No. 2016AP1980

In The Supreme Court of Wisconsin

STATE OF WISCONSIN EX REL. DEPARTMENT OF NATURAL RESOURCES,
PETITIONER,

v.

WISCONSIN COURT OF APPEALS, DISTRICT IV,
CLEAN WISCONSIN, INC., LYNDA A. COCHART, AMY COCHART,
ROGER D. DEJARDIN, SANDRA WINNEMUELLER, CHAD COCHART,
AND KINNARD FARMS, INC.,
RESPONDENTS.

Petition From The Court Of Appeals, District IV,
Case No. 2016AP1688

OPENING BRIEF AND APPENDIX OF THE DEPARTMENT OF NATURAL RESOURCES

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INTRODUCTION

Section 752.21(2) states that "[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." Wis. Stat. § 752.21(2) (emphases added). Subsection 801.50(3)(a), in turn, provides that "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"—except as to two types of cases not applicable here. Wis. Stat. § 801.50(3)(a).

Clean Wisconsin, Inc. and five individuals separately sued the Department of Natural Resources over a permit reissuance to a dairy farm. Clean Wisconsin designated Dane County as the venue for its case in its filings, and the five individuals' case was consolidated into Clean Wisconsin's. The Dane County Circuit Court then heard the case on the merits and entered a final judgment against the Department. The Department then appealed to the Court of Appeals for District II, exercising its right to "select[ ]" the appellate venue under Section 752.21(2). Yet, the Court of Appeals for District IV decided sua sponte that Section 752.21(2) did not apply here because Clean Wisconsin had not "unilaterally" selected Dane County as its venue, given that the choice of venue was restricted by Wis. Stat. § 227.53(1)(a)3. District IV

therefore removed the case from District II's docket and placed the case on its own.

District IV's conclusion was legally wrong: the term "designated" in Subsection 801.50(3)(a) and Section 752.21(2) cannot possibly mean "selected" by the plaintiff, "unilaterally" or otherwise. Rather, as used in these particular provisions, "designated" means "specified" or "indicated," such that a Subsection 801.50(3)(a) designation occurs whenever the plaintiff simply specifies the county to hear its action in its filings. This is the only plausible interpretation because Section 752.21(2) uses the words "designated" and "selected" separately and in the same sentence. Thus, according to fundamental principles of statutory interpretation, these terms must be given different meanings if at all possible.

The Department is therefore petitioning this Court for a supervisory writ directed at District IV. Section 752.21(2) grants the Department an express right to select its appellate venue in the first instance, and that right cannot be vindicated through the ordinary course of appellate review. Indeed, forcing the Department to go through one full round of appellate litigation in the wrong venue completely obliterates the right to select the venue in the first instance.

ISSUES PRESENTED

Section 752.21(2) provides that "[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." Wis. Stat. § 752.21(2). Does this provision give the Department the right to "select[ ]" the appellate district in which to file its appeal in a case where the Plaintiff's designation of the venue under Subsection 801.50(3)(a) was limited in scope by Subsection 227.53(1)(a)3?

The court of appeals answered, "No."

ORAL ARGUMENT AND PUBLICATION

On February 14, 2017, this Court issued an order for merits briefing and stated that oral argument would be scheduled in due course. App. 85–86.

STATEMENT OF THE CASE

I. Statutory Background

This case deals with Wisconsin's circuit-court venue statutes and appellate-court venue statutes, to the extent they apply to actions solely against the State.

A. In Wisconsin, circuit-court venue for actions solely against the State is initially governed by Section 801.50(3).[1] The first subsection to Section 801.50(3) reads that, "[e]xcept as provided in pars. (b) and (c), all actions in which the sole

[1] Section 801.50(3) is limited to "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." Wis. Stat. § 801.50(3)(a). This includes actions against the Department. *Metzger v. Dep't of Taxation*, 35 Wis. 2d 119, 131, 150 N.W.2d 431 (1967) (the Department is "a mere administrative arm of the state," thus a suit against it is an action against "the state").

defendant is the state . . . shall be venued in the county designated by the plaintiff unless another venue is specifically authorized by law." Wis. Stat. § 801.50(3)(a).

There are two statutory exceptions to this subsection. The first explains that "[a]ll actions relating to the validity or invalidity of a rule shall be venued as provided in s. 227.40(1)." Wis. Stat. § 801.50(3)(b). The second exception governs prisoner actions: "[a]n action commenced by a prisoner . . . in which the sole defendant is the state . . . shall be venued in Dane County unless another venue is specifically authorized by law." Wis. Stat. § 801.50(3)(c).

For actions under Section 801.50(3)(a), the number of venues eligible for a plaintiff's designation varies depending on whether other venue statutes also apply to the particular case. *See, e.g.*, Wis. Stat. § 227.53(1)(a)3 ("[T]he proceedings [against a state agency] shall be held in the circuit court for the county where the petitioner resides."); Wis. Stat. § 801.50(4)(a) ("Venue of an action seeking a remedy . . . by habeas corpus shall be in the county . . . [w]here the plaintiff was convicted or sentenced . . . ." (formatting altered)).

Additionally, by virtue of Subsection 801.50(3)(a)'s "unless another venue is specifically authorized by law" exit ramp, the plaintiff's designated venue is not always the ultimate venue of decision. For example, a case's venue may transfer "in the interest of justice or for the convenience of [trial participants]." Wis. Stat. § 801.52; *see also Kohlbeck v. Reliance Constr. Co.*, 2002 WI App 142, ¶ 25, 256 Wis. 2d 235,

647 N.W.2d 277. Venue may also change according to the parties' stipulation and a court's authorization. *See* Wis. Stat. § 227.53(1)(a)3.

B. Appellate venue in Wisconsin is governed by Section 752.21. Section 752.21(1) requires "a judgment or order appealed to the court of appeals [to] be heard in the court of appeals district which contains the court from which the judgment or order is appealed," "[e]xcept as provided in sub. (2)." Wis. Stat. § 752.21(1). Section 752.21(2), which is the critical provision for this case, 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." Wis. Stat. § 752.21(2).

C. Reading the circuit-court and appellate-court venue provisions together, when a plaintiff to an action solely against the State "designates" the venue under Subsection 801.50(3)(a), the appellant from that action may "select" the court of appeals to hear the appeal (so long as it does not select the court of appeals district containing the circuit court that decided the case). Conversely, when the plaintiff in such an action does not designate the venue under Subsection 801.50(3)(a) at all—*i.e.*, the case is venued under Subsections 801.50(3)(b) or (c)—or when the plaintiff's designated venue under Subsection 801.50(3)(a) is not the venue that ultimately

decides the case, the appeal must be filed with the court of appeals district containing the circuit court. Wis. Stat. § 752.21(1).

II. Factual Background

This case arises out of a permit dispute involving Kinnard Farms, Inc., a dairy farm in Kewaunee County.

A. In March 2012, Kinnard Farms asked the Department to reissue its Pollutant Discharge Elimination System permit, and the Department granted the request. App. 2. Private individuals then challenged the Department's decision, App. 2; *see* Wis. Stat. § 283.63(1)–(2), and an Administrative Law Judge concluded that the Department could reissue Kinnard Farm's permit only if two other conditions were attached to it, App. 2–3.

Kinnard Farms petitioned under Wis. Admin. Code § NR 2.20 for the Department to review the ALJ's decision, but the Department declined. App. 3. After consultation with the Department of Justice, however, the Department reconsidered its denial and concluded that the two conditions added by the ALJ were unlawful. App. 3–5. Specifically, the Department concluded that 2011 Wisconsin Act 21 barred the imposition of the two permit conditions. App. 4. That law prohibits agencies from "implement[ing]" any "condition" on a permit that is not "explicitly required or explicitly permitted by statute or by rule." Wis. Stat. § 227.10(2m) (enacted by Act 21). Since the conditions attached to Kinnard Farms' permit

by the ALJ were not "explicitly required or explicitly permitted," the Department concluded (in September 2015) that these conditions would not be added to, or modified into, the permit. App. 5.

B. On October 12, 2015, Clean Wisconsin and five individuals separately challenged the Department's decision not to implement the two extra conditions on Kinnard Farms' permit, via Wis. Stat. § 227.52. App. 5, 34, 55. Pursuant to Section 801.50(3)(a), Clean Wisconsin designated Dane County as the appropriate venue for its challenge, App. 27–34, 36–38, while the individual petitioners designated Kewaunee County, App. 36, 55–75. The petitioners filed their challenges on the same day, but Clean Wisconsin filed a few hours before the individuals. App. 37–38. The Dane County Circuit Court consolidated the individual petitioners' petition into Clean Wisconsin's petition and then placed the consolidated cases on its docket. App. 40, 45, 48. This was consistent with the stated venue preferences of the petitioners, but contrary to the venue preference of the Department. App. 40, 45, 48.[2]

In July 2016, the Dane County Circuit Court entered a judgment on the merits in favor of Clean Wisconsin, holding that the Department was required to impose the two extra conditions on Kinnard Farms' permit, notwithstanding the

[2] Unless otherwise noted, the remainder of this brief will refer to Clean Wisconsin and the individual petitioners collectively as "Clean Wisconsin."

Department's claim that Act 21 removed its legal authority to enforce such conditions. App. 5.

C. The Department appealed the Dane County Circuit Court's decision and selected, pursuant to Section 752.21(2), the Court of Appeals for District II as its appellate venue. App. 76. Despite the Department's selection, the Court of Appeals for District IV—which hears appeals from Dane County venued under Section 752.21(1)—removed the Department's appeal from District II's docket and placed it on its own. *See* App. 76–77 (order transferring appellate venue). District IV did this unilaterally; indeed, the record does not reflect whether District II was ever notified of the case. On September 9, 2016, the Department moved for reconsideration of District IV's appellate-venue decision; that request was denied on September 29, 2016. App. 78–82 (order denying reconsideration).

To reach the conclusion that the Department was not entitled to select its appellate venue under Section 752.21(2), District IV held that Clean Wisconsin had not "designated" the circuit-court venue under Subsection 801.50(3)(a) because venue was also governed by Wis. Stat. § 227.53(1)(a)3. App. 77, 80–81. That section requires "person[s] aggrieved by [certain agency decisions]," like the Department's decision here, to file a petition "in the circuit court for the county where the petitioner resides" when the petitioner is a Wisconsin resident. Wis. Stat. § 227.53(1), (1)(a)3. It also enables the parties to change the venue by stipulation and the court's

permission. Wis. Stat. § 227.53(1)(a)3. District IV concluded that Section 227.53(1)(a)3 "specifically authorized" other venues for Clean Wisconsin's case, and so, pursuant to Subsection 801.50(3)(a)'s "unless another venue is specifically authorized by law" clause, no designation of venue occurred. App. 80–81; *see also* App. 77 ("venue was governed by § 227.53(1)(a)3. and the petitioners could not select the place of venue under § 801.50(3)(a)").

The upshot is that District IV interpreted Subsection 801.50(3)(a) to apply only in cases where the "venue [can be] designated unilaterally by the plaintiff"—though the court admitted that "[Subsection] 801.50(3)(a) does not use the term 'unilaterally' in referring to the designation by the plaintiff." App. 81 ("The obvious purpose of [Subsection 801.50(3)(a)] is to allow the plaintiff, and the plaintiff alone, to select venue in the type of case described there . . . ."). So, "[b]ecause . . . the petitioners could not select [read: 'unilaterally designate'] the place of venue under § 801.50(3)(a), the [Department was] not entitled to select the district on appeal under § 752.21(2)." App. 77; *see also* App. 81.

D. On October 13, 2016—two weeks after District IV denied the Department's motion for reconsideration—the Department petitioned this Court for a supervisory writ ordering District IV to return the Department's appeal to District II's docket. Dkt. Entry 10-13-2016, No. 2016AP1980. This Court ordered District IV and Clean Wisconsin to file a response to the Department's petition and then, after these

responses were filed, ordered full briefing and oral argument. App. 83–84, 85–86.

STANDARD OF REVIEW

Whether a supervisory writ is warranted depends on four elements: "(1) an appeal is an inadequate remedy; (2) grave hardship or irreparable harm will result [if the writ is not granted]; (3) the duty of the [lower] court is plain and it must have acted or intends to act in violation of that duty; and (4) the request for relief is made promptly and speedily." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 17, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted); *see also State ex rel. Two Unnamed Pet'rs. v. Peterson*, 2015 WI 85, ¶¶ 102–06, 363 Wis. 2d 1, 866 N.W.2d 165. This Court may also consider "equitable principles" and "the rights of the public and third parties" in determining whether to grant the writ. *Kalal*, 271 Wis. 2d 633, ¶ 17 (citation omitted). Finally, this Court reviews the lower court's conclusions of law de novo. *See Peterson*, 363 Wis. 2d, ¶¶ 102, 105.

SUMMARY OF ARGUMENT

The Department succeeds in satisfying all four elements governing the grant of a supervisory writ.

I. This Court granting relief via a supervisory writ is appropriate when the ordinary appellate process is inadequate. Here, the Department has the specific statutory right to select its appellate venue in the first instance under Section 752.21(2). District IV violated that right by removing

the Department's appeal from District II's docket, the district selected by the Department, and placing it on its own. Attempting to remedy this violation after District IV decides the merits of this case impairs and frustrates the Department's right, thus this Court should exercise discretionary review here.

This Court has regularly exercised discretionary review to protect rights similar to the right the Department attempted to exercise here. For example, in *State ex rel. Klabacka v. Charles*, 36 Wis. 2d 122, 152 N.W.2d 857 (1967), and *State v. Jensen*, 2010 WI 38, 324 Wis. 2d 586, 782 N.W.2d 415, this Court, in a discretionary-review posture, vindicated defendants' statutory rights to have the trials against them occur, in the first instance, in a particular venue. Meaningful review after a trial in those cases was impossible since it would have required the defendants to first litigate in the wrong venue. So too here. The Department similarly has the right, under Section 752.21(2), to select the appellate venue in the first instance. It is impossible for this Court to vindicate that right after a full round of appellate review in the wrong venue.

II. The grant of a supervisory writ is necessary to avoid grave hardship or irreparable harm to the Department. The Legislature saw fit to grant to litigants in the Department's position the statutory right to select the appellate venue. Failure to grant a supervisory writ will completely strip the Department of this right in this case. Moreover, granting the

writ here will preserve the scarce resources of the court of appeals, the litigants, and the private business involved in this case—all permissible public and third-party factors this Court may consider here.

III. District IV removing the Department's case from District II's docket and placing it on its own violated its plain duty to respect the Department's statutory rights. Under Section 752.21(2), "[a] judgment or order appealed from an action venued in a county designated by the plaintiff . . . as provided under s. 801.50(3)(a) shall be heard in a court of appeals district selected by the appellant." As used in Subsection 801.50(3)(a) and Section 752.21(2), "designated" means to "point out, indicate," "particularize," or "specify." *See* 4 *Oxford English Dictionary* 520 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (first provided definition). A plaintiff therefore designates a venue under Subsection 801.50(3)(a) when it indicates or specifies the venue in its pleadings. This designation will occur in every case solely against the State, subject to two express statutory exceptions. Other venue statutes may limit the number of venues eligible for designation; for example, Subsection 227.53(1)(a)3 required Clean Wisconsin to designate its venue of residence here. Yet, the applicability of these statutes does not mean a Subsection 801.50(3)(a) designation does not occur—it simply means the designation must be made within other statutory limits.

Here, Clean Wisconsin designated Dane County as the venue when it indicated Dane County as the appropriate venue in its pleadings, consistent with Subsection 801.50(3)(a). The scope of venues available to Clean Wisconsin was limited by Subsection 227.53(1)(a)3, but this of course does not mean a Subsection 801.50(3)(a) designation never occurred. Therefore, under Section 752.21(2), the Department has the statutory right to select its appellate district. It selected District II.

In concluding that the Department did not have appellate-venue selection rights, District IV erroneously interpreted "designated" in Subsection 801.50(3)(a) to mean "selected"—thus a designation only occurs when the plaintiff, free from *any* constraints, can select any venue in which to file. But this definition of "designated" is not permissible here. Section 752.21(2), which must be interpreted in conjunction with Subsection 801.50(3)(a), uses the terms "designated" and "selected" separately and in the same sentence. It is a cardinal principle of statutory interpretation that similar but different terms must be given different meanings where possible. *Gister v. Am. Family Mut. Ins.*, 2012 WI 86, ¶ 33, 342 Wis. 2d 496, 818 N.W.2d 880. The Department's interpretation of "designated" to mean "indicated" or "specified" gives effect to every portion of the statutory scheme created by Section 752.21(2) and Subsection 801.50(3)(a), is consistent with Chapter 227, and follows this cardinal statutory-interpretation rule.

IV. Finally, the Department's petition for a supervisory writ was filed promptly and speedily, as the Respondents have previously conceded. The Department filed its petition two weeks after District IV denied the Department's motion for reconsideration—under the circumstances here, that short window is prompt and speedy under any reasonable definition of those terms.

ARGUMENT

The supervisory-writ standard comprises four elements: "(1) an appeal is an inadequate remedy; (2) grave hardship or irreparable harm will result [if the writ is not granted]; (3) the duty of the [lower] court is plain and it must have acted or intends to act in violation of that duty; and (4) the request for relief is made promptly and speedily." *Kalal*, 271 Wis. 2d 633, ¶ 17 (citation omitted); *see also Peterson*, 363 Wis. 2d 1, ¶¶ 102–06. These elements are satisfied here.[3]

[3] This Court ordinarily requires supervisory-writ petitioners to first seek relief in the court of appeals, unless it is "impractical" to do so. Wis. Stat. § (Rule) 809.71. When a petitioner alleges that an error was committed by the court of appeals itself, as the Department alleges here, it is "impractical" to first file the petition in the court of appeals. *See State v. Buchanan*, 2013 WI 31, ¶¶ 13–18, 346 Wis. 2d 735, 828 N.W.2d 847 (analyzing petition for supervisory writ complaining of action of the court of appeals without discussing Section 809.71's requirement to first file in the court of appeals).

I. An Appeal From An Eventual Final Decision By District IV Is An Entirely Inadequate Remedy For A Violation Of Venue-Selection Rights

A. Section 752.21(2) gives the appellant, in actions solely against the State where the plaintiff designates the venue, the right to select the appellate venue in the first instance. This appellate-venue selection right can vest in either the State or the private plaintiff, depending on which party loses in the circuit court. Wis. Stat. § 752.21(2). Here, Clean Wisconsin "designated" the circuit-court venue under Subsection 801.50(3)(a); since the Department lost in that venue, it now has the right to "select" the venue on appeal under Section 752.21(2). *See infra* Part III.B–C. District IV violated the Department's right when it removed the appeal from District II's docket and placed it on its own.

District IV's order to change the appellate venue in this case, like all venue orders, is interlocutory. *See Aparacor, Inc. v. Dep't of Indus., Labor, & Human Relations*, 97 Wis. 2d 399, 402–04, 293 N.W.2d 545 (1980); *Irby v. Young*, 139 Wis. 2d 279, 280 n.1, 407 N.W.2d. 314 (Ct. App. 1987). Such orders are usually only reviewed by this Court after a final judgment has been entered, *see Aparacor*, 97 Wis. 2d at 401–03; however, this Court has the power to review interlocutory decisions in its discretion, *see* Wis. Stat. § 808.03(2) (authorizing appeals by permission); Wis. Stat. § (Rule) 809.71 (authorizing supervisory writs).

When the delay of the review of an interlocutory order would impair or frustrate a party's rights, this Court granting discretionary review is appropriate. For example, in *Klabacka*, this Court held that a circuit court erred in denying a civil defendant's change-of-venue motion, which would have moved the trial to the venue of the defendant's residence, as required by statute. 36 Wis. 2d at 123, 129–30 (applying Wis. Stat. § 261.01(12) (1967) on certiorari review). And in *State v. Jensen*, this Court held that it was error not to venue a criminal trial in the venue of the defendant's residence, as mandated by statute. 324 Wis. 2d 586, ¶¶ 6–7. In both of these cases, the venue statutes granted the defendants the right to have their cases litigated in a *particular* venue in the first instance. *See Klabacka*, 36 Wis. 2d 129–30; *Jensen*, 324 Wis. 2d 586, ¶¶ 42, 53. An appellate court cannot vindicate such a right if it forces the defendant to first fully litigate in the wrong venue before seeking review. This conclusion is consistent with courts' treatment of the qualified-immunity defense: since qualified immunity includes the right to not stand trial, appellate courts must review denials of qualified immunity in an interlocutory posture in order to have the opportunity to vindicate the defense at all. *See, e.g.*, *Arneson v. Jezwinski*, 206 Wis. 2d 217, 229, 556 N.W.2d 721 (1996) (exercising this Court's "superintending power").

B. Here, the Department is asserting a specific procedural right, under Section 752.21(2), to select its appellate venue in the first instance. *See generally Klabacka*,

36 Wis. 2d at 123, 129–30; *Jensen*, 324 Wis. 2d 586, ¶¶ 6, 53. If District IV violated this right, this Court cannot remedy that violation through the ordinary appellate process—that is, after a final judgment on the merits from District IV—because that would require the Department to first litigate in the wrong appellate venue. The Department would have to fully litigate this appeal in District IV and then petition this Court for review of District IV's venue decision (along with its merits decision), raising the very same arguments presented here. Finally, assuming this Court granted that petition and agreed with the Department on the venue issue, the Department may well have to relitigate the merits of the case in District II on remand—the appellate venue it was originally entitled to select. *See Jankee v. Clark Cnty.*, 2000 WI 64, ¶ 9 n.3, 235 Wis. 2d 700, 612 N.W.2d 297 (stating that this Court may decline to "address additional issues" when "resolution of one issue disposes of a case" (citation omitted)). Alternatively, the Court may avoid the venue issue by simply ruling on the merits of the underlying dispute, thus wholly depriving the Department of its right to select the appellate venue under Section 752.21(2).

In sum, requiring the Department to litigate in the wrong venue (District IV) in order to vindicate its right to litigate in the venue of its choice in the first instance (District II) is illogical. Rather, the only way to vindicate the Department's procedural right here is through this Court's

discretionary review. *See Klabacka*, 36 Wis. 2d 129–30; *Jensen*, 324 Wis. 2d 586, ¶¶ 42, 53.

C. The counterarguments originally presented by District IV in its responses to the Department's petition in this Court are unpersuasive. District IV claimed that *Klabacka* and *Jensen* were distinguishable because they dealt with trial-venue rights, not appellate-venue rights. Dist. IV. Resp. 5. But the right to select appellate venue in the first instance is identical to the right to select trial venue in the first instance with respect to the relevant question here—namely, whether the right can be vindicated after a final judgment. Since appellate-venue selection rights, just like trial-venue selection rights, cannot be vindicated in that circumstance, *Klabacka* and *Jensen* directly support this Court granting interlocutory review.

District IV also argued that *Klabacka* and *Jensen* are distinguishable because, unlike the defendants in those cases, the Department is seeking to use its selection rights to avoid its "home" venue. Dist. IV. Resp. 22. This argument misses the mark: the Legislature granted the Department the statutory right to select its appellate venue in the first instance—not the right to have an appeal heard in its "home" appellate venue. *Compare* Wis. Stat. § 752.21(2), *with Klabacka*, 36 Wis. 2d at 129–30 (applying Wis. Stat. § 261.01(12) (1967)). District IV violated that legislatively created right, and, as *Klabacka* and *Jensen* show, that type of violation can only be remedied in an interlocutory posture.

II. The Department Will Suffer Grave Hardship And Irreparable Harm If The Writ Is Not Granted

The second element of the supervisory-writ standard, that the petitioner show the writ is needed to avert grave hardship and irreparable harm, is closely related to the first element. *See Kalal*, 271 Wis. 2d 633, ¶ 17. As previously explained, District IV violated the Department's statutory right to select its appellate venue in the first instance. Wis. Stat. § 752.21(2). This Court declining to grant a supervisory writ would permanently strip the Department of this legislatively granted right since relief cannot be granted through the ordinary appellate process. Moreover, the permanent loss of the right to have a case heard in a particular venue, a right the Legislature saw fit to grant, is a serious hardship. *See Klabacka*, 36 Wis. 2d 129–30; *Jensen*, 324 Wis. 2d 586, ¶¶ 42, 53. Accordingly, the Department has met this second element.

In addition to preserving the Department's statutory rights, a supervisory writ would comport with "equitable principles" and considerations of "rights of the public and third parties," discretionary factors the Court may consider here. *Kalal*, 271 Wis. 2d 633, ¶ 17 (citation omitted). Specifically, granting the Department's petition would preserve scarce resources of the judiciary, the Department, and private parties. For example, this Court attempting to remedy District IV's violation of the Department's venue-selection rights through ordinary appellate review (even if

such a remedy were possible) could result in duplicative litigation over the merits of this complex lawsuit. Specifically, District IV would decide the case on the merits, the Department would petition for review, and then, if the Court granted the petition and sided with the Department on its selection-of-venue claim, the Court may remand to District II to hear the case again on the merits. That would waste the resources of the court of appeals, the Department, and the private litigants here—it would also delay final resolution to Kinnard Farms, the private party holding the permit at issue.

III. District IV's Duty Is Plain: Section 752.21(2) Grants The Department The Right To Select Its Appellate Venue Because Clean Wisconsin Designated Dane County Circuit Court Under Subsection 801.50(3)(a).

The third supervisory-writ element, whether District IV violated a plain duty, turns on the correct interpretation of Section 752.21(2) and Subsection 801.50(3)(a). If Section 752.21(2) grants the Department the right to select its appellate venue under the circumstances here, then District IV violated its plain duty to respect the Department's appellate-venue selection rights.

A. This Court interprets statutes by looking, first and foremost, to the text. *See Kalal*, 271 Wis. 2d 633, ¶ 45. The Court reads the text according to its "common, ordinary, and accepted meaning," unless it is clear that a technical or special meaning applies. *Id.* A statute must be read in the

"context" of "the language of surrounding or closely-related statutes." *Id.* ¶ 46.

As used in Subsection 801.50(3)(a) and Section 752.21(2), "designated" means to "point out, indicate; to particularize, specify." *See* 4 *Oxford English Dictionary* 520 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (first provided definition); *see also infra* Part III.C (discussing why defining "designated" to mean "selected" is unavailable here). A plaintiff designates a venue under Subsection 801.50(3)(a) when it *indicates* or *specifies* in its pleadings where it is filing the case. This designation will occur in all cases plaintiffs bring solely against the State, with two express statutory exceptions. *See* Wis. Stat. § 801.50(3)(a) (expressly creating the two exceptions by stating "Except as provided in pars. (b) and (c)").

Other statutes may limit the scope of venues eligible for designation under Subsection 801.50(3)(a) by the plaintiff, depending on the type of action the plaintiff is bringing. Here, for example, Subsection 227.53(1)(a)3 required Clean Wisconsin to designate the "county where [it] resides." Wis. Stat. § 227.53(1)(a)3. And Wis. Stat. § 801.50(4) requires a habeas petitioner to file in the venue of his conviction, *id.* § 801.50(4)(a), or the venue of his confinement, *id.* § 801.50(4)(b), depending on the nature of the habeas claim. But again, when other venue limitations apply, a plaintiff still designates a venue under Subsection 801.50(3)(a); that is, the

plaintiff still "indicates" or "specifies" the venue in its pleadings, just within additional statutory limits.

Importantly, not every case in which the plaintiff designates the venue under Subsection 801.50(3)(a) ultimately triggers the appellant's selection rights under Section 752.21(2). Rather, this venue framework contains a statutory exit ramp: Section 801.50(3)(a) requires the case to be heard in the venue "designated by the plaintiff *unless* another venue is specifically authorized by law." Wis. Stat. § 801.50(3)(a) (emphasis added). And Section 752.21(2) grants appellate-venue selection rights only when the appeal is taken from a "judgment or order" "*from* an action venued in a county designated by the plaintiff." Wis. Stat. § 752.21(2) (emphasis added). Therefore, when an action is lawfully moved to a venue other than the venue designated by the plaintiff, then the appellant would not be able to select the appellate venue under Section 752.21(2).

A case may travel the exit ramp in a number of common circumstances. For example, the venue of a case may change "in the interest of justice or for the convenience of [trial participants]." Wis. Stat. § 801.52; *see also Kohlbeck*, 256 Wis. 2d 235, ¶ 25. And under Chapter 227, in particular, the parties may stipulate to a change of venue after a Chapter 227 case is filed. Wis. Stat. § 227.53(1)(a)3 (also requiring the court's authorization before a change occurs). If such circumstances occur, then the party that loses in the ultimate circuit court of venue—including the State—would not have

the right to select the appellate venue under Section 752.21(2).

B. Here, Clean Wisconsin "designated" the venue for this action under Subsection 801.50(3)(a) when it indicated Dane County in its pleadings as the appropriate venue. App. 27–34, 55–75. This case does not fall into Subsection 801.50(3)(a)'s express statutory exception for cases venued under Subsection 801.50(3)(b) or (c). Further, the venue was not changed from the venue designated by Clean Wisconsin before the circuit court entered final judgment. *See infra* pp. 29–30 (discussing effect of the consolidation of the individual petitioners' case with Clean Wisconsin's case). The scope of venues eligible for Clean Wisconsin's designation was limited by Subsection 227.53(1)(a)3, but again, this does not change the fact that Clean Wisconsin "indicated" or "specified" Dane County as the circuit court of venue in its pleadings.

C. To reach a contrary holding, District IV concluded that Clean Wisconsin did not "designate" the venue under Subsection 801.50(3)(a) because Subsection 227.53(1)(a)3 limited the venues Clean Wisconsin could "select" from. App. 81. That is, by limiting Clean Wisconsin's choice of venue, Subsection 227.53(1)(a)3 fell within Subsection 801.50(3)(a)'s "unless another venue is specifically authorized by law" clause, meaning it prevented any Subsection 801.50(3)(a) designation from occurring. The court thought it "obvious" that, in order for a Subsection 801.50(3)(a) designation to occur, "the plaintiff, and the plaintiff alone,"

must be able to "*select* venue" without limitation. App. 81 (emphasis added). That is, venue is only "designated" by the plaintiff under Subsection 801.50(3)(a) when it is "designated *unilaterally* by the plaintiff." App. 81 (emphasis added). The court could not have been clearer: "[b]ecause . . . the petitioners could not select the place of venue under § 801.50(3)(a), the [Department was] not entitled to select the district on appeal under § 752.21(2)." App. 77; *see also* App. 81.

District IV's conclusion fails: the term "designated" in Subsection 801.50(3)(a) and Section 752.21(2) cannot possibly mean "selected" by the plaintiff, "unilaterally" or otherwise, because Section 752.21(2) uses the words "designated" and "selected" separately and in the same sentence. As used in Subsection 801.50(3)(a), therefore, "designated" means "point out, indicate; to particularize, specify," 4 *Oxford English Dictionary* 520 (first definition). "Designated" does not mean "select" here. It is of course possible to define "designated" as "selected" in some situations, *see id.* at 521 (one portion of the fifth provided definition); *Ho-Chunk Nation v. Dep't of Revenue*, 2009 WI 48, ¶¶ 22–23, 317 Wis. 2d 553, 766 N.W.2d 738 (acknowledging "multiple definitions of the word 'designate'"), but the statutory context forecloses that possibility here.

This Court looks to a statute's context—that is, closely related statutes—to determine which meaning a word bears when multiple permissible meanings may be available, like

the word "designated" here. *See Kalal*, 271 Wis. 2d 633, ¶ 46. The relevant context for Subsection 801.50(3)(a)'s use of "designated" is Section 752.21(2); these two statutes create one venue framework for actions solely against the State, *see supra* pp. 20–23, and thus must be interpreted together, *see Kalal*, 271 Wis. 2d 633, ¶ 46.

Crucially, as noted above, Section 752.21(2) uses "designated" and "selected" in the same sentence, which establishes that "designated" cannot mean "selected" here. Section 752.21(2) reads: "A judgment or order appealed from an action venued in a county *designated* by the plaintiff [ ] under s. 801.50(3)(a) shall be heard in the court of appeals district *selected* by the appellant." Wis. Stat. § 752.21(2) (emphases added). It is a fundamental principle of statutory interpretation [ ] that each word "should [ ] be given distinct meanings." *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 62, 327 Wis. 2d 572, 786 N.W.2d 177. "[W]here the legislature uses similar but different terms in a statute, particularly within the same section, [the Court] may presume it intended the terms to have different meanings." *Gister*, 342 Wis. 2d 496, ¶ 33 (first brackets in original) (citation omitted); *see also Kalal*, 271 Wis. 2d 633, ¶ 46 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage"). Because "designated" readily bears the meaning of "indicated" or "specified" in this context, and because the alternative definition of "selected" is definitively foreclosed via Section 752.21(2)'s usage of both

"designated" and "selected" in a single sentence, District IV erred in giving the word the latter meaning.

D. The counterarguments originally presented by District IV and Clean Wisconsin in their responses to the Department's petition are likewise unpersuasive.

1. District IV cited two pieces of legislative history that, in its view, support its interpretation of Subsection 801.50(3)(a). The first is the Legislative Reference Bureau's analysis of 2011 SB 117, the bill that created Subsection 801.50(3)(a) and amended Section 752.21(2). Dist. IV Resp. 19. The Bureau's report does nothing more than restate the language of these two statutes without any relevant analysis: "Under current law, all actions in which the sole defendant is the state . . . must be brought in Dane County. This bill permits the plaintiff to *designate* the county within which to bring the action . . . . [Additionally,] [t]his bill permits the appellant to *select* the court of appeals district within which to bring the appeal." App. 87 (emphases added).

The second piece of legislative history is the fiscal estimate report generated for SB 117. Dist. IV Resp. 19–20. That report states that SB 117 "changes the venue for actions in which the state . . . is the sole defendant to allow the plaintiff to *select* the county where the action is filed." App. 90 (emphasis added). The fiscal estimate wholly fails to address the fact that "designated" and "selected" are used separately in Section 752.21(2), and thus cannot be interchangeable

terms in Subsection 801.50(3)(a). Accordingly, the fiscal estimate is no help either.

2. District IV and Clean Wisconsin both claimed that the unique features of Chapter 227 proceedings render Subsection 801.50(3)(a) inapplicable to the case here. *See* Clean Wis. Resp. 16–17; Dist. IV Resp. 10–13 & n.5.

For Clean Wisconsin's part, it argued that Section 752.21(2)'s use of "plaintiff," "defendant," and "action" shows that it does not apply to Chapter 227 cases because that chapter uses the terms "petitioner," "respondent," and "special proceeding." Clean Wis. Resp. 16–17. Clean Wisconsin claimed that these terms are "legal terms of art [that] have distinct legal meanings." Clean Wis. Resp. 17. But despite this claim, it failed to define the "distinct legal meanings" of these terms, let alone explain why those distinctions mattered to Subsection 801.50(3)(a)'s applicability. *See* Clean Wis. Resp. 16–17. Of course, neither the differences between these terms, nor the import of those differences, is self-explanatory: for example, a "plaintiff" is "[t]he party who brings a civil suit," a definition broad enough to include a "petitioner," which is simply "[a] party who presents a petition to a court." *Plaintiff*, *Black's Law Dictionary* (10th ed. 2015); *Petitioner*, *Black's Law Dictionary* (10th ed. 2015).

In any event, Chapter 227 "contemplates the *limited* use of [ ] civil procedure statutes," like the venue statutes here, "which do not conflict" with Chapter 227's provisions.

Wagner v. State Med. Examining Bd., 181 Wis. 2d 633, 641, 511 N.W.2d 874 (1994) (citations omitted). Section 801.50(3)(a) does not conflict with the Chapter 227 venue provision here, Subsection 227.53(1)(a)3. *See supra* pp. 21–23. Subsection 801.50(3)(a) simply requires a plaintiff to "designate" a venue by specifying a circuit court in its filings, while Subsection 227.53(1)(a)3 just limits the scope of venues available for designation by requiring the plaintiff to designate "the county where [it] resides" as the venue in these Chapter 227 cases.

3. The Respondents both claimed that the Department's interpretation of Subsection 801.50(3)(a) and Section 752.21(2) would violate public policy because it "open[s] the door to forum shopping." Clean Wis. Resp. 21; Dist. IV Resp. 13–14, 23. This is an attack on the Legislature's policy judgment in enacting these venue statutes, not an argument against the Department's text-based interpretation of those provisions. The Legislature saw fit to explicitly grant appellants who lost before the circuit court the right to "select[ ]" the appellate venue in actions solely against the State, Wis. Stat. § 752.21(2); it is this statutory right of selection that Respondents criticize as "forum shopping."

4. Finally, both Respondents argued that, even if the Department's interpretation of Subsection 801.50(3)(a) is correct, District IV is still the appropriate appellate venue because the five individual petitioners designated Kewaunee County in their filings, yet the case was decided in Dane

County. Clean Wis. Resp. 23–24; Dist. IV Resp. 14–15. This argument fails because the individual petitioners' case was consolidated *into* Clean Wisconsin's case, and thus no longer exists as a separate case.

In Wisconsin, consolidation creates one single case, thus only the lead case's pleadings may be used to answer questions of venue. After two cases are consolidated, "there remains but one action and one set of pleadings." *Wis. Brick & Block Corp. v. Vogel*, 54 Wis. 2d 321, 325, 195 N.W.2d 664 (1972); *see also State v. Rachwal,* 159 Wis. 2d 494, 515, 465 N.W.2d 490 (1991) ("[W]hen the consolidation took effect . . . the various pleadings essentially were fused into a single action. They were no longer independent and separate actions."). Here, the individual petitioners' case was consolidated into Clean Wisconsin's case—indeed, after the consolidation order, the case retained the Dane County case number (15-CV-2663) assigned to the pleadings Clean Wisconsin originally filed. App. 91–92 (consolidation order). Since only Clean Wisconsin's "set of pleadings" "remains," *Vogel*, 54 Wis. 2d at 325, this is the only document relevant to the venue questions here. Clean Wisconsin's pleadings designated Dane County under Subsection 801.50(3)(a), and that court actually decided the case here. Therefore, the Department has the right to select District II as the appellate district under Section 752.21(2). Importantly, if the sole remaining case—15-CV-2663—had been transferred back to Kewaunee County (where the individual petitioners filed) or

any other county after the cases were consolidated, then the Department would not possess appellate-venue selection rights under Section 752.21(2).

* * *

Summarizing this element, when a plaintiff brings an action solely against the State, the plaintiff must designate the circuit-court venue for the action under Subsection 801.50(3)(a). When that designated county actually decides the case, the appellant from the case has the right, under Section 752.21(2), to select the venue on appeal. Since Clean Wisconsin designated Dane County here—and that court actually decided the case—the Department has the right to select District II as the appellate venue. District IV had the plain duty to respect the Department's statutory right; it violated that plain duty when it removed the case from District II's docket and placed it on its own.

IV. The Department's Petition Was Made Promptly And Speedily, As Respondents Have Conceded

The final element for issuing a supervisory writ is whether the Petitioner has petitioned "promptly and speedily" after the relevant lower-court decision was entered. *Kalal*, 271 Wis. 2d 633, ¶ 17 (citation omitted). The Department filed its petition on October 13, 2016, challenging the decision District IV entered on September 29, 2016. While the precise time for filing a prompt and speedy petition will vary on the facts of each case, the two-week filing time here would be satisfactory under any reasonable interpretation of this

element. *See, e.g.*, *Madison Metro. Sch. Dist. v. Circuit Court for Dane Cnty.*, 2011 WI 72, ¶¶ 21–25, 336 Wis. 2d 95, 800 N.W.2d 442 (approximately three-week gap found to be prompt and speedy); *State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court for Milwaukee Cnty.*, 2000 WI 30, 233 Wis. 2d 428, 608 N.W.2d 679 (same). Indeed, the Respondents previously conceded that the Department has met this element here. Dist. IV Resp. 3 n.1 ("Respondent does not contest that DNR promptly and speedily requested relief."); *see* Clean Wis. Resp. (failing to discuss this element).

CONCLUSION

The decision of the Court of Appeals for District IV should be reversed. This Court should issue a supervisory writ ordering District IV to return this case to the docket of District II.

Dated this 16th day of March, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 7,295 words.

Dated this 16th day of March, 2017.

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KEVIN M. LEROY
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of March, 2017.

_____

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