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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 Motion to Dismiss**

TABLE OF CONTENTS

INTRODUCTION 2

STANDARD FOR MOTIONS TO DISMISS 3

ARGUMENT 4

I. Plaintiffs' open-records claims under chapter 22 are moot because they have now received the records they requested. 4

II. Even if some timeliness claim isn't moot, it fails as a matter of law when brought against the Governor because it's a nonjusticiable political question and would infringe on her executive privilege. 8

A. Assessing the timeliness of a response from the Governor is a nonjusticiable political question. 9

B. Interpreting chapter 22 to apply a timeliness claim against the Governor would infringe on her executive privilege by requiring her to disclose protected information to defend the claim. 11

III. Plaintiffs aren't entitled to injunctive or mandamus relief. 14

CONCLUSION 16

INTRODUCTION

Amid an unprecedented pandemic, Plaintiffs Laura Belin, Clark Kauffman, and Randy Evans made a series of open records requests to Governor Kim Reynolds from April 2020 to August 2021. Pet. ¶¶ 38–84. When they didn't receive responses to their requests as fast as they desired, they sued. They allege that Governor Reynolds, some of her current and former staff, and the Governor's Office (collectively, "Governor Reynolds") violated Iowa's open records laws—chapter 22 of the Iowa Code—by failing to provide them the records. Pet. ¶ 4. And they sought injunctive and other relief to enforce compliance with chapter 22 and obtain the requested records. *Id.* at 21–22 ¶¶ 1–5. But less than three weeks later, Boal provided Plaintiffs all records responsive to their requests through counsel in this proceeding. *See* Exhibit A (Affidavit of Michael Boal and Records Response Cover Letters).

Because Plaintiffs have received all the requested records, this suit is now moot. Even if Plaintiffs continue to claim that the speed at which their responses were provided violates chapter 22, *see* Pet. ¶¶ 4, 97, that claim also fails as a matter of law. When brought against the Governor, her office, or her staff, such a claim is a nonjusticiable political question because it cannot be decided without making policy and value decisions about the allocation of time and resources within the Governor's Office. Interpreting it to apply would also infringe on the Governor's executive privilege by forcing her to reveal information protected by the privilege to defend the reasonableness of her efforts to respond. And even if the claim can be asserted, Plaintiffs have not alleged a violation here because Governor Reynolds, Boal, and the Governor's Office did not refuse to provide Plaintiffs their records. These cases should be dismissed.

STANDARD FOR MOTIONS TO DISMISS

Rule 1.421 of the Iowa Rules of Civil Procedure authorizes a pre-answer motion to dismiss for "[f]ailure to state a claim upon which nay relief may be granted." Iowa R. Civ. P. 1.421(1)(f). Motions to dismiss test "the legal sufficiency of the challenged pleading." *Southard v. Visa U.S.A., Inc.*, 734 N.W.2d 192, 194 (Iowa 2007). A motion to dismiss "accept[s] as true the petition's well-pleaded factual allegations, but not its legal conclusions." *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014). A motion to dismiss must be granted "when the petition's allegations, taken as true, fail to state a claim upon which relief may be granted." *Id.*

Since "a court will generally decline to hear a case when, because of changed circumstances, the court's decision will no longer matter," *Homan v. Branstad*, 864 N.W.2d 321, 328 (Iowa 2015), a motion to dismiss is an appropriate method of alerting the court that a case is moot. *See, e.g.*, *Remer v. Bd. of Med. Examiners*, 576 N.W.2d 598, 599 (1998) (affirming denial of attorney fees in a judicial review proceeding after district court had granted the agency's motion to dismiss on mootness grounds); *Riley Drive Ent. I, Inc. v. Reynolds*, Polk Cty. Case No. CVCV060630, at 7–11 (Iowa D. Ct. Nov. 16, 2020) (granting motion to dismiss on mootness and other grounds); *cf. Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 334 N.W.2d 439, 442 (Iowa 1983) (granting motion to dismiss portion of appeal as moot). This court may consider evidence of mootness outside the existing record when ruling on a motion to dismiss. *Cf. Clarke Cty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 170 & n.3 (Iowa 2015) (considering evidence outside the record submitted with motion to dismiss appeal as moot); *see also Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Cmm'n*, 255 N.W.2d 917, 924 (Wis. 1977).

ARGUMENT

I. Plaintiffs' open-records claims under chapter 22 are moot because they have now received the records they requested.

"Courts exist to decide cases, not academic questions of law. For this reason, a court will generally decline to hear a case when, because of changed circumstances, the court's decision will no longer matter." *Homan*, 864 N.W.2d at 328. A case should be dismissed as moot "if it no longer presents a justiciable controversy because the issues involved are academic or nonexistent." *Id.* (cleaned up). Put another way, the "test is whether an opinion would be of force and effect with regard to the underlying controversy." *Women Aware v. Reagen*, 331 N.W.2d 88, 92 (Iowa 1983).

A court may still choose to decide an otherwise moot case under the public-importance exception, when "matters of public importance are presented and the problem is likely to recur." *Homan*, 864 N.W.2d at 330 (cleaned up). Courts consider four factors in deciding whether to exercise discretion to decide a moot case under this 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.

Id. (quoting *Maghee v. State*, 773 N.W. 228, 234 (Iowa 2009)).

But even so, the judiciary's "lawgiving function is carefully designed to be an appendage to [its] task of resolving disputes." *Wengert v. Branstad*, 474 N.W.2d 576, 578 (Iowa 1991). "When a dispute ends, the lawgiving function ordinarily vanishes" and a court "certainly should not go out of [its] way to answer a purely moot question because of its possible political significance." *Id.*

Plaintiffs filed this suit when they had not yet received the records that they had requested from Governor Reynolds. Pet. ¶¶ 4, 9, 17, 84. Those records have now been provided. Exhibit A (Affidavit of Michael Boal and Records Cover Letters). This resolved the controversy between the parties and any further opinion of the court would have no "force and effect with regard to the underlying controversy." *Women Aware*, 331 N.W.2d at 92. The issues involved in the suit are now "nonexistent." *Homan*, 864 N.W.2d at 328.

The Iowa Court of Appeals has held that an open-records lawsuit becomes moot after the agency provides the records sought in the suit. *See Neer v. State*, No. 10-0966, 2011 WL 662725, at *1 (Iowa Ct. App. Feb. 23, 2011) ("Because the State released the records to Neer, we agree with the district court that this case became moot."). But because that case involved a dispute about the confidentiality of law enforcement investigative files after a criminal case is complete, the court also agreed to the exception to mootness applies because it was an important issue likely to reoccur and deciding the issue would help in future court proceedings. *Id.* at *2.

So too have courts from other jurisdictions agreed. *See Cabinet for Health & Fam. Servs. v. Courier-J., Inc.*, 493 S.W.3d 375, 382–83 (Ky. Ct. App. 2016) (recognizing that many federal and state courts recognize that once a party produced the records, the action for public records becomes moot); John Bourdeau, et al., 37A Am. Jur. 2d Freedom of Information Acts § 473 (Aug. 21, 2021 update) ("Once the records are produced in a case under the Federal Freedom of Information Act (FOIA) or a state counterpart, the substance of the controversy disappears and becomes moot since the disclosure the suit seeks has already been made.").

And this moot suit doesn't satisfy the requirements of the public-importance exception. *See Homan*, 864 N.W.2d at 330. While any claim under

chapter 22 presents a public issue, this suit involves routine open-record requests. Unlike the disputed confidentiality issue in *Neer v. State*, 2011 WL 662725, at *2, here, there are no novel issues about whether the records were public records subject to chapter 22 or subject to any confidentiality provisions where authoritative guidance could be useful. While records requests certainly occur with frequency before governmental bodies, including the Governor's Office, it's unlikely that any issue with the production of these specific records will recur. Nor is it likely that the delays caused by the "once in a lifetime" pandemic will be a reoccurring issue. Pet. ¶ 3.

The Supreme Court's decision in *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013), is not to the contrary. While the Court did hold that a city violated chapter 22 by delaying in producing requested records. *See id.* at 462–63. But the Supreme Court didn't consider mootness in the decision. Because the issue was not considered and ruled on by the Court, *Horsfield Materials* is not binding precedent on the issue. *See State v. Foster*, 356 N.W.2d 548, 550 (Iowa 1984) ("To sustain a claim of binding precedent a case must be interpreted in reference to an involved question which necessarily must be decided."); Bryan A. Garner et al., *The Law of Judicial Precedent* 84 (2016) ("A decision's authority as precedent is limited to the points of law raised by the record, considered by the court, and determined by the outcome."). Nor did that case—involving a City—have the same constitutional and political-question issues present here against the Governor, her staff, and her office.

There's also no textual basis in chapter 22 to support a timeliness claim for electronic records. In *Horsfield Materials*, the Court acknowledged that "there is no explicit time deadline in chapter 22 for the production of Public records." 834 N.W.2d at 460. But it reasoned that section 22.4 "suggests that our legislature contemplated immediate access to public records." *Id.* at 461.

And then it then relied on proposed administrative guidance that has been adopted by some state agencies to construe an "obligation to produce public records promptly, subject to the size and nature of the request." *Id.* at 462.

But the rights in section 22.4 that may be "exercised at any time during the customary office hours," *id.* at 461 (quoting Iowa Code § 22.4), are set forth in section 22.2. *See* Iowa Code § 22.2(1) (providing that "[e]very person shall have the right to ex-amine and copy a public record" and that right "shall include the right to examine a public record without charge while the public record is in the physical possession of the custodian of the public record"). And those rights to immediately examine and copy don't apply to requests for electronic records that must be retrieved from data processing software. *See* Iowa Code § 22.2(4)(b). For those records, the governmental body need only "establish policies and procedures to provide access to public records" in the system. Iowa Code § 22.3A(2)(a). There is nothing in that section that suggests a requirement to immediate access, nor liability for a response provided slower than the requestor desires.

With no textual basis for a timeliness claim here, and the records already provided, this case is moot and should be dismissed.[1]

[1] While not binding on this Court, similar arguments on mootness and many of the other issues in this case have recently been rejected by the district court in *Rasmussen v. Reynolds*, Polk Cty. Nos. CVCV062318 & CVCV062322 (Iowa Dist. Ct. Dec. 21, 2021), and *Rasmussen v. Iowa Dep't of Pub. Health*, Polk Cty. No. EQCE086910 (Iowa Dist. Ct. Jan. 27, 2022). The Iowa Supreme Court is currently considering Governor Reynolds' application for interlocutory review of *Rassmusen v. Reynolds*, which is docketed as Supreme Court No. 21-2008.

II. Even if some timeliness claim isn't moot, it fails as a matter of law when brought against the Governor because it's a nonjusticiable political question and would infringe on her executive privilege.

Plaintiffs allege that Governor Reynolds violated chapter 22 by not producing their requested records fast enough. *See* Pet. ¶¶ 91, 97–100. They rely mainly on the Iowa Supreme Court's decision in *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013). *See* Pet. at 16–17 n.14–17. There, the Court held that a city that hadn't provided requested records for nearly three months didn't substantially comply with chapter 22. *Horsfield Materials*, 834 N.W.2d at 462. The Court rejected any absolute deadline for responding to record requests. *Id.* at 461. But it held that this three-month delay was a "refusal" to provide records that put the burden on the city to prove compliance. *Id.* at 463 & n.6. And while it was a "close question," whether the delay was reasonable, the Court reasoned that the city hadn't provided enough detailed evidence in its defense. *Id.* at 462–63.

The city administrator had testified in some detail about the tasks necessary to produce the records and the other "urgent matters" with which he was dealing. *Id.* at 462. But the Court found it lacking that "his explanations did not include any dates or other time frames." *Id.* And the Court thus could not judge "how much time it really took city officials to work on [the records] request, relative to other demands on city officials' time." *Id.* at 462–63.

Assuming that the *Horsfield Materials* analysis is correct for other governmental bodies, it should not be extended to apply to a claim against the Governor, her staff, and her office. This court would be asked to decide whether the time spent by the Governor and her staff in relation to the time working on Plaintiffs' open-records requests was reasonable. Doing so would present a nonjusticiable political question. Such an interpretation of chapter 22 would

also unconstitutionally infringe on the Governor's executive privilege by forcing her to disclose protected information to defend the claim. For either of these reasons, the claim must be dismissed.

A. Assessing the timeliness of a response from the Governor is a nonjusticiable political question.

A political question exists when "one or more of the following considerations is present":

> (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 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) (quoting *State ex rel. Dickey v. Besler*, 954 N.W.2d 425, 435 (Iowa 2021)).

"Whether a matter involves a "political question" is determined on a case-by-case basis and requires an examination of the nature of the underlying claim." *King v. State*, 818 N.W.2d 1, 17 (Iowa 2012). The doctrine is grounded in separation-of-powers principles, and counsels that the court must "leave intact the respective roles and regions of independence of the coordinate branches of government." *Des Moines Register & Trib. Co. v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996). Only one of the six considerations need be present to preclude suit. *Iowa Citizens*, 962 N.W.2d at 794. But many considerations counsel toward that result here.

First, there are not judicially discoverable and manageable standards for resolving whether the timeliness of the Governor's response was reasonable. How would a court be expected to assess whether the Governor's senior legal counsel should have been spending more time working on Plaintiffs' requests rather than, say, drafting a public health disaster proclamation or discussing passed legislation with the Governor as she considers whether to sign it? Or by what standard could a court of law pass judgment on whether the Governor should have hired more staff or allocated more of her staff to work on open-records requests instead of duties related to the pandemic, the legislative session, or other operations of state government? Conducting the *Horsfield Materials* analysis to consider the timeliness of the Governor's response to an open-records request would be unmanageable.

So too would this assessment be impossible to make without "initial policy determination[s] of a kind clearly for nonjudicial discretion." The allocation of limited time and resources of the Governor's staff, particularly during the current challenges times is at core a policy and political question—not a legal one. And second-guessing whether the Governor has made these decisions properly—when the voters elected her and thereby sanctioned her judgment over precisely these types of policy decisions—would amount to "expressing a lack of respect due [to the] coordinate branches of government."

And deciding these questions would cause the court to wade into areas textually entrusted to the Governor. The Iowa Constitution tasks the governor with executing the state's laws. *See* Iowa Const. art. IV, § 1 (vesting "[t]he supreme executive power of this state" in the Governor); *id.* art. IV, § 8 ("He shall take care that the laws are faithfully executed."). The operations of her office staff that coordinate all these duties are at the core of this constitutional authority. *See Ryan v. Wilson*, 300 N.W. 707, 712 (Iowa 1941) (noting that while

the Governor "is the chief executive officer of the State, his job isn't a one-man job" and "[i]n the performance of his manifold duties, he is required to call for and to rely upon the assistance of many other officers and employees of the State"); *Godfrey v. State*, 962 N.W.2d 84, 112 (Iowa 2021) (recognizing Governor's management of the budget of the executive branch was a "constitutional power[] to be exercised wholly at the discretion of the governor" under article IV, section 1 of the Constitution). The tasks that the Governor assigns to the staff of her office—and how her staff resources are allocated between responding to open-records requests and her other "many and burdensome and important" duties, *Ryan*, 300 N.W. at 712—are textually entrusted to the Governor by the Constitution.

For all these reasons, any timeliness claim presents a political question. It improperly requires the judiciary to preempt the exercise of discretion by the executive. It should be dismissed for lack of justiciability.

B. Interpreting chapter 22 to apply a timeliness claim against the Governor would infringe on her executive privilege by requiring her to disclose protected information to defend the claim.

An interpretation of chapter 22 that permits a timeliness claim to be asserted against the Governor, her staff, and her office would also raise serious constitutional concerns as a violation of the separation of powers because defending the claim would infringe on the Governor's executive privilege. Leaving aside the political-question problems, to conduct the *Horsfield Materials* analysis of the reasonableness of the response time, the district court would need substantial details about what the Governor and her staff were spending their time doing in relation to their time on each of Plaintiffs' open-records requests. And the court would need to know why the Governor decided to allo-

cate her staff resources in that way. And mere summary explanations are insufficient—the Supreme Court has demanded detailed, specific evidence. *Horsfield Materials*, 834 N.W.2d at 462–63. Thus if a timeliness claim against the Governor, her staff, or her office could proceed to discovery or trial, Plaintiffs would inquire into these topics. And to properly defend against such a claim, the Governor and her staff would be forced to put forth similar information.

But the Governor's decision-making and communications are protected by executive privilege. And absent her waiver, they should generally be kept confidential. Interpreting chapter 22 to require the court to answer these questions would set up a clash between the protections of the privilege and the judiciary's resolution of the lawsuit. And that's particularly problematic given the burden-shifting interpretation in *Horsfield Materials* that would force the Governor to choose between waiving executive privilege or possibly failing to meet her burden to show the reasonableness of a delayed response. These concerns should be avoided by interpreting chapter 22 not to provide a timeliness claim against the Governor.

This Court has acknowledged that there is "an executive privilege, derived from the doctrine of separation of powers in both our State and federal constitutions." *State ex rel. Shanahan v. Iowa Dist. Ct.*, 356 N.W.2d 523, 526–27 (Iowa 1984). The Court quoted from *United States v. Nixon*, 418 U.S. 683 (1974), which explained that "[t]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." *State ex rel. Shanahan*, 356 N.W. at 527 (quoting *Nixon*, 418 U.S. at 706). But the Court ultimately decided the case on other statutory grounds. And so, the full scope of the privilege has not yet been fleshed out.

But the starting point—particularly given its favorable citation in *Shanahan*—is *Nixon*. The issue in *Nixon* was whether a court could enforce a subpoena for Presidential communications for use in a criminal prosecution. More generally, the opinion discusses the two competing interests to be balanced in executive privilege cases: transparency in disclosing important documents, and deference by courts to executive decision- and policy-making. A unanimous Court recognized that the "President's need for complete candor and objectivity from advisers calls for great deference from the courts." 418 U.S. at 706. Executive privilege therefore upholds "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* at 708.

Other states have also followed *Nixon* to recognize an executive privilege for their Governor. *See, e.g.*, *Freedom Foundation v. Gregoire*, 310 P.2d 1252 (Wash. 2013) (en banc); *Republican Party of New Mexico v. New Mexico Tax'n & Revenue Dept.*, 283 P.3d 853 (N.M. 2012); *State ex rel. Dann v. Taft*, 848 N.E.2d 472 (Ohio 2006); *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777 (Del. Super. Ct. 1995); *Nero v. Hyland*, 386 A.2d 846 (N.J. 1978).

The states have varied in how they define the precise scope of the privilege and how the privilege can be pierced by other interests. But the sorts of communications and decision-making in the internal day-to-day operations of the Governor's office that would be put at issue here would be at the core of its protections. The Court should be wary of opening the door to the consequences of that confidentiality being lost. *Cf. Ryan*, 300 N.W. at 715 ("In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives

that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint." (quoting *Spalding v. Vilas*, 161 U.S. 483, 498–99 (1896))). This is particularly so where even if the court received all the confidential information, the claim still presents a non-justiciable political question.

III. Plaintiffs aren't entitled to injunctive or mandamus relief.

Plaintiffs' request for mandamus and injunctive relief to obtain their previously requested records is moot. *See* Pet. ¶ 123; *id.* at 22 ¶ 3. The records have been provided. *See* Exhibit A (Affidavit of Michael Boal and Records Response Cover Letters). There is nothing more to mandate or enjoin.

Plaintiffs' request for prospective mandamus and injunctive relief requiring Governor Reynolds to comply with Iowa's open-records laws for one year is also misplaced. Mandamus is only available to compel performance of a legal duty that has already been breached after compliance was demanded by the plaintiff. *See* Iowa Code § 661.9; *Charles Gabus Ford, Inc. v. Iowa State Hwy. Comm'n*, 224 N.W.2d 639, 644 (Iowa 1974) (describing the "essential prerequisites for seeking mandamus to include "a breach or non-performance of such duty by the defendant"); 52 Am. Jur. 2d *Mandamus* § 45 ("Mandamus generally is not granted on a speculation as to the possible occurrence of future events, to prevent or remedy a future injury, to take effect prospectively, or to compel future acts or to remedy an anticipated failure to discharge a duty."). The Governor has no duty under chapter 22 to provide records that haven't yet

been requested. And compliance with such a speculative duty hasn't been demanded and refused. Plaintiffs request for prospective mandamus relief must be dismissed.

Plaintiffs also lack standing to seek prospective injunctive relief. *See Dodge v. City of Council Bluffs*, 10 N.W. 886, 889 (Iowa 1881) (holding that injunction was inappropriate because equitable relief is available "to prevent injuries which are imminent, not merely possible"); *Lessenger v. City of Harlan*, 168 N.W. 803, 807 (Iowa 1918) ("Unless damage to the plaintiff . . . is reasonably apprehended, [s]he has no ground on which to base an injunction."). "[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs (TOC), Inc.*, 528 U.S. 167, 185 (2000).

The petition fails to allege facts that show Plaintiffs would be protected from irreparable harm by a prospective injunction that Governor Reynolds comply with chapter 22 for the next year. It's speculative whether there will be future open records requests submitted that are processed less quickly than Plaintiffs would desire. The delays with the past requests actually pleaded were, as even acknowledged by Plaintiffs caused by the "many challenges due to the COVID-19 pandemic, a once in a lifetime event." Pet. ¶ 3. It's unlikely that such a similar situation will reoccur. Because of this lack of standing—or any basis in the petition to conclude prospective injunctive relief under 22.10(3)(a) is "appropriate"—any request for prospective injunctive relief should be dismissed.

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CONCLUSION

For these reasons, Plaintiffs' open-records claim against Governor Reynolds, Michael Boal, Pat Garrett, Alex Murphy, and the Office of the Governor should be dismissed.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties of record by delivery in the following manner on January 27, 2022:

☐ U.S. Mail	☐ FAX
☐ Hand Delivery	☐ Overnight Courier
☐ Federal Express	☐ Other
☒ EDMS	

Signature: */s/ Samuel P. Langholz*