Supreme Court of Wisconsin

NO. 2022AP1736 W

NANCY KORMANIK,

Plaintiff-Petitioner,

vs.

WISCONSIN ELECTIONS COMMISSION,

Defendant,

RISE, INC. AND DEMOCRATIC NATIONAL COMMITTEE,

Intervenor-Defendants,

COURT OF APPEALS,

Respondents.

RETRIEVED FROM DEMOCRACYDOCKET.COM

RESPONSE TO PLAINTIFF NANCY KORMANIK'S PETITION FOR SUPERVISORY WRIT

Diane M. Welsh, SBN 1030940
PINES BACH LLP
122 W. Washington Ave, Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
dwelsh@pinesbach.com

Graham W. White*
Richard A. Medina*
Samuel T. Ward-Packard, SBN 1128890
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4652
gwhite@elias.law
rmedina@elias.law
swardpackard@elias.law

Kathryn Ali*
Elizabeth Lockwood*
ALI & LOCKWOOD LLP
300 New Jersey Avenue NW, Suite 900
Washington, D.C. 20001
Telephone: (202) 651-2475
katie.ali@alilockwood.com
liz.lockwood@alilockwood.com

Attorneys for Intervenor-Defendant-Respondent Rise, Inc.

*Admitted *pro hac vice* by the Circuit Court.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Table of Contents

INTRODUCTION 1

BACKGROUND 2

LEGAL STANDARD 6

ARGUMENT 7

I. Kormanik has not shown that the Court of Appeals violated a plain duty. 8

II. Kormanik has failed to demonstrate an inadequate remedy. 11

III. Kormanik has not shown irreparable harm in the absence of a writ. 13

CONCLUSION 18

RETRIEVED FROM DEMOCRACYDOCKET.COM

Intervenor-Defendant-Respondent Rise, Inc., by its attorneys, submits this response in opposition to the Petition for a Supervisory Writ.

INTRODUCTION

Plaintiff-Petitioner Nancy Kormanik ("Kormanik") asks this Court to issue the "extraordinary and drastic remedy" of a supervisory writ to review a (proper) venue determination based on (flawed) arguments that she never raised below. But a supervisory writ is not a substitute for an appeal, and may not issue unless a petitioner establishes, among other things, that (i) the Court of Appeals violated a plain duty, (ii) the petitioner has no other remedy available, and (iii) the petitioner will face grave hardship or irreparable harm without the writ. Kormanik here does not—and cannot—satisfy any of these criteria: the Court of Appeals' venue decision was manifestly correct (and thus cannot be said to have violated any "plain duty"); Kormanik has other, unexhausted appellate remedies available to her but opted instead to leapfrog straight to this Court; and she has never adduced anything beyond a vague, unsubstantiated allegation that she will

RETRIEVED FROM DEMOCRACYDOCKET.COM

face any irreparable harm from any aspect of this litigation—let alone from a decision about in which venue to docket the appeal of a temporary injunction order. The Court should deny Kormanik's request for a supervisory writ and return this case to District IV for consideration of Rise's petition for leave to appeal and motion for stay. The Court should also leave the stay the Court of Appeals entered untouched.

BACKGROUND

RETRIEVED FROM DEMOCRACYDOCKET.COM

Kormanik this action less than a month ago—with absentee voting already under way in Wisconsin—in Waukesha County Circuit Court against the Wisconsin Elections Commission ("WEC") "seeking a declaratory judgment regarding the proper construction of the Wisconsin Statutes that prohibits a municipal clerk from returning a previously completed and returned absentee ballot to an elector, including Wis. Stat. §§ 6.86(5), (6)." Kormanik Appendix ("App.") 3. Kormanik alleged that venue was proper in Waukesha County under Wis. Stat. §§ 227.40 and 801.50(3)(b). App. 4. She also filed a Motion for a Temporary

Restraining Order and Temporary Injunction under Wis. Stat. § 813.02(1). *See* App. 20.

Rise, Inc. and the Democratic National Committee ("DNC") subsequently filed motions to intervene and answers. WEC has not yet answered Kormanik's complaint, and neither Rise nor the DNC conceded that venue was proper in Waukesha County under Wis. Stat. § 801.50(3)(b). WEC, Rise, and the DNC each filed briefs in opposition to Kormanik's Motion for a Restraining Order and Temporary Injunction.

RETRIEVED FROM DEMOCRACYDOCKET.COM

On October 5, 2022, the circuit court held a hearing at which it granted Rise and the DNC's pending motions for intervention and heard argument on Kormanik's request for a temporary injunction. It granted that injunction in an October 7 Order.[1] That

[1] The Order provides, among other things, that WEC is "enjoined and prohibited from publicly displaying, applying, or disseminating certain published guidance, including its August 1, 2022 memorandum titled "Spoiling Absentee Guidance for the 2022 Partisan Primary" ("August 1st Published Memorandum"), its August 2, 2022 publication titled "Rules about 'Spoiling' Your Ballot" ("August 2nd Published Memorandum"), or other similar guidance. The Order further requires WEC to "notify all Wisconsin municipal clerks and local election officials that the August 1st Published Memorandum and August 2nd Published Memorandum have been withdrawn[.]" And it ordered WEC

same day, Rise and the DNC each petitioned for leave to appeal the temporary injunction order and sought a stay of the temporary injunction—requests that WEC subsequently joined. Both Rise and the DNC directed their petitions to the Court of Appeals, District IV, pursuant to Wis. Stat. § 752.21(2), though the DNC petition was docketed in District II.

The Court of Appeals, Chief Judge Brash, then directed the parties to file letter briefs analyzing whether venue was proper in District II (as Kormanik argues) or District IV (as Rise and the DNC selected). App. 202–03. Rise, the DNC, and Kormanik each did so. App. 211–13 (Rise's October 10 letter); App. 206–10 (DNC's October 10 letter); App. 204–05 (Kormanik's October 10 letter). WEC did not submit a letter.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Later that day, the Court of Appeals concluded that Rise and the DNC were entitled to select a district under Wis. Stat. § 752.21(2), and thus that the petition for leave and the

---

to take all these steps by "7 p.m. on Monday, October 10, 2022." App. 20–22.

accompanying stay motion would be heard in District IV. App. 214–18. The Court of Appeals rested its analysis on this Court's decision in *State* ex rel. *DNR v. Wisconsin Court of Appeals, District IV*, 2018 WI 25, 380 Wis. 2d 354, 909 N.W.2d 114, which it called "the key case interpreting § 752.21(2)." App. 216. The court understood that case to establish that a plaintiff designates venue "within the meaning of § 801.50(3)(a)" even when another statute "restrict[s] venue eligibility." App. 217. And it credited the DNC's argument that "even though § 801.50(3)(b) required Kormanik to designate venue... in according with Wis. Stat. § 227.40(1), she was also designating venue within the meaning of § 801.50(3)(a)." App. 217. Finally, it noted that Kormanik "ha[d] not addressed *DNR*, much less explained why its reasoning would not apply." App. 217–18. In so doing, the court acknowledged Rise's alternative argument that Kormanik had incorrectly invoked Wis. Stat. § 801.50(3)(b) but did not reach that issue. App. 217 n.3.

That same evening, a three-judge panel of the Court of Appeals, under the heading District II/IV, issued a temporary stay

RETRIEVED FROM DEMOCRACYDOCKET.COM

of the circuit court's temporary injunction order pending the panel's decision on whether to grant the petitions for leave to appeal. App. 219–21.

Kormanik then turned to this Court by filing a petition for supervisory writ. This Court ordered the Court of Appeals and the parties to submit responses by October 13 at noon. This brief follows.

RETRIEVED FROM DEMOCRACYDOCKET.COM

LEGAL STANDARD

A supervisory writ is "an extraordinary and drastic remedy that is to be issued only upon some grievous exigency." *State* ex rel. *Kalal v. Circuit Ct. for Dane County*, 2004 WI 58 ¶17, 271 Wis. 2d 633, 681 N.W.2d 110. It is "not a substitute for an appeal." *Id.* And it may issue only where a petitioner carries her burden to show four factors—that "(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. Failure to satisfy any of these factors requires denial of the writ. *Kalal*, 2004 WI 58, ¶17. Further,

this Court's ultimate decision to issue a writ "is controlled by equitable principles," and in its discretion, the Court "can consider the rights of the public and third parties." *Id.*

ARGUMENT

The Court should deny the petition for a supervisory writ for at least three reasons. *First*, Kormanik has not shown that the Court of Appeals violated a "plain duty." Nor could she; the Court of Appeals properly determined that Wisconsin law requires appellants to select the Court of Appeals district in declaratory-judgment actions brought solely against a state agency, such as this. *Second*, Kormanik has not established that further proceedings in the Court of Appeals—where she has not sought reconsideration—are inadequate such that the extraordinary remedy of a supervisory writ is necessary. *Third*, for similar reasons, Kormanik cannot show that she would be irreparably harmed by the Court's denial of this supervisory writ. Each of these provides an independent basis to deny

RETRIEVED FROM DEMOCRACYDOCKET.COM

Kormanik's request for a supervisory writ. Together, they command that result.

Finally, no matter which Court of Appeals hears Rise's pending petition for leave to appeal, this Court should not disturb the stay of the circuit court's temporary injunction order, which was appropriately granted.

I. Kormanik has not shown that the Court of Appeals violated a plain duty.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Kormanik fails to carry her burden right out of the gate, because the Court of Appeals' venue analysis was proper and did not violate any "plain duty." *Kalal*, 2004 WI 58, ¶22 ("A basic requirement for the issuance of a supervisory writ" is a "violation of a plain duty by the circuit court judge. A plain duty 'must be clear and unequivocal and, under the facts, the responsibility to act must be imperative.") (Citation omitted). Although appeals are generally heard in the District containing the relevant circuit court, *see* Wis. Stat. § 752.21(1), there are exceptions to that rule. As Kormanik concedes, *see* Pet. 7–8, she named WEC (a "state commission" within the meaning of Wis. Stat. § 801.50(3)(a)) as the

sole defendant in her complaint. *See DNR*, 2018 WI 25, ¶¶13, 21 (a plaintiff designates venue at the time the complaint is filed). This changes the general rule, and so was the starting point for the Court of Appeals' analysis. Appeals from actions such as this one are heard in a "court of appeals district selected by the appellant" so long as that district does not contain the "court from which the judgment or order is appealed." Wis. Stat. § 752.21(2) (providing that this exception applies to actions against a sole state agency defendant and venued under Wis. Stat. § 801.50(3)(a)). Rise and the DNC complied with this mandate, selecting District IV rather than District II as the District to consider their petitions for leave to appeal.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Kormanik attempts to side-step this result in two ways. Both fail. *First*, she invokes § 801.50(3)(b) as the basis for venue in Waukesha County Circuit Court, but her suit fundamentally is not a challenge to "the validity of [a] rule or guidance document." Wis. Stat. § 227.40(1). Rather, by Kormanik's own admission, "[t]his is an action against the Wisconsin Elections Commission seeking a

declaratory judgment regarding the proper construction of the Wisconsin Statutes that prohibits a municipal clerk from returning a previously completed and returned absentee ballot to an elector, including Wis. Stat. §§ 6.86(5), (6)." App. 3. Although Kormanik critiques a WEC memorandum and press release relating to the 2022 August primary election, this is an action for prospective relief in the form of a declaratory judgment and an injunction ordering WEC to issue guidance adhering to Kormanik's interpretation of Wis. Stat. §§ 6.86(5) and (6).

Second, this Court's decision in *DNR* makes clear that, contrary to Kormanik's arguments, *see* Pet. 8, there is no conflict between Wis. Stat. §§ 801.50(3)(a) and 801.50(3)(b) here. As this Court recognized, Section 801.50(3)(a) applies where a state agency is the "sole defendant" even if another statute also requires plaintiff to bring suit in a particular county. *DNR*, 2018 WI 25, ¶¶14–40. In other words, Section 801.50(3)(a) overrides other statutory provisions. *DNR* concerned a challenge to an agency decision that, under Wis. Stat. § 227.53(1)(a)(3), was required to be

RETRIEVED FROM DEMOCRACYDOCKET.COM

venued "in the circuit court for the county where the petitioner resides." This case is in the same posture. The statutes Kormanik invoked to establish venue include the same requirement, and (just as in *DNR*) Kormanik was required to file her suit in "the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides." Wis. Stat. § 227.40(1). And, just as in *DNR*, Kormanik is therefore deemed to have "designated" venue within the meaning of Section 801.50(3)(a). *See DNR*, 2018 WI 25, ¶31.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The Court of Appeals' determination was correct and therefore cannot be said to have violated "a plain duty." This is dispositive. *Kalal*, 2004 WI 58, ¶22.

II. Kormanik has failed to demonstrate an inadequate remedy.

This Court should deny the petition for the additional reason that Kormanik has failed to demonstrate the lack of an adequate remedy. Unlike the petitioner in *DNR*—and contrary to Kormanik's claim that this case presents "identical circumstances," Pet. 6—Kormanik did not attempt to seek

reconsideration of the Court of Appeals' venue order. Instead, she came straight to this Court, lodging a petition that raises—and rests heavily on—brand new arguments that Kormanik never presented to the Court of Appeals. *See* Pet. 4, 8–9 (arguing that *DNR* does not control the appellate venue question in this case while acknowledging that she never even addressed *DNR* below); App. 217–18 (explaining that Kormanik "has not addressed *DNR*, much less explained why its reasoning would not apply"). Kormanik offers no explanation for her failure to present her new arguments about *DNR* to the Court of Appeals on reconsideration before seeking the extraordinary remedy of a supervisory writ from this Court. A supervisory writ is a remedy of "last resort" that may be issued "only upon some grievous exigency"—not where unexhausted avenues of potential relief remain in a lower court. *See Kalal*, 2004 WI 58, ¶ 17. The writ is not appropriate here.

This case also differs from *DNR* because the circuit court has not issued a final judgment and the Court of Appeals is not entertaining the merits. Instead, at issue is whether the circuit

RETRIEVED FROM DEMOCRACYDOCKET.COM

court abused its discretion in granting a *temporary injunction*. Because the absence of a writ will not foreclose review of appellate venue "before entry of final judgment," *DNR*, 2018 WI 25, ¶42, there is no merit to Kormanik's contention that relief at a later stage of this litigation "would be far too late." Pet. 5. Her petition should be denied on this additional basis.

III. Kormanik has not shown irreparable harm in the absence of a writ.

RETRIEVED FROM DEMOCRACYDOCKET.COM

For similar reasons, Kormanik has not shown that she will suffer "grave hardship or irreparable harm" in the absence of a supervisory writ. *DNR*, 2018 WI 25, ¶46. Relying again on *DNR*, Kormanik claims that her "right to a proper venue under Wis. Stat. § 752.21(1)" will be irreparably deprived unless this Court issues a supervisory writ now. Pet. 6. This is wrong. *DNR* is again inapposite because Kormanik skipped ahead to this Court rather than first seeking reconsideration from the Court of Appeals. And in any event, no irreparable injury exists because (again, unlike in

DNR) the circuit court has issued only preliminary relief; it has not resolved the merits or issued final judgment.[2]

Nor can Kormanik demonstrate irreparable harm if this case proceeds in District IV with the Court of Appeals' stay of the underlying temporary injunction remaining in place. Kormanik has yet to establish that she has been harmed (or even will be harmed) by WEC's guidance, much less that a stay of the temporary injunction would cause any additional harm. Kormanik vaguely alleges "potential disenfranchisement by identity theft and voter fraud," App. 32, yet has not identified a single instance of identity theft or voter fraud supporting her claim, let alone one *resulting from the challenged guidance*—which functionally has been in place since 2014. Kormanik therefore cannot credibly

RETRIEVED FROM DEMOCRACYDOCKET.COM

[2] Further, any error in the designation of appellate venue in one district over another is harmless. Wisconsin statutory law requires the courts to disregard "any error or defect… in the proceedings which shall not affect the substantial rights of the adverse party." Wis. Stat. § 805.18. Any error here fits that provision to a T. The four Districts of the Court of Appeals are on equal footing—equally fair, equal in jurisdiction, and of equal competence. And in this case, the only question currently pending before the Court of Appeals is whether to grant petitions for permissive appeal.

argue a threat of any harm while the Court of Appeals' stay remains in effect.

On the other side of the coin, both Rise and Wisconsin voters will suffer irreparable harm absent a continued stay, in the form of diverted resources to reeducate voters (Rise) and improperly foreclosed avenues for curing ballots (voters). *See DNR*, 2018 WI 25, ¶ 9 (explaining that this Court's "deliberation on whether to issue the writ is controlled by equitable principles and, in [this Court's] discretion, [it] can consider the rights of the public and third parties") (internal quotation marks omitted). Rise will be forced to divert resources mid-election to reeducate voters and encourage in-person voting to avoid the disenfranchisement threatened by the temporary injunction. These injuries cannot be redressed post-appeal, given Rise's limited time to get out the vote before the upcoming election.

Voters, too, will be harmed. At least 64,325 Wisconsin voters have returned their completed absentee ballots to clerks in reliance on Wisconsin's longstanding policy of allowing them to

RETRIEVED FROM DEMOCRACYDOCKET.COM

spoil those ballots until the Thursday prior to Election Day. App. 152. Just as in *Teigen*, "[w]ithdrawal of existing guidance while an election is underway is likely to result in voter confusion and uncertainty in the administration of the election," causing substantial harm to voters. *Teigen v. Wis. Elections Comm'n*, No. 2022AP91, (Wis. Jan. 28, 2022).[3] This harm can hardly be overstated. The practical result of the circuit court's temporary injunction is that Wisconsin's 1800-plus local election officials will apply inconsistent standards—and thus that some Wisconsin voters will have their votes arbitrarily rejected. A stay is warranted to guard against such harm while the election is underway.

RETRIEVED FROM DEMOCRACYDOCKET.COM

[3] The potential for confusion here is exponentially greater than in *Teigen*. For one thing, WEC asserted below that as of October 3, 2022, more than *301,442* absentee ballots have been mailed to electors and *64,325* ballots have been returned. App. 151-52. For another, the temporary injunction enjoys WEC's August 2022 guidance in its *entirety* and is not limited to those aspects of the guidance that Plaintiff claims is unlawful. By enjoining that guidance in its entirety, the temporary injunction creates a serious risk of confusion among voters that other non-controversial components of the challenged guidance are now unlawful. *See, e.g.*, App. 13-14 (clarifying that a voter who received an absentee ballot but did not return it can vote in person on election day).

Keeping the stay in place, moreover, will benefit the public interest by preventing widespread confusion in the midst of an ongoing election. Local officials have already started conducting absentee voting using the now-enjoined processes. Clerks used the same processes to administer the recent primary election and used similar processes during past election cycles. And voters, including many who already made plans to vote, rely on the existence of settled, publicly disseminated processes. Without a stay, absentee voters are likely to be disenfranchised—a result that is decidedly not in the public interest.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Equitable principles thus overwhelmingly favor denying the petition for a writ. And in all events, this Court should not disturb the Court of Appeals' stay of the underlying temporary injunction.[4]

[4] Because Kormanik does not challenge the Court of Appeals' stay of the temporary injunction in this Petition, Rise does not address all of the reasons why such a stay is appropriate here, as it argued to the Court of Appeals below. *See* Rise's Mem. in Supp. of Pet. for Leave to Appeal 14-19, *Kormanik v. Wis. Elections Comm'n*, No. 2022AP1720-LV (Wis. Ct. App. Oct. 7, 2022); see also Rise's Mem. in Supp. of Mot. to Stay, *Kormanik*, No. 2022AP1720-LV (Wis. Ct. App. Oct. 7, 2022); Rise Supp. Mem. in Supp. of Mot. to Stay, *Kormanik*, No. 2022AP1720-LV (Wis. Ct. App. Oct. 12, 2022).

CONCLUSION

For the foregoing reasons, Rise respectfully requests that the Court deny Kormanik's supervisory writ, permit the Court of Appeals, District IV to consider the merits of Rise's petition for leave to appeal, and otherwise maintain the Court of Appeals' stay of the circuit court's temporary injunction.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Dated: October 13, 2022

Respectfully submitted,

By: *<u>Electronically signed by Diane M. Welsh</u>*
Diane M. Welsh, SBN 1030940
PINES BACH LLP
122 W. Washington Ave,
Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
dwelsh@pinesbach.com

Graham W. White*
Richard A. Medina*
Samuel T. Ward-Packard, SBN 1128890
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4652
gwhite@elias.law
rmedina@elias.law
swardpackard@elias.law

Kathryn Ali*
Elizabeth Lockwood*
ALI & LOCKWOOD LLP
300 New Jersey Avenue NW,
Suite 900
Washington, D.C. 20001
Telephone: (202) 651-2475

katie.ali@alilockwood.com
liz.lockwood@alilockwood.com

Attorneys for Intervenor-Defendant-Respondent Rise, Inc.

*Motion for admission *pro hac vice* granted by the Circuit Court.

RETRIEVED FROM DEMOCRACYDOCKET.COM