2) (providing for "a reasonable fee" for services provided "in supervising the examination and copying"; providing for reimbursement of the "actual costs" of "making and providing copies"; providing for "[c]osts

for legal services" in certain circumstances). General "search and retrieval fees" are not among these enumerated costs. In other states with similar statutes setting forth specific tasks for which charges can be made, courts have rejected attempts to obtain reimbursement for other, unspecified tasks.

For example, in *Milwaukee J. Sentinel v. City of Milwaukee*, the Wisconsin Supreme Court held that cities could not charge fees for the staff time spent reviewing and redacting records. 815 N.W.2d 367, 370–71 (2012). Wisconsin's public records law stated that it must be construed in favor of "complete public access" to government records and that "only in an exceptional case may access be denied." *Id.* at 375 (quoting Wis. Stat. § 19.31). The court first noted that fees "directly implicate[]" citizens' access to government records. *Id.* at 370. The statute enumerated four tasks that the government could recoup the "actual, necessary, and direct" cost of performing: reproducing, photographing, locating, and mailing records. *Id.* at 373 (quoting Wis. Stat. § 19.31(a)–(d)). The city argued that redaction fell under the tasks of "reproduction" and "location" because a record is not "truly" located or reproduced until it is lawfully disclosable. *Id.*

The court rejected this argument, relying on the plain meaning of 'reproduce' and 'locate.' To "reproduce" meant to "produce a counterpart, an image, or a copy of"—a definition that "inherent[ly]" excluded alterations like

redactions. *Id.* at 374 (quoting *The American Heritage Dictionary of the English Language* 1532 (3d ed. 1992)). Next, to "locate" something was to "find" it, meaning a custodian finishes "locating" a record once they "go[] to the file cabinet (or the computer file)" and possess it. *Id.* (quoting *The American Heritage Dictionary of the English Language* 1055 (3d ed. 1992)). Redaction, by contrast, is a separate process that begins after location. *Id.* Thus, redaction did not fall under one of the four tasks for which the government could impose fees. *Id.* Crucially, the court declined to interpret the law's mention of four specific tasks as authorizing "fees for a broad range of tasks" like redaction. *Id.* at 375 ("That the legislature listed four tasks for which fees may be imposed demonstrates that the legislature considered the imposition of fees and knew how to authorize particular types of fees. . . . If the legislature had wanted to … include the task of redaction as a task for which fees may be imposed, it would have said so. It did not."). The individual tasks chosen for reimbursement may be different in Iowa, but the underlying legislative choice is the same.

Similarly, and quite recently, the Indiana Court of Appeals, in *Tutt v. Evansville Police Dep't*, held that the Indiana legislature's omission of the word "inspection" meant that the government could not charge a fee to inspect a vehicle accident report. 204 N.E.3d 305, 309–10 (2023). The plaintiff went

to a police department and requested to inspect an accident report in person, but an employee directed her to visit a website and pay a $12 charge for a copy of the report. *Id.* at 306. Accident reports implicated two statutes: Indiana's Access to Public Records Act ("APRA") and the accident report statute. *Id.* at 308–10. APRA provided the right to "inspect and copy" public records such as accident reports, subject to certain exceptions. *Id.* at 307 (quoting Indiana Code § 5-14-3-3(a)). APRA also said public agencies "may not charge any fee under this chapter … [t]o inspect a public record." *Id.* at 308 (emphasis in original).

In an attempt to get around APRA's requirement of free access, the police department unsuccessfully argued that its inspection fee was lawful under the accident report statute, which provided that police departments must make vehicle accident reports available for "inspection and copying under [APRA]." *Id.* at 309 (citing Indiana Code § 9-26-2-3) (emphasis removed). The court rejected this argument, differentiating between sections of the accident report statute. One subsection authorized law enforcement to "charge a fee . . . for each report." *Id.* (citing Indiana Code § 9-26-9-3(a)) (emphasis in original). Another authorized fees for "each report" and for "the inspection and copying of other report related data." *Id.* (citing Indiana Code § 9-26-9-3(c)(1) and (2)). The court held: "If the legislature wanted to include a fee for

the 'inspection' of an accident report (as opposed to 'other report related data'), it could have used the same language in (c)(1) that it used in (c)(2). It did not." State legislatures choose the language of their public records statutes carefully.

Likewise, an Ohio Supreme Court case differentiated between "inspection" (free) and "copying" (at cost) in Ohio's public records law. *State v. Hutson*, 640 N.E.2d 174, 178 (1994). The law said that "all public records . . . shall be promptly prepared and made available for inspection" upon request, but also that government bodies "shall make copies" of requested records "at cost." Ohio Rev. Code. § 149.43(B)(1). Essentially, the court held that under Ohio's law, "[t]he right of inspection, as opposed to the right to request copies, is not conditioned on the payment of any fee under." *Hutson*, 640 N.E.2d at 178–79. The court stressed that "any doubt . . . must be resolved in favor of disclosure." *Id.* at 179. Thus, because the requestor sought to only inspect records, then decide afterwards whether she wanted copies, the government could not impose a fee. *Id.* Again, because fees inherently limit access, courts must construe their authorization only in the most carefully limited sense.

A final persuasive case is *Fuller v. City of Homer*, where the Alaska Supreme Court held that the authorization of fees for "searching and copying

tasks" tasks did not extend to authorization of fees for staff time spent on reviewing documents for privilege. 113 P.3d 659, 665–66 (2005). State law and city regulations said that if the "production of records" takes longer than five hours, the government may charge fees for "search and copying tasks." *Id.* at 663, 665 n.23 (citing Alaska Stat. 40.25.110; Homer Regulation 01.03 (2003)). The decisive words were "production," "search," "copying," and "tasks." *Id.* at 665–66. "Production" was not broadly construed, but meant only "the act or process of producing, bringing forth, or making[] . . . the act of exhibiting." *Id.* at 665 (quoting Webster's Third New Int'l Dictionary 1810 (1961)). The words in this definition were all "routine ministerial efforts," which indicated that "'production' is essentially administrative and clerical," unlike privilege review, which required "professional judgment." *Id.* at 665–66. Moreover, the fact that 'tasks' was plural suggested that "searching and copying are distinct . . . processes, and that the entire phrase is not meant to broadly encompass other processes," like privilege review. *Id.* at 666. Put another way, the authorization of fees for "search and copying" tasks did not extend to privilege review because the latter was qualitatively different from, and necessarily took place after, the former. *See id.* at 665–66.

In summary, the choices as to which specific tasks reimbursement is allowed vary among the states. But a state legislature properly understanding

the underlying principle that public records are the public's records does not allow its custodians unlimited, or even substantial discretion to charge for the service of providing them.

In Iowa, our legislature primarily chose to allow reimbursement for time spent "supervising the examination or copying" and for copy costs. *See* Iowa Code § 22.3(2). General "search and retrieval" cannot be characterized as either reimbursable expense. Without specific authorization, the costs of such work cannot be passed on to the requester; instead, such work is among those duties we expect our public officials to perform as part of their regular duties.

CONCLUSION

"Public business is the public's business. The people have a right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings." Harold L. Cross, *The People's Right to Know: Legal Access to Public Records and Proceedings* XIII (1953); *see also* David Cuillier, *The People's Right to Know: Comparing Harold L. Cross' Pre-FOIA World to Post-FOIA Today*, 21 Comm. L. & Pol'y 433, 433–34 (2016) (noting these words in Mr. Cross's book "fueled the twentieth century transparency movement in the United States"). By their nature, fees are a limitation on the right to know. They put public records beyond the reach

of those of ordinary means and discourage inquiries by making them cost-prohibitive. It is for the legislature, as a matter of informed policymaking, to decide which fees it is willing to permit. In Iowa, general "search and retrieval" fees are not among these, and therefore, they may not be authorized judicially. The District Court erred when it provided a blanket endorsement of Defendants' fee policy, and for these reasons Amici support Mr. Teig's appeal asking this Court to reverse.

COST CERTIFICATE

I hereby certify that the cost of printing this application was $0.00 and that that amount has been paid in full by the ACLU of Iowa.

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CERTIFICATE OF COMPLIANCE

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/s/ Thomas D. Story August 2, 2023
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