IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LAURA BELIN, BLEEDING HEARTLAND LLC, CLARK KAUFFMAN, IOWA CAPITAL DISPATCH, RANDY EVANS, AND IOWA FREEDOM OF INFORMATION COUNCIL, Plaintiffs, v. GOVERNOR KIM REYNOLDS, MICHAEL BOAL, PAT GARRETT, ALEX MURPHY, and OFFICE OF THE GOVERNOR OF THE STATE OF IOWA, Defendants.	Case No. CVCV062945 **BRIEF IN SUPPORT OF RESISTANCE TO MOTION TO DISMISS**

COME NOW, Plaintiffs Laura Belin ("Belin") Bleeding Heartland LLC ("Bleeding Heartland"), Clark Kauffman ("Kauffman"), Iowa Capital Dispatch, Randy Evans (Evans), and Iowa Freedom of Information Council ("FOIC"), by and through their attorneys, Leah Patton and Rita Bettis Austen of the American Civil Liberties Union of Iowa Foundation, file a Brief in Support of the Resistance to Defendants' Motion to Dismiss.

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I. Background Facts and Proceedings

"'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 misconduct that thrives in darkness." *City of Riverdale v. Diercks*, 806 N.W.2d 643, 645 (Iowa 2011) (quoting Justice Louis Brandeis, *What Publicity Can Do*, Harper's Weekly, Dec. 20, 1913)). At issue in this case are troubling and ongoing non-compliance and unreasonable delay by the Iowa Governor's Office and its staff to Iowa Code Chapter 22 open records requests submitted by Iowa's reporters and news organizations, including Plaintiffs, that spans over eighteen months. Pet. ¶ 2.

Plaintiffs Belin and Bleeding Heartland made numerous requests to obtain public records from Defendants under Iowa's open records law through Michael Boal ("Boal"), the governor's records custodian, from April 27, 2020, until June 16, 2021, on matters of public interest both related and unrelated to the COVID-19 pandemic. *Id.* ¶ 5. Boal acknowledged receipt of a few the open records requests. *Id.* ¶ 6. However, the Governor's Office did not provide Belin and Bleeding Heartland with the requested open records. *Id.* ¶ 7. Belin and the Bleeding Heartland renewed the requests numerous times over many months. *Id.* ¶ 8. Nevertheless, the Governor's Office did not produce any records in response to the open records requests until after this litigation was filed, at which point it provided an incomplete response. *Id.* ¶ 9.

Plaintiffs Evans and the FOIC also submitted open records requests to the Governor's Office through Boal from August 10 to August 27, 2021. *Id.* ¶ 10. Boal acknowledged receipt of the FOIC's open records requests. *Id.* ¶ 11. However, the Governor's Office did not provide the FOIC with the requested open records even after it renewed its requests until after

this litigation was filed, at which point it provided an incomplete response. *Id.* ¶ 12.

Finally, Plaintiffs Kauffman and Iowa Capital Dispatch submitted open records requests to the Governor's Office through Boal, Pat Garrett ("Garrett"), and Alex Murphy ("Murphy") from April 8 to November 3, 2021. *Id.* ¶ 13. Boal, Garrett, and Murphy eventually acknowledged receipt of these requests. *Id.* ¶ 14. However, the Governor's Office did not provide Kauffman and Iowa Capital Dispatch with the requested open records except for a few documents. *Id.* ¶ 15. Kauffman and Iowa Capital Dispatch renewed their requests for the records that were not provided several times. *Id.* ¶ 16. Nevertheless, the Governor's Office did not produce the remaining responsive records until after this litigation was filed. *Id.* ¶ 17.

Due to the substantial delay since the original open records requests were made, the multiple renewals of the original requests, and the refusal of the Governor's Office to provide the records, Plaintiffs had no choice but to file the lawsuit on December 16, 2021. *See generally* Pet. In the petition, the Plaintiffs allege that the Defendants have violated Iowa Code Chapter 22 in two ways: (1) They have failed to promptly and timely provide the records requests, and (2) they have denied access to the open records altogether. *Id.* ¶ 4. The Plaintiffs have requested a declaratory judgment, injunctive relief, including prospective relief, an order of mandamus, attorney's fees, and court costs. *Id.* ¶¶ 121-23.

On January 3, 2022, eighteen days after the lawsuit was filed, the Governor's Office provided partial records to Plaintiffs. *See* Ex. A (Affidavit of Michael Boal and Records Response Cover Letters). However, Defendants redacted and withheld records responsive to the Plaintiffs' open records requests. *See* Ex. 1 (Email exchange with Sam Langholz dated February 3, 2022, and attached letters). Specifically, Defendants redacted and withheld records citing exemptions under Iowa Code sections 22.7(5), (18), and (50). *See id.* The

Plaintiffs objected to the withholding and redaction of these records as not timely. *See id.* In response, the Defendants indicated that they do not intend to provide the redacted and withheld records. *See id.*

On January 7, 2022, the Defendants accepted service of the lawsuit. *See* Acceptance of Service. On January 13, 2022, the Defendants filed an appearance in this case. *See* Appearance. On January 27, 2022, the Defendants also filed a motion to dismiss, arguing that since the records were provided in response to the lawsuit the case is moot, the lawsuit presents a nonjusticiable political question, the lawsuit is barred by the Governor's executive privilege, and the Plaintiffs are not entitled to injunctive or mandamus relief. *See* Motion to Dismiss.

Since the lawsuit was filed, Plaintiffs and their members have continued to submit open records requests to the Governor's Office. *See, e.g.*, Ex.2 (Open Records Request dated January 14, 2022).

II. Argument

The court should deny Petitioners' motion in full for four reasons: First, the case is not moot because Defendants did not provide the Plaintiffs all the records that were requested. Also, the Defendants delayed months to years in providing the records request responses and only provided the records in response to the litigation, which occurred eighteen days after the petition was filed. Even if the case were moot, the public interest exception and the voluntary cessation exceptions to the mootness doctrines apply. Second, this lawsuit does not involve a nonjusticiable political question. Third, there is no provision in Iowa Code Chapter 22 granting the Governor immunity from suit, and the Governor's invocation of executive privilege is not relevant at this stage in the proceedings and is premature. Fourth, as aggrieved parties, Plaintiffs have standing to seek injunctive and mandamus relief.

A. Standard for Motion to Dismiss

Iowa is a notice pleading state; therefore, motions to dismiss are generally disfavored. *Benskin, Inc. v. West Bank*, 952 N.W.2d 292, 296 (Iowa 2020). "Nearly every case will survive a motion to dismiss under notice pleading." *Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 609 (Iowa 2012). The Iowa Supreme Court has warned against using motions to dismiss as a "premature attack[ ] on litigation" and instead challenge cases by summary judgment or trial. *Benskin, Inc.*, 952 N.W.2d at 296.

When reviewing a motion to dismiss, the court must accept the facts alleged in the petition as true. *Hawkeye Food Service Distrib., Inc.*, 812 N.W.2d at 604. In addition, the allegations are viewed "in the light most favorable to the plaintiff with doubts resolved in that party's favor." *Soike v. Evan Mathews & Co.*, 302 N.W.2d 841, 842 (Iowa 1981). Dismissal of a case is only proper "if the petition shows no right of recovery under any state of facts." *Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192, 194 (Iowa 2007). Stated another way, there must be "no conceivable set of facts entitling the non-moving party to relief." *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004). If the claim's viability is debatable, then the court should deny a motion to dismiss. *Southard*, 734 N.W.2d at 194.

B. Burden-Shifting in Chapter 22 Judicial Enforcement Cases

The party seeking judicial enforcement of Chapter 22 must show that the record custodian is subject to the chapter's requirements, the records are government records, and the record custodian refused to provide the records to the party for examination and copying. *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 460 (Iowa 2013). Once the party seeking enforcement meets its burden, the burden shifts to the record custodian to show compliance with Chapter 22. *Id.*

C. Plaintiffs' Suit Is Not Moot.

Contrary to the Defendants' assertion, the Plaintiffs' lawsuit is not moot as to either of their claims. On Plaintiffs' claim that Defendants unlawfully withheld records, a number of records remain outstanding. Although Defendants provided the Plaintiffs with many requested open records after the lawsuit was filed, they are still withholding others. On Plaintiffs' separate claim that the Defendants unlawfully delayed in providing records, the provision of partial records after months and years of noncompliance is a factual consideration in determining whether the delay was reasonable, which goes to the merits. But it is insufficient as a matter of law to moot out the separate injury arising from delay in violation of the statute.

1. Regarding Plaintiffs' Unlawful Withholding Claims: Defendants Are Still Withholding Some Open Records from Plaintiffs.

Defendants have not provided all the open records that the Plaintiffs requested. Instead, Defendants redacted and withheld several of the documents pursuant to Iowa Code section 22.7. As set forth below, the time to assert a basis to withhold documents under section 22.7 has long passed such that Defendants cannot rely on this section to withhold the documents. Therefore, Plaintiffs' unlawful withholding claim is not moot.

Under Iowa Code Chapter 22, Iowa's open records law provides that "[e]very 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." Iowa Code § 22.2(1). The purpose of Chapter 22 is "to open the doors of government to public scrutiny [and] to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." *City of Riverdale*, 806 N.W.2d at 652. Under Chapter 22, there is a presumption of openness, and disclosure of open records is the rule. *Gabrilson v.*

Flynn, 554 N.W.2d 267, 271 (Iowa 1996).

Iowa Code Chapter 22 carves out specific exceptions to the liberal policy of access to public records. *Gabrilson*, 554 N.W.2d at 271; *see* Iowa Code § 22.7. However, section 22.8(4) contains a deadline for the records custodian to assert such an exception as the basis of withholding records: "A reasonable delay for this purpose shall not exceed twenty calendar days and ordinarily should not exceed ten business days." Iowa Code § 22.8(4)(d). In *Horsfield Materials, Inc. v. City of Dyersville*, the Iowa Supreme Court stated that this section "imposes an outside deadline for a government entity to determine "whether a confidential record should be available for inspection and copying to the person requesting the right to do so.'" *Horsfield Materials, Inc.*, 834 N.W.2d at 461. As *Horsfield Materials, Inc.* holds clear, this statutory limit to assert an exception to chapter 22 is firm and a separate inquiry from the question of unreasonable delay of the records themselves.

In this case, Defendants did not timely assert an exception applies and have waived their ability rely of the asserted exceptions as a lawful basis to withhold records. Defendants waited until January 3, 2022, months and years after the 20-day deadline, to first assert any exception. On that date, Defendants redacted and withheld records based on exemptions under sections 22.7(5), (18), and (50).

The requests were originally made on July 3, 2020, July 17, 2020, June 1, 2021, June 16, 2021, and August 10, 2021. Pet. ¶¶ 46 (records related to House File 2643), 52 (previously provided public records), 56 (Terrace Hill charitable donation records), 60 (Senate File 567 records), and 81 (the deployment of Iowa State Patrol members to Texas records). Defendants redacted and withheld records requested on July 3 and July 17, 2020, and June 1 and 16, 2021, pursuant to Iowa Code section 22.7(18). *See* Ex.1 (Email exchange with Sam Langholz dated

February 3, 2022, and attached letters). Further, Defendants redacted and withheld records requested on August 10, 2021, pursuant to sections 22.7(5) and (50). *See id.* Plaintiffs have objected to the withholding and redaction of these records as not timely. *See* Ex. 1 (Email exchange with Sam Langholz dated February 3, 2022, and attached letters). Defendants continue to refuse to provide these records. *See id.*

Thus, the assertion that they were relying on Chapter 22.7 exceptions to withhold records occurred anywhere from one-and-a-half to almost five months after the original records requests were made. This is clearly outside of the twenty-day timeframe the record custodian has to determine whether a confidential record should be available for inspection and copying to Plaintiffs.

As a result, Defendants have waived the ability to withhold and redact records under the exceptions contained in section 22.7(5), (18), and (50). Defendants must provide Plaintiffs with the withheld and redacted records and have failed to do so. Since Defendants have not provided these records, Plaintiffs' unlawful withholding claim is not moot.

2. Regarding Plaintiffs' Unlawful Delay Claims: These Are Not Mooted by the Untimely Eventual Provision of Records.

Chapter 22 contemplates immediate access to public records. *Horsfield Materials, Inc.*, 834 N.W.2d at 461. Under Chapter 22, the records must be promptly provided unless the size or nature of the request makes prompt access not feasible; therefore, if the size or nature of the request requires time for compliance, then the record custodian shall comply with the open records request as soon as feasible. *Id.*

A case is moot when it no longer presents a justiciable controversy because the issues have become either academic or nonexistent. *Junkins v. Branstad*, 421 N.W.2d 130, 133 (Iowa

1988). "The test is whether a judgment, if rendered, would have any practical legal effect upon the existing controversy." *Id.* The Governor's Office relies on *Neer v. State* to argue that the case is moot. Defendants Br. 5 (citing *Neer v. State*, 2011 WL 662725 (Iowa Ct. App. Feb. 23, 2011)). In *Neer*, the Iowa Court of Appeals affirmed the district court's finding that the public interest exception to the mootness doctrine applied to the open records case; as a result, the court reached the question of whether certain records were confidential under Chapter 22. *Id.* at *2.

The State's reliance on the *Neer* decision is misplaced. First, the decision is an unpublished Court of Appeals decision that is not binding authority. Iowa R. App. P. 6.904(2)(c); *see also State v. Shackford*, 952 N.W.2d 141, 145 (Iowa 2020) (explaining that unpublished decisions are not "precedential"). Second, *Neer* is distinguishable. Neer had filed suit to compel production, *id. at* *1, but there is no mention of a second claim regarding unlawful *delay* in violation of Chapter 22, as Plaintiffs make here. Third, the Court of Appeals in *Neer* declined to address whether remedies under Chapter 22 for prospective injunctive relief, statutory damages, attorney's fees, and costs remained viable after the State voluntarily produced the records in response to the lawsuit because the district court instead applied the public interest exception to overcome mootness. *Id.* at *1. Thus, *Neer* does not speak to those questions at all.

The Iowa Supreme Court's decision in *Horsfield Materials, Inc.*, supports the Plaintiffs' position that their claims regarding unlawful delay are not mooted by eventual untimely production. *See Horsfield Materials, Inc.*, 834 N.W.2d 444. Two years after the *Neer* decision, the Iowa Supreme Court decided *Horsfield Materials, Inc.*, where the open records were provided after the litigation was filed but before trial. *Id.* In *Horsfield Materials, Inc.*, the Iowa Supreme Court held Chapter 22 had been violated as a result of unlawful *delay*: "Although section 22.10(2) speaks in terms of a refusal rather than a delay in production, we think a refusal

to produce encompasses the situation where, as here, a substantial amount of time has elapsed since the records were requested and the records have not been produced at the time the requesting party files suit under the Act." *Id.* at 463, n.6. Assuming without deciding whether the substantial compliance test is the appropriate standard to be applied to claims of violation of Chapter 22, the Court found under the facts of the case that the records custodian did not substantially comply with its obligation to produce the records promptly, subject to the size and nature of the request. *Id.* at 462. In so finding, the Court considered the delay between the request and production was seventy-one days, the records custodian did not produce any documents until the plaintiff filed the suit, and there was a hiatus in communication between the records custodian and the plaintiff. *Id.* In addition, the Court considered the records custodian's efforts to locate and produce the documents as well as the other business it was addressing. *Id.*

The Governor's Office argues that the parties did not raise and the Iowa Supreme Court in did not address or decide the issue of mootness in *Horsfield Materials, Inc.* It is more precise to say that the Court decided the case on the basis of a claim of unlawful delay, rather than unlawful withholding. And it speaks directly to unlawful delay, whereas *Neer*, which is not precedent in any case, speaks only to unlawful withholding—not delay. On the unlawful delay claim, *Horsfield Materials* stands for the proposition that a judiciable controversy remains after records are eventually provided. The issue of mootness can be raised by the Court *sua sponte* even if no party raises the issue because the Court has the responsibility to police its own jurisdiction. *Bribriesco-Ledger v. Klipsch*, 957 N.W.2d 646, 649 (Iowa 2021). If production of records by the records custodian mooted a lawsuit, then it is reasonable to assume the Iowa Supreme Court would have raised and decided that issue in *Horsfield Materials, Inc.*

The Governor's argument also fails because it is illogical and conflates the two separate issues of withholding and delay. While producing records is relevant to an unlawful withholding claim, it has no bearing on the justiciability of an unlawful delay claim.

It would also undermine the purpose of Chapter 22 in requiring timely compliance, and work to read out the timeliness requirements from the statute, in contravention to principles of statutory interpretation. *See Johnston v. Iowa Dep't of Transp.*, 958 N.W.2d 180, 190 (Iowa 2021) ("Canons of statutory interpretation require that every word and every provision in a statute is to be given effect, if possible, and *not* deemed mere surplusage.") (emphasis in original). This Court properly rejected the Governor's Office's claim that the production of the records after the lawsuit was filed rendered the case moot in a related recent open records case. *See Rasmussen v. Iowa Dep't of Pub. Health*, Polk County case number EQCE086910 (Jan. 27, 2022, ruling on motion to dismiss). As this Court reasoned,

> [i]f this was true, then there would be no enforceable obligation to turn over public records until the responsible party or entity is sued. The Act did not intent to require citizens of this State to sue in order to obtain government records. A plain reading of all the remedies beyond compelling compliance that the Act affords, including statutory damages, attorneys fees, prospective injunctive relief and removal from office, confirms that the Act's intent was not to moot claims simply by providing the requested documents.

Id.

Just like in *Horsfield Materials, Inc.*, Plaintiffs in this case have stated claims of a violation of Chapter 22 because of the substantial delay in providing the records, which only occurred after the lawsuit was filed. The delay in production of the records in this case is from just over one-and-a-half years to almost five months, which is much more than the 71-day delay that occurred in the *Horsfield Materials, Inc.* case. *See* Pet. ¶ 99. Moreover, there were substantial hiatuses in communication from just over one-and-a-half years to almost four months. *See* Pet. ¶¶ 43-45 (hiatus between May 4, 2020, email from the Governor's Office and January 3,

2022, letter providing the records); 49-51 (hiatus between July 28, 2020, email from the Governor's Office and January 3, 2022, letter providing the records); 67-69 (hiatus between May 5, 2021, email from the Governor's Office and January 3, 2022, letter providing the records); 77-79 (hiatus between September 20, 2021, text messages from the Governor's Office and January 3, 2022, letter providing the records); and 82-84 (hiatus between August 20, 2021, email from the Governor's Office and January 3, 2022, letter providing the records). In addition, Plaintiffs seek remedies other than simply an order for production of the documents. Plaintiffs seek declaratory relief, prospective injunctive relief, an order of mandamus, reasonable attorney's fees, and court costs. Therefore, the case is not moot.

D. Even if the Plaintiffs' Suit Were Moot, Exceptions to the Mootness Doctrine Apply.

Even if the court were to find that all the records requested have been provided and the case is moot, two exceptions to the mootness doctrine apply to this case—public interest that is likely to recur and voluntary cessation. Plaintiffs' claims present issues of public importance that are capable of repetition but would evade review. Defendants also cannot automatically moot a case simply by ending the unlawful conduct, considering Defendants could resume the unlawful conduct after dismissal of the case. These are considered in turn below.

1. The Public Interest Exception Applies to This Case.

The public interest exception to the mootness doctrine applies to this case. The exception applies "where matters of public importance are presented and the problem is likely to recur." *Iowa Freedom of Info. Council v. Wifvat*, 328 N.W.2d 920, 922 (Iowa 1983). The court has discretion to hear the appeal under these circumstances. *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 679 (Iowa 1998). An important factor for consideration is whether the challenged action "is such that often the matter will be moot before it can reach an appellate court." *Id.*

There are four factors a court should consider in determining whether to apply this mootness exception: "(1) the private or public nature of the issue; (2) the desirability of an authoritative adjudication to guide public officials in their future conduct; (3) the likelihood of the recurrence of the issue; and (4) the likelihood the issue will recur yet evade appellate review." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 234 (Iowa 2002).

On the first factor, the timely and complete production of public records as provided for under law from the Governor's Office is a matter of great public importance. Plaintiffs as well as other reporters and news organizations have struggled during the COVID-19 pandemic to get responses to open records requests fulfilled by the Governor's Office at all as well as in a timely manner. The people of Iowa rely on robust reporting, government transparency, and accountability in a time of democratic strain, such as the COVID-19 pandemic, more, not less, than at times of ease.

On the second factor, it is desirable to obtain an authoritative decision in an open records case involving the Governor's Office when there are no published or unpublished cases in Iowa dealing with open records requests involving the Governor's Office, or, to Plaintiffs' knowledge, any instance of sustained disregard for the obligations of the Office under Chapter 22 in known history. Allowing the violation of the law demonstrated here to be unchecked sets a terrible precedent for the future of our state. It also sets a terrible precedent for other state agencies as well as local governmental bodies. These entities are likely to follow the Governor's lead in terms of their own responses to open records requests, and a decision in this case would affect other governmental bodies handling of their own open records requests. Absent resolution of the claims in this case, we are likely to see these other entities point to the Governor's Office, with all of the resources and dedicated communications and legal staff at its disposal, and reason that

if the Governor's Office can ignore Chapter 22 in times of stress and strain, *for years*, surely their offices, with fewer resources, can as well.

The third factor also weighs in Plaintiffs' favor because of the high likelihood of recurrence. This is evident from the positions of the parties themselves. Plaintiffs are prominent reporters and media organizations who fulfill a vital function in our state's democracy by investigating and reporting the news on a daily basis. Access to open records is vital to their ability to do that work. Defendants likewise are frequent fliers when it comes to open records requests. As the head of the executive branch of our government, Defendants are a unique and indispensable source for journalists as to the direction and execution of statewide policy. There have been, and will continue to be, many more open records requests as between these parties. And while we all hope that the current pandemic will come to an end, there will always be times of extraordinary stress and strain. While no one can predict the future, we know it is unreasonable to think that the future will not also force our state to contend with floods, drought, public health emergencies, economic hard times, and times of social unrest. It is vital that our democratic checks and balances, including the work done by reporters to inform the public through open records requests, continue in these times.

Finally, as to the fourth factor, adjudication is also desirable because if the Defendants' interpretation of mootness is accepted, then an aggrieved party would never be able to obtain prospective injunctive relief, attorneys fees, court costs, and other remedies provided for under Chapter 22 for violations of the open records law. The Governor and any future governor would have a blueprint to ignore open records requests and then moot out a subsequent lawsuit by providing the records before the case is finished. As a result, the appellate court would never reach the issue.

Based on the foregoing, the public interest exception should apply to this case if the court determines the issue is moot.

2. The Voluntary Cessation Exception Applies to This Case.

In addition, the voluntary cessation to mootness exception applies in this case. Under this doctrine, ordinarily, a defendant's voluntary cessation of unlawful conduct does not suffice to moot a case. *Friends of Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 174 (2000). "[A] defendant's voluntary cessation of a challenged practice does not deprive a . . . court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). The exception exists because if a defendant could defeat a lawsuit simply by temporarily ceasing its unlawful conduct, then the defendant could resume the unlawful conduct as soon as the case is dismissed. *Knox v. Service Employees Int'l Union*, 567 U.S. 298, 306 (2012). In other words, the defendant would be free to return to its own ways. *Friends of the Earth, Inc.*, 528 U.S. at 189.

Therefore, the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Exp. Ass'n, Inc.*, 393 U.S. 199, 203 (1968). And the party who asserts mootness bears the "heavy burden" of persuading the court that the challenged conduct cannot reasonably be expected to happen again. *Id.*

The Defendants have not sustained their heavy burden in persuading the court that their violation of Chapter 22 cannot reasonably be expected to happen again. Any claim Defendants may make in this case to suggest they have reformed their open records request responses and permanently fixed the issues so that they will not happen again is not borne out by past behavior.

The Governor's Office admitted to the past failures in responding to and timely providing open records requests on January 7, 2021, and committed to responding in a timely manner going forward. *See* Pet. ¶ 107. Nonetheless, the Plaintiffs submitted several requests after January 7, 2021, and those requested records were not timely provided. *See id.* ¶¶ 56-59 (Terrace Hill charitable donation records from June 1, 2021)), 60-63 (Senate File 567 records from June 16, 2021), 64-69 (Terrace Hill charitable donation records from April 8, 2021), 70-80 (termination of Iowa Veteran's Home Director records), and 81-84 (deployment of Iowa State Patrol Members to Texas records). Also, the Governor's Office only provided the records in this case in response to the litigation and after substantial delays of more than one-and-a-half-years to almost five months. Besides the Plaintiffs involved in this litigation, there have been other reporters and news organizations that have had issues with getting the Governor's Office to timely provide records. *See id.* ¶ 102. There is also pending litigation brought by another plaintiff against the Governor's Office for failure to timely respond to and provide open records requests, which were also provided only in response to the litigation. *See Rasmussen v. Reynolds*, Polk County case numbers CVCV062318 and CVCV062322. And finally, Defendants have *still* not complied in providing all of the disputed records and have asserted they have no intent to do so. *See* Ex. 1 (Email exchange with Sam Langholz dated February 3, 2022, and attached letters).

Any alleged change in the Governor's Office handling of open records request is temporary and only in response to the litigation. Other than the Governor's statement that the office will try to do better, the balance of all other evidence weighs against it. Defendants cannot meet their burden to show they would promptly comply with open records requests in the future and would not return to their old ways if the lawsuit were dismissed. For these reasons, the voluntary cessation exception applies to this case even if the case were moot.

E. The Lawsuit Does Not Present a Nonjusticiable Political Question.

Contrary to Defendants' claim, this case does not present a nonjusticiable political question in assessing the timeliness of its response to Plaintiffs' open records requests. The judicial branch is entrusted to apply and interpret Iowa Code Chapter 22, and in resolving this case, the judicial branch would not be wading into a matter that is exclusively entrusted to the executive branch.

Declining to resolve political questions is prudential, rather than jurisdictional, for the courts. The interests served by the exercise of restraint on political questions are rooted in the separation of powers doctrine, which requires the courts to "leave intact the respective roles and regions of independence of the coordinate branches of government." *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996). "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the General Assembly] or the confines of the Executive Branch." *King v. State*, 818 N.W.2d 1, 16-17 (Iowa 2012) (quoting *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). The courts are not suited to make these determinates, considering the courts are not equipped to formulate state policies or develop standards for nonlegal matters. *Id.* Generally, the courts apply the political question doctrine to matters that are entrusted exclusively to the legislative branch, executive branch, or both. *State ex rel Dickey v. Beslar*, 954 N.W.2d 425 (Iowa 2021).

In considering whether there is a nonjusticiable political question presented, the courts consider the following factors:

> (1) A textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving the issue; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

> (4) the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due to coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Iowa Citizens for Cmty. Improvement v. State, 962 N.W.2d 780, 794 (Iowa 2021). Whether a political question is involved is determined on a case-by-case basis and requires reviewing the nature of the underlying claim. *Des Moines Register & Tribune Co.*, 542 N.W.2d at 495-96.

The Plaintiffs' claims involve whether the Governor's Office has complied with Chapter 22 in terms of the timeliness of its response to the Plaintiffs' open records requests. The judiciary's role is to apply and interpret Chapter 22. Therefore, the judicial branch does not wade into territory that is exclusively entrusted to the executive branch by doing so. As this Court eloquently stated in *Rasmussen v. Reynolds*,

> [t]he Iowa legislature has already created a law and policy surrounding access to public records. Although the judicial branch may be called upon to apply and interpret Iowa's Open Records Act in this case, that is the customary role of the judiciary. This is not a situation where the judiciary is being called on to wade into a matter that is exclusively entrusted to another branch. Instead, the legislature has already acted and set forth requirements. The Iowa legislature has provided 'every person' with the 'right to examine and copy a public record . . .' The legislature also identified categories of public records that 'shall be kept confidential.' The legislature established a private right of action for 'any aggrieved person' to 'seek judicial enforcement of the requirements of the chapter.' And the legislature set forth the available remedies. The Iowa Supreme Court has interpreted the law to require that records be 'provided promptly,' unless it would be infeasible to do so. In addition, the legislature provided certain good faith or reasonable defenses.
>
> The Iowa statute did not exclusively entrust discretion regarding whether to allow examination of public records to the executive branch. Instead, the legislature required government bodies to provide examination of public records; included certain exceptions, defenses, and reasonableness considerations; and allowed aggrieved parties to seek judicial enforcement. The interpretation of statues and consideration of defenses is the type of dispute within the judiciary's role to address. As the Supreme Court explained in *United States v. Nixon*, 418 U.S. 683 (1974), it is 'the province and duty of the judicial department to say what the law is' and '[n]othwithstanding the deference each branch must accord the others,' . . . judicial power cannot be 'shared with the Executive Branch.'

Rasmussen v. Reynolds, Polk County case numbers CVCV062318 and CVCV062322 (Dec. 21, 2021, ruling on motion to dismiss) (citations omitted).

Applying the six-factor test to this case shows that a political question is not present in this case.

First, there is not "textually demonstrable constitutional commitment" to the Governor's Office in determining when to release public records in the custody of the State. To the contrary, Chapter 22 is enforced one of two ways: either by filing a complaint with the Iowa Public Information Board, or by filing a judicial enforcement action. Iowa Code §§ 23.5(1), 22.10(1). In the case of claims made against the Governor's Office, only judicial enforcement is available. *Id*. § 23.12.

Second, the courts do not lack "judicially discoverable and manageable standards" for reviewing and determining this case, considering that the applicable standards have already been set forth in *Horsfield Materials, Inc.*

Third, there is no need for an initial policy determination by the executive branch in this case, and courts routinely make judgments on the timeliness of the parties' conduct in determining the relief that should be granted.

Fourth, the suit would not require the judiciary to express a lack of respect for the executive branch because courts in Iowa have decided challenges brought under Chapter 22 against executive branch agencies. *See e.g., Iowa Film Prod. Servs. v. Iowa Dep't of Econ. Dev.*, 818 N.W.2d 207 (Iowa 2012); *Gannon v. Board of Regents of the State*, 692 N.W.2d 31 (Iowa 2005); *Northeast Council on Substance Abuse, Inc. v. Iowa Dep't of Pub. Health*, 513 N.W.2d 757 (Iowa 1994); *US West Communications, Inc. v. Office of Consumer Advocate*, 498 N.W.2d

711 (Iowa 1993); *KMEG Television, Inc. v. Iowa State Bd. of Regents*, 440 N.W.2d 382 (Iowa 1989); *AFSCME/Iowa Council 61 v. Iowa Dep't of Pub. Safety*, 434 N.W.2d 401 (Iowa 1988).

Fifth, there is no need for unquestioning adherence to a political decision already made. In fact, the Governor's Office as recently as January of 2021 conceded publicly that the past sustained noncompliance with Chapter 22 was unacceptable and expressed a commitment to being open and transparent and responding to open records requests in a timely manner going forward, although the violations continue. *See* Pet. ¶ 108.

Moreover, the question at issue here is fundamentally not a political one—it's a legal one, seeking adjudication of the Plaintiffs' statutory claims under Chapter 22. The political question doctrine is no more a bar to judicial resolution on questions of compliance with Chapter 22 than it is to claims routinely made against the Governor and adjudicated in state and federal court on issues much more hotly contested in the political arena, for example: asserting the violation of free speech, substantive due process, equal protection, and state and federal nondiscrimination laws. *See, e.g., Godfrey v. State*, 962 N.W.2d 84 (Iowa 2021), *Planned Parenthood of the Heartland v. Reynolds ex. rel. State*, 915 N.W.2d 206 (Iowa 2018), *Animal Legal Defense Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021); *Arc of Iowa v. Reynolds*, 2022 WL 211215 (8th Cir. Jan. 25, 2022). As Justice White explained, "not every matter touching on politics is a political question." *Japan Whaling Ass'n*, 478 U.S. at 229. In particular, he explained, a case that involves interpretation of a statute is "one of the . . . characteristic roles" of the Court. *See id.* at 230 (finding no application of political question doctrine in case where wildlife conservation groups brought an action alleging that cabinet members violated their statutory duty with respect to enforcement of international whaling quotas).

Sixth, the question involved in this case is not subject to multifarious pronouncements by different branches of government any more than any other suit where the executive branch is the defendant. The courts in Iowa are solely vested with resolving legal claims asserting the Governor's Office has complied with Chapter 22. Iowa Code §§ 22.10(1), 23.5, 23.12.

This lawsuit is not barred by the political question doctrine.

F. The Governor's Executive Privilege Does Not Bar This Lawsuit.

Executive Privilege does not warrant dismissal of this case, for three reasons. First there is no provision in Iowa Code Chapter 22 granting the Governor immunity from suit. Second, the Governor's invocation of executive privilege is also not relevant at this stage in the proceedings and is premature. Executive privilege only potentially applies at the discovery stage of the proceedings; it is not a basis to dismiss claims. Third, it also only potentially applies to the Governor herself, not to the other Defendants in this case. These arguments are set forth below.

First, nothing in Chapter 22 suggests that the Governor's Office is exempt from its requirements or otherwise immune from suit. Chapter 22 grants the right of every person to examine and copy public records, which includes "all records, documents, tape, or other information, stored or preserved in any medium, of and belonging to this state. . . ." *Id.* § 22.1(3). Chapter 22 also discusses how it applies to government bodies, defined as "this state" as well as "any branch . . . of the foregoing." *Id.* § 22.1(1). The Governor's Office is covered under Chapter 22, and there is no express exception for the Governor's Office. If the legislature intended that the Governor's Office be exempted from Chapter 22 or otherwise immune from suit, it could have stated as much as it has in other statutes providing immunity from suit. *See id.* § 669.14 (containing exceptions to any claim against the state brought under the State Tort Claims Act); *Nelson v. Lindaman*, 867 N.W.2d 1, 10 (Iowa 2015) (stating that if the legislature

intended to exclude from a statute a certain claim, then it would have said so as it has done in other statutes providing immunity).

Since there is no statutory executive privilege at issue in this case, the Governor's Office alleges that a constitutional executive privilege applies to shield it from this lawsuit. Defendants' Br. 11. The Iowa Supreme Court has been presented with but has not decided this issue. *See State ex rel. Shanahan v. Iowa Dist. Ct. for Iowa Co.*, 356 N.W.2d 523, 527 (Iowa 1984) (stating that the state raised the issue, but the court did not decide the issue, instead disposing of the issue on statutory privilege grounds). To support its proposition, the Governor's Office cites to *United States v. Nixon*. Defendant's Br. 13. In *Nixon*, the President was served a subpoena in a criminal prosecution to produce tape recordings and certain documents. *Nixon*, 418 U.S. at 687-88. The President sought to quash the subpoena based on constitutional executive privilege. *Id.* at 688. The Supreme Court held that "[i]f a President concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege on the return of the subpoena." *Id.* at 713. The Court recognized the role of the judiciary in balancing the "weighty and legitimate competing interests"—the need for the evidence in a criminal prosecution against a constitutional privilege against their release. *Id.* at 709. Thus, the Supreme Court stated a court should treat the subpoenaed material as presumptively privileged and require the prosecution to show the material was essential to justice in the pending criminal case. *Id.* at 713. Following the prosecution's demonstration, the court would then review the material in camera. *Id.* at 714.

Although the *Nixon* case recognizes a constitutional executive privilege, the case also provides for consideration of legitimate competing interests. The Iowa Supreme Court has addressed other privileges; in doing so, the Court cited the *Nixon* case and determined whether a

compelling need for the evidence overrides the privilege claimed. *See Lamberto v. Brown*, 326 N.W.2d 305, 307-08 (Iowa 1982) (applying a two-part test of necessity and exhaustion, the Iowa Supreme Court held that there had not been shown a compelling need for the evidence, considering the first amendment privilege that was involved in the case); *Brown v. Johnston*, 328 N.W.2d 510, 512 (Iowa 1983) (in considering the constitutional right to privacy of patrons checking out library books, "each claim of privilege must be weighed against a societal need for the information and the availability of it from other sources," and the State's interest in criminal charges and the fair administration of justice outweighed the patrons' interest).

Applied to this case, the Governor's invocation of executive privilege is also not relevant at this time and is premature. Assuming executive privilege is available, it is only available at the discovery stage of the proceedings and not at earlier stage of the proceedings such as this stage. As the Supreme Court stated in *Nixon*, "the guard, furnished to [the President] to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a [district] court after those subpoenas have been issued; not in any circumstance which is to proceed their being issued." *Nixon*, 418 U.S. at 714. The constitutional executive privilege is a privilege against production, not a privilege against being sued. It is typically invoked when a subpoena or a discovery request is served. Although the Governor's Office may anticipate the potential invocation of the privilege if and when discovery is had, the issue at this point is premature and not relevant to this stage in the proceeding. While the Governor is free in the future to make a claim that executive privilege applies in response to a specific discovery request, which this Court can, at that time, adjudicate, it provides no basis to dismiss this action against her.

Finally, at the discovery stage of the proceedings, executive privilege would not apply to the other Defendants in this case since the privilege would only apply to the Governor's communications with aides and advisors regarding official executive branch matters, not her aides and advisor's communications with those outside the Governor's Office. In Nixon, the United States Supreme Court explained that the executive privilege is a governmental privilege intended to promote candid communications between the President and his or her advisors concerning the exercise of his or her Article II duties. *See Nixon*, 418 U.S. at 705, 708, 711. It follows that the privilege does not include communications between the Governor's aides and advisors and those persons and entities outside of the Governor's Office.

For these reasons, Defendants' assertion of executive privilege as a basis to dismiss this case is meritless.

G. As Aggrieved Parties, the Plaintiffs May Seek Injunctive and Mandamus Relief.

Because Plaintiffs are aggrieved parties and have standing, they may seek prospective injunctive and mandamus relief.[1] To demonstrate standing, a party must have a "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Alons v. Iowa Dist. Ct. for Woodbury Co.*, 696 N.W.2d 858, 863-64 (Iowa 2005). In Iowa, this means that the complaining party must "(1) have a specific personal or legal interest in the litigation and (2) be injuriously affected." *Citizens for Responsible Choices v. City of Shenandoah*, 868 N.W.2d 470, 475 (Iowa 2004). The Iowa Supreme Court has explained standing's rationale to

> refuse to determine the merits of a legal controversy irrespective of its correctness, where the party advancing it is not properly situated to prosecute the action. When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and

[1] Defendants have not specifically sought to dismiss Plaintiffs' request for declaratory relief, attorney's fees, and costs. Pet. ¶ 121; Pet. at 21-22.

> not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded.

Alons, 696 N.W.2d at 864.

Plaintiffs have standing and are aggrieved parties such that they can seek prospective injunctive relief. Chapter 22 provides that any "aggrieved party" may bring a lawsuit to enforce the provisions of that chapter. Iowa Code § 22.10(1). Being aggrieved for purposes of chapter 22 means having been denied the right to timely access, copy, and disseminate public records. *Id*. § 22.2(1) (stating that "[e]very 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"); *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 229 (Iowa 2019) ("The Act essentially gives all persons the right to examine public records" unless those records fit "specific categories of records that must be kept confidential."); *Horsfield Materials, Inc.*, 834 N.W.2d at 461 (right to timeliness of public records requests).

Plaintiffs are "aggrieved parties" under Chapter 22 because they submitted open records requests, which were not promptly provided by the Governor's Office and in some cases continue to be withheld. They have a specific personal and legal interest in the litigation because they and their members were the parties seeking the public records which Defendants withheld and continue to withhold. The violations of Chapter 22 alleged in this case are injurious to Plaintiffs' rights to examine the records and disseminate them. Plaintiffs' case illustrates that the injury from being denied a record in a timely manner is not alleviated by being provided the record eventually: Plaintiffs' report the news. The ability to investigate and report on matters of public importance in a newsworthy manner hinges not on eventual access (in response to a lawsuit), but timely access. Plaintiffs are also injured by the ongoing denial of some records, for which the Governor's Office has improperly asserted exceptions under section 22.7.

Further, Chapter 22 provides the availability of prospective injunctive relief, specifically that the court "if appropriate, may order the lawful custodian and other appropriate persons to refrain from one year from any future violations of this chapter." *Id.* § 22.10(3)(a). Because they are aggrieved parties who allege systemic past and ongoing violations, it follows that they have standing to seek prospective injunctive relief.

The Governor's Office argues that it is speculative whether the Plaintiffs will submit future open records requests that will be processed in an untimely manner. The Plaintiffs and their members are news reporters and news organizations who have submitted many open records requests over the last eighteen months to the Governor's Office. Pet. ¶ 2. They routinely submit, have continued to submit, and without any plausible question, will continue to submit in the future, open records requests to the Governor's Office. *Id.* ¶¶ 5-17. As just one example, Belin and the Bleeding Heartland submitted an open records request after the lawsuit was filed. *See* Ex. 2 (Open Records Request dated January 14, 2022). It's hardly speculative, based on Defendants' past and ongoing violations of Chapter 22, that injunctive relief is warranted.

Finally, as with their claims regarding executive privilege, their arguments regarding prospective injunctive relief are premature. Whether injunctive relief is appropriate in this case is a matter that should be determined after hearing the merits of the case and should not be resolved at the motion to dismiss stage.

Similarly, the Plaintiffs are entitled to seek mandamus relief: "The provisions of this chapter and all rights of persons under this chapter may be enforced by mandamus or injunction, whether or not any other remedy is also available." *Id.* § 22.5. Because they are aggrieved parties, it follows that they have standing to seek mandamus relief that is provided for by statute.

Whether mandamus relief is appropriate in this case is a matter that should be determined after hearing the merits of the case and should not be resolved at the motion to dismiss stage.

II. Conclusion

For these reasons, the Defendants' motion to dismiss must be denied.

Respectfully submitted,

/s/ Leah Patton
Leah Patton, AT0006022
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: (515) 243-3988
Fax: (515) 243-8506
Email: leah.patton@aclu-ia.org

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

Proof of Service

The undersigned certifies that the foregoing instrument was served upon all parties of record via EDMS on February 7, 2022.

/s/ Leah Patton
Leah Patton