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DISTRICT II

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COURT OF APPEALS

October 27, 2022

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Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1720-LV

Nancy Kormanik v. Wisconsin Elections Commission
(L.C. # 2022CV1395)

2022AP1727-LV

Nancy Kormanik v. Wisconsin Elections Commission
(L.C. # 2022CV1395)

Before Gundrum, P.J., Grogan and Lazar, JJ.

Democratic National Committee (DNC) and Rise, Inc. have filed petitions¹ seeking leave to appeal the circuit court's October 7, 2022 order requiring the Wisconsin Elections Commission (WEC) to take certain action related to guidance it has provided in connection with aspects of the absentee-voting process currently underway. WEC has filed a letter joining the petitions. Nancy Kormanik has filed responses opposing them.

Leave to appeal may be granted by this court when it will materially advance the termination of the litigation, clarify further circuit court proceedings, protect the petitioner from substantial or irreparable injury, or clarify an issue of general importance to the administration of justice. WIS. STAT. § 808.03(2). Additionally, before leave to appeal will be granted, the petitioner must show a substantial likelihood of success on the merits of the appeal. See *State ex rel. Hass v. Wisconsin Court of Appeals*, 2001 WI 128, ¶13, 248 Wis. 2d 634, 636 N.W.2d 707. We are not persuaded that these criteria are satisfied.

In particular, we fail to see how granting leave to appeal would protect the petitioners from substantial or irreparable injury. The guidance at issue concerns a municipal clerk's ability to, at the request of the elector, (1) deliberately spoil an unspoiled absentee ballot the elector has previously returned to the clerk and then provide the elector with a new ballot so that the elector may fill out and return the new ballot or (2) return to the elector an unspoiled absentee ballot the elector has previously returned to the clerk so that the elector may deliberately spoil it

¹ The petitions were initially transferred to District IV after the petitioners selected that district pursuant to WIS. STAT. § 752.21. The petitions have since been transferred to District II by order of our supreme court in *Kormanik v. Brash*, 2022AP1736-W.

himself/herself and then receive from and return to the clerk a new ballot. The circuit court enjoined such guidance after concluding that it ran contrary to Wisconsin law. The court's order does not change what is on the ballot. Nor does it prevent a single voter—Democrat, Republican, or otherwise—from casting a ballot in the upcoming election. Thus, claims of confusion and disenfranchisement ring hollow. Furthermore, the petitioners have failed to explain in any meaningful way how it is they could be harmed at all by the court's order, particularly because there is no indication that the order would favor any candidate or party in any way. To the extent the order might affect any voters, it would do so equally and without favor to voters or candidates of any particular political stripe.

Likewise, we are not convinced that the petitioners have shown a substantial likelihood of success on the merits of the appeal. While we do not make a final and definitive ruling on the matter due to the case's procedural posture, the circuit court's interpretation of the relevant statutes appears reasonable. On its face, WIS. STAT. § 6.86(6) generally prohibits a municipal clerk from returning an absentee ballot to the elector. One exception to this rule is found in § 6.86(5), which allows the clerk to issue a new ballot whenever an elector or an elector's agent "returns a spoiled or damaged absentee ballot." This, of course, implies that the absentee ballot is *already* spoiled or damaged when it is returned by the elector. It does not appear to authorize a municipal clerk to return to the elector an unspoiled absentee ballot the elector has previously submitted to the clerk or to authorize a clerk to spoil a previously submitted unspoiled absentee ballot.

For these reasons, we deny the petitions. The previously ordered temporary stay of the circuit court's October 7, 2022 order shall remain in place until 3:00 p.m. on October 28, 2022, at which point it will be lifted and the circuit court order will then be in effect.

Nos. 2022AP1720-LV
2022AP1727-LV

Upon the foregoing reasons,

IT IS ORDERED that the petitions for leave to appeal are denied, and petitioners DNC and Rise shall each pay \$50 to the respondent for costs.

IT IS FURTHER ORDERED that the circuit court's October 7, 2022 order shall remain temporarily stayed until 3:00 pm on October 28, 2022, at which point it will be lifted and the circuit court order will then be in effect.

Sheila T. Reiff
Clerk of Court of Appeals

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