IN THE SUPREME COURT OF IOWA

SENATOR ROBY SMITH, et al., Plaintiffs, v. IOWA DISTRICT COURT FOR POLK COUNTY, Defendant.	No. 22-0401 **Legislators' Resistance to Motion to Shorten Appellate Deadlines**

The League of United Latin American Citizens of Iowa ("LULAC") asks this Court to slash the time for briefing this certiorari proceeding—giving the Legislators only 15 more days to write their proof brief and five days for their reply. It asks the Court to schedule a special oral argument in late April or May. And it wants the Court to issue a decision fast enough that LULAC can conduct a bench trial, get a district court ruling from that trial, and presumably obtain or defend against appellate review—all before voting in the November 8 general election begins in mid-October.

But these extraordinary measures aren't warranted. And they'd prejudice the Legislators, upend the Court's normal operations, and impede the administration of justice. LULAC has selected an artificial deadline by which it *wants* to have a final decision. But for the past year, it's failed to prosecute this case as

needed to achieve that goal. Indeed, it didn't subpoena the Legislators for the allegedly "critical discovery" until eight months after filing suit. LULAC's request to salvage its effort now—at the expense of a reasonable appellate process for the serious constitutional issues raised here—should be denied.

This extraordinary request to expedite isn't warranted.

LULAC sued to challenge the constitutionality of amendments to Iowa's election laws more than a year ago. *See* Petition (Mar. 9, 2021). Since then, countless elections have been conducted in jurisdictions throughout Iowa. That included three special elections for partisan offices in the Iowa Legislature. *See* Secretary of State, *2021 Election Results*, https://perma.cc/GPG3-QVL8; Governor Reynolds, Proclamation of Dec. 14, 2021, Special Election, https://perma.cc/L4WS-RDHB. And it included record-turnout, hotly contested city and school board elections across Iowa in November 2021. KCCI, *See Iowa Reports Record Turnout for 2021 Election* (Nov. 3, 2021), https://perma.cc/YXS3-6V88. Yet even though LULAC claims "irreparable harm" that "implicates the fundamental constitutional rights of Iowans," LULAC has never sought temporary injunctive relief to redress this alleged harm for any of these elections. Mtn. to Shorten App. Deadlines at 3.

Instead, LULAC has decided it needs a decision before the upcoming November election. And it complains that this Court's

normal appellate rules and case processing procedures for this appeal will impede that desired result. But it is LULAC that decided to wait eight months after suing before subpoenaing the Legislators for "critical discovery." Mtn. to Shorten App. Deadlines at 3; *see also* Pltf's Not. of Serving Subpoenas (Nov. 19, 2021). And LULAC that took three weeks to move to compel discovery after receiving the Legislators' objections. *See* Pltf's Mtn. to Compel Discovery from Legislators at 1–2 (Dec. 23, 2021). And it is LULAC that decided it didn't want to proceed with its long-scheduled trial without first resolving this constitutional dispute with the Legislators. *See* Uncontested Mtn. to Continue Trial ¶¶ 3, 5 (Mar. 11, 2021); Hearing on Motion to Stay Order to Compel (Mar. 10, 2021).

LULAC cannot now complain that these litigation choices have prevented it from obtaining a ruling on its statutory challenge as fast as it had hoped. And its failure to treat this case as an emergency until now betray its claims that this Court should rush consideration of this appeal to avoid some alleged irreparable harm.

This case presents serious questions under the Iowa Constitution. It has enormous ramifications for the operations of the Legislature and Iowans' communications with their elected representatives—well beyond the impact to LULAC's single lawsuit. So it deserves the robust yet concise appellate briefing that requires time for the parties to achieve. And it warrants careful deliberation

by the Court to properly consider the balance of the separation of powers between two co-equal branches of government.

The Court's past efforts to accommodate true emergency appeals with extraordinary measures is admirable. And the Legislators—like other State officials and agencies—stand ready to facilitate expedited consideration of urgent matters in appropriate cases. But this is not such a case.

Unlike other cases in which the Court has taken herculean steps to expedite, neither this certiorari proceeding nor the underlying lawsuit involves the grant or denial of temporary relief. *See, e.g.*, *LULAC v. Pate*, 950 N.W.2d 204, 208 (Iowa 2020) (expediting appeal of denial of temporary injunction against enforcement of election statute); *DSCC v. Pate*, 950 N.W.2d 1, 3 (Iowa 2020) (expediting interlocutory appeal of emergency stay of agency action); *LULAC v. Pate*, No. 18-1276 (Aug. 10, 2018) (expediting interlocutory appeal of temporary injunction issued against enforcement of election statutes and summarily reversing in part and affirming in part); *Planned Parenthood of the Heartland v. Branstad*, No. 17-0708 (May 9, 2017) (expediting interlocutory appeal of denial of temporary injunction of abortion statute and summarily reversing). By its nature, temporary relief is intended to address emergency

irreparable harm and is well-suited to limited briefing and consideration, since it is not a final decision and only considers likely success rather than the actual merits.

But this proceeding presents questions that will be finally decided—involving the availability of legislative privilege, the confidentiality of citizens' communications to their elected officials, and the separation of powers. The decision will be binding precedent—unreviewable but for a constitutional amendment—on the people of Iowa. *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491 (Iowa 1996), has governed this area for more than twenty-five years. And with the parties' assistance, the Court's decision here should be one that provides guidance for the decades to come.

The closest example of a past expedited case may be *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845 (Iowa 2014), which was an expedited appeal of a final judgment in a judicial review proceeding. *See id.* at 847–48. But that case *had* to be heard before the election or it would have become moot because it involved a candidate's eligibility for the primary ballot. *See id.* at 847. On the contrary, LULAC's statutory challenge here won't be moot. If LULAC eventually succeeds in permanently enjoining Iowa's election laws in 2023, that will have just as much effect on all future elections as if the ruling occurred in the summer of 2022.

And rushing the briefing and consideration of such important constitutional issues is not without risk of prejudice to the parties and the administration of justice. Without providing sufficient time for briefing, the parties are denied their full day in court, confident that they've made their strongest case for the correct result. And the Court is deprived of the opportunity of hearing those best-supported arguments. Indeed, the Court may reach a different result or rely on different reasoning than it would have on more careful reflection. *Compare Chiodo*, 846 N.W.2d at 848–57 (adopting, in an expedited plurality decision, one test for determining an "infamous crime" under the Iowa Constitution), *with Griffin v. Pate*, 884 N.W.2d 182, 199–205 (Iowa 2016) (adopting a different test after fuller briefing and deliberation); *see also Griffin*, 884 N.W.2d 206 (Wiggins, J., dissenting) (explaining one justice's "change" in "position" because of new reasoning of other justices and one of the briefs causing the justice "to reevaluate [his] thoughts on the issue"); *Chiodo*, 846 N.W.2d at 858 (Mansfield, J., concurring) (discussing how that expedited decision "unnecessarily introduced uncertainty and invited future litigation").

Expediting this appeal is also inappropriate because it won't give LULAC a final decision in time to affect the November election without extreme efforts by all involved. Under LULAC's proposed schedule, the case would be ready for oral argument at the end of

April. There's currently no scheduled trial date. And even assuming this Court issued a decision by the end of May, a trial couldn't be planned until at least July. Only that timetable would ensure that the Legislators would have 30 days to conduct the unprecedented search of their records— if this Court would rule that they must comply with LULAC's subpoenas—and give LULAC time to prepare for trial using any produced records.

A July trial is already too late to impact one of LULAC's challenged statutory amendments: the shortening of the time for requesting absentee ballots. *See* Am. Pet. ¶¶ 2, 41, 81, A–B. If LULAC is correct that the statutory change is unconstitutional, the previous period would begin on July 11. *See* Act of March 8, 2021, ch. 12 (Senate File 413), § 43, 2021 Iowa Acts 22, 30.

But even setting that aside, if the trial were held as early in July as possible—and as far as the Legislators are aware, no such trial date is available that works for all the parties—the earliest a district court decision could likely be issued after post-trial briefing would be sometime in August. (And that would be exceedingly fast—the court issued its order to compel under review here five weeks after the hearing.) That would leave only two months for briefing and deciding the appeal on the merits in this Court before October 10, 2022. That's when LULAC claims the State should have to begin accepting absentee ballots if LULAC's successful in its

challenge to the shortening of those deadlines. *See* Am. Pet. ¶¶ 2, 42, 81, A–B; Act of March 8, 2021, § 47, 2021 Iowa Acts 31.

This two-month period for appellate review is less time than LULAC allows the parties and the Court to complete the current certiorari proceeding in its proposed expedited schedule. And that shorter window would be to consider the *permanent injunction* of a duly enacted state election statute as unconstitutional "on the eve of an election." *LULAC v. Pate*, 950 N.W.2d 204, 215 (Iowa 2020) (quoting *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020)). Even then—with a decision in September or October—it'd already be too late to change processes without undue confusion. *See id.* at 215–16 (following the U.S. Supreme Court's *Purcell* principle in declining to alter election rules close to an election).

And again, LULAC asks for all this in a case that it filed a year ago. When it has never asked for temporary emergency relief. And after it waited for eight months to even raise this constitutional discovery dispute. Its request to speed up now is too late. The Legislators, this Court, and the people of Iowa shouldn't bear the brunt of LULAC's choices.

Instead of LULAC's proposal, the ordinary deadlines in the rules of appellate procedure are appropriate. Because of the timing of this appeal and the Court's adjudicative terms, the first available regular oral argument session is in September. And the normal

deadlines will result in this case being ready for assignment by that September session. So further shortening of the briefing schedule is unnecessary—it wouldn't achieve any faster submission without altering the Court's normal schedule.

To ensure that this schedule can be maintained, the Legislators would agree not to seek any extensions of the normal deadlines. And they would not object to prioritizing the case for argument and submission in September. But LULAC's extreme request for rushed briefing and expedited consideration should be denied.

If the Court still expedites submission, it should set a less prejudicial briefing schedule.

To be clear, the Legislators resist any shortening of the ordinary briefing deadlines. But if the Court decides that expedited submission is appropriate, the Court should set a briefing schedule that minimizes the prejudice to the Legislators. LULAC's proposed schedule doesn't give enough time to write the Legislators' briefs and conflicts with other time-sensitive obligations of the Legislators' counsel in this Court and federal court. The Legislators would instead propose using the expedited deadlines applicable to certified questions from federal court under Rule 6.902(2) as a guide.

Following that rule and assuming the court reporter files the transcript by the deadline of May 2, 2022, the following schedule could be established:

Legislators' Proof Brief	May 27, 2022	(25 days)
LULAC's Proof Brief	June 13, 2022	(15 days)
Reply Brief / Appendix	June 28, 2022	(15 days)
Final Briefs	July 5, 2022	(7 days)

The case could then be scheduled for oral argument in July 2022. And given the significant and substantial constitutional issues involved, it *should* be scheduled for oral argument regardless whether it is expedited. The Legislators believe that oral argument would help the Court consider the case and request to be heard before submission.

But even under this expedited schedule—as with LULAC's proposed schedule—it seems unlikely that LULAC can accomplish all that it hopes and would have trouble reaching a final decision in the underlying case in time to affect the next general election. So expediting the briefing and submission of this case lacks sufficient benefit to outweigh costs to the parties and the Court.

Conclusion

The normal deadlines for briefing under the Rules of Appellate Procedure are appropriate here. They will let this case be heard at the next available oral argument session in September 2022. And LULAC hasn't shown that justice requires a faster submission. The Court should deny LULAC's request to expedite this appeal.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

/s/ Samuel P. Langholz
SAMUEL P. LANGHOLZ
Assistant Solicitor General
Iowa Department of Justice
1305 E. Walnut Street, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5164
(515) 281-4209 (fax)
sam.langholz@ag.iowa.gov

ATTORNEY FOR CERTIORARI PLAINTIFFS

/s/ W. Charles Smithson
W. CHARLES SMITHSON
Legal Counsel and
Secretary of the Senate
Iowa State Capitol
1007 E. Grand Avenue
Des Moines, Iowa 50319
(515) 281-5307
charlie.smithson@legis.iowa.gov

ATTORNEY FOR CERTIORARI PLAINTIFFS SENATOR ROBY SMITH, SENATOR JIM CARLIN, SENATOR CHRIS COURNOYER, SENATOR ADRIAN DICKEY, SENATOR JASON SCHULTZ, SENATOR DAN ZUMBACH AND FORMER SENATOR ZACH WHITING

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on March 24, 2022, this resistance was electronically filed with the Clerk of the Supreme Court and served on counsel of record for all parties before the district court using EDMS.

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