STATE OF WISCONSIN
SUPREME COURT

NANCY KORMANIK,

Plaintiff-Petitioner,

-vs-

WISCONSIN ELECTIONS COMMISSION,

Defendant,

and

RISE, INC. and DEMOCRATIC NATIONAL COMMITTEE

Intervenor-Defendants,

and

COURT OF APPEALS DISTRICTS II & IV,

Respondents.

Case Nos.
22-AP-1720
22-AP-1727

PLAINTIFF NANCY KORMANIK'S PETITION FOR SUPERVISORY WRIT UNDER WIS. STAT. §§ 809.71 AND 751.07

On Petition from October 10, 2022 Order, Court of Appeals, District II, Chief Judge Chief Judge William W. Brash, III, Presiding

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INTRODUCTION

This petition presents a critical issue: What is the proper appellate venue for this case? This Court recently granted a petition for supervisory writ to consider a similar contested issue of appellate venue. *See State ex rel. Dep't of Nat. Res. v. Wis. Ct. of Appeals, Dist. IV* [*DNR*], 2018 WI 25, ¶ 9, 380 Wis. 2d 354, 909 N.W.2d 114. In *DNR*, the Court addressed an apparent conflict in venue statutes presented by Wis. Stat. §§ 801.50(3)(a) and 227.53(1)(a)3. The Court reconciled the conflict, holding that both statutes applied. Applying the plain text of those statutes, however, the Court reasoned that there was no conflict and that both statutes could be applied at the same time. In this case, the Court of Appeals relied upon DNR to conclude that paragraph (3)(a) of section 801.50 also does not conflict with paragraph (3)(b). But unlike the two provisions at issue in *DNR*, those paragraphs are irreconcilable. Paragraph (3)(b) is *an exception* to paragraph (3)(a). They cannot both apply at the same time.

Procedurally—although not substantively—this case is *DNR* Part II. Ms. Kormanik petitions this Court for a supervisory writ to correct the Court of Appeals' decision. This Court should grant review for the same reasons it granted review in *DNR*. Indeed, a supervisory writ is even more urgent here, given that the Court of Appeals' transferred venue *yesterday* and ordered all briefing due in this case by noon *tomorrow*. This Court should vacate the Court of Appeals' decision because, unlike *DNR*, this case does not implicate section 801.50(3)(a). The Court of Appeals' decision misapplies *DNR* and, left uncorrected, would nullify sections 801.50(3)(b) and (3)(c).

ISSUE PRESENTED

Whether the Court of Appeals violated its plain duty by transferring the case to District IV after ruling that both section 801.50(3)(a) and its exception, (3)(b), apply.

BACKGROUND

On September 23, 2022, Ms. Kormanik, a resident of Waukesha County, filed this lawsuit to stop The Wisconsin Elections Commission (WEC) from violating Wisconsin law. App. 1-19. The suit was venued in Waukesha County under Wis. Stat. §§ 227.40 and 801.50(3)(b). App. 4. Wisconsin election law generally prohibits election officials from returning absentee ballots to voters. Wis. Stat. § 6.86(6). That rule is subject to a couple exceptions. One is that if an absentee ballot lacks a witness certification, an election official may return the ballot to the voter for correction. *Id.* § 6.87(9). The other exception is that an election official may return an absentee ballot to a voter if the ballot was returned in a "spoiled" or "damaged" condition. *Id.* § 6.86(5). State law allows election officials to return absentee ballots under those narrow circumstances. Otherwise, election officials "shall not return" those ballots to voters. *Id.* § 6.86(6).

WEC recently issued guidance flouting that law. On August 1, 2022, WEC published a memorandum advising that "[a]bsentee voters can request to spoil their absentee ballot and have another ballot issued as long as the appropriate deadline to request the new absentee ballot has not passed." App. 12. That is, a voter who returned a final absentee ballot can, for any reason, request that a clerk or election official spoil the ballot and send a new one back to the voter. App. 16. But Wisconsin law says that clerks and elections officials "shall not return" those

ballots—and neither of the two exceptions to that prohibition applies to ballots returned in an undamaged or unspoiled condition. Wis. Stat. § 6.86(6).

On October 7, the Waukesha County Circuit Court temporarily enjoined WEC from these unlawful practices. The injunction generally prohibits WEC from issuing guidance that conflicts with section 6.86(6). *See* App. 20-22. WEC was ordered to comply with the injunction by 7:00 PM on October 10, 2022.

On October 8, the Democratic National Committee (DNC) and Rise, Inc. filed separate petitions for review of the Circuit Court's nonfinal order. The DNC and Rise also requested emergency *ex parte* stays of the injunction. The DNC then moved to designate appellate venue in District IV.

The clerk directed the parties file letters addressing the venue issue. Ms. Kormanik filed a straightforward letter explaining why venue was proper in District II under Wis. Stat. § 752.21(1). App. 204-05. The Court of Appeals rejected Ms. Kormanik's argument, faulting her for failing to address *DNR*. But *DNR* does not control the venue issue here, and the Court of Appeals erred in applying it. The Court effectively rejected Ms. Kormanik's argument because she did not apply an inapplicable case, and Ms. Kormanik did not have an opportunity to file a reply to alert the Court of Appeals to its error. While *DNR* does not control the outcome of this case, it does establish a procedure to correct the Court of Appeals' decision: the Court should grant the petition for supervisory writ, vacate the Court of Appeals' order, and transfer the case back to District II where it belongs.

ARGUMENT

I. The Court should grant the petition.

This Court has already explained why this precise situation warrants a supervisory writ. In *DNR*, as in this case, the Court of Appeals erroneously transferred the case from District II to District IV. This Court granted a petition for supervisory writ and vacated the Court of Appeals' erroneous transfer order. It should do the same here.

This Court grants supervisory writs when:

(1) an appeal is an inadequate remedy;

(2) grave hardship or irreparable harm will result;

(3) the duty of the trial court is plain and it acted or intends to act in violation of that duty; and

(4) the request for relief is made promptly and speedily.

DNR, 2018 WI 25, ¶ 9. As this Court held in *DNR*, an improper appellate venue checks all these boxes. And the case presents an important issue that this Court should resolve.

First, appeal is an inadequate remedy. The "rules of appellate procedure do not give the [petitioner] the right to appeal the Court of Appeals' venue order." *Id.* ¶ 43. Ms. Kormanik would have to wait for resolution of the DNC's petition for review, remand to the Circuit Court, a final judgment, subsequent appeal, and finally petition to this Court. And because this Court is not an "an error-correcting tribunal," it would not necessarily take her case. *Id.* Ms. Kormanik's petition for review would thus "depend on a serendipitous confluence between (1) the venue error, and (2) a 'plus' factor" justifying review." *Id.* Even then, relief would be far too late. This Court concluded in DNR "that a petition to review the court of appeals' eventual decision on the merits is an

inadequate remedy to address the question of appropriate appellate venue." *Id.*¶ 45. This case presents that identical circumstance.

Second, Ms. Kormanik would suffer irreparable harm if this Court were to deny the supervisory writ. This conclusion follows from the fact that appeal is an inadequate remedy for improper venue. *See id.* ¶ 46. Ms. Kormanik has a right to proper venue under Wis. Stat. § 752.21(1). The Court of Appeals' decision deprives her of that statutory right. And because Ms. Kormanik cannot appeal that decision, "the loss [is], by definition, irreparable." *Id.* ¶ 47.

Third, the Court of Appeals violated a plain duty. The appellate venue statute is mandatory. *See* Wis. Stat. § 752.21; *DNR*, 2018 WI 25, ¶ 13. "[T]he court of appeals has no discretion with respect to where it must hear the appeal." *DNR*, 2018 WI 25, ¶ 13. That makes it "a 'plain duty' within the meaning of our supervisory writ jurisprudence." *Id.* And, as explained in the next section, the Court of Appeals violated that duty.

Fourth, Ms. Kormanik filed this petition rapidly. The Court of Appeals issued its transfer order yesterday afternoon. The petitioner in *DNR* filed the petition approximately two weeks after the venue decision, which the Court held was "unquestionably 'prompt and speedy.'" *Id.* ¶ 10. Ms. Kormanik filed this petition immediately seeking correction of the Court of Appeals' decision.

Finally, this petition presents an important issue that the Court should resolve. The issue of venue is present in every lawsuit. The Court granted the petition for review in *DNR* to resolve "an important issue of first impression regarding the right of an appellant to select appellate venue." *Id.* ¶ 2. This case is *DNR* Part II. The Court of Appeals' error effectively nullifies section 801.50(3)(b) and (3)(c). This Court should

take this case to clarify the law and prevent the abolition of litigants' statutory rights.

II. The Court should vacate the Court of Appeals' decision and transfer the case to District II.

The statutory language of section 801.50(3) easily resolves this case. To the extent it applies, *DNR* supports venue in District II. And the Court of Appeals violated its plain duty by concluding otherwise.

A. Wisconsin statutes require District II to hear this case.

Appellate venue is proper only in District II. Appellate venue is proper "in the court of appeals district which contains the court from which the judgment or order is appealed." Wis. Stat. § 752.21(1). District II contains the Waukesha County Circuit Court, from which this appeal is taken. Appellate venue is therefore proper only in District II.

Section 752.21(2)—which provides an exception to the normal appellate venue rules—does not apply here. That provision states that an appeal "from an action venued in a county designated by the plaintiff to the action as provided under [section] 801.50(3)(a) shall be heard in a court of appeals district selected by the appellant." *Id.* § 752.21(2). But Plaintiff did not designate venue in this case under section 801.50(3)(a). Therefore, section 752.21(2) does not apply.

This case was venued under *paragraph (3)(b)*—not (3)(a). Section 801.50(3)(b) states that "[a]ll actions relating to the validity or [invalidity] of a rule or guidance document shall be venued as provided in [section] 227.40(1)." Ms. Kormanik filed a declaratory judgment action under section 227.40(1) relating to the validity or invalidity of a rule or

guidance by the Wisconsin Elections Commission. App. 4. Section 801.50(3)(b) therefore controlled venue in the Circuit Court.

The text and structure make clear that paragraph (3)(a) and (3)(b) cannot both apply. The statute itself calls (3)(b) an exception: "*Except as provided in pars. (b) and (c)*, all actions in which the sole defendant is the state ... shall be venued in the county designated by the plaintiff unless another venue is specifically authorized by law." *Id.* § 801.50(3)(a) (emphasis added). Paragraph (3)(a) is a default provision that provides venue rules when neither (3)(b) nor (3)(c) apply. The Court must give that exception meaning. Either paragraph (3)(a) applies, or (3)(b) applies, or (3)(c) applies. Applying both the general rule and its exception violates basic principles of logic and statutory interpretation. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 ("In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute" and when possible "give reasonable effect to every word, in order to avoid surplusage.")

In sum, because the case was venued in the Circuit Court under section 801.50(3)(b), appellate venue is proper "in the court of appeals district which contains the court from which the judgment or order is appealed." *Id.* § 752.21(1). District II contains the Waukesha County Circuit Court, from which this appeal was taken, so appellate venue is proper only in District II.

B. *DNR*'s venue reasoning does not apply.

DNR distinguishes itself. In *DNR*, the Court addressed a conflict between section 801.50(3)(a) and section 227.53(1)(a)3. Neither of those sections applies here. This case is about section 801.50(3)(b), which is an

exception to paragraph (3)(a). The Court explicitly said that paragraph (3)(b) was "not relevant" to its decision. *DNR*, 2018 WI 25, ¶ 16 n.8. The holding in *DNR* is thus "not relevant" to this case. *Id.*

The reasoning in *DNR* demonstrates why it could not apply here. In *DNR*, the petitioners were required to file their case in their county of residence under Wis. Stat. § 227.53(1)(a)3., which restricts venue for administrative appeals. *Id.* ¶ 14. The petitioners argued that section 227.53(1)(a)3. conflicted with section 801.50(3)(a). Because section 227.53(1)(a)3. reduced their venue options to one (their county of residence), the petitioners argued they did no "designating" under section 801.50(3)(a). *Id.* ¶ 23. The Court rejected that argument: "Because there is no conflict between § 801.50(3)(a) and § 227.53(1)(a)3., we apply them both and conclude that even when the latter statute eliminates any opportunity to choose a county, the plaintiff still designates venue within the meaning of § 801.50(3)(a)." *Id.* ¶ 31.

Ms. Kormanik does not make that argument. Section 227.40(1) did require her to file this lawsuit in her county of residence, but Ms. Kormanik *does not argue* that section 227.40(1) conflicts with section 801.50(3)(a). Rather, she argues that her case falls under paragraph (3)(b), which is an exception to paragraph (3)(a). And we know it is an exception because *the statute calls it an exception*. If (3)(b) applies, (3)(a) does not apply. The reasoning in *DNR* underscores that paragraph (3)(b) takes this case outside the normal rule that is paragraph (3)(a).

C. The Court of Appeals violated a plain duty.

As already shown, the Court of Appeals has a plain duty to hear the appeal in the proper venue. *See DNR*, 2018 WI 25, ¶ 13. The court violated its plain duty by committing three errors.

First, the court relied in part on *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519. But *Teigen* is wholly inapplicable here, as no party objected to venue in that case. The Court of Appeals noted that "the posture of this case is very similar" to *Teigen*. App. 216. But that is irrelevant because, as the court itself observed, "[n]o one challenged the selection of District IV in *Teigen*, and that issue was not addressed in the supreme court's eventual decision in that case." *Id.* at 216 n.2. Objections to venue are waivable. No one objected to venue in *Teigen*, but Ms. Kormanik objects to the Court of Appeals' venue decision in this case. This Court does not expound rules of law through silence. *Teigen* is irrelevant to this case, and the Court of Appeals erred in relying on it.

Second, the Court of Appeals misinterpreted Ms. Kormanik's argument. The court said it was "not persuaded by Kormanik's argument that because her complaint alleged that venue was proper under Wis. Stat. § 801.50(3)(b), this case does not also fall within Wis. Stat. § 801.50(3)(a)." App. 217. But Ms. Kormanik never made that argument. Nor could she, as venue allegations are legal conclusions that are not binding on courts. *League of Women Voters v. Evers*, No. 2019AP559, 2019 WL 1396759, at *1 (Wis. Ct. App. Mar. 27, 2019) (citing *DNR*, 380 Wis. 2d 354, ¶ 13). Ms. Kormanik's argument is simply that she filed a declaratory judgment action "relating to the validity or [invalidity] of a rule or guidance document," thus triggering venue under section 801.50(3)(b). The Court of Appeals rejected a strawman.

Third, the Court of Appeals misapplied *DNR*. The court reasoned that "even though § 801.50(3)(b) required Kormanik to designate venue in the circuit court in accordance with Wis. Stat. § 227.40(1), she was

also designating venue within the meaning of § 801.50(3)(a)." App. 217. That reasoning ignores the text and structure of section 801.50(3).

Paragraph (3)(a) does not apply in every circumstance. It applies generally to actions in which the sole defendant is the state, "*[e]xcept as provided in pars. (b) and (c).*" Wis. Stat. § 801.50(3)(a). If paragraph (3)(b) applies, then (3)(a) does not apply. That is the nature of an exception. The appellate venue statute, section 752.21, uses identical language. *See id.* § 752.21(1) ("[E]xcept as provided in sub. (2), a judgment or order appealed to the court of appeals shall be heard in the court of appeals district which contains the court from which the judgment or order is appealed."). Paragraph (1) applies "[e]xcept" in the circumstances where paragraph (2) applies. *Id.* They cannot both apply. *See DNR*, 380 Wis. 2d 354, ¶ 13. The same language appears in section 801.50(3)(a). But the Court of Appeals—after finding that paragraph (3)(b) applied—inexplicably ruled that paragraph (3)(a) *also* applies. That ignores the plain language of the statute, which calls paragraph (3)(b) an exception.

The court's reasoning also ignores the structure of the statute. Again, compare section 801.50(3) to section 752.21. Both paragraphs in section 752.21 use the language "shall." As the Court held in *DNR*, that means that both sections are mandatory. *DNR*, 380 Wis. 2d 354, ¶ 13. Paragraph (1) sets up a "general rule" that applies in most circumstances, and paragraph (2) sets up a "specific rule" that applies in the alternative. Either the general rule or the specific rule applies, because "[t]he appeal must be heard somewhere." *Id.* But because both rules are mandatory, they cannot both apply. The same is true of section 801.50(3), which contains a general rule—(3)(a)—and two specific

rules—(3)(b) and (3)(c). Each rule is mandatory, so multiple rules cannot apply. If the specific rule of (3)(b) applies, then (3)(a) does not apply.

The Court of Appeals rejected Ms. Kormanik's argument for the three reasons described above. All three reasons were error, as shown. And because the error violates the court's plain duty to venue the appeal in the proper district, this Court should issue the supervisory writ.

III. The Court should stay the underlying proceedings until it resolves this petition.

Ms. Kormanik respectfully requests that the Court stay proceedings in the Court of Appeals pending disposition of this petition, just as this Court did in *DNR*. A stay is appropriate where the movant: (1) "makes a strong showing that it is likely to succeed on the merits of the appeal"; (2) "shows that, unless a stay is granted, it will suffer irreparable injury" while the appeal is pending; (3) "shows that no substantial harm will come to other interested parties" while the appeal is pending; and (4) "shows that a stay will do no harm to the public interest." *Waity v. LeMahieu*, 2022 WI 6, ¶6, 400 Wis. 2d 356, 969 N.W.2d 263.

Ms. Kormanik has made a strong showing that she will succeed on the merits of this petition. As explained in Sections I and II, a supervisory writ is appropriate to correct the Court of Appeal's plain error of venue.

Ms. Kormanik will also suffer irreparable injury absent a stay. As this Court recognized in *DNR*, the Court of Appeal's decision deprives Ms. Kormanik of her statutory right to proper venue. *See DNR*, 2018 WI 25, ¶ 47. And because Ms. Kormanik cannot appeal that decision, "the loss [is], by definition, irreparable." *Id.* Moreover, the Court of Appeals

administratively stayed the injunction that Ms. Kormanik obtained from the Circuit Court. That stay—issued by the wrong court—is causing Ms. Kormanik irreparable harm every moment it remains in place. For that reason, Ms. Kormanik seeks this expedited petition to correct the Court of Appeals' error.

A stay will not cause substantial harm to other interested parties. So long as the Court of Appeals' stay remains in place, the interested parties in this case cannot possibly claim any harm resulting from a slight delay in resolution of this venue issue.

Finally, a stay will do no harm to the public interest. The public interest considerations are on Ms. Kormanik's side, as she explained in her opposition to the DNC's motion to stay the Circuit Court's temporary injunction. *See* App. 197-99. The public has a right to fair elections administered in accordance with the law. The Court of Appeals inappropriately venued this case in District IV, and then administratively stayed the injunction that Ms. Kormanik obtained. That stay harms the public interest day by day, until this Court resolves the Court of Appeals' error.

CONCLUSION

For these reasons, Ms. Kormanik respectfully requests that this Court (1) grant the petition for supervisory writ, (2) vacate the Court of Appeals' order designating venue in District IV, and (3) stay proceedings in the Court of Appeals until resolution of the petition.

Dated this 11th day of October, 2022.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C., Attorneys for Plaintiff-Petitioner.

By: _____

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in §§ 809.51 and 809.71 for a petition produced with a proportional serif font. The length of this brief is 3,370 words.

Dated this 11th day of October, 2022.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C., Attorneys for Plaintiff-Petitioner.

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CERTIFICATE OF SERVICE

I certify that on this 11th day of October 2022, I caused a copy of this petition to be served upon counsel for each of the parties via the appellate court's electronic filing system, via e-mail, and via hand-delivery.

Dated this 11th day of October, 2022.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C., Attorneys for Plaintiff-Petitioner.

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