No. 2021AP1673

In the Supreme Court of Wisconsin

STATE OF WISCONSIN EX REL. JOSHUA L. KAUL,
PLAINTIFF-APPELLANT,

V.

FREDERICK PREHN,
DEFENDANT-RESPONDENT,

WISCONSIN LEGISLATURE,
INTERVENOR-DEFENDANT-RESPONDENT.

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

RESPONSE BRIEF OF THE WISCONSIN LEGISLATURE

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INTRODUCTION

For more than a century, it has been a settled rule in Wisconsin that an appointed state officer may hold over after the expiration of a fixed term pending the confirmation of his successor, because the expiration of a fixed term does not create a "vacancy" in office. This Court explicitly affirmed that longstanding common-law rule in *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 125 N.W.2d 636 (1964), which reviewed the vacancy statute and various appointment statutes and concluded that "nowhere is it declared that an office is vacant when an incumbent holds over after expiration of the term for which he was initially appointed." *Id.* at 290. The Attorney General's predecessors have repeatedly cited *Thompson* for precisely that point. And numerous members of the Board of Natural Resources—of both political parties—have continued to serve long after their terms expired, just as Frederick Prehn is doing. Yet now, egged on by disgruntled special-interest groups, the Attorney General claims that Prehn is a usurper because he did not immediately leave office when his term expired, even though the Senate has not yet confirmed his successor.

The Attorney General makes several efforts to sidestep this Court's clear holding in *Thompson*, but none succeeds. The vacancy statute provides that the expiration of an *elected* term creates a vacancy, and the Legislature's consistent refusal to add a similar provision for *appointed* terms confirms that it did not intend for such events to create vacancies. Amendments to the vacancy statute since *Thompson*—including the words "except as otherwise provided"—do not evidence any intent to change the common-law rule. Nor do changes to the provisional appointment statute have any bearing on this case, as that statute is

implicated only when there *is* a vacancy. A provisional appointment cannot *create* vacancy.

The Attorney General asks this Court to overturn *Thompson*, but he satisfies none of the criteria for abandoning *stare decisis*. The vacancy and appointment statutes have not meaningfully changed, the rule has proved eminently workable—as the Attorney General's previous opinions confirm—and overruling *Thompson* would upset deep-seated reliance interests by changing the way that retirement benefits are calculated for holdovers.

The Attorney General's alternative argument, that Prehn can be removed for any reason now that his term has expired, is equally flawed. The removal statute plainly ties the removal power to the *type* of office the incumbent holds. Officers serving in offices filled by gubernatorial appointment for a fixed term with the advice and consent of the Senate are subject to for-cause removal, while those serving in other types of offices—including those filled by gubernatorial appointment with no fixed term with the advice and consent of the Senate—may be removed at any time. Prehn is serving on the Board of Natural Resources, whose members are appointed for staggered six-year terms with the advice and consent of the Senate. Accordingly, he is serving in the type office that is subject only to for-cause removal. The Attorney General's policy-based arguments for limiting for-cause removal to the duration of a fixed term cannot overcome the plain text of the removal statute.

Separation-of-powers doctrine does not provide any basis for declaring Prehn a usurper or rewriting the removal statute. This case arises from a dispute between the Governor and the Legislature over an appointee to public office. The Senate's decision not to confirm Prehn's

successor does not undermine the Governor's provisional appointment power or interfere with his ability to remove public officers. Indeed, it is the Attorney General's (new) position that would violate the separation of powers by giving the Governor authority to install his nominees on the Board without Senate confirmation, even though the Board exercises substantial delegated legislative authority.

This Court should affirm the circuit court's decision and allow this political dispute to be resolved by the political branches, as contemplated by the Constitution.

ISSUES PRESENTED

1. Whether the expiration of an appointive term of office on the Board of Natural Resources creates a vacancy that the Governor is authorized to fill under the provisional appointment statute.

The circuit court answered "no."

2. Whether a state officer "serving in an office that is filled by appointment of the [G]overnor for a fixed term by and with the advice and consent of the [S]enate" may be removed only "for cause," even after the expiration of the fixed term.

The circuit court answered "yes."

3. Whether it is consistent with the separation of powers to allow a duly appointed and confirmed member of the Board of Natural Resources to continue serving after the expiration of his term until a successor is confirmed by the Senate.

The circuit court did not reach this question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that this case merits oral argument and publication.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Wisconsin Department of Natural Resources is "under the direction and supervision" of the Board of Natural Resources. Wis. Stat. § 15.34(1). The Department's mission is to "protect and enhance our natural resources," "provide a healthy [and] sustainable environment," and "ensure the right of all people to use and enjoy these resources in their work and leisure."[1] The Board, as the "policy-making unit for [the] [D]epartment," sets policies related to fishing and wildlife management and approves regulations. Wis. Stat. § 15.01(1r). The Board comprises members appointed by the Governor with the advice and consent of the Senate for staggered six-year terms. *Id*. § 15.34(2).

In 2015, the Governor appointed Respondent Frederick Prehn to a six-year term on the Board, and the Senate confirmed him unanimously on a bipartisan basis.[2] Prehn's six-year term expired on May 1, 2021. *See* Wis. Stat. §§ 15.07(1)(c); 15.34(2)(a). Anticipating that Prehn's seat would become vacant, Governor Evers nominated Sandra Naas to replace him.[3] The Senate has not yet confirmed Naas, however, and

[1] Wis. Dep't of Nat. Res., *About*, https://tinyurl.com/yu4cn4mj.

[2] Wis. Nat. Res. Bd. (NRB) Members 1968 – Current (May 7, 2019), https://tinyurl.com/3rbszws6; Wisconsin Senate Journal (Nov. 2015), https://tinyurl.com/yfu5frd8; Wisconsin Senate Roll Call (Nov. 2015), https://tinyurl.com/3fs5rt2m.

[3] Danielle Keading, *Evers Appoints New Nat'l Res. Bd. Members, But Chair Won't*

Prehn has thus continued to serve as chairman of the Board. Prehn has stated that he will step down as soon as the Senate confirms his replacement.[4]

Displeased with Prehn's decision, the Humane Society of the United States and the Center for Biological Diversity wrote to the Attorney General in July 2021 "to complain" that Prehn is "unlawfully occupying and exercising the powers of a public office."[5] They requested that the Attorney General "take prompt action to remedy this situation in a *quo warranto* action."[6] Other groups likewise "request[ed that] the Attorney General take action to obtain a writ of quo warranto."[7]

II. PROCEDURAL HISTORY

The Attorney General filed a complaint seeking a writ of quo warranto or, in the alternative, a declaration that Governor Evers can remove Prehn from office without cause under Wis. Stat. § 17.07(4). *See* R.2, ¶¶ 3–4. The complaint alleges that Prehn no longer has a "legal entitlement to be a Board member" because his fixed term expired on May 1, 2021, *id.* ¶ 25, and that by continuing to serve on the Board "Prehn has usurped, intruded into, or unlawfully held or exercised a public office." *Id.* ¶ 26 (citing Wis. Stat. § 784.04(1)(a)).

The circuit court dismissed the Attorney General's lawsuit with prejudice. Relying on *Thompson*—which "analyzed a nearly identical

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Leave, Urban Milwaukee (May 25, 2021), https://tinyurl.com/7yxv3z47.

[4] *Id.*

[5] Letter, *Request for Quo Warranto Action, Wis. Stat. § 784.04(1)(a), Regarding Dr. Frederick Prehn* (July 20, 2021), https://tinyurl.com/ykzvdk93.

[6] *Id.*

[7] *See, e.g.*, Press Release, *WI Environmental and Conservation Organizations Support Legal Action to End NRB Chair's Holdover Past the Expiration of His Term* (July 22, 2021), https://tinyurl.com/mnxw999h.

patchwork of appointment, holdover, and removal rules, [and] rejected the" same argument made here "that expiration of a term of appointive office creates a vacancy"—the court held that Prehn's office is not vacant. R.72:12. Although the Attorney General argued that the legal backdrop at the time of *Thompson* was "completely different," the court recognized that "[v]acancies" remain a "necessary predicate for any sort of appointment" to public office, notwithstanding various amendments to "the statutory scheme of appointment[s]" since *Thompson*. *Id*. at 13–14. The court also explained that "[b]oth past and present versions of Wis. Stat. § 17.03 provide for 'any other event' to create [a] vacancy," and *Thompson* explicitly held that the expiration of a fixed term does not constitute such an "other event." *Id*. at 13.

The court then made quick work of the Attorney General's claim that Prehn can now be removed at the Governor's pleasure. "For cause" job protection under Section 17.07(3) applies to any officer "serving in an office that is filled by appointment of the [G]overnor for a fixed term by and with the advice and consent of the [S]enate," such as Prehn's office. R.72:14–16 (citing Wis. Stat. §§ 15.07(1)(c) & 15.34(2)(a)).

The Attorney General appealed and petitioned to bypass. This Court granted bypass. It also granted the Legislature's motion to intervene, concluding that "permissive intervention is appropriate." Order, No. 2021AP1673 (Dec. 16, 2021).

STANDARD OF REVIEW

"The interpretation of a statute is a question of law" that this Court "reviews *de novo*." *State ex rel. Shroble v. Prusener*, 185 Wis. 2d 102, 110, 517 N.W. 2d 169 (1994). And this Court does not take "as true legal

conclusions pled" in a complaint. *Doe v. Archdiocese of Milwaukee*, 2005 WI 123, ¶ 19, 284 Wis. 2d 307, 700 N.W.2d 180.

SUMMARY OF ARGUMENT

The circuit court's holding that Prehn is not "usurping" public office and is removable only "for cause" is compelled by the plain text of the relevant statutes, binding precedent, and the common law, and it is consistent with decades of practice and the opinions of the Attorney General's predecessors. This Court should affirm.

I. The Constitution gives the Legislature authority to determine when a public office is vacant, and the Legislature has exercised that authority in Section 17.03. That statute does not provide that the expiration of a fixed term creates a vacancy in an *appointive* office—though the statute explicitly provides for such a vacancy at the expiration of an *elected* term. In *Thompson*, this Court interpreted a materially identical version of the vacancy statute and held, consistent with a century of common-law precedent, that appointed officers can hold over after the expiration of their terms pending the Senate's confirmation of their successors. That decision controls the result here.

The Attorney General's arguments to the contrary do not withstand scrutiny. Although Section 17.03 has been slightly modified since *Thompson*, none of those amendments clearly evinces an intent to overturn the longstanding common-law rule. Nor do the words "shall expire" in the appointment statute, Section 15.07(1)(c), indicate that the expiration of an appointed term creates a vacancy.

The Attorney General asserts that allowing Prehn to remain in office pending Naas's confirmation would create certain "practical

problems," but he fails to acknowledge that holdovers have been the norm in Wisconsin for decades. Indeed, the Attorney General's predecessors have repeatedly opined that appointed officers may remain in office past the expiration of their terms.

II. The removal statute, Section 17.07(3), provides that "[s]tate officers serving in an office that is filled by appointment of the [G]overnor for a fixed term by and with the advice and consent of the [S]enate" may be removed only for cause. Seats on the Board are filled by gubernatorial appointment for a fixed term with advice and consent of the Senate. Accordingly, Board members are removable only for cause.

The Attorney General argues that for-cause removal protection ends when the fixed term expires, but that argument cannot be squared with the plain text of the statute. Under the rule of the last antecedent, the phrase beginning with "is filled" describes the "office" to which the officer was appointed—it does not refer to the officer himself. It is thus irrelevant whether the officer is serving during a fixed term or is holding over. So long as the officer is serving in a particular *type* of office—*i.e.*, an office filled as provided by Section 17.07(3)—the officer is removable only for cause.

Contrary to the Attorney General's contention, affording Prehn for-cause removal protection does not give the Legislature the removal power or interfere with the Governor's ability to remove Prehn.

III. The Attorney General is correct that this case raises separation-of-powers concerns, but these structural considerations cut against his position, not for it. The Board, although a part of the Executive Branch, exercises substantial delegated legislative authority, and the Senate's exercise of its advice-and-consent role is critical to

ensure that Board members exercise that authority consistent with the will of the people.

The Attorney General complains that allowing Prehn to remain in office pending confirmation of his successor would interfere with the Governor's removal power, but he cannot point to any provision of the Wisconsin Constitution or any precedent from *this* Court to support that argument. His reliance on federal constitutional decisions is doubly misplaced, as they would not control the result here given dispositive differences between Wisconsin and federal law. The Wisconsin authorities the Attorney General cites, which involved statutes purporting to give the Legislature authority to remove officers or control purely executive decisions, are wholly inapposite.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DENIED THE PETITION FOR WRIT OF QUO WARRANTO BECAUSE PREHN IS LAWFULLY HOLDING OFFICE.

The Attorney General's claim—that Prehn is a usurper unlawfully exercising the powers of a Board member—necessarily assumes that the Board seat he occupies became vacant as a matter of law when his term expired on May 1, 2021. But Wisconsin law, consistent with the longstanding common-law rule in this State and around the country, is clear that a public office does *not* become vacant when the sitting officer holds over past the expiration of his or her term.

A. The Vacancy Statute, Settled Precedent, and Longstanding Tradition All Confirm That an Office Does Not Become "Vacant" When an Incumbent Holds Over After the Expiration of a Fixed Term

The Wisconsin Constitution provides that "[t]he [L]egislature may declare the cases in which any office shall be deemed vacant." Wis. Const. art. XIII, § 10(1). Pursuant to this grant of authority, the Legislature passed Section 17.03, which lists the precise circumstances that create a "vacancy" in public office. This list includes an incumbent's death, resignation, or removal from office, but *does not* include the expiration of an *appointive* term of office. Wis. Stat. § 17.03.

The Legislature plainly knew how to specify that an office would be vacant following the expiration of a term of office, for that is precisely what it did with respect to *elected* offices. *See* Wis. Stat. § 17.03(10). The "well known and often applied [interpretive] canon" of "'*expressio unius est exclusio alterius*' (the expression of one thing excludes another)" leads to the conclusion that the expiration of an *appointed* term does not create a vacancy. *See State ex rel. Riegert v. Koepke*, 13 Wis. 2d 519, 522, 109 N.W.2d 129 (1961).

The Legislature's decision not to designate expiration of an appointive term as an event that creates a vacancy is consistent with the traditional common-law rule recognized by Wisconsin courts for more than a century. As this Court observed long ago, "the general trend of decisions in this country is to the effect that, where the written law contains no provision, either express or implied [] to the contrary, an officer holds his office until his successor is elected and qualified." *State v. Johnson*, 176 Wis. 107, 186 N.W. 729, 730 (1922); *see also State ex rel. Prince v. McCarty*, 65 Wis. 163, 26 N.W. 609, 610 (1886) (concluding that

an office holder "had the right to hold it until his successor was qualified"). This uncontroversial rule follows common-law traditions in other jurisdictions as well.[8]

In *Thompson*, this Court applied the common-law rule in a case involving similar facts to those here: a challenge to incumbents holding over in office *after* their successors had been nominated by the Governor but *before* they were confirmed by the Senate. This Court recognized that "the power to declare when an office shall be deemed to be vacant is vested in the [L]egislature" and concluded that "nowhere" has the Legislature "declared that an office is vacant when an incumbent holds over after expiration of the term for which he was initially appointed." *Thompson*, 22 Wis. 2d at 290. *Thompson* specifically held that those appointed officers "may holdover in office until their successors are duly appointed *and confirmed* by the [S]enate." *Id.* at 293 (emphasis added).

Thirty years later, the Court of Appeals applied *Thompson* and concluded that "an officer required to be confirmed by the [L]egislature has the right to continue in office after the expiration of his or her term and is an officer de jure until the [L]egislature again considers confirmation." *Morris v. Employe Tr. Funds Bd. of State of Wis.,* 203 Wis. 2d 172, 180, 554 N.W.2d 205 (Ct. App. 1996) (footnote omitted) (citing *Thompson*, 22 Wis. 2d at 294).

Until recently, it was widely understood that holdovers could continue to serve lawfully after the expiration of their terms. For example, members of the Board appointed by governors of both political

[8] *See, e.g.*, *Grooms v. LaVale Zoning Bd.*, 340 A.2d 385, 390–91 (Md. Ct. Spec. App. 1975); *Walker v. Hughes*, 36 A.2d 47, 50 (Del. 1944); *see also* 67 C.J.S. Officers § 154; 63C Am. Jur. 2d Public Officers and Employees § 148 (citing cases).

parties have held over at least *five times* in the past 20 years without generating any controversy. James Tiefenthaler was appointed for a term ending on May 1, 2003, and he stayed on the Board until February 2004.[9] Stephen Willett was appointed for a term ending on May 1, 2003, and yet he stayed *four more years* until January 2007.[10] Herbert Behnke was appointed in 1989 and was later reappointed in 1995.[11] In 2001, he was renominated, though not confirmed, for a term that was to end on May 1, 2007.[12] Although the Governor withdrew his nomination in 2003, Behnke stayed on the Board until January 2006.[13] Howard Poulson was also appointed in 1995 and later renominated, though not confirmed, for a term that was to end on May 1, 2007.[14] The Governor withdrew his nomination in 2003, but Poulson stayed on until September 2007.[15] And Gerald O'Brien was appointed to serve until May 1, 2005, but stayed on three more years until April 2008.[16]

The Attorney General has never contended that these holdovers were unlawful. Quite the opposite. *See, e.g.*, 73 Wis. Op. Att'y Gen. 100

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[9] Wis. Senate Journal (1999) 145 (nomination) and 390 (confirmation); Wisconsin Department of Natural Resources, *Wisconsin Natural Resources Board (NRB) Members 1968 – Current*, https://tinyurl.com/2jb8m5f4.

[10] Wis. Senate Journal (1999) 145 (nomination) and 390–91 (confirmation); *Wisconsin Natural Resources Board (NRB) Members 1968 – Current*, https://tinyurl.com/2jb8m5f4.

[11] Wis. Senate Journal (1989) 208 (nomination) and 255 (confirmation); Wis. Senate Journal (1989) 427 (nomination) and 459 (confirmation).

[12] Wis. Senate Journal (2001) 26 (nomination).

[13] Wis. Senate Journal (2003) 8; *Wisconsin Natural Resources Board (NRB) Members 1968 – Current*, https://tinyurl.com/2jb8m5f4.

[14] Wis. Senate Journal (1995) 313 (nomination) and 355–56 (confirmation); Wis. Senate Journal (2001) 26 (nomination).

[15] Wis. Senate Journal (2003) 8-9; *Wisconsin Natural Resources Board (NRB) Members 1968 – Current*, https://tinyurl.com/2jb8m5f4.

[16] Wis. Senate Journal (1999) 144 (nomination) and 340 (confirmation); *Wisconsin Natural Resources Board (NRB) Members 1968 – Current*, https://tinyurl.com/2jb8m5f4.

(1984) ("With respect to the appointive officers … it is [the Attorney General's] opinion" that "an incumbent holder of such an office who has been duly appointed and confirmed is entitled to hold over until his or her successor is appointed … and confirmed.") (citing *Thompson*); 80 Wis. Op. Att'y Gen. 46 (1991) ("Expiration of a term of office does not create a vacancy under section 17.03."). The Attorney General makes no attempt to explain his sudden abandonment of his office's long-held position.

Because the Wisconsin Constitution provides that the Legislature determines when a vacancy occurs, and the Legislature has not provided that a vacancy occurs at the expiration of an appointed office, the expiration of Prehn's term did not create a vacancy.

B. The Attorney General's Counterarguments Are Meritless

The Attorney General contends that Naas, not Prehn, is the rightful holder of the contested Board seat because Prehn's seat supposedly became vacant on May 1, 2021, and the Governor used his provisional appointment powers to install Naas. But the contention that Prehn's seat became vacant at the expiration of his term is based on a misreading of the relevant statutes and conflicts with binding precedent. And because the Governor has authority to make a provisional appointment only when an office is "vacant" under Section 17.03, his attempt to provisionally appoint Naas to the seat is null and void.

1. The Attorney General misreads the vacancy and appointment statutes.

a. The Attorney General concedes that Section 17.03 does not list the expiration of an appointed term as a condition that creates a vacancy. He nevertheless contends that Prehn's seat became vacant at the

expiration of his term because whereas "other appointment statutes … include express holdover provisions," there is no express holdover provision in Section 15.07(1)(c) authorizing Board members to continue serving. AG Br. 22. That argument violates bedrock rules of statutory interpretation and runs headlong into this Court's decision in *Thompson*.

It is axiomatic that every "[s]tatute must be interpreted in light of the common law and the scheme of jurisprudence existing at the time of its enactment." *Strenke v. Hogner*, 2005 WI 25, ¶ 28, 279 Wis. 2d 52, 694 N.W.2d 296. As the Legislature has explained, *see supra* I.A., the background common-law rule in existence when the vacancy statute was first enacted *allowed* appointed officers to hold over absent a specific provision to the contrary. Indeed, the holding in *Thompson* was based on this longstanding common-law rule. In *Thompson*, this Court addressed the Governor's attempt to appoint replacements for five incumbents serving in various state offices, but only *one* of those incumbents was serving in an office that had an express "statutory 'holdover clause.'" *Thompson*, 22 Wis. 2d at 293; *see* Wis. Stat. § 6.32(4)(d) (1963–64). Yet because the background rule allowed holdovers absent an express provision to the contrary, the Court held that these "offices were not vacant" and that the incumbents could "holdover in office until their successors are appointed and confirmed by the [S]enate." *Thompson*, 22 Wis. 2d at 293. Far from drawing a line between those appointed to offices with an express holdover provision and those serving in other offices, the Court explained that "[w]here there is an express statutory provision for holding over after expiration of an appointive term, *it is even more clear* that the office is not 'vacant.'" *Id.* at 293–94 (emphasis added). *Thompson* thus refutes the Attorney General's argument that

the Court should "give[] effect" to the "difference" between Section 15.07(1)(c), which lacks an express holdover provision, and various *other* statutes addressing *other* offices that include such provisions. AG Br. 22.

b. The Attorney General contends that certain changes to the vacancy statute require a contrary result. He points to language in Section 17.03 stating that "[e]xcept as otherwise provided, a public office is vacant when" certain events occur. AG Br. 23. According to the Attorney General, this provision—which was added in 1983—"expressly recognizes that vacancies are also created by other statutes," and the phrase "shall expire" in Section 15.07(1)(c) provides such a vacancy. *Id.*; *see also* AG Br. 28–29. That argument is hopelessly flawed.

To begin, it is a rule of statutory construction that an intent to change the common law must be "clearly expressed in the language of the statute," *Strenke*, 2005 WI 25, ¶ 29; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012), and the addition of the phrase "except as otherwise provided" does not clearly express the Legislature's intent to uproot a century of common law. Indeed, that phrase says nothing about holdovers or the expiration of fixed terms of office. *See Meek v. Pierce*, 19 Wis. 300, 303 (1865) ("[T]he rules of the common law are not to be changed by doubtful implication"—"[t]o give such effect to the statute, the language must be clear, unambiguous and peremptory.").

Moreover, the Attorney General's interpretation of the phrase "except as otherwise provided" is incorrect. The Attorney General erroneously reads the phrase to mean "*in addition to* any other statutes that create a vacancy." *See* AG Br. 28–29. But the word "except" plainly refers to *exceptions* to the 13 enumerated events set forth in Section

17.03. And the words "otherwise provided" confirm that these exceptions will be found in other statutes. The best reading of the phrase is thus that a vacancy shall occur in the 13 enumerated situations unless another statute specifically provides that a vacancy will *not* occur in that situation. For example, Section 17.03(12) provides that a vacancy exists when "offices are established upon the creation by the legislature of a new county and a new town." This provision could be read as creating a vacancy whenever a new mayorship has been created. But Section 17.245 provides otherwise: "Whenever an elective office is created in a city, village or town pursuant to law or ordinance, the office shall not be deemed vacant until it has first been filled by the electorate."

The Attorney General's interpretation of the phrase "except as otherwise provided" would also create surplusage in the statute. Section 17.03(13) states that a vacancy can be created by the occurrence of "[a]ny other event … which is declared by any special provision of law to create a vacancy." Section 17.03(13) thus indicates that other statutes may also specify when vacancies occur. For example, Section 17.05 authorizes the Governor to "declare vacant the office of any state officer required by law to execute an official bond whenever a judgment is obtained against such officer for a breach of the conditions of such bond"—a situation not addressed by the general vacancy statute. Interpreting the phrase "except as otherwise provided" to mean the same thing as Section 17.03(13) would violate a "bedrock principle in statutory interpretation." AG Br. 29 n.4.

The Attorney General's misplaced focus on the "except as otherwise provided" language is plainly driven by a desire to identify some meaningful change in the law. After all, Section 17.03(13) was part

of the statute when *Thompson* was decided. And indeed, *Thompson* specifically asked whether Section 17.03 "or any other" statute provided for "a vacancy" when "the incumbent holds over after expiration of his term." *Thompson*, 22 Wis. 2d at 290–91. The appointment statutes there, as here, specified when the terms of office expired. *Id.* at 282 & n.2 (citing Wis. Stat. §§ 15.21(1) (1963) ("Thereupon appointment shall be made of a successor state auditor for a term … *ending October 1, 1963*"); 25.155 ("As the term of each appointed trustee *expires* …."); 101.02 ("The term of office of each member of the industrial commission, … *shall expire* on said date") (emphases added). Yet *Thompson* concluded that "nowhere is it declared that an office is vacant when an incumbent holds over after expiration of the term for which he was initially appointed." *Id.* at 290. Because "the *Thompson* court had the opportunity to create a vacancy upon the 'other event' of [an] expiration of [] term of office but declined to do so," R.72:13 (footnote omitted), the Attorney General's argument is foreclosed by binding precedent.

Even if this Court were to decide the issue as a matter of first impression, the words "shall expire" do not clearly express any intent to abrogate the common law rule allowing holdovers.[17] And because Section 15.07(1)(c) does not mention the words "vacant," "vacancy," or any

[17] By contrast, other statutes that create vacancies in public offices in various situations do so *explicitly*. *See, e.g.*, Wis. Stat. § 15.435(1)(c) ("If a municipal or county official or a school board member leaves office while serving on the board, the member's position on the board shall be considered vacant until a successor is appointed…."); Wis. Stat. § 17.245 (a newly created "office of municipal judge … shall be considered vacant" "if a city, village or town enacts an ordinance or bylaw creating a municipal court … before the December 1 preceding the spring election"); Wis. Stat. § 60.30(2)(d) (the office of town assessor "is vacant" "[i]f a person elected to the office is not certified by June 1 of the year elected").

similar term, interpreting Section 15.07(1)(c) to create a vacancy at the expiration of the term would violate the fundamental "maxim[] of statutory construction … that courts should not add words to a statute to give it a certain meaning." *State v. Lickes*, 2021 WI 60, ¶ 24, 397 Wis. 2d 586, 960 N.W.2d 855 (citation omitted).

2. The Attorney General misreads this Court's pre-*Thompson* precedent to manufacture a fictional common-law rule.

Unable to identify any relevant changes to the vacancy or appointment statutes that would justify a departure from *Thompson*, the Attorney General suggests that *Thompson* is distinguishable (or wrongly decided) because it failed to address a purported "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." AG Br. 29. But there is no such principle, and the Attorney General's argument is based on a misreading of this Court's pre-*Thompson* precedent addressing *elected* officers.

a. The Attorney General's lead case is *Pluntz*, *see* AG Br. 30, which held that even though an elected sheriff held over after his term, "there was nevertheless a vacancy in the office." *State ex rel. Pluntz v. Johnson*, 176 Wis. 107, 184 N.W. 683, 685 (1921), *judgment vacated on reh'g on other grounds by* 176 Wis. 107, 186 N.W. 729 (1922). In reaching that decision, the Court drew a clear distinction between "those appointed to fill a vacancy" and "those who are elected." *Id.* at 684. The former may hold over "until a successor shall be elected and qualified" while the latter may not. *Id.* The Court also noted that the Constitution made

sheriffs ineligible for reelection for two years after "the termination of their offices," which the Court interpreted as "constitut[ing] an elective term of two years and no more." *Id.* at 684–85. The Court concluded that "[a]s one who is elected to the office of sheriff does not hold over, the end of the term for which he is elected necessarily marks the termination of his office." *Id.* at 685. The Court's decision was based on specific constitutional text, not a background rule prohibiting holdovers in the absence of an express statutory provision.

The Attorney General's reliance on *State ex rel. Schroeder v. Feuerstein* and *State ex rel. Martin v. Heil* is also misplaced. In *Feuerstein*, the Court interpreted a statute providing that school officers shall "hold their respective offices for three years and *until their successors have been elected or appointed*, but not beyond ten days beyond the expiration of their term of office without being again elected or appointed." 159 Wis. 356, 150 N.W. 486, 488 (1915) (emphasis added) (quoting Wis. Stat. § 431 (1913)). The Court interpreted that statute as evidencing "the legislative intent that a clerk once duly elected should hold office till his successor is elected or appointed, and for a period of ten days thereafter if his successor does not qualify within that time, but no longer without a re-election or reappointment." *Id.* The Court did not invoke the any purported common-law rule against holdovers—it interpreted an express provision that created a vacancy within 10 days of the election or appointment of a successor. There is no comparable statute addressing members of the Board.

This Court's decision in *Heil* is even further afield. The issue there was whether the Governor (another elected official) could hold over beyond his term. 242 Wis. 41, 48–49, 7 N.W.2d 375 (1942). Citing *Pluntz*,

this Court recognized that "there has been a tendency in the authorities to hold, in spite of the absence of these words, that an incumbent holds over until his successor is selected and qualified." *Id.* at 48–49. But the Court reasoned that the absence of such a provision was "not wholly conclusive" with respect to the Governor, because he is "the holder of a political office of the first importance." *Id.* at 48, 50. *Heil*'s conclusion that the Governor cannot hold over beyond his term did not disturb the general common-law rule as applied to *other* officers. *See id.* at 51 ("There is, on the other hand, little practical objection in an administrative office to … continu[e] until a successor is elected and qualified.").

b. The Attorney General contends that even if appointed officers can hold over, they are *de facto* officers, not *de jure* officers, and thus must depart once their successor is nominated and qualified. *Thompson* reached precisely the opposite conclusion: "[O]ne who has the legal right to continue in office after expiration of his term is an officer *de jure*, and not *de facto*." 22 Wis. 2d at 294. Consequently, *Thompson* held that the appointment of a successor to a duly confirmed incumbent "was ineffective in the absence of confirmation." *Id.* Indeed, the Attorney General himself argued in *Thompson* "that the holdover incumbents are in effect, *de jure* officers, who cannot be replaced without confirmation by the [S]enate." *Id.* at 283. The lower courts have thus read *Thompson* to mean that an officer "has the right to continue in office after the expiration of his or her term and is an officer de jure until the [L]egislature again considers confirmation." *Morris*, 203 Wis. 2d at 180 (citing *Thompson*, 22 Wis. 2d at 294). The Attorney General cites various cases from *other* states applying his preferred version of the "de facto officer" doctrine, AG Br. 30–31, but that is not the law in Wisconsin.

3. The rule applied in *Thompson* does not create "fundamental problems."

The Attorney General ultimately resorts to a nonsensical policy argument, contending that the common-law rule that has governed vacancies in this State for more than a century, and which was affirmed more than fifty years ago in *Thompson*, creates "fundamental problems." AG Br. 32. First, he contends that allowing Prehn to holdover until his successor is confirmed would "nullify[] the Governor's provisional appointment authority." *Id.* Second, he contends that it would allow Prehn "to remain in office at *his* and the [S]enate's pleasure." *Id.* But courts "do not reach beyond the statutory text" to "weigh the extrinsic ramifications of [their] construction," *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2019 WI 24, ¶ 18, 385 Wis. 2d 748, 924 N.W.2d 153, and these arguments are makeweight.

a. The provisional appointment statute allows the Governor to fill "[v]acancies occurring in the office of any officer normally nominated by the [G]overnor, and with the advice and consent of the [S]enate appointed." Wis. Stat. § 17.20(2)(a). The provisional appointment power is thus predicated on there *being a vacancy*. Where an incumbent holds over pending the confirmation of his successor by the Senate, there is no vacancy. *See supra* I.A. Nothing about that result nullifies the provisional-appointment power—the Governor is free to make a provisional appointment whenever a vacancy arises through one of the events enumerated in Section 17.03.

b. The second "problem" identified by the Attorney General—that officers could "remain in office at [their] and the [S]enate's pleasure," AG Br. 32—flows from the fact that the Governor's appointees may not take

office unless they have been confirmed by the Senate. That is not a "problem"—it is a feature of our constitutional system of government. Neither *State ex rel. Dithmar v. Bunnell*, 131 Wis. 198, 110 N.W. 177 (1907), nor *State ex rel. Hamilton v. Krez*, 88 Wis. 135, 59 N.W. 593 (1894), is to the contrary.

In *Dithmar*, the defendant was elected to fill an unexpired term until January 1906, replacing the previously appointed temporary incumbent in that office. 110 N.W. at 179. After the defendant's election, the Legislature amended the relevant statutes, purportedly extending the temporary incumbent's term of office to January 1906. This Court held the Legislature could not prevent the defendant "from taking the office" or "designate some one else to fill the office during the portion of the unexpired term for which he was so elected." *Id.* at 184. And in *Krez*, after a city attorney was elected to a two-year term, the Legislature subsequently extended the term of office from two years to four. 59 N.W. at 593. The question was whether the new statute authorized the incumbent to serve for four years. *Id.* The Court concluded that "to hold the office again and anew, he must be elected anew, or appointed by the proper municipal authority." *Id.* at 594. Unlike in *Dithmar* and *Krez*, the Legislature here has not passed a statute extending Prehn's term of office. It is simply asking this Court to uphold the common-law rule allowing an appointed officer to serve in office until his successor has been confirmed.

The Attorney General's "fundamental problems" argument is also foreclosed by *Thompson*. There, as here, the Governor had appointed various individuals to succeed the sitting incumbents—all of whom were "holding over after the expiration of their terms"—yet the Court held

that these officers could "holdover in office until their successors are duly appointed *and confirmed by the [S]enate*." 22 Wis. 2d at 293 (emphasis added). If that result created "fundamental problems," the Court presumably would have reached a different result.[18]

c. The Attorney General contends that changes to the provisional-appointment statute warrant a different result here than in *Thompson*. Specifically, he notes that whereas the Governor previously could make a provisional appointment only during a recess, he can now "make appointments when the [S]enate fail[s] to act on a nominee." AG Br. 27. According to the Attorney General, this change in the statutory scheme "removed the underlying concern that an office would remain physically vacant until the [S]enate acted on the appointment." *Id.*

Even if the amendments to Section 17.20 removed the primary rationale for the common-law rule by ensuring that offices will not remain vacant pending confirmation of a successor, "[s]tatutes in derogation of the common law are to be strictly construed," and those amendments to the provisional-appointment statute do not "clear[ly]" or "unambiguous[ly]" express a legislative intent to change the background rule allowing holdovers. *Strenke*, 2005 WI 25, ¶ 29; *see* Wis. Stat. § 990.001(7) ("A revised statute is to be understood in the same sense as the original unless the change in language indicates a different meaning so clearly as to preclude judicial construction."). And these policy arguments should be directed to the Legislature, which has the

[18] The Hawaii Supreme Court's decision in *Morita v. Gorak* turned on particulars of Hawaiian law. 453 P.3d 205, 213–15 (Haw. 2019). Most notably, the court relied extensively on the drafting history of Hawaii's constitution. *Id.* That history has no relevance here.

constitutional authority to define when vacancies in office occur. Wis. Const. art. XIII, § 10(1).

4. The Attorney General can satisfy none of the criteria for overturning *Thompson*.

The Attorney General contends that, even if *Thompson* forecloses his arguments, it should be overruled. Yet "respect for prior decisions is fundamental to the rule of law." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W. 2d 257. "Consequently, … 'any departure from the doctrine of stare decisis demands special justification." *Id.* (citation omitted). "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and [the Legislature] remains free to alter what [courts] have done." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (citation omitted).

A party seeking to overturn settled precedent must therefore show that "developments in the law have undermined the [prior] rationale" and that there is "a need to make a decision correspond to newly ascertained facts." *Johnson Controls*, 2003 WI 108, ¶ 98. Additional considerations include "whether the prior decision is unsound," "unworkable," or implicates "reliance interests." *Id.* ¶ 99. None of these criteria militates in favor of overturning *Thompson*.

First, as discussed above, the statutory changes to Sections 17.20 and 17.03 do not undermine *Thompson*. As the circuit court recognized, "[b]oth past and present versions of Wis. Stat. § 17.20 require a 'vacancy' as a necessary predicate for any sort of appointment." R.72:13. Although the Legislature amended Section 17.03 nearly a dozen times after

Thompson was decided,[19] not once has the Legislature included the expiration of an appointed term as an event that makes an appointive office "vacant." Under the doctrine of acquiescence, "refusal to pass a measure that would defeat the courts' construction is not an equivocal act." *Zimmerman v. Wis. Elec. Power Co.*, 38 Wis. 2d 626, 634, 157 N.W.2d 648 (1968). The Legislature "is presumed to know that in absence of its changing the law, the construction put upon it by the courts will remain unchanged; for the principle of the courts' decision—legislative intent—is a historical fact and, hence, unchanging." *Id*. Therefore, "when the [L]egislature acquiesces or refuses to change the law, it has acknowledged that the courts' interpretation of legislative intent is correct." *Id.; see also Kilian v. Mercedes-Benz USA, LLC*, 2011 WI 65, ¶ 30, 335 Wis. 2d 566, 799 N.W.2d 815, (citing *Zimmerman*, 38 Wis. 2d at 633–34).

The Legislature's decision to amend Section 17.03 to forbid officers in *elective* offices from holding over—while leaving undisturbed *Thompson*'s holding as to *appointive* offices—further confirms that *Thompson* is still consistent with Legislative intent. *See* 1983 Wis. Act 484, § 140 (amending Section 17.03(10)). "If [the Legislature] wanted the [appointive] term to expire after [so many] years regardless of whether a successor had been appointed and qualified, it would have said so." *United States v. Ayala*, 917 F.3d 752, 757 (3d Cir. 2019) (citing *Parsons v. United States*, 167 U.S. 324, 333 (1897)).

[19] *See* 2013 Wis. Act 20, § 193; 2005 Wis. Act 387, § 3; 1989 Wis. Act 241, §§ 1, 2; 1989 Wis. Act 31, § 160; 1987 Wis. Act. 391, § 77e; 1985 Wis. Act 332, § 19; 1985 Wis. Act 312, § 11; 1985 Wis. Act 304, § 133; 1983 Wis. Act 484, §§ 138–40; Assem. B. 902, 1979 Reg. Sess., ch. 249, § 8 (Wis. 1979); S.B. 1, 1972 Spec. Sess., ch. 304, § 29 (Wis. 1972); S.B. 434, 1971 Reg. Sess., ch. 154, § 2 (Wis. 1971).

Second, *Thompson*'s holding is not unsound. It was based on longstanding common-law precepts that the Legislature has never seen fit to disturb. *See supra* I.A; *Strenke*, 2005 WI 25, ¶ 28 ("A statute must be interpreted in light of the common law and the scheme of jurisprudence existing at the time of its enactment.").

Third, the rule announced in *Thompson* is not unworkable. Holdovers have continued to serve in office for the past several decades without objection. *See supra* I.A. That certain public-interest groups would rather have Naas sit on the Board than Prehn is no reason to overthrow nearly sixty years of settled precedent.

Fourth, overruling *Thompson* and declaring appointed offices vacant at the expiration of a fixed term would upset significant reliance interests because retirement benefits are often based on years of continuous service. In *Morris*, the court of appeals analyzed when the plaintiff "began service" in public office to sort out a dispute over "state retirement benefits." 203 Wis. 2d at 176. The plaintiff argued that although he was first appointed in 1971 and the benefits program was available to qualifying persons who began service after 1973, he was eligible because of post-1973 reappointments to his office. *Id.* The court disagreed. Citing *Thompson*, the court held that the plaintiff "began service" in 1971 since "an incumbent holds over after the expiration of the term" and his "(appointive) office is" thus not "vacant" for subsequent appointment. *Id.* at 180.

Although the officer in *Morris* wanted to restart his employment clock after his first term expired because of a favorable change in the law, most public officers who continue to serve after the expiration of their terms would be harmed by a new interpretation holding that their

offices in fact became vacant the day their terms ended. Because the "state retirement benefit[]" system calculates benefits, in part, based on years of continuous service, *id.* at 181, the Attorney General's proposed rule would reduce the benefits of public officers who held over after their terms expired.

II. THE GOVERNOR CANNOT REMOVE PREHN EXCEPT "FOR CAUSE"

The Attorney General contends that even if Prehn is lawfully serving on the Board, the Governor should be able to remove him at any time. AG Br. 36. But the plain text of Wis. Stat. § 17.07(3) says otherwise.

A. Section 17.07(3) Prohibits the Governor from Removing Prehn "at Pleasure" Because Prehn Is Serving in the Type of Office Subject Only to "For Cause" Removal

Section 17.07 governs the removal standards for appointed state officers. Some officers serve at the "pleasure" of the Governor, while others may be removed only "for cause." Wis. Stat. § 17.07.[20] The Legislature's decision to designate certain officers as removable only "for cause" reflects its "desire to have th[e] officer as free and independent as an official may be in the discharge of his duties." *State ex rel. Schwenker v. Dist. Ct. of Milwaukee Cnty.*, 206 Wis. 600, 240 N.W. 406, 409 (1932).

As relevant here, "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" may be removed "by the governor at any time, for cause." Wis. Stat. § 17.07(3). By contrast, "state officers serving in an

[20] "Cause" is defined as "inefficiency, neglect of duty, official misconduct, or malfeasance in office." Wis. Stat. § 17.001.

office that is filled by appointment of the governor with the advice and consent of the senate to serve at the pleasure of the governor" may be removed "by the governor at any time." *Id.* § 17.07(4). Prehn continues to serve lawfully on the Board because his office did not become "vacant" when his term expired. *Supra* I.A–B. The appropriate removal standard is thus determined by the type of "office" Prehn is "serving in." Specifically, the question is how the office in which Prehn is serving "is filled." Wis. Stat. § 17.07(3).

As the circuit court recognized, "the only practical difference" between officers subject to "for cause" removal under Section 17.07(3) and those subject to removal at any time under Section 17.07(4) "is whether the office in which they are serving has been filled for a fixed term." R.72:16. The "office" here is the Board of Natural Resources, whose members are "appointed for staggered 6-year terms." *See* R.72:16 ("The office in which Prehn is serving is the Board, which is filled for a fixed term of six years, and not at the pleasure of the [G]overnor") (citing Wis. Stat. §§ 15.07(1)(c) & 15.34(2)(a)). Prehn is thus "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." Wis. Stat. § 17.07(3).

Thus, under a straightforward reading of Section 17.07(3), Prehn is removable only for cause for as long as he continues to serve in that office. *Id.; see Moses v. Bd. of Veterans Affairs*, 80 Wis. 2d 411, 416, 259 N.W.2d 102 (Wis. 1977) (as long as an officer "remains an officer appointed by the [G]overnor, [and] confirmed by the [S]enate, he remains removable from office only by the [G]overnor, for cause.").

B. The Attorney General's Contention That "For Cause" Protection Ends When a "Fixed Term" Expires Violates Basic Rules of Statutory Interpretation

The Attorney General contends that Section 17.07(3)'s tenure protection vanishes upon expiration of a "fixed term" because the statute uses the present tense "is filled"—and not "was filled." AG Br. 37–39. That argument fails Statutory Construction 101 and is foreclosed by precedent.

Under the grammatical "rule of the last antecedent," the phrase "that is filled by appointment of the governor for a fixed term" modifies the noun "office"—not "officers." *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) ("[A] limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows."); *accord, e.g.*, *Coffin v. Bowater Inc.*, 501 F.3d 80, 94–95 (1st Cir. 2007) (applying *Barnhart* in construing a "that is" modifying clause as modifying only the noun directly before the clause); *In re Marriage of Meister*, 2016 WI 22, ¶ 29 n.13, 367 Wis. 2d 447, 876 N.W.2d 746 (gathering Wisconsin cases applying the statutory-interpretation canon of the rule of the last antecedent); R.72:15 (same).[21] The relevant question is thus how the "office" Prehn is "serving in" "is filled." The answer to that question is clear: a seat on the Board "is filled" by appointment for a fixed term with advice and consent of the Senate. Prehn is thus serving in an "office" whose members are subject only to for-cause removal.

[21] In 1995, the Legislature amended Section 17.07(3) to make clear that for-cause tenure protection relates to the office itself—not to the "state officers," as in the earlier version. 1995 Wis. Legis. Serv. Act 27, § 437 (changing for-cause protection statute from "State officers appointed by the governor for a fixed term" to "State officers *serving in an office that is filled* by *appointment of* the governor for a fixed term").

Even if the Legislature were to change the method of appointment, that would not affect the removal standard *for Prehn*, who was appointed as specified in Section 17.07(3). *See Moses*, 80 Wis. 2d at 415. In *Moses*, the petitioner was appointed by the Governor and confirmed by the Senate as Secretary of Veteran Affairs, and thus was subject to removal only "for cause" under the then-current version of Section 17.07(3). *Id.* After he was appointed, the Legislature amended the appointment statute to give the Board of Veteran Affairs the appointment power instead of the Governor. *Id.* The revised appointment statute provided that a state officer serving in an office appointed by "any officer or body without the concurrence of the governor" may be removed by the appointing body "at pleasure." *Id.* at 414. Under that provision, the Board of Veteran Affairs voted to terminate petitioner, arguing that Section 17.07(3) no longer applied because the petitioner was "now an officer appointed without the concurrence of the [G]overnor." *Id.* at 416. This Court rejected that argument and held that the "the deletion in the appointment statute did not change … that [the petitioner] was the secretary of veterans affairs by virtue of" gubernatorial appointment and Senate confirmation. *Id.* at 415–16. Although the "amendment changed the method of appointment," the Court recognized that "it left the method of removal … unchanged." *Id.* at 416. The Court thus held that as long as one "remains an officer appointed by the [G]overnor, [and] confirmed by the [S]enate, he remains removable from office only by the [G]overnor, for cause." *Id.*

The same rule applies here. Although Prehn's term has expired, he became a member of the Board by virtue of his appointment by the Governor to a fixed term with the advice and consent of the Senate.

Because Prehn was appointed in the manner set forth in Section 17.07(3), he is subject to "for cause" removal only.

The post-*Moses* amendments to Section 17.07(3) that the Attorney General highlights, AG Br. 40, do not change the result. In 1979, the Legislature added the phrase "for a fixed term" to Section 17.07(3). 1979 Wis. Laws ch. 221, § 85.[22] The Attorney General contends that this amendment means for-cause removal protection ends "once an officer's specified term has ended." AG Br. 39. But that amendment merely limited the *category* of officers protected by the for-cause removal standard. Following that amendment, officers appointed by the governor to serve at his pleasure could be removed at any time, while those appointed to a "fixed term" were still subject only to removal for cause.

The legislative notes cited by the Attorney General confirm that the purpose of the amendment was to resolve a conflict between two state laws that generated confusion about the proper removal standard for certain officers. Analysis by Wis. Legis. Reference Bureau, LRB-9352, *cited with approval by* AG Br. 40. The 1979 amendment to Section 17.07 resolved the conflict by creating two standards for removal: (1) all appointees "who serve at the [G]overnor's pleasure, whether or not subject to [S]enate confirmation, may be removed at any time without a showing of cause," while "appointees who serve for a fixed term and whose appointments require [S]enate confirmation may not be removed by the [G]overnor" without cause. *Id.* The legislative notes do not suggest that for-cause removal vanishes after an officer's fixed term expires.

[22] The 1979 amendment changed the language of Section 17.07(3), not of Section 17.20(3). *See* AG Br. 40.

Citing two out-of-state cases, the Attorney General insists that for-cause protection must be tied to "fixity of tenure." AG Br. 39 (citing *State ex rel. Nagle v. Sullivan*, 40 P.2d 995, 998 (Mont. 1935), and *State ex rel. Mosconi v. Maroney*, 90 S.W. 141, 147 (Mo. 1905)). Neither case addressed public officers who continue to hold office after the end of their terms. Indeed, *Nagle* cautions that "the extent of the power and the manner of [the] exercise [of a removal statute] is to be determined by the wording of the applicable statute." 40 P.2d at 998; *see id.* at 999 ("In this connection, reference to precedent from other jurisdictions is of slight aid; no case construing the exact phraseology of our statute, and few interpreting statutes of similar tenor, can be cited.").

Wisconsin's removal statute does not provide (or even suggest) that for-cause removal protection is valid only for the duration of a fixed term. Rather, the phrase "for a fixed term" is a descriptor of the types of offices that receive protection under the statute. *Nagle* and *Mosconi* are therefore inapposite.

The Attorney General complains that applying the for-cause removal standard to holdovers would "curb both the Governor's removal power and the appointment power, allowing the [S]enate to choose candidates through inaction." AG Br. 40–41. That is incorrect. By statute, the Governor retains the ability both to nominate members of the Board and to remove Board members "for cause." Wis. Stat. §§ 15.07(1)(a); 17.07(3). Extending for-cause removal past the expiration of a term does not impair those executive functions. Nor does it give the Legislature authority to select anyone to sit on the Board.

Finally, the Attorney General analogizes Prehn's situation to an officer serving an indefinite term without the concurrence of the

Governor. AG Br. 41. But Prehn was not appointed to an office with an indefinite term and does not have a permanent entitlement to his seat—his tenure will end once the Senate confirms his successor. *See Thompson*, 22 Wis. 2d at 293. Until then, however, he enjoys the protection of the for-cause standard of removal under Section 17.07(3).

III. SEPARATION-OF-POWERS PRINCIPLES DEMAND THAT PREHN BE ALLOWED TO REMAIN IN OFFICE PENDING SENATE CONFIRMATION OF HIS SUCCESSOR.

Although the Attorney General filed this action against Prehn, this case implicates bedrock separation-of-powers issues arising from the Senate's refusal to confirm the Governor's nominee to the Board for the six-year term beginning on May 1, 2021. Prehn has publicly indicated that he will step down as soon as the Senate confirms his replacement, but the Governor is apparently unwilling to wait for the constitutionally required confirmation process.[23] Instead, he presumably authorized the Attorney General to run into Court and seek an order ousting Prehn.

Allowing such an end-run around the advice-and-consent requirement would be an affront to the separation of powers because it would hinder the Senate's ability to supervise the Board, which exercises significant delegated legislative authority. *See* Wis. Stat. § 15.07(1)(a) (requiring "advice and consent"). The Attorney General contends that letting Prehn remain in office until the Senate confirms his replacement would somehow give the Legislature authority to "effectively commandeer" the appointment authority and put the power of removal

[23] *See supra* n.3.

into the hands of the Legislature. AG Br. 33. Neither argument has merit.

A. The Legislature Is Lawfully Exercising Its Advice-and-Consent Role Consistent with Separation-of-Powers Principles

The Wisconsin Constitution vests all legislative power in the Legislature. *Koschkee v. Taylor*, 2019 WI 76, ¶¶ 10–11, 387 Wis. 2d 552, 929 N.W. 2d 600. This includes the power to "determine the general purpose or policy to be achieved by the law." *Id.* ¶ 11. "From time to time, the Legislature "has used its power to create administrative agencies" and "delegate[d] to [those] agencies certain legislative powers." *Id.* ¶ 13. Accordingly, although administrative "[a]gencies are considered part of the executive branch," *id.* ¶ 14, they are "creations of the [L]egislature" and thus "can exercise only those powers granted by the [L]egislature." *Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992). Because "agencies [have] no inherent constitutional authority to make rules," when they "promulgate rules, they are exercising legislative power that the [L]egislature has chosen to delegate to them by statute." *Koschkee*, 2019 WI 76, ¶¶ 12, 18. Agencies also exercise delegated power when they "determine the general purpose or policy to be achieved by the law." *Id.* ¶ 11. Because of this, they "remain subordinate to the [L]egislature" so far as they exercise that delegated authority. *Id.* ¶ 18.

In addition to controlling the rulemaking process, the Legislature asserts control over agencies via the confirmation power. Article XIII, section 10, of the Wisconsin Constitution vests the Legislature with the power to determine how an office may be filled. Where, as here, an

agency is under the "direction and supervision of a board," the Legislature has provided that "the members of the board … shall be nominated by the [G]overnor, and with the advice and consent of the [S]enate[,] appointed[] to serve for terms prescribed by law." Wis. Stat. § 15.07(1)(a).

Allowing Prehn to continue serving until his successor is confirmed does not interfere with the Governor's appointment power. Nothing in the Wisconsin Constitution requires the Legislature *to confirm* the Governor's appointees, much less to do so at the Governor's preferred pace. The Attorney General frets that "the Governor could be indefinitely saddled with a critical mass of Board members that do not share his view on executing the law." AG Br. 49. But the Board does not execute the law. Instead, the "powers and duties of the board shall be regulatory, advisory, and policy-making, and not administrative." Wis. Stat. § 15.05(1)(b); *see* Wis. Stat. § 15.01(1r) (the Board is the "policy-making unit" of the Department). The administrative—*i.e.,* executive—"powers and duties of the department are vested in the secretary." *Id.* § 15.05(1)(b). The secretary is nominated directly "by the [G]overnor" and serves at his "pleasure." *Id.* § 15.05(1)(c). Hence if the Governor does not see eye-to-eye with the Department secretary, he may remove the secretary and use his provisional appointment power to fill the resulting vacancy if the Senate delays in confirming his nominee. But because the Board exercises delegated legislative authority, the Legislature has every right to block an appointee if it fears he or she will use that power contrary to the will of the People.

This Court's recent decision in *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35

("*SEIU*"), is inapposite. The issue there was whether the Legislature could prescribe the content or method by which executive agencies disseminate guidance documents. *Id.* ¶ 103. As this Court explained, "[a] guidance document cannot affect what the law is, *cannot create a policy*, cannot impose a standard, and cannot bind anyone to anything." *Id.* ¶ 105 (emphasis added). Accordingly, "the creation and dissemination of guidance documents"—unlike the promulgation of regulations or official policy statements—"fall within the executive's core authority" to enforce the law. *Id.* This Court thus struck down the challenged statute as an unconstitutional effort to insert the Legislature "as a gatekeeper between the analytical predicate to the execution of the laws and the actual execution itself." *Id.* ¶ 107. The situation here, by contrast, does not involve any attempt by the Legislature to interfere with the exercise of executive power. The Senate is merely exercising its advice-and-consent function.

B. Enforcing the Removal Statute as Written Does Not Violate the Separation of Powers

The Attorney General contends that the Legislature cannot limit a chief executive's authority to remove executive officers after the expiration of a fixed term and that interpreting the removal statute to confer for-cause protection on Prehn after the expiration of his term violates the separation of powers. AG Br. 45. But individuals serving on administrative bodies exercising legislative authority have traditionally been subject to a higher standard for removal. *See Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628–29 (1935) (the FTC acts primarily as a "legislative agency" and thus the "illimitable power of removal is not possessed by the President

in respect of officers" of the Commission).

The cases that the Attorney General cites do not support his position that the Governor should have carte-blanche power over administrative bodies. In *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2192 (2020), the Court held that the head of the CFPB does not enjoy "for cause" protection from removal, as the CFPB "concentrat[es] power in a unilateral" agency head. *See also Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021) (citing *Seila Law* and reaching the same conclusion for the "single Director" head of the Federal Housing Finance Agency). The single-director structure contrasts with "multimember bodies," like the Board here, whose members may be subject to tenure protections created by Congress. *Seila Law*, 140 S. Ct. at 2199–2200 (citing *Humphrey's Ex'r*, 295 U.S. at 624); *see also Collins*, 141 S. Ct. at 1787 & n.21 ("[T]he President[]" must be able to "remove the *head* of an agency with *a single top officer*" without restriction, but that holding does not apply to "multi-member agencies [with members who are] nominated by the President and confirmed by the Senate to a fixed term.") (emphasis added). *Seila Law* is particularly inapplicable here because the DNR Secretary—who exercises administrative authority—is removable by the Governor at any time. *See supra* III.A.

The Attorney General cites *Humphrey's Executor* as limiting "for cause" removal to an officer's fixed term. AG Br. 48. But that is not what *Humphrey's Executor* said. Instead, the Court upheld for-cause removal for members of multi-member boards or commissions that exercise legislative or judicial power. *Humphrey's Ex'r*, 295 U.S. at 624–26. Nothing in *Humphrey's Executor* hints that the Court was considering

holdover appointees. And even if the Court had limited for-cause removal to the duration of a fixed term, its opinion interpreting the U.S. Constitution would not control this case given the differences between the state and federal constitutions. Indeed, *Humphrey's Executor* doubted that Congress could limit the President's ability to remove *anyone* occupying a "place in the executive department," and upheld for-cause removal for members of the Federal Trade Commission only because the Commission was created "to carry into effect legislative policies embodied in the statute … and to perform other specified duties as a legislative or as a judicial aid." *Id.* at 628. Yet the Legislature has limited the Governor's removal power for members of all boards whose members are appointed for a fixed term with advice and consent of the Senate, even when those boards oversee executive branch departments. Wis. Stat. §§ 15.07(1)(a); 17.07(3). Rigidly applying the logic of *Humphrey's Executor* would thus require invalidating the for-cause removal standard even for board members whose terms *have not expired*. That is not the law in Wisconsin, and this Court is thus free to ignore the dicta in *Humphrey's Executor*.

The Attorney General contends that preserving for-cause removal after the expiration of Prehn's term would give the Legislature control over the removal power, which is a "quintessentially executive" function in his view. AG Br. 45. This argument fails, because maintaining the "for cause" removal standard plainly does not give the Legislature any authority to remove Prehn. Indeed, the Legislature has no statutory role whatsoever in a "for cause" removal proceeding. *See* Wis. Stat. § 17.16(3). And the Governor remains free to remove Prehn should he be guilty of "inefficiency, neglect of duty, official misconduct, or malfeasance in

office." Wis. Stat. §§ 17.001; 17.07(3). Unlike in *Bowsher v. Synar*, 478 U.S. 714, 725 n.4 (1986), where Congress passed an unconstitutional statute providing "for direct congressional involvement over the decision to remove the Comptroller General," here the Legislature is simply asking the Court to give effect to the general removal statute. *See also id.* at 726.

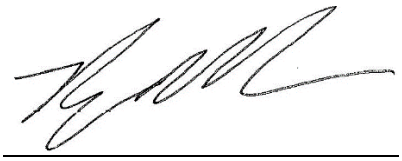
Although the Governor is surely frustrated that the Senate has not confirmed Prehn's replacement, he is always welcome to engage the Legislature in dialogue. But neither he nor the Attorney General can rewrite the vacancy or removal statutes to serve a political agenda for their powerful constituencies. The Constitution makes clear that the legislative branch can check the Governor's control of a policy-making Board that exercises significant legislative power.

CONCLUSION

This Court should affirm the circuit court's order dismissing this case and denying the Attorney General's request for a writ of quo warranto.

Dated: January 5, 2022

Respectfully submitted,



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,999 words.

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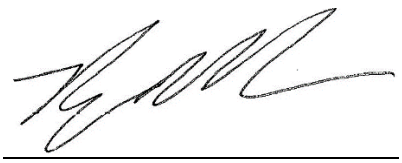

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I hereby certify that:

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

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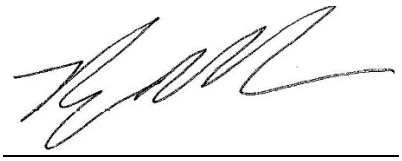

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Per Wis. Stat. § 809.80(4), I certify that this brief was delivered to a third-party commercial carrier for delivery to the Wisconsin Supreme Court within three calendar days. I further certify that the brief or appendix was correctly addressed.

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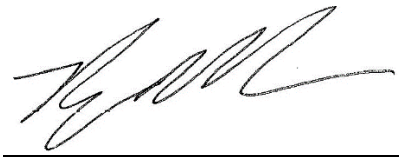

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2022, I caused true and correct paper copies of this brief to be delivered to counsel of record, addressed as follows:

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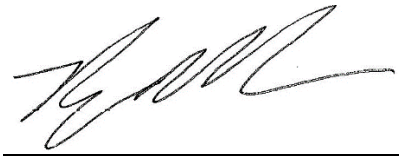

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