IN THE IOWA SUPREME COURT

DANNY HOMAN, STEVEN J. SODDERS, JACK HATCH, PAT MURPHY, and MARK SMITH **Plaintiffs,** **v.** **TERRY BRANSTAD, GOVERNOR, STATE OF IOWA and CHARLES M. PALMER, IOWA DEPARTMENT OF HUMAN SERVICES DIRECTOR,** **Defendants.**	**Supreme Court Case No. _____** **Polk County Case No. EQCE075765** **DEFENDANTS' APPLICATION FOR APPEAL IN ADVANCE OF FINAL JUDGMENT (Ruling Requested Before March 3, 2014, the Deadline Set by the District Court For Submission of Evidence for Appropriate Bond)**

COME NOW Defendants, Terry Branstad, Governor of the State of Iowa, and Charles M. Palmer, Director of the Iowa Department of Human Services, and pursuant to Iowa Rule of Appellate Procedure 6.104(1), request that to be granted an appeal in advance of final judgment. The district court issued an order granting a preliminary injunction on February 5, which directed that the Iowa Juvenile Home be reopened. The order, however, gives Defendants twenty-five days to file an affidavit concerning the required amount of bond. The injunction is not effective until such time as the bond is filed. Iowa R. Civ. Pro. 1.1508. In lieu of requesting an immediate stay, Defendants request a ruling on this motion on or before March 3, 2014. In support thereof, Defendants respectfully state:

STATEMENT OF THE CASE

The district court has entered an unprecedented preliminary injunction ordering Governor

Branstad to reopen the Iowa Juvenile Home ("IJH"), a state-run institution for children who are adjudicated delinquent or in need of assistance in Toledo, Iowa. (Dist. Ct. Order at 17-18). Months ago, Director Palmer made the "difficult decision" to find alternative placements for the children after well-publicized complaints about the IJH's uses of seclusion and restraint. (Petition, Ex. C, at 1).

In direct violation of this Court's precedents, the district court's preliminary injunction is based on an unverified petition. *See, e.g., Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 95 (Iowa 1985) (reversing district court's grant of a preliminary injunction and observing the court could not do so "solely on the basis of the allegations contained in an unverified petition"). At the evidentiary hearing on the preliminary injunction, no evidence was offered, received, or admitted on behalf of the plaintiffs. *See* Tr. at 31-33, 40-42.

The district court's order is also based in part on a legal conclusion that the plaintiffs were likely to succeed on their claim that Article IV, Section 9 of the Iowa Constitution ("the Take Care Clause")[1] required Governor Branstad and Director Palmer to spend the entire amount appropriated to the IJH. But the district court itself recognized that "there is absence of judicial precedence" in

[1]Article IV, section 9 of the Iowa Constitution states, "He shall take care that the laws are faithfully executed." Despite recognizing that the "He" in Article IV, section clearly refers to the Governor, the district court held Plaintiffs' claim under this constitutional provision applies equally to Director Palmer because, in the court's view, Director Palmer can act "only . . . in accordance with the legislative authority granted to said department and also under the control and subject to the requirements of the duties and responsibilities of the executive branch as set forth in Article IV of the Constitution of Iowa." The district court went on to boldly assert, "The actions . . . of the Director of the Department of Human Services are thus the actions of the executive branch and, therefore, the actions of the Governor of the State of Iowa." Not only is this statement without legal authority, it appears to directly contravene all of Iowa Code chapter 17A and potentially subjects the Governor to liability for all actions of the executive branch and its employees.

Iowa for Plaintiffs' claim. Dist. Ct. Order at 8. The district court's grant of a preliminary injunction, therefore, directly violates over one hundred years of this Court's precedent. *See, e.g., Beidenkopf v. Des Moines Life Ins. Co.*, 160 Iowa 629, 142 N.W. 434, 438 (1913) ("An injunction will not issue where the right of the complainant . . . depends upon a disputed question of law about which there may be a doubt, which has not been settled by the . . . law of this state."); *see also Kent Prods. Inc. v. Hoegh*, 245 Iowa 205, 61 N.W.2d 711, 715 (1953) (observing that a preliminary injunction "against public officers should not be ordered unless on the pressure of urgent public necessity" and "ordinarily . . . will be refused where plaintiff's right to an injunction is doubtful.").

The district court's extraordinary and unprecedented order demands this Court's immediate review. The court's preliminary injunction impermissibly destroys the *status quo*. *See Kent Prods.*, 61 N.W.2d at 71. It furthermore is contrary to this Court's prudential standing requirements and lacks any evidence to support a finding of irreparable harm to these five Plaintiffs. Decisions about the best interests of these children are left to the exclusive jurisdiction of the juvenile court. Governor Branstad and Director Palmer, therefore, respectfully request this Court grant interlocutory review of the district court's preliminary injunction, direct an expedited briefing schedule, and set this matter for oral argument as soon as possible.

FACTUAL AND PROCEDURAL HISTORY

On January 2, 2014, Plaintiffs Danny Homan, Steven Sodders, Jack Hatch, Pat Murphy, and Mark Smith, each as a "taxpayer, resident and citizen" of the State of Iowa, filed a "Petition for Declaratory Judgment, Injunctive Relief, and Writ of Mandamus" ("Petition") against Governor Branstad and Director Palmer. The Petition contained no counts or claims for relief, but instead

requested a declaration that Governor Brandstad's "refusal to allow the spending of funds appropriated in Section 17 of S.F. 446 is an unconstitutional impoundment"; an injunction "prohibiting the closure of the [IJH] and prohibiting the misappropriation of funds dedicated to the [IJH]"; and "a Writ of Mandamus ordering that the [IJH] remain open." Petition at 5. Plaintiffs alleged that, on December 9, 2013, Director Palmer notified the public that the IJH would close. Plaintiffs requested an expedited hearing, and the Chief Judge of the Fifth Judicial District agreed to expedite the case. Pls., Letter Dated 1/2/14; Order Dated 1/10/14.

On January 10, 2014, Plaintiffs filed an "Application for Preliminary Injunction with Notice and Request for Hearing," pursuant to Iowa R. Civ. P. 1.1502. Plaintiffs requested immediate relief on their Petition, arguing that the impending closure of the IJH would result in the alternative placement of children, lay-offs of employees, and "irreparable harm" to the Iowa Constitution.

On January 15, 2014, the IJH closed, after Plaintiffs filed the Petition and Application, but before the Defendants responded thereto, or the district court scheduled a hearing.

On January 21, 2014, Defendants separately moved to dismiss the Petition on the grounds that Plaintiffs lacked standing and that chapter 17A was Plaintiffs' exclusive remedy. Defendants also resisted the Application. On January 23, 2014, the court sua sponte scheduled a hearing on Defendants' Motion to Dismiss and Plaintiffs' Application for Preliminary Injunction. On January 24, 2014, Plaintiffs resisted Defendants' motion to dismiss.

On January 31, 2014, the district court heard argument on Defendants' motion to dismiss and held an evidentiary hearing on Plaintiffs' Application. At the evidentiary hearing on the Application, no evidence was offered, received, or admitted on behalf of Plaintiffs. Defendants offered, and the

district court received and admitted, two exhibits on behalf of the Defendants. *See* Def.'s Ex. A (with attachments 1, 2, and 3) and Def.'s Ex. B.

On February 5, 2014, by written order, the district court denied Defendants' motion to dismiss and granted Plaintiffs' Application. Defendants now seek interlocutory review of that portion of the district court's order that granted Plaintiffs' Application.

ARGUMENT

Iowa Rule of Appellate Procedure 6.104 permits Defendants, as parties aggrieved by an interlocutory order of the district court, to apply to this Court for permission to appeal in advance of final judgment. The district court's extraordinary and unprecedented preliminary injunction, ordering the "reopening" of the IJH, demands this Court's interlocutory review. The preliminary injunction is directly contrary to precedent from this Court, was issued without *any* factual support, and wholly disrupts the status quo2 by ordering the reopening of a facility that have been determined not to meet the needs of children placed there. Defendants are not asking this Court to determine if there is a cause of action for unconstitutional impoundment in Iowa under the Take Care Clause. Rather the issue for the Court is whether *these* plaintiffs, based on *this* record,

[2] It is important to emphasize that Defendants did not seek a preliminary injunction until January 10, despite Homan's admission that he learned about the plan to transfer residents out of the IJH and layoff the majority of its employees on December 9. Homan Affidavit. At no time did Plaintiffs request an emergency hearing on the application for preliminary injunction. The district court sua sponte set the hearing for a date after the planned "closure" of the IJH. Plaintiffs did not attempt to move up the hearing date. Instead, Plaintiffs "sat on their rights" waiting over a month after all the residents had been placed elsewhere and the majority of the staff transferred or laid off to seek equitable relief. To grant such extraordinary relief under these circumstances is improper. It is particularly troublesome here, where in the interim Plaintiff Homan filed a union grievance concerning the layoffs at IJH and negotiated an MOU with the State.

were entitled to a temporary injunction. The answer is clearly no.

The governing legal principles are settled and familiar. The issuance or denial of a temporary injunction invokes the equitable power of the court. As a result, in determining whether to grant a temporary injunction, courts employ equitable principles. *Max100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001); *accord Matlock v. Weets*, 531 N.W.2d 118, 123 (Iowa 1995). The grant of injunctive relief is extraordinary and should be granted with caution. *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 639 (Iowa 1991); *accord Kleman*, 373 N.W.2d at 95 ("We have repeatedly emphasized that the issuance or refusal of a temporary injunction is a delicate mater—an exercise of judicial power which requires great caution, deliberation, and sound discretion."). "The test for issuing an injunction is whether the facts in the case show a necessity for intervention of equity in order to protect rights cognizable in equity." *Matlock*, 531 N.W.2d at 123.

The District Court Abused its Discretion by Granting a Temporary Injunction on a Novel, Unprecedented Cause of Action.

As framed by the district court, Plaintiffs' Petition rests solely on the Take Care Clause, which Plaintiffs allege prohibits executive "impoundment" of appropriated funds. All parties, and the district court, recognize that there is no precedent for such "impoundment" claim in Iowa. Plaintiffs referred to "the nonexistence of Iowa Supreme Court case law" in their briefing to the district court. Pls. to Defs Mtn. to Dism. at 6. The district court recognized the "absence of judicial precedent for [the] constitutional claim" in denying the Defendants' Motion to Dismiss. Nevertheless, the district court found there was a "possibility of a right of recovery under such a claim" and granted Plaintiffs' Application. Dist. Ct Order at 8.

In contradiction to this finding of a "possibility" of recovery on an unprecedented claim, the district court found Plaintiffs had "a likelihood of success on the merits" and granted the preliminary injunction. Dist. Ct. Order at 13. A possibility and a likelihood are two very different things. The dichotomy and the inconsistency of the district court on this point cannot be reconciled. A novel, unprecedented claim cannot and should not serve as the basis for a preliminary injunction.3

Where there is a disputed question of law, issuance of an injunction is particularly dangerous. *Iowa State Dep't of Health v. Hertko*, 282 N.W.2d 744, 751 (Iowa 1979). As recognized by this Court in *Hertko*, " '[a]n injunction will not issue where the right of the complainant, which it is designed to protect, depends upon a disputed question of law about which there may be doubt, which has not been settled by the . . . law of this state.' " *Id.* (citation omitted). "[T]o doubt is to deny." *Madison Square Garden Corp., v. Braddock*, 90 F.2d 924, 927 (3d Cir. 1937), *accord Lee v. Consol. Sch. Dist. No. 4*, 494 F. Supp. 987, 989 (W.D. Mo. 1980) (court does not consider the maxim to be an overstatement); *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 813 (4th Cir. 1991) (in similar). The district court abused its discretion in issuing a temporary injunction on the "possibility" that Plaintiffs' novel claim may—at some uncertain date in the future—be recognized in Iowa.

The District Court Abused its Discretion By Granting a Temporary Injunction to Plaintiffs Who Have No Standing To Sue.

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[3] It also demonstrates why mandamus cannot lie here. Mandamus is "a summary and extraordinary writ" that "will not be issued in doubtful cases but only where the rights and duties are clear and there is no other speedy and adequate remedy in the ordinary course of the law." *Reed v. Gaylord*, 216 N.W.2d 327, 332 (Iowa 1974).

Plaintiffs profess to be one citizen, resident, and taxpayer of Iowa, and four citizens, residents, taxpayers, and legislators of Iowa. Petition at ¶¶ 1–5. Plaintiffs asserted they were harmed by Defendants' actions only as citizens and taxpayers. Petition at ¶ 10. Despite this limited pleading, the district court found organizational and legislative standing to sue. Not only is there no support for this determination based upon the pleadings, the determination is contrary to the very decisions cited by the district court in support of its ruling.

Organizational Standing. The district court's sua sponte found organizational standing without briefing from the parties. AFSCME is not a party to this action. How may there be organizational standing when no organization is a named party?

Although Danny Homan is a named Plaintiff, Homan does not allege or assert that he has the legal authority to represent AFSCME or the organization's interests in this suit. Homan stated in an affidavit in response to Defendants' Motion to Dismiss that he is President of AFSCME, but does not say he is authorized to bring suit on that organization's behalf.

This is not a mere defect in the Petition that may be easily amended. Even assuming AFSCME were a named party, or that Homan could somehow in his individual capacity assert the union's interests, there still would be no organization standing. AFSCME's interest and injury lays in the layoffs or reduction of force of IJH's former employees. That interest is wholly subsumed by the Collective Bargaining Agreement ("CBA") and Iowa Code chapter 20. Under the CBA, AFSCME is required to file a grievance. Iowa Code § 20.18. This is the union's exclusive remedy for violations of the CBA and chapter 20.

Both AFSCME and Homan are undoubtedly aware of the need to grieve violations of the

CBA. The record shows AFSCME and Homan in fact filed a grievance on December 19 challenging the closure of the IJH. *See* Defendant's Reply Brief Ex. 1. As a result of this grievance, the State and AFSCME entered into a Memorandum of Understanding ("MOU"). *See* Defendant's Reply Brief Ex. 2. The question wholly ignored by the district court is what interest or injury does AFSCME or Homan have above and beyond this grievance and MOU? The answer is none—Homan has no standing to sue.

Legislative Standing. In finding the four legislators had standing, the district court expanded the doctrine of legislative standing to near universal portions—wholly beyond all precedent. Contrary to the district court's ruling, legislative standing is not and cannot be absolute, as the United States Supreme Court thoroughly explored in *Raines v. Byrd*, 521 U.S. 811, 117 S. Ct. 2312 (1997). Indeed, absolute legislative standing would thwart the concern for separation of powers and a limited judiciary—the two interests underlying the standing doctrine. In any event, there is no Iowa Supreme Court authority on point so a preliminary injunction is inappropriate.

This is not a question of the effectiveness of a legislator's vote. The issue in this case is whether the executive executed a law in the manner intended by the legislature. That is a fundamentally different question and a question for which the Plaintiffs cannot show a particularized injury. As the Third Circuit Court of Appeals has held, "[A]n official's mere disobedience or flawed execution of a law for which a legislator voted . . . is not an injury in fact for standing purposes." *Russell v. DeJongh*, 491 F.3d 130, 134 (3d Cir. 2007).

In examining the contours of legislative standing, federal courts have consistently distinguished between the complete withdrawal or nullification of a voting opportunity and "a

diminution in a legislator's effectiveness, subjectively judged by him or her, resulting from Executive action withholding information or failing to obey a statute enacted through the legislators. . . ." *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir.) (en banc), *vacated on other grounds*, 444 U.S. 996, 100 S. Ct. 533 (1979). The reason for this distinction is simple—once a law is passed a legislator has no special interest apart from the average citizen in seeing a law followed. *Russell*, 491 F.3d at 135.

This distinction is especially important where, as here, the legislature retains the ability to correct any perceived error in the Defendants' execution of the law through the legislative process. *Id.* at 136; *see also Raines*, 521 U.S. at 829, 117 S. Ct. at 2322. This situation is analogous to *Alons*. In *Alons*, the Iowa Supreme Court determined that legislators lacked standing to challenge a district court's interpretation of a statute. *Alons*, 698 N.W.2d at 873. The Court noted, "If the legislature disagrees with a court's interpretation, its prerogative is to pass legislation making it clear that the court's interpretation of their intention was incorrect." *Id.* Just as in *Alons*, if the legislature disagrees with the Defendants'' interpretation of its appropriations bill, it prerogative is to pass legislation in the ongoing legislative session that just began, not to sue.

None of the Plaintiffs had standing to sue. Granting an injunction to Plaintiffs without an interest and injury in the action is an abuse of discretion.

The District Court Abused its Discretion in Issuing a Preliminary Injunction on the Basis of an Unverified, Unarticulated Petition.

Iowa law is quite clear. Iowa Rule of Civil Procedure 1.1502 requires a request for preliminary injunction to be supported by affidavit. This Court has further explained that before

a court can grant a temporary injunction, there must be some evidence in the form of an affidavit or sworn testimony upon which the court "can ascertain the circumstances confronting the parties and balance the harm that a preliminary injunction may prevent against the harm that may result from its issuance." *Kleman*, 373 N.W.2d at 96.

Plaintiffs did not submit any affidavits with their request for temporary injunction. Nor did the Plaintiffs call a single witness at the hearing on the request for temporary injunction. Tr. pp. 31–42. In fact, Plaintiffs did not introduce any evidence at the hearing at all. *Id.* The only "evidence" in the record submitted by the Plaintiffs are five attachments to their Petition—a copy of the appropriation bill, a copy of the Governor's Executive Order creating the Iowa Juvenile Home Protection Task Force, a copy of DHS press release from December 9, 2013, a 1998 Administrative Order concerning line item veto cases, and a letter from the Plaintiffs to Chief Judge Gamble requesting that this case be treated like a line-item veto case—and an affidavit from Danny Homan in support of their resistance to the motion to dismiss.

The district court based the preliminary injunction on the unverified and unsubstantiated claims in the Petition. The background facts identified by the district court consist of the allegations in the Petition, none of which were verified and which Defendants' evidence in part disproved. *Compare* District Court Ruling pp. 1–5 *with* Exhibits A (DHS' CFO testifying appropriated funds have not been transferred and are not intended to be transferred). While certainly it is proper to assume all allegations in the Petition at true when evaluating a motion to dismiss, the opposite is true when evaluating a request for preliminary injunction.

The district court order does not point to a single piece of evidence to support its ruling.

There was no evidence of irreparable injury and it wholly is unclear how the Plaintiffs would be irreparably injured if the preliminary injunction was denied. The Court concluded there was irreparable injury but neglects to identify any facts upon which that conclusion is based. *See* Dist. Ct. Order, at 13. In the Application, the Plaintiffs did not even allege an injury to themselves. Instead they alleged (1) the amorphous injury which occurs whenever a law is not faithfully executed, (2) the potential injury to the juveniles formerly placed at the IJH if they are moved elsewhere, and (3) the potential injury to the employees of the IJH, and the Toledo community, as a result of potential layoffs.

Neither Plaintiffs nor the district court cite any authority that an "irreparable" injury to the Constitution or the law itself warrants grant of the extraordinary remedy of a temporary injunction.

Plaintiffs presented no evidence as to irreparable injury which may result to former residents of the IJH. Indeed, these Plaintiffs have no right to assert an injury to children. The district court did not even mention the juveniles in issuing the preliminary injunction. The only evidence in the record about the former residents of the facility was presented by the Defendants. That evidence, moreover, demonstrates that the best interests of the juveniles is not served by the preliminary injunction. LaVerne Armstrong's affidavit demonstrates that juvenile courts throughout Iowa are responsible to determine which placement is in the best interests of the former resident of IJH. *See* Defts' Ex. B, *passim.*

Issuance of the preliminary injunction has no effect on the placement of these juveniles. The juvenile court has exclusive jurisdiction to adjudicate a child as having committed a

delinquent act or as being a child in need of assistance. Iowa Code §§ 232.47(2); 232.96. Further, only the juvenile court has jurisdiction to determine the least restrictive disposition appropriate for adjudicated delinquents or children in need of assistance and to order placement of such juveniles at the IJH. *Id.* §§ 232.52(1); 232.52(2)(*e*); 232.99; 232.102(3). The district court's order does not directly alter or change the current placement of any juveniles in Iowa. Essentially, the district court ordered the IJH "reopened" without any residents.

Even assuming Plaintiffs could raise the interests of IJH's former employees, and assuming there was some evidence in the record about the employees, the employees have not suffered an irreparable injury warranting issuance of a preliminary injunction. Presumably, the employees' injury is the loss of employment—the loss of salary. This is a purely financial concern. Economic loss standing alone does not constitute irreparable injury. *Teleconnect Co. v. Iowa State Commerce Comm'n*, 366 N.W.2d 511, 514 (Iowa 1985); *Wisconsin Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985).

There is no irreparable injury here—to these five Plaintiffs—warranting issuance of a preliminary injunction. The district court abused its discretion in granting a preliminary injunction without evidentiary support.

The District Court Abused Its Discretion in Granting a Preliminary Injunction Against Public Officials

"Preliminary restraint against public officers should not be ordered unless on the pressure of urgent necessity, and ordinarily a temporary injunction against public officers will be refused where plaintiff's right to an injunction is doubtful or is based on facts determinable only by trial." *Kent*

Products, 245 Iowa at 205, 61 N.W.2d at 715 (citing 43 C.J.S., Injunctions, § 108c, at 619). *See also Clay v. Harrison Hills City Sch. Dist. Bd. of Educ.*, 723 N.E.2d 1149 (Ohio 1999) ("Great caution should be exercised when a court of law is requested to constrain the functions of other branches of government."). The reason for this restraint is clear—to exercise this authority too broadly is to risk subsuming the powers reserved to the other branches of government.

In *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 43 S. Ct. 597 (1923), Massachusetts argued that a Congressional appropriation of money to individual states in exchange for complying with the Maternity Act (designed to reduce maternal and infant mortality) was unconstitutional. The theory was that the purpose of the appropriation was not national but local to the states and that the financing of it fell disproportionately to industrial states such as Massachusetts. *Id.* at 479, 43 S. Ct. at 598.

The Supreme Court held that it has no authority to grant preventive relief when the complaining party was asking the Court to prevent execution of an unconstitutional enactment. "To do so would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess." *Id.* at 488, 43 S.Ct. at 601. The Supreme Court held that it could only intervene when the party alleging unconstitutionality "has sustained or is immediately in danger of sustaining some direct injury as a result of its [the statute's] enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.*

The grant of the preliminary injunction puts the district court in the unprecedented and unenviable position of controlling the operation of the IJH. The district court ordered the

reopening of IJH even though it has no jurisdiction to order that children be placed at the IJH or to direct how an executive branch agency should exercise its discretion in spending an appropriation. The district court's order is based on a single premise—that Governor Branstad did not faithfully execute IJH's appropriation. This appropriation bill does not exist in a vacuum. Under the Take Care Clause, Governor Branstad has the duty to faithfully execute *all* laws of the State of Iowa. These laws include the entire statutory scheme of children adjudicated delinquent or in need of assistance. *See* Iowa Code chapters 232, 233, 234. These laws are based on a single, overriding premise—the best interests of the children. As Chief Executive, Governor Branstad had the duty to balance these interests. By ordering the reopening of the IJH, the district court has exceeded its constitutional authority and impermissibly assumes the duties of another branch of government without sufficient justification.

Granting Defendants' Application for Appeal in Advance of Final Judgment will better serve the interests of justice. The district court clearly abused its judicial review power, and this Court should restore not only the status quo at the IJH but also the delicate balance that our tripartite system of government requires.

CONCLUSION

For the reasons expressed above, Defendants pray this Court grant interlocutory review of the district court's preliminary injunction order.

Respectfully submitted,

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Proof of Service

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on the 7th day of February, 2014.

✓ U.S. Mail ___FAX
___ Hand Delivery ___Overnight Courier
___ Federal Express ___Other
___ Electronically
Signature: _____