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STATE OF WISCONSIN
IN THE SUPREME COURT

Case No. 2021AP1673

STATE OF WISCONSIN
ex rel. JOSHUA L. KAUL,

Plaintiff-Appellant-Petitioner,

v.

FREDERICK PREHN,

Defendant-Respondent.

WISCONSIN LEGISLATURE,

Intervenor-Defendant-Respondent.

APPEAL FROM A FINAL DECISION
AND ORDER DISMISSING THE COMPLAINT,
ENTERED IN THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE VALERIE BAILEY-RIHN PRESIDING

DR. FREDERICK PREHN'S BRIEF

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INTRODUCTION

Wisconsin's constitution has always vested in the Legislature the power to "declare when any office shall be deemed vacant." Since it first enacted statutes, the Legislature has done so.

In order to avoid disruption of government services to the people caused by appointive offices sitting vacant, Wisconsin's common law has long held that appointed officials lawfully remain in office until a successor is chosen and qualifies for office.

The seven members of the Natural Resources Board (Board) are appointive officers. The statutes empower the Governor to appoint officials to office two ways: 1. Through the regular full term appointment process; and 2. Through an interim appointment process available when a seat on the Board is vacant.

Under the regular full term appointment process, Board members are appointed to six-year terms in office. The Governor must appoint a successor to replace an incumbent Board member whose term expires, and the Senate must then confirm the successor to qualify her or him for office. Once the Senate qualifies the successor, the incumbent Board member's term in office ends, and the successor assumes office on the Board.

Only if there is a vacancy on the Board may the Governor use the interim appointment process.

The Governor nominated a successor to the Board to replace Dr. Frederick Prehn, the Defendant-Respondent, as his six-year fixed term expired May 1, 2021. Dr. Prehn remains in office until the regular full term appointment process is complete. Once his successor qualifies, i.e. is confirmed by the Senate, Dr. Prehn's term on the Board will end.

Instead of seeking a political solution to the standoff between the Governor and the Senate over confirmation, the State seeks to oust Dr. Prehn.

Dr. Prehn remains in office lawfully, so a writ of quo warranto is not available. Because members of the Board may only be removed "for cause," even after the expiration of their fixed terms in office, the Governor may

only remove Dr. Prehn "for cause." No cause exists, and the State has not made a single allegation to the contrary.

The State makes novel arguments in support of its theories as to why Dr. Prehn's office is vacant, and why the Governor may remove him from office. The State's theories are contrary to this Court's precedent, Wisconsin's statutes, Wisconsin common law, and even the opinions of prior Attorney Generals.

The State claims the expiration of a fixed term in office creates a vacancy, or that the Governor may remove Dr. Prehn from the Board at any time after his fixed term in office as expired, so either way the Governor may make an interim appointment to the Board. Not so.

When a fixed term on the Board expires, the Governor must appoint a successor through the regular full term appointment process. The Board seat need not be vacant for the regular full term appointment process to operate. Dr. Prehn continues to serve on the Board until his appointed successor qualifies through Senate confirmation.

Wisconsin's constitutional history, Wisconsin's history of environmental conservation agencies, Wisconsin's statutes, this Court's precedent, and the common law all support the Circuit Court's decision dismissing the State's complaint for failure to state a claim upon which relief may be granted. The Circuit Court reached the correct result, determining that Dr. Prehn lawfully continues in office on the Board. This Court should affirm.

STATEMENT OF ISSUES ON APPEAL

1. Does Dr. Prehn continue to lawfully hold his office on the Natural Resources Board, because the Governor's nominee to succeed him has not yet qualified for office through senate confirmation?

The Circuit Court answered "yes." This Court should affirm.

2. Does the "for cause" removal standard continue to prevent the Governor from removing Dr. Prehn from the Board without cause after the expiration of his six-year fixed term in office?

The Circuit Court answered "yes." This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court should hear oral argument and publish its decision.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

A. Facts from the State's Complaint, R. 2.

The relevant factual allegations set forth in the State's Complaint are as follows:

Prehn was appointed to the Board by former Governor Scott Walker on May 18, 2015. R. 2, ¶ 12.

Prehn's appointment was to a six-year term, with his term ending on May 1, 2021. Id. ¶ 13.

Governor Tony Evers appointed Sandra Naas to the Board on April 30, 2021, to serve in anticipation of Prehn's resignation at or before the last day of his term on May 1. Id. ¶ 14.

Prehn has cited *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 125 N.W.2d 636 (1964), as authority to continue on as a Board member. Id. ¶ 17.

B. Facts supplied by the parties and amici.

The State includes additional facts in its brief. AG Br. 15-16. The parties and amici provided the following facts to the Circuit Court though briefing, generally referring to the public record:

As a "lifelong hunter, angler and conservationist," Dr. Prehn has tackled complicated and important issues throughout his years of service on the Board, including "water quality, the use of motorized vehicles . . . on public lands and trails, and chronic wasting disease in the [S]tate's whitetail deer herd."[1]

[1] Keith Uhlig, *Wausau dentist Dr. Fred Prehn elected as chair of Wisconsin Natural Resources Board*, WAUSAU DAILY HEARLD (Feb. 18, 2019), https://tinyurl.com/3dcs9wav; R. 21 at 3.

The Wisconsin Senate has not confirmed the Governor's nominee to succeed Dr. Prehn, and Dr. Prehn has indicated he will carry out the duties of his office until the Senate confirms his successor.[2]

Interest groups that oppose various policies the DNR has pursued under the current Board, specifically the Humane Society of the United States and the Center for Biological Diversity, wrote to the Attorney General on July 20, 2021, and accused Dr. Prehn of unlawfully continuing to serve on the Board.[3] These interest groups requested that the Attorney General pursue a writ of quo warranto to oust Dr. Prehn from the Board.[4]

C. Facts from the Circuit Court's decision and order, R. 72.

The Circuit Court referred to only the following undisputed facts:

On May 18, 2015, Wisconsin Governor Scott Walker appointed Prehn to the Board. R. 72 at 2, citing R. 18, ¶ 5; App. at 002.

As of September 17, Prehn continued to serve in that office. Id., citing R. 18 at ¶ 3.

The parties agree that Dr. Prehn's fixed term in office has expired. The parties disagree about the legal effect of the expiration of a Board member's fixed term in office. .

II. PROCEDURAL BACKGROUND.

Dr. Prehn moved to dismiss the State's complaint for failure to state a claim upon which relief may be granted. R. 18. Granting Dr. Prehn's motion, the Circuit Court framed the issue succinctly: "the Court must determine whether Prehn lawfully holds office." R. 72 at 6; App. at 006.

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[2] Naomi Kowles, *'This is my choice': Despite expired term, chair of state Natural Resources Board says he's still not leaving*, CHANNEL 3000 (June 25, 2021), https://tinyurl.com/saw7uudj; R. 21 at 4.

[3] Letter, *Request for Quo Warranto Action,* Wis. Stat. § 784.04(1)(a)*, Regarding Dr. Frederick Prehn* (July 20, 2021), https://tinyurl.com/ykzvdk93; R. 21 at 4.

[4] *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; R. 21 at 4.

The State pursues on appeal the same two related theories in its attempt to oust Dr. Prehn from the Board. Both theories, had they any support in the law, would result in Dr. Prehn's office on the Board being vacant.

First, the State attempts to equate the expiration of a fixed term in office with a vacancy in office. Second, it argues that when a Board member's fixed term in office expires, the Governor may remove the Board member at any time, at the Governor's pleasure, thus creating a vacancy. Both of the State's theories depend on Dr. Prehn's office being vacant. Since it is not vacant, the State cannot prevail.

III. THE DECISION BELOW IN THE CIRCUIT COURT.

The Circuit Court correctly declined to accept the State's novel arguments in support of its theories of ouster.

A. The Circuit Court rejected the State's vacancy argument.

The decision below found Board members may hold over in office after their fixed terms in office expire. The Circuit Court correctly recognized "Wisconsin's longstanding common law rule in favor of the implied holdover of state officers," and that nothing in the appointment statute governing the Board, Wis. Stat. § 15.07(1)(c), "was intended to abrogate that rule." R. 72 at 9; App. at 009.

The Circuit Court further noted that this Court has already "rejected the argument that expiration of a term of appointive office creates a vacancy." Id. at 12, citing *State ex rel. Thompson v. Gibson,* 22 Wis. 2d 275, 294, 125 N.W.2d 636 (1964).

The Circuit Court also rejected the State's argument that *Thompson's* holdover rule is no longer good law because of subsequent statutory changes: "[A]lthough the statutes analyzed in *Thompson* have changed several times in the intervening half-century, these changes have no operative effect as to whether a vacancy exists and cannot alter *Thompson*'s holding." Id. at 14.

B. The Circuit Court rejected the State's removal argument.

The Circuit Court correctly rejected the State's argument that the Governor may remove Dr. Prehn at any time after his fixed term in office expired on May 1, 2021. Interpreting Wis. Stat. §§ 17.07(3) and (4), the Circuit Court held that because Dr. Prehn is serving on the Board after Senate

confirmation for a fixed term, not at the pleasure of the Governor, he can be removed only "for cause." Id at 15-16.

The Circuit Court did draw three incorrect conclusions.

First, the Circuit Court incorrectly concluded "[a] state officer may only be appointed to a fill a "vacancy" in a state office." Id. at 7. As explained in Section I. A. below, a vacancy is not a necessary precondition for the regular full term appointive process to operate.

Second, the Circuit Court incorrectly concluded there are circumstances under which a vacancy occurs that are not enumerated by statue or in the constitution. Id. at 11. The Circuit Court cited a case in which an official holding two, incompatible offices was held to create a vacancy. As explained in I. D. below, Wisconsin does not follow a common law vacancy rule.

Third, the Circuit Court, somewhat puzzlingly, stated Dr. Prehn has taken the position that not even the Senate confirmation of a successor would end his term on the Board, that he may continue to serve on the Board as long as he pleases. Not so. Dr. Prehn has repeatedly recognized that his term on the Board ends when the Senate confirms his successor. R. 19 at 6, 14, and 18.

STANDARD OF REVIEW

The State correctly sets forth the standard of review. AG Br. 18.

ARGUMENT

I. DR. PREHN'S SEAT ON THE BOARD IS NOT VACANT; HE LAWFULLY REMAINS A MEMBER OF THE BOARD.

Both of the State's causes of action – a writ of quo warranto and a declaratory judgment – require that it convince this Court Dr. Prehn's office on the Board is actually vacant. Because Dr. Prehn lawfully holds over on the Board awaiting the Wisconsin Senate's confirmation of his successor, the Board has no vacancies. The Wisconsin Senate has not confirmed Sandra Naas's appointment to the Board. Until Ms. Naas's confirmation, Dr. Prehn's term on the Board continues.

A. Wisconsin's constitution, vacancy and appointment statutes control when an office is vacant.

Wis. Stat. § 15.07(1)(a) provides that members of the Board shall be nominated and appointed by the Governor, with the advice and consent of the senate, to serve for terms prescribed by law. In turn, Wis. Stat. § 15.34(2)(a) sets forth a fixed term of six years for each Board member, and § 15.07(1)(c) further establishes that a Board member's term expires May 1 of their final year. While it may seem counterintuitive at first, the expiration of the Board member's term does not result in a vacancy. The incumbent's term on the Board ends when the Senate confirms a successor, unless one of the enumerated vacancy-causing event occurs.

The Wisconsin Constitution vests in the legislature power to "declare the cases in which any office shall be deemed vacant." WIS. CONST. ART. VI, § 4[5]; *Thompson* at 290. The Legislature has made such provisions, passing Wis. Stat. § 17.03, which sets forth the cases upon which public offices are deemed vacant.[6] Nowhere do the statutes or constitution declare that the expiration of a fixed term of appointive public office causes a vacancy.

This Court considered and interpreted an earlier version of § 17.03 in *State ex rel. Thompson v. Gibson*, concluding that when "an incumbent holds over after the expiration of the term for which he was originally appointed . . . it cannot be said that the office is vacant . . ." *Thompson* at 294. This is so because officers whose appointments require Senate confirmation "may hold over until their successors are duly appointed and confirmed by the senate." *Id.* at 293.

The *Thompson* court was not announcing a new rule. The *Thompson* decision is in line with Wisconsin Supreme Court precedent. Forty years earlier, this Court held:

> 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. This rule of construction prevents the inconvenience and annoyance resulting from the suspension of official functions because there is no officer authorized to discharge such functions.

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[5] Wis. Const. arts. VI, § 4 and XIII, § 11 also describe events that cause vacancies.
[6] Wis. Stat. § 17.03 lists 13 separate causes of vacancies in a public office.

State ex rel. Pluntz v. Johnson, 176 Wis. 107, 186 N.W.2d 729, 730 (1922)(*not vacated*); *State ex rel. Martin v. Heil,* 242 Wis. 41, 51, 7 N.W.2d 375 ("There is . . . little practical objection in an administrative office to permitting a sheriff or clerk of court to give continuity to the administration of his office by continuing until a successor is elected and qualified.")

Based upon the settled precedent of this Court, there is presently no vacancy on the Board, and Dr. Prehn has the right to continue in office as a member of the Board de jure until the legislature confirms Ms. Naas's appointment.

B. A vacancy is not a necessary predicate to an appointment, as Wisconsin distinguishes between appointments to fill a vacancy and regular full term appointments.

In briefing below, neither the parties nor amici pointed out the legal distinction between appointments to fill a "vacancy," and "regular full term" appointments. In its decision and order, the Circuit Court concluded, incorrectly, "[a] state officer may only be appointed to a fill a 'vacancy' in a state office." Wis. Stat. § 17.20. R. 72 at 7; App. at 007. A vacancy in office is not a necessary predicate to an appointment. Wisconsin's statutes do not contain a general appointment statute. Rather, the statutes that create appointive offices describe how the office will be filled. In the case of the Board, Wis. Stat. § 15.07 (governing boards) provides the method for appointing members of the Board. The appointment statute, not § 17.20, prescribes the manner in which an appointive officer will take office pursuant to a "regular full term" appointment.

Thus there are two types of appointments to office: 1. Regular full term appointments; and 2. Appointments to fill vacancies. The plain language of § 17.20 itself recognizes these two types of appointments:

> Vacancies in appointive state offices shall be filled by appointment by the appointing power and in the manner prescribed by law for making regular full term appointments thereto, and appointees to fill vacancies therein shall hold office for the residue of the unexpired term or, if no definite term of office is fixed by law, until their successors are appointed and qualify. Wis. Stat. § 17.20(1).

§ 17.20(1) thus distinguishes between appointments to fill "vacancies" and appointments made "in the manner prescribed by law for making regular full term appointments." Accordingly, an office does not have to be "vacant" in order for an officer to be appointed.[7]

If an office is vacant, then the person appointed to fill it serves "for the residue of the unexpired term" unless there is no fixed term, in which case the appointee to fill a vacancy serves until "their successors are appointed and qualify."

Dr. Prehn was appointed to a "regular full term" appointment, not to fill a vacancy. Had he been appointed to fill an office on the Board that was vacant, then his term would arguably end at the expiration of "the residue of the unexpired term."

Because the Board is filled with appointees nominated by the Governor and qualified by the advice and consent of the Senate, § 17.20(2)(a) permits the Governor to appoint a nominee to exercise the powers of office immediately upon appointment. That way, when an office is vacant, the Governor can immediately fill the office with an appointee able to act with full authority. This special exception to the "regular full term" appointment process furthers the long-standing public policy of continuity of officials in office. Public policy is decidedly against leaving an office vacant, disrupting government services to the people of Wisconsin. But the plain language of the statute permits this process only when there is a vacancy.

Otherwise, when there is no vacancy, the "regular full term" appointive process is required. Compare the use of "shall" in (1) with "may" in (2). The regular full term appointment process mandatory, while the interim process is permissive.

The purpose of setting a "fixed term" for appointive office is not to determine when the appointed official must leave office, but rather to protect the appointive official from being replaced during the fixed term via the regular full term appointment process. Otherwise, a Governor partnered with a friendly senate could overnight remake the Board, contrary to the

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[7] If no one could be appointed to office unless the office were vacant, then *every* appointed official could be removed at the Governor's pleasure, pursuant to Wis. Stat. § 17.07(5): "State officers serving in an office that is filled by appointment of the Governor alone for a fixed or indefinite term *or to supply a vacancy in any office,* elective or appointive, except justices of the supreme court and judges and the adjutant general, by the Governor at pleasure."

policy choice made at the creation of the Wisconsin Department of Natural Resources to insulate the policy-making functions of the Board from ping-ponging between political poles. See Section III B.

C. *Thompson* reaffirmed the common law holdover rule, which remains unchanged.

In *Thompson*, our Supreme Court's ruling that vacancies do not occur when an appointed official's term expires applied differently to different appointed offices, some subject to Wisconsin Senate confirmation, and some not. The Sentate-confirmed officials in *Thompson* whose terms in office had expired continued to hold office until the Senate confirmed a successor. The following chart sets forth the different appointments and conditions of appointment involved in *Thompson*:

Appointee and Office	Explicit/express holdover provision in appointment statute?	Appointments held ineffective without Senate confirmation and incumbent officer allowed to hold over?
John Gibson -- appointed state auditor on October 8, 1963	No	Yes
George W. Jankowski -- appointed to the conservation commission	No	Yes
Dale Phillips -- appointed to the savings and loan advisory committee	No	Yes
Martin W. Hanson -- appointed to the conservation commission	No	Yes
Walter O. Morton -- appointed to the investment board	Yes	Yes
George W. Otto -- appointed to the industrial commission	No	No

J. W. Barnstable -- appointed to the board of examiners in chiropractic	No	No

The express statutory holdover provision that applied to investment board members did not escape the notice of the *Thompson* court: "Where 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' within the meaning of sec. 17.20 (2)." *Thompson* at 293-945 (emphasis supplied).

The State tries to make much of the presence of explicit holdover clauses in other sections of Wisconsin's statutes, as evidence the law has shifted since the *Thompson* decision. BR1 at 22. In reality, such holdover clauses are nothing new. An express holdover clause was literally featured in the *Thompson* decision. The presence of holdover clauses in the statutes governing some appointive offices is no clear indication of an intent on the part of the Legislature to overrule or modify the common law, nor somehow implicitly modify the common law to extend § 17.03(10) to appointive offices.

Thompson reaffirmed the common law holdovers rule that incumbents remain in office until their successor has been qualified. *Pluntz v. Johnson* at 729. The State argues the absence of an express holdover clause in §§ 15.34(2)(a) and 15.07(1)(c), which establish six-year terms for the Board members, and the expiration of terms on May 1, respectively, means the Legislature intended that the expiration of Board member's term would result in a vacancy. BR1 at 23. As discussed previously, the State's argument is squarely contrary to the Legislature's intent expressed in § 17.03(10). The State's argument is also contrary to the law governing legislative changes to the common law. When the Legislature changes a common law rule, it does so intentionally, with "clear, unambiguous and peremptory" language, not by implication or omission.

Statutes in derogation of the common law are to be strictly construed. *State v. Gomaz*, 141 Wis. 2d 302, 320 n.11, 414 N.W.2d 626, 634 (1987) . Statutes are not to be construed as changing the common law unless the purpose to effect such a change is clearly expressed therein and such purpose is demonstrated by language that is clear, unambiguous and peremptory. *Leahy v. Kenosha Memorial Hosp.,* 118 Wis. 2d 441, 449, 348 N.W.2d 607, 612 (Ct. App. 1984). Courts presume to give effect to

common law rules unless statutes clearly express otherwise. *Gaugert v. Duve,* 2001 WI 83, ¶41, 244 Wis. 2d 691, 628 N.W.2d 861.

Wisconsin's common law holdover rule is in accord with the common-law tradition in other jurisdictions as well. *See* 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 ("While there is some authority to the contrary, as a general rule, apart from any constitutional or statutory regulation on the subject, an incumbent of an office may hold over after the conclusion of his or her term until the election and qualification of a successor.")

There is no suggestion in the 1983 revisions to Chapter 17 that the Legislature had any intent to change the common law appointive officer holdover rule established by the holding in *Thompson,* except to make the *Thompson* rule inapplicable to "elective" offices. The happenstance that some appointive offices have express holdover clauses and some do not says very little about the Legislature's intent – certainly not a clear intent to change the common law.

D. Amendments to Ch 17 after 1964 affirm the *Thompson* rule, not undermine it.

The State argues *Thompson's* rule – officials confirmed by the Wisconsin Senate remain in office until the Senate confirms a successor – is no longer good law because it relies upon statutes that have subsequently been amended or repealed. BR1 at 26-27.

The Circuit Court disagreed with the state, noting:

> Both past and present versions of Wis. Stat. § 17.03 provide for "any other event" to create vacancy. In *Thompson,* the statute read:
>
> (10) On the happening of any other event which is declared by any special provision of law to create a vacancy.
>
> Wis. Stat. § 17.03(10) (1963-64). The modern version of that statute, which was renumbered7 Sub. (13), is practically identical: a vacancy occurs upon:

> (13) Any other event occurs which is declared by any special provision of law to create a vacancy.
>
> Wis. Stat. § 17.03(13). Thus, the *Thompson* court had the opportunity to create a vacancy upon the "other event" of the expiration of Keliher's term of office as state auditor, but declined to do so. R. 72 at 13; App. at 013.

The Circuit Court is correct. In addition, all legislation must be interpreted in the light of the common law and the scheme of jurisprudence existing at the time of its enactment. *In re D.M.M.,* 137 Wis. 2d 375, 389-90, 404 N.W.2d 530, 536 (1987). The common law, having been classified and arranged into a logical system of doctrine, principles, rules, and practices, furnishes one of the most reliable backgrounds upon which analysis of the objects and purposes of a statute can be determined. *Id*. The Legislature is presumed to know the common law before the statute was enacted. *Id*.

The 1983 changes the Legislature made to § 17.03 show that the Legislature was 1. Aware of the *Thompson* rule; and 2. Decided to limit the *Thompson* rule to appointive offices, by declaring that elective offices, and only elective offices, become vacant when the incumbent's term expires.

In *Thompson,* this Court provided the Legislature a roadmap, an instruction manual, as to how to amend Wis. Stat. § 17.03 in order to abrogate the common law holdover rule. All the Legislature had to do was declare that when a fixed term in appointive office expires, that office is vacant. Or the Legislature could have specified some appointive offices are vacant upon expiration of the fixed term in office, and left the common law holdover rule intact as to others. Either hypothetical enactment would have legislatively overruled *Thompson*, and ended the common law holdover rule as to appointive offices. Instead, in 1983 Wisconsin Act 484, the Legislature abrogated the common law holdover rule as to *elective* offices only.

Sections 138 – 140 of 1983 Wisconsin Act 484 made three changes to § 17.03 simultaneously. Two are critically important to this case. The fact that the Legislature made these changes simultaneously speaks to legislative intent.

1. The Act created current § 17.03(10), explicitly providing that *elective* offices are vacant upon the expiration of an elective official's term;

2. The Act renumbered former § 17.03(10) to (13);

3. The Act added the phrase "except as otherwise provided" to the introductory paragraph of § 17.03.

It is difficult to imagine that the legislature intended adding "except as otherwise provided" to have the effect the State ascribes to it: the expiration of a fixed term in appointive office suddenly operates to cause a vacancy. AG Br. 28. That cannot be the legislative intent.

Here is the text of 1983 Act 484, sections 138-140:

> SECTION 138. 17.03 (intro.) and (6) of the statutes are amended to read:
>
> **17.03 Vacancies, how caused.** (intro.) Any public office, ~~including offices of counties, cities, villages, towns, school districts and vocational, technical adult education districts shall become or be~~ is deemed vacant upon the happening of any of the following events, except as otherwise provided:

SECTION 139. 17.03 (10) of the statutes is renumbered 17.03 (13).

SECTION 140. 17.03 (10) of the statutes is created to read:

17.03 (10) The expiration of the term of the incumbent if the office is elective.

Giving the words "except as otherwise provided" the effect the State wants them to have (BR1 at 29, fn. 4), i.e. extinguishing the common law holdover rule as to appointive offices by implicitly declaring a vacancy upon the expiration of the appointive term, makes no sense. Given the Legislature's drafting choices, its intent was clearly to disallow elected officials from holding over. The State's interpretation really lacks arguable merit.

E. Wisconsin has no common law vacancy rule.

As explained in Section A, only the Legislature may declare when an office is vacant. Thus, the Circuit Court incorrectly concluded there are circumstances under which a vacancy occurs that are not enumerated by statue or in the constitution. R. 72, 11; App. at 011.

The Circuit Court cited one example of a vacancy arising from the common law doctrine barring a single person from holding multiple, incompatible offices. *State ex. Rel. Stark v. Hines*, 194 Wis. 34, 215 N.W.447, 448 (1927). In *Stark,* this Court held that a municipal judge, by accepting the office of city attorney, created a vacancy in the office of judge he tried to hold simultaneously. While the *Stark* Court did not say so explicitly, its holding is best understood as declaring that the municipal judge functionally resigned his judgeship when he accepted the incompatible office of city attorney.

Stark relied upon *State ex rel. Johnson v. Nye*, 148 Wis. 659, 671, 135 N.W. 126, 130 (1912), which equated accepting a second, incompatible office with a resignation of the first office: "[T]he defendant had the absolute right to resign, therefore his acceptance of the office of grain commissioner, assuming that it was incompatible with the office of member of assembly, absolutely vacated the office of member of assembly." A resignation results in a vacancy. Wis. Stat. § 17.03(2).

The modern view of the consequences of holding multiple, incompatible offices seems to be different. Wisconsin's resignation statute, § 17.01, does not provide that holding incompatible offices amounts to a resignation. While Wisconsin retains the common law rules surrounding holders of multiple, incompatible offices, the modern remedy is a court order that the multiple officeholder resign one or the other of the incompatible offices he or she holds. *Otradovec v. Green Bay,* 118 Wis. 2d 393, 395, 347 N.W.2d 614, 616 (Ct. App. 1984). The *Nye* Court's ruling is really only different in that it concluded that accepting a subsequent, incompatible office operated as a voluntary resignation from the former, rather than giving the defendant a choice as to which office to resign.

While Dr. Prehn could resign pursuant to Wis. Stat. § 17.01(2), nothing in § 17.01 requires him to resign at any point in time. Because his fixed term in office on the Board has expired, there is no need for him to resign. The Governor may appoint Dr. Prehn's successor, and his successor takes office, ending Dr. Prehn's term in office, as soon as there is Senate confirmation. Because Dr. Prehn's term in office has expired, the "regular full term" appointment process, provided in § 15.07(1)(a), applies.

The State's best argument that Dr. Prehn's office is vacant comes from common law. BR1 30-31. The common law distinguishes between de facto and de jure officers, and generally holds that a vacancy may still exist when a holdover is a de facto, not a de jure officer. 43 Am. Jur. Public Officers § 484; 67 C.J.S. Officers § 154 (Aug. 2021 update). The State cites

several foreign decisions from states that follow the common law de facto vacancy rule, the details of which are not important here. BR1 30-31.

The State's foreign decisions cannot help the State's case because the common law de facto vacancy rule is not the law of Wisconsin. Wisconsin has never followed the de facto vacancy rule. Wisconsin's Constitution vests in the Legislature "the power to declare when an office shall be deemed to be vacant." *Thompson* at 290 (citing WIS. CONST. ART. XIII, § 10.) Our constitution has so provided since 1848. If the de facto vacancy rule was the common law in 1848, Wisconsin did not preserve it.

> WIS. CONST. ART. XIV, § 13. provides:
> Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature.

By vesting the power to declare when a vacancy arises in the Legislature, the constitution leaves no room for a common law de facto vacancy rule. The common law de facto vacancy rule is inconsistent with WIS. CONST. ART. XIII, § 10(1). The State's brief completely ignores Section 10, Article XIII, not mentioning it even once.

Applying *Thompson's* holding in *Morris v. Employe Trust Funds Bd.*, 203 Wis. 2d 172, 180, 554 N.W.2d 205 (Ct. App. 1996), the Wisconsin Court of Appeals concluded "an officer required to be confirmed by the Legislature has the right to continue in office after the expiration of his or her term and is an officer de jure until the Legislature again considers confirmation." The *Morris* court was correct, because the combination of the common law holdover rule and WIS. CONST. ART. XIII, § 10(1), essentially render a holdover in appointive office a de jure officer.

The State correctly points out that the *Thompson* Court recognized the distinction the common law makes between de facto and de jure hold overs. *Thompson* at 293–94; BR1 30-31. It did not matter. Though the *Thompson* Court was clearly aware of the common law de facto vacancy rule, it nevertheless concluded that the holdover incumbents whose appointive statutes lacked an explicit holdover provision remained lawfully in office. *Id.* at 293.

Continuing to cite the vacated *Pluntz* opinion, the State argues offices occupied by an officer lawfully holding over are nonetheless vacant. BR1 30. Even the vacated opinion does not help the State. The *Pluntz*

Court's comment about a vacancy is dicta. *Pluntz* was not about when a vacancy arises. The question in *Pluntz* was when Johnson, the sheriff respondent, was again eligible for election as sheriff. *Pluntz* at 118. At the time, the constitution excluded an elected incumbent sheriff from reelection for two years. WIS. CONST. ART. VI, § 4. art. VI, § 4 (1922). The *Pluntz* court determined Johnson was not disqualified from election. *Pluntz* at 116. The decision did not determine when an office was vacant. The details of *Pluntz* are complicated, but they do not matter to this case. Dr. Prehn relies on *Pluntz* only for the central proposition: state officials have the right to hold over until a successor qualifies. *Id.* at 114-15.

F. The Board has followed Wisconsin's common law holdover rule in practice.

At least five Board members have held over in the last twenty years.

James Tiefenthaler was appointed for a term ending on May 1, 2003, and he stayed on the Board until February of 2004.[8]

Stephen Willett was appointed for a term ending on May 1, 2003, and stayed on until January of 2007.[9] Herbert Behnke was first appointed in 1989 and was later reappointed in 1995.[10] In 2001, Behnke was renominated, though not confirmed, for a term that was to end on May 1, 2007.[11] Although Governor Doyle withdrew Behnke's nomination in 2003, Mr. Behnke stayed on until January of 2006.[12] Howard Poulson was first appointed in 1995 and later renominated, though not confirmed, for a term that was to end on May 1, 2007.[13] Governor Doyle withdrew Poulson's nomination in 2003, but Poulson stayed on until September of 2007.[14] And

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[8] Wis. Senate Journal (1999) 145 (nomination) and 390 (confirmation); Wisconsin Department of Natural Resources, *Wisconsin Natural Resources Board (NRB) Members 1968 – Current*, https://p.widencdn.net/kl6uvx/NRB-Members-1968.

[9] Wis. Senate Journal (1999) 145 (nomination) and 390–91 (confirmation); *Wisconsin Natural Resources Board (NRB) Members 1968 – Current*.

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

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

[12] Wis. Senate Journal (2003) 8; *Wisconsin Natural Resources Board (NRB) Members 1968 – Current*.

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

[14] Wis. Senate Journal (2003) 8-9; *Wisconsin Natural Resources Board (NRB) Members 1968 – Current.*

Gerald O'Brien was appointed to serve until May 1, 2005, but stayed on until April of 2008.[15]

As examples, the holdover Board members Mr. Willett and Mr. Tiefenthaler are instructive. Governor Thompson nominated Stephen Willett to serve on the Board, and his term started in 1992.[16] Willett was again nominated and confirmed to serve a second term, which expired in May of 2003.[17] Governor Doyle did not re-nominate Willett when his term expired in 2003; instead, he nominated Ms. Jane Wiley on July 8, 2004.[18] The Senate did not confirm Ms. Wiley's appointment until January of 2007.[19] For the several years between the expiration of Mr. Willett's term and the Senate confirming Ms. Wiley, Mr. Willett sat on the Board, attended meetings, voted, and voiced opinions.[20]

Governor Thompson also appointed James Tiefenthaler to serve on the Board; his first term started in 1992. He was again nominated and confirmed by the Senate to serve a second term, which expired on May 1, 2003.

Governor Doyle nominated Ms. Christine Thomas to replace Mr. Tiefenthaler's on May 12, 2003. [21] The Senate did not vote on Ms. Thomas's nomination until March 11, 2004.[22] Until the Senate confirmed

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[15] Wis. Senate Journal (1999) 144 (nomination) and 340 (confirmation); *Wisconsin Natural Resources Board (NRB) Members 1968 – Current.*

[16] Natural Resources Board Members from 1968 to Present; https://p.widencdn.net/kl6uvx/NRB-Members-1968.

[17] Ninety-Fourth Regular Session of the Wisconsin Senate, Letter from Governor Thompson to the Senate (April 30, 1999); https://docs.legis.wisconsin.gov/1999/related/journals/senate/19990511/_279.

[18] Ninety-Sixth Regular Session of the Wisconsin Senate, Letter from Governor Doyle to the Senate (July 8, 2004); https://docs.legis.wisconsin.gov/2003/related/journals/senate/20040714/_56.

[19] Ninety-Eighth Regular Session of the Wisconsin Senate, Vote on several of Governor Doyle's Appointees (Jan. 30, 2007); https://docs.legis.wisconsin.gov/2007/related/journals/senate/20070130/_98.

[20] Natural Resources Board Meeting Minutes, Wis. Dep't of Nat. Resources (Jan. 24, 2007); https://p.widencdn.net/aqqmm9/Jan-2007-NRB-minutes.

[21] Ninety-Sixth Regular Session of the Wisconsin Senate, Letter from Governor Doyle to the Senate (May 14, 2003). https://docs.legis.wisconsin.gov/2003/related/journals/senate/20030514/_194.

[22] Ninety-Sixth Regular Session of the Wisconsin Senate, Vote on Several of Governor Doyle's Appointees (March 11, 2004); https://docs.legis.wisconsin.gov/2003/related/journals/senate/20040311/_104.

Ms. Thomas, Tiefenthaler, like Willet, remained on the Board; he attended meetings, cast votes, and voiced opinions.[23]

Upon their confirmation by the Senate, the successors did not start fresh, full 6-year terms running from the date of confirmation. Rather, the Senate journal reflects the terms of the successors lasted until 6 years after the May 1 expiration date of the incumbents they replaced. These recent holdover Board members held over in conformity with Wisconsin's long-standing common law rule, as well as the common law rule regarding the effect of a holdover on the successor's fixed term, reducing the length of the successor's term in office.[24]

The reduced time in office that results when an incumbent Board member held over in office until his successor was confirmed, is consistent with the common law holdover rule:

> A term of office is not affected by the holding over of an incumbent beyond the expiration of the term for which he or she was appointed. The period between the expiration of an officer's term and the qualification of his or her successor is as much a part of the incumbent's term of office as the fixed constitutional or statutory period. … Thus, a holdover does not change the length of the term, but merely shortens the tenure of the succeeding officer." 63C Am. Jur. 2d *Public Officers and Employees* § 150.

Not only has Wisconsin's law recognized the common law holdover rule for over a century, Wisconsin's government, as to the Board in particular, has followed it in practice.

II. THE GOVERNOR MAY NOT REMOVE DR. PREHN FROM OFFICE, EXCEPT "FOR CAUSE."

The Circuit Court correctly rejected the State's argument that the Governor may remove Dr. Prehn at any time after his fixed term in office expired on May 1, 2021. Interpreting Wis. Stat. §§ 17.07(3) and (4), the Circuit Court held:

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[23] Natural Resources Board Meeting Minutes, Wis. Dep't of Nat. Resources (Feb. 24, 2004); https://p.widencdn.net/hy9rgb/02-04-NRB-minutes (last visited September 7, 2021).

[24] Ninety-Eighth Regular Session of the Wisconsin Senate, Vote on several of Governor Doyle's Appointees (Jan. 30, 2007); https://docs.legis.wisconsin.gov/2007/related/journals/senate/20070130/_98.

> The Court reads these statutes to mean the legislature has drawn a distinction between two sorts of appointive officers, based on the manner in which the officer is appointed. The first sort of officer, who may be removed only "for cause,"12 serves in an office "filled by appointment of the Governor for a fixed term." The second sort of officer, who may be removed "at any time," serves in an office "filled by appointment of the Governor … to serve at the pleasure of the Governor." Id. at 15-16.

Because Dr. Prehn is the first sort of appointive officer, serving a fixed term, not at the pleasure of the Governor, the Circuit Court correctly determined the Governor may only remove him "for cause." Id.

A. The method of filling the appointive office determines when the Governor may remove an officer.

No reasonable construction of Wis. Stat. § 17.07 supports the State's argument, urging that Dr. Prehn shed his "for cause" protection from removal when his fixed term in office expired. By statute, appointed officials are categorically either removable 1. "for cause" or 2. whenever the Governor wants.

Wis. Stat. § 17.07 provides in relevant part as follows:

> **17.07 Removals; legislative and appointive state officers.** Removals from office of legislative and appointive state officers may be made as follows:
>
> . . .
>
> **(3)** 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, or serving in an office that is filled by appointment of any other officer or body for a fixed term subject to the concurrence of the Governor, by the Governor at any time, for cause.
>
> . . .
>
> **(4)** State officers serving in an 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, or serving in an office that is filled by appointment of any other officer or body for an indefinite term subject to the concurrence of the Governor, by the Governor at any time.

Dr. Prehn's method of qualification for office, by Senate confirmation, places him in the first category of § 17.07(3) officers removable only "for cause."

The method of filling an appointive office determines whether Wis. Stat. § 17.07(3) or (4) applies to an appointee. Wis. Stat. § 17.07(4) explicitly applies to officers appointed "to serve at the pleasure of the Governor" and officers appointed by "any other officer or body for an indefinite term subject to the concurrence of the Governor," and therefore does not apply to Dr. Prehn. Accordingly, Chapter 17 does not provide Governor Evers any authority to remove Dr. Prehn from the Board "at his pleasure." The method by which the office is filled determines whether the Governor may remove an officer "at any time" or only "for cause." Because the method by which the office is filled does not change based on practical circumstances surrounding a particular officer, the applicability of § 17.07(3) or (4) to a particular officer never changes. Accordingly, Dr. Prehn has not "lost" the statutory protection that permits the Governor to remove him only "for cause." The State has not even alleged that facts exist that could support removing Dr. Prehn "for cause."

B. *Thompson* confirms that Senate confirmation protects Dr. Prehn from being removed without cause.

The *Thompson* court's reasoning regarding the scope of the Governor's statutory right to remove appointed officers also applies with full force in this case. On this issue, *Thompson* provides the controlling legal premise that an incumbent confirmed by the senate, legally occupying his or her office as a holdover official, is entitled to the protection of "for cause" removal by virtue of his or her senate confirmation.

In its analysis of this issue, the *Thompson* court noted that, under a former version of § 17.07(4), state officers "appointed by the Governor alone" may be removed "by the Governor at pleasure." *Thompson* at 295-96. The *Thompson* court's discussion of Mr. Hidde, an unconfirmed chiropractic board incumbent, is also instructive. This Court reasoned that the Governor's nomination of Mr. Hidde's successor, Mr. Barnstable, "operated to remove Hidde from office, and thus created a vacancy within the meaning of sec. 17.20 (2)." *Id.* at 296.[25] Therefore, the *Thompson* court reasoned, Mr. Barnstable's appointment "to the board of examiners in

[25] The *Thompson* court seems to have assumed – without deciding – that a vacancy is a necessary precondition to a gubernatorial appointment to office. The Governor was free to replace Hidde, so whether the office was vacant does not matter.

chiropractic was valid and effective when made and he may continue in this post unless and until rejected by the senate." *Id.*

In this case, Dr. Prehn, like Mr. Hidde, is an incumbent. Unlike Mr. Hidde, however, Dr. Prehn, was nominated by the Governor and *confirmed by the Senate.* It follows from the *Thompson* court's logic that, if Mr. Hidde had also been nominated by the Governor and confirmed by the Senate, Mr. Barnstable's appointment would not have been "valid and effective" until confirmed by the Senate.

Accordingly, *Thompson* precludes any appointment in this matter purporting to replace Dr. Prehn.

C. No "cause" exists to remove Dr. Prehn from the Board.

Pursuant to Wis. Stat. § 17.07(3), Governor Evers may only remove Dr. Prehn as a member of the Board "for cause." Wis. Stat. § 17.001 defines "cause" to mean "inefficiency, neglect of duty, official misconduct, or malfeasance in office." The State has not established any facts that support a finding of "inefficiency, neglect of duty, official misconduct, or malfeasance in office." The Complaint does not even allege any basis to remove Dr. Prehn as a member of the Board "for cause." R. 2.

It appears the State has wisely waived any theory that Dr. Prehn may be removed "for cause" simply because he declined to resign and continues to hold office. It is illogical that lawfully continuing to hold an appointive office could constitute "inefficiency, neglect of duty, official misconduct, or malfeasance in office." There can also be no serious argument that declining to resign somehow amounts to a form of misconduct, and thus "cause" for removal. There is in fact no basis to remove Dr. Prehn as a member of the Board "for cause."

III. THE HISTORY OF THE DEPARTMENT OF NATURAL RESOURCES ILLUMINATES THE LEGISLATURE'S CHOICES.

Conservation and environmental management have been evolving over Wisconsin's history beginning even before its statehood. Scholarship regarding Wisconsin environmental regulation and management divides its history into four phases: the Era of Uncontrolled Exploitation from 1867 through 1895; the Progressive Conservation Era from 1895 through 1915; Conservation's Golden Years from 1927 through 1966; and finally the modern era starting with the creation of the Department of Natural Resources

and the Natural Resources Board.[26] History contextualizes and supports the decision below.

A. History of Wisconsin's conservation agencies and citizen boards.

As early as 1867, the Legislature established the first State Forestry Commission to study the effects of clearing trees from our state.[27] The Forestry Commission had no budget and no regulatory authority, but studied the depletion of forests and produced a report.[28] In 1874, the Legislature appointed a state Fisheries Commission to study and restock declining commercial fisheries.[29] In 1880, the Fisheries Commission requested the Legislature enact regulations to protect spawning walleye, and the Legislature did so.[30] The Legislature was the sole environmental and conservation regulator during the state's early history.[31] The citizens that served on these early Commissions had no decision-making authority and served only in an advisory capacity.

In 1905, during the progressive era, the Legislature replaced the Forestry Commission with the State Board of Forestry.[32] This Board was the first to have statutory responsibility to hire and oversee a state forester, create a forest reserve system, and budget appropriated funds.[33] In 1908, the Governor appointed the first Conservation Commission, another advisory body.[34] Seven years later, in 1915, the Legislature abolished all conservation related commissions and consolidated their functions under a paid, professional, three member Conservation Commission.[35] These three Commissioners were appointed to serve staggered, six year terms.[36]

The Commission was short-lived. In 1921, the Governor removed the entire Commission, replacing it with a single Conservation Commissioner

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[26] Christine L. Thomas, One Hundred Twenty Years of Citizen Involvement with the Wisconsin Natural Resources Board, *Environmental History Review* (1991), available at https://p.widencdn.net/unc3ah/120-years-citizen-involvement-WNRB
[27] Id. p. 65.
[28] Id.
[29] Id. p. 62.
[30] Id. p. 63.
[31] Id. p. 64.
[32] Id. p. 68.
[33] Id. p. 70.
[34] Id.
[35] Id.
[36] Id. p. 71.

who had "lost a political position and needed a job."[37] The single Commissioner was apparently a decent man who was "totally unqualified to serve" as a Commissioner of Conservation.[38] As a result of the Governor's interference with the Conservation Commission, "conservation interests believed that the Department could not possibly make progress if it swayed back and forth with every gubernatorial election."[39] These concerns, along with significant interest in conservation during this era, led to legislation – co-drafted by conservationist Aldo Leopold – to establish the Conservation Department in 1927.[40] The Conservation Department, overseen by six citizen board members of the Conservation Commission, continued to oversee conservation in Wisconsin for the following forty years.[41] In 1993, the Conservation Department began a series of public hearings that evolved into the Conservation Congress, eventually codified by statute into the body that exists today.[42] Management of the deer herd was a central controversy in Wisconsin conservation through the 1930s and 40s,[43] similar to the controversies about wildlife management that exist today.

B. The creation and evolution of the modern Department of Natural Resources and Natural Resources Board.

Controversy attended the creation of the modern Department of Natural Resources and the Natural Resources Board created to oversee it. The creation of the DNR and the Board was just a part of the Governor's push to reorganize and streamline Wisconsin government, which consisted of over ninety agencies.[44] Lack of legislative control over these various agencies informed the Governor's approach to reorganizing Wisconsin government.[45] The Kellett Commission, tasked with studying how to reorganize Wisconsin's government, had an executive committee consisting of the leaders of Wisconsin's major industries.[46]

The Kellett Commission proposed merging the venerable Conservation Department with the new Department of Resource

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[37] Christine L. Thomas, The Role of the Wisconsin Natural Resources Board in Environmental Decision-making: a comparison of perceptions (1989), p. 66, available at the UW Law School Library.
[38] Thomas (1991), p. 71.
[39] Id.
[40] Id. p. 72.
[41] Id.
[42] Id.
[43] Thomas (1989) p. 71.
[44] Id. p. 77.
[45] Id. p. 78.
[46] Id. p. 79.

Development, formed in 1966.[47] Conservationists, including members of the Conservation Commission, were alarmed at the proposed merger, fearing "development interests would over-shadow conservation interests."[48] While the reorganization plan recommended consolidating over ninety state functions into just twenty-six agencies,[49] only the merger of the Conservation Department and the Department of Resource Development caused public controversy.[50] The opposition to the merger included intensive efforts by conservationists to call, telegram, and write letters to legislators, as well as a "massive rally at the state capitol" by protestors wearing red hunting coats.[51] The effort was called the "Red Shirt Rebellion."[52]

After weeks of debate, a proposal was made for a Board of seven members with six-year staggered terms, three from the north of Wisconsin and three from southern Wisconsin.

When it created the Department in 1967, the Legislature made a deliberate choice to require both a Board and a Secretary of the DNR. The Board used to have even more independence from the Governor. Under the original organization of the Department, the Governor did not appoint the secretary of the Department. It was the Board that selected the secretary. Wis. Stat. § 15.05(b), (1967-68). In 1995, the Legislature added § 15.05(c), which took away from the Board the responsibility of choosing the Secretary, and gave the Governor the power to appoint the Secretary with the advice and consent of the senate, to serve at the Governor's pleasure.

The Legislature in 1995 made the deliberate choice to make the Secretary an officer who serves at the pleasure of the Governor, even after nomination and confirmation through the advice and consent of the Wisconsin Senate. The Secretary may now be removed by the Governor at any time, even after confirmation. Wis. Stat. § 17.07(4). The Secretary, serving at the Governor's pleasure, has the primary responsibility for executing the law, as an agent of the Governor. This 1995 legislative adjustment to the Governor's appointment power remains the law.

The modern Natural Resources Board shares responsibility with the Secretary of the Department of Natural Resources. The statutes charge the Secretary with the responsibility of administering the Department. Thus, the Secretary is the head of the Department, but is subject to the supervision and oversight of the Board. The Board sets broader policy in its oversight

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[47] Id. pp. 78-79.
[48] Id. p. 79.
[49] Id. p. 77.
[50] Id. pp. 80-81; 83.
[51] Id.
[52] Id.

capacity, but is not involved with day-to-day administration or execution of laws.

C. The Natural Resources Board is a policy-making and advisory body not responsible for execution of the laws, and protected from political removals, as was its predecessor, the Conservation Commission.

In creating the modern Department of Natural Resources, the Legislature chose to continue the tradition of citizen board oversight of conservation agencies. The role of the Board continued to be important, even after the 1995 change to the law giving the Governor the power to appoint the DNR Secretary. Making the Secretary removable at the pleasure of the Governor allows the Governor to immediately exercise control over the administrative and executive functions of the Department.

The terms in office for Board members, both because they are appointed to staggered, six-year terms, and because they serve not at the pleasure of the Governor, but until a successor has been confirmed by the Wisconsin Senate, provide a brake on the speed with which the Governor can commit the Department to an about-face in policy. The Legislature's choice in so structuring the Department embodies a preference for stability over political accountability.

A "board" is a "part-time body functioning as the policy-making unit for a department." Wis. Stat. § 15.01(1r). The Natural Resources Board has such responsibilities. "the powers and duties of the board shall be regulatory, advisory and policy-making, and not administrative." Wis. Stat. § 15.05(b) The Secretary sees to the execution of the laws that are the responsibility of the Department. "All of the administrative powers and duties of the department are vested in the secretary, to be administered by him or her under the direction of the board." Id. The advisory and policymaking functions of the Board are thus intended to be independent of core execution of law functions that are the prerogative of the executive.

While the State claims to be concerned about the Governor's power to "execute the laws," BR1 43; R. 17, 39, the Governor's interest in appointing to the Board a successor to Dr. Prehn whom he hopes will vote in a manner consistent with the Governor's policy preferences has nothing to do with the "execution of the laws." It is a political and policy preference.

The Legislature created the Department of Natural Resources and the Natural Resources board in 1967, just a few years after this Court decided *Thompson v. Gibson.* The Legislature knew with certainty, in light of *Thompson*, that Board members would hold over in office in the absence of

an express holdover clause. *Thompson* involved two unconfirmed appointees to the Conservation Commission—the predecessor of the Board—nominated to replace validly-appointed and validly-confirmed incumbents whose terms had expired. *See Thompson* at 280-82. The appointments were held ineffective. Id. The language then applicable to the terms of Commission members is not meaningfully different in any relevant respect from those provisions now applicable to the terms of NRB members. Compare Wis. Stat. § 23.09(2) (1963-64) with Wis. Stat. §§ 15.07(1)(a), (1)(c); 15.34(1), (2)(a)-(b).

With *Thompson's* holding regarding the unconfirmed Conservation Commission nominees in mind, the Legislature enacted Chapter 15 of the Wisconsin Statues containing no explicit holdover clauses at all. See Ch 15, (1967-68). There was no need, in light of *Thompson's* recent holding, to make the common law holdover rule explicit. The Legislature continued the tradition of citizen board oversight of conservation when it created the Department and its overseeing Board, knowing the appointees to the Board would hold office until their successors were appointed and confirmed by the Senate.

IV. HISTORY SHOWS WISCONSIN BALANCED POWER BETWEEN THE GOVERNOR AND LEGISLATURE DIFFERENTLY THAN THE FEDERAL GOVERNMENT, UNDERMINING THE STATE'S SEPARATION OF POWERS ARGUMENT.

The federal government of the United States and the government of Wisconsin differ with respect to the choices their constitutional framers made as to the powers granted to the President and Governor, respectively. The history of each government's constitutional convention illuminates the different ways each set of framers chose to set the balance of power between the executive and legislative branches of government.

Wisconsin's different choices as to separation of powers are rooted in the history of its constitution, and the modern balance of power is consistent with our history.

The delay in Senate confirmation of Dr. Prehn's successor is ultimately a political question that this Court cannot resolve.

A. The President of the United States enjoys greater executive power, especially as to removal of executive officers.

The President of the United States enjoys broad appointment and removal powers. The President may generally remove executive officers at any time. The federal Constitution does not delineate the president's power to remove appointed executive officials from office. The President's removal powers are implied in Article II, Section 2, Clause 2 of the United States Constitution, which provides for the President's appointment powers.[53] In the first Supreme Court of the United States decision regarding the extent of the implied presidential removal power, the court declared, "Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices ..." *Myers v. United States*, 272 U.S. 52, 163 (1926). It was not until *Humphrey's Executor* that the Supreme Court of the United States clarified which offices Congress could insulate from presidential removal. *Humphrey's Executor v. United States,* 295 U. S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935).

It is now clear that the President's broad removal power does not extend to independent federal agencies. Independent federal agencies are "generally headed by a commission or board made up of five to seven members."[54] Any agency that does not have to report to or answer to a higher official in the executive branch, e.g. a department secretary, is also independent.[55] Independent agencies also include those agencies whose top official enjoys for-cause removal protections.[56] There are now 66 separate independent federal agencies.[57]

During the federal constitutional convention, everyone participating knew that George Washington would be the first president of the United States.[58] The founders of United States envisioned Washington serving many terms as president, not just the two he ended up serving.[59] Washington could have assumed king-like power after the Revolution, but retired instead.[60] The federalist framers of the constitution thought a strong

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[53] https://constitution.congress.gov/browse/essay/artII-S2-C2-2-1-5-1/ALDE_00001142/
[54] https://ballotpedia.org/Independent_federal_agency
[55] Id.
[56] Id.
[57] Id.
[58] https://csac.history.wisc.edu/document-collections/constitutional-debates/executive-branch/
[59] Id.
[60] Id.

leader of the fledgling democracy would be necessary to stand up to the princes that otherwise dominated as world heads of state at the time.[61]

The federal founders were indeed concerned about an aggrandized Legislature, after enduring the ineffectual articles of confederation, adopted in 1777.[62] The articles of confederation were essentially a tyranny of the legislature. That fear, combined with their confidence in Washington's competence, leadership, and their comfort with his integrity, resulted in a powerful federal presidency.

B. Wisconsin balanced the power of the Governor and the Legislature differently, consistent with the concerns particular to our state government.

By contrast, Wisconsin has always carefully limited the Governor's removal powers. Since its adoption in 1848, the Wisconsin Constitution has reserved the power to determine when a vacancy occurs to the Legislature. WIS. CONST. ART. XIII, § 10. Chapter 11, § 8 of the Revised Statutes of 1849 provided that the Governor could remove officers appointed by the Governor with the advice and consent of the senate "for official misconduct, or habitual or willful neglect of duty …" which mirrors the modern removal statute that requires "cause" before the Governor may remove an appointed official confirmed by the senate. § 17.07(3). Similarly, Ch. 11, § 9 provided "All officers who are or shall be appointed by the Governor for a certain time, or to supply a vacancy, may be removed by him," which likewise mirrors the current § 17.07(4), permitting the Governor to remove at any time officials whose appointment does not require the senate's advice and consent.

As a state, not a federal government, Wisconsin had different concerns. Wisconsin's constitutional framers were concerned about the power of the executive, the Governor being the most likely person to impose a tyrannical rule upon the people of our new state. There was, for example, vigorous advocacy of a one-year term and a limit to the number of successive terms he could serve. "The debates evidence to a considerable degree that distrust of the executive which belongs to the period of the Revolution and the years following it." *State ex rel. Martin v. Heil* 242 Wis. 41, 50, 7 N.W.2d 375 (1942).

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[61] Id.

[62] https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president

The Journal of the Convention to Form a Constitution for the State of Wisconsin[63] reflects a robust debate about executive power, contemplating one-year terms in office, and limited power of appointment:

> 'Mr. WHITON moved to amend the first section by striking out the word "two" and inserting the word "one", so that the Governor should be chosen annually… It was a generally admitted fact, that the shorter the term of office the more the officer would feel his responsibility to the people…Another objection to long terms to the chief executive office was, that it enabled him to gather around him a clique of politicians, and to fortify himself against competitors, by a clique influence.
>
> Mr. LOVELL remarked… the executive office would be entirely divested of the appointing power… Divested of this power, the executive would have no means of drawing around him a clique…' (Journal at 55-56)
>
> 'Mr. CHASE… believed that short terms and frequent elections would tend to allay, rather than aggravate the excitement attendant upon political contests. Political parties might move heaven and earth once in four years, but he did not believe they could do it every year.
>
> The amendment was lost – 27 to 39.' (Id. at 59)

The convention delegates also twice considered permitting the legislature to override an executive veto with less than a two-thirds majority vote, or denying the Governor the veto power altogether.

> 'Mr. GALE said he was surprised to see gentlemen urge the two-thirds rule, and claim to be democrats… The gentleman from Rock (Mr. WHITON) had correctly stated that the veto power was a prerogative of the crown of England…he was decidedly opposed to the Governor being invested with such supreme power over the people's representatives.' (Id. at 89-90)

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[63] Available at: https://books.google.com/books?id=r8A4AAAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false

Debate about permitting the Governor any removal power at all was also notable.

> 'Mr. O'CONNOR moved to strike out of the 4th section that part with authorized the Governor to remove any officer provided for in that section, (sheriffs, coroners, &c.)
>
> Messrs. LOVELL and KING spoke briefly in favor of conferring on the Governor the power to remove these officers for cause.
>
> Mr. DORAN admitted the necessity of vesting such a power somewhere, but preferred that it should be vested in the district court, and hoped the mover would modify his amendment accordingly.
>
> After some further discussion… the question was taken on the amendment, and lost.'
>
> 'Mr. WHITON moved to… empower the Governor to remove the treasurer from office in case of malfeasance therein…Mr. DORAN was opposed to placing any such power in the hands of the Governor…
>
> …
>
> Mr. JUDD said… he doubted whether such a power ought to exist any where; but if it was deemed necessary, he should prefer that it should be regulated by the legislature… The amendment was rejected.' (Id. at 91)

So concerned with any sort of executive power was the Wisconsin constitutional convention that the original Wisconsin Constitution limited sheriffs from holding office by excluding them from reelection. Sheriffs had to wait two years before running for sheriff again. WIS. CONST. ART. VI, § 4 (1848).

The Journal does not indicate the framers of Wisconsin's Constitution had any specific concerns that the Legislature would "aggrandize" itself at the expense of the executive and judicial branches, contrary to the State's assertions. BR1 at 13, 47, 51.

The concerns of the framers of Wisconsin's constitution are reflected in the vacancy, appointment and removal rules in our modern statutes and constitution, and support the Circuit Court's dispositional order.

C. Wisconsin's constitution, not federal law, set the balance of power in our state and permits the Legislature to enact the appointment and vacancy laws now in force.

It is Wisconsin's constitution that ultimately controls the question of balance of power, not federal law. "[O]ur constitution means what it says, not what federal cases say, and not what we might want it to say." *James v. Heinrich,* 2021 WI 58, ¶61, 397 Wis. 2d 516, 567, 960 N.W.2d 350, 375 (Justice Hagedorn concurring). Justice Hagedorn's observation has deep roots in Wisconsin law.

In *The Attorney General ex rel. Bashford v. Barstow*, 4 Wis. 567, 785 (1855), Justice Smith admonished the Court to rely upon Wisconsin's constitution to determine "the distribution of the powers of government which *it has in fact made*." This Court should again do so here, and find the State's separation of powers arguments unpersuasive.

D. The confirmation standoff between the Senate and the Governor is political, and this Court lacks the authority to craft a judicial vacancy rule.

Ultimately, the Senate has yet to vote on confirming Dr. Prehn's successor. When the Senate refuses to confirm the Governor's nominee, and the Governor refuses to appoint a nominee that the Senate will confirm, the result is an unfortunate standoff between the executive branch and the legislative branch of government. Such a standoff is a non-justicable political question that even this Court cannot resolve. *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶ 40.

This Court cannot order the Governor to appoint a different nominee to the Board, one that the Senate would confirm. It likewise cannot order the Senate to confirm, or even vote on, the Governor's nominee. Finally, because the constitution vests the power to declare vacancies with the Legislature, this Court may not craft a judicial vacancy rule.

The Governor and the Senate must engage with each other to solve the political question of who will succeed Dr. Prehn on the Board. Dr. Prehn urges the Governor and the Senate to do so.

CONCLUSION

For all of the foregoing reasons, the Circuit Court's dispositional order should be affirmed.

Dated this 5th day of January, 2022.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief produced in proportional serif font. The length of this brief is 10,514 words.

I further certify that:

I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12) (2019–20).

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

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on opposing parties.

Dated this 5th day of January, 2022.

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