STATE OF WISCONSIN
SUPREME COURT

Derrick A. Sanders,

Petitioner-Appellant,

v.

State of Wisconsin Claims Board,

Respondent-Respondent-Petitioner.

Appeal No. 2021-AP-373
Dane County Case No. 2020-CV-1016

BRIEF FOR PETITIONER-APPELLANT DERRICK A. SANDERS

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ISSUE PRESENTED FOR REVIEW

Derrick Sanders spent 26 years in prison for a crime he did not commit. After the Circuit Court vacated his conviction, the State of Wisconsin Claims Board found by clear and convincing evidence that Sanders was innocent, and that he did not contribute to bringing about his wrongful conviction. The Board then turned to compensating Sanders under Section 775.05(4) of the Wisconsin Statutes. That statute reads:

> If the claims board finds that the petitioner was innocent and that he or she did not by his or her act or failure to act contribute to bring about the conviction and imprisonment for which he or she seeks compensation, the claims board shall find the amount which will equitably compensate the petitioner, not to exceed $25,000 and at a rate of compensation not greater than $5,000 per year for the imprisonment. Compensation awarded by the claims board shall include any amount to which the board finds the petitioner is entitled for attorney fees, costs and disbursements. If the claims board finds that the amount it is able to award is not an adequate compensation it shall submit a report specifying an amount which it considers adequate to the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172(2).

Wis. Stat. § 775.05(4). The Claims Board awarded Sanders $25,000.

The issue presented for review is: Must the Claims Board determine, and explain with at least some reasoning, whether the $25,000 it awarded to Sanders is adequate to equitably compensate him?

Answers below:

The Claims Board awarded Sanders $25,000 but did not find that $25,000 is the amount that will equitably compensate him, or that it is adequate to serve that purpose. Nor did the Board set forth reasoning in support of any such conclusions. The Circuit Court for Dane County affirmed. The Court of Appeals reversed, holding that the Claims Board

must exercise its discretion as to whether $25,000 is or is not adequate compensation for Sanders.

INTRODUCTION

Section 775.05(4) does not allow the Claims Board to do what it did here: curtly award $25,000 to compensate an innocent man for his 26 years in prison without explaining why it chose that amount. The statute's plain text demands that the Board determine whether its award is adequate to serve the statute's express purpose of providing equitable compensation. That plain meaning also is confirmed by the statute's early history—which the Board, overlooking the crucial detail that capsizes its argument, missteps in reading to support its crabbed interpretation of the statute.

Section 775.05(4) required a reasoned determination about how much will equitably compensate Sanders for his extraordinary term of wrongful imprisonment. The Board did not carry that light burden, and it now denies that it needed to. Reversal and remand, which here means affirmance of the Court of Appeals, is necessary. The Board must exercise its discretion under a correct interpretation of the statute.

STATEMENT OF THE CASE

A. Sanders' Vacated Conviction

Thirty years ago, the Circuit Court for Milwaukee County convicted Sanders of first-degree intentional homicide, party to a crime, for the 1992 murder of Jason Bowie. R.5:31. The court sentenced Sanders to life in prison. *Id.* Sanders had been a Navy veteran with no criminal record before his conviction. R.5:49–50.

A man named Anthony Boddie killed Bowie with a gunshot. R.5:31 (¶¶ 1–3). He apparently did so over a television set he believed Bowie

had stolen. R.5:19, 5:42, 5:55. A second perpetrator, John Peavy, was with Boddie when he committed the murder. R.5:31 (¶¶ 1–3). Boddie and Peavy both pleaded guilty to the crime. *Id.*

Sanders has consistently maintained that he had no involvement in the murder. R.5:33 (¶ 16). He admitted to punching or kicking Bowie when Boddie confronted him about the television, before stopping and urging Boddie to calm down. R.5:43–45. But Sanders never wavered in his position that he was not present when Boddie later killed Bowie in a different location, and that he did not know about Boddie's intent. R.5:32–33 (¶¶ 12–14, 16), 5:50.

Sanders, however, was charged based on Peavy's false statement that Sanders (not Peavy) was with Boddie when he committed the murder. R.5:19–20, R.5:33 (¶ 15). Boddie and Peavy both initially tried to blame Sanders in attempt to exonerate themselves. R.5:42–43. Boddie, however, recanted shortly thereafter, admitting that he was the killer, that only Peavy was also present, and that Sanders was not aware of what Boddie was doing. R.5:28–29, 5:34 (¶ 7); *see also* R.5:38–39 & 5:53–59 (Boddie, still incarcerated in 2018, again admitted that he lied when trying to pin the blame on Sanders).

Sanders twice pleaded no contest to homicide, party to a crime, based on misunderstandings about the charge—including an erroneous belief that his involvement in the earlier battery of Bowie made him strictly liable for Boddie's subsequent decision to commit murder. R.5:31–33 (¶¶ 3–20). The second time Sanders pleaded no contest, his attorney stipulated to the State's criminal complaint as a factual basis for his plea—even though the attorney's contemporaneous notes showed that Sanders, in privileged discussions, had continued to contradict the

complaint's allegations by maintaining that he was not present for the homicide and did not know that Boddie or Peavy intended to kill Bowie. R.5:32–33 (¶¶ 8–16).

The Circuit Court for Milwaukee County vacated Sanders' conviction in 2018. R.5:34–35. The State then dismissed its case against Sanders, conceding it lacked evidence to re-charge him as a party to Bowie's murder. R.5:37–39, 5:41. The prosecutor stated that Sanders' involvement in the earlier battery of Bowie "could be a substantial battery," but that a battery charge would have been time barred in any event.[1] R.5:39.

B. The Claims Board Proceedings

Sanders, without assistance of counsel, petitioned the Claims Board for compensation. *See* R.5:6–18. He sought around $530,000 based on his assets and hourly wage when he was convicted, plus an additional sum—up to about $5 million—based on the earning potential he may have had without his wrongful conviction and imprisonment. R.5:16–17. The Milwaukee County District Attorney's Office did not oppose Sanders' petition. R.5:63; *see also* Wis. Stat. § 775.05(2) ("Upon receipt of the petition, the claims board shall transmit a copy thereof to the prosecutor

[1] "Substantial battery" did not exist in 1992, when Boddie murdered Bowie. *See* 1993 Wis. Act 441 §§ 4, 8 (creating the crime of "substantial battery" effective in 1994); Wis. Stat. § 991.11 (an act generally takes effect "on the day after its date of publication"); 1993 Assembly Bill 879, *Analysis by the Legislative Reference Bureau*, Supp.-App. 010 ("Under current law, the battery statutes make distinctions between 2 types of harm: bodily harm and great bodily harm. This bill adds a middle-category of substantial bodily harm, covering situations in which the harm is temporary but substantial."). Today, "substantial battery" is punishable as a Class I felony. Wis. Stat. § 940.19(2). The confinement portion of a bifurcated sentence for a Class I felony may not exceed 18 months. Wis. Stat. § 973.01(2)(b)9.

who prosecuted the petitioner and the judge who sentenced the petitioner for the conviction which is the subject of the claim, or their successors in office, for the information of these persons.").

The Claims Board initially addressed Sanders' case in an August 2019 meeting, but elected to defer its decision "in order for a hearing to be scheduled at which [Sanders] and the Milwaukee County District Attorney's Office will be present to answer questions." R.6:14–16. After the District Attorney's Office declined to send a representative to the hearing, however, the Claims Board questioned the Office in an email that Sanders was unaware of. *See* R.6:31; R.8:5, Pet.-App. 134. The Board asked the District Attorney's Office whether, by not opposing Sanders' petition, it also did not oppose payment of the maximum total compensation ($5.75 million) that Sanders sought. *Id.* In response, the District Attorney's Office expressed its "general support for Mr. Sanders' petition for compensation" but stated it was "not taking any position" on the amount Sanders requested, which the Office incorrectly characterized as having "varied over the course of this process." *Id.*

Sanders appeared at a hearing in December 2019, R.7:63–67, and the Claims Board issued a written decision in February 2020, R.7:56–59, Pet.-App. 128–31. The Board found by clear and convincing evidence that Sanders was innocent of the crime for which he was imprisoned. R.7:58–59, Pet.-App. 130–31; *see also* Wis. Stat. § 775.05(3) ("After hearing the evidence on the petition, the claims board shall find either that the evidence is clear and convincing that the petitioner was innocent of the crime for which he or she suffered imprisonment, or that the evidence is not clear and convincing that he or she was innocent."). It also found that

Sanders did not contribute to bringing about his conviction. R.7:59, Pet.-App. 131.

Regarding the amount of Sanders' compensation, the Board wrote only: "Accordingly, the Board further concludes that compensation in the amount of $25,000 shall be awarded from the Claims Board appropriation." R.7:59, Pet.-App. 131. It did not state that $25,000 will equitably compensate Sanders, or that $25,000 is adequate to serve that purpose. *See* R.7:56–59, Pet.-App. 128–31.

Sanders petitioned for rehearing, and one of the Board's five members responded by letter. R.7:68–71; R.8:3–4, Pet.-App. 132–33. The member's letter, like the Board's decision, did not state whether $25,000 is adequate to equitably compensate Sanders; nor did it explain the basis of any such finding. R.8:3–4, Pet.-App. 132–33.

C. Review at the Circuit Court and Court of Appeals

Sanders, again without the benefit of counsel, petitioned for judicial review of the Board's decision. R.1. The Circuit Court for Dane County affirmed the Board. R.23, Pet-App. 121–27. Sanders, still *pro se*, appealed. R.24; May 18, 2021 Order; R.26. The Court of Appeals reversed the Circuit Court and remanded the cause with directions. *Sanders v. Claims Bd.*, unpublished slip op. ¶¶ 1, 53, No. 2021AP373, 2022 WL 2070388 (Wis. App. June 9, 2022). The Court of Appeals found "no findings or analysis discernible in the record to demonstrate [the Claims Board's] exercise of discretion in determining whether" the $25,000 it awarded to Sanders "is 'an adequate compensation' as required under § 775.05(4)." *Id.* ¶ 1. It thus reversed and remanded "to the circuit court with directions to remand to the Claims Board to properly exercise its discretion as to whether $25,000 is or is not adequate compensation" for Sanders. *Id.*

D. Other History Regarding Section 775.05

In 1913, Wisconsin became the nation's first state to enact a statute offering compensation to innocent persons convicted of and imprisoned for crimes. Wis. Legislative Reference Bureau, *Claims Against the State*, 2 LRB Reports 11 (Oct. 2018) at 3; *see also* 1913 Laws of Wisconsin, ch. 189. As of 2018, similar compensation statutes had been adopted by 32 other states, the District of Columbia, and the federal government. LRB, *Claims Against the State*, 2 LRB Reports 11 at 3.

The maximum compensation that the State of Wisconsin Claims Board may award to exonerees now is either the lowest or second lowest in the country, depending on the metric. *See id.*; *contrast* Wis. Stat. § 775.05(4) *with* Tex. Civ. Prac. & Rem. Code § 103.052(a)(1) (eligible exonerees in Texas are "entitled to compensation in an amount equal to . . . $80,000 multiplied by the number of years served in prison").

As a safety valve, however, Wisconsin directs the Claims Board to report to the chief clerk of each house of the legislature if it "finds that the amount it is able to award is not an adequate compensation." Wis. Stat. § 775.05(4). And the Claims Board has done so in other cases. For example, in 2010, the Board found that $115,000—$5,000 for each year of incarceration—was needed to equitably compensate Robert Lee Stinson for his 23 years of wrongful incarceration. *See* State of Wisconsin Claims Board, Decisions re: Dec. 9, 2010 hearings (Dec. 27, 2010) at 4 (¶ 5); *see also* R.5:102–103 (same); 2011–2012 Senate Journal (Jan. 12, 2011) at 22–29 (reporting numerous Board decisions, including its recommendation that the legislature award Stinson $90,000 in addition to the $25,000 the Board awarded from its appropriation); 2013 Wis. Act 206 (awarding Stinson the additional $90,000).

More recently, the Board found that a total of $1,000,000—plus an additional $100,110.13 for attorneys' fees—was needed to compensate Daryl Dwayne Holloway for his 24 years in prison. *See* State of Wisconsin Claims Board, Claim of: Daryl Dwayne Holloway, Claim No. 2021-050-CONV, Decision (Apr. 14, 2022). And the Board reached that conclusion even in the face of some resistance. The Milwaukee County District Attorney's Office took no position on whether Holloway should be compensated at all. *Id.* at 3. The Office also informed the Board "that the . . . DNA analysis [that exonerated Holloway] only related to the first assault [of two] and that the second victim remains adamant that Holloway was her attacker." *Id.* It further stated, "in relation to the second assault, . . . that two witnesses testified at trial that they saw Holloway in the area just prior to the assault," and that "[o]ne witness saw him at a party at a house on the same block as [the second victim's] apartment and that Holloway's clothing looked as though he'd been crawling through bushes." *Id.* Additionally, the Office "note[d] that there was a fifth, uncharged count related to a burglary that occurred several days after [the second victim's] assault"; that the victim in the burglary incident "came home and found a man in her house, who grabbed her purse and fled"; and that "[o]ne of the items reported missing was a jewelry box that was later recovered in the victim's yard with Holloway's fingerprints on it." *Id.* at 3–4.

In finding that $1,000,000 (plus attorneys' fees) was needed to compensate Holloway, the Board noted that "Wisconsin has the lowest annual compensation rate of any state that provides wrongful conviction compensation." *Id.* It also stated that, having "served 24 years in prison," Holloway "is the longest wrongfully convicted person released in

Wisconsin to date." *Id.* at 2, 3; *but see* R.7:56, Pet.-App. 128 (Sanders in fact spent longer in prison than Holloway). The Board's finding and recommendation now are before the legislature. *See* 2021–2022 Senate Journal (May 10, 2022) at 943–47 (reporting six recent Board decisions, including its recommendation that the legislature award Holloway $975,000 in addition to the $25,000 the Board awarded from its appropriation).

STANDARD OF REVIEW

This Court's review is de novo. The Court reviews the decision of the Claims Board, not that of the Circuit Court or Court of Appeals. *Turnpaugh v. State Claims Bd.*, 2012 WI App 72, ¶ 1, 342 Wis. 2d 182, 816 N.W.2d 920 ("We review the decision of the Claims Board and not that of the circuit court."); *see also Wisconsin Bell, Inc. v. Lab. and Indus. Rev. Commn.*, 2018 WI 76, ¶ 28, 382 Wis. 2d 624, 914 N.W.2d 1, *as amended on denial of reconsideration sub nom. Wisconsin Bell, Inc. v. LIRC*, 2018 WI 100, 384 Wis. 2d 771, 920 N.W.2d 928 ("In cases involving administrative agencies we review the decision of the agency, not the decision of the court of appeals or circuit court."); Wis. Stat. § 775.05(5) (the Claims Board's findings and award are "subject to review as provided in ch. 227"); Wis. Stat. § 15.105(2) (creating the Claims Board, which is "attached to the department of administration" within the executive branch). And where, as here, the matter is one of statutory interpretation, this Court gives the agency no deference. Wis. Stat. § 227.57(11) ("Upon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law."); *Cree, Inc. v. Lab. and Indus. Rev. Commn.*, 2022 WI 15, ¶ 13, 400 Wis. 2d 827, 970 N.W.2d 837 ("Statutory interpretation is a matter of law which we review de novo, giving no deference to the agency's legal conclusions.").

"The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." Wis. Stat. § 227.57(5). "When discretion has not been exercised [by the agency], the proper avenue is to remand." *J.I. Case Co. v. Lab. and Indus. Rev. Commn.*, 118 Wis. 2d 45, 49, 346 N.W.2d 315 (Ct. App. 1984).

ARGUMENT

I. The Board Must, on Remand, Determine Whether Its Award Is Adequate to Equitably Compensate Sanders.

A. The statute's plain text requires the Board to determine whether its award is adequate equitable compensation.

Fairly and reasonably construed, Section 775.05(4)'s text does not permit the Claims Board simply to award the $25,000 it has in its purse without considering whether that amount is adequate to equitably compensate an exoneree like Sanders. The Board must determine, within its discretion, whether its award is adequate to serve the purpose of equitable compensation. That is clear from the plain language of Section 775.05(4)'s first and last sentences.

The first sentence of Section 775.05(4) directs the Board to "find the amount which will equitably compensate the petitioner, not to exceed $25,000 and at a rate of compensation not greater than $5,000 per year for the imprisonment." Wis. Stat. § 775.05(4). The Board cannot make that finding without determining whether the amount it awards will, or will not, be adequate equitable compensation. No amount may be "the amount" which will equitably compensate an exoneree if it is not

adequate to serve that purpose. This is so regardless of whether the amount is the $25,000 statutory maximum, or something less. The statute does not instruct the Board merely to find *an* amount between $1 and $25,000—the Board must find "*the* amount which will equitably compensate the petitioner." Wis. Stat. § 775.05(4) (emphasis added). It must determine, within its discretion, how much compensation it truly believes is equitable.

Section 775.05(4)'s final sentence confirms this plain meaning. There, the legislature recognized that in making the determination required under the statute's first sentence, the Board may find "that the amount it is able to award is not an adequate compensation." *Id.* That language would make no sense if the Board were not tasked with determining *whether* the amount it may award is adequate. Logically, the Board must determine whether the amount it can award is adequate if there is any possibility of the Board's finding that such amount "is not an adequate compensation." Wis. Stat. § 775.05(4). The Board cannot find the answer to a question that the Board does not first ask.

The statute does not, it is true, *specifically* direct the Board to determine whether its award is "adequate." But as Justice Scalia wrote, textualist statutory interpretation "begins and ends with what the text says *and fairly implies*." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) at 16 (emphasis added); *see also id.* at 355–56 (warning against "a narrow, crabbed reading of a text" when "what is needed is reasonableness, not strictness of interpretation," and adherence "to the *fair meaning* of the text" (emphasis in original)). The text of Section 775.05(4) plainly implies that the Board must consider whether its award is adequate. For there to be

any chance of the Board's finding "that the amount it is able to award is not an adequate compensation," the Board must, as a predicate matter, determine *whether* its award is an adequate compensation. Equally, the Board cannot "find the amount which will equitably compensate" an exoneree without determining whether such amount is adequate equitable compensation. The two questions [1] whether an amount is "the amount which will equitably compensate the petitioner" and [2] whether the same amount is "an adequate compensation" are indistinct.

Like Justice Scalia, we in Wisconsin interpret statutory language "reasonably, to contain all that it fairly means." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997) at 23. This Court construes statutory text as it would be "understood by reasonably well-informed persons." *State ex rel. Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶ 47, 271 Wis. 2d 633, 681 N.W.2d 110. To that end, it interprets "statutory language . . . in the context in which it is used; not in isolation but as part of a whole." *Id.* ¶ 46; *see also Brey v. State Farm Mut. Automobile Ins. Co.*, 2022 WI 7, ¶ 11, 400 Wis. 2d 417, 970 N.W.2d 1 ("ascertaining the plain meaning of a statute requires more than focusing on a single sentence or portion thereof" (quotation marks omitted)). And the Court's "plain-meaning approach is not literalistic; rather, the ascertainment of meaning involves a process of analysis focused on deriving the fair meaning of the text itself." *Brey*, 2022 WI 7, ¶ 11 (quotation marks omitted). Statutory interpretation in Wisconsin "centers on the ascertainment of meaning, not the recitation of words in isolation." *Id.* ¶ 13 (quotation marks omitted).

That is also how we use language to communicate in ordinary life. Say, for example, that a client tells a law firm: *Make a budget, not to*

exceed $25,000, estimating the amount it would cost for you to handle this matter—but tell us if you find that the $25,000 cap is inadequate. Say too that the firm wins the work after projecting a cost of $25,000, but then is only halfway done when its billings hit that threshold. Called upon to explain itself, the firm could not reasonably tell the client: *This is because we identified projected costs that got us to $25,000 and, having hit your cap, went with that number and ended the analysis.* A reasonable listener or reader would have understood that the client affirmatively wanted the firm to determine whether $25,000 would be adequate.

Or consider this request from one spouse to the other: *Can you get some milk at the grocery store?* The other spouse could not excusably respond: *How can I get something you're saying is at the grocery store when you can see I'm standing in front of you right here in this house?* A neutral observer would adjudicate the crabby spouse in the wrong. Because a reasonable listener would have understood the fair meaning of the request: *Can you [drive to the grocery store and] get some milk at the grocery store [and presumably also bring that milk back here]?*

The "predicate act" canon also is relevant, especially as applied to Section 775.05(4)'s final sentence. That canon holds that "authorization of an act also authorizes a necessary predicate act." *Est. of Miller v. Storey*, 2017 WI 99, ¶ 52 n.21, 378 Wis. 2d 358, 903 N.W.2d 759 (quotation marks omitted). Section 775.05(4) gives the Board instructions, not "authorization," so the canon is not on all fours. But the underlying intuition—our natural understanding that explicit statements imply their necessary predicates—still is applicable. The final sentence of Section 775.05(4) tells the Board what it must do "if" it finds that "the amount it is able to award is not an adequate compensation." Wis. Stat. § 775.05(4). As noted above, a necessary

predicate of the Board's making—or even declining to make—that finding is a prior determination *whether* the Board's award is adequate. The statute's "If the claims board finds . . ." clause implies the predicate determination will be made, just as "permission to harvest the wheat on one's land implies permission to enter on the land for that purpose." Scalia & Garner, *Reading Law* at 192 (applying the predicate act canon).

The Court must give Section 775.05(4)'s text its "fair meaning." *Brey*, 2022 WI 7, ¶ 11. Read fairly, that text means the Board must determine whether the amount it awards to an exoneree is adequate to equitably compensate that exoneree. This case need not be more complicated than that.

B. The Board's reading clashes with the statute's text.

The Board's counter-interpretation is unsupportable. It slices Section 775.05(4) into pieces and stiches them back together with no regard for the harmony that a fair and careful reading would preserve.

The Board breaks down the statute into a "two-step process." Claims Board's Opening Br. at 26. In step one, the Board says it "must find the amount that will compensate the petitioner within the boundaries of the statutory $25,000 maximum." *Id.* at 26–27. The Board is clear that during this first step, it believes it *cannot* find that any amount higher than $25,000 is "the amount which will equitably compensate the petitioner." Wis. Stat. § 775.05(4). The Board says its "discretion to determine what will 'equitably' compensate a petitioner expressly *cannot* 'exceed $25,000.'" *Id.* at 37–38 (emphasis in original). Then, after finding in step one that an amount between $1 and $25,000 will equitably compensate the exoneree, the Board moves on to "step two" of its process. But step two "is triggered only *if* the Claims Board finds that the statutory maximum is inadequate." *Id.* at 27. If and only if the

Board makes that finding, step two requires the Board to submit a report to the legislature specifying an amount that it considers adequate. *Id.*

This reading of the statute is untenable, because the first and second steps of the Board's "process" are in conflict, violating the canon that "provisions of a text should be interpreted in a way that renders them compatible, not contradictory." *In re T.L.E.-C.*, 2021 WI 56, ¶ 30, 397 Wis.2d 462, 960 N.W.2d 391 (quotation marks omitted); *see also* Scalia & Garner, *Reading Law* at 180 ("The imperative of harmony among provisions is more categorical than most other canons of construction because it is invariably true that intelligent drafters do not contradict themselves (in the absence of duress)."). The Board claims that in "step one," it *must* find that an amount at or below what the Board is able to award "will equitably compensate the petitioner." Wis. Stat. § 775.05(4). But if that were true, "step two" should never be reached—the Board *never* could find that "the amount it is able to award is not an adequate compensation." *Id.* The $25,000 that the Board is able to award cannot simultaneously be "the amount which will equitably compensate" an exoneree *and* "not an adequate compensation"—not if language is used as it ordinarily is. So the statute's final sentence, beginning "If the claims board finds . . . ," would be otiose under the Board's construction.[2] Or if not, the Board's members would have to twist

[2] Contrary to what the Board claims, the Court of Appeals did not "ignore" the word "if" in Section 775.05(4)'s final sentence. *See* Claims Board's Opening Br. at 36. The Court of Appeals expressly *agreed*—as does Sanders—that the Claims Board must submit a report to the legislature only "if" it finds that the amount it can award is inadequate. *See Sanders*, 2022 WL 2070388, ¶ 43 (agreeing that "the language in § 775.05(4) . . . requir[es] that the Claims Board submit a report to the legislature only '[i]f the [C]laims [B]oard finds that the amount it is able to award is not an adequate compensation'" (quoting Wis. Stat.

their minds in knots by pondering how compensation that is "equitable" might also be, in some elusive sense, "not an adequate compensation."

Those knots need not be tied because Section 775.05(4)'s different sentences are so easily harmonized. *When does the Board determine whether the amount it is able to award "is an adequate compensation"*? When it finds "the amount which will equitably compensate the petitioner." Wis. Stat. § 775.05(4). *And what is the objective that compensation should be judged "adequate" or "inadequate" to serve?* The objective expressly stated in the statute's first sentence: providing an amount "which will equitably compensate the petitioner." *Id.*

The Board creates discord even within the statute's first sentence, standing on its own. It construes that sentence essentially to say that the Board "shall find the amount which will equitably compensate the petitioner"—*unless that amount turns out to be higher than $25,000, in which case the Board shall find that $25,000 is the amount which will equitably compensate the petitioner, even if the Board does not genuinely believe that $25,000 is the amount which will equitably compensate the petitioner*. The Board pits different parts of one sentence against each other, interpreting the "not to exceed . . ." qualifying clause to interfere with the main clause's mandate that the Board "shall find the amount which will equitably compensate the petitioner."

Again, the conflict is unnecessary. The "not to exceed . . ." qualifying clause is harmoniously read to limit what the Board has power to *award*—that is, to specify the referent of the phrase "the

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§ 775.05(4)) (alterations in original)). The word "if" is given full effect in Sanders' and the Court of Appeals' statutory interpretation. The Board's claim that the Court of Appeals "ignored" or "rewrote" that word is baseless.

amount it is able to award" appearing in the statute's last sentence. The "not to exceed . . ." clause need not and should not be read to stop the Board from finding "the amount which will equitably compensate the petitioner" in each case. Wis. Stat. § 775.05(4). The legislature would not have written that the Board "*shall* find the amount which will equitably compensate the petitioner" if it did not want the Board to follow that instruction. *Id.* (emphasis added); *see also Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 32, 339 Wis. 2d 125, 810 N.W.2d 465 ("[W]e presume that the word 'shall' is mandatory.").

C. Statutory history confirms Sanders' interpretation.

The statute's history would cement the analysis if its text left any doubt. *See Brey*, 2022 WI 7, ¶ 20 ("Statutory history, which involves comparing the statute with its prior versions, may also be used as part of 'plain meaning analysis.'" (quotation marks omitted)). The key pieces of that history—1913 Laws of Wisconsin, ch. 189 and 1935 Laws of Wisconsin, ch. 483—are partially addressed in the Claims Board's brief. S*ee* Claims Board's Opening Br. at 32–34. But the Board misses a critical part of the story: the 1935 legislation expressly enacted a *revisor's bill*. That omission leaves the Board's history incomplete. It also leads the Board to draw an upside-down inference from the 1935 act. Rigorously examined, the 1935 history shows that, as relevant here, the statute's meaning is the same today as it was in 1913.

The Board agrees it would lose this case under the initial, 1913 version of the statute. *See* Claims Board's Opening Br. at 32–33 (conceding that in 1913, the statute imposed what the Board calls a "full finding requirement"); *see also id.* at 38 (characterizing the same

requirement as a "total-value requirement"). For reference, the 1913 statute read:

> If the board shall find that the petitioner was innocent of the crime or offense for which he has suffered imprisonment, and that he did not by his act or failure to act contribute to bring about the conviction and imprisonment for which he seeks compensation, the board shall proceed to find the amount which will compensate the petitioner for his wrongful imprisonment. Such board may award a compensation to the petitioner so found innocent of not to exceed five thousand dollars in any case, and at a rate of compensation not greater than fifteen hundred dollars per year for the imprisonment so unjustly suffered. If the board shall find that the amount they may be able to award will not be an adequate compensation to the petitioner they shall report an amount to the legislature which they shall deem to be adequate and shall recommend the appropriation by the legislature to the petitioner of the amount in excess of the amount they may have awarded.

1913 Laws of Wisconsin, ch. 189 § 1 (creating Wis. Stat. § 3203a(4) (1913)).

The legislature revised the statute (which by then was numbered Section 285.05) in 1935 Laws of Wisconsin, ch. 483. But relevant here, it did so by enacting a revisor's bill. The 1935 legislation, enacted to revise certain statutes regarding actions and special proceedings, derived from 1935 Senate Bill 75. *See* 1935 Laws of Wisconsin, ch. 483, Supp.-App. 007. That bill was "a supplement to Bill No. 50, S [1935 Senate Bill 50]," and it instructed the reviewing legislators to "[s]ee the first note in that bill [1935 Senate Bill 50]." 1935 S.B. 75 at 1, NOTE, Supp.-App. 002. In turn, the referenced note in 1935 Senate Bill 50 states:

> Following the practice which has prevailed unbroken from the beginning of statutory revision in Wisconsin, this bill proposes some (mostly minor) changes in the law but *in every instance where a change is made there is a note calling attention to the change and giving a reason therefor*.

> The purpose, in chief, is to make the statutes more clear, concise and compact; to plainly express the meaning which has been judicially attributed to various provisions; to strike out obsolete provisions and those which have been superseded or impliedly repealed or which are duplications; to supply omissions and defects and correct errors, and to modernize the phraseology.
>
> *The absence of a note to any section of the bill means that only verbal changes are intended.*

1935 SB. 50 at 1, NOTE, Supp.-App. 001 (emphasis added); *see also* Wis. Stat. § 990.001(7) ("If the revision bill contains a note which says that the meaning of the statute to which the note relates is not changed by the revision, the note is indicative of the legislative intent."); *State v. Lyons*, 183 Wis. 107, 197 N.W. 578, 582 (1924) ("This court has held that the notes of revisors of statutes, which have been presented to the Legislature when acting upon revision bills, must be given due consideration in determining legislative intent where obscurity would otherwise exist.").

With that context unshorn, it is easily seen that 1935 Laws of Wisconsin, ch. 483 did not make any substantive change relevant to this case. In arguing to the contrary, the Board seizes on this revision:

> . . . the ~~board~~ *commission* shall ~~proceed~~ ~~to~~ find the amount which will compensate ~~the~~ ~~petitioner~~ *him* for his wrongful imprisonment~~.~~ ~~Such~~ ~~board~~ ~~may~~ ~~award~~ ~~a~~ ~~compensation~~ ~~to~~ ~~the~~ ~~petitioner~~ ~~so~~ ~~found~~ ~~innocent~~ ~~of~~ *but* not to exceed five thousand dollars ~~in~~ ~~any~~ ~~case,~~ and at a rate of compensation not greater than fifteen hundred dollars per year for the imprisonment ~~so~~ ~~unjustly~~ ~~suffered~~. If the ~~board~~ *commission* shall find that the amount ~~they~~ ~~may~~ ~~be~~ *it is* able to award will not be an adequate compensation ~~to~~ ~~the~~ ~~petitioner~~ ~~they~~ *if* shall report an amount to the legislature which ~~they~~ *it* shall deem ~~to~~ ~~be~~ adequate. . . .

1935 S.B. 75 § 5, Supp.-App. 005 (revising section 285.05(4)); *see also* 1935 Laws of Wisconsin, ch. 483 § 5, Supp.-App. 008–009 (same); Claims Board's Opening Br. at 33–34. But in fact, that revision demonstrates

that the substantive requirements of the 1913 statute are unchanged today.

Even on their face, the 1935 revisions belie the Board's claim of a substantive break. The Revisor of Statutes condensed the language limiting what the board (or "commission," in 1935) could award, yet while leaving intact the statute's command to "find the amount which will compensate him [the petitioner]." 1935 S.B. 75 § 5, Supp.-App. 005. The Revisor of Statutes and the legislature never would have left that mandatory language in the statute if they had wished to *repeal* the requirement that the board (or commission) "find the amount which will compensate" an exonerated convict.

Lest there be doubt, the Revisor of Statutes' notes confirm that no such change was made. "[I]n every instance where a change [was] made" in the act, "there [was] a note calling attention to the change and giving a reason therefor." 1935 SB. 50 at 1, NOTE, Supp.-App. 001. The notes for Section 285.05, however, say nothing about the supposed change the Board claims occurred. 1935 S.B. 75 § 5, NOTE, Supp.-App. 006. The absence of such a note "means that only verbal changes [were] intended." 1935 SB. 50 at 1, NOTE, Supp.-App. 001. Instead of changing the statute's meaning, the revisions only made the text more "concise and compact"—an objective the Revisor of Statutes expressly noted. 1935 SB. 50 at 1, NOTE, Supp.-App. 001 (emphasis added).

Case law also confirms this reading of the 1935 legislation. It is a "well-established rule of statutory interpretation that it will be presumed that in the enactment of a Revisor's Bill there was no intention to change the meaning of the statutes revised, or work any radical change in the law; and that the statute will not be construed as effecting

a change in meaning, unless the language used is so clear and explicit as not to be subject to interpretation." *London Guarantee & Acc. Co. v. Wisconsin Pub. Serv. Corp.*, 228 Wis. 441, 279 N.W. 76, 78 (1938) (quotation marks omitted)); *see also State ex rel. Harris v. Kindy Optical Co.*, 235 Wis. 498, 292 N.W. 283, 285 (1940) ("The true use of the revisor's services is to simplify and make plain the language of the statute."); *Gray v. Wisconsin Tel. Co.*, 30 Wis. 2d 237, 248, 140 N.W.2d 203 (1966) ("[T]here is a presumption that a revisor's bill is not intended to change the law. That presumption is properly applicable to this case, as there is nothing in the revisor's notes to indicate that the change was for any purpose other than consolidating several statutes on the same subject." (citations omitted)); *State v. Maas*, 246 Wis. 159, 164, 16 N.W.2d 406 (1944) (applying the same rule and finding no change in meaning where "the revisors, in attempting to make the statute more brief and concise, combined two clauses in a single paragraph").

Indeed, the law goes further than refuting the Board's misinterpretation of the 1935 act. It shows that, because the 1935 act did not change the meaning of the provision of interest here, that meaning is *the same as it was in 1913*. "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." Wis. Stat. § 990.001(7) (emphasis added); *see also Wisconsin Power & Light Co. v. City of Beloit*, 215 Wis. 439, 254 N.W. 119, 123 (1934) ("[T]he change of the statute was effected by a revisor's bill . . . . If there is any ambiguity in the changed language, it will be interpreted to mean as in the statutes revised."); *Guse v. A. O. Smith Corp.*, 260 Wis. 403, 406, 51 N.W.2d 24 (1952) ("[T]he Act continues to have the legal effect of sec.

2394–4, Stats.1911, notwithstanding the 1931 revision, because revisions of statutes do not change their meaning unless the intent to change the meaning necessarily and irresistibly follows the changed language.")

The Board thus gives away the case by conceding— correctly—that its position would be untenable under the 1913 statute. In the Board's own words, the 1913 statute "required the board . . . to 'find the amount which will compensate the petitioner,' full stop." Claims Board's Opening Br. at 33 (quoting 1913 Laws of Wisconsin, ch. 189 § 1). That requirement was not substantively changed in 1935. It remains in the statute today, and the Board must comply with it.

D. Reversal and remand are necessary so the Board can exercise its discretion.

Once Section 775.05(4) is properly construed, reversal and remand follow. A court "shall set aside or modify [an] agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." Wis. Stat. § 227.57(5). The latter option is appropriate here, because a correct interpretation of Section 775.05(4) compels the Board to make a discretionary determination: to determine what amount is adequate to equitably compensate Sanders. *See Mulder v. Mittelstadt*, 120 Wis. 2d 103, 115, 352 N.W.2d 223 (Ct. App. 1984) ("An appeal to equity requires a weighing of the factors or equities that affect the judgment—a function which requires the exercise of judicial discretion."); *State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶ 78, 353 Wis. 2d 307, 845 N.W.2d 373 ("[T]he basis of all equitable rules is the principle of discretionary application. . . . Appellate courts apply the

erroneous exercise of discretion standard in reviewing decisions in equity." (quotation marks omitted)). The Board, not any court, must make that determination on remand. *See* Wis. Stat. § 227.57(8) ("[T]he court shall not substitute its judgment for that of the agency on an issue of discretion."); *J.I. Case Co.*, 118 Wis. 2d at 49 ("When discretion has not been exercised, the proper avenue is to remand.").

One of the Board's own prior cases illustrates this well. In *Turnpaugh v. State Claims Board*, the Court of Appeals reversed the Board on two issues of law. 2012 WI App 72, ¶¶ 6–10, 342 Wis. 2d 182, 816 N.W.2d 920. The correct interpretation of the law, as established by the Court of Appeals' opinion, dictated that Turnpaugh was entitled to compensation under Section 775.05—and thus it compelled the Board to determine the amount. *See id.* ¶¶ 7–10. So, the Court of Appeals reversed and "remand[ed] . . . to the Claims Board for an assessment of what 'will equitably compensate' under the guidelines set out in Wis. Stat. § 775.05(4)." *Id.* ¶ 11; *see also id.* ¶ 4 (quoting Wis. Stat. § 227.57(5)).

In exercising its discretion on remand, the Board must do what it did not in its initial decision: set forth some reasoned explanation of its award. For an administrative agency much as for a court, "[d]iscretion is more than a choice between alternatives without giving the rationale or reason behind the choice." *Reidinger v. Optometry Examining Bd.*, 81 Wis. 2d 292, 297, 260 N.W.2d 270 (1977) (reversing an Optometry Board decision "because the Board failed to exercise its discretion"). "Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning." *Reidinger*, 81 Wis. 2d at 297 (quotation marks omitted). "[T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of

discretion should be set forth." *Id.* at 298 (quotation marks omitted); *see also Turnpaugh*, 2012 WI App 72, ¶¶ 7, 9 (criticizing the Claims Board's "*ipse dixit* conclusion without analysis" and determinations that were "terse and devoid of reasoning").

This Court and the Court of Appeals will reverse an agency for failure to demonstrate a reasoned exercise of discretion even where the agency's failure, unlike the Board's here, does not stem from an erroneous interpretation of law. *See, e.g.*, *Reidinger*, 81 Wis. 2d at 297–98; *Madison Gas and Elec. Co. v. Pub. Serv. Commn. of Wisconsin*, 109 Wis. 2d 127, 136–37, 325 N.W.2d 339 (1982) (reversing the Public Service Commission where it "gave no rationale for its action beyond that it was 'just and reasonable'"); *Hacker v. State Dept. of Health and Soc. Services*, 197 Wis. 2d 441, 477, 541 N.W.2d 766 (1995) (reversing a DHSS hearing examiner decision that "never provided any explanation why the proven allegations supported the decision to revoke [a residential facility operator's licenses] . . . but [i]nstead . . . simply followed the discussion of the evidence supporting the violation with the conclusion that DHSS could revoke [the] licenses"); *Argonaut Ins. Co. v. Lab. and Indus. Rev. Commn.*, 132 Wis. 2d 385, 391–92, 392 N.W.2d 837 (Ct. App. 1986) ("There is nothing in the record before us to indicate that the examiner exercised her discretion as that term has been defined by the courts, and her failure to do so is in itself an abuse of discretion.").

Reasoning in the record is necessary because it is a precondition of judicial review. By statute, the Board must "keep a complete record of its proceedings in each case," and its "findings and . . . award . . . shall be subject to review as provided in ch. 227." Wis. Stat. § 775.05(5). But review of a discretionary decision "is frustrated when . . . the

decisionmaker acts without giving the parties or the reviewing court any inkling of the reasons underlying the decision." *Argonaut*, 132 Wis. 2d at 391; *see also J.I. Case Co*, 118 Wis. 2d at 49 ("If an agency fails to exercise its discretion on an issue . . there is no way [a] court can review its final determination . . . ."). By failing to explain its discretionary determination (or to make one at all), an agency puts the courts in the untenable position of having either to forgo meaningful review or to violate the legislature's directive that a "court shall not substitute its judgment for that of the agency on an issue of discretion." Wis. Stat. § 227.57(8). Only remand can solve that problem.

Here, there is no "evidence in the record" to show that the Board engaged in any "process of reasoning" to determine what amount is adequate to equitably compensate Sanders. *Reidinger*, 81 Wis. 2d at 297. That is unsurprising, since the Board denies that it needed to make that determination in the first place. The Board's entire analysis under Section 775.05(4) consisted of one sentence: "Accordingly, the Board further concludes that compensation in the amount of $25,000 shall be awarded from the Claims Board appropriation." R.7:59, Pet.-App. 131. The Board did not make even a *conclusory* determination that $25,000 is "the amount which will equitably compensate" Sanders, or that $25,000 is "an adequate compensation." Wis. Stat. § 775.05(4). Still less did it make a determination supported by reasoning. The Board utterly failed to explain why it chose $25,000 as the amount of Sanders' award, thus thwarting judicial review.

The Board exaggerates what is being asked of it when it claims that Sanders or the Court of Appeals wants the Board to specifically explain "why it did not submit a report to the Legislature" or to "spell

out" how the Board determines the "exact" amount it awards to each exoneree. *See* Claims Board's Opening Br. at 36, 38. The Court of Appeals did not instruct the Claims Board to do either of those things. *See Sanders*, 2022 WL 2070388, ¶ 1 (instructing the Board "to properly exercise its discretion as to whether $25,000 is or is not adequate compensation"). Nor is Sanders asking it to. No one is claiming that the Board must explain its determination with exactitude, or provide reasoning as thorough as one would expect from an appellate opinion, or duplicatively address questions (such as "why the Board did not submit a report to the Legislature") that will implicitly be answered if the Board simply explains what amount it finds will equitably compensate an exoneree—and why. That is all Sanders asks this Court to instruct the Claims Board to do: explain in *some* fashion what it determines is adequate to equitably compensate Sanders, and what the reasons are for its determination. That is the minimum needed to enable meaningful judicial review of the Board's discretionary determination.

The Board also makes a short "harmless error" argument, but it is easily dismissed. The Board appears to reason that remand would be pointless because the Board (according to the Attorney General's Office) would respond to the remand by doing nothing except adding the words "we find that $25,000 is adequate compensation" to its prior decision. *See* Claims Board's Opening Br. at 41. That argument is unavailing for three reasons.

First, the Board could not properly exercise its discretion simply by writing down the conclusory sentence suggested in its brief. The Board need not use magic words nor adopt any particular format in exercising its discretion, but it must set forth *some* sort of "rationale or

reason" for its decision. It must demonstrate that it undertook a "process of reasoning" when determining what will equitably compensate Sanders. *Reidinger*, 81 Wis. 2d at 297. Stating a conclusion with no accompanying reasoning would not cut it.

Second, the Board's position contradicts Wis. Stat. § 227.57(5). As noted above, that statute gives the courts—using the mandatory word "shall"—two choices for responding to the Board's erroneous interpretation of law: [1] "set aside or modify the [Board's] action"; or [2] "remand the case to the [Board] for further action under a correct interpretation of [Section 775.05(4)]." Wis. Stat. § 277.57(5). Section 227.57(5) does not permit the procedure that the Board seems to propose: *affirming* an agency despite its erroneous interpretation of law, provided only that the agency represents through the Attorney General's Office that it has already decided to reach the same result on remand as it did before.

Third, the lone case the Board cites in making its "harmless error" argument only demonstrates how unsupported that argument is in law. In *Houslet v. State Department of Natural Resources*, the Department denied an application for a dredging contract and—having rejected the contract—declined to make factual findings about what the contract's water pollution effects would have been if the contract had been accepted. 110 Wis. 2d 280, 281, 289–91, 329 N.W.2d 219 (Ct. App. 1982). The Court of Appeals affirmed the Department's decision to reject the contract, but held that the Department still should have made findings about what the contract's water pollution effects would be if the contract instead were accepted. The Court of Appeals, however, reached that conclusion purely in the interest of judicial economy. It reasoned that

water pollution findings *would have been* needed if, counterfactually, the Court of Appeals had reversed the Department, thus making the proposed contract's water pollution effects relevant:

> There is a purpose to be served in requiring a specific water pollution finding even when an application is denied on other grounds, because the denial on those grounds might be overturned on judicial review. Requiring a pollution finding in all cases would avoid the necessity of a remand to the department for the missing findings, in that event, and the probability of another judicial review thereafter. This would effect a savings in time and expense for litigants, the department, and reviewing courts alike.
>
> We therefore hold that a water pollution finding is required in all cases, regardless whether a dredging contract is granted or is denied for reasons unrelated to water pollution.

Houslet, 110 Wis. 2d at 290–91. With that as its rationale, the Court of Appeals naturally did not order a remand after *affirming* the Department's decision to reject the dredging contract on grounds unrelated to water pollution findings. *See id.* at 291. Requiring the Department to make findings that judicial review *already* had deemed irrelevant would not have effected any "savings in time and expense for litigants, the department, [or] reviewing courts." *Id.* at 291. It would have done the opposite, by irrationally forcing the Department to make findings that the Court of Appeals had just confirmed would be of no use to anyone. That is the lesson to draw from *Houslet*, and it has no bearing here.

II. The Board's Email Issue Is Immaterial.

Separate from the issue about Section 775.05(4)'s interpretation, the Board asks this Court to "hold that Sanders cannot justify reversing or remanding the Claims Board's decision based on its staff's clarification email exchange with the District Attorney's Office." Claims Board's

Opening Br. at 49. In seeking that relief, the Board argues that "Sanders cannot show that the Claims Board engaged in any improper communication with the District Attorney's Office that prejudiced him resulting in material error." *Id.* at 42; *see also id.* 42–48.

This distinct issue raised by the Board need not be addressed. Sanders is not arguing that the Claims Board's decision should be reversed or remanded based on the Board's emails with the District Attorney's Office. The Court of Appeals did not reverse the Board's decision on that basis; nor did it instruct the Board to take any action on remand relating to the emails. *Sanders*, 2022 WL 2070388, ¶¶ 1, 44–48, 53. Sanders did not cross-petition for review of the Court of Appeals' decision not to reverse or remand the Board on any basis other than the Board's misconstruction of Section 775.05(4). And insofar as Sanders could have asserted the email issue as an alternative ground to "defend the court of appeals' ultimate result," Wis. Stat. § (Rule) 809.62(3m)(b)1.—a doubtful proposition, since the Court of Appeals' "ultimate result" included no relief specific to the email issue—he has not done so here. The Claims Board is asking this Court to hold that Sanders is not entitled to relief that Sanders does not seek.

CONCLUSION

This Court should affirm the decision of the Court of Appeals and remand the cause with directions to remand to the Claims Board to properly exercise its discretion as to whether the $25,000 it awarded Sanders is adequate to equitably compensate him.

Dated this 9th day of March, 2023.

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 8,585 words.

Electronically signed by:
Matthew Splitek

CERTIFICATION REGARDING SUPPLEMENTAL APPENDIX

I hereby certify that filed with this brief is a supplemental appendix and that if the record is required by law to be confidential, the portions of the record included in the supplemental appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Matthew Splitek