STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP1673

STATE OF WISCONSIN
ex rel. JOSHUA L. KAUL,

Plaintiff-Appellant,

v.

FREDERICK PREHN,

Defendant-Respondent,

WISCONSIN LEGISLATURE,

Intervenor-Defendant-Respondent.

APPEAL FROM A FINAL DECISION
AND ORDER DISMISSING THE COMPLAINT,
ENTERED IN THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE VALERIE BAILEY-RIHN, PRESIDING

STATE OF WISCONSIN'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Statutes

Other Authorities

INTRODUCTION

Frederick Prehn, a former appointee to the Wisconsin Natural Resources Board, refuses to leave office. His refusal is contrary to statutory text, history, and common sense, yet Prehn has continued to exercise executive branch powers, with other former officers now following suit.

The statutes governing vacancies, appointments, and removals from state office decide this case. They mandate that Prehn's term ended on May 1, 2021. They make explicit that the Governor had authority to fill Prehn's seat with a provisional appointee, whose appointment "shall be in full force until acted upon by the senate." And they provide that Governor Evers's provisional appointee, Sandra Naas, may currently "exercise all of the powers and duties of the office to which [she] is appointed," now that she has taken the oath of office.

Contrary to these statutes, Prehn argues that a fifty-year-old case (*State ex rel. Thompson v. Gibson*) interpreting different statutory provisions allows him to spurn the Governor's new appointment and remain in office as long as he chooses. Current statutes, not *Thompson*, control this case. Those statutes are consistent with longstanding common-law principles governing vacancies and appointments, including this Court's precedent in cases like *State ex rel. Pluntz v. Johnson*. Those cases and the current statutes are clear that a holdover does not prevent a vacancy from arising and does not prevent the Governor from appointing a provisional successor. *Thompson* never overruled those principles, and to the extent it is inconsistent with them and current statutes, it should be overruled.

Not only did *Thompson* interpret a different set of statutes, but the statutes in place then included an important failsafe—a recess appointment provision—that ensured that neither the Legislature nor a holdover like Prehn could

exercise permanent control over the executive's appointment and removal decisions. That failsafe no longer exists in current statutes. That makes it even more important to give effect to what the current statutes do contain: a provisional appointment provision, which takes effect while the senate considers an appointment, preventing the existence of indefinite holdovers like Prehn.

In fact, there is a second way the statutes prevent that: gubernatorial removal. By statute, during his fixed term, Prehn was only removable for cause. But his term has ended, as has his tenure protection. Prehn is now removable at Governor Evers's pleasure, which the Governor has exercised by appointing Naas.

Statutes decide this case, but if there were any doubt, the separation-of-powers doctrine removes it. Statutes must be interpreted to avoid constitutional encroachments. Prehn's view—that he may remain in office as long as he likes—would violate the separation of powers in two ways. First, it encroaches on the core executive function to control removal, after a term has ended, so the executive can properly take care that the laws are faithfully executed. Allowing Prehn to continue in office contrary to the Governor's wishes nullifies the chief executive's prerogative over that core removal power. Second, Prehn's view transfers that core executive power to the Legislature, which also is impermissible. The Legislature may not control the removal of executive officers. However, under Prehn's view, so long as the Legislature declines to act on Nass's appointment, Prehn remains in office. By that mechanism, the Legislature can retain a former executive officer indefinitely, at the pleasure of *the Legislature*. This is directly contrary to the Founders' fears of aggrandizement by the legislative branch.

This Court can avoid these weighty constitutional issues by applying the current statutes as written. The

decision below should be reversed, and judgment entered for the State.

ISSUES PRESENTED

1. The general statute governing vacancies in state and local offices provides that, in addition to 13 listed events, vacancies also occur "as otherwise provided." The specific statute at issue here provides that fixed-term appointments to the Wisconsin Natural Resources Board ("the Board") "shall expire on May 1." And for offices like Board seats, the gubernatorial appointment statute provides that the Governor may fill such vacancies with a provisional appointment, which "shall be in full force until acted upon by the senate." Until the senate acts, the provisional appointee "may exercise all of the powers and duties of the office to which such person is appointed during the time in which the appointee qualifies."

Here, following the expiration of Prehn's term, Governor Evers provisionally appointed Sandra Naas to serve on the Board. Naas qualified by taking the oath of office, yet Prehn refuses to step aside and allow Naas to take her lawful seat on the Board. Does Prehn's refusal to leave office and allow Naas to take office support issuance of a writ of quo warranto?

This circuit court answered "no," based on its reading of *State ex rel. Thompson v. Gibson*.

This Court should answer "yes" because *Thompson* does not control the current appointment statutes. In the alternative, the Court should overrule *Thompson* to the extent necessary to conform to the statutes and constitutional principles.

2. The general rule is that appointive officers are removable at the pleasure of the appointing authority. However, statutes provide that some officers enjoy "for cause"

protection during the pendency of a fixed term. After the term expires, the default "at pleasure" removal again applies. That is consistent with what the constitutional separation of powers mandates.

Prehn served a fixed term that ended on May 1, 2021. Now that his term has expired, does Prehn continue to enjoy "for cause" tenure protection?

The circuit court answered "yes."

This Court should answer "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By accepting the petition for bypass, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

I. Factual background.

Governor Scott Walker appointed Prehn as a member of the Board on May 18, 2015, with a term expiring May 1, 2021. (R. 72:2.) On April 30, 2021, Governor Evers announced the appointment of Sandra Dee E. Naas and Sharon Adams to the Board, in anticipation of the vacancies that would be created by the expiring terms of Prehn and Julie Anderson on May 1. (*See* R. 17:7.) Anderson stepped down from the Board on April 14, 2021, and Adams filled the position left open by Anderson's resignation. (*See* R. 17:7–8.)

Prehn, however, refused to vacate his former office. (R. 72:2.) Rather, despite his fixed term having ended, Prehn continues to act as a Board member at monthly meetings, including by voting on Board matters affecting the policies and acts of the Department of Natural Resources (DNR). (*See* R. 72:2; *see also* R. 17:8.) Based on Prehn's and the Legislature's public comments and assertions in this

litigation, it is anticipated that Prehn plans to continue to exercise the Board officer duties indefinitely, until the Legislature is satisfied with a replacement. (*See* R. 19:10; 55:25 (noting Prehn's argument to remain in office indefinitely); *see also* Legis. Br. Opp'n Bypass 16 (asserting that Governor must "negotiate" with senate before provisional appointee can take office).) Some other board members are now following suit.[1]

II. Procedural background.

The State of Wisconsin, by its Attorney General, brought this action pursuant to Wis. Stat. § 784.04 to remove and exclude Prehn from the Board member office that he currently claims to occupy. (R. 2.) The State alleged that by refusing to allow Governor Evers's lawful appointee to take office, Prehn was violating the statutes governing appointments to, and removal from, state boards. (*See* R. 2:5–7.) As relief, the State sought a writ of quo warranto removing and excluding Prehn from the Board office he claims to occupy. (R. 2:7.) In the alternative, the State requested a declaration that the Governor may remove Prehn at pleasure since he no longer enjoys "for cause" tenure protection. (R. 2:7.) Based on the time sensitivity of the issues presented, the circuit court ordered expedited briefing and decision. (R. 6.)

In its expedited decision, the circuit court granted Prehn's motion to dismiss. (R. 72.) Despite recognizing "very good reasons for concluding a 'vacancy' occurs when a person's

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[1] *See, e.g.*, https://www.wtcsystem.edu/assets/4July-13-14-2021-WTCSB-Minutes.pdf (indicating that three former members of Wisconsin Technical College System Board—Levzow, Tourdot, and William—continued to act despite terms ending May 1, 2021; while provisional appointees—Rogers, Buhr—were present but not allowed to participate); *see also* Wis. Stat. §§ 15.07(1), 15.94 (technical college system board appointment provisions).

term is over," the court held that *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 125 N.W.2d 636 (1964), precludes that reading of the current statutes and thus precludes the Governor's provisional appointee from taking office until either Prehn chooses to step down or the Legislature chooses to confirm the Governor's provisional appointee.[2] (*See* R. 72:2, 6–14.) Thus, while acknowledging that both the language of current statutes and common sense support Prehn's exclusion, the court held that it was "bound by the holding of *Thompson v. Gibson* to conclude that there is no vacancy in the Board seat" and that Prehn could therefore remain, potentially for life. (R. 72:14; *see* R. 72:12–14.)

The court also held that despite the expiration of Prehn's term, he continued to be removable only "for cause." (R. 72:14–16 (citation omitted).) The court interpreted Wis. Stat. § 17.07, which governs the removal of officers, as drawing a distinction between officers who are appointed for a fixed term and those who are not. (R. 72:15.) The court concluded that if the office was initially filled for a fixed term, the individual possesses "for cause" protection indefinitely. (R. 72:16 (citation omitted).)

Finally, the court addressed the State's argument that the laws must be interpreted to avoid the constitutional problems of gutting the Governor's power to remove executive officers and providing the Legislature with effective control over removal. (R. 72:16.) The court found that "[t]hese

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[2] During briefing, the Wisconsin Legislature moved to intervene, which the circuit court denied. (*See* R. 8; 15; 58.) The court allowed the Legislature to submit briefing as an amicus. (R. 58:2.) The Legislature appealed the circuit court's interim decision denying its motion to intervene. *See Kaul v. Prehn*, Case No. 2021AP1610. That case is being held in abeyance pending this Court's disposition of the Legislature's intervention petition, which the Court recently granted.

arguments are compelling but unavailing," given its view that *Thompson* controlled the outcome of the case. (R. 72:17.)

This appeal followed.

STANDARD OF REVIEW

On review of a decision granting a motion to dismiss, an appellate court accepts as true the complaint's factual allegations, and reviews legal questions de novo. *See Serv. Emps. Int'l Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶ 26, 393 Wis. 2d 38, 946 N.W.2d 35. This appeal presents questions of law regarding the meaning of Wisconsin statutes, which are entitled to *de novo* review. *See id.*

SUMMARY OF THE ARGUMENT

Two independent statutory grounds mandate that Prehn must leave office. Each is compelled by statutory text and confirmed by statutory history, context, and common sense.

First, Prehn's fixed-term appointment expired on May 1, 2021, thereby creating the vacancy that Governor Evers filled by provisionally appointing Naas. Prehn's refusal to allow Naas to take office is directly contrary to statute and supports the writ of quo warranto.

Thompson, on which Prehn will likely rely and which the circuit court found binding, is not to the contrary. Most fundamentally, current statutes—not *Thompson*'s reasoning—control this case. Multiple statutory changes since then demonstrate that the expiration of Prehn's fixed term creates a vacancy and that the Governor lawfully appointed Naas to fill that vacancy. Reading *Thompson* as Prehn urges is inconsistent with current statutes, as well as established common-law principles articulated in cases long before *Thompson*. Those cases make clear that a vacancy *does* exist upon the expiration of a fixed term like Prehn's, where

there is no statutory holdover provision. Thus, *Thompson* does not support Prehn's continuation in office. However, if this Court were to disagree, then *Thompson* should be overruled to the extent necessary to conform to the current statutes and constitutional principles.

The second reason Prehn must leave office is because, now that his term is over, he no longer has "for cause" tenure and is removable at the Governor's pleasure. This is consistent with the statutory text, which grants "for cause" protection only to those officers presently serving a fixed-term appointment. It is also consistent with historical practice and common sense. Recognizing "for cause" tenure protection for an expired term would effectively insulate former office holders as long as they choose to remain in office.

If any doubt remained, the constitutional separation of powers would resolve it. Interpreting the statutes as Prehn urges would raise two impermissible problems of constitutional authority: prohibiting the chief executive from exercising removal authority over high-level executive branch officials whose terms have ended; and, at the same time, vesting that removal authority in the Legislature, which could maintain its preferred executive branch officials as long as it chooses. These impermissible constitutional encroachments are avoided by simply applying the appointment and removal statutes as written.

Prehn must leave office. The decision below should be reversed and judgment entered for the State, requiring Prehn to step aside and allowing Naas to begin her work as provided by the provisional appointment statute.

ARGUMENT

I. Prehn is unlawfully occupying the Board seat after his term expired and after the Governor lawfully appointed Naas.

A. Statutes governing state boards and appointments.

This case involves multiple statutes relating to the appointment of officers to fill seats on state boards. Those statutes concern four main topics: board-member appointments, officers' terms, filling vacancies, and provisional appointments.

First, the statute governing appointments to state boards provides that for departments under the direction and supervision of a board, members "shall be nominated by the governor, and with the advice and consent of the senate appointed, to serve for terms prescribed by law." Wis. Stat. § 15.07(1)(a). Relevant here, DNR is under the direction and supervision of the Board. Wis. Stat. § 15.34(1).

Second, Board members shall be "appointed for staggered 6-year terms." Wis. Stat. § 15.34(2)(a). For offices with fixed terms, like the Board here, members' terms "shall expire on May 1." Wis. Stat. § 15.07(1)(c).

Third, another set of statutes governs the procedures by which vacancies in appointive state offices are filled. The general rule is that "[v]acancies in appointive state offices shall be filled by appointment by the appointing power and in the manner prescribed by law for making regular full term appointments." Wis. Stat. § 17.20(1). Appointees to those state offices "shall hold office for the residue of the unexpired term or, if no definite term of office is fixed by law, until their successors are appointed and qualify." *Id.*

Fourth, for gubernatorial appointments like this one, another statute also applies, Wis. Stat. § 17.20(2)(a). Under

that statute, "[v]acancies occurring in the office of any officer normally nominated by the governor, and with the advice and consent of the senate appointed, may be filled by a provisional appointment by the governor for the residue of the unexpired term, if any, subject to confirmation by the senate." Wis. Stat. § 17.20(2)(a). The Governor's provisional appointment "shall be in full force until acted upon by the senate" and the "provisional appointee may exercise all of the powers and duties of the office to which such person is appointed during the time in which the appointee qualifies." *Id*. For these provisional gubernatorial appointments, the appointee "qualifies" for office simply by "fil[ing] the required oath of office." Wis. Stat. § 17.01(13).

B. Prehn's fixed term expired and the Governor's lawful appointment is now in full force.

When Prehn's term expired on May 1, the Governor's provisional appointment of Naas was "in full force." Wis. Stat. § 17.20(2)(a). The two governing statutes are supported by statutory history, canons of construction, case law, and common sense.

1. Statutory text mandates that the Governor's provisional appointee was entitled to assume office immediately upon expiration of Prehn's fixed term.

This case is controlled by the text of two current statutes. *Thompson*'s analysis of now-superseded law does not control.

a. The expiration of Prehn's definite fixed term created a vacancy.

The first principle requires little discussion: Prehn's definite, fixed term expired on May 1. The governing statute

includes no holdover provision and instead mandates unequivocally that Prehn's term "shall expire on May 1." Wis. Stat. § 15.07(1)(c).

Notably, this statute is different from some other appointment statutes that include express holdover provisions. For example, members of the council on recycling "shall serve a 4-year term expiring on the date that the next term of governor commences . . . or until a successor is appointed." Wis. Stat. § 15.347(17)(c). Local election officials "shall hold office for 2 years and until their successors are appointed and qualified." Wis. Stat. § 7.30(6)(a). Local weed commissioners "shall hold office for one year and until a successor has qualified or the [local executive] . . . determines not to appoint a weed commissioner." Wis. Stat. § 66.0517(2)(a). And first-class city commissioners serve for "5 years . . . and until a successor is appointed and qualified." Wis. Stat. § 62.50(1h); *see also, e.g.*, Wis. Stat. § 62.14(1) (allowing officeholders to hold over "until their successors are qualified").

"When the legislature uses different terms in a statute—particularly in the same section—[courts] presume it intended the terms to have distinct meanings." *Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2019 WI 24, ¶ 29, 385 Wis. 2d 748, 924 N.W.2d 153 (citation omitted). Likewise, it is a principle of statutory construction that "courts should not add words to a statute to give it a certain meaning." *State v. Neill*, 2020 WI 15, ¶ 23, 390 Wis. 2d 248, 938 N.W.2d 521 (citation omitted). "Rather, [courts] interpret the words the legislature actually enacted into law." *Id.* (citation omitted).

Here, both in Wis. Stat. ch. 15 and in other similar term-setting statutes, the Legislature has expressly authorized some appointments to hold over. No such authorization exists for appointees to the Board. That difference must be given effect.

Closely related statutes further support this distinction. Most notably, the procedure under the general appointment statute, Wis. Stat. § 17.20(1), provides that "appointees to fill vacancies [in appointive offices] shall hold office for the residue of the unexpired term or, if no definite term of office is fixed by law, until their successors are appointed and qualify." The statute thus distinguishes between offices with a definite, fixed term and those without one, such as those with express holdover provisions, noted above.

The absence of an express holdover provision underscores that when Prehn's term ended on May 1, 2021, it terminated his lawful possession of the office. The Governor has exercised his authority to appoint a provisional appointee to the vacant office, and so Prehn's continued occupation of that office is contrary to statute and unlawful.

The general vacancy statute states that "[e]xcept as otherwise provided, a public office is vacant when," and then lists 13 events. While the list does not specifically include the expiration of a fixed appointive term as creating a vacancy, the general statute's opening clause expressly recognizes that vacancies are also created by other statutes "as otherwise provided." *See* Wis. Stat. § 17.03 (intro.).

Here, the statutes do provide otherwise, dictating that Board members' six-year terms "shall expire" on May 1. Wis. Stat. §§ 15.07(1)(c), 15.34(2)(a). This vacancy is thus "otherwise provided" in the specific applicable statute.

As the statutes make clear, the time at which an appointive term expires depends on the particular office. Some appointive terms extend indefinitely "until a successor is appointed and qualified." *See* Wis. Stat. § 15.795(1). Others, while including an initial set term, do not actually expire and instead continue, for example, "for 2 years and until their successors are appointed and qualified" ("qualified" means

having taken the oath). *E.g.*, Wis. Stat. §§ 7.30(6)(a), 45.74(2), 66.0517(2)(a). Still other appointive terms continue at the pleasure of the appointing authority. *E.g.*, Wis. Stat. §§ 48.11(1), 59.35(1). And of course others, like that governing Prehn's here, do include a fixed, definite term that ends on a set date.

Given these different terms for appointive offices scattered throughout the code, the general vacancy statute leaves it to office-specific statutes to dictate when a vacancy arises in a particular appointive office as "provided" in those various statutes. *See* Wis. Stat. § 17.03. The statutes governing Prehn's former office do just that.

b. The provisional appointment statute mandates that the Governor's provisional appointment is "in full force until acted upon by the senate."

Following the expiration of Prehn's term, Governor Evers's appointee was immediately entitled to take office, as expressly provided in the gubernatorial provisional appointment statute.

Wisconsin Stat. § 17.20(2)(a) authorizes the Governor to use a procedure that is nearly unique among all appointing authorities under Wis. Stat. ch. 17.[3] Whereas Wis. Stat. ch. 17 includes appointment procedures for offices in counties, cities, towns, villages, and school boards, among others, *see, e.g.*, Wis. Stat. §§ 17.22, .23., .24, .26, .27, the provisional appointment statute provides a specific provision for gubernatorial appointees. Wis. Stat. § 17.20(2)(a). The statute provides that for an "officer normally nominated by the

[3] One other constitutional officer, the state superintendent, is authorized to use this procedure in a limited circumstance. *See* Wis. Stat. § 17.20(2)(b).

governor, and with the advice and consent of the senate appointed," the officer may instead be appointed "by a provisional appointment by the governor." *Id.* And once the Governor's provisional appointee takes the oath of office, the appointee "may exercise all of the powers and duties of the office." *Id.*; *see* Wis. Stat. § 17.03(13). Such provisional appointments by the Governor "shall be in full force until acted upon by the senate." Wis. Stat. § 17.20(2)(a).

It is unsurprising that the Governor has this unique authority. In our constitutional system of government, the Governor is unique. He is the chief executive, elected by the people to carry the laws into effect. This structure thus prevents gaps in offices when a term ends and, in addition, prevents separation of powers issues, as discussed in section III., *infra*.

The gubernatorial provisional appointment statute means Naas has an immediate right to perform the duties of the office that Prehn refuses to relinquish. Naas was appointed to fill the vacancy created by the expiration of Prehn's term—a "[v]acanc[y] occurring in the office of any officer normally nominated by the governor, and with the advice and consent of the senate appointed." *Id.* And Governor Evers provisionally appointed Naas "subject to confirmation by the senate," during which time her appointment "shall be in full force until acted upon by the senate." *Id.* During that time, she "may exercise all of the powers and duties of the office." *Id.*

By operation of statute, Prehn's term is over and Naas's provisional appointment is "in full force." *Id.*

2. Statutory history of the appointment and vacancy provisions further supports the straightforward interpretation of the current statutes.

The result dictated by the text also is consistent with the history of the appointment and vacancy statutes, which have changed over time, including after this Court's decision in *Thompson*, 22 Wis. 2d at 125, which the circuit court found controlling. *Thompson* does not control the current statutes or their key mechanisms.

When *Thompson* was decided, the Governor had two sources of provisional appointment authority: one was Wis. Stat. § 14.22 (1963–64), which provided that the Governor could make provisional appointments when the Legislature was "not in session." The other was then-existing Wis. Stat. § 17.20(2) (1963–64), which allowed the Governor to make provisional appointments to fill vacancies when the Legislature was *in recess*. So in 1964 the Governor had two avenues to make appointments if the senate failed to act on his nominations, but both relied on the Legislature's regular gaps in session.

In *Thompson*, the Governor sought to make such appointments. The Court held that the Legislature was "in session" at the time of the appointments, which meant that Wis. Stat. § 14.22 was unavailable. 22 Wis. 2d at 290. The Court also held that the Legislature was in "recess" at the times of the appointments, but some of the offices were not "vacant" under the prior version of Wis. Stat. § 17.20(2).

Importantly, after *Thompson*, the gubernatorial provisional appointment statutes were changed to eliminate recess appointments. *See* 1977 Wis. Laws ch. 418, § 78. That law repealed Wis. Stat. § 14.22 and amended Wis. Stat. § 17.20(2). Eliminating the recess appointment mechanism, the new statutes authorized the Governor to make provisional

appointments as a matter of course whenever there is a vacancy. Wis. Stat. § 17.20(2)(a).

As explained in the Legislative Reference Bureau's analysis accompanying the 1977 bill, the amendment "extends the power of the governor to make provisional appointments under the same circumstances regardless of whether the legislature is in recess." Analysis by Wis. Legis. Reference Bureau, LRB-9627 (available in drafting file for 1977 Wis. Laws ch. 418, Wis. Law Library, Madison, Wis.). In other words, "[u]nless the appointee is to replace an official who has not resigned and is serving for a fixed term which has *not yet expired*, the appointee may take office immediately." *Id*. (emphasis added).

The statutory change had two important effects. First, it eliminated the failsafe of recess appointments discussed in *Thompson*—where the Governor could make appointments when the senate failed to act on a nominee. Second, it added a new, expanded failsafe: the statutes now authorize the Governor to make provisional appointments *any time*, with those appointments "in full force until acted upon by the senate." Wis. Stat. § 17.20(2)(a).

That change superseded the statutory scheme analyzed in *Thompson*. Specifically, it removed the underlying concern that an office would remain physically vacant until the senate acted on the appointment, effectively creating a vacuum in public office. *See, e.g.*, *Thompson*, 22 Wis. 2d at 293–94 (discussing distinction between *de facto* and *de jure* officers).

The current version of the provisional appointment statute, enacted after *Thompson*, eliminates that possibility and ensures that as soon as a provisional appointee is named and qualifies, there will be no such vacuum. *Thompson*'s discussion of a fundamentally different statutory scheme thus does not control the analysis under the current statutes.

The different procedures in place further illustrates why *Thompson*'s interpretation does not control here. Under the older statutes, a governor could make provisional appointments when the Legislature was not "in session," so the longest the senate could stall a confirmation was until the end of its session, at which time the Governor's provisional appointments would "be . . . valid and effectual." Wis. Stat. § 14.22 (1963–64); *see also Thompson*, 22 Wis. 2d at 289–90. This had the effect of creating a constitutional safety valve, ensuring that the Governor had *some* opportunity to make provisional appointments without excessive interference by the Legislature in executive branch functioning.

That recess-appointment safety valve no longer exists, which makes it all the more important that the current provisional appointment statute be given proper effect. Projecting *Thompson*'s interpretation onto current statutes would transform a statute that now allows for immediate provisional executive appointments (thereby properly empowering the Governor) into one granting appointees the superpower of indefinitely holding onto an expired term (thereby improperly empowering an expired Board member and the senate). That makes no sense as a matter of statutory interpretation or separation of powers, and thus further counsels the straightforward interpretation discussed above.

Thompson also would not control for additional reasons, including a materially different vacancy statute from current Wis. Stat. § 17.03. That version of the statute did not include the "[e]xcept as otherwise provided" clause that now exists in Wis. Stat. § 17.03. This is significant because the court stated that, then, there was "no provision in [the vacancy] statute, or any other, providing that a vacancy exists when a lawful appointee holds over." *Thompson*, 22 Wis. 2d at 290–91. That is no longer true. Following *Thompson*, the vacancy statute was amended to include the "[e]xcept as otherwise provided" clause. *See* 1983 Wis. Act 484. With that addition, the statute

now expressly recognizes that other statutes may provide circumstances for vacancies—including those dictating that a Board member's term "shall expire on May 1." Wis. Stat. § 15.07(1)(c).[4]

3. Common-law principles and common sense further support the straightforward textual result.

Thompson did not even address—much less question or overrule—the longstanding common-law principle that an incumbent may not lawfully hold over in office where statutory language definitively limits the term of office and does not include an express holdover provision. *See, e.g.*, *State v. Feuerstein*, 159 Wis. 356, 150 N.W. 486, 488 (1915); *State ex rel. Martin v. Heil*, 242 Wis. 41, 48, 7 N.W.2d 375 (1942). Instead, the court's decision just *assumed* that the incumbents there were "lawfully holding over after expiration of [their] term[s]." *Thompson*, 22 Wis. 2d at 290.

Here, Prehn has no such express holdover authority, and common-law principles of vacancy and holdover undercut

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[4] The circuit court overlooked this distinction and instead focused on a different statutory provision, one found in the enumerated list of vacancy-creating events. (*See* R. 72:13.) That is, both the *Thompson*-era statute and the current general-vacancy statute (Wis. Stat. § 17.03) provide that a vacancy occurs where "any special provision of law" so states. (*See* R. 72:13 (discussing Wis. Stat. § 17.03(10) (1963–64) and Wis. Stat. § 17.03(13) (2019–20)). But this ignores the addition of the "except as otherwise provided" clause, discussed above. The circuit court's analysis would thus read that newer clause out of the statutes, rendering it surplusage, contrary to the bedrock principle in statutory interpretation. *See Arty's, LLC v. DOR*, 2018 WI App 64, ¶ 15, 384 Wis. 2d 320, 919 N.W.2d 590.

his position. Most notable is *State ex rel. Pluntz v. Johnson*, on which Prehn relied heavily below. *See* 176 Wis. 107, 184 N.W. 683 (1921), *judgment vacated on reh'g on other grounds by* 176 Wis. 107, 186 N.W. 729 (1922). *Pluntz* makes clear that even when there is a holdover, the office is nonetheless "vacant" for purposes of appointing a successor. *See* 184 N.W. 683. In *Pluntz* this Court explained that although a sheriff had "legally held over" pursuant to an express holdover provision, "there was nevertheless a vacancy in the office, and his title thereto after the expiration of the fixed and definite term was defeasible, and subject to be terminated *whenever an eligible and lawfully elected or appointed successor should qualify therefor*." *Id*. at 685 (emphasis added). *Pluntz* thus further supports the conclusion that the mere existence of a holdover does not defeat a successor taking office upon "qualification," like Naas has done here by taking the oath. *See* Wis. Stat. § 17.01(13).

This is illustrated further by reference to the common law concepts of *de jure* and *de facto* officers. As *Thompson* explained, only where there "is an express statutory provision for holding over after expiration of an appointive term" does an incumbent continue in office as "an officer *de jure*, and not *de facto*." *Thompson*, 22 Wis. 2d at 293–94; *see also, e.g.*, *State ex rel. Haven v. Sayle*, 168 Wis. 159, 169 N.W. 310 (1918). The authority on which the *Thompson* court relied—American Jurisprudence, *see* 22 Wis. 2d at 294—makes the same distinction. 43 Am. Jur. *Public Officers* § 484 (explaining that a former officer in Prehn's circumstances is *de facto*).[5]

The purpose of the *de facto* officer doctrine "is the continuity of governmental service and the protection of the

[5] The same rule is stated in the current edition of American Jurisprudence. 63C Am. Jur. 2d *Public Officers and Employees* § 34 (2d ed. Aug. 2021 update).

public in dealing with such officers, not to protect them from displacement by *de jure* successors." *Bradford v. Brynes*, 70 S.E.2d 228, 231 (S.C. 1952). While holdovers "are generally regarded as *de facto* officers and cannot be punished as intruders, . . . their temporary occupation of office does not prevent the existence of a vacancy and the filling of the office by the duly empowered authority." 67 C.J.S. *Officers* § 154 (Aug. 2021 update). Thus, a holdover like Prehn "in effect, occupies a technically vacant office until the next officer is appointed." *Romanoff v. State Comm'n on Judicial Performance*, 126 P.3d 182, 191 (Colo. 2006); *see also State ex rel. Ryan v. Bailey*, 48 A.2d 229, 231–32 (Conn. 1946) (explaining that officer without express holdover provision can stay on only as a *de facto* officer and "that his occupancy of the office does not prevent the existence of a vacancy to be filled by the authority duly empowered to do so") (citation omitted).

Thus, the common-law principles on which Prehn relied below (and which were identified in *Thompson*) do not support his continued usurping. He "has no right as against the one rightfully chosen [as] his successor," and the qualified officer is entitled to take possession of the office immediately. 43 Am. Jur. *Public Officers* § 486. When the law permits an immediate appointment to fill this vacancy, like Wis. Stat. § 17.20(2)(a) does here, that provisional appointment is valid and effective. *See, e.g., Byrnes*, 70 S.E.2d at 232 (explaining that "[t]he word 'vacancy' when applied to public offices is not employed in a technical sense," and that an office "may be vacant when it is occupied by one who is not a *de jure* officer, as by a mere usurper, or by one who is holding over") (citation omitted).

One additional point about *Thompson* bears mention, particularly as pertains to its interaction with common-law principles. As was observed in a contemporaneous Legislative Council Report, *Thompson* "resolved only the problems

relating to the specific appointments based on the existing facts. The many other appointments not included in [*Thompson* and a related case] . . . , as well as many basic problems, were left unresolved."[6] As explained above, many of those "basic problems" have since been addressed in the currently operative statutes.

In addition to those statutes and underlying common law principles, common sense also supports Prehn's ouster. If it were otherwise—that no vacancy arose when Prehn's term expired—that would create two fundamental problems. First, this would have the effect of nullifying the Governor's provisional appointment authority under Wis. Stat. § 17.20(2)(a) in situations like this. Despite a statute authorizing the Governor to appoint a replacement to immediately "exercise all of the powers and duties of the office" pending senate confirmation, *id.*, Prehn's view is that something more is needed to create a vacancy before that statute can be given effect. Throughout briefing below, Prehn was unable to explain why a "vacancy" arises only *after* the successor is confirmed under the provisional appointment statute—a gap in logic that the circuit court highlighted. (R. 72:11.) The clear, logical answer is that current statutes mandate that the vacancy arose on the expiration of Prehn's term.

The second practical problem with Prehn's view is that it would give former officers like him the right to remain in office at *his* and the senate's pleasure. The statutes say nothing about that (but the removal statute and separation of powers does, as discussed below). If a former officeholder like

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[6] 2 Wis. Legis. Council, Report, *General Report*, 110 (May 1965) (conclusions and recommendations of the judiciary committee), https://books.google.com/books?id=anEwAQAAIAAJ&printsec=frontcover#v=onepage&q&f=false (begins on page 516 of compiled document).

Prehn were not required to vacate, that holdover and a supportive senate could effectively commandeer the Governor's removal authority.

The Supreme Court of Hawaii rejected just such a result of allowing a holdover appointee to remain in office solely by virtue of the state legislature refusing to confirm the governor's interim appointee. *See Morita v. Gorak*, 453 P.3d 205, 215 (Haw. 2019). In rejecting a proposed interpretation of the statutes that would have allowed that result, the court highlighted the "substantial" constitutional problem of holding that the governor is simply "without recourse to replace a holdover commissioner if the legislature refuses to confirm a new appointment." *Id.* Fortunately, current Wisconsin statutes do not support such an absurd, anti-democratic result.

Over 100 years ago, this Court addressed just such an attempted usurpation of appointment power by the Legislature. In refusing to give effect to the Legislature's attempt to install a preferred candidate in the office of county judge, the Court held that the "power is not left with the Legislature in its discretion to appoint or elect all officers" as it chooses, and that "the continuance of a person in office by legislative interference, beyond the specific term for which he was elected or appointed, is equivalent to a new appointment to the office, and void if the office be one that the Legislature cannot fill by direct appointment or election." *State ex rel. Dithmar v. Bunnell*, 131 Wis. 198, 110 N.W. 177, 184 (1907) (quoting *O'Connor v. City of Fond du Lac*, 109 Wis. 253, 268, 85 N.W. 327 (1901)); *see also State ex rel. Hamilton v. Krez*, 88 Wis. 135, 59 N.W. 593, 594 (1894).

The plain language of the current statutes supports what common sense also dictates: an officer whose fixed term expired, and whose successor is statutorily authorized to perform her duties, must leave. This Court should rule accordingly.

C. If *Thompson* is read as authorizing Prehn's continued presence in office, this Court should overrule it.

For the reasons just discussed, this case can and should be decided on the text of current statutes, not *Thompson*'s interpretation of long-superseded ones. But if *Thompson* is read as authorizing Prehn's continued authority to remain in office, this Court should overrule it.

Wisconsin courts consider multiple factors when determining whether to overrule a previous decision, and require at least one of the following to be true:

> (1) Changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and consistency in the law; (4) the prior decision is "unsound in principle;" or (5) the prior decision is "unworkable in practice."

State v. Roberson, 2019 WI 102, ¶ 50, 389 Wis. 2d 190, 935 N.W.2d 813 (quoting *Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 2006 WI 91, ¶ 33, 293 Wis. 2d 38, 717 N.W.2d 216).

At least three of these factors support overruling *Thompson* if it were read as supporting Prehn's continued presence in office: (1) changes in the statutes undercut the rationale supporting the decision; (2) the decision is unsound in principle, particularly in light of pre-existing common law principles; and (3) the decision is unworkable in practice.

First, as just discussed, changes in the statutes since *Thompson* show that its rationale is no longer applicable, particularly for gubernatorial provisional appointments.

Second, *Thompson* is unsound in principle if it is read to mean that an officer like Prehn—with a fixed term and no holdover clause—can remain in office indefinitely despite the

existence of a qualified successor. As noted, this proposition was already questionable at the time *Thompson* was decided, based on the prevailing common-law rule. *See, e.g.*, *Pluntz*, 184 N.W. at 685 (recognizing that vacancy exists even where there is a lawful holdover, and that holdover's claim to office terminates upon appointment of qualified successor). The Court in *Thompson* made no effort to distinguish the common-sense rule as stated in *Pluntz*, which remains good law. Insofar as *Thompson* is read as conflicting with that longstanding common-sense rule (as well as current statutes), *Thompson* should give way.

Third, *Thompson* also is unworkable in practice if it is read to support the result Prehn urges. It is unworkable not only because it would conflict with current statutes, but also because it would support a result contrary to the separation of powers. As discussed *infra*, the separation of powers requires that the Governor have control over the removal of executive branch officers like Prehn, whose term is expired. This authority cannot be infringed by individual officers refusing to leave office or by the Legislature blocking the Executive's decision to replace an officer. *Thompson* did not address these serious concerns, perhaps because the recess-appointment statutes then in place limited the time for which the Executive's removal authority could be impinged. But now, under Prehn's view, *Thompson* would grant former officers like him and the senate *indefinite power* to defeat the Executive's prerogative. That unworkable result cannot stand.

In sum, while the State believes that this Court need not overrule *Thompson* to conclude that Prehn is unlawfully holding over, there exist multiple reasons to do so if the Court were to conclude that *Thompson* is a barrier to the correct answer here.

II. The statutes permit the Governor to remove Prehn at pleasure.

The foregoing resolves this case. However, there is a second, independent reason why ouster is appropriate: the statutes allow the Governor to remove Prehn at pleasure. If it were otherwise, Prehn could use his refusal to leave office as a superpower to keep a position, with tenure protection, after his tenure expired. That makes no sense and cannot be the correct meaning of the statutes.

A. Statutes and principles governing removal of executive officers.

The executive's power generally includes "the authority to remove those who assist him in carrying out his duties." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513–14 (2010). Removal power is critical to ensuring political accountability. *Id.* at 514; *see also, e.g.*, *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021).

These principles are reflected in Wisconsin statutes. In some instances, the statutes grant officers fixed-term tenure protection, in which case they can be removed only "for cause." But that protection has limits—it necessarily ends when the fixed term does. Otherwise, the default of removal at pleasure applies.

Wisconsin Stat. § 17.07 sets forth two standards for removing appointed state officers: (1) for cause and (2) at pleasure. "State officers serving in an office that is filled by appointment of the governor for a fixed term by and with the advice and consent of the senate, or serving in an office that is filled by appointment of any other officer or body for a fixed term subject to the concurrence of the governor," may only be removed by the Governor "for cause." Wis. Stat. § 17.07(3).

With just a few (inapplicable) exceptions, all other appointed officers may be removed at pleasure. This includes

officers appointed "to serve at the pleasure of the governor," appointed "for an indefinite term subject to the concurrence of the governor," and "serving in an office that is filled by appointment of the governor alone for a fixed or indefinite term or to supply a vacancy in any office." Wis. Stat. § 17.07(4)–(5). The law also includes a catch-all provision for "[o]ther state officers serving in an office that is filled by appointment of any officer or body without the concurrence of the governor," who may be removed "by the officer or body having the authority to make appointments to that office, at pleasure." Wis. Stat. § 17.07(6).

B. The removal statutes make Prehn immediately removable at the Governor's pleasure.

Under the plain language of the removal provisions, Prehn's tenure has expired and he is removable at the Governor's pleasure.

For an officer to have "for cause" tenure protection, he must be serving in a fixed term at the present time. The statute uses the present tense throughout: the officer must be "serving" in an office "that *is* filled . . . for a fixed term." Wis. Stat. § 17.07(3). As a result, the law requires that to have "for cause" protection, an office must currently be filled for a fixed term. Once that term is over, the protection goes with it. That present-tense construction is consistent with both basic rules of grammar and precedent interpreting similar phrases. *See, e.g.*, *Town of Somerset v. DNR*, 2011 WI App 55, ¶¶ 9–10, 332 Wis. 2d 777, 798 N.W.2d 282 (interpreting phrase "is located," concluding that "[b]y using a present tense verb form, the statute clearly specifies that the Department is to remit the payment to the municipality where the property is located at the present time"); *Mont v. United States*, 139 S. Ct. 1826, 1838 (2019) (reading phrase "is imprisoned" as present-tense, requiring a "real-time assessment"

consistent with colloquial use); *see also, e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003); *Stafford v. Briggs*, 444 U.S. 527, 535–36 (1980).

The plain language construction is confirmed by surrounding provisions. The statute contemplates that a single office may be "filled" in different ways depending on changing circumstances. For example, where an office "is filled" by gubernatorial appointment with the advice and consent of the senate "for a fixed term," the incumbent has "for cause" protection. Wis. Stat. § 17.07(3). But where an individual who later occupies that same office is "appointed by the governor during the recess of the legislature" or to "supply a vacancy," he may be removed at the Governor's pleasure. Wis. Stat. § 17.07(5).[7]

The same logic applies to Prehn's fixed term: once it was over, the office was no longer filled for a fixed term, and he cannot avail himself of "for cause" protection. Although his appointive term "was fixed and definite," his holdover period "was indefinite and uncertain." *Pluntz*, 184 N.W. at 686;[8] *see also State ex rel. Withers v. Stonestreet*, 99 Mo. 361, 899 (Mo. 1889) (holding that after expiration of fixed term, holdover officer could be removed at pleasure of the executive).

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[7] The circuit court overlooked the present tense construction of the law, effectively reading "is filled" to also include "was filled." (*See* R. 72:15–16.) That reading is not permitted by statutory language or everyday grammar. *See Debeck v. DNR*, 172 Wis. 2d 382, 388, 493 N.W.2d 234 (Ct. App. 1992) ("[T]he legislature has not provided that the use of the present tense in the statutes includes the past."). That is, although the office *was filled* by a fixed-term appointee during Prehn's term, it no longer is.

[8] On rehearing, this Court again affirmed the distinction between a fixed term and a holdover period. *See Pluntz II*, 186 N.W. 729.

The Governor may therefore remove Prehn immediately. His term is over and so he is removable at pleasure. The job he was appointed to do ended; it makes no sense to require more "cause" than that, nor do the statutes require anything more.

C. Statutory history and context further demonstrate that "for cause" protection terminates at the end of a fixed term.

The text of the removal statutes reflects the development of the removal power over time. "[F]or cause" protection is an exception to the longstanding general rule that executive officers are removable at the will of the appointing authority. *See*, *e.g., In re Hennen*, 38 U.S. 230, 259 (1839) (holding that even when senate has advice-and-consent role in appointment, the incidental power of removal is "vested in the President alone"); *Free Enter. Fund*, 561 U.S. at 509 (finding that once removal restrictions were struck as invalid, appointee was removable at will of appointing power).

In turn, where there are exceptions of "for cause" protection, they are not unlimited: "[i]t is fixity of tenure that destroys the power of removal at pleasure otherwise incident to the appointing power." *State ex rel. Nagle v. Sullivan*, 40 P.2d 995, 998 (Mont. 1935) (quoting *State ex rel. Mosconi v. Maroney*, 90 S.W. 141, 147 (Mo. 1905)). That justification has no power once an officer's specified term has ended.

Statutory history confirms these mechanisms in Wisconsin law. When the phrase "fixed term" was added to the "for cause" removal provision, the explanatory notes observed that the change "provides, in accordance with the presently accepted understanding of the situation, that appointees who serve for a fixed term and whose appointments required senate confirmation may not be removed by the governor *in mid-term* unless a showing of

cause is made." Department of Administration, Explanatory Notes for Statutory Changes Appearing in the 1980 Annual Review Bill, Appendix to 1980 Assembly Bill 1180 (available in drafting file for 1979 Wis. Laws ch. 221, Wis. Law Library, Madison, Wis.); *see also* Analysis by Wis. Legis. Reference Bureau, LRB-9352 (available in drafting file for 1979 Wis. Laws ch. 221, Wis. Law Library, Madison, Wis.) (same).

Developments in the removal law highlight why this is correct. Under the removal law in effect when *Thompson* was decided, every officer who was "appointed by the Governor by and with the advice and consent of the senate" had "for cause" protection. Wis Stat. § 17.07(3) (1963–64). As noted, the law was later amended in 1979 to create the critical division between individuals serving a "fixed term" and those that are not. 1979 Wis. Laws ch. 221, §§ 85–88 (adding "for a fixed term" to Wis. Stat. § 17.20(3) and creating subsection (4)). Under the current version of the law, Prehn's "for cause" protection stopped when the office was no longer filled "for a fixed term." Wis. Stat. § 17.07(3). That statutory change must be given effect. *State ex rel. DNR v. Wis. Court of Appeals, Dist. IV*, 2018 WI 25, ¶ 38 n.16, 380 Wis. 2d 354, 909 N.W.2d 114 ("[W]hen the legislature changes the structure of a statute, we must construe it anew.").

Further support is evident in the context of the appointment and removal provisions. The senate has the power of advice and consent for certain appointees, but the appointment and removal powers remain an executive function. *See* Wis. Stat. § 15.07(1). By establishing "for cause" protection for "fixed term" officials, the law temporarily insulates certain officers who are serving for a limited, fixed duration. *See* Wis. Stat. § 17.07(3). Extending that protection to holdover officials—especially someone like Prehn, who was appointed to a position that lacks a specific holdover provision, Wis. Stat. § 15.34(2)(a)—would curb both the

Governor's removal power and the appointment power, allowing the senate to choose candidates through inaction.

That is not authorized by the statutes or our system of government. *See, e.g.*, *Seemann v. Kinch*, 606 A.2d 1308, 1312 (R.I. 1992) ("The Senate cannot postpone its confirmation decision indefinitely by such delay in action in confirming or prevent the Governor from making an interim appointment because the Senate would then possess more power and control over the selection process."). Rather, the statutes sensibly create a fixed term position of limited duration, and limit the "for cause" tenure protection to it. *See Metivier v. Town of Grafton*, 148 F. Supp. 2d 98, 104 (D. Mass. 2001) (finding extension of "for cause" tenure protection to holdover official would render meaningless "designation of her three-year term").

At best, Prehn's position could be analogized to an officer serving an indefinite term without the concurrence of the Governor—who would be removable "at any time" or "at pleasure." Wis. Stat. § 17.07(4), (6). And the Governor has decided not to keep him, having already appointed someone else who currently has the right to the office. For this additional reason, Prehn must vacate it.

III. Interpreting the statutes as Prehn urged below would violate the separation of powers.

There are two independent statutory reasons that Prehn should be removed from office: (1) by statute, his term is over, his office is vacant, and the Governor's provisional appointee has a right to it; and (2) with his fixed term having expired, Prehn no longer enjoys "for cause" tenure protection and is removable at the Governor's pleasure. The statutes, by their terms, require both of those results, and the Court may stop there.

However, if there were any doubt about adopting that interpretation, it would be resolved by a final

consideration: the separation of powers requires it. When interpreting statutes, courts "should avoid interpreting a statute in such a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional." *Am. Family Mut. Ins. Co. v. DOR*, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998). This canon would apply here because Prehn's view of the law is unconstitutional.

Like in the federal system, the separation of powers is a bedrock of Wisconsin's system of democratic, divided government. Here, it requires that the chief executive be able to act as the head of the executive branch. Central to that power is the authority to remove executive officers where the officer's term expired. Prehn's contrary approach is untenable under that framework.

A. The structure of the Board in the executive branch.

The Board's executive officers oversee and control, together with the DNR Secretary, various acts and decisions of DNR.

DNR and the Board are creatures of Wis. Stat. ch. 15, titled "Structure of the executive branch." DNR is a "principal administrative agency within the executive branch of Wisconsin state government." Wis. Stat. § 15.01(5). In other words, DNR, along with certain other departments, is a core executive agency. *See* Wis. Stat. §§ 15.02(2), .34(1).

A "department" may be "headed by," for example, "a secretary" or "a board." Wis. Stat. § 15.02(2). When a board heads a department, it functions as the "policy-making unit." Wis. Stat. § 15.01(1r). Generally, a "board shall be regulatory, advisory and policy-making, and not administrative"; it also approves the promulgation of rules. Wis. Stat. § 15.05(1)(b). Among other things, department heads may "plan, direct, coordinate and execute the functions vested in the

department," compile a budget, and engage in various other functions and duties. Wis. Stat. § 15.04(1)–(1)(a).

DNR's "head" is divided in two. It has a secretary that exercises certain duties, as well as a board that also exercises certain of those duties. Wis. Stat. §§ 15.05(1)(c), 15.07(1). Both the secretary and the board members are appointed by the Governor. *Id*. Here, the Board's role is "the direction and supervision" of DNR. Wis. Stat. § 15.34(1). DNR oversees a significant swath of the code touching on fish, wildlife, forests, parks, and water resources. *See, e.g.*, Wis. Stat. chs. 16, 26–31, 33, 281.

B. Separation of powers principles.

1. It is exclusively the province of the executive branch to take care that the laws are faithfully executed.

The separation of powers plays a fundamental role in Wisconsin's governmental structure. The Legislature's authority is "the power to make the law," whereas the executive's authority is "executing the law." *SEIU*, 393 Wis. 2d 38, ¶ 95. The distinction is "the difference between the power to prescribe and the power to put something into effect." *Id.*

That distinction is constitutional: Wisconsin's constitution "vests executive power in the governor," *id.* ¶ 60, and it is the executive's "exclusive province to 'take care that the laws be faithfully executed.'" *Id.* ¶ 87 (quoting Wis. Const. art. V, § 4). Thus, under our constitution, the chief executive "must determine for himself what the law requires (interpretation) so that he may carry it into effect (application)." *Id.* ¶ 96 (citation omitted).

2. The acts of executive officers are a manifestation of the chief executive, and the Legislature may not intrude into their oversight.

While the constitution "places primary responsibility on the governor to see that the laws are faithfully executed," it is administrative officers that carry out executive functions. *Id.* ¶ 60; *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (explaining parallel principles in the U.S. Constitution, that "the Framers expected that the President would rely on subordinate officers for assistance").[9]

Not only are administrative agencies "part of the executive branch," but they are "one manifestation of the executive." *SEIU*, 393 Wis. 2d 38, ¶ 97 (citation omitted). Thus, in general,[10] when an administrative agency acts, "it is exercising executive power." *Id.*

Applying these principles in *SEIU*, this Court addressed a statute that required executive agencies to identify laws that support those agencies' written guidance and to follow certain procedures when creating "guidance documents." *Id.* ¶ 90. That was unconstitutional: "the executive's mind with respect to the law he is to execute" concerns a "core power" on which the Legislature could not

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[9] This Court has recognized on multiple occasions that principles related to the separation of powers under the U.S. Constitution "inform [Wisconsin courts'] understanding of the separation of powers under the Wisconsin Constitution." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384); *accord League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 31, 387 Wis. 2d 511, 929 N.W.2d 209.

[10] The exception is that the Legislature may pass laws dictating certain authority and procedures for agency rulemaking, as that is a delegated legislative act. *SEIU*, 393 Wis. 2d 38, ¶ 79. But there are limits even then: an "endless suspension of rules could not stand." *Id.* ¶ 81.

intrude. *Id.* ¶¶ 102, 104–05. It is the executive's "inseparable" "constitutionally-vested power," *id.* ¶ 106, to "be clearly satisfied as to the meaning of . . . a law" and "to see that the subordinate officers of his department conform with fidelity to that meaning." *Id.* (quoting *Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 600 (1838)). Restated, the Legislature cannot be "a gatekeeper between the analytical predicate to the execution of the laws and the actual execution itself." *Id.* ¶ 107. If it were otherwise, the Legislature would "control the execution of the law itself." *Id.*

3. The chief executive's power to remove an executive officer after his term has expired cannot be limited to for-cause removal.

A necessary corollary to these principles is that a legislative body cannot limit a chief executive's authority to remove executive officers where, as here, the officer's term expired.

This Court has long recognized that appointments are generally "within the executive function." *State ex rel. Gubbins v. Anson*, 132 Wis. 461, 112 N.W. 475, 479 (1907). This is true of officers of the Board, who, like DNR's Secretary, are appointed by the Governor. Wis. Stat. §§ 15.05(1)(c), 15.07(1). Indeed, this Court has recognized the Governor's appointment power of cabinet secretaries as quintessentially executive. *SEIU*, 393 Wis. 2d 38, ¶ 97 n.8 (citing Wis. Stat. § 15.05(1)(a)).

Removal power for executive officers is even more fundamental. A restriction on removal "is a much greater limitation upon the executive branch, and a much more serious blending of the legislative with the executive, than a rejection of a proposed appointment." *Myers v. United States*, 272 U.S. 52, 121 (1926). In both Wisconsin and the federal system, the chief executive must ultimately be able to remove

officers "who have 'different views of policy'" or in whom he lacks confidence. *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (citation omitted).

Courts continue to recognize that the removal power is "vital" and part-and-parcel to our democratic system of "electoral accountability." *Id.* at 1784. For example, in *Collins*, the U.S. Supreme Court invalidated for-cause protection during the *pendency* of an executive officer's 5-year term. *Id.* at 1770–71. The for-cause protection was invalid because the "removal power helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch, and it works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote." *Id.* at 1784; *see also SEIU*, 393 Wis. 2d 38, ¶¶ 60, 87, 96–97, n.8.

Similarly, in *Seila Law*, the U.S. Supreme Court explained that the separation of powers is violated where a chief executive "may not have any opportunity to shape [the agency's] leadership and thereby influence its activities"—for example, where an "unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set against that agenda." *Seila Law LLC*, 140 S. Ct. at 2204. Thus, a chief executive's removal power "is the rule, not the exception." *Id.* at 2187.[11]

[11] As discussed *infra*, the U.S. Supreme Court has recognized only two limited exceptions, neither of which apply here, and has "declined to extend those limits to 'a new situation.'" *Seila Law LLC*, 140 S. Ct. at 2198.

4. The Legislature cannot control the executive's removal power.

Another vital principle is that the legislative branch "cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." *Bowsher v. Synar*, 478 U.S. 714, 715 (1986). A different rule would vest with a legislature "control over the execution of the laws." *Id.* at 726. This Court also has long recognized as much: "the continuance of a person in office by legislative interference, beyond the specific term for which he was elected or appointed, is . . . void if the office be one that the Legislature cannot fill by direct appointment or election." *State ex rel. Dithmar*, 110 N.W. at 184 (citation omitted).

This implicates the Founders' fears that the legislative branch "will aggrandize itself at the expense of the other two branches." *Bowsher*, 478 U.S. at 727 (citation omitted). Thus, the clear rule is that the legislative branch's "participation in the removal of executive officers is unconstitutional" under separation-of-powers principles. *Id.* at 725.

C. Interpreting the statutes to allow Prehn to continue serving after his term expired, contrary to the wishes of the chief executive, would violate the separation of powers.

Prehn's view of the law would violate separation of powers in two independent ways: (1) it unlawfully prevents the Governor from removing an executive officer after his term has expired; and (2) it unlawfully puts the power of removal in the hands of the Legislature.

1. Prehn's view would unconstitutionally prohibit the chief executive from removing, at pleasure, executive officers whose terms have expired.

The Governor has the exclusive power of removal of executive officers like Prehn, unless one of two narrow exceptions apply. *Seila Law LLC*, 140 S. Ct. at 2187, 2198. The two recognized exceptions are seen as "the outermost constitutional limits" of restrictions on the chief executive's removal power. *Id.* at 2199–200 (citation omitted). Neither applies here.

First, removal may be restricted during a set term when the officer is "inferior," meaning they lack "policymaking" authority and are otherwise limited in their duties and jurisdiction. *Id.*; *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988) (stating that inferior officers have narrowly limited duties and jurisdiction and do not formulate policy). Board officers have none of the qualities of an inferior officer. Rather, by statute, Board members are co-heads of DNR, and exercise "policy-making," "regulatory," and "supervis[ory]" authority. Wis. Stat. §§ 15.01(lr), 15.05(1)(b), 15.07(1), 15.34(1).

Second, removal may be restricted for certain multi-member boards, as in *Humphrey's Executor*. But, among other differences, *Humphrey's* concerned removal restrictions *during* a fixed term. *Humphrey's Ex'r v. United States*, 295 U.S. 602 629 (1935) (discussing the power to set a term and limit removal "in the meantime"). Further, the *Humphrey's* Court understood its exception to apply only to an officer "who occupies no place in the executive department and who exercises no part of the executive power." *Id.* at 628.

The logic of this exception has no application when the officer is squarely in the executive department,

see Wis. Stat. § 15.01(5),[12] much less when he insists on staying *after* his term expires. Restricting removal *during* a fixed term may sometimes be tenable because multi-member boards have recurring openings, and the executive can gradually assert his view by replacing the old members as their terms end. But when those members refuse to leave after their term ends, limiting their removal runs headlong into the separation-of-powers problem: a chief executive "may not have any opportunity to shape [the agency's] leadership and thereby influence its activities," especially if "saddled with a holdover Director from a competing political party." *Seila Law LLC*, 140 S. Ct. at 2204.

If Prehn were correct, the Governor could be indefinitely saddled with a critical mass of Board members that do not share his view on executing the law. That system ceases to reflect the democratic principles embodied in the separation of powers. *See SEIU*, 393 Wis. 2d 38, ¶¶ 87, 106; *see also Collins*, 141 S. Ct. at 1784. The Governor must have the authority to remove, at pleasure, an executive officer whose term has expired.

The *SEIU* decision demonstrates just how far afield Prehn's contrary view is. The guidance-document law addressed there unlawfully intruded into a core executive power, with the Court recognizing that if the Legislature would "regulate the necessary predicate to executing the law, then the legislature can control the execution of the law

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[12] *Humphrey's* addressed an apolitical board thought to exercise "no part of the executive power," but rather only authority to make reports and recommendations to the legislature and judiciary. *Seila Law LLC*, 140 S. Ct. at 2198–99 (citation omitted). Here, however, the Board is co-head of a principal executive agency with "policy-making," "regulatory," and "supervis[ory]" authority. Wis. Stat. § 15.01(1r), 15.05(1)(b), 15.34(1). And, unlike in *Humphrey's*, the governor appoints all members of the Board without regard to party-based restrictions. Wis. Stat. § 15.07(1).

itself." *SEIU*, 393 Wis. 2d 38, ¶ 107. In other words, the encroachment there was one step removed from executive action, but unlawful all the same.

Here, Prehn's proposed encroachment is direct: prohibiting the chief executive the power to "control the execution of the law itself" because the officers executing it are beyond his reach, indefinitely. *Id.* The unlawfulness of that premise is not a close call.

2. Prehn's view also would violate the separation of powers by granting legislative oversight in the removal of an executive officer.

A related but independent problem with Prehn's theory is that it allows the Legislature to participate in removal. That also is not allowed.

Legislative control over removals is a more serious limitation upon the executive branch than a rejection of an executive's appointment. *See Myers*, 272 U.S. at 121. For that reason, there is a clear rule: the legislative branch "cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." *Bowsher*, 478 U.S. at 715. Rather, the Legislature's "participation in the removal of executive officers is unconstitutional." *Id.* at 725.

Prehn's theory violates that rule. Prehn would have it that he can continue to serve on the Board until the Legislature chooses to confirm his replacement, which has no time limit. In Prehn's view, if the Legislature decides not to confirm a replacement, he could serve indefinitely, as could any other board member whose term ends. The Board's makeup—and its policy views—would remain static at the pleasure of the Legislature.

Further, in the system Prehn has conceived, a Board member may go out of his way to conform to the *Legislature's* preferences, just to keep his job longer.[13] *See id.* at 726–27 (describing similar ills). So long as the Legislature likes Prehn's policy views, it could keep this up, relenting only if presented with an appointee who mirrors the Legislature's views about how the laws should be executed.

Prehn's preferred system would therefore do grave violence to the separation of powers, which allows for no legislative role in removals. *See*, *e.g.*, *SEIU*, 393 Wis. 2d 38, ¶¶ 60, 87, 96–97, 106–07; *State ex rel. Dithmar*, 110 N.W. at 184; *Collins*, 141 S. Ct. at 1784, 1787; *Bowsher*, 478 U.S. at 726; *Myers*, 272 U.S. at 121–22. It brings to mind the Founders' worry that the legislative branch, if left unchecked, "will aggrandize itself at the expense of the other two branches." *Bowsher*, 478 U.S. at 727 (citation omitted). Prehn's interpretation is forbidden under the separation of powers, and no proper statutory construction can adopt it.

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[13] For example, it has been reported that Prehn consulted with legislative leaders' offices and lobbyists when deciding to remain in office past his fixed term. Associated Press, *Emails: DNR Board Chairman Consulted With GOP About Staying*, U.S. News (Aug. 30, 2021, 12:48 p.m.), https://www.usnews.com/news/best-states/wisconsin/articles/2021-08-30/emails-dnr-board-chairman-consulted-with-gop-about-staying.

CONCLUSION

The circuit court's decision should be reversed and this Court should hold that the State is entitled to a writ of quo warranto excluding Prehn from the office of Board member. In the alternative, the Court should direct the circuit court to declare that Prehn is subject to immediate removal by the Governor at his pleasure.

Dated this 16th day of December 2021.

Respectfully submitted,

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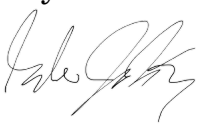

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,479 words.

Dated this 16th day of December 2021.

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I hereby certify that:

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