STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP1673

STATE OF WISCONSIN
ex rel. JOSHUA L. KAUL,

Plaintiff-Appellant,

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

# STATE OF WISCONSIN'S REPLY BRIEF

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### I. Respondents' arguments show why *Thompson* must be overruled if it is read as allowing Prehn's indefinite holdover.

Prehn and the Legislature claim to embrace the century-old common law rule for holdovers, but they actually want only half of it: they like its authority for Prehn to hold over, but dislike the fact that a vacancy also exists during the holdover, waiting to be filled. But they cannot pick and choose. Rather, current statutes permit the Governor to make a provisional appointment during that vacancy.

*Thompson* should not control; it took place in a different statutory landscape and did not apply the cases describing the common law rule. To the extent *Thompson* is read to allow Prehn to hold over indefinitely, subject only to the will of the Senate, the decision must be overruled.

#### A. Prehn's argument violates the very common-law principle that allowed him to hold over originally.

Prehn and the Legislature recognize that *no* statute allows him to hold over beyond the date his term expired. To remedy that problem, both briefs rely extensively on the common-law holdover rule. But that rule has *two* parts: (1) an appointee whose term has ended may hold over, but (2) there is a vacancy in the office that the Governor is entitled to fill, and the replacement may take office and serve once she is qualified. Those parts come as a set: they ensure continuity until the Governor picks a new officer, but they do not allow the officer to prevent his replacement. Prehn cannot pick and choose—if he has a common-law ability to hold over, he also must follow the common law when it comes to exiting that office.

As stated in *State ex rel. Pluntz v. Johnson*, 176 Wis. 107, 184 N.W. 683 (1921), *j. vacated on reh'g*, 176 Wis. 107, 186 N.W. 729 (1922), the common law allows holdovers, but holding over still leaves a vacancy to be filled by appointment of a successor. In *Pluntz*, the court held that, following expiration of an appointive term, there was "a vacancy in the office, and his title thereto after the expiration of the fixed and definite term was defeasible, and subject to be terminated whenever an eligible and lawfully elected or appointed successor should qualify therefor." *Pluntz*, 184 N.W. at 685. Well-accepted treatises are in accord: where "a specific term of office is provided by law, but no provision confers any right of tenure or preferential rights, an office becomes vacant upon expiration of the term." 63C Am. Jur. 2d *Public Officers and Employees* § 119 (2d ed. Jan. 2022 update).

Under those principles, Prehn could hold over as a *de facto* officer, but only until a successor—here, Nass—qualified under the statutes. He cannot have his cake and eat it, too.

And "qualified" means taking the oath of office, not being confirmed by the Senate. Respondents equate *qualification* with *confirmation*. (*E.g.*, Legislature Br. 19–21, 29; Prehn Br. 20.) But they are different things. Qualification is all that common law and current statutes require, and the statutes define "qualification" as taking the oath of office. *See* Wis. Stat. §§ 17.20(2), 17.01(13); *see also Johnson*, 186 N.W. at 730; *State ex rel. Prince v. McCarty*, 65 Wis. 163, 26 N.W. 609, 609 (1886) (successor's right to office begins upon *qualification*, i.e., "execut[ing] and deposit[ing] his official bond," and "tak[ing] and subscrib[ing] the oath of office"). The appointee then serves in a provisional appointment until confirmed and "may exercise all of the powers and duties of the office to which such person is

appointed" for the residue of the unexpired term. Wis. Stat. § 17.20(2)(a).

The Legislature's discussion of the case law on holdovers (Legislature Br. 26–27) is not to the contrary. Both *State v. Feuerstein*, 159 Wis. 356, 150 N.W. 486, 488 (1915), and *State ex rel Martin v. Heil*, 242 Wis. 41, 7 N.W.2d 375 (1942), affirmed the common law rule allowing holdovers. *E.g.*, *Heil*, 242 Wis. at 51 (reaffirming that for offices other than the governor there is "little practical objection" to allowing the incumbent to hold over). But the Legislature leaves out the rest of the story. Those cases also confirm that the officer's ability to hold over is paired with a vacancy in the office, with the holdover's title defeasible once a new officer is appointed and qualifies. *Id.* at 48–49, 51; *Feuerstein*, 150 N.W. at 488.

### B. No statute allows Prehn's continued usurping.

Prehn's position that he can hold over is wholly derived from the common law. No statute permits Prehn to stay until his successor was named and qualified, much less to hold over until the Senate tires of him. The statute under which he was appointed says his term "shall expire." *See* Wis. Stat. § 15.07(1)(c). That moment came and went on May 1, 2021, and statutes give him no ability to continue beyond that date.

Prehn and the Legislature embrace the part of the common law rule they like—the right to hold over—but then ignore the second part of the rule—that a holdover still leaves a vacancy to be filled. Inconsistently, the Legislature argues that the common law remains in place and that subsequent enactments did not "uproot a century of common law" (*e.g.*, Legislature Br. 22), but then implies that Wis. Stat. § 17.03 now constitutes the exclusive list of events causing vacancies, with no place remaining for the common law rule. There is no statutory support for that view.

The subsections of Wis. Stat. § 17.03 do not purport to state the exclusive list of vacancies or exclude the common law rule for vacancies where there is an appointed-term holdover. To the contrary, Wis. Stat. § 17.03 begins with the phrase "[e]xcept as otherwise provided," and ends with a catchall provision for "any other event . . . which is declared by any special provision of law to create a vacancy." Wis. Stat. § 17.03(13).

The Legislature tries to explain away "except as otherwise provided," suggesting it means that other laws may only *narrow* the types of events causing vacancies. (Legislature Br. 22–23.) That asks "except" to bear far too much weight. The Legislature offers no analysis of why the word "except" can only shrink the universe of Wis. Stat. § 17.03. The more reasonable meaning of the clause is to recognize that statutes limiting a specific office's term, like the Natural Resources Board ("the Board") here, necessarily create a vacancy—especially in conjunction with the common law.[1] And as discussed in the State's first brief, because those end dates vary depending on the office, it makes sense to cross-reference them generally rather than collecting deadlines from throughout the code.

The Legislature and Prehn noted that, in 1983, the Legislature added subsection (10) for the expiration of elective offices but not a similar provision for the expiration of appointive offices. (Legislature Br. 17, 32; Prehn Br. 22.) This

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[1] More than just unreasonable, Respondents' view of vacancy is illogical: if there were no vacancy to fill when a holdover remains after the expiration of his term, the Governor could never appoint a successor for the Senate to confirm. Prehn tries to construct a novel framework to support the notion that an appointment can be made without a vacancy, but his argument puzzlingly relies on the *vacancy* statutes for authority. (*See* Prehn Br. 16–18 (discussing Wis. Stat. § 17.20(1).) The Legislature does not even try to address the illogic of the no-vacancy view.

again begs the question of whether Wis. Stat. § 17.03 is an exhaustive list that excludes the common law rule. Notably, subsection (10) was not added as part of a general rewrite of the vacancy statutes; it was part of a comprehensive *elections* bill. 1983 Wis. Act 484, § 140. There would have been no reason for such a bill to comb through and refine the vacancy statutes.

### C. *Thompson* was decided under a different statutory framework and did not consider both aspects of the common law rule.

Prehn and the Legislature assert that *Thompson* is sound precedent. But they ignore two key problems with applying the case here: (1) *Thompson*'s failure to cite, much less analyze, the cases discussing the common law rule; and (2) statutory changes in 1977 that ended the ability of the Governor to make a provisional appointment when the Legislature is out of session—a failsafe that ensured the Governor's appointment power could not be endlessly thwarted—and substituted an expanded ability to make provisional appointments.

First, *Thompson* never explained the legal source of the right to hold over and did not cite, much less analyze, any of the Wisconsin cases discussing the common-law rule, contrary to what the Legislature implies. (Legislature Br. 21.) *Thompson* offered no explanation for the legal source of an officer's ability to hold over. The decision just accepted it as fact, without analyzing the precedent or applying the common law in its entirety—the pairing of the right to hold over with the existence of a vacancy in the meantime. Indeed, with no discussion of *Pluntz* or related cases, *Thompson*'s rule (at least as portrayed by Respondents) would conflict with the prevailing common-law rule that an office becomes vacant

upon expiration of a fixed term. *See Pluntz*, 184 N.W. at 685; 63C Am. Jur. 2d *Public Officers and Employees* § 119 (2d ed. Jan. 2022 update).

Second, as explained (State Br. 26–27), the 1977 amendments repealed Wis. Stat. § 14.22, which previously gave the Governor the ability to make a provisional appointment, regardless of a vacancy, during times when the Legislature was out of session. That statute was still in force when *Thompson* was decided, so the Court's decision was against the background fact that, regardless of a vacancy, any delay in the Governor's ability to appoint would necessarily be temporary. The clear intent of the subsequent 1977 change to Wis. Stat. § 17.20 was to "extend" the Governor's ability to make provisional appointments. *Thompson* did not address that new framework.

### D. Respondents provide no persuasive reason to uphold *Thompson*.

*Thompson* need not be overruled if current statutes are applied as the State has urged: Prehn's fixed term expired and he was only a *de facto* officer who must leave now that Nass qualified by statute. But if *Thompson* precludes this result, it should be overruled. None of the Legislature's arguments against overruling are persuasive.

The Legislature first claims that overruling isn't necessary because statutory changes "do not undermine *Thompson*." (Legislature Br. 31–33.) As explained, however, *Thompson* is irreconcilable with a proper application of the current statutes. (*See* State Br. 26–29.)

Second, the Legislature is wrong that *Thompson* "was based on longstanding common-law precepts." (Legislature Br. 33.) As discussed above, *Thompson* did not address those principles, much less overrule the longstanding common law governing holdovers and vacancies. The same is true with *Thompson*'s description of former officers as "*de jure*, and not

*de facto*" (*id.* at 27 (quoting *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 294, 125 N.W.2d 636 (1964))); common law rules dictate that a holdover lacking express holdover authority is at best a *de facto* officer with no right to hold office after his successor qualifies. *See Pluntz*, 184 N.W. at 685; *State ex rel. Haven v. Sayle*, 168 Wis. 159, 169 N.W. 310, 311 (1918); 63C Am. Jur. 2d *Public Officers and Employees* § 34 (2d ed. Jan. 2022 update).

Third, the Legislature claims *Thompson* is not unworkable since other incumbents have held over in "the past several decades" with no vocal objection. (Legislature Br. 33.) Even if true, a few instances of acquiescence over decades says nothing about the *lawfulness* of the practice. Rather, whether it is workable should be judged against the statutes, the very common law Prehn seeks to invoke, and separation of powers principles, none of which support that *Thompson*, as interpreted by Prehn, is workable.

The Legislature also refers to two Attorney General opinions applying *Thompson*. (*See id.* at 19–20.) They are irrelevant. They involved county-level appointments and did not analyze the gubernatorial provisional-appointment statute. *See* 80 Op. Att'y Gen. 46 (1991); 73 Op. Att'y Gen. 99 (1984). Moreover, one of the cited opinions confirmed that the common-law rule controlled—i.e., that an incumbent may only holdover until his successor "qualifies." *See* 73 Op. Att'y Gen. at 100.

Fourth, the Legislature's reference to "reliance interests" in state retirement benefits wrongly conflates "vacancy" with "state service." (Legislature Br. 33–34.) Retirement benefits are governed by detailed procedures under Wis. Stat. ch. 40, which defines "creditable service" to mean the time an employee received earnings working for the state. *See* Wis. Stat. § 40.02(17). Whether service is creditable has nothing to do with whether a vacancy arises upon the

expiration of his term, and overruling *Thompson* changes nothing about retirement benefits.

In sum, Prehn's usurping is unlawful under the statutes and common law. But if there's any doubt about *Thompson*'s lingering effect, it should be overruled.

## II. Separately, Prehn is removable at the Governor's pleasure because Prehn's former Board seat no longer "is filled" by an officer serving a fixed term.

Apart from the law on appointments, Prehn still cannot prevail because the removal statutes provide that he is immediately removable at the Governor's pleasure. The separation of powers confirms this.

The statutes provide "for cause" protection to an "officer" who is "serving in an office that is filled by appointment of the governor for a fixed term by and with the advice and consent of the senate." Wis. Stat. § 17.07(3). The statute turns on there being an office that "is filled" by an officer who is "serving" a "fixed term." *Id.* That use of the present tense unambiguously requires that the office *currently* be filled by an officer serving a "fixed term." *See, e.g.*, *Nichols v. United States*, 578 U.S. 104, 109 (2016) (analyzing use of "present tense" verb "resides"). "Fixed term" means something that lasts for a "specified" and "finite" length of time. *See, e.g.*, Fixed, adj. Merriam-Webster.com (accessed Jan. 31, 2022) ("[N]ot subject to change or fluctuation."). That language must be given effect: once the specified term is over, the office is no longer filled for a fixed term, and "for cause" protection ends.

Trying to avoid this result, the Legislature erects a strawman argument under the guise of the rule of the last antecedent. It points to the fact that the "office" and not an "officer" must be filled for a fixed term. (Legislature Br. 36.) This mischaracterizes the State's argument: the point is that

the statute extends for-cause protection only if the *office* at issue currently "is filled" by an officer serving a fixed term. Nothing in the statute supports the Legislature's atextual assertion that "[t]he relevant question is thus how the 'office' Prehn is 'serving in' 'is filled.'" (*Id.*) Indeed, this interpretation would make nonsense out of the law by extending "for cause" protection to *anyone* who serves in the office—including recess or vacancy appointments who can plainly be removed at pleasure. Wis. Stat. § 17.07(5).

The only way to give coherent meaning to the statutory text is that it concerns someone who currently is serving in an office during its "fixed term." Since Prehn's term has expired, he does not qualify. *See* 63C Am. Jur. 2d *Public Officers and Employees* § 150 (2d ed. Jan. 2022 update) (contrasting "[t]he period between the expiration of an officer's term and the qualification of his or her successor" with "the *fixed* constitutional or statutory period").

The Legislature's reliance on *Moses v. Board of Veterans Affairs*, 80 Wis. 2d 411, 259 N.W.2d 102 (1977), is mistaken. There, the Court held that an officer "appointed by" the Governor could not be removed by the Board of Veteran Affairs, even though the law was changed to give the board the appointment power. The Legislature asserts that this creates a "rule" that the removal power must be predicated on a static view of the office. (Legislature Br. 37–38.) But *Moses* was about who has the removal power, not the duration of "for cause" protection.

And in any case, *Moses* was decided long before 1995, when the law was changed to its present-tense construction. 1995 Wis. Act 27, § 437 (adding "serving in an office that is filled by appointment" to Wis. Stat. § 17.20(3) and directing that other state officers under Wis. Stat. § 17.20(6) are removable by the officer or body "having the authority to make appointments to that office, at pleasure"). The Legislature is correct when it says that amendment "limited

the *category* of officers protected by the for-cause removal standard": the standard applies to officers that are serving for a fixed term, not holdover officers serving indefinitely. (Legislature Br. 38.)

The Legislature's other arguments fare no better. The Legislature purports to rely on legislative notes to suggest that for-cause protection continues long after an officer's fixed term has ended. (*Id.*) But those notes say just the opposite: "in accordance with the presently accepted understanding," "appointees who serve for a fixed term and whose appointments require senate confirmation may not be removed by the governor *in mid-term* unless a showing of cause is made." Analysis by Wis. Legis. Reference Bureau, LRB-9352 (available in drafting file for 1979 Wis. Laws ch. 221, Wis. Law Library, Madison, Wis.) (emphasis added). Wisconsin statutes provide that for-cause protection must be tied to the fixity of tenure. Wis. Stat. § 17.07(3). As noted previously (State's Br. 39), out-of-state precedent confirms that Wisconsin's mechanisms are the general rule. *See State ex rel. Nagle v. Sullivan*, 40 P.2d 995, 998 (Mont. 1935).[2]

Finally, by pure ipse dixit, the Legislature claims that granting lifetime tenure protection "does not impair [core] executive functions." (Legislature Br. 39). The Legislature's failure to provide any citation or explanation on this point says enough, but the weight of law to the contrary removes

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[2] The Legislature's point that the *Nagle* court observed precedent from other jurisdictions was of limited assistance is a red herring: the court was discussing the interpretation of a particular law that provided a four-year fixed term "unless sooner removed," not the general principles of removal, which "are supported by the overwhelming weight of authority." *State ex rel. Nagle*, 40 P.2d at 998–99 (citation omitted).

any doubt. *See, e.g.*, *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2204 (2020); *Serv. Emps. Int'l Union, Local 1 v. Vos ("SEIU")*, 2020 WI 67, ¶ 97, 393 Wis. 2d 38, 946 N.W.2d 35.

## III. Under the separation of powers, Prehn must be removable by the Governor after his fixed term expired, and the Legislature may not participate in removal.

Prehn's view also cannot prevail under the constitutional-avoidance doctrine: it would violate the separation of powers to (1) prevent the chief executive from removing an expired-term executive officer and (2) allow the Legislature to play a part in his continued tenure. Neither Prehn nor the Legislature has a satisfactory answer to this. Rather, the Legislature candidly asserts that it seeks to "supervise the Board." (Legislature Br. 40.) That admission should give pause: the Board is the co-head of a core executive agency.

Prehn and the Legislature attempt to sidestep this serious encroachment by baldly asserting that the Board is a legislative agency and "does not execute the law." (*Id.* at 42–44; Prehn Br. 35–36.) They assert that, because the Department of Natural Resources (DNR) Secretary exercises "administrative" functions, it follows that the Board must be quasi-legislative. Relatedly, they assert that the Board's role in rulemaking makes it a legislative agency.

This is flatly wrong. Executive power does not begin and end with "administration." And splitting something that is

executive in two makes it no less executive.[3] The Board employs executive judgment and discretion in applying and implementing the law in a variety of ways—making decisions about how to allocate resources, using enforcement authority to choose which particular problems to address and how, and applying laws to a given set of circumstances. *Cf. SEIU*, 393 Wis. 2d 38, ¶¶ 96, 104 (describing executive functions); *see also Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986) (rejecting legislative branch participation in federal budget decisions, after the budget's enactment). To illustrate, just one Board meeting agenda shows topics ranging from approving donations for equipment and acquisitions; approving prohibitions on certain land projects' hunting and fishing for public safety purposes; setting certain hunting quotas; and deciding on land acquisitions.[4]

There are different ways to exercise policy judgment, and each branch plays its part. The Legislature expresses its policy views by enacting law. The executive exercises policy judgment when carrying out those laws. The executive is not, as this Court has explained, "a legislatively-controlled automaton. Before executing, he must of necessity determine for himself what the law requires him to do." *SEIU*, 393 Wis. 2d 38, ¶ 96. That is, "he must determine for himself what the law requires (interpretation) so that he may carry it into effect (application). Our constitution not only does not

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[3] Prehn points out that the Board's fixed terms differentiate it from the Secretary, who enjoys no fixed term. But that difference isn't executive versus legislative; rather, it creates a scenario where the Secretary is immediately answerable to the chief executive, while the Board's responsiveness is more gradual. That obvious functioning of the statutes is currently being thwarted.

[4] Wis. Nat. Res. Bd., *January 22, 2021, Natural Resources Board Special Meeting Agenda & Materials*, https://dnr.wisconsin.gov/About/NRB/2021/22-January.

forbid this, *it requires it*." *Id.* (emphasis added) (citation omitted).

It is true that DNR and the Board engage in rulemaking functions and so are—to that limited extent—borrowing legislative authority. But the rulemaking analysis does not carry over into their overarching executive functions: "when an administrative agency acts (other than when it is exercising its borrowed rulemaking function), it is exercising executive power." *Id.* ¶ 97. *Every* head of *every* principal executive agency is involved in rulemaking. The way the Legislature may participate in that limited aspect of the agency's function is through the rulemaking process as provided by statute, not by controlling who runs executive agencies. Loaning an executive agency something, with certain prescribed guardrails, does not convert it to a legislative agency.

The statutes reflect this. It could not be clearer that the Board is an executive entity. DNR and the Board are both created under Wis. Stat. ch. 15, which sets out the "structure of the executive branch." DNR is not only executive but is a "*principal* administrative agency within the executive branch." Wis. Stat. § 15.01(5). In turn, under Wis. Stat. ch. 15, DNR is "headed by" the board, including for "regulatory, advisory and policy-making" activities. *See* Wis. Stat. §§ 15.02(2), .05(2). Overall, the Board's role is "the direction and supervision" of DNR. Wis. Stat. § 15.34(1).

As this Court has held, the executive branch must control this execution, without interference, to the point that even requiring processes for guidance documents unconstitutionally infringes on a "core power" by intruding on "the executive's mind with respect to the law he is to execute." *SEIU*, 393 Wis. 2d 38, ¶¶ 102, 104–05. Prehn and the Legislature have no answer for how that guidance-document law could be unconstitutional while a much more direct infringement—wresting control of expired-term, core

executive-branch officers from its chief—could be constitutional.

Prehn's tact is to say that federal law shouldn't matter (Prehn Br. 36–40), but that argument is flawed in two respects. First, what is cited above is from this Court, and Prehn's view is irreconcilable with it. Second, this Court indeed does look to federal separation of powers principles as a model for Wisconsin's. *E.g.*, *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384; *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 31, 387 Wis. 2d 511, 929 N.W.2d 209; *SEIU*, 393 Wis. 2d 38, ¶¶ 96–97. Prehn comes nowhere close to demonstrating why this precedent should be suddenly abandoned for his benefit.

Lastly, the Legislature argues that a different analysis applies to multimember boards and single agency heads, but that also is incorrect. The separation-of-powers problem in cases like *Seila Law* is that a chief executive "may not have any opportunity to shape [the agency's] leadership and thereby influence its activities." *Seila Law LLC*, 140 S. Ct. at 2204. That is exactly the problem created here, where any number of Board members could hold over indefinitely at the pleasure of the Senate.

By contrast, the multi-member board case, *Humphrey's Executor*, concerned removal restrictions *during* a fixed term. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). And it dealt with an apolitical board's officer "who occupies no place in the executive department and who exercises no part of the executive power," but rather makes "investigations and reports thereon for the information of Congress . . . in aid of the legislative power." *Id.* at 628; *Seila Law LLC*, 140 S. Ct. at 2198–99. *Humphrey's* discussion bears no resemblance to the Board, which oversees a principal executive agency; or to Prehn, whose term has expired.

That there is no U.S. Supreme Court case about a fixed-term executive officer refusing to leave *after* his term expires is telling—it is so far beyond the pale. Restricting removal *during* a fixed term may arguably be tenable because multi-member boards have recurring openings. But going beyond that runs headlong into the separation-of-powers problems of (1) continually saddling a chief executive with contrary executive priorities and judgment and (2) giving the Legislature an unlawful role in participating in removal. *See SEIU*, 393 Wis. 2d 38, ¶¶ 96–97; *Bowsher*, 478 U.S. at 725 (ruling that legislative branch's "participation in the removal of executive officers is unconstitutional").

No one questions that a permanent appointment can be conditioned upon legislative confirmation and for-cause protection during the pendency of the statutory term. But when the Legislature seeks to exert control over the executive branch by prohibiting removal of officers whose statutory terms and protections have expired, it encroaches on a core feature of executive authority. Restricting removal "is a much greater limitation upon the executive branch, and a much more serious blending of the legislative with the executive, than a rejection of a proposed appointment." *Myers v. United States*, 272 U.S. 52, 121 (1926). This encroachment must be dealt with if the separation of powers is to have meaning in Wisconsin, as this Court has held.[5]

[5] Prehn asserts that the issue here poses a "political question" unfit for the courts. (Prehn Br. 41.) As the numerous separation-of-powers cases make plain, that is incorrect.

## CONCLUSION

The decision below should be reversed and a writ or declaration should issue requiring Prehn to step aside.

Dated this 31st day of January 2022.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a reply brief produced with a proportional serif font, as modified by the requested expansion of words. The length of this reply brief is 4469 words.

Dated this 31st day of January 2022.

GABE JOHNSON-KARP
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) (2019–2020)

I hereby certify that:

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

I further certify that:

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

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

Dated this 31st day of January 2022.

GABE JOHNSON-KARP
Assistant Attorney General