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SUPREME COURT

No. 2021AP1673

In the Wisconsin Court of Appeals

District I

STATE OF WISCONSIN *EX REL.* JOSHUA L. KAUL,
Petitioner-Appellant,

v.

FREDERICK PREHN,
Respondent-Respondent.

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

THE WISCONSIN LEGISLATURE'S REPLY IN SUPPORT OF ITS PETITION TO INTERVENE

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INTRODUCTION

The Attorney General is of two minds about the role of the Legislature in this case. In his petition to bypass, he told the Wisconsin Supreme Court that the "issues" implicated in this case "are fundamental to the proper functioning of Wisconsin government," and that the "Court's guidance is needed to avoid the separation-of-powers problems" that supposedly would result if Prehn were allowed to remain on the Natural Resources Board ("NRB"). *State ex rel. Kaul v. Prehn*, No. 2021AP001673, Pet. For Bypass at 7 (Wis. Sept. 27, 2021). Yet in his opposition to intervention, he ignores these separation-of-powers issues and argues that this case is merely a "dispute between two executive-branch officials." Opp'n 13. That is nonsense. And the Attorney General cannot even keep his story straight for the duration of his opposition, as he finally admits that he seeks to "remov[e] Prehn so that the Legislature will fulfill its obligation to take up its advice and consent role." *Id.* at 14. As that statement tacitly concedes, this case involves a dispute between the Governor and the Legislature arising from the Senate's refusal to confirm the Governor's nominee to the NRB. The Legislature must be allowed to intervene in this interbranch dispute to protect its institutional interests.

That common-sense result is also mandated by the plain text of Wisconsin Statute Section 803.09(2m), which authorizes the Legislature to intervene as of right whenever a party "challenges" the "construction of . . . a statute." Nearly sixty years ago, the Supreme Court interpreted Wisconsin Statute Section 17.03,

holding that the expiration of a fixed term of office does not create a vacancy in an appointed office and that a public officer may therefore lawfully holdover until his or her successor is confirmed. *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 290–91, 125 N.W.2d 636 (1964). The Attorney General's claim, which is predicated on the notion that Prehn's seat *is vacant*, necessarily challenges that settled interpretation of Section 17.03.

The Attorney General protests that he is not challenging the *validity* of any statute, but that is irrelevant. Section 803.09(2m) authorizes intervention when a party challenges *either* the construction *or* the validity of a statute. The Attorney General also contends that he is merely asking the court to apply various *other statutes* as written, but as the circuit court recognized, the Supreme Court's interpretation of Section 17.03 controls the outcome of this case. Because the Attorney General implicitly challenges the construction of that statute, the Legislature is entitled to intervention as of right.

This Court should alternatively grant permissive intervention under Section 803.09(2) because this case implicates the separation of powers and neither party will adequately represent the Legislature's interest. The Attorney General contends that the Legislature's defense does not share a common question of law with the main action, but the central question in this case—addressed by both the Legislature and the parties—is whether the expiration of a fixed term creates a vacancy. The Legislature's argument that the Attorney General's interpretation of Section 17.03 violates the separation of powers likewise involves

a common question of law with the main action. The Court should thus grant the Legislature's petition to intervene.

ARGUMENT

I. THE LEGISLATURE IS ENTITLED TO INTERVENE UNDER WIS. STAT. §§ 803.09(2M) AND 806.04(11) BECAUSE THE ATTORNEY GENERAL "CHALLENGES THE CONSTRUCTION OF A STATUTE" AS PART OF HIS QUO-WARRANTO "CLAIM"

Under Wisconsin law, the Legislature may intervene as a matter of right whenever a party "challenges the construction . . . of a statute, as part of a claim." Wis. Stat § 803.09(2m).[1] The word "construction" means "[t]he act or process of interpreting or explaining the meaning of a writing." *Construction*, Black's Law Dictionary (11th ed. 2019); *accord State v. Grade*, 165 Wis. 2d 143, 148, 477 N.W.2d 315 (Ct. App. 1991) ("In construing a statute, the primary source of *construction* is the language of the statute itself.") (emphasis added). Section 803.09(2m) thus authorizes the Legislature to intervene whenever a party challenges the settled interpretation of a statute.

That is precisely what the Attorney General is doing here. The Attorney General's quo-warranto action, which accuses Prehn of unlawfully usurping a seat on the Natural Resources Board, is predicated on the notion that Prehn's seat became *vacant* at the expiration of his term on May 1, 2021. But for nearly sixty years, Section 17.03, which governs vacancies, has been interpreted to allow holdovers in public office because the expiration of an

[1] Likewise, in declaratory-judgment actions, where "the construction or validity of a statute is otherwise challenged . . . the state legislature [is] entitled to be heard." Wis. Stat. § 806.04(11).

appointive term of office is *not* one of the enumerated circumstances that creates a vacancy. *Thompson*, 22 Wis. 2d at 290–91 ("[N]o provision in [Section 17.03] or any other [statute] provid[es] that a vacancy exists when a lawful appointee holds over."). The Attorney General's claim thus necessarily challenges the settled interpretation of Section 17.03. That is all that is required for intervention as of right.[2]

Largely ignoring the word "construction" in Section 803.09(2m), the Attorney General argues that intervention is not authorized because he is not challenging "*any* statutes in this lawsuit"—by which he presumably means the *validity* of a statute. Opp'n 4. But while a challenge to the validity of a statute is certainly *one* ground for intervention, it is not the *only* ground for intervention. On the contrary, Section 803.09(2m) authorizes intervention as of right when a party "challenges the *construction or* validity of a statute" (emphasis added). The Attorney General's failure to give independent meaning to the word "construction" violates the well-established interpretive canon that requires "[s]tatutory language [to be] read where possible to give reasonable effect to every word, in order to avoid surplusage." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012). If "construction" and

[2] The Attorney General also challenges the settled construction of Section 17.07(3), which affords Prehn "for cause" tenure protection. The Attorney General argues that the circuit court misinterpreted that statute and that Prehn is subject to removal for any reason under Section 17.07(4). *See* Dkt. 72 at 14–16. ("Dkt." refers to the circuit court's docket entries.)

"validity" (or "constitutionality") in Section 803.09(2m) "meant the same thing, then one or the other would be surplusage." *In re Matter of D.K.*, 2020 WI 8, ¶ 40, 390 Wis. 2d 50, 937 N.W.2d 901.

Democratic National Committee v. Bostelmann, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423, is not to the contrary. In that case, the Seventh Circuit certified the following question: "whether, under Wis. Stat. § 803.09(2m), the State Legislature has the authority to represent the State of Wisconsin's interest in the *validity* of state laws." *Id.* ¶ 3 (emphasis added). Not surprisingly, the Court answered that narrow question in the affirmative, holding that the Legislature has an interest in "defending the validity of state law when challenged in court.'" *Id.* ¶ 8. But the Court was *not* asked to decide—and thus did not decide—whether intervention is warranted in cases where, as here, a party is challenging the settled construction of a statute. Contrary to the Attorney General's mischaracterization of *Bostelmann*, the Supreme Court never said that "intervention is *limited to*" cases where the validity of a state law is at issue. Opp'n 11 (emphasis added).[3]

The Attorney General insists that he merely wants the "relevant statutes" applied "as written." Opp'n 4. But he fails to mention Section 17.03 in his list of "relevant statutes" and simply *assumes* that a "vacancy [was] created by the expiration of Prehn's

[3] The Attorney General faults the Legislature for not citing *Bostelmann*, Opp'n 10, but that case did not interpret the relevant language from Section 803.09(2m) that authorizes intervention when a party challenges the "construction" of a statute, and thus it has little relevance here.

term," *id.* at 5, even though the settled interpretation of Section 17.03 refutes that assertion.[4] As the circuit court recognized, Prehn is not a usurper because, under Section 17.03, "there is no vacancy in the Board seat." Dkt. 72 at 13–14 (holding that *Thompson* continues to govern the interpretation of Section 17.03). The Attorney General cannot defeat intervention by simply pretending that Section 17.03 is not one of the "statutes at issue" in this case. *See* Opp'n 6. Indeed, his decision to seek judicial bypass effectively concedes that he cannot prevail unless the Supreme Court overrules *Thompson* and reinterprets Section 17.03 to create a vacancy at the expiration of an appointive term. *See Prehn*, Pet. For Bypass at 14 (acknowledging that "*Thompson* can be read as stating a rule that conflicts with current statutes").

The Attorney General contends that the Legislature's interpretation of Section 803.09(2m) would "render the enumerated instances for intervention superfluous" by "allowing intervention any time statutory interpretation is at issue." Opp'n 9–10. But the Court need not decide whether the Legislature could intervene as of right in "cases ranging from divorces to commercial

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[4] The Attorney General contends that Sections 15.07(1)(c) and 15.34(2)(a) authorize the Governor to make an interim appointment under Section 17.20(2)(a). Opp'n 4–5. But neither of those statutes even purports to create a vacancy in an appointive office. Section 15.34(2)(a) merely specifies that board members shall serve for "staggered 6-year terms," and Section 15.07(1)(c) provides that "fixed terms of members of boards shall expire on May 1." As the circuit court recognized, "the *Thompson* court had the opportunity to create a vacancy upon the 'other event' of the expiration of Keliher's term of office as state auditor, but declined to do so" based on its interpretation of Section 17.03. Dkt. 72 at 13 (footnote omitted). The Attorney General thus cannot prevail unless Section 17.03 is reinterpreted.

disputes" whenever statutory interpretation is involved, *id*. at 11, because here the Attorney General is plainly *challenging* the longstanding "construction . . . of a statute." Wis. Stat. § 803.09(2m). This is thus a paradigmatic case for intervention.

The Supreme Court's recent decision in *Clean Wisconsin, Inc. v. Wisconsin Department of Natural Resources*, 2021 WI 71, -- Wis. 2d --, 961 N.W.2d 346, confirms that intervention is warranted here. The claims in that case turned entirely on the proper interpretation of Wis. Stat. § 227.10(2m), which prohibits an agency from implementing or enforcing a standard or requirement that is not explicitly required by statute. *See id*. ¶ 16. Although no party argued that the statute was unconstitutional or otherwise invalid, the Court unanimously granted the Legislature's motion to intervene after "[h]aving considered intervention under Wis. Stat. 803.09(1), (2), and (2m)." Pet. Exhibit A. The Attorney General contends that the "order in *Clean Wisconsin* says nothing about the propriety of intervention here." Opp'n 11. But it is generally accepted that the "binding aspect of [a] fragmented decision . . . is its 'specific result'" whenever there is "no theoretical overlap." *State v. Deadwiller*, 2013 WI 75, ¶ 30, 350 Wis. 2d 138, 834 N.W.2d 362 (quoting *Berwind Corp. v. Comm'r of Soc. Sec.*, 307 F.3d 222, 234 (3d Cir. 2002)). Applying that same rule here, *Clean Wisconsin* stands for the proposition that the Legislature may intervene under Section 803.09(2m) in any case in which a party throws into doubt the meaning of one of its statutes.

Finally, the Attorney General frets that allowing

intervention whenever the construction of a statute is at issue would be "absurd." Opp'n 11. But the absurdity canon does not "justify a court in amending the statute or giving it a meaning to which its language is not susceptible merely to avoid what the court believes are . . . unwise results." *State ex rel. Associated Indem. Corp. v. Mortensen*, 224 Wis. 398, 272 N.W. 457–58 (1937). And there is nothing absurd about allowing intervention in cases like this, where the plaintiff seeks to disturb the long-settled interpretation of an important statute that directly implicates the separation of powers.

II. THE LEGISLATURE IS ALTERNATIVELY ENTITLED TO INTERVENE PERMISSIVELY UNDER WIS. STAT. § 803.09(2)

This Court should alternatively allow the Legislature to intervene permissively under Section 803.09(2), which provides that "[u]pon timely motion anyone may be permitted to intervene in an action when a movant's . . . defense and the main action have a question of law or fact in common." This Court has "discretion" to grant intervention, *id.*, and given the "statewide importance" of the issues here, it should exercise that discretion and grant the petition. *See Milwaukee Cnty. v. Milwaukee Dist. Council 48 – Am. Fed. of St., Cnty. and Mun. Emps., AFL-CIO*, 109 Wis. 2d 14, 20, 325 N.W.2d 350 (Ct. App. 1982) (granting intervention in case with "statewide importance").[5]

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[5] The Attorney General mistakenly construes the petition to intervene here as an "end-run around the circuit court's decision" denying intervention. Opp'n 13. The Legislature was compelled to file its petition in this Court because its appeal of the circuit court's order denying intervention in District 2 will not be decided in time for it to

The Attorney General contends that the Legislature does not have a "claim or defense" in common with the main action. Opp'n 12. That blinks reality. The Legislature's main defense to the Attorney General's claim is that Prehn is lawfully holding over because his successor has not been confirmed by the Senate and Section 17.03 does not create a vacancy at the expiration of a fixed term. That defense plainly involves a question of law at issue in the main action, as the parties vigorously contest whether Prehn's seat became "vacant" on May 1, 2021.

The Legislature has also raised an additional defense to the Attorney General's proposed interpretation of Section 17.03—namely, that it would violate the separation of powers by allowing the Governor to sidestep the confirmation process. The Attorney General protests that he is not seeking to "cut the Legislature out of the appointment process" but rather is attempting to remove Prehn so that the "Legislature will fulfill its obligation to take up its advice and consent role." Opp'n 14. But that argument, which concedes that this action against Prehn is designed to force the Legislature's hand, only confirms that intervention is appropriate here. And the Legislature's defense plainly shares a question of law with the main action because the Attorney General argued in the circuit court that *Prehn's interpretation* of the relevant statutes violates the separation of powers. *See* Dkt. 17 at 33, 36–37 (arguing

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participate in the merits briefing here. Moreover, Section 803.09(2m) permits the Legislature to intervene "at any time in the action," and 803.09(2) permits "anyone" to "intervene in an action" upon a "timely motion." In all events, the circuit court's order denying intervention was plainly an abuse of discretion, so the Legislature's motion should be granted regardless of which standard of review this Court applies.

that Prehn's interpretation of the relevant statutes would "put[] the power of removal in the hands of the Legislature" and give the Legislature de facto control over the execution of the laws by making appointees beholden to the Legislature's policy views). And the fact that neither of the executive-branch parties can adequately represent the Legislature's institutional interests in this separation-of-powers dispute is a reason to *grant* permissive intervention, not deny it.[6]

CONCLUSION

This Court should grant the petition to intervene under Wis. Stat. §§ 803.09(2m) and 806.04(11), or in the alternative, under Wis. Stat. § 803.09(2).

[6] *One Wisconsin Institute, Inc. v. Nichol*, 310 F.R.D. 394 (W.D. Wis. 2015), is not on point, because that case did not involve the same interbranch conflict as here. *See* Opp'n. 14.

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Respectfully submitted,

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