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IN THE SUPREME COURT OF IOWA

No. 22–0005

POLLY CARVER-KIMM,

Appellee,

vs.

KIM REYNOLDS, PAT GARRETT, GERD CLABAUGH, SARAH REISETTER, SUSAN DIXON, and STATE OF IOWA,

Appellants.

Appeal from the Iowa District Court for Polk County
Lawrence P. McLellan, District Judge

APPELLANTS' REPLY BRIEF

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY C. PETERZALEK
SAMUEL P. LANGHOLZ
TESSA M. REGISTER
Assistant Attorneys General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
(515) 281-4209 (fax)
jeffrey.peterzalek@ag.iowa.gov
sam.langholz@ag.iowa.gov
tessa.register@ag.iowa.gov

ATTORNEYS FOR APPELLANTS

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ARGUMENT

I. Carver-Kimm cannot bring a common-law wrongful-discharge claim or a whistleblower wrongful-discharge claim under section 70A.28 against the Governor or her staff because they have no authority to discharge an employee of the Iowa Department of Public Health.

Carver-Kimm still fails to overcome the critical defect in her wrongful-termination claims against the Governor and Garrett. They didn't employ her and thus couldn't have terminated her. This isn't an extraordinary new requirement in conflict with prior precedent. It's common sense.

And while it's not ultimately necessary to decide this issue on a constitutional basis, Governor Reynolds properly preserved her constitutional arguments. It would be odd indeed if this Court had to blind itself to a possible a violation of the separation of powers just because of the reasoning chosen by a district court. Especially so where Carver-Kimm seeks to stretch statutory and common liability so far that it attaches to the exercise of unquestionable constitutional powers.

What's more, she does so based on her mere "belief" that the Governor and Garrett had anything to do with her resignation. This doesn't state a plausible claim with particularity on her common law wrongful termination claim as required by section 669.14A(3). And Carver-Kimm hasn't offered even a word to the contrary.

A. Carver-Kimm overreads this Court's prior precedent on individual liability and overstates the effect of holding that the Governor can't be sued for discharging an employee she doesn't employ.

Carver-Kimm asks the Court to overlook the impossibility of Governor Reynold or her staff discharging an employee who was employed by someone else. She largely repeats her arguments presented to—and adopted by—the district court. So Appellants' opening brief has already explained why they are wrong.

But she now also contends that section 70A.28 is *broader* than the Iowa Civil Rights Act and thus supports a broader scope of individual liability. *See* Appellee's Br. at 25–26. This new argument ignores that she didn't rely on any of these other prohibitions in statute in her petition. *See* Appellants' Br. at 26 n.2 (citing App. 36). Nor her argument in the district court. *See* App. 77–81. Indeed, adverse actions other than discharge could support a claim under section 70A.28. *See* Appellants' Br. at 26 n.2. But Carver-Kimm brings only a wrongful discharge claim. That she *could* have alleged something else doesn't mean that "discharge" should be interpreted more broadly.

And while Carver-Kimm still confidently asserts that "the question of individual liability for the tort of wrongful discharge is well-settled," Appellee's Br. at 27, she cites no new case settling the scope of individual liability for that tort. Nor one extending that

liability to a person who did not actually discharge the employee because the employee worked for someone else. *See id.* at 27–29. She still relies exclusively on *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 776 (Iowa 2009), which disclaimed any such holding. *See* Appellants' Br. at 28–29.

But her more significant misstep is overstating the effect of the common-sense holding that wrongful-discharge claims cannot be brought against someone who did not employ the plaintiff employee. She contends that limiting wrongful-discharge claims to those who actually discharge an employee "would be a serious burden to future courts" requiring them "to parse whether a specific supervisor has 'legal authority' to terminate the plaintiff." Appellee's Br. at 30. But Carver-Kimm's claim against the Governor is the extreme case—seeking to impose liability on a state official and her staff who are not even in the agency that employed the plaintiff.

Recognizing that it is legally impossible for such a person to discharge a department employee doesn't mean that Plaintiffs and courts would need to address all the nuances of an agency's internal structure. Indeed, Appellants haven't sought dismissal at this pleading stage of the three different Department supervisors against whom Carver-Kimm brings her whistleblower discharge claim. *See* App. 163.

It would be *more* confusing and burdensome if this Court were to extend the interpretation of section 70A.28 and the wrongful-discharge tort to include influence from someone outside the employing organization within the definition of "discharge." How much influence would be necessary to be an actionable discharge? If members of the news media complained to a department director about the Department's public information office and the director fired her in the face of threatened negative editorials, could the media be held liable for wrongful discharge? Or if a major supplier or client of an organization threatened to cease business dealings if the organization didn't fire an employee, could the employee sue the threat-makers? Perhaps some other torts could be brought against these hypothetical outsiders. But since they lack the authority to discharge a person they do not employ—as the Governor lacked the authority over Carver-Kimm—they cannot be liable for wrongful discharge of that non-employee.

Finally, Carver-Kimm points to the example of President Nixon firing his Attorney General and Deputy Attorney General because they each refused to discharge one of their department employees—Special Prosecutor Archibald Cox. *See* Appellee's Br. at 31. She complains that the President wouldn't be liable for discharging Cox for wrongful termination under Appellants' proposed standard here. And she's right. But her hypothetical proves the

point. The President terminated two people—the Attorney General and Deputy Attorney General—and setting aside any other problems with the suit, *they* could allege that they'd been discharged by the President. But the President didn't discharge Archibald Cox. He had to fire two people to find a third who would carry out his wishes. That he had to do so shows that he didn't have the authority to fire Cox. And if Cox had some claim for wrongful discharge, it would be against that Department official who discharged him—not the President.

Carver-Kimm's example also shows one more reason why this narrow interpretation should not be a concern. The President—like the Governor—is accountable in other ways aside from the civil liability in a lawsuit. And ultimately, Congress began the process of exercising its impeachment power and the President resigned.

B. This Court can—and should—consider the potential constitional concerns when deciding the scope of section 70A.28 and the wrongful termination tort.

Carver-Kimm contends that this Court can't consider the constitutional concerns with her sweeping interpretation of liability under section 70A.28 and the wrongful-discharge tort because "the District Court never addressed it." Appellee's Br. at 33. She reasons that Appellants thus "did not preserve error on this issue." *Id.* at 32. But Appellants raised this constitutional avoidance argument

in the district court in its briefing on the issue of whether an agency employee could bring a wrongful-discharge claim under section 70A.28 or the common law against the Governor and her staff when they have no authority to discharge the employee. And the Court decided this issue. Appellants properly preserved error.

Appellants presented their constitutional avoidance argument as a part of their motion to dismiss on the ground that neither section 70A.28 nor the wrongful-discharge tort could apply to a discharge claim against the Governor and her staff by an employee who wasn't employed by the Governor. *See* App. 55–56 n.5, 66, 102 n.1, 125. Carver-Kimm responded to their arguments. App. 80–81. And the district court implicitly rejected them in holding that Carver-Kimm stated both claims by alleging Governor "Reynolds and Garrett effectuated her termination." App. 167, 180.

That the argument was mainly set out in a footnote—a half-page one that quoted two constitutional provisions and two on-point decisions of this Court—doesn't prevent Appellants from providing "additional ammunition" for this "same argument" in their briefing on appeal. *Ames 2304, LLC v. City of Ames, Zoning Bd. of Adjustment*, 924 N.W.2d 863, 868 (Iowa 2019) (cleaned up); *see also* App. App. 55–56 n.5, 66, 102 n.1, 125.

Carver-Kimm contends that the lack of any constitutional reasoning by the district court means that the issue wasn't decided

by the court and thus not preserved. Appellee's Br. at 32–35. But *Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002), is distinguishable. There, the district court failed to rule on one of several grounds for dismissal. *See Meier*, 641 N.W.2d at 540. While here, the district court ruled on (and rejected) all the grounds for the motion—including the one supported by this constitutional avoidance argument. App. 164–80. And despite *Meier,* this Court has reached the merits in similar situations because the court "must have *implicitly* rejected the argument when it" rule. *33 Carpenters Constr., Inc. v. State Farm Life & Cas. Co.*, 939 N.W.2d 69, 76 (Iowa 2020) (assuming "without deciding that error was minimally preserved" and "elect[ing] to reach the merits"); *see also State v. Childs*, 898 N.W.2d 177, 181 (Iowa 2017) (holding that error was preserved on statutory question not discussed by district court when it considered second intertwined constitutional question).

Indeed, this Court has even considered a new argument that wasn't presented to the district court at all when it is merely "an additional theory of statutory interpretation on appeal when it raised its claim" in the district court. *Ames 2304, LLC*, 924 N.W.2d at 867. That's because it's not a "new argument altogether." *Id.* And because it was a statutory interpretation issue, the new theory based on a related statute had to be considered by the Court in any event under its statutory interpretation precedent. *See id.* at 868.

So too here, where constitutional avoidance is intertwined in the proper interpretation of a statute (and the common law). *See Simmons v. State Pub. Def.*, 791 N.W.2d 69, 74 (Iowa 2010); *Roth v. Evangelical Lutheran Good Samaritan Soc.*, 886 N.W.2d 601, 611 (Iowa 2016); *Childs*, 898 N.W.2d at 181. What's more, requiring the filing of a reconsideration motion just because the court didn't expressly address every theory supporting a party's argument on an issue would bog down the district courts and serve little purpose. So this Court can—and should—consider the constitutional concerns presented by Appellants.

C. Carver-Kimm misconstrues the Governor's constitutional powers and misunderstands how those powers are at play here.

Contrary to Carver-Kimm's contentions, this appeal doesn't present the issue of whether "Governor Reynolds is constitutionally immune from wrongful termination suits." Appellee's Br. at 31. No person employed by or appointed by Governor Reynolds brings this suit. That issue may come soon enough—at least as to suits by appointed officers. *See* Br. in Support of Mtn. to Dismiss Am. Pet., *Foxhoven v. Reynolds*, Polk No. LACL150848 (Apr. 15, 2022).

But here, the issue is whether a sweeping interpretation of liability under section 70A.28 and the wrongful-discharge tort—one that covers a Governor's actions merely influencing one of her

appointed department heads to discharge a department employee when she can't do so herself—would unconstitutionally infringe on her exclusive executive power. Because if so, this Court should avoid those "constitutional icebergs," *Simmons*, 791 N.W.2d at 74, by interpreting the statute and common law more narrowly to cover only those who actually discharge *their* employees.

Appellants point to two constitutional powers implicated by a Governor's influence over a department head to act: removal of the department head for failing to accept the input or management of the department's budget to try to force the action. *See* Appellants' Br. at 35–39. Each arises from a separate constitutional provision. *See id.* at 35–36 (citing Iowa Const. art. IV, §§ 1, 9). And together, they are at the core of the Governor's constitutional powers.

Carver-Kimm focuses her resistance only on the first—the Governor's removal power. She offers no argument against her statutory interpretation crashing into the budget management power, which this Court has already recognized cannot be the basis for statutory liability. *See Godfrey v. State*, 962 N.W.2d 84, 112 (Iowa 2021). And that alone is one iceberg to avoid.

But the arguments that Carver-Kimm *does* make—attacking the Governor's constitutional removal power of appointed cabinet officials—fare no better.

First, she argues that the Court should disregard the extensive analogous precedent from the United States Supreme Court, *see* Appellants' Br. at 36, because of article III, section 20, of the Iowa Constitution. *See* Appellee's Br. at 36–39. That constitutional provision governs the forcible removal of public officers. Its first sentence establishes the impeachment process as the removal mechanism for the Governor, certain judges, and other constitutional executive branch officers. *See* Iowa Const. art. III, § 20; *see also Brown v. Duffus*, 23 N.W. 396, 398 (Iowa 1885); *Clark v. Herring*, 260 N.W. 436, 437–38 (Iowa 1935); Iowa Const. art. V, § 19 (granting this Court additional removal power for judges). Its second sentence authorizes the Legislature to enact a process for trial of "[a]ll other civil officers" who commit "misdemeanors and malfeasance in office." Iowa Const. art. III, § 20; *see also Clark*, 260 N.W. at 437–38; *State v. Henderson*, 124 N.W. 767, 700 (Iowa 1910).[1]

Carver-Kimm contends this provision "expressly limits the Governor's removal power." Appellee's Br. at 36. But it does nothing of the sort. It merely grants the Legislature the power to create a statutory mechanism to *force out* errant officials at all levels of government, including those with otherwise fixed terms. This doesn't

[1] The second sentence states in full: "All other civil officers shall be tried for misdemeanors and malfeasance in office in such manner as the general assembly may provide." Iowa Const. art. III, § 20.

conflict with the Governor's *removal* authority in taking care that the laws are executed. The two authorities work together to serve different purposes. If an officer is enriching himself with public funds, he must be forced out under section 66.1A to protect the public. But if an appointee serving at the Governor's pleasure is underperforming, or acts inconsistent with the Governor's policy aims, then he must be replaced to ensure the executive branch is accountable to the electorate.

Appellants haven't argued that only the Governor can remove an official. Iowa has a long and colorful history of forcing out the unethical and intoxicated. *See, e.g.*, Iowa Code § 397 (1851) (allowing for civil removal of county officers for willful misconduct or maladministration in office); Iowa Code § 66.1A (2021) (allowing civil removal of any appointed officer for corruption, neglect, willful misconduct, and other grounds); *State ex rel. Duckworth v. Smith*, 257 N.W. 181, 182 (Iowa 1934) (affirming removal of county treasurer who helped himself to public funds on more than twenty occasions). The legislature's authority to prescribe minimum qualifications for office, and enforce those qualifications by forcible removal, is settled. *Henderson*, 124 N.W.2d at 770. Carver-Kimm's cited cases stand for this principle: unqualified officials can be forced out of office through civil action. *Id.*; *Clark*, 260 N.W. at 438 (holding that

insurance commissioner was not an impeachable officer and thus could be forced out by civil action).

Second, Carver-Kimm contends that the President's removal power stems from the appointments clause, and thus federal cases are not persuasive authority. Appellee's Br. at 39–41. But she misreads *Myers* and its progeny. As Chief Justice Taft explained, "[W]hen the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power for removal." *Myers v. United States*, 272 U.S. 52, 122 (1926). When the Executive is "stripped of the [removal] power our precedents have preserved," her "ability to execute the laws—by holding [her] subordinates accountable for their conduct—is impaired." *Free Enter. Fund. v. Pub. Acct. Oversight Bd.*, 561 U.S. 477, 496 (2010). Thus, it is the obligation to faithfully execute the laws—an obligation that is identically vested in the Governor of Iowa—that requires the undisturbed ability to remove of cabinet-level officers.

Carver-Kimm also claims that "[s]tate [c]ourts have consistently held that governors do not have removal powers similar to the President's." Appellee's Br. at 41. But she cites no state court decisions that have so held. Instead, she cites a sentence within a treatise and a dissent. *See id.* That she opted not to cite the cases within

the treatise is understandable—they all support Defendants' position.[2] *See Bruce v. Matlock*, 111 S.W. 990, 991 (Ark. 1908) (holding fixed terms for members of state charitable agency are constitutional); *Holder v. Anderson*, 128 S.E. 181, 183 (Ga. 1925) (holding fixed terms for state highway board are constitutional); *Johnson v. Laffoon*, 77 S.W.2d 345, 348–49 (Ky. 1934) (holding fixed terms for state highway commission are constitutional); *State v. Hough*, 87 S.E. 436, 437–38 (S.C. 1915) (holding governor could not unilaterally suspend an elected county sheriff and appoint a replacement).

Indeed, imposing fixed terms or for-cause limitations within independent agencies, where the electorate has no expectation that their vote for Governor or President will affect the agency's performance, does not flout the Take Care Clause. *Humphrey's Executor*, 295 U.S. 602, 629 (1935). But the Director of Public Health was not bestowed with a fixed term or for-cause removal. *See* Iowa Code § 135.2(1)(a). And thus the electorate expects their vote for Governor will affect the operations of the Department of Public Health. Again, despite Carver-Kimm's contrary assertion, courts in other

[2] All but one of these cases pre-date *Myers*, which first announced that the Take Care Clause required removal power to ensure the laws are faithfully executed. *See Myers*, 272 U.S. at 163–64, 176. Even so, the discussions of fixed-term positions within independent agencies generally track federal precedent and Appellants' position.

states have also interpreted their constitutions to prohibit undue interference with the governor's control over superior executive officers for just this reason. *See* Appellants' Br. at 37.

Because Carver-Kimm's broad interpretation would improperly inject the Judiciary into the exclusive purview of the Executive Branch to execute the laws, it should be rejected. Properly interpreting section 70A.28 and the common law wrongful-discharge tort, neither imposes liability on the Governor or her staff because they lacked authority to discharge Carver-Kimm.

D. Carver-Kimm doesn't even try to defend the sufficiency of her pleading of the tort claim under the heightened pleading standards of section 669.14A(3).

As detailed in Appellants' opening brief, Carver-Kimm's wrongful-discharge-in-violation-of-public-policy claim must satisfy the heightened pleading requirements of Iowa Code section 669.14A(3). And Carver-Kimm has failed to plead a plausible claim with particularity. *See* Appellants' Br. at 39–44.

Carver-Kimm offers no response. *See* Appellee's Br. at 21–71. She doesn't contend that the pleading requirements are inapplicable. She doesn't try to show that she satisfies them. She has thus waived any argument in defense of the district court's decision denying dismissal of her tort claim against the Governor and Garrett. *See* Iowa R. App. P. 6.903(2)(g)(3) (requiring argument section

to contain "contentions and the reasons for them with citations to the authorities relied" and stating that "[f]ailure to cite authority in support of an issue may be deemed waiver of that issue"); Iowa R. App. P. 6.903(3) (requiring appellee's brief to comply with most requirements of Rule 6.903(2), including 6.903(2)(g)(3)).

This Court can reverse and dismiss this claim for failure to satisfy the heightened pleading requirements alone. *See State v. Wade*, 757 N.W.2d 618, 622–23 (Iowa 2008) (holding that appellee waived issues not argued in its appellate brief "as reasons for upholding the district court's ruling"); *Morris v. Steffes Grp., Inc.*, 924 N.W.2d 491, 498 (Iowa 2019) (holding the same and collecting cases).

II. Section 669.14A provides qualified immunity to Governor Reynolds and Garrett for Carver-Kimm's tort claim.

The core debate over whether the qualified immunity protections of section 669.14A apply here has been adequately briefed by the parties. And those protections should apply. *See* Appellants' Br. at 44–52. But Carver-Kimm makes three new arguments in her brief. They're all off base. The district court should have dismissed her wrongful-discharge-in-violation-of-public-policy claim.

A. Governor Reynolds and Garrett haven't waived qualified immunity—indeed they haven't answered the tort claim because they're asserting the immunity.

Carver-Kimm contends that the section 669.14A doesn't apply here because Governor Reynolds and Garrett waived it by failing to "plead this affirmative defense or raise the issue through a pre-answer motion to dismiss." Appellee's Br. at 43. This isn't true. Yet she tries to support this contention by stringing together Appellants' response to two different claims and two different times.

Carver-Kimm at first brought only a whistleblower discharge claim under Iowa Code section 70A.28. *See* App. 9–10. And indeed Governor Reynolds, Garrett, and the State answered this claim in October 2020 without raising any defense under section 669.14A—a statute that hadn't yet been enacted and even now doesn't apply to section 70A.28. *See* Answer (Oct. 7, 2020). But that answer has nothing to do with this appeal about whether section 669.14A's qualified immunity protections apply to a different tort claim brought in a later amended petition.

Carver-Kimm alleged her wrongful-discharge-in-violation-of-public-policy claim for the first time in her first amended petition filed nearly a year later in June 2021. *See* App. 21–22. Governor Reynolds, Garrett, and the State never answered that claim. They moved to dismiss on many bases, including the qualified immunity

protections of section 669.14A. *See* App. 24–25 ¶ 3. And when Carver-Kimm reasserted that new claim in her second amended petition, they again raised the qualified immunity protections of section 669.14A in their motion to dismiss that petition. *See* App. 41 ¶ 4; *see also* App. 66–67. They still haven't answered that claim.

Carver-Kimm thus has no factual basis to contend that Appellants have answered her wrongful-discharge-in-violation-of-public-policy claim without asserting the qualified-immunity protections of section 669.14A. *See* Appellee's Br. at 43–44. It's just not true. And this *tort* claim is the only claim that Appellants have ever argued is barred by section 669.14A—a part of the Iowa *Tort* Claims Act. *See* Appellants' Br. at 10, 11, 24, 44–55; *see also* App. 24–25, 45, 66–67, 106–116. Carver-Kimm's argument that Appellants waived their qualified immunity protections under section 669.14A and failed to preserve error on this issue is thus meritless.

B. Carver-Kimm's second amended petition—the one under review here—was filed after section 669.14A became effective; the filing date of previous petitions is irrelevant.

Appellants moved to dismiss Carver-Kimm's second amended petition. *See* App. 40–41. The district court then ruled on the legal sufficiency of Carver-Kimm's second amended petition. *See* App. 154 n.1, 162–63. This is an appeal of that ruling on the second amended petition. *See* App. 182. And Carver-Kimm filed her second

amended petition no earlier than July 28, 2021—about six weeks after section 669.14A became effective.[3] *See* App. 27; Act of June 17, 2021 (Senate File 342), ch. 183, §§ 12, 15, 2021 Iowa Acts 715, 719–20 (codified at Iowa Code § 669.14A (2022)). Thus, the earliest date for the event of legal consequence—when the conduct governed by section 669.14A occurred, *see Hrbek v. State*, 958 N.W.2d 779, 783 (Iowa 2021)—is July 28, 2021, when Carver-Kimm filed the second amended petition.

But Carver-Kimm points this Court to the filing of her *first* amended petition. *See* Appellee's Br. at 52. Even though the district court never ruled on the sufficiency of that petition. *See* App. 154 n.1, 162–63. And Appellants never appealed any ruling about that petition. So that petition is not before the Court in this appeal. The only support Carver-Kimm offers for this curious assertion is the relation-back provision applicable to the statute of limitations. *See* Appellee's Br. at 52 (citing Iowa R. Civ. P. 1.502(5)). But relating back for statute-of-limitations purposes doesn't mean that the filing date for *all* purposes is treated as some earlier date. That reading

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[3] It matters not whether the filing date for this purpose is when Carver-Kimm submitted a proposed second amended petition—July 28, 2021, *see* App. 27—or when she actually *filed* the petition after receiving leave from the court to do so—on August 13, 2021. *See* App. 30; *see also* Appellee's Br. at 52 & n.3 (arguing that it should be considered filed when proposed based on inapplicable statute-of-limitations precedent).

of Rule 1.502(5) has no basis in its text and would create unnecessary confusion.

Carver-Kimm's interpretation also makes no sense. Appellants raised the applicability of section 669.14A in their original motion to dismiss her first amended petition. *See* App. 24–25 ¶¶ 3, 5. And rather than stand on her first amended petition and argue against dismissal on that basis, she decided to seek leave to amend the petition. *See* App. 27–28. Indeed, Appellants didn't resist her doing so. *See* Def's Resp. to Pltf's Mtn to File 2d Am. Pet. (July 29, 2021). While Carver-Kimm describes her amendment as "merely assert[ing] additional factual allegations," Appellee's Br. at 52, even this appears to have been an attempt to respond section 669.14A's heightened pleading requirements. *See* Iowa Code § 669.14A(3). And in any event, with section 669.14A in effect and the chance to file a new amended petition, Carver-Kimm could have engaged in even greater adjustments to her claims, knowing the new requirements of that statute, including that of pleading only "clearly established" violations of the law. Iowa Code § 669.14A(1).

The amended petition under review here—the *second* amended petition—was filed after the effective date of section 669.14A. *See* App. Applying all the provisions of that statute isn't retroactive application.

C. Applying section 669.14A's qualified immunity protections here isn't unconstitutional.

Carver-Kimm calls application of section 669.14A's qualified immunity protections here "a brazen attempt to violate both the Iowa and United States Constitutions." Appellee's Br. at 54. She contends that application of the statute would violate due process because it "take away [her] right to bring her tort claim" after it "accrued the day she was terminated." *Id.*

But this argument that she has some vested right to bring her claim free of any statutory defenses or changes in legal schemes conflicts with *Baldwin v. City of Waterloo*, 372 N.W.2d 486 (Iowa 1985). In *Baldwin*, a motorcyclist collided with a pole lying in the middle of the road and suffered injuries. *Id.* at 487. The cyclist filed a negligence claim against the City of Waterloo and nearby property owners, alleging they were negligent in allowing the pole to be placed in the road. *Id.* at 488. At the time the cyclist suffered his injuries and filed suit, joint and several liability was governed by common law and "unlimited." *Id.* at 492. But while the cyclist's suit was pending the Legislature promulgated a new statute that altered joint and several liability by narrowing the class of defendants a plaintiff could recover an entire judgment from. *Id.* at 491. The statute applied retroactively, and the cyclist alleged retroactive application violated her due process rights under "both the United

States and Iowa Constitutions." *Id.* The Iowa Supreme Court disagreed.

The Court explained, "Plaintiff has no vested right in a particular result of this litigation or in the continuation of the principal of unlimited joint and several liability." *Id.* at 492. It reasoned that "a right is not 'vested' unless it is something *more than a mere expectation, based on an anticipated continuance of the present laws.* It must be some right or interest in property that has become fixed or established, and is not open to doubt or controversy." *Id.* (quoting *Schwarzkopf v. Sac Cty. Bd. of Supervisors*, 342 N.W.2d 1, 8 (Iowa 1983)) (emphasis added). And "[a]ny *interest that these defendants might have in the continued state of the law* concerning joint and several liability was not a 'vested' right entitled to constitutional protection." *Id.* (emphasis added). Thus, the new statute limiting joint and several liability applied to the pending suit without offending any constitutional principles. *Id.*

So too here. The statutory qualified immunity defense in no way alters the substance of Carver-Kimm's claims, which were—and still are—based on the common law. A court deciding whether her particular wrongful-discharge tort is "clearly established" under Iowa law to avoid the application of statutory qualified immunity is the "legal machinery by which the substantive law is enforced

or made effective" at work. *Id.* at 491. And any possible federal constitutional problem is further belied by federal court's consistently applying the creation and alterations to qualified immunity to pending cases. *See* Appellants' Br. at 52.

Carver-Kimm's constitutional concerns are unwarranted. Her wrongful-discharge-in-violation-of-public-policy claim alleging a never-before-recognized public policy should be dismissed based on the qualified immunity protections of section 669.14A.

III. Carver-Kimm still fails to point to a clearly defined and well-recognized public policy; neither an entire code chapter nor an equitable standard for a district court to apply can cut it.

In her petition and district court briefing, Carver-Kimm alleged that she was terminated for "compiling and producing records requested by media outlets and members of the public, pursuant to Iowa Code Chapter 22," which "was in furtherance of the clear public policy of the State of Iowa to free and open examination of public records even if such examination may cause inconvenience or embarrassment to public officials." App. 37 ¶ 37 (citing Iowa Code § 22.8(3)); *see also* App. 37–38 ¶¶ 36–38; App. 83–87. And on appeal she has continued to focus on this generalized policy of complying with chapter 22 and the statement in section 22.8(3). *See* Appellee's Br. at 56–62. But the entirety of chapter 22 and an equitable standard for a district court to apply in section 22.8(3) aren't a clearly

defined and well-recognized policy sufficient to support the tort of wrongful discharge in violation of public policy.

Carver-Kimm stresses that section 22.8(3) describes "the policy of this chapter." Iowa Code § 22.8(3); *see* Appellee's Br. at 57–58. But that alone can't make the policy clearly defined and well-recognized. The statute she cites is merely one factor a district court is to consider in deciding whether to exercise its discretion to shield an otherwise public record from release with an injunction. *See* Iowa Code § 22.8(3). Carver-Kimm doesn't explain how it creates a concrete actionable requirement for a government agency or its employees. And its text precludes such a conclusion since it states only that "free and open examination of public records is *generally* in the public interest," and cautions that "inconvenience or embarrassment" are not reasons for a court to grant an injunction. *Id.*

And while Carver-Kimm now discusses other provisions in chapter 22 that might "provide additional clarity on the scope of the public policy," Appellee's Br. at 58, those aren't provisions she relied on in her petition. There she merely cited Chapter 22 as a whole and section 22.8(3). *See* App. 37–38 ¶¶ 36–38. And she cannot save her claim with mere argument since this claim is subject to heightened pleading requirements under section 669.14A(3) that require to specify her claimed violation "with particularity." Iowa Code § 669.14A(3).

Nor can Carver-Kimm turn chapter 22 into a statute relating to "public health, safety, or welfare," *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 110 (Iowa 2011), just because she worked in the Department of Public Health during a pandemic. *See* Appellee's Br. at 62–64. By this logic, *any* statute could relate to public health, safety, or welfare, if the plaintiff happened to be employed in a workplace involved in those issues. That can't be. Would an employee who didn't work in such a workplace not be able to bring the wrongful discharge tort? This Court has never recognized a wrongful-discharge-in-violation-of-public-policy claim that could only apply to some employers within the State. Even if chapter 22 could otherwise be a clearly defined and well-recognized policy, because it doesn't relate to public health, safety, or welfare, chapter 22 can't be the basis of a wrongful discharge tort.

IV. The termination of an employee can't undermine any generalized policy of open access to records because chapter 22's robust enforcement remedies prevent that.

Because Carver-Kimm hasn't identified a clearly defined and well-recognized public policy, the Court need not reach this second question: whether that policy is undermined by her resignation. But assuming either chapter 22 as a whole or the equitable relief standard in Iowa Code section 22.8(3) establish some generalized policy of open access to records, termination of a government employee for

performing duties somehow in furtherance of that open access doesn't undermine the policy.

A government agency cannot fire its way out if compliance with chapter 22. Even assuming that employees would be chilled from providing access, individuals requesting public records will get those records. They have multiple ways to do so with the robust enforcement remedies available both through court and the Public Information Board. *See* Iowa Code §§ 17A.19, 22.5, 22.8, 22.10, 23.7–.10; *see also* Appellants' Br. at 66–68. Any generalized public policy of open access to records thus isn't dependent on the individual willingness of government employees to comply.

That's why Carver-Kimm's comparison to *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275 (Iowa 2000), is inapt. *See* Appellee's Br. at 67–69. There, the court held that a public policy in favor of providing truthful testimony in court proceedings was undermined by the discharge of an employee for planning to do so. *See Fitzgerald*, 613 N.W.2d at 285–88. While perjury statutes can punish a person who lies under oath—and thus provide some chilling effect for untruthful testimony—they can't force a person to testify truthfully. *See* Iowa Code § 720.2. Indeed, perjury statutes don't force a person to testify at all. Their after-the-fact punishment for those who choose—or are forced by other means—to testify thus doesn't prevent a violation of the public policy in favor of providing

truthful testimony in court proceeding. And they thus don't mitigate the chilling effect that was found sufficient to undermine the policy in *Fitzgerald*. *See Fitzgerald*, 613 N.W.2d at 288.

Not so here. Unlike a criminal perjury statute, the enforcement procedures of chapter 22 and 23 fully vindicate any public policy in chapter 22. The agency avoids no legal obligation by terminating an employee responsible for providing public records. Nor does it become any less likely that the public policy will be fulfilled. What's more, most government employees have the further protection of knowing that they couldn't be discharged for such a reason and would be protected by the merit appeals process if they ever were. *See* Iowa Code §§ 8A.411, 8A.412, 8A.413(19), 8A.415(2). The wrongful-discharge-in-violation-of-public-policy tort isn't necessary to prevent the undermining of any generalized public policy of open access to records.

CONCLUSION

For these reasons—and those explained in Appellants' opening brief—the district court's decision denying the motion to dismiss Carver-Kimm's wrongful-discharge-in-violation-of-public-policy claim and all claims against Governor Reynolds and Pat Garrett should be reversed.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

/s/ Jeffrey C. Peterzalek
JEFFREY C. PETERZALEK

/s/ Samuel P. Langholz
SAMUEL P. LANGHOLZ

/s/Tessa M. Register
TESSA M. REGISTER
Assistant Attorneys General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
(515) 281-4209 (fax)

jeffrey.peterzalek@ag.iowa.gov
sam.langholz@ag.iowa.gov
tessa.register@ag.iowa.gov

ATTORNEYS FOR
APPELLANTS

CERTIFICATE OF COST

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/s/ *Samuel P. Langholz*
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 5,788 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Samuel P. Langholz*
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

I certify that on August 29, 2022, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ *Samuel P. Langholz*
Assistant Attorney General