STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2021AP001673

STATE OF WISCONSIN ex rel. JOSHUA L. KAUL,

Plaintiff-Appellant,

v.

FREDERICK PREHN,

Defendant-Respondent,

WISCONSIN LEGISLATURE,

Intervenor-Defendant-Respondent.

On Appeal from Dane County Circuit Court
The Honorable Valerie L. Bailey-Rihn, Presiding
Dane County Case No. 2021CV001994

NON-PARTY BRIEF OF THE HUMANE SOCIETY OF THE UNITED STATES AND THE CENTER FOR BIOLOGICAL DIVERSITY

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INTRODUCTION

The case for Frederick Prehn's removal from office is simpler than the circuit court and the parties to this case suggest. The State's *quo warranto* claim presents just one question: does Prehn "unlawfully hold or exercise" his former position on the Natural Resources Board today, more than eight months after the expiration of his statutorily defined term?

No detour through the vacancy statute in Wisconsin Statute chapter 7 is necessary. Prehn is unlawfully occupying his office even if, as the circuit court found, it is not statutorily vacant. At most, the vacancy statute speaks to whether the Governor may invoke his special interim appointment powers to install a successor on the board *before* Prehn leaves office. But this case is not about appointing Prehn's successor; it is about Prehn unlawfully occupying his office.

State ex rel. *Thompson v. Gibson* likewise distracts from the basic question presented by this case. 22 Wis. 2d 275, 125 N.W.2d 636 (1964). It addressed the validity of recess appointments made to fill seats occupied by officials holding over. The presence of holdovers may bear a superficial resemblance to this case, but the question before the *Thompson* court was whether the recess appointments were valid, not whether the underlying holdovers were lawful. This Court need neither overrule nor reconcile *Thompson*, because it is irrelevant to the inquiry into the lawfulness of Prehn's holdover under the *quo warranto* statute.

That inquiry should begin and end with the statutes governing appointments to state boards and establishing term limits for Natural Resources Board members in Wisconsin Statute chapter 15, which inescapably establish that Prehn is unlawfully occupying his office and should be removed pursuant to a writ of *quo warranto*.

STATEMENT OF INTEREST

Amicus curiae Humane Society of the United States ("HSUS") is a non-profit organization founded in 1954 dedicated to protecting all animals, including wolves and other wildlife. The HSUS is the nation's largest animal protection organization and has regional offices and state directors located throughout the country, including a Wisconsin State Director working exclusively on issues that impact the organization's thousands of members and supporters in Wisconsin. The HSUS works on behalf of its members and supporters to ensure that Wisconsin's wildlife is responsibly, humanely, and scientifically managed for its constituents, other members of the public, and many future generations to enjoy.

Amicus curiae Center for Biological Diversity (the "Center") is a nonprofit organization with more than 1.7 million supporters—including about 20,000 in Wisconsin–concerned with the increasing rate of extinction and loss of biological diversity in the United States. For more than 30 years, the Center has advocated for science-based conservation of imperiled wildlife and plants, including gray wolves and other rare animals that live in Wisconsin.

Amici have frequently appeared before the Wisconsin Natural Resources Board ("NRB") in the course of their advocacy, given the NRB's responsibilities for and oversight of state wildlife management. For example, *Amici*'s staff and volunteers have attended and testified at NRB meetings, and *Amici* have also frequently mobilized their members and supporters in Wisconsin to submit comments to the NRB. *Amici* have a strong interest in NRB governance and apolitical natural resource management.

Pursuant to Wis. Stat. § 784.04(1), *Amici* filed a complaint with the Attorney General's office on July 20, 2021, requesting that he bring a *quo warranto* action.[1] *Amici* alleged that Defendant-Respondent Frederick Prehn ("Prehn") was unlawfully occupying and exercising the powers of a public office and explained the legal and factual basis for their allegations, including interpretations of statute and case law.

ARGUMENT

Prehn can and should be removed through a writ of *quo warranto* even if the state office he unlawfully occupies is not vacant, because 1) vacancy is not a precondition for removal, 2) *Thompson* is inapposite, and 3) the plain text of the statutes governing NRB appointments make clear that Prehn is unlawfully occupying his position long after the expiration of his term.

[1] The Legislature suggests, without support, that the governor's office orchestrated this action. (Leg. Br. at 40.) In fact, the Attorney General may bring a *quo warranto* action "upon his or her own information" or, as here, "upon the complaint of any private party." Wis. Stat. § 784.04(1).

I. A Writ of Quo Warranto Should Issue Regardless of Whether Prehn's Office is Statutorily "Vacant"

Quo warranto actions provide for the remedy of removal "when any person shall usurp, intrude into or unlawfully hold or exercise any public office." Wis. Stat. §§ 784.04(1)(a), 784.13. The circuit court incorrectly reasoned that if no "vacancy" existed within the meaning of the state vacancy statute, then Prehn's occupation of his office past the expiration of his statutorily defined term cannot be unlawful. (R. 72:11) ("[W]ithout a vacancy, an official cannot be removed..."). On appeal, Prehn and the Legislature repeat this premise. (Leg. Br. at 16, Prehn Br. at 15.) Doing so misreads both the *quo warranto* and vacancy statutes, obfuscating what should be a straightforward inquiry. Whether Prehn is unlawfully occupying a state office and whether that office is vacant are two distinct questions. The circuit court erred in conflating them, and Prehn and the Legislature invite this Court to repeat that error.

The text and history of the *quo warranto* statute makes this clear. It directs a reviewing court to determine the "right of the defendant" to hold the office at issue – not to determine whether the office is vacant. Wis. Stat. § 784.08.[2] Indeed, the *quo warranto* statute does not even mention "vacancy," "vacant," or any variation of these terms. *Id.* §§ 784.01-13. The original *quo warranto* statute (codifying the common law writ) was adopted in 1856. 1856 Wis. Laws ch. 120, § 331. Since its original adoption in 1848, the constitution has vested the Legislature with the

[2] The reviewing court may, but is not required to, adjudicate "the right of the party...alleged to be entitled" to the public office at issue. Wis. Stat. § 784.08.

power to "declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in this constitution." Wis. Const. art. XIII, § 10. Had the Legislature intended to reduce the venerable *quo warranto* action to a mere judicial enforcement mechanism for statutorily defined vacancies, it could have done so in 1856 (or any of the seven times the statute has been amended since then). *See Heritage Farms v. Markel Ins.,* 2009 WI 27, ¶ 40, 316 Wis. 2d 47, 762 N.W.2d 652, *reconsid. denied* ("We generally presume that when the legislature enacts a statute, it is fully aware of the existing laws.")

So too with the vacancy statute. It does not—and does not purport to—universally enumerate *every* circumstance in which a state, county, or local official might be unlawfully holding or usurping public office. Instead, it is best read as covering only limited, special circumstances, addressing the need for a special, streamlined procedure to install successors in those cases. These circumstances include an incumbent's death, removal from office, or conviction for a serious crime. Wis. Stat. § 17.03. Should a sitting state official pass away or move out-of-state, for example, the vacancy statute provides mechanisms to appoint interim and permanent replacements for the remainder of their unexpired term. *Id.* §§ 17.03, 17.20 (filling vacancies in appointive state offices). Section 17.03, then, is most naturally read as a list of circumstances where the special appointment provisions provided in Sections 17.18 to 17.27 are available. But nothing in the statute supports Prehn's and the Legislature's premise that Section 17.03 functions as an exhaustive recitation

of every way in which a person could "usurp, intrude into or unlawfully hold or exercise any public office" within the meaning of the *quo warranto* statute. Wis. Stat. § 784.04(1)(a).[3]

Moreover, reading the statutes together illustrates that they are meant to address categorically different situations. The *quo warranto* statute provides a means to adjudicate the title of an alleged usurper or unlawful occupier to the public office they claim. The vacancy statute addresses conditions that, on the whole, are not nefarious or unlawful so much as circumstantially unfortunate or inconvenient: death, incapacitation, relocation out-of-state, or simple cold feet about accepting an office. Wis. Stat. § 17.03. It would thus be nonsensical to read the vacancy statute as defining the entire range of situations where *quo warranto* removal could issue.

This is not to suggest that there is no overlap between the vacancy statute and the *quo warranto* statute. For example, the office of a state legislator who no longer maintains residency in her district would unquestionably be statutorily vacant. Wis. Stat.

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[3] The Legislature points to a provision in the vacancy statute providing that a vacancy exists for an *elective* office when "the incumbent's term expires, [with certain exceptions]," contrasting this against the absence of a similar provision for *appointive* offices to argue that Prehn is lawfully holding over. (Leg. Br. at 17 (*citing* Wis. Stat. § 17.03(10)). First, this is irrelevant, since – as discussed above – vacancy and unlawful occupation of a state office are not coextensive, and Prehn's holding over past his statutory term limit provides an independent and sufficient basis to remove him. Second, there is a better reading of this subsection that is more sensitive to the context and purpose of the vacancy statute. Section 17.03(10) specifies a vacancy in an *elected* office after expiration of term—which would only occur if a successor has not been elected yet through ordinary processes—because a provisional appointee may be needed to fill the vacancy until a special election can be held. This concern does not apply to *appointive* offices where no special election is required.

§ 17.03(4)(b). If she nevertheless continues to occupy her office, a *quo warranto* action might provide a vehicle to adjudicate the question of her residency and order her removal.

But case law shows that while vacancies generate *some* of the circumstances where persons may be ousted for unlawfully occupying state office, they do not account for *all* of them. Officials can—and historically have been—removed from office in *quo warranto* actions even where their offices were not statutorily vacant. For example, this Court has affirmed the ouster of officials for failing to meet statutory qualifications for their office,[4] for irregularities in the votes leading to their election to office,[5] and where the statutes creating their office were constitutionally invalid.[6] None of these circumstances constituted a vacancy at the time, nor would they under the Legislature's and Prehn's (collectively, "Respondents") narrow reading of the contemporary vacancy statute. Wis. Stat. § 17.03. Yet the court affirmed ouster in each case because defendant had nevertheless usurped or unlawfully occupied their office by violating other statutes governing the position.

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[4] *See Fordyce v. State*, 115 Wis. 608 (1902) (affirming ouster of a county superintendent of schools who did not possess the statutorily specified minimum experience and certification qualifications for the position); *see also State v. Pierce*, 191 Wis. 1 (1926) (affirming ouster of Buffalo County judge for failing to meet statutory requirement of admission to practice in the state courts of Wisconsin).

[5] *See State v. Mott*, 111 Wis. 19 (1901) (affirming ouster of school commissioner where the vote culminating in his election did not conform with procedures set out in the city charter); *see also State* ex rel. *Curran v. Palmer*, 24 Wis. 63 (1869) (denying demurrer in *quo warranto* action alleging illegal votes).

[6] *See State* ex rel. *Walsh v. Dousman*, 28 Wis. 541, 548 (1871) (ousting Milwaukee County auditor where statute creating office was unconstitutional).

These cases rebut Respondents' insistence that judicial removal of an official in a *quo warranto* action cannot issue absent a statutory vacancy. So too does common sense. In Respondents' view, the State and the people would be left with no judicial remedy to redress even the most patently unlawful usurpations of state office, so long as they were not among the list enumerated in Section 17.03.

For these reasons, this Court can and should order Prehn's removal from office, or remand to the circuit court to do so, even if it is persuaded that Prehn's seat is not vacant. At most, the absence of a vacancy only means the Governor cannot install an interim successor using his powers under the vacancy statute at this time. Wis. Stat. § 17.20. But as noted above, this case is about Prehn, not his successor.

II. *Thompson* is Inapposite Because it Addressed the Legitimacy of the Governor's Recess Appointments, Not the Lawfulness of the Underlying Holdovers

Respondents, following the circuit court, rely heavily on *State* ex rel. *Thompson v. Gibson* for the proposition that Prehn's holdover is lawful. 22 Wis. 2d 275. Unlike this case, the question before the *Thompson* court *did* genuinely turn on the interpretation of the vacancy statute, in the context of a declaratory judgment brought as an original action before this Court. At issue was the validity of several recess appointments made by the Governor using a statutory procedure for filling vacancies under Section 17.20. *Id.* at 285-86. *Thompson* held that those recess appointments were ineffective because the incumbents' holding over after the expiration of their terms did

not create a statutory vacancy allowing for appointments under that section. *Id.* at 290-291.

Thompson is inapposite here and need not even be substantively grappled with. The court's holding was limited to the validity of the Governor's recess appointments and did not pass on the lawfulness of incumbents' decisions to hold over. *Id.* Indeed, the parties did not dispute the issue of whether those incumbents' holdovers were themselves lawful, conceding that they were and instead focusing on whether a vacancy nevertheless existed. *Id.* at 290 ("The attorney general contends that there can be no vacancy when there is an incumbent *lawfully holding over* after expiration of his term, while the appointees argue that a vacancy does exist *under such circumstances.*") (emphasis added). In fact, the only holdover incumbent that the *Thompson* court remarked *did* have a legal right to remain in office served on the Investment Board, whose organic statute included an express holdover clause at the time. *Id.* at 293; *cf.* State Br. at 21-22 (contrasting NRB statute, which does not contain express holdover clause).

Like the vacancy statutes that it applied, *Thompson* at most only speaks to whether it is proper for the Governor to invoke Section 17.20's procedure for filling vacancies. But the question here is a more fundamental one: whether Prehn may lawfully continue to occupy a position on the NRB in the first instance, irrespective of when or through what process his successor may be appointed. *Thompson* does not squarely address this question, let alone stand for the remarkable proposition that appointed officials may *always* hold their offices past the expiration of their

terms, without regard to the text of the statutes establishing those terms.

III. Prehn is Unlawfully Occupying His Office

Prehn continues to occupy his NRB seat in violation of state law.

Members of most public boards in Wisconsin, including the NRB, are appointed "to serve for terms prescribed by law." Wis. Stat. § 15.07(1)(a). NRB members are appointed for fixed six-year terms. Wis. Stat. § 15.34(2)(a). Section 15.34 includes no provision extending NRB members' terms beyond that six-year duration, under any circumstances. By the plain text of these statutes, Prehn's statutorily defined term expired on May 1, 2021, and he lacks any legal basis to continue holding office. Because "'the meaning of the statute is plain,'" the inquiry should end here. *State* ex rel. *Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

Statutes establishing the terms for some *other* government offices provide, in clear and unambiguous language, that an official may lawfully continue in office until their successor is installed. For example, members of the Housing and Economic Development Authority serve "for staggered 4-year terms" and "shall hold office until a successor has been appointed and has qualified." Wis. Stat. § 234.02(1); *see also* State Br. at 22 (providing additional examples). This Court interprets these statutes to mean what they say: "[w]here the law *expressly provides* that the officer shall continue to hold office until his successor is chosen and qualified, he will not cease to be an officer." *State v.*

Nobles, 109 Wis. 202, 85 N.W. 367, 368 (1901) (emphasis added); *see also State v. Feuerstein*, 159 Wis. 356, 150 N.W. 486, 488 (1915) (school district officer lawfully held over where statutory term limit was "three years *and until their successors have been elected or appointed*") (emphasis added).[7]

The statute governing appointments to the NRB, by contrast, contains no such hold-over provision. Wis. Stat. § 15.34(2)(a). It fixes member terms at "six years," not six years and until a successor is confirmed. *Id.* Because the statute lacks an express hold-over clause, NRB members may not lawfully occupy their offices beyond the expiration of their fixed statutory term. *See State* ex rel. *Martin v. Heil*, 242 Wis. 41, 48, 7 N.W.2d 375, 378 (1942), State Br. at 22-24, 29-30.

The Court should not go beyond the text of the statute to infer an absent holdover provision because courts limit agencies to only the "explicit authority" granted by statute. *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 52, 391 Wis. 2d 497, 942 N.W.2d 900; *see also* Wis. Stat. § 227.01(1) (defining "agency" to include an "officer in the state government"). Inferring a holdover provision not present in the text of Section 15.34 requires an impermissibly broad construction that grants implied or non-explicit authority

[7] Prehn incorrectly refers to the holdover rule as the common law default in Wisconsin. He acknowledges, however, that several statutes expressly provide for holding over until a successor is appointed. *E.g.*, Prehn Br. at 19-20. If holding over were the common law default rule, there would be no need for statutes to also specify that holding over for a successor is permissible. *State* ex rel. *Kalal*, 271 Wis. 2d 633, ¶ 46 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.") (citations omitted).

to individuals to continue taking official actions past the expiration of their legally defined terms.

That prior members of the Board have held over in their offices, as Prehn and the Legislature emphasize (*e.g.*, Prehn Br. at 26), does not mean doing so is lawful. It simply means no *quo warranto* action was brought to challenge their decision to hold over. The Legislature soothingly suggests, without any support, that prior instances of holding over occurred "without... controversy." (Leg. Br. at 18-19.) Yet such holding over has been and continues to be highly controversial.

> When board members stay past their terms, [former DNR Secretary George] Meyer said it goes against the intent of a gradual transition of power. He considered it a way to prevent the governor of one party from having control of the board.
>
> "It really overturns the will of the people that was voiced through the election of the new governor, and I would say this regardless of the parties here. It makes no difference whether the Democrats are in charge or the Republicans," said Meyer. "Either way, this would be contrary to the way the system's set up — to allow the people to have a say on what philosophies and people are going to be running the policy, the Natural Resources Board, and the DNR."

Danielle Kaeding, *Evers Seeks Fresh Faces on Natural Resources Board, But Current Chair Isn't Stepping Down Yet*, Wis. Public Radio (May 25, 2021).[8]

In addition to violating state law, Prehn's actions continue this dubious history and should be rejected by this Court.

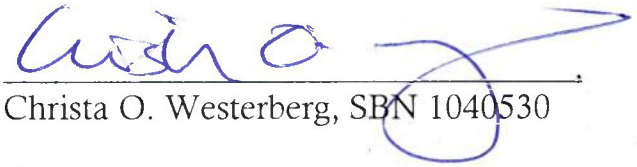
[8] *Available at* https://www.wpr.org/evers-seeks-fresh-faces-natural-resources-board-current-chair-isnt-stepping-down-yet.

CONCLUSION

For the reasons stated above, *amici* HSUS and the Center respectfully request this Court to reverse the circuit court's decision and hold that the State is entitled to a writ of *quo warranto* excluding Prehn from the office of Natural Resources Board.

Respectfully submitted this 19th day of January, 2022.

PINES BACH LLP



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,970 words.

Dated this 19th day of January, 2022.

Christa O. Westerberg, SBN 1040530

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

I hereby certify that:

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

I further certify that:

This electronic brief and appendix are identical in content and format to the printed form of the brief and appendix 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.

Christa O. Westerberg, SBN 1040530