IN THE SUPREME COURT

No. 14-0178

DANNY HOMAN *et al.*,

Appellees,

v.

TERRY BRANSTAD *et al.*,

Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SCOTT D. ROSENBERG, PRESIDING

APPELLANTS' REPLY BRIEF

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CERTIFICATE OF FILING

On the 23rd day of July, I, the undersigned, do hereby certify that I or someone acting on my behalf did electronically file through the Iowa Court System Appellants' Reply Brief.

/s/ Timothy L. Vavricek

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ARGUMENT

I. THE DISTRICT COURT ERRED IN ENTERING A PRELIMINARY INJUNCTION ORDERING DEFENDANTS TO REOPEN THE IOWA JUVENILE HOME.

Iowa Rule of Civil Procedure 1.1502(1) is plain and unambiguous: a temporary injunction shall not issue unless "the petition, ***supported by affidavit***, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably injure the plaintiff." (Emphasis added.). Just as in *Kleman v. Charles City Police Department*, 373 N.W.2d 90, 95-97 (Iowa 1985), this Court should reverse the district court because plaintiffs presented no evidence at the hearing on their request for a temporary injunction. As the language of Rule 1.1502(1) suggests,

> To authorize the issuance of a writ of temporary injunction, it was incumbent upon plaintiffs not only to plead facts which, if proved, would entitle them to injunctive relief, but to offer evidence at the hearing which would prove their probable right thereto on final hearing and of probable injury in the interim.

Pickard v. Castillo, 550 S.W.2d 107, 111 (Tex. Civ. App. 1977) (quoted in *Kleman*, 373 N.W.2d at 96).

Plaintiffs offer a number of novel but unpersuasive and incorrect responses in an attempt to circumvent the plain and unambiguous language

of Rule 1.1502 and *Kleman*. Each argument fails for the reasons set forth below.

First, Plaintiffs argue Iowa Rule of Civil Procedure 1.413 "presents a means for surpassing the affidavit requirement of Iowa Rule of Civil Procedure 1.1502." Appellees' Br. at 11. Rule 1.413 generally abolished the verification of pleadings in favor of deeming counsel's signature as a certificate that counsel has filed the pleading in good faith—in other words, that the attorney filing the pleading has satisfied the "three duties known as the reading, inquiry, and purpose elements." *Barnhill v. Iowa Dist. Ct. for Polk Cnty.*, 765 N.W.2d 267, 272 (Iowa 2009) (internal quotation marks omitted). But Rule 1.413 expressly states that the verification requirement remains "unless special statutes so require," and Rule 1.1502 requires verification. This Court should read these two rules in harmony with one another and reject plaintiffs' interpretation, which impermissibly ignores the exception in Rule 1.413 to "surpass[]" Rule 1.1502's verification requirement. *See Schaefer v. Putnam*, 841 N.W.2d 68, 78 (Iowa 2013) ("[W]e interpret status and court rules so as to harmonize them with one another[.]"). Verification and signature are not one and the same.

Second, Plaintiffs apparently argue in the alternative that, even if Rule 1.1502 requires verification, Danny Homan's affidavit satisfies Rule

1.1502's standard because it "as attached to the Plaintiffs' Motion to Reply to Resistance to Petition for Preliminary Injunction." Appellees' Br. at 11. This is incorrect. Plaintiffs attached Homan's Affidavit to their "Resistance to Defendants' Motion to Dismiss," filed on January 24, 2014. The record makes clear that Plaintiffs did *not* attach the affidavit to their Application for Preliminary Injunction, filed January 10, 2014, and did not file a reply to Defendants' resistance to such Application. Likewise, at the hearing on the motion for an application, Plaintiffs did not submit any affidavits, offer any other documentary evidence, or even call a single witness. Tr. pp. 31-42, App. 110-21. Plaintiffs cannot attempt to repurpose Homan's affidavit after the close of evidence.[1]

Third, Plaintiffs argue that "not providing an affidavit does not equate to a lack of evidence" and "a lack of affidavit does not signify that an affidavit was not obtainable to verify the facts contained in the petition." Perhaps so, but this does not alleviate Plaintiffs of the burden to demonstrate the "extraordinary circumstances" warranting injunctive relief against the

[1]Defendants would note that, in any event, Homan's affidavit does not purport to verify the Petition. Rather, the affidavit contains eight discrete paragraphs that are not coterminous with the allegations in the Petition and do not support all the allegations upon which the district court relied in its ruling.

Governor and Director Palmer. *See, e.g., Myers v. Caple*, 258 N.W.2d 301, 304 (Iowa 1977). They simply did not do so.

In sum, under governing law and settled precedent, the district court abused its discretion in entering a preliminary injunction. The Petition was unverified, and Plaintiffs presented no evidence at the hearing on their Application for injunctive relief. As in *Kleman*, the court should reverse the district court without reaching the merits of the underlying constitutional controversy. *See Kleman*, 373 N.W.2d at 96 (declining to "intimate any view" on the underlying issues).

II. THE DISTRICT COURT ERRED IN ORDERING DEFENDANTS TO DESTROY THE STATUS QUO.

Iowa Rule of Civil Procedure 1.1502(1) is plain and unambiguous in yet another respect: a temporary injunction shall not issue unless "the petition, supported by affidavit, shows the plaintiff is entitled to relief ***which includes restraining the commission or continuance of some act*** which would greatly or irreparably injure the plaintiff." (Emphasis added.). In other words, for more than a century this Court has held an injunction must preserve, not destroy, the status quo. *See, e.g., City of Audubon v. Iowa Light, Heat & Power Co.*, 192 Iowa 1389, 186 N.W. 434, 435 (1922); *City of Fort Dodge v. Fort Dodge Tele. Co.*, 172 Iowa 638, 154 N.W. 914, 915 (1915); *Snodgrass v. McDaniel*, 144 Iowa 674, 123 N.W. 336, 336 (1909).

Plaintiffs themselves reiterate this principle in their own brief. *See, e.g.*, Appellees' Br. at 23 ("[A] temporary injunction is a preventative remedy to maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation.") (quoting *Lewis Invs., Inc. v. City of Iowa City*, 703 N.W.2d 180, 184 (Iowa 2005). As indicated in Defendants' opening brief, when the district court issued its injunction it was undisputed that the Iowa Juvenile Home was already closed. To "reopen" is neither to "maintain" nor otherwise "restrain[] the commission or continuance of some act."

Plaintiffs do not directly challenge Defendants' argument in this regard, but rather baldly assert in the final heading of their brief that the "status quo would have remained, even if the Iowa Supreme Court had not intervened conclusion [sic]." Appellees' Br. at 23. It is wholly unclear how Plaintiffs justify this assertion—Plaintiffs do not elaborate on the heading except to emphasize the truth that a district court retains some discretion in deciding whether to issue an injunction. To the contrary, the relevant question is whether the district court's injunction sought to maintain or destroy the status quo. And it is undisputed that the district court's order commanded the Governor and Director Palmer to take affirmative actions to destroy the status quo by reopening the Iowa Juvenile Home—a stunning

"back to the future" order that all parties must now concede is antithetical to legislative intent. *See* 2014 Iowa Acts, H.F. 2463, § 147 (amending 2013 Iowa Acts, ch. 138, § 147 to remove all funding for the Iowa Juvenile Home's operations and instead only appropriate up to $507,766 to fund two FTEs to secure and maintain its empty building and vacant grounds).

III. PLAINTIFFS LACK STANDING.

Plaintiffs concede that, in order to demonstrate standing, they "must have a specific personal interest in the litigation and be injuriously affected." *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004). Plaintiffs cannot meet this standard.

Legislative Standing

Take, for instance, the alleged legislative standing of Plaintiffs Steven Sodders, Jack Hatch, Pat Murphy, and Mark Smith to bring this action. These Plaintiffs continue to say they may bring this action in their capacities as legislators to "maintain[] the effectiveness of their votes." Appellees' Br. at 9. Again, Defendants would urge this Court to draw a distinction between "a dimunition in a legislator's effectigveness, subjectively judged by him or her, resulting from Executive action . . . failing to obey a statute enacted through the legislators" from a complete withdrawal or nullification of a voting opportunity. *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir.) (en

banc), *vacated on other grounds*, 444 U.S. 996, 100 S. Ct. 533 (1979). But in any event, here the four Plaintiffs-legislators clearly had the opportunity, while this lawsuit was pending, to pass legislation to support their construction of 2013 Iowa Acts, S.F. 445. Instead, the Iowa General Assembly passed legislation to remove all funding for the Iowa Juvenile Home's operations and instead only appropriate up to $507,766 to fund two FTEs to secure and maintain its empty building and vacant grounds. *See* 2014 Iowa Acts, H.F. 2463, § 147 (amending 2013 Iowa Acts, ch. 138, § 147. These four Plaintiffs-legislators do not seek to "maintain[] the effectiveness of their votes" but instead to effect what their votes could not maintain—the Iowa Juvenile Home—in the wake of well-publicized complaints about the Iowa Juvenile Home's uses of seclusion and restraint.

Organizational Standing

With respect to organizational standing, Plaintiffs assert Homan has standing "from his interest in representing the bargaining unit employees who were adversely affected by the Appellant Governor's constitutional violations." Appellees' Br. at 9. Yet, as Defendants have stressed previously, organizational standing was not pled, AFSCME is not a party to the litigation, and nothing in the Petition alleges that Homan has the legal

authority to represent AFSCME or its interests in this lawsuit. Organizational standing should not be presumed.

But even if organizational standing were pled and alleged, Plaintiffs fail to answer why AFSCME's interests would not be wholly subsumed by the Collective Bargaining Agreement ("CBA") and Iowa Code chapter 20. Plaintiffs' only response to the CBA preemption issue is to assert, without any citation to authority or the record, that "the standard grievance procedures do not apply to the case at hand because it is one pertaining to constitutional issues rather than contract interpretation." Appellees' Br. at 9.

Plaintiffs' own conduct belies this argument regarding the CBA. As Ms. Jean M. Slaybaugh, Chief Financial Officer of the Iowa Department of Human Services ("DHS"), testified in her affidavit, AFSCME filed a grievance of the decision to close the Iowa Juvenile Home. Defs.' Ex. A, ¶ 9 & Exs. 1 (CBA) and 2 (grievance). AFSCME then entered into a Memorandum of Understanding ("MOU") with DHS and other state agencies regarding the closure of the Iowa Juvenile Home. *Id.*, Ex. A., ¶ 9 & Ex. 3. This is consistent with the law regarding grievance procedures. *See* Iowa Code § 20.18 (stating union members "shall" file grievances for alleged violations of the CBA); *cf. Elgin v. Dep't of Treas.*, 132 S. Ct. 2126, 2140 (2012) (holding civil service reform act provided exclusive avenue to

judicial review of alleged constitutional violations of federal employer); *Krafsur v. Davenport*, 736 F.3d 1032, 1036-41 (6th Cir. 2013) (applying *Elgin*).

CONCLUSION

This Court should reverse the district court's granting of Plaintiffs' Application for Preliminary Injunction and dissolve the district court's injunction in its entirety.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Reply Brief complies with the type-volume limitation, typeface, and type-style requirements of Iowa R. App. P. 6.903. This Reply Brief was prepared in Microsoft Word 2007 using Times New Roman 14. The number of words is 1,826, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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