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SUPREME COURT OF WISCONSIN
No. 2021AP1673

State of Wisconsin ex rel. Joshua L. Kaul,

Plaintiff-Appellant,

v.

Dr. Frederick Prehn,

Defendant-Respondent,

Wisconsin Legislature

Intervenor-Defendant-Respondent.

BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF TEACHERS-WISCONSIN

Scott B. Thompson, SBN 1098161
LAW FORWARD, INC.
222 W. Washington Ave., ste. 250
Madison, Wisconsin 53703
sthompson@lawforward.org
414.241.3827

Jeffrey A. Mandell, SBN 1100406
Rachel E. Snyder, SBN 1090427
Carly Gerads, SBN 1106808
STAFFORD ROSENBAUM LLP
222 W. Washington Ave., ste. 900
Madison, Wisconsin 53703
jmandell@staffordlaw.com
608.256.0226

Of Counsel

Summer H. Murshid
Hawks Quindel S.C.
5150 N Port Washington Rd #243,
Milwaukee, WI 53217
smurshid@hq-law.com
414.269.1202

Counsel for Amicus Curiae

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The American Federation of Teachers-Wisconsin ("AFT-W" or "*amicus*") is the Wisconsin state affiliate of the American Federation of Teachers. AFT-W's mission is to champion fairness, democracy, economic opportunity, high-quality public education, healthcare, and public services for students, their families, and our communities. AFT-W encourages the civic engagement of its membership. To assist members in those endeavors, AFT-W provides information concerning the operation of state government as it pertains to public education and public services. It also invests time and resources advocating on its members' behalf to advance its respective mission.

INTRODUCTION

A representative democracy must exercise power in ways that are responsive to the electorate's will. Wisconsin's governmental power is diffused among three coequal branches of government, each responsive to the electorate in different ways and on different electoral schedules. The Wisconsin Constitution vests primary executive power in the governor, who heads the executive branch. Wis. Const. art. V, § 1. Administrative agencies function within the executive branch, subject to the supervisory authority of the governor, who is directly accountable to the statewide electorate. *Koschkee v. Taylor*, 2019 WI 76, ¶14, 387 Wis. 2d 552, 929 N.W.2d 600.

For that reason, our statutes generally grant the governor authority to appoint—sometimes with Senate advice and consent—officials to lead those agencies for which the governor "holds the ultimate responsibility." Wis. Legis. Reference Bureau, *A Profile of the Executive Branch*, Wisconsin Blue Book 83 (1969). When the governor is deprived of this authority, the executive branch cannot function as designed.

Such a deprivation occurs when the Senate, in concert with a former governor's holdover appointee, blocks a sitting governor from exercising appointment authority. In that scenario (the instant one), although the voters of Wisconsin chose a new governor, the former governor maintains ghost authority over the executive branch. The will of the people is stymied.

This is a structural issue, not a partisan one. In recent years, Democrats and Republicans alike have engaged in gamesmanship around the appointments process. It is equally wrong, and equally dangerous to democracy, regardless of who is calling the play. This Court has the opportunity to restore the balance of power between the political branches and to preserve responsive democracy for Wisconsinites. It should seize that opportunity and stop the practice at issue here before it metastasizes further throughout state government—as it is now beginning to do.

ARGUMENT

I. The executive branch is designed to balance responsiveness to the electorate with effective legislative oversight.

Chapter 15 of the Wisconsin Statutes establishes the structure of the executive branch of government. The executive branch comprises several "administrative departments and independent agencies," often overseen by boards, Wis. Stat. §§ 15.02, 15.07. As a general rule, the governor appoints the members of these boards. Wis. Stat. § 15.07.

Wisconsin government—the executive branch included—is tailored to elevate the people's business over partisan squabbles. For example, rather than shut down when the political branches fail to timely adopt a new biennial budget, Wisconsin government continues to function; since at least 1953,[1] state law has provided for appropriations from the prior fiscal year to remain in effect until amended or eliminated. Wis. Stat. § 20.002(1). Likewise, and directly relevant here, when the governor nominates an individual to serve in a vacant[2] office subject to Senate confirmation, the appointment takes immediate effect, allowing the person to "exercise all of the powers and duties of the office" until acted upon by the Senate. Wis. Stat. § 7.20(2). This ensures continuous agency operations by preventing vacancies arising from legislative inaction.

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[1] *See* 1953 Wis. Laws, ch. 251.

[2] Although disputed, the existence of such a vacancy here triggers the governor's ability to nominate. (*See* Kaul Br.)

Wisconsin's structure vis-à-vis continuation and appointments contrasts starkly with the federal government's. The federal government shuts down absent the enactment of necessary appropriations bills.[3] And the federal confirmation process fosters extended vacancies in appointive offices. To fill vacancies, the President nominates certain federal officers who are appointed with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. With limited exceptions, a presidential nominee does not assume the powers of office until confirmed by the Senate.[4] Unless a statute specifies otherwise, only during a Senate recess can a presidential appointee take office immediately (and then only temporarily). U.S. Const. art. II, § 2, cl. 3.[5] In effect, by remaining in session and not confirming presidential nominees, the Senate can keep certain offices vacant for extended periods, to impair—and even preclude—affected agencies from functioning.

By way of illustration, in 2011, President Obama nominated individuals to fill three vacancies on the five-member National Labor Relations Board. *N.L.R.B. v. Noel Canning*, 573 U.S. 513 (2014). Under federal law, the NLRB cannot operate without a quorum of three members. *New Process Steel, L.P. v. NLRB*, 560 U.S. 574, 687-88 (2010). After

[3] *See, e.g.*, Mihir Zaveri *et al.*, *The Government Shutdown Was the Longest Ever. Here's the History.,* N.Y. Times (Jan. 25, 2019), available at https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html.

[4] Vivian S. Chu, Congressional Research Service, *Recess Appointments: A Legal Overview* 1 (2014).

[5] *See also* Chu, *supra*, at 25.

extended Senate inaction, in January 2012, President Obama invoked the recess-appointment authority to unilaterally install his three nominees. *Noel Canning,* 573 U.S. at 520. The new members immediately took office, allowing the NLRB to resume functioning. But the U.S. Supreme Court invalidated their appointments and thereby confirmed that, through inaction, the Senate may deprive a federal agency of a quorum and preclude it from exercising its powers. *Id*. at 556.

Wisconsin was once similarly situated. From statehood through the 1960s, state law permitted the governor to make immediate appointments only when the legislature was either not in session or in recess. *E.g.*, R.S. 1849 ch. 6 § 88, ch. 11 §§ 12, 14; Wis. Stat. §§ 14.22, 17.20(2) (1963-64). But in the aftermath of two Supreme Court cases adjudicating the validity of various gubernatorial appointments,[6] the legislature changed that framework as part of a larger effort to restructure state government to make it more responsive to Wisconsinites.

Notably, in 1967, shortly after this Court's decision in *Thompson* and following years of study and work, the legislature completely reorganized the executive branch, 1967 Wis. Laws chs. 75, 327, creating a "less unwieldy and more efficient structure which would be more responsive to the chief executive and, consequently, to the people." Wis. Legis. Reference Bureau,

[6] *See State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 125 N.W.2d 636 (1964); *State ex rel. Reynolds v. Smith*, 22 Wis. 2d 516, 126 N.W.2d 215 (1964).

A Profile of the Executive Branch, Wisconsin Blue Book 83 (1969). The results of this reorganization are relevant here. Today, "[t]he organization of state government should assure its responsiveness to popular control," including by "improve[ing] the administrative capability of the executive to carry out [legislative] policies." Wis. Stat. § 15.001(3)(intro), (a). To accomplish this aim, the legislature "established a standard pattern for the expiration of appointive terms so that each succeeding administration will be able to complete the creation of its 'team' early in the administration and during a time period when nominations, where so provided by law, can be reviewed by the Senate." Wis. Legis. Reference Bureau, *Executive Branch*, Wisconsin Blue Book 377 (1968).

While the legislature was making plans to reorganize the executive branch, it was also reviewing potential changes to executive appointments in response to this Court's 1964 decisions in *Thompson* and *Reynolds*. The Legislative Council first reviewed the matter and considered revisions, looking for examples elsewhere, including the federal executive appointment process,[7] and by 1977 the legislature was prepared to make a change. As part of the budget review bill, the legislature empowered the governor to make provisional appointments at any time. 1977 Wis. Laws ch. 418, §§ 9, 78.[8]

[7] Wis. Legis. Reference Bureau, Research Bulletin 80-RB-1, *The Removal of State Public Officials from Office* 8 (Jan. 1980).

[8] These changes explain, in part, why the circuit court erred in concluding that its ruling was dictated by *Thompson*. Several statutes crucial to the *Thompson* court's analysis either

These provisional appointments are effective immediately and allow the appointee to exercise all the associated powers of the office. Wis. Stat. § 17.20(2). Unlike federal recess appointees, however, a provisional appointee may be rejected by the Senate. *Id*. Thus, the present statutory regime grants the governor authority to immediately make provisional appointments, upon which the Senate may subsequently pass judgment. Wisconsin's model promotes continuity of government by providing a mechanism for promptly filling vacancies while checking that power through legislative oversight.

The executive power to provisionally appoint presupposes a commensurate restriction on legislative efforts aimed at undermining it. In 1987, Attorney General Donald Hanaway concluded that the appointment power and the predecessor to Wis. Stat. § 17.20(2)(a) empower the governor and the Senate to appoint people only to presently vacant positions, not future terms that may become vacant later:

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no longer exist or have been fundamentally altered. First, Wis. Stat. § 14.22 was repealed in 1977. *See* 1977 Wis. Laws ch. 418, § 9. Second, Wis. Stat. § 17.20 was amended to eliminate the recess appointment mechanism. *See* 1977 Wis. Laws ch. 418, § 78. Finally, when *Thompson* was issued in 1964, Wis. Stat. § 17.03 read: "Any public office, including offices of counties, cities, villages, towns and school districts, however organized, shall become or be deemed vacant upon the happening of any of the following events …" In the early 1980s, the legislature rewrote the statute to read: "Any public office is deemed vacant upon the happening of any of the following events, *except as otherwise provided*, …" 1983 Wis. Act 484, § 138 (emphasis added). The addition of the "except as otherwise provided" clause nearly 40 years ago—which still exists today—is key and a substantial change after *Thompson*. As a result of this change, section 17.03 now recognizes that other statutes may provide case-specific circumstances for vacancies, a significant statutory change that the circuit court overlooked.

> If governors were allowed to nominate and senates allowed to appoint for anticipated vacancies in terms which had not yet begun, a governor with a cooperative senate could presume to fill vacancies in appointive offices occurring many years past the end of his or her term and well past the end of the senate's session and the next election.

76 Wis. Op. Att'y Gen. 272, 273-74 (1987). The same logic requires that the converse must also be true: Although Wisconsin statutes do not expressly state that a vacancy occurs when an incumbent's term expires, to conclude otherwise allows a Senate hostile to the governor to keep appointive offices filled perpetually, contravening the limited terms expressly prescribed by law for such offices and the declared policy that the executive branch be responsive to popular control. This absurd result is precisely that which Dr. Prehn and the legislature advance here.

II. Mischief interrupting the appointment process, if allowed to continue unchecked, threatens democracy.

This stalemate over the Natural Resources Board demonstrates how gamesmanship of the appointment process, if unchecked, can upend the careful balance of power that our legislature wrote into law. That balance requires that the organization of Wisconsin government "assure its responsiveness to popular control." Wis. Stat. § 15.001(3)(a). Yet, under the distortion of the appointment scheme advanced by Dr. Prehn here, the executive branch's "responsiveness to popular control" is eliminated and the will of the people thwarted.

This case is a perfect example. Today, the branches of Wisconsin government are divided along party lines. In 2018, Wisconsin voters replaced

the Republican governor who appointed Dr. Prehn with a Democratic successor. The Senate, however, remains firmly under Republican control.

The Senate and Dr. Prehn have usurped the executive power to appoint members of the Natural Resources Board. Together, in a two-stage effort, they have cemented an ousted administration's dead hand control of the Board. *First*, the Senate disregards Governor Evers's appointments. Senate Majority Leader Devin LeMahieu expressed that the Senate has no intention of considering gubernatorial nominees to replace Dr. Prehn or any of several other officials whose terms have expired.[9] *Second*, Dr. Prehn refuses to leave office. He insists he may remain on the Board, potentially forever, so long as the Senate has not confirmed his replacement. (Prehn Br. at 9) The consequence of their combined decisions is that, contrary to his statutorily limited term in office, a *former* governor's appointee claims a perpetual hold on a key state board, until and unless the Senate approves the current governor's nominee. This simply cannot be the case.

Such cynical tactics are inherently antidemocratic, and they violate the spirit and letter of the executive-branch reforms, discussed above, that aim to ensure that state government responds to the people's will. Boards

[9] *LeMahieu says Senate Republicans plan to pursue new elections bills ahead of Gableman review findings*, WisPolitics (Jan. 6, 2022), available at https://www.wispolitics.com/2022/lemahieu-says-senate-republicans-plan-to-pursue-new-elections-bills-ahead-of-gableman-review-findings/ ("[Senate Majority Leader Devin] LeMahieu said Senate Republicans don't plan to take up Gov. Tony Evers' remaining appointments to the boards overseeing the UW System, Tech Colleges or the DNR.").

such as the Natural Resources Board function within the executive branch. The choice voters make when electing a governor—as the head of that branch—is in part an expression of their desired preference for populating such boards. Yet, here, an expired board member and a small number of legislators—rather than Wisconsin's statewide electorate—are subverting Wisconsinites' preference, as expressed through the 2018 election. Allowing Dr. Prehn and the Senate to effectively extend an ousted administration's control in ways that interfere with successor administrations cannot be reconciled with the axiomatic premises of our democracy. *See, e.g.*, Adam Przeworski, *Democracy and the Market* 10 (1991) ("Democracy is a system in which parties lose elections.").

If this Court grants its imprimatur to such antidemocratic tactics, it will thwart the collective will of Wisconsin voters, rendering the majority subservient to a faction within the state Senate. *See The Federalist No. 10*, at 104 (James Madison) (John C. Hamilton ed., 1892) (warning against the power of faction that, even when including the majority, may "sacrifice to its ruling passion or interest both the public good and the rights of other citizens"). Undermining the majority's preferences as expressed at the ballot box not only belies democratic principles but also undermines Wisconsin's structural commitment to both a responsive executive branch and the separation of powers. These tactics are antithetical to Wisconsin law, and this Court should emphatically reject them.

The risks this case poses to state governance are substantial, and they stretch far beyond the Natural Resources Board. Although Dr. Prehn holds only one seat on a seven-member board, Wis. Stat. § 15.34, his refusal to cede power presents the blueprint for poisoning the executive branch with partisan chicanery. Indeed, other officials are already paying attention and following suit. Of acute concern to *amicus*, the state board that oversees Wisconsin's technical colleges is now besieged by several copycat actors. Three members of that board, Mary Williams, Becky Levzow, and Kelly Tourdot, *all* continue to serve beyond the expiration of their terms.[10] Where historically there are only a few examples of board "holdovers" (Prehn Br. at 26-27), this burgeoning trend is cause for escalating concern.

The Natural Resources Board and the Technical Colleges Board are not the only boards susceptible to partisan mischief. Chapter 15 of the Wisconsin Statutes identifies a multitude of boards for which member appointment authority is vested in the governor. The total number of such appointed officials is staggering; a complete list, taken from the Wisconsin Blue Book, appears in Appendix A. Such appointed positions in Wisconsin's executive branch include everything from the Banking Institutions Review Board, the Board on Aging and Long-Term Care, and the Waste Facility Siting Board (Wis. Stat. § 15.07(1)(b)) to the Board of Curators for the

[10] *See* https://www.wtcsystem.edu/assets/6November-9-10-2021-WTCSB-Minutes.pdf.

Wisconsin Historical Society (Wis. Stat. § 15.70(4)), the Kickapoo Reserve Management Board (Wis. Stat. § 15.445(2)(d)), and everything in between. The appointment power, strewn across nearly every section of Chapter 15, is thus an essential component to a functioning and responsive executive branch. Should this Court countenance the interference modeled by Dr. Prehn here, vast swaths of executive power could fall prey to similar dead hand control, all contrary to the will of Wisconsin voters and Wisconsin law.

To be clear, such efforts are not uniquely the province of one political party. Although in this instance a Republican Senate is thwarting a Democratic governor, similar partisan efforts have plagued the appointment process by the hands of Democrats. For example, in the early 2000s a Democratic Senate refused to consider the sitting Republican governor's nominees to the Board of Regents.[11] The Democratic Senate declined to take up the nominations, opting to wait and see if the next election would put a Democrat in the governor's office. As is the case now, the nominations of the sitting governor were disregarded. Such interference in the routine exercise of the executive function was wrong then, and it remains wrong now.

This case presents novel questions about cynical gamesmanship over executive-branch appointments. The Court should unequivocally reject this

[11] Kristin Wieben, *Doyle replaces regents, opens up a can of worms*, Badger Herald (Jan. 17, 2003), available at https://badgerherald.com/news/2003/01/17/doyle-replaces-regen/.

toxic tactic before it metastasizes and fully disrupts the careful balance underlying our separation of powers, which is "not just important, but the central bulwark of our liberty." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶30, 393 Wis. 2d 38, 946 N.W.2d 35.

CONCLUSION

Because Dr. Prehn's holdover appointment threatens the executive-branch responsiveness on which democratic accountability rests, the Court should reverse the circuit court's decision and grant judgment in the appellant's favor.

Dated this 11th day of February, 2022.

Electronically signed By: Scott B. Thompson
Scott B. Thompson, SBN 1098161
LAW FORWARD, INC.
222 West Washington Avenue,
Suite 250
Madison, WI 53703-0326
sthompson@lawforward.org
608.535.9808

Jeffrey A. Mandell, SBN 1100406
Rachel E. Snyder, SBN 1090427
Carly Gerads, SBN 1106808
STAFFORD ROSENBAUM LLP
222 West Washington Avenue, Suite 900
P.O. Box 1784
Madison, WI 53701-1784
jmandell@staffordlaw.com
608.256.0226

Of Counsel

Summer H. Murshid
Hawks Quindel S.C.
5150 N Port Washington Rd #243, Milwaukee, WI 53217
smurshid@hq-law.com
414.269.1202

Counsel for Amicus Curiae

CERTIFICATION OF COMPLIANCE
WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19 (7), (8) (b), (bm), and (c) for a brief. The length of this brief is 2,948 words.

Signed:

By Electronically signed by Scott B. Thompson
Scott B. Thompson

CERTIFICATION OF MAILING AND SERVICE

I certify that a paper original and 22 paper copies of the foregoing Brief of *Amicus Curiae* American Federation of Teachers-Wisconsin and Appendix were hand-delivered to the Clerk of the Supreme Court on February 11, 2022.

I further certify that on February 11, 2022, I sent true and correct email copies of the foregoing Brief of *Amicus Curiae* American Federation of Teachers-Wisconsin and Appendix, to all counsel of record.

By Electronically signed by Scott B. Thompson
Scott B. Thompson