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No. 2024AP351

In the Wisconsin Court of Appeals

DISTRICT II

WISCONSIN ELECTIONS COMMISSION *and* MEAGAN WOLFE,
PLAINTIFFS-RESPONDENTS,

v.

DEVIN LEMAHIEU, ROBIN VOS, *and* CHRIS KAPENGA,
DEFENDANTS-APPELLANTS.

On Appeal From The Dane County Circuit Court
The Honorable Ann M. Peacock, Presiding
Case No.2023CV2428

OPENING BRIEF OF DEFENDANTS-APPELLANTS

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ISSUES PRESENTED

1. Whether Wis. Stat. § 15.61(1)(b)1 requires Plaintiff-Respondent the Wisconsin Elections Commission ("WEC") to appoint an Administrator for the four-year term beginning on July 1, 2023, regardless of whether a vacancy in such office exists.

The Circuit Court answered "no."

2. Whether the Circuit Court should issue a writ of mandamus to require WEC to appoint promptly an Administrator under Wis. Stat. § 15.61(1)(b)1.

The Circuit Court answered "no."

INTRODUCTION

Under Wis. Stat. § 15.61(1)(b)1, WEC "shall be under the direction and supervision of an administrator, who shall be appointed by a majority of the members of the commission, with the advice and consent of the senate, to serve for a 4-year term expiring on July 1 of the odd-numbered year." Wis. Stat. § 15.61(1)(b)1. This text means what it says: WEC has the mandatory duty to appoint a new Administrator upon the expiration of the Administrator's term, and the Senate may then confirm that Administrator to serve for the next four years, exercising its advice and consent power.

The term for the current occupant of the Administrator's office, Ms. Megan Wolfe, expired on July 1, 2023. Yet, upon the expiration of Ms. Wolfe's term nearly a year ago, WEC did not appoint a new Administrator for the Senate to consider confirming under its advice and consent power. Instead, WEC held a vote where three Commissioners voted to re-appoint Ms. Wolfe for the July 1, 2023–27 term, while three Commissioners abstained, meaning that a majority of WEC did not agree to send Ms. Wolfe's re-appointment to the Senate. Ms. Wolfe thus continues to occupy the office of WEC Administrator as a holdover without ability for the Senate to exercise its advice and consent power.

After the Senate (along with one of its committees) issued what were, in effect, votes of no confidence in Ms. Wolfe as Administrator, WEC and Ms. Wolfe brought this lawsuit against Defendants-Respondents legislative leaders, claiming—as relevant to this appeal—that Subsection 15.61(1)(b)1 does not

mean what it says. In WEC's and Ms. Wolfe's view, WEC's duty to appoint a new Administrator under Subsection 15.61(1)(b)1 is no duty at all, meaning that WEC *never* has to appoint a new Administrator for the Senate's advice and consent so long as a holdover occupies the office. The Circuit Court agreed with WEC and Ms. Wolfe in a written decision below.

The Circuit Court's decision was wrong. Subsection 15.61(1)(b)1's text, context, and statutory purpose all mean that WEC has the mandatory duty to appoint a new Administrator for the Senate's advice and consent once the Administrator's term expires. That is why Subsection 15.61(1)(b)1 uses the term "*shall*"—as in, the "administrator . . . *shall* be appointed by a majority of the members of the commission"—thereby imposing a mandatory duty. Wis. Stat. § 15.61(1)(b)1 (emphasis added). The Circuit Court's contrary conclusion would allow a partisan minority of WEC to keep in place a holdover Administrator indefinitely, without the Senate exercising its core right of advice and consent.

This Court should reverse the judgment of the Circuit Court, requiring the Circuit Court both to enter an order declaring that WEC must appoint an Administrator at the end of a term under Subsection 15.61(1)(b)1, and to issue a writ of mandamus compelling WEC to appoint promptly such an Administrator for the term beginning July 1, 2023.

ORAL ARGUMENT AND PUBLICATION

Given the issues of public importance involved, the Legislature respectfully submits that this case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. Legal Background

The Wisconsin State Legislature ("Legislature") created WEC in 2016, 2015 Wis. Act 118, as an independent agency "responsible for guidance in the administration and enforcement of Wisconsin's election laws," *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶ 24, 394 Wis. 2d 602, 951 N.W.2d 556 (citing Wis. Stat. § 5.05). Thus, the Legislature gave WEC the authority to, among other things, promulgate rules "interpreting or implementing the laws regulating the conduct of elections or election campaigns," Wis. Stat. § 5.05(1)(f); determine which candidates qualify for ballots, *see id.* § 5.06; certify election results, *id.* § 7.70; "investigate violations of" election laws, *id.* § 5.05(2m)(a); and "prosecute alleged civil violations of those laws," *id.* WEC also has the authority to issue guidance on election procedure, *id.* § 5.05(5t), (6a), and provide "training," *id.* § 5.05(7), for the more than 1,800 local clerks local election officials who have "significant responsibility" for running Wisconsin's "highly decentralized system for election administration," *State ex rel. Zignego v. Wis.*

Elections Comm'n, 2021 WI 32, ¶ 13, 396 Wis. 2d 391, 957 N.W.2d 208; Wis. Elections Comm'n, *About the WEC*.[1]

The Legislature created WEC as an explicitly bipartisan institution to replace the former Wisconsin Government Accountability Board—a board that critics had decried as being "partisan." Senator Leah Vukmir, *Testimony on Senate Bill 294* (Oct. 13, 2015).[2] Accordingly, six Commissioners typically[3] comprise WEC, with Wisconsin law requiring one Commissioner to be appointed by the Senate Majority Leader; one to be appointed by the Senate Minority Leader; one to be appointed by the Speaker of the Assembly; one to be appointed by the Assembly Minority Leader, Wis. Stat. § 15.61(1)(a)1–4; and two to be appointed by the Governor with the advice and consent of the Senate, with these gubernatorial appointments drawn from two lists of qualifying individuals prepared by "legislative leadership of the 2 major political parties," one from each list, *id.* § 15.61(1)(a)5.

Wisconsin law also provides for an Administrator of WEC, who plays an important role in WEC's functioning. Specifically,

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[1] Available at https://elections.wi.gov/about-the-wec (all websites last visited June 12, 2024). This Court can take judicial notice of "[a] fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," Wis. Stat. § 902.01(2), which sources include government websites, *see State v. Harvey*, 2001 WI App 59, ¶ 8, 242 Wis. 2d 189, 625 N.W.2d 892.

[2] Available at https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2015/ab388/ab0388_2015_10_13.pdf.

[3] Section 15.61 also provides for the appointment of a seventh Commissioner drawn from a list created by the chief officer of a political party ("other than the 2 major political parties") "whose candidate for governor received at least 10 percent of the vote in the most recent gubernatorial election." Wis. Stat. § 15.61(1)(a)6.

Wisconsin law places WEC "under the direction and supervision of an administrator," *id.* § 15.61(1)(b)1—defined as the state's "chief election officer," *id.* § 5.05(3g)—who "shall perform such duties as the commission assigns," *id.* § 5.05(3d). WEC has purported to empower the Administrator with authority to oversee nearly every aspect of Wisconsin elections, including by providing that the Administrator may act unilaterally "without the requirement for prior consultation with the Commission Chair" in some circumstances. R.6 at 18. WEC has delegated to the Administrator the authority "[t]o certify and sign . . . candidate certifications, certificates of election, and certifications of election results"; "[t]o accept, review, and exercise discretion to approve applications for voting system modifications"; "[t]o implement [WEC's] determinations regarding sufficiency of nomination papers or qualifications of candidates"; "[t]o communicate with litigation counsel representing [WEC] in order to advise [WEC] regarding necessary decisions"; "[t]o execute and sign contracts on behalf of the Commission"; "[t]o exempt municipalities from polling place accessibility requirements"; and "[t]o exempt municipalities from the requirements for the use of voting machines or electronic voting systems." *Id.* at 17–18.

Subsection 15.61(1)(b)1 of the Wisconsin Statutes—the critical statute in this appeal—establishes the procedures that WEC must follow to appoint its Administrator, and it comprises five sentences. Subsection 15.61(1)(b)1's first sentence provides that the "elections commission shall be under the direction and supervision of an administrator, *who shall be appointed by a*

majority of the members of the commission, with the advice and consent of the senate, to serve for a 4-year term expiring on July 1 of the odd-numbered year." Wis. Stat. § 15.61(1)(b)1 (emphasis added). Subsection 15.61(1)(b)1's second sentence provides that, "[u]ntil the Senate has confirmed" WEC's appointment, the Commission "shall be under the direction and supervision of an interim administrator selected by a majority of the members of the commission." *Id.*

Then, sentences three to five of Subsection 15.61(1)(b)1 (the remainder of this subsection) establish additional procedures for the appointment of an Administrator that apply when the position is vacant. So, Subsection 15.61(1)(b)1's third sentence states that, "[i]f a vacancy occurs in the administrator position, the commission shall appoint a new administrator . . . no later than 45 days after the date of the vacancy." *Id.* Subsection 15.61(1)(b)1's fourth sentence then provides that if the WEC "has not appointed a new administrator at the end of th[is] 45-day period," then WEC forfeits its power under sentence two to make an interim appointment, and the Joint Committee on Legislative Organization ("JCLO") "shall appoint an interim administrator to serve until a new administrator has been confirmed by the senate but for a term of no longer than one year." *Id.* Finally, under Subsection 15.61(1)(b)1's fifth and final sentence, "[i]f the administrator position remains vacant at the end of the one-year period, the process for filling the vacancy described in [Subsection 15.61(1)(b)1] is repeated until the vacancy is filled." *Id.*

B. Factual Background

In February 2018, WEC's former Interim Administrator Michael Haas announced his intent to resign and "request[ed] that the Commission appoint another individual to the [Administrator] position." R.21 at 15, App.46. Less than a month later, WEC unanimously appointed Plaintiff-Respondent Meagan Wolfe as Interim Administrator and then "submit[ted] her name to the Senate." *Id.* In May 2019, the Senate confirmed Ms. Wolfe as WEC's new Administrator to serve for the "four-year term from July 1, 2019, through June 30, 2023." R.21 at 16, App.47.

On June 27, 2023, shortly before the expiration of Administrator Wolfe's term and while she remained in her office, WEC held a special meeting to appoint a new Administrator for the term beginning July 1, 2023. *Id.* Three Commissioners voted in favor of Administrator Wolfe's reappointment (Commissioners Don M. Millis, Marge Bostelmann, and Robert Spindell) while three abstained (Commissioners Joseph J. Czarnezki, Ann S. Jacobs, and Mark L. Thomsen), resulting in a 3–0 vote and thus a lack of majority support for Administrator Wolfe's reappointment. R.21 at 16, App.47 (citing Wis. Elections Comm'n, *Open Session Minutes* (June 27, 2023)[4]); Wis. Elections Comm'n, *Open Session Minutes*, *supra*; *see* Wis. Stat. § 15.61(1)(b)1 (providing that the Administrator "shall be appointed by a majority of the members of the commission"). The abstaining Commissioners declared that WEC did "not have the authority" to appoint an Administrator

[4] Available at https://perma.cc/8ELG-D4S2.

because a vacancy did not exist. R.4 at 20 n.7, App.77; R.21 at 17 n.18, App.48 n.18. Commissioner Thomsen—one of the abstaining Commissioners—added that WEC should only make an appointment if the Senate "promised to confirm" and that, without such a "promise," WEC "should not even play this game." R.21 at 17, App.48.

After this June 27 vote, the Senate scheduled a hearing for late August to address the appointment of Administrator Wolfe "as Administrator of the Wisconsin Elections Commission, to serve for the term ending July 1, 2027," *id.*—although Administrator Wolfe had not been "appointed by a majority" of the Commission for that then-upcoming term, Wis. Stat. § 15.61(1)(b)1. Then, just weeks before that hearing, WEC held a special meeting to discuss whether Administrator Wolfe should testify before the Senate. R.21 at 18, App.49. Although WEC declined to take a formal position, Commissioner Jacobs—another abstaining Commissioner—stated that she did not want to "legitimize the position" of the Senate. *Id.* Following this meeting, Administrator Wolfe decided against testifying at the Senate hearing. R.21 at 19, App.50.

In late August, the Senate held this hearing regarding the Administrator's appointment and, on September 11, 2023, the Senate's Committee on Shared Revenue, Elections and Consumer Protection issued a no-confidence vote against Administrator Wolfe. *See* R.21 at 20, App.51. When explaining his vote of no confidence, Senator Dan Feyen noted that Administrator Wolfe "didn't show up for her public hearing." *Id.* (citing Molly Beck,

Senate Elections Committee Votes Against Keeping Elections Chief Meagan Wolfe, Milwaukee J. Sent. (Sept. 11, 2023) [5]); Molly Beck, *Senate Elections Committee Votes Against Keeping Elections Chief Meagan Wolfe*, *supra*. Senator Romaine Quinn also referred to Administrator Wolfe's decision to forego attending the August oversight hearing to defend her job performance as the reason for his vote. R.21 at 20, App.51 (citing Molly Beck, *Senate Elections Committee Votes Against Keeping Elections Chief Meagan Wolfe*, *supra*). On September 14, 2023, the full Senate then issued what was effectively a vote of no confidence of its own, passing a resolution reiterating that it "has no confidence in Meagan Wolfe as administrator" and calling upon WEC "to fulfill its nondiscretionary statutory duty to appoint an [I]nterim [A]dministrator and to submit a nomination for a permanent replacement." R.22 at 10–11.

C. Procedural Background

On September 14, 2023, WEC and Administrator Wolfe filed their Complaint in Dane County Circuit Court against three members of the Legislature: Senator and Majority Leader Devin LeMahieu; Senator and Co-Chair of the JCLO, Chris Kapenga; and Speaker of the Assembly and Co-Chair of the JCLO, Robin Vos. R.4, App.58–82. The Complaint seeks a declaratory judgment that: (1) "Administrator Wolfe is lawfully holding over" as WEC Administrator; (2) WEC's "June 27, 2023, vote did not appoint Administrator Wolfe to a new term"; (3) the Senate's

[5] Available at https://perma.cc/9W9A-CFS4.

September 14, 2023, votes "deem[ing] Administrator Wolfe nominated" and "reject[ing] Administrator Wolfe's 'appointment' have no legal effect"; (4) the "Commission has no duty to make an administrator appointment" while Administrator Wolfe occupies her office as a legal holdover; and (5) the JCLO "has no power to appoint an interim administrator while Administrator Wolfe is holding over." *Id.* at 9. Further, the Complaint sought two injunctions: one "preserving Administrator Wolfe" as a holdover and another prohibiting JCLO "from appointing an interim administrator until and unless Administrator Wolfe resigns, dies, or is removed by the Commission." *Id.* at 9–10. On October 11, 2023, Plaintiffs-Respondents filed a Motion for a Temporary Injunction, R.5, seeking temporary-injunctive relief for all claims, R.5 at 1–2, while continuing to seek declaratory relief, R.4 at 9, App.69.

On October 13, 2023, Defendants-Appellants filed their Answer and Counterclaim to the Complaint. R.21, App.32–57. As for their Answer, Defendants-Appellants admitted to four of Plaintiffs-Respondents' legal assertions—namely, that: (a) Administrator Wolfe is "lawfully holding over" as Administrator; (b) WEC's vote on June 27, 2023, did not reappoint Administrator Wolfe to a new term in office; (c) the Senate's September vote rejecting the appointment of Administrator Wolfe and the accompanying Senate resolution "ha[ve] no legal effect"; and (d) the JCLO lacks power to appoint an Administrator while Administrator Wolfe occupies her office as a legal holdover. R.21 at 21, App.52. But Defendants-Appellants emphatically denied

that WEC "has no duty to make an administrator appointment" under Subsection 15.61(1)(b)1 while Administrator Wolfe occupies her office as a legal holdover. *Id.*

In their Counterclaim, Defendants-Appellants asserted that, under the plain language of Subsection 15.61(1)(b)1, WEC is under a duty to appoint an Administrator for each four-year term, regardless of whether a vacancy in the office exists. R.21 at 26, App.57; R.22 at 13–17. Defendants-Appellants thus sought declaratory relief and a writ of mandamus in their Counterclaim "compelling WEC to appoint an administrator," R.21 at 26, App.57—arguing that such relief is appropriate because: WEC's duty to appoint an Administrator is not discretionary, R.22 at 18–20; the failure to make such an appointment harms the Senate's right to provide advice and consent as to the individual in the Administrator position, *id*. at 20–23; and a prompt appointment would benefit the public interest by restoring public confidence in the integrity and reliability of Wisconsin's elections, *id*. at 23–25.

Preliminary proceedings in the Circuit Court then followed. Defendants-Appellants moved to dismiss as moot and non-justiciable the four claims of Plaintiffs-Respondents to which Defendants-Appellants had admitted. R.31. Defendants-Appellants separately argued that Plaintiffs-Respondents' requested temporary-injunctive relief was unnecessary because, as noted, Defendants-Appellants had admitted and acquiesced to the claims at issue in Plaintiffs-Respondents' temporary-injunction motion. R.40 at 7. So, given these admissions, Defendants-Appellants explained, only one merits issue remained for the court

to decide: whether WEC has a mandatory duty under Subsection 15.61(1)(b)1 to make an appointment at the end of the Administrator's term if the Administrator lawfully holds over. *Compare* R.21 at 23 *with* R.49 at 11–12; *see* App.27–28, 54; *see also* R.22 at 12; R.31 at 5; R.40 at 2. The Circuit Court nevertheless granted Plaintiffs-Respondents' Motion for a Temporary Injunction. *See* R.45 at 5–7.

The parties then submitted Motions for Judgment on the Pleadings. *See* R.39; R.48; R.50. As relevant to this appeal, Defendants-Appellants argued that they were entitled to judgment on the pleadings, including a writ of mandamus, because the proper interpretation of Subsection 15.16(1)(b)1 requires WEC to appoint an Administrator upon expiration of the four-year term, R.55 at 13–23. That interpretation of Subsection 15.16(1)(b)1, Defendants-Appellants further explained, also finds support in *State ex rel. Kaul v. Prehn*, 2022 WI 50, 402 Wis. 2d 539, 976 N.W.2d 821, R.55 at 20–23—a case upon which Plaintiffs-Respondents had previously relied to justify WEC's decision to forego appointing a new Administrator, *see, e.g.*, R.10 at 2, 9–10. Defendants-Appellants further argued that a contrary reading of Subsection 15.61(1)(b)1 would create absurd results that also violate the separation of powers by allowing an Administrator to serve indefinitely by denying the Senate's power to advise and consent to the appointment. R.55 at 23–26. Plaintiffs-Respondents argued that WEC has no duty to appoint an Administrator during the pendency of a holdover under Subsection 15.61(1)(b)1 because "only" Subsection 15.61(1)(b)1's

third sentence's "provision [that] states in active voice that the Commission shall appoint" serves to "trigger[ ]" a duty to appoint, R.51 at 13, and *Prehn* "recognized that, when there is a holdover, the appointing authority has an option, not a duty, to make a new appointment," *id.* at 18.

On January 12, 2024, the Circuit Court issued a Decision and Order that granted judgment on the pleadings to Plaintiffs-Respondents and denied judgment on the pleadings to Defendants-Appellants. R.72 at 2, App.2. The Circuit Court interpreted Subsection 15.61(1)(b)1 as "creat[ing] a duty to appoint an administrator *only* upon the occurrence of a vacancy," R.72 at 6, App.6 (emphasis added); *see also* R.72 at 5–12, App.5–12; concluded that this interpretation of Subsection 15.61(1)(b)1 is "consistent with the controlling case law under *Prehn*," R.72 at 12, App.12; *see also* R.72 at 6–7, App.6–7; and rejected Defendants-Appellants' separation-of-powers concerns caused by this interpretation of Subsection 15.61(1)(b)1, R.72 at 10–11, App.10–11. The Circuit Court thus held that WEC is under an affirmative duty to appoint a new Administrator only "[i]f a vacancy occurs," while that duty is discretionary where a legal holdover remains in the Administrator position following the expiration of her term. R.72 at 11–12, 16, App.11–12, 16. The Circuit Court then concluded that Plaintiffs-Respondents were otherwise entitled to declaratory and injunctive relief here, R.72 at 12–14, App.12–14, and that Defendants-Respondents were not entitled to a writ of mandamus, R.72 at 15, App.15.

The Circuit Court entered declaratory judgments and injunctions in its Decision and Order. Specifically, the Circuit Court ordered that: (1) Administrator Wolfe is lawfully holding over as Administrator of WEC; (2) WEC's June 27, 2023 vote did not appoint Administrator Wolfe to a new term; (3) the Senate's September 14, 2023 votes to deem Administrator Wolfe nominated and to reject Administrator Wolfe's putative June 27, 2023 appointment lack legal effect; (4) Wis. Stat. § 15.61(1)(b)1 "does not create a positive and plain duty" for WEC to appoint an Administrator while an Administrator lawfully holds over; (5) JCLO has no power to appoint an Interim Administrator while an Administrator lawfully holds over; (6) Defendants-Appellants are enjoined "from taking any official action contrary to these declarations"; and (6) Defendants-Appellants' "counterclaim is dismissed and their pending motions are denied." R.72 at 16, App.16.

Defendants-Appellants timely appealed. R.74.

STANDARD OF REVIEW

Whether a circuit court properly granted or denied judgment on the pleadings is a question of law that this Court reviews *de novo*. *Com. Mortg. & Fin. Co. v. Clerk of Cir. Ct.*, 2004 WI App 204, ¶ 9, 276 Wis. 2d 846, 689 N.W.2d 74. Judgment on the pleadings is essentially "summary judgment minus affidavits and other supporting documents." *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988) (citation omitted); *see also Waity v. LeMahieu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263 (setting forth the standard of review on summary judgement). When

considering a motion for judgment on the pleadings, courts must first "examine the complaint to determine whether a claim has been stated" and "then turn to the responsive pleadings to ascertain whether a material factual issue exists." *Freedom from Religion Found., Inc. v. Thompson*, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991) (citation omitted). Where the court finds that the "complaint is sufficient to state a claim and the responsive pleadings raise no material issues of fact, judgment on the pleadings is appropriate." *Id.* Additionally, when a circuit court decides a question of statutory interpretation, that is also a question of law that this Court reviews *de novo*. *State v. Alexander*, 2013 WI 70, ¶ 18, 349 Wis. 2d 327, 833 N.W.2d 126. With respect to mandamus relief, this Court will overturn a grant or denial of a writ of mandamus when the circuit court erroneously exercised its discretion. *Zignego*, 2021 WI 32, ¶ 38. And as particularly relevant here, this Court reviews de novo whether there is a "clear, specific legal right" or a "positive and plain" legal duty at issue, such as would support the grant of a writ of mandamus. *Milwaukee Police Ass'n, Loc. 21 v. City of Milwaukee*, 2008 WI App 119, ¶ 7, 313 Wis. 2d 253, 757 N.W.2d 76.

ARGUMENT

I. Subsection 15.61(1)(b)1 Of The Wisconsin Statutes Requires WEC To Appoint An Administrator For The Four-Year Term Beginning On July 1, 2023, Regardless Of Whether A Vacancy Exists

Subsection 15.61(1)(b)1 requires WEC to appoint an Administrator for the four-year term beginning on July 1, 2023, irrespective of whether a vacancy in that office exists.

Subsection 15.61(1)(b)1's plain text and statutory context compel such a reading, *infra* pp.23–27, and this reading affords due consideration to the Legislature's design in establishing WEC to bolster the integrity of elections, *infra* pp.27–29. The Circuit Court's contrary interpretation of Subsection 15.61(1)(b)1 finds no support in either the text of this statute, *infra* pp.29–30, or the Wisconsin Supreme Court's decision in *Prehn*, 2022, WI 50, *infra* pp.30–33; renders multiple statutory clauses surplusage, *infra* pp.33–34; and enshrines the absurd result that an explicitly bipartisan institution can be "under the direction and supervision," Wis. Stat. § 15.61(1)(b)1, of an official who retains power with the support of exclusively one party, *infra* pp.34–35.

A. Courts must give statutory text its "common, ordinary, and accepted meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). Statutory text must be interpreted "as part of a whole . . . to avoid absurd or unreasonable results," and it is "read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.* ¶ 46 (citation omitted). A statute's "purpose [is] perfectly relevant to a plain-meaning interpretation" and "may be readily apparent from [the statute's] plain language." *Id.* ¶¶ 48–49. Finally, "as a general matter, legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation." *Id.* ¶ 51.

B. Here, under the plain text, statutory context, and statutory purpose of Subsection 15.61(1)(b)1, WEC must appoint

an Administrator at the expiration of each four-year term, regardless of whether a vacancy in that office exists.

Subsection 15.61(1)(b)1's text imposes a duty upon WEC to appoint an Administrator at the expiration of every four-year term, without regard to whether a vacancy in that office exists. The first sentence of this Subsection provides that WEC "shall be under the direction and supervision of an administrator, who *shall be appointed* by a majority of the members of the commission, with the advice and consent of the senate, to serve for a 4-year term expiring on July 1 of the odd-numbered year." Wis. Stat. § 15.61(1)(b)1 (emphasis added). This textual language gives WEC both the *authority* to appoint a new Administrator at the end of the Administrator's term, even absent a vacancy, and the *duty* to make such an appointment.

Beginning with WEC's authority to make such an appointment, Subsection 15.61(1)(b)1's "*shall be appointed*" language confers appointment authority upon WEC that does not depend upon a vacancy. *Id.* (emphasis added). That conclusion follows from the Wisconsin Supreme Court's decision in *Prehn*, where the Court explained that "[t]he Governor *must nominate* . . . members of the [Department of Natural Resources ('DNR')] Board," *Prehn*, 2022 WI 50, ¶ 18 (emphasis added) (citing, as relevant, Wis. Stat. § 15.07(1)(a)), based upon statutory language that provided simply that these members "*shall be nominated* by the governor," Wis. Stat. § 15.07(1)(a) (emphasis added). Subsection 15.61(1)(b)1's "*shall be appointed*" language is materially indistinguishable from Subsection 15.07(1)(a)'s "*shall*

be nominated" language, and thus requires the same interpretation with respect to WEC's appointment authority. *Compare* Wis. Stat. § 15.61(1)(b)1 (emphasis added), *with id.* § 15.07(1)(a) (emphasis added). *Prehn* also makes clear that WEC's appointment authority under Subsection 15.61(1)(b)1 does not depend upon the existence of a vacancy, as there the Court explained that, once a DNR member's "term expired, the Governor now has the prerogative to appoint a successor" under Section 15.07 even where the member's office is not vacant. *Prehn*, 2022 WI 50, ¶ 29 (also explaining that the Governor's appointee would serve once confirmed by the Senate); *see infra* pp.30–33 (discussing *Prehn* and its use of the word "prerogative"). So, like the Governor's appointment authority under Section 15.07, WEC's appointment authority under Subsection 15.61(1)(b)(1) does not depend upon a vacancy in the office of the Administrator. *Compare* Wis. Stat. § 15.61(1)(b)1, *with id.* § 15.07(1)(a).

WEC's duty to appoint a new Administrator at the end of the Administrator's term, even in the absence of a vacancy, flows from Subsection 15.61(1)(b)1's text for much the same reasons. Again, Subsection 15.61(1)(b)1's first sentence mandates that WEC's Administrator "*shall* be appointed by a majority of the members of the commission." Wis. Stat. § 15.61(1)(b)1 (emphasis added). The statutory term "shall" "carries the idea that" there is "no discretion," *State v. Hoppmann*, 207 Wis. 481, 240 N.W. 884, 885 (1932); *accord Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 486 (2015) (citation omitted), and thus "is presumed mandatory," *Bank of N.Y. Mellon v. Carson*, 2015 WI 15, ¶ 21, 361 Wis. 2d 23, 859

N.W.2d 422 (citation omitted); *see also Kuhnert v. Advanced Laser Machining, Inc.*, 2011 WI App. 23, ¶ 21, 331 Wis. 2d 625, 794 N.W.2d 805 (Ct. App. 2011). Therefore, pursuant to this "shall be appointed" phrase of Subsection 15.61(1)(b)1, WEC must, as a mandatory duty, appoint an Administrator at the expiration of each term, without regard to whether a vacancy exists.

This interpretation of Subsection 15.61(1)(b)1 also "give[s] reasonable effect to every word" of the Subsection, as bedrock principles of statutory interpretation require. *Kalal*, 2004 WI 58, ¶ 46. Subsection 15.61(1)(b)2 provides that the Administrator must serve with the Senate's "advice and consent" and that the Administrator's term lasts for four years before it "expir[es]." Wis. Stat. § 15.61(1)(b)1. So, once the Administrator's term "expires"—that is, "come[s] to an end," *see Expire*, Oxford English Dictionary Online (Sept. 2023)[6]—WEC would cease to be "under the direction and supervision" of an Administrator confirmed by the Senate "to serve for a 4-year term," as Subsection 15.61(1)(b)1 requires. Wis. Stat. § 15.61(1)(b)1; *accord State ex rel. Reynolds v. Smith*, 22 Wis. 2d 516, 520–21, 126 N.W.2d 215 (1964). The only way for WEC to once again be "under the direction and supervision" of an Administrator confirmed by the Senate to "serve for a 4-year term" is for WEC to make a new appointment at the expiration of each four-year term, so the Senate can perform its "advice and consent" role every four years. Wis. Stat. § 15.61(1)(b)1. And Subsection 15.61(1)(b)1's other four sentences provide successive

[6] Available at https://doi.org/10.1093/OED/6501863734 (subscription required).

backstops to ensure that the Administrator office does not remain vacant indefinitely while the appointment process under Subsection 15.61(1)(b)1's first sentence proceeds. *Supra* p.13.

The statutory "context" confirms that, under Subsection 15.61(1)(b)1, WEC must make a new Administrator appointment at the expiration of each four-year term. *See Kalal*, 2004 WI 58, ¶ 46. Many other Wisconsin statutes contain similarly worded appointment provisions, under which various agency officials "shall be appointed by" others to lead their agency. For example, Subsection 15.103(1) provides that the Administrator of the Division of Hearings and Appeals "shall be appointed by the secretary of administration in the classified service," Wis. Stat. § 15.103(1), and Subsection 15.137(5)(b) stipulates that the voting members of the Fertilizer Research Council "shall be appointed jointly by the secretary of agriculture, trade and consumer protection and the dean of the College of Agricultural and Life Sciences at the University of Wisconsin-Madison, to serve for 3-year terms." Wis. Stat. § 15.137(5)(b); *see also id.* §§ 15.105(32), 15.165(3)(b), 15.185(7)(a), 15.194(1), 15.253(3), 15.255(2)(c), 15.347(12), 15.347(19)(a)–(b), 15.374(1)(a), 16.28(2), 27.11(2)(a), 43.17(4). In each circumstance, the statutory text and context make clear that many the appointment is mandatory.

Finally, requiring WEC to submit an appointment for Senate confirmation at the end of every four-year term is essential to the Legislature's design in establishing the bipartisan Commission to bolster the integrity of Wisconsin's election process. The

Legislature created WEC in 2016 to protect "the integrity of individual ballots as well as election results in Wisconsin," Wis. Elections Comm'n, *Wisconsin's Commitment to Election Integrity,* ¶ 3,[7] and to replace the former Government Accountability Board, which critics had derided for being "partisan" and "[c]oncentrating power into one individual," Senator Leah Vukmir, *Testimony on Senate Bill 294*, *supra*. To combat these issues, the Legislature provided WEC with six Commissioners, and mandated that Wisconsin's "2 major political parties" each control three Commissioner appointments. Wis. Stat. § 15.61(1)(a). Further cementing this bipartisan structure, the Legislature required WEC to appoint its Administrator "by a majority of the members of the commission," *id.* § 15.61(1)(b)1, which ensures that every Administrator serves with bipartisan support. And compelling WEC to make its appointments by periodically submitting them for Senate confirmation ensures that WEC's bipartisan appointment receives broader democratic support and avoids "a cloud of suspicion [being] cast upon the integrity of the" election process. *In re Contest of Election of Vetsch*, 71 N.W.2d 652, 660 (Minn. 1955); *see also Stasch v. Weber*, 199 N.W.2d 391, 395 (Neb. 1972). Thus, reading WEC's controlling mandate to provide an affirmative duty to appoint at the end of the term guarantees that each Administrator maintains and periodically demonstrates bipartisan and democratic support, thereby furthering the

[7] Available at https://perma.cc/7FAW-R697.

Legislature's purpose in establishing WEC to strengthen the integrity of Wisconsin's electoral process.

C. The Circuit Court held that WEC has no duty under Subsection 15.61(1)(b)1 to appoint an Administrator to a four-year term at the expiration of the prior four-year term if there is a holdover. That holding is wrong for many reasons.

First, the Circuit Court's reading is contrary to the statutory text. The Circuit Court primarily reasoned that because Subsection 15.61(1)(b)1's third sentence—providing that the "administrator . . . shall be appointed by a majority of the members of the commission," Wis. Stat. § 15.61(1)(b)1—"tells WEC it has a duty to appoint a new administrator 'if a vacancy occurs,'" it follows that "it is not reasonable to infer a second duty to appoint a new administrator at other times." R.72 at 12, App.12; *see also* R.72 at 8–9, App.8–9. But this conclusion cannot be reconciled with the text of Subsection 15.61(1)(b)1's first sentence. As explained above, *supra* pp.25–26, when the word "shall" appears in a statute, that "indicates mandatory action," while "[t]he word 'may' in a statute generally allows for the exercise of discretion," *Kuhnert*, 2011 WI App 23, ¶ 21; *see also* R.72 at 8, App.8 (quoting *Bank of N.Y. Mellon*, 2015 WI 15, ¶ 21). So, because Subsection 15.61(1)(b)1's first sentence uses "*shall* be appointed," rather than "*may* be appointed," WEC's duty to appoint an Administrator at the expiration of a four-year term is mandatory, *contra* R.72 at 7 & n.1, 11–12, App.7 & n.1, 11–12, and nothing in Subsection 15.61(1)(b)1's third sentence changes that conclusion.

Contrary to the Circuit Court's apparent belief, *see* R.72 at 6, 11–12, App.6, 11–12, the Legislature's use of the passive voice in Subsection 15.61(1)(b)1's first sentence does not suggest that WEC's appointment power is discretionary, let alone provide such an indication with sufficient clarity to overcome the ordinary, mandatory meaning of the word "shall." *See State v. Hemp*, 2014 WI 129, ¶ 30, 359 Wis. 2d 320, 856 N.W.2d 811. Notably, in other statutes, the Legislature has provided for discretionary appointments by stating that an appointment "may be made." For example, Section § 851.75 states that "the circuit judges for the county may appoint the register in probate a deputy clerk," Wis. Stat. § 851.75, and Subsection 867.01(3)(b) provides that a "[s]pecial administrator may be appointed" if "the court deems it necessary," *id.* § 867.01(3)(b).

Second, the Circuit Court read the Supreme Court's decision in *Prehn*, 2022 WI 50, as support for its conclusion that WEC's duty to appoint an Administrator to a four-year term is discretionary while a legal holdover remains in office, *see* R.72 at 7–8, 11–12, App.7–8, 11–12, but that is wrong. In *Prehn*, an appointed member of the DNR board held over in his position after the expiration of his term, and the Governor sought to replace that official by making a provisional appointment, per the governing statute that required that a "[v]acanc[y] occur[s]" before a such a provisional appointment may be made. 2022 WI 50, ¶¶ 2–3; Wis. Stat. § 17.20. The Attorney General filed a writ of quo warranto against the DNR-member holder, alleging that he "d[id] not legally hold office because his term expired and his office [wa]s therefore

vacant." *Prehn*, 2022 WI 50, ¶ 14. *Prehn* addressed the question of whether a vacancy automatically occurs at the expiration of the term of an appointed office, or whether an office fails to be vacant when a legal holdover remains in the position. *Id.* ¶¶ 2–3. Answering that question, the Supreme Court concluded that the expiration of a term alone does not create a vacancy under Wis. Stat. § 17.03. 2022 WI 50, ¶ 35. Thus, a statute requiring that a "[v]acancy occur[s]" before the Governor may make a provisional appointment did not come into play when the office is lawfully held over. *Id.* ¶ 29; *see* Wis. Stat. § 17.20. *Prehn* further noted that, at the end of the appointed official's term, the Governor retained the "prerogative to appoint" the holdover's nonprovisional successor, 2022 WI 50, ¶ 29, and was able to make such a nonprovisional appointment without needing to overcome that incumbent official's "for cause" removal protections, *id.*, and then interpreted the Governor's nomination power under Subsection 15.07(1)(a) as mandatory, *id.* ¶ 18; *see supra* pp.24–25. *Prehn*'s holding about legal holdovers not resulting in a vacancy in an office thus does not help WEC's position on the question here: whether WEC has the mandatory duty to appoint a new Administrator under Subsection 15.61(1)(b)1 at the end of a term absent a vacancy.

The Circuit Court's determination that WEC is not under an affirmative duty to appoint an Administrator at the expiration of each four-year term represents a misapplication of *Prehn*'s holding. While *Prehn* noted that, at the end of the appointed official's term, the Governor retained the "prerogative to appoint" the holdover's nonprovisional successor under Wis. Stat. § 15.07,

Prehn, 2022 WI 50, ¶ 29, that does not equate to a *discretionary* duty not to appoint, as the Circuit Court erroneously concluded, R.72 at 7 & n.1, 12, App.7 & n.1, 12. Indeed, *Prehn* itself interpreted the Governor's authority under Wis. Stat. § 15.07 to be mandatory, given that it interpreted Wis. Stat. § 15.07(1)(a) to mean that "[t]he Governor *must nominate* . . . members of the DNR board." *Prehn*, 2022 WI 50, ¶ 18 (emphasis added). But even putting this point aside, *Prehn*'s core holding was that the expiration of the DNR board member's term did not create a vacancy, such that the Governor had no right to make a provisional appointment to fill that office. *Id.* ¶ 29. As noted above, that relates only to Subsection 15.61(1)(b)1's third through fifth sentences, not to Subsection 15.61(1)(b)1's first sentence, which is the key part of Subsection 15.61(1)(b)1 in dispute here. *Supra* pp.13, 29.

Relatedly, the Circuit Court was also wrong to conclude that *Prehn*'s use of the word "*prerogative*" when discussing the Governor's power to appoint DNR board members under Wis. Stat. § 15.07 means that WEC's power to appoint an Administrator under Subsection 15.61(1)(b)1's first sentence includes the power to make no appointment at WEC's option. R.72 at 7 & n.1, 11–12 (citing *Prerogative*, Black's Law Dictionary (11th ed. 2019)), App.7 & n.1, 11–12. Again, *Prehn* itself indicates that the Governor's appointment power under Section 15.07 is a mandatory duty, explaining that the Governor "*must nominate* . . . members of the DNR board." *Prehn*, 2022 WI 50, ¶ 18. Thus, the best understanding of *Prehn*'s use of the term "prerogative" with

respect to Section 15.07 is as a synonym for the Governor's "right" or "power" of appointment under Section 15.07, *see Prerogative*, Black's Law Dictionary, *supra*—a right or power that is mandatory, *see Prehn*, 2022 WI 50, ¶¶ 18, 23. Indeed, duties often arise where an office holder has an exclusive power, *see* R.55 at 20–21 (discussing the examples of jurors who have the exclusive power and duty to vote on guilt or innocence and police officers who have the exclusive power and duty to arrest an individual with an outstanding warrant), and the Commission, the Governor, and other appointing authorities have interpreted similar statutes in this way for decades, *see* R.22 at 15–17 (describing history of appointments made without a vacancy at or near the expiration of a fixed term).

Third, the Circuit Court's approach fails to "give reasonable effect," *Kalal*, 2004 WI 58, ¶ 46, to Subsection 15.61(1)(b)1's requirements that the Administrator "serve for a 4-year term" and that the term "expir[es] on July 1 of the odd-numbered year," Wis. Stat. § 15.61(1)(b)1, rendering these provisions surplusage, *Kalal*, 2004 WI 58, ¶ 46. According to the Circuit Court, once an Administrator obtains a Senate-confirmed appointment, her term in office is effectively indefinite, expiring only when a majority of the Commissioners agree to remove her under Wis. Stat. § 15.61(1)(b)2. R.72 at 8, App.8. That interpretation eliminates any meaning from the statute's mandate that the Administrator "serve for a *4-year term expiring on July 1 of the odd-numbered yea*r." Wis. Stat. § 15.61(1)(b)1 (emphasis added).

The Circuit Court's view that the expiration of the Administrator's term provides WEC with the "prerogative" to appoint a replacement, R.72 at 8, App.8, does not salvage its reading. In *Prehn*, the expiration of an appointee's term meant not only that the Governor had the power to appoint a replacement; the Governor was *also* able to do so without needing to overcome the incumbent's "for cause" removal protections. 2022 WI 50, ¶ 29. However, such protections do not apply here. As the Circuit Court correctly noted, WEC can remove the Administrator, and appoint a new one, "at its pleasure." R.72 at 8, App.8. Thus, a reading of the expiration clause as providing WEC with the "prerogative" to appoint at will, when it already has that authority during the Administrator's term, fails to provide meaning to both the length of the term and its expiration, rendering each provision surplusage.

Finally, the Circuit Court held that its interpretation of Subsection 15.61(1)(b)1 did not violate the separation of powers, because, in *Prehn*, the Supreme Court held that the Legislature "providing [the DNR board member there] for-cause protection" from removal by the Governor did not violate the separation of powers. R.72 at 10–11, App.10–11. Respectfully, *Prehn*'s holding with regard to for-cause-removal protections is *not* "the same separation of powers concerns" that are present in this case. R.72 at 11, App.11. In *Prehn*, the Governor still had the "option" to remove the DNR board member at issue and replace him with an appointee—namely, by establishing for-cause removal, R.72 at 11, App.11—while here, the Senate is powerless to provide any advice

and consent on a new Administrator until WEC decides to act, under the Circuit Court's interpretation of Subsection 15.61(1)(b)1. This creates the absurd, separation-of-powers-violating results discussed above, where the Administrator will retain power indefinitely with the support of exclusively one political party.

II. This Court Should Order Entry Of A Writ Of Mandamus Directing WEC To Promptly Appoint An Administrator Under Wis. Stat. § 15.61(1)(b)1

A. A writ of mandamus may be "used to compel public officers to perform duties arising out of their office and presently due to be performed." *Pasko v. City of Milwaukee*, 2002 WI 33, ¶ 24, 252 Wis. 2d 1, 643 N.W.2d 72 (citation omitted); *State ex rel. Rogers v. Wheeler*, 97 Wis. 96, 104, 72 N.W. 225 (1897) (directing a circuit court to grant a writ of mandamus requiring a county judge to appoint commissioners). This Court may issue a writ of mandamus when the moving party satisfies four prerequisites: (1) the moving party possesses a "clear legal right"; (2) a governmental entity has violated a "positive and plain duty"; (3) the violation causes "substantial damages"; and (4) "no other adequate remedy at law" exists. *See Pasko*, 2002 WI 33, ¶ 24 (citation omitted); *see generally* Wis. Stat. §§ 783.01 *et seq.*, 801.02(5). The "refus[al] to issue the writ [of mandamus] constitutes an abuse of judicial discretion" when each of the mandamus elements are satisfied. *Neu v. Voege*, 96 Wis. 489, 493, 71 N.W. 880 (1897). This Court reviews the prerequisites of a "clear [ ] legal right" and "positive and plain" legal duty de novo. *Milwaukee Police Ass'n,* 2008 WI App 119, ¶ 7.

A party seeking mandamus relief has "clear legal right" when a statute or other legal instrument entitles the moving party to the requested relief. *See Mount Horeb Cmty. Alert v. Vill. Bd. of Mount Horeb*, 2003 WI 100, ¶39, 263 Wis. 2d 544, 665 N.W.2d 229. When an action requires the exercise of discretion but the party refuses to exercises its discretion, "mandamus is appropriate to compel the exercise of discretion." *State ex rel. Althouse v. City of Madison*, 79 Wis. 2d 97, 106, 255 N.W.2d 449 (1977).

Likewise, statutes and other legal forms create a "positive and plain duty" for a party to act. *Milwaukee Police Ass'n,* 2008 WI App 119, ¶ 7; *see also State ex rel. Lewandowski v. Callaway*, 118 Wis. 2d 165, 171, 346 N.W.2d 457 (1984) (finding a statutory duty for the Wisconsin Patient Compensation Panel to consider a claim); *State ex. rel. Coogan v. Michek*, 2020 WI App 37, ¶¶ 2, 17–23, 40, 392 Wis. 2d 885, 945 N.W.2d 754 (awarding mandamus relief because the public official had a "'positive and plain duty'" to follow its unambiguous mandate); *see also State ex rel. Althouse*, 79 Wis. 2d at 106 ("The fact that the [positive and plain] duty imposed involves the construction of a statute does not mean that the obligation set forth in the statute may not be compelled by mandamus."); *Zignego,* 2020 WI App 17, ¶¶ 54–100 (utilizing plain language analysis of Wisconsin statutes to determine whether a positive and plain duty existed). A "positive and plain duty" exists when the duty is "clear and unequivocal." *Zignego*, 2020 WI App 17, ¶¶ 31, 33.

Additionally, a party seeking a writ of mandamus satisfies the requirement for "substantial damages" when the party suffers

more than nominal damages. *See Burns v. Madison*, 92 Wis. 2d 232, 244, 284 N.W.2d 631 (1979) ("Substantial damages are damages which are considerable in amount and intended as a real compensation for a real injury." (citation omitted)). A party's refusal to appoint an official meets the damages requirement for a writ of mandamus. *See State ex rel. Wis. State Dep't of Agric. v. Aarons*, 248 Wis. 419, 423, 22 N.W.2d 160 (1946) ("[I]f the law provided that the [officials] should be appointed by the chairman of the county board . . . no one would contend that this court should . . . issue a writ [of mandamus]."). There is "no [other] adequate remedy at law" when a "safe, speedy, and efficient remedy" is required to redress the wrong. *Harley v. Lindemann*, 129 Wis. 514, 522, 109 N.W. 570 (1906) (citations omitted).

The Court of Appeals has applied these standards in another appointment case, *State ex rel. Milwaukee County Personnel Review Board v. Clarke*, 2006 WI App 186, 296 Wis. 2d 210, 723 N.W.2d 141. There, the Court of Appeals affirmed a circuit court's grant of a writ of mandamus ordering a sheriff to reappoint an employee as a deputy. *Id.* ¶ 57. The sheriff had demoted an appointed deputy, but the personnel review board found the demotion unwarranted and ordered the Sheriff to reappoint the deputy to his old rank. *Id.* ¶¶ 1, 7–9. The Sheriff refused, and the board consequently sought a writ for the deputy's reappointment. *Id.* ¶¶ 10–12. The circuit court granted the writ of mandamus, and the Court of Appeals affirmed the circuit court's decision. *Id.* ¶ 57. The Court of Appeals reasoned that (1) the board possessed a clear legal right to order appointment, (2) the board's decision created a

positive and plain legal duty for the Sheriff to reappoint the deputy, (3) substantial damage to the board resulted from the sheriff's refusal to honor its decision, and (4) there was no adequate remedy at law because equity was the only method for the board to expeditiously enforce an appointment. *Id.* ¶¶ 43–57.

B. This Court should order entry of a writ of mandamus directing WEC to appoint promptly an Administrator because all elements of the writ of mandamus are satisfied.

Clear Legal Right. The Legislature has a "clear, specific legal right" *Zignego,* 2020 WI App 17, ¶ 30 (citations omitted), to offer its advice and consent to the new term of a WEC Administrator. *See* Wis. Stat. § 15.61(1)(b)1; *supra* pp.11, 26–27. Wis. Stat. § 15.61(1)(b)1 requires the Senate to offer its "advice and consent" upon the WEC Administrator's appointment to a "4-year term expiring on July 1 of the odd-numbered year." *Id.* When a statute grants a state actor the right to review another government actor's action—whether offering advice and consent regarding a WEC Administrator or reviewing the appointment of a deputy, *Clarke*, 2006 WI App 186, ¶¶ 43–57—it is considered a legal right. *See id.*; *State ex rel. Althouse*, 79 Wis. 2d at 106 (directing a circuit court to enter a writ of mandamus because a statute granted a clear legal right). Here, Wis. Stat. § 15.61(1)(b)1 gives the Senate the "clear legal right" to offer its advice and consent with regards to each WEC Administrator term. *Supra* pp.11, 26–27. Unless this Court grants the writ of mandamus, WEC's refusal to appoint an Administrator will deprive the Senate of that right.

Positive And Plain Duty. WEC has a nondiscretionary duty to appoint an Administrator to a new term. *See supra* Part I; Wis. Stat. § 15.61(1)(b)1. WEC refuses to perform its "positive and plain duty" to "appoint[ ] by a majority of the members of the [WEC]" an Administrator to "serve for a 4-year term expiring on July 1 of the odd-numbered year." Wis. Stat. § 15.61(1)(b)1. Because WEC refuses to comply with their positive and plain duty to appoint an Administrator, this Court must now compel them to do so.

Substantial Damages. WEC threatens to inflict substantial damage on Defendants-Appellants by gutting the Senate's legal duty to offer "advice and consent" on the WEC Administrator's appointment to a new term. *Supra* pp.11, 26–27; Wis. Stat. § 15.61(1)(b)1. WEC instead chooses to holdover perpetually the previous term of the WEC Administrator, threatening the procedural protections designed as checks and balances in the separation of powers. WEC causes damage through its abrogation of the Senate's advice and consent power—"an important and material part of the appointive process which is not to be by-passed or thwarted." *State ex rel. Reynolds,* 22 Wis. 2d at 519. The Senate's advice and consent requirement ensures that WEC remains accountable to the People through their elected representatives. WEC has attempted to remove Administrator Wolfe from the statutorily prescribed confirmation process, undermining the branches' "a system of separateness but interdependence, autonomy but reciprocity." *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 546, 576 N.W.2d 245 (1998) (citations omitted).

No Other Adequate Remedy At Law. A writ of mandamus is the only adequate remedy at law for WEC's continuous violation of the Senate's statutory right to provide advice and consent as to WEC Administrator's appointment. No other adequate remedy at law provides "safe, speedy, and efficient remedy" for the Senate. *Harley*, 129 Wis. at 522. Timely resolution is especially important here given the upcoming state primary on August 13, 2024, and general election on November 5, 2024. *See* Wis. Elections Comm'n, *Upcoming Events*.[8] If the Court does not grant Defendants-Appellants' requested writ of mandamus, Administrator Wolfe will holdover indefinitely without the Senate's "advice and consent." Wis. Stat. § 15.61.

C. The Circuit Court denied mandamus relief for two reasons, both of which were incorrect. The Circuit Court first explained that Defendants-Appellants "fail[ed] to demonstrate that WEC has a positive and plain duty to appoint an administrator [under Subsection 15.61(1)(b)1] when its administrator lawfully holds over," R.72 at 15, App.15, but that is incorrect for all of the reasons that that Defendants-Appellants have explained above, *supra* Part I. The Circuit Court then suggested the Legislature's own official acts with respect to Ms. Wolfe's position demonstrated that mandamus relief is not in the public interest. R.72 at 15, App.15. Yet, the Legislature's official acts referenced by the Circuit Court simply amounted in substance to a vote of no confidence in Ms. Wolfe, coming after WEC itself

[8] Available at https://elections.wi.gov/news-events/events?audience=316&event_type%5b%5d=249&event_type%5b%5d=251.

failed to follow its own mandatory duty to appoint a new Administrator as Subsection 15.61(1)(b)1 requires. *Supra* pp.8–9, 15–16. Especially under these circumstances, enforcing Subsection 15.61(1)(b)1's plain terms is clearly supported by the public interest.

CONCLUSION

This Court should reverse the judgment of the Circuit Court, requiring the Circuit Court both to enter an order declaring that WEC has a duty to appoint an Administrator at the end of a term under Wis. Stat. § 15.61(1)(b)1, and to issue writ of mandamus compelling WEC to appoint an Administrator for the term beginning July 1, 2023.

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Respectfully submitted,

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 8,493 words.

Dated: June 12, 2024

Electronically signed by Misha Tseytlin
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