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SUPREME COURT

Supreme Court of Wisconsin

NO. 2022AP1736-W

NANCY KORMANIK,

Plaintiff-Petitioner,

vs.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Respondent,

DEMOCRATIC NATIONAL COMMITTEE,

Intervenor-Defendant-Respondent,

RISE, INC.,

Intervenor-Defendant-Respondent, and

COURT OF APPEALS DISTRICTS II & IV,

Respondents.

Appeal Nos. 2022AP1720-LV and 2022AP1727
Waukesha County Circuit Court Case No. 2022CV1395

INTERVENOR-DEFENDANT-RESPONDENT DEMOCRATIC NATIONAL COMMITTEE'S OPPOSITION TO PLAINTIFF NANCY KORMANIK'S PETITION FOR SUPERVISORY WRIT UNDER WIS. STAT. §§ 809.71 AND 751.07

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INTRODUCTION

Pursuant to the Court's Order of October 12, 2022, Intervenor-Defendant-Respondent Democratic National Committee ("DNC"), by its undersigned counsel, submits this Opposition to Plaintiff Nancy Kormanik's Petition for Supervisory Writ Under Wis. Stat. §§ 809.71 and 751.07. As the Court's Order observes, the Petition for Supervisory Writ does not request any action from this Court relating to the temporary stay issued by the Court of Appeals on October 10. Accordingly, this Opposition focuses on the issue of venue that Petitioner raises, without addressing in any detail why the Court of Appeals' temporary stay is appropriate. [1]

Chief Judge Brash's challenged October 10 venue order

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[1] If the Court ultimately addresses the merits of the Court of Appeals' decision to issue a temporary stay, DNC respectfully requests that Respondents have the opportunity to brief that issue in full. In the meantime, DNC's arguments in support of the temporary stay are set forth in DNC's Petition for Leave to Appeal From Temporary Injunction Order and Emergency Request for Stay of Temporary Injunction, which is included in DNC's Appendix to this Opposition. *See* DNC App. 178-208.

correctly held that these appeals should be heard by District IV pursuant to Wis. Stat. § 752.21(2). Pet. App. 214-218. DNC explains why in the Argument below. But that venue issue must be put into its proper context at the outset. What's the emergency here? The only emergency is that absentee voting in the November 8 federal and state elections has been underway for several weeks now but that, last Friday afternoon, October 7, the Waukesha County Circuit Court issued, at Petitioner's request, a Temporary Injunction ordering the Wisconsin Elections Commission ("WEC") to "withdraw" important absentee-voting guidance *immediately*, without any stay to allow for an opportunity to seek appeal, even though such a court-ordered withdrawal of WEC guidance *in the midst of absentee voting* flouts the stay orders by the Wisconsin Court of Appeals and this Court earlier this year in the *Teigen* litigation, which figures prominently in the venue dispute as well.

Specifically, in *Teigen,* another Waukesha County Circuit Judge enjoined long-standing WEC guidance about a different aspect of absentee voting (the use of drop boxes) on January 13 and

ordered that it be withdrawn promptly even though absentee voting for the February 15 spring election was already underway. This Court upheld the Court of Appeals' decision to stay that injunction, because absentee voting was already well underway; the injunction "create[ed] a high risk of inconsistent or incomplete guidance to voters"; and "the risk of confusion—and possible disenfranchisement—[was] compelling." *Teigen v. Wisconsin Elections Commission*, L.C. No. 2021-CV-958 (Ct. App. Dist. II/IV Jan. 24, 2022) (granting stay), *emergency motion to vacate stay denied*, No. 2022AP91 (Jan. 28, 2022). The *Teigen* stay decisions appear at DNC App. 010-035. Simply put, courts "should not muddy the waters during an ongoing election." DNC App. 024 (Hagedorn, J., concurring).

The *Teigen* stay decisions apply with even greater force and urgency in this matter. The *Teigen* stay issues involved a low-turnout February primary election. This case, on the other hand, involves the November general election for critical federal and state elections (including for the U.S. Senate, U.S. House,

Governor, other state executive offices, and the Wisconsin Legislature). Turnout is significantly larger, and the risks of confusion and error from changing voting rules mid-election are much greater now than last February. Moreover, absentee voting is much further along in this election than it was in *Teigen*, substantially increasing the harm of changing absentee voting procedures mid-election. As of October 11, 317,060 absentee ballots had been delivered—or were in the process of being delivered—to Wisconsin voters, and voters had already returned 125,220 completed absentee ballots to clerks. DNC App. 054.

That is the emergency, and it is all of Petitioner's making. She and her legal team could have challenged the WEC's guidance long before this, well before absentee voting got underway.

ISSUE PRESENTED

Did District II Chief Judge Brash's challenged October 10 venue order correctly hold that these appeals should be heard by District IV pursuant to Wis. Stat. § 752.21(2)?

STATEMENT OF THE CASE

Petitioner's challenge addresses the procedure by which a

municipal clerk or local election official may return a completed and submitted absentee ballot to an elector, and the procedures by which a municipal clerk or local election official may "spoil" an absentee ballot at an elector's request. In particular, Petitioner disputes the statutory interpretations in documents issued by WEC on August 1, 2022—over nine weeks ago—which is materially identical to guidance WEC has provided for at least the last seven statewide elections in Wisconsin over the past two years, and apparently much further back.[2]

Yet Petitioner waited until *after* absentee ballots and instructions had been distributed and *after* absentee balloting was already underway before filing her belated challenge to WEC's longstanding guidance. Petitioner filed her complaint against the WEC on September 23, 2022, in Waukesha County Circuit Court.

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[2] DNC has only analyzed relevant Commission guidance over the past two years, since September 2020. According to the October 4, 2022 Affidavit of WEC Administrator Meagan Wolfe, the WEC's challenged guidance on spoiling ballots dates back to 2014, meaning that the challenged guidance has been in place for at least eight years and dozens of statewide elections. *See* DNC App. 054-055.

Also on September 23, she filed a motion for a temporary restraining order and temporary injunction, asking the Court to set aside the WEC's long-standing guidance allowing absentee voters to notify clerks they are spoiling their completed and submitted ballots and to request new absentee ballots. Intervenor-Defendants promptly filed motions to intervene.

On October 5, 2022, following a hearing on Petitioner's Motion for a Temporary Restraining Order and Temporary Injunction, the Circuit Court granted a Temporary Injunction, making oral findings that Petitioner had satisfied the criteria for such relief. The Circuit Court also granted the motions to intervene. At the conclusion of the hearing, DNC and the other defendants moved for a stay of the ruling, which the Circuit Court denied in an oral ruling. On October 7, the Circuit Court entered a written order containing the terms of the Temporary Injunction. Among other requirements, the written order prohibits the WEC "from publicly displaying, applying, or disseminating certain published guidance, including its August 1, 2022 memorandum

titled 'Spoiling Absentee Guidance for the 2022 Partisan Primary' and its August 2, 2022 publication titled 'Rules about Spoiling Your Ballot.'" DNC App. 057.

On October 7, DNC and Rise filed petitions for leave to appeal from the Temporary Injunction Order and emergency motions for a stay of the Order pending disposition of the petitions for leave. The WEC has joined in those petitions and stay requests.

STANDARD OF REVIEW

A party seeking a supervisory writ must demonstrate that an appeal is an inadequate remedy, grave hardship or irreparable harm will result, the trial court acted in violation of a plain duty, and the request for relief is made promptly and speedily. *State ex rel. Dep't of Natural Resources v. Wis. Court of Appeals, District IV*, 909 N.W.2d 114, 119-20 (Wis. 2018).

ARGUMENT

I. Appellate venue properly rests in District IV.

DNC and Rise both designated venue in District IV pursuant to Wis. Stat. § 752.21(2).[3] The appellate venue path that was followed earlier this year in the *Teigen* litigation is squarely on point; this case and *Teigen* are materially indistinguishable on the issue of appropriate appellate venue. *See* DNC App. 010-035.

Just like this case, *Teigen* was filed by Waukesha County residents in the Waukesha County Circuit Court seeking declaratory and injunctive relief against WEC absentee-voting guidance documents, along with declaratory rulings about the meaning and interaction of various absentee-voting statutes. The complaint in *Teigen* designated venue in Waukesha Circuit Court as follows: "¶ 24. Venue is proper in this Court pursuant to Wis.

[3] Section 752.21(2) provides: "A judgment or order appealed from an action venued in a county designated by the plaintiff to the action as provided under s. 801.50(3)(a) shall be heard in a court of appeals district selected by the appellant but the court of appeals district may not be the court of appeals district that contains the court from which the judgment or order is appealed."

Stat. §§ 801.50 and/or 227.40(1)." *See* DNC App. 063. By contrast, the complaint in this case designates venue in Waukesha Circuit Court as follows: "¶ 5. Venue is appropriate in Waukesha County pursuant to Wis. Stat. §§ 227.40(1) and 801.50(3)(b)." *See* Pet. App. 4. Note that neither complaint refers to Section 801.50(3)(a), the statutory provision mentioned in Section 752.21(2). More on that below.

Both *Teigen* and this case fall squarely within the set of actions defined in 801.50(3)(a): they are "actions in which the sole defendant is the state, any state board or commission, or any state officer, employee, or agent in an official capacity." The WEC was the sole defendant in each case when filed. In each case, non-state parties were allowed to intervene as defendants in support of the WEC, but that does not change the venue analysis. What matters is whether a state commission (or similar state actor) was the "sole defendant" in the complaint that initiated the action at the time the plaintiff "designated venue." *State ex rel. DNR v. Wisconsin Court of Appeals, District IV,* 2018 WI 25, ¶ 13, 380 Wis. 2d 354,

909 N.W.2d 114; *see id.* ¶ 21 (also referring to a single point in time in which a plaintiff "designates" venue).

When the Waukesha County Circuit Court in *Teigen* entered relief against the WEC, the WEC and the intervenor-defendants supporting WEC immediately appealed and selected District IV as the appellate venue pursuant to Section 752.21(2). DNC notes that the Court of Appeals' caption to its January 24, 2022 stay order reads **District II/IV**, but the three-judge panel that issued the order consisted of three District IV judges (Blanchard, P.J., Graham, and Nashold, JJ.). *See* DNC App. 010. This District IV three-judge stay order was upheld by the Supreme Court four days later, while that Court simultaneously granted bypass to consider the merits directly. *See* DNC App. 021-025. To the best of DNC's knowledge, at no time in the appeal process was there any dispute that District IV was a properly designated appellate venue.

Petitioner waits to acknowledge the *Teigen* stay decisions until page 10 of its petition, and then dismisses them as "irrelevant to this case" and "wholly inapplicable here" because no one

objected to District IV appellate venue, whereas Petitioner now does. But the reason no one objected is because all sides in that hotly disputed litigation recognized that venue was proper in District IV. More important, from the Caption of the Court of Appeals January 24 order ("District II/IV"), it is clear that the Court of Appeals Clerks' Office (and probably one or more judges themselves) gave the venue question their considered attention. The *Teigen* appellate venue track is hardly "irrelevant" or "wholly inapplicable."

Here, DNC and Rise separately petitioned for leave to appeal last Friday, October 7, and designated venue in District IV. WEC has joined in the petitions and motions for stay (with exceptions noted by counsel in its filing at DNC App. 071.)

In these circumstances, *Teigen* is on point in all material respects. Indeed, under Section 752.21(2), it appears to DNC that District II is the *one* Court of Appeals District in which appellate venue would be *improper*, because "the court of appeals district" that hears the appeal "may not be the court of appeals district that

contains the court from which the judgment or order is appealed." That appears to exclude District II, which is one reason why DNC and Rise both believe that District IV should be selected as the appellate venue, as in *Teigen*, pursuant to Section 752.21(2).

DNC can think of no reason to distinguish the selection of District IV in *Teigen* from the selection of appellate venue sought here, and Chief Judge Brash agreed there is none. As noted above, the *Teigen* complaint cited "Wis. Stat. §§ 801.50 and/or 227.40(1)" in the process of designating venue in Waukesha County (Exhibit A), while Petitioner's complaint in this case cites "Wis. Stat. §§ 227.40(1) and 801.50(3)(b)" in the course of designating venue in Waukesha County (Exhibit B). Neither complaint cites Section 801.50(3)(a), the statutory provision mentioned in Section 752.21(2). (As discussed below, however, DNC believes that in citing to Section 801.50(3)(b), Petitioner necessarily cited to Section 801.50(3)(a) as well.)

As Chief Judge Brash emphasized, what matters is which county a plaintiff suing a state actor *designated*, not which specific

venue provision it *cited* in support of its venue designation. Even Petitioner agrees, stating: "venue allegations are legal conclusions that are not binding on courts." Pet. at 10 (citing *League of Women Voters v. Evers*, No. 2019AP559, 2019 WL 1396759, at *1 (Wis. Ct. App. March 27, 2019)). Otherwise, plaintiffs could simply avoid the special appellate venue provisions of Section 752.21(2) by never citing to Section 801.50(3)(a) in their pleadings. That, of course, cannot be the rule. The leading case interpreting this special venue provision illustrates the point. In *DNR v. Wisconsin Court of Appeals, District IV,* the lead plaintiff Clean Wisconsin, Inc. sued the Wisconsin Department of Natural Resources in Dane County Circuit Court, claiming venue under Wis. Stat. § 227.53(1)(a)(3) because Clean Wisconsin had its principal place of business in Dane County and was therefore a "resident" there. *See* DNC App. 075 ¶ 5. No mention was made of Section 801.50(3)(a), yet after the DNR lost in Dane County it selected District II as the venue for its appeal. After extensive litigation, DNR's selection of District II was ultimately upheld by the Supreme Court. *DNR v. District IV,*

2018 WI 25, ¶¶ 14-40. What matters is the venue "designated" by the plaintiff (whether or not that venue is dictated by law or voluntarily chosen); if the case otherwise qualifies under Section 801.50(3)(a) because the sole defendants originally sued by the plaintiff are state actors sued in their official capacities, the appellate venue gets to be "selected" by appellants. That is precisely the case here.

DNC is aware of other important recent decisions in which appellate venue under Section 752.21(2) was successfully designated even though the respondents had not cited 801.50(3)(a) in their complaints, and in fact cited other subsections of Section 801.50. In *League of Women Voters v. Knudson*, for example, the plaintiffs claimed "[v]enue is proper in Dane County because it is the county where the claims arose," citing Wis. Stat. § 801.50(2)(a) and making no reference to Section 801.50(3)(a). *See* DNC App. 092 ¶ 15. After plaintiffs prevailed, the intervenor-defendant Wisconsin Legislature filed an appeal designating District III as the appellate venue under Section 752.21(2). District III Deputy

Chief Judge Stark denied plaintiff-respondents' request to transfer venue to District IV, holding that the plain terms of Section 801.50(3)(a) applied because (1) plaintiffs had designated venue in Dane County, and (2) their suit fell within the terms of Section 801.50(3)(a) because the sole defendants when venue was first designated were state actors sued in their official capacities. *See* DNC App. at 115-117; *see also League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, 387 Wis.2d 511, 929 N.W.2d 209 (final Supreme Court decision). On reconsideration, Chief Judge Stark explained that Section "801.50(3)(a) applies *along with* any other statute that might affect the choice of venue." *League of Women Voters v. Evers* ("*League II*"), No. 2019AP559, 2019 WL 1396759, at *1 (Wis. Ct. App. Mar. 27, 2019) (unpublished) (emphasis added) (citing *DNR*, 380 Wis. 2d 354, ¶ 31).[4] As a result,

[4] DNC cites to several unpublished Court of Appeals and Supreme Court orders in this opposition. This Court itself has recently cited to numerous such orders, so they appear to be properly citable. *See, e.g., Waity v. LeMahieu*, 2022 WI 6, ¶¶ 4, 15-16, 48, 52, 57-58, 400 Wis.2d 356, 969 N.W.2d 263; *see id.* ¶ 90 (Dallet, J., dissenting). Petitioner

even where plaintiffs choose to venue an action under one subsection of Section 801.50, "Section 801.50(3)(a) is mandatory, and applies by operation of law." *Id*. Thus, "[a]lthough the plaintiffs may have chosen to venue their action under § 801.50(2)(a), § 801.50(3)(a) also applies to make Dane County the county "designated" by the plaintiffs." The same holds here.

Similarly, in *Waity v. LeMahieu,* L.C. No. 2021-CV-589, plaintiffs sued various legislators in Dane County Circuit Court, arguing that "[v]enue is proper in Dane County because it is the county where the claims arose" within the meaning of Wis. Stat. § 801.50(2)(a) and making no reference to Section 801.50(3)(a). *See* DNC App. 124 ¶ 12. Here again, after losing in Dane County Circuit Court, the legislators appealed and designated District III as the appellate venue pursuant to Section 752.21(2). *See* DNC

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herself cites to one of these unpublished orders in her petition, so it is fair for other parties to do so as well in response. In any event, counsel do not cite these cases as legal authority on appellate venue, but instead use them to illustrate the recent practice of this Court and the Court of Appeals.

App. 141-142. District III accepted that designation, and the case remained there until the legislators successfully moved to bypass District III because it was taking too long from the legislators' standpoint and instead obtained relief directly from the Supreme Court. *See* DNC App. 144-145, this Court's bypass order) and DNC App. 146 (this Court's stay order); *see also Waity*, 2022 WI 6 (final Supreme Court decision).

Even if it mattered whether a plaintiff cites Wis. Stat. § 809.50(3)(a) in their complaint in deciding whether Section 752.21(2) applies—and it never has before—Petitioner in her complaint cited to Section 809.50(3)(b), which is incorporated by reference in subsection (3)(a) ("***Except as provided in pars. (b) and (c)***, …"), and is necessarily part and parcel of subsection (3) as a whole. *See League II*, 2019 WL at *1 ("Section 801.50(3)(a) is mandatory, and applies by operation of law. Because we have an appeal from a case in which the sole defendants were state officers or employees, and the plaintiffs designated Dane County as the county of venue, Wis. Stat. § 752.21(2) applies and allows the

appellant to select District III to hear the appeal."). Moreover, as demonstrated in the *DNR v. District IV* decision, a plaintiff can be compelled under one venue provision to bring suit in a particular county while *also* being deemed to have "designated" that county within the meaning of Section 809.50(3)(a) even if they had no choice. *See* 2018 WI 25, ¶¶ 23-31. In other words, under the reasoning of *DNR v. District IV*, a case venued under Section 801.50(3)(b) (and therefore under 227.40(1)) is *also* venued under Section 801.50(3)(a)—the plaintiff designates the venue as specified by Section 227.40(1).

Finally, even putting all the points and authorities cited above to one side, Sections 752.21(2) and 801.50(3)(a) also apply here because Petitioner's claim and requested relief are *not* restricted to a Section 227.40(1) "action for declaratory judgment as to the validity of [an agency] rule or guidance document." The complaint makes clear that it seeks relief under "Wis. Stat. §§ 806.04 and/or 227.40." Pet. App. 4 ¶ 4. Indeed, Petitioner's temporary injunction papers filed September 23 did not even *cite*

to chapter 227 or discuss the prerequisites for relief under Section 227.40 but instead focused solely on injunctive relief under Wis. Stat. § 813.02(1). DNC App. 162-177. Because Petitioner clearly is seeking relief under Sections 806.04 and 813.02, venue is appropriate under Section 809.50(3)(a) for that reason as well.

Consistent with the appellate venue precedents in *Teigen*, *DNR v. District IV, Waity,* and *League of Women Voters v. Evers,* DNC respectfully submits that Chief Judge Brash correctly ruled that appellate venue rests in District IV because the complaint against WEC designated venue in Waukesha County and meets the venue criteria of Wis. Stat. § 801.50(3)(a), and Intervenor-Defendants designated District IV under Wis. Stat. § 752.21(2).

CONCLUSION

For the reasons stated, the Court should deny the Petition for Supervisory Writ.

Dated: October 13, 2022

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 3,026 words.

I further certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: October 13, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October 2022, I caused a copy of this brief to be served upon counsel for each of the parties via electronic filing.

Electronically signed by
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