No. 2021AP1673

In the Supreme Court of Wisconsin

STATE OF WISCONSIN *EX REL.* JOSHUA L. KAUL,

PETITIONER-APPELLANT,

V.

FREDERICK PREHN,

RESPONDENT-RESPONDENT.

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

NON-PARTY WISCONSIN LEGISLATURE'S OPPOSITION TO THE STATE'S PETITION FOR BYPASS

RYAN J. WALSH
Counsel of Record
JOHN K. ADAMS
EIMER STAHL LLP
10 East Doty Street,
Suite 800
Madison, WI 53703
(608) 441-5798
rwalsh@eimerstahl.com
jadams@eimerstahl.com

Counsel for the Wisconsin Legislature

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INTEREST OF NON-PARTY WISCONSIN LEGISLATURE

This case involves a dispute between two executive-branch officials—the Attorney General and Frederick Prehn, the chair of the Natural Resources Board (the "Board")—over the proper interpretation of various statutes addressing vacancies in public office and the Governor's removal power. Although the Legislature is not a named party, the case squarely implicates its constitutionally assigned powers in two ways.

First, Petitioner asks the Court to declare that the expiration of Prehn's appointed term of office created a "vacancy" on the Board. But the Wisconsin Constitution gives "[*t*]*he [L]egislature*" authority to "declare the cases in which any office shall be deemed vacant[.]" WIS. CONST. art. XIII, § 10(1) (emphasis added). Pursuant to this power, the Legislature has enacted several important statutes concerning vacancies, removals, and gubernatorial appointments that are squarely at issue here. *See, e.g.*, Wis. Stat. §§ 17.03, 17.07. The Legislature thus has an interest in the proper interpretation of these statutes.

Second, the Attorney General is seeking to oust Prehn from the Board because the Senate has not yet confirmed the Governor's nominee to replace him. Once Prehn is removed from office, the Governor intends to fill the now-vacant Board seat via an interim appointment—*i.e.,* without seeking the Senate's approval. The case thus represents an attempted end-run around the Senate's advice-and-consent role.

Petitioner's arguments on the merits are foreclosed by this Court's decision in *State ex rel. Thompson v. Gibson*, 22 Wis. 2d

275, 125 N.W. 2d 636 (1964), as the circuit court recognized and Petitioner now concedes. The petition thus invites this Court to revisit and overrule *Thompson*, and Prehn, while arguing that the Attorney General is wrong on the merits, apparently agrees that this Court's review is warranted. But this Court need not intervene (much less at this premature stage, before receiving the benefit of the court of appeals' analysis) because the circuit court's faithful application of longstanding precedent is consistent with the plain text of the statutes governing vacancies and removal. The result below also accords with numerous well-reasoned opinions issued by previous Attorneys General. And far from being an anomaly, Prehn's conduct is consistent with past practice: at least five Board members have held over past their terms' expiration in the past twenty years. Because the circuit court's judgment was correct and Petitioner cannot satisfy any of the criteria for Supreme Court review, the Legislature opposes the Attorney General's bypass petition.

ISSUE PRESENTED

Whether this Court should grant review, bypassing the court of appeals, to revisit its holding in *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 125 N.W. 2d 636 (1964), that the expiration of an appointed term of office does not create a "vacancy."

STATEMENT OF THE CASE

A. In 2015, the Governor of Wisconsin nominated Prehn to the Board, and the Wisconsin Senate confirmed him unanimously

on a bipartisan basis.[1] Prehn's six-year statutory term of service expired on May 1, 2021. *See* Wis. Stat. §§ 15.07(1)(c); 15.34(2)(a).

Shortly before Prehn's term expired, Governor Evers nominated Sandra Naas to replace him.[2] However, the Senate has yet to confirm Naas, and Prehn continues to serve on the Board. Prehn has stated that, consistent with Wisconsin law, he will step down once the Senate confirms his replacement.[3]

Two months after Prehn's term expired, several politically powerful interest groups urged the Attorney General to bring a case against Prehn for overstaying his term.[4] On August 17, 2021, the Attorney General initiated this action, seeking a writ of quo warranto ousting Prehn from office or a declaration that Governor Evers can remove Prehn from office without cause under Wis. Stat. § 17.07(4).

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[1] Wisconsin Senate Journal (Nov. 2015), https://docs.legis.wisconsin.gov/2015/related/journals/senate/20151106ex/_81; Wisconsin Senate Roll Call (Nov. 2015), https://docs.legis.wisconsin.gov/2015/related/votes/senate/sv0146.

[2] Danielle Kaeding, *Evers Appoints New Natural Resources Board Members, But Chair Won't Leave*, Urban Milwaukee (May 25, 2021), https://tinyurl.com/7yxv3z47.

[3] Laurel White, *Judge Dismisses Attorney General's Case To Remove GOP-Backed DNR Board Chair*, Wisconsin Public Radio (Sept. 17, 2021), https://tinyurl.com/33s7ny7w.

[4] Letter, *Request for Quo Warranto Action, Wis. Stat. § 784.04(1)(a), Regarding Dr. Frederick Prehn* (July 20, 2021), https://tinyurl.com/ykzvdk93; 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) (Midwest Environmental Advocates, Wisconsin's Green Fire, League of Women Voters of Wisconsin, Clean Wisconsin, River Alliance of Wisconsin, and Sierra Club – Wisconsin Chapter), https://tinyurl.com/mnxw999h.

The Legislature promptly filed a motion to intervene under Wis. Stat. §§ 13.365, 803.09(2), and 803.09(2m), but the circuit court denied the motion. Cir.Ct.Dkt.58.[5]

B. The circuit court acted quickly on the Attorney General's complaint. After granting his request for an expedited briefing schedule and decision, the circuit court issued a written order on September 17, 2021, dismissing the complaint. Pet.App.229–45.

The court first analyzed whether Prehn's seat became "vacant" when his term expired. Chapter 17 of the Wisconsin Statutes does not provide for a vacancy when an appointed term of office "expires." *See* Wis. Stat. § 17.03. Applying *Thompson*, which interpreted the same statute and held that a public officer may hold over after the expiration of a term of office until the officer's successor is elected and qualified, the circuit court held that Prehn's seat did not become vacant at the expiration of his term and thus that Prehn was lawfully holding over. Pet.App.230.

The court made quick work of the Attorney General's alternative argument that Prehn can now be removed for any reason because the statutorily fixed term of his office lapsed. "For cause" job protection under Section 17.07(3) applies to any officer "serving in an office that is filled by the appointment of the governor for a fixed term by and with the advice and consent of the senate." Pet.App.242–44 (citing Wis. Stat. §§ 15.07(1)(c) &

[5] The Legislature appealed the order denying intervention in District II. No. 2021AP1610. After the Attorney General appealed his loss in District I, the Legislature moved to intervene in that appeal as well. If this Court grants the petition, the Legislature will promptly move to intervene in this proceeding as well.

15.34(2)(a)). As the circuit court recognized, Prehn is serving in just such an office and thus is entitled to for-cause removal protection as long as he sits on the Board.

Finally, the circuit court rejected the Attorney General's separation-of-powers arguments. The Attorney General asserted that "the Governor, as the chief executive, must be allowed to remove executive offers" whenever they holdover. Pet.App.244. If the Governor cannot remove Prehn, the Attorney General argued, then the statutes governing removal, vacancy, and appointment may be "unconstitutional." *Id*. at 244–45. The circuit court opined that these arguments were "unavailing" because this Court had already resolved these issues in *Thompson*. *See id*. at 245.

The Attorney General subsequently filed an appeal in District I and a petition for judicial bypass in this Court.

STANDARD OF REVIEW

"A matter appropriate for [judicial] bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1), and one the court concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issues." Wisconsin Supreme Court Internal Operating Procedures, § III.B.2. In deciding whether to grant review, this Court considers whether a petition presents legal issues that need to be "develop[ed], clarif[ied], or harmoniz[ed]." Wis. Stat. § (Rule) 809.62(1r)(c). This means that the "case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation," or presents "novel" issues that have statewide impact. *Id*. This Court will also consider whether

the petition raises a "significant question of . . . state constitutional law." *Id.* § (Rule) 809.62(1r)(a). "Supreme [C]ourt review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented." *Id.* § 809.62(1r).

ARGUMENT

I. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH SETTLED LAW, AND THERE IS NO REASON FOR THIS COURT TO RECONSIDER *THOMPSON*

The Attorney General's claims, which arise out of a political dispute between the Governor and the Senate over the appointment and confirmation of Prehn's successor, undoubtedly implicate important separation-of-powers issues. Nevertheless, there is no reason to grant review here because those issues were settled conclusively more than a "half-century" ago in *Thompson*, and nothing that has happened since then has called the correctness of that decision into question. *See* Pet.App.242.

A. In *Thompson*, the Governor made a handful of appointments "to offices occupied by [various] incumbent[s] holding over after expiration of [their] term[s]." 22 Wis. 2d at 281–82. The appointees had not been confirmed by the Senate. *Id.* The Attorney General sought a declaratory judgment to determine whether those gubernatorial appointments were "valid and effective" under the law. *Id.* at 285. This Court reasoned that there must first be a "vacancy" before the Governor may appoint someone to an office that requires Senate confirmation. *Id.* at 290. And there is no vacancy when an incumbent "holds over" after the

expiration of his or her term, the Court concluded, because there is "no provision in" Section 17.03, "or any other [statute]," that provides for "a vacancy … when a lawful appointee holds over." *Id.* at 290–91.

Thompson is consistent with the historical "trend of decisions in this country" holding 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 ex rel. Pluntz 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).[6]

Executive branch officials have routinely held over after the expiration of their terms. Indeed, within the last twenty years, members of the DNR Board alone have held over at least *five times*.[7] Yet as far as the Legislature is aware, no one has ever suggested that these previous holdovers were unlawful usurpers.

B. The Attorney General urges this Court to reconsider *Thompson*, but none of the statutory amendments over the past 50 years undermine this Court's holding in that case.[8]

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[6] *See also* 67 C.J.S. Officers § 154 ("As a general rule, in the absence of a constitution or statute providing otherwise, an officer is entitled to hold office until a successor is appointed or elected and has qualified" and thus "cannot be punished as [an] intruder[]."); 63C Am. Jur. 2d Public Officers and Employees § 148 & n.2 ("[A]n incumbent of an office may hold over after the conclusion of his or her term until the election and qualification of a successor.") (citing cases).

[7] *See* Prehn Resp. n.1 (citing examples).

[8] Prehn asks this Court to "reaffirm Wisconsin's long-standing holdover rule for appointive officials," Prehn Resp. 4, but reaffirming precedent is not a reason to grant bypass.

1. As the Attorney General does not dispute, Section 17.03 does not provide for a vacancy at the expiration of a term of *appointive* office. Conversely, Section 17.03(10) states that a vacancy is created at the expiration of an *elective* term of office. *See* Wis Stat. § 17.03(10) ("[A] public office is vacant when," "[i]f the office is elective, the incumbent's term expires[.]"). Under the "well known and often applied canon[]" of "'*expressio unius est exclusio alterius*,'" the only reasonable reading of Section 17.03 is that the expiration of an appointed term does *not* create a vacancy. *State ex rel. Riegert v. Koepke*, 13 Wis. 2d 519, 522, 109 N.W.2d 129, 131 (1961). Nor has the Attorney General identified any other statute indicating that a vacancy arises at the expiration of an appointed term.

The removal statute, Section 17.07, is equally clear. In that statute, the Legislature gave "for cause" job protection to anyone "serving in an office filled by the appointment of the governor for a fixed term by and with the advice and consent of the senate." Wis. Stat. § 17.07(3). By contrast, Section 17.07(4) permits the Governor to remove any state officer when that officer is appointed "to serve at the pleasure of the governor." "[T]he only practical" and obvious "difference between these two sorts of appointive officers is whether the office in which they are serving has been filled for a fixed term or not." Pet.App.244. Because Prehn was appointed (and confirmed) to a fixed term of office, the circuit court correctly concluded that the statute unambiguously provides him with "for cause" tenure protection. *Id.* The law in these areas needs no further development.

2. Contrary to the Attorney General's politically motivated assertion that *Thompson* is "ripe for reexamination," Pet.13, that decision is as sound today as it was in 1964. The Attorney General warns that appointees may seek to holdover "indefinitely" if this Court does not "reexamine" its precedents. *See id.* But the rule in *Thompson* has been in place for over 50 years and the Attorney General has never taken issue with holdovers before now. Indeed, up until two months ago, the Attorney General's office had repeatedly opined that public officers may continue to serve after the expiration of their terms. *See, e.g.*, 80 Wis. Op. Att'y Gen. 46 (1991) (concluding that the "[e]xpiration of a term of office does not create a vacancy under section 17.03."); 73 Wis. Op. Att'y Gen. 100 (1984) (concluding that, "[w]ith respect to the appointive officers," "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[.]"). Moreover, Prehn has publicly declared his intent to step down whenever the Senate confirms his successor, so the possibility of an "indefinite" holdover is illusory even in this case. *See supra* p. 9.

Moreover, the Attorney General's newfound opposition to holdovers provides no basis for revisiting *Thompson* (much less overruling it) because courts interpreting statutes cannot "reach beyond the statutory text" of the vacancy and removal statutes "to consider the practical, political, or policy implications" of a faithful interpretation. *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 385 Wis. 2d 748, 764, 924 N.W.2d 153, 161, 2019 WI 24, ¶ 18.

Nor is review warranted to resolve the alleged tension

between *Thompson* and *Pluntz*. In *Pluntz*, the Court stated 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*, 176 Wis. 107, 186 N.W. 729 (1922). That decision, which addressed a *constitutional* provision related to vacancies, is easily reconciled with *Thompson*, which interpreted Wis. Stat. §§ 17.03 and 17.20. 22 Wis. 2d at 286–88. *Pluntz* dealt with an *elective* term of office, where the law is clear that the expiration of a term creates a vacancy, whereas the relevant portions of *Thompson* concern *appointive* terms of office. Accordingly, this Court need not expend its limited resources ensuring consistency between its longstanding decisions in *Thompson* and *Pluntz*.

3. Finally, although the Attorney General is correct that this case involves significant separation-of-powers issues, the constitutional considerations cut against his interpretation of the relevant statutes and do not support review. Here, the Attorney General is asking the Court to remove Prehn so that the Governor can install his nominee to the Board using an interim appointment. The Attorney General argues that this convoluted procedure is necessary because the Senate will not confirm Naas. But the Senate's advice-and-consent role is an integral part of the "checks and balances" inherent in the separation of powers. *See Noel Canning v. N.L.R.B.*, 705 F.3d 490, 504 (D.C. Cir. 2013). And these checks are especially important here because the Board exercises substantial delegated *legislative* authority. *See Koschkee v. Taylor*, 387 Wis. 2d 552, 563, 929 N.W.2d 600, 605, 2019 WI 76,

¶ 13 (noting that "the legislature has used its power to create administrative agencies . . . and to delegate to [those] agencies certain legislative powers").

When the Senate declines to confirm a nominee, the proper recourse is for the Governor to negotiate in good faith or nominate someone else. This Court should not assist the executive branch's efforts to circumvent the Senate's advice-and-consent function by creatively interpreting the statutes governing vacancies and removal to allow for interim appointments in the face of such standoffs.

II. THERE IS NO URGENCY THAT WARRANTS IMMEDIATE REVIEW

Notwithstanding the Attorney General's claim of urgency, Pet.15, this case has moved briskly through the lower courts. The circuit court issued a dispositive ruling within a month of the Complaint being filed, and the court of appeals promptly granted the Attorney General's request to expedite. The court of appeals should be given the opportunity to review and decide this case before this Court gives the case further consideration. If, in the meantime, the Attorney General sees fit to seek interim relief—to address any "urgency" that he perceives—he is free to do so.

The Attorney General also contends that "the statutes governing quo warranto procedure mandate expedited proceedings" in this Court "to determine a contested right to a public office." Pet.16. But the statutes he cites—Sections 784.07 and 801.02(5)—refer to proceedings in the *circuit court*, not this Court. There is no dispute that proceedings in the circuit court

were expedited, fulfilling the statutory requirement.

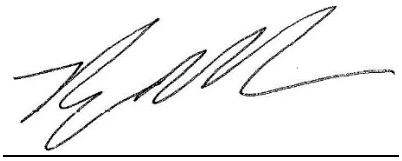
The Attorney General also asserts that this Court's precedent "demonstrates a strong policy in favor of promptly resolving the rights and titles to public office." Pet.16 (citing *State ex rel. Fugina v. Pierce*, 191 Wis. 1, 209 N.W. 693 (1926); *State ex rel. Martin v. Ekern*, 228 Wis. 645, 280 N.W. 393 (1938)). But the Attorney General's cited cases discuss situations where the plaintiff filed an original action in the Supreme Court. Instead of doing that here, the Attorney General chose to file in Dane County, which he presumably believed was a favorable forum. Given that strategic decision, the Attorney General's pleas of urgency ring hollow.

CONCLUSION

The Supreme Court should deny the Attorney General's petition to bypass.

Dated: October 26, 2021

Respectfully submitted,



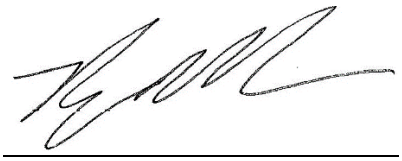
RYAN J. WALSH
State Bar No. 1091821
Counsel of Record
JOHN K. ADAMS
EIMER STAHL LLP
10 East Doty Street, Suite 800
Madison, WI 53703
(608) 441-5798
(608) 441-5707 (fax)
rwalsh@eimerstahl.com
jadams@eimerstahl.com

Counsel for the Wisconsin Legislature

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b), (bm) and 809.62(4) for a brief produced with a proportional serif font. The length of this brief is 2,994 words.

Dated this 26th day of October, 2021.



RYAN J. WALSH

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULE) 809.19(12) and 809.62(4)(b) (2019–20)

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. §§ (Rule) 809.19(12) and 809.62(4)(b) (2019–20).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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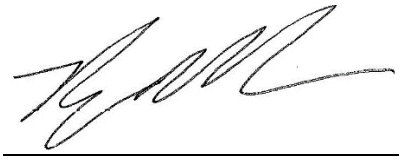
Dated this 26th day of October 2021.



RYAN J. WALSH