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CIRCUIT COURT
DANE COUNTY, WI
2021CV001994

BY THE COURT:

DATE SIGNED: September 17, 2021

Electronically signed by Judge Valerie Bailey-Rihn
Circuit Court Judge

STATE OF WISCONSIN DANE COUNTY CIRCUIT COURT
BRANCH 3

STATE OF WISCONSIN ex rel.
JOSHUA L. KAUL,

Plaintiff,

vs. Case No. 21-CV-1994

FREDERICK PREHN,

Defendant.

DECISION AND ORDER
GRANTING DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

This case is about the interpretation of several statutes relating to the appointment and removal of state officers. In 2015, the Governor of Wisconsin appointed Dr. Frederick Prehn ("Prehn") to a six year term on the Wisconsin Natural Resources Board ("the Board.") On May 1, 2021, Prehn's term expired. The State of Wisconsin, by its relator Wisconsin Attorney General Joshua L. Kaul, ("the State") alleges that the Governor of Wisconsin has appointed a different person to serve in that same Board seat for the proceeding term but, now four months later, Prehn

unlawfully continues to appear and exercise authority at Board meetings.

Three issues are now before the Court. The State seeks a writ of quo warranto to remove Prehn from office. Prehn moves to dismiss the State's complaint pursuant to numerous theories. Both parties also seek, in the alternative, a declaratory judgment as to whether Prehn lawfully holds office.

For the reasons stated below, the Court concludes that Prehn's motion to dismiss must be granted; although this Court not condoning Prehn's actions.[1] Although there are very good reasons for concluding a "vacancy" occurs when a person's term is over, that is not for this Court. This Court must follow the precedent set forth in *State ex rel. Thompson v. Gibson,* 22 Wis. 2d 275, 294, 125 N.W.2d 636 (1964). If the reasons for the holding in *State ex rel. Thompson* have changed, it is up to the Supreme Court to decide. The Court need not proceed to address any alternative relief sought.

I. BACKGROUND

1. Undisputed Facts.

The few facts material to this action are not disputed. On May 18, 2015, Wisconsin Governor Scott Walker appointed Prehn to the Board. Prehn Proposed Answer, dkt. 18:5. As of September 17, Prehn continued to serve in that office. *Id.* at 3. Parties simply dispute whether Prehn's continued service is lawful.

2. Procedural Posture.

On August 17, 2021, the State filed a complaint, which alleged Prehn has unlawfully held,

[1] The Court cannot help but feel that the citizens of Wisconsin are the losers when the legislature fails to hold confirmation and other hearings in a timely manner. A timely confirmation hearing would have eliminated the need for the State's filing and saved the taxpayers attorneys' fees incurred in this matter.

and continues to unlawfully hold, his seat on the Board. Cmplt., dkt. 2. The complaint seeks relief in the form of a writ of quo warranto and/or a declaratory judgment. The State also filed a motion to expedite this matter pursuant to the procedure for a writ of quo warranto. Dkt. 3. The following day, the Court[2] granted the motion and ordered expedited briefing, further "endeavor[ing] to issue a decision and final order on or before September 20, 2021." Order to Respond, dkt. 6:2.

On August 23, 2021, both the Wisconsin Legislature and a Kansas-based advocacy group named "Hunter Nation, Inc." filed motions to intervene in this case pursuant to Wis. Stat. § 803.09.[3] The Court has since denied both motions to intervene in an oral ruling, *see* dkt. 57 (Trans. of oral ruling), but these proposed intervenors, as well as Atty. Daniel Suhr, have filed amicus briefs in support of Prehn. *See* Wisconsin Legislature Amicus Br., dkt. 55; Daniel Suhr Amicus Br., dkt. 16; Hunter Nation Amicus Br., dkt. 52.

On August 30, Prehn moved to dismiss this action under numerous theories. Motion to dismiss, dkt. 18. Alternatively, Prehn seeks a declaratory judgment that he lawfully holds office. *Id.* Having considered the extensive briefing submitted by the parties and the amici, the Court is prepared to issue its written decision.

II. STANDARD OF REVIEW

1. Legal Standard for a Motion to Dismiss.

Any pleading which sets forth a claim for relief must contain "[a] short and plain statement of the claim" and "[a] demand for judgment for the relief the pleader seeks." Wis. Stat. § 802.02(1).

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[2] Three judges have presided over this matter:

> Judge Nia Trammell was originally assigned to this case. On September 2, 2021, Judge Josann Reynolds, was assigned to this case. Dkt. 31. On September 8, 2021, Judge Valerie Bailey-Rihn was assigned to, and continues to preside over, this case. Dkt. 49.

[3] All references are to the 2019-20 statutes unless otherwise noted.

In determining whether these requirements have been met, "[a]ll pleadings shall be so construed as to do substantial justice." Wis. Stat. § 802.02(6).

These are "the requirements for a complaint if it is to withstand a motion to dismiss for failure to state a claim." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶20, 356 Wis. 2d 665, 849 N.W.2d 693. In other words, a complaint "must plead facts which, if true, would entitle the complainant to relief." *Id.*, ¶21 (citing *Strid v. Converse*, 111 Wis. 2d 418, 422-23, 331 N.W.2d 350). "[I]t is the substantive law which drives what facts must be pled," and bare legal conclusions "provide no assistance in warding off a motion to dismiss." *Id.*, ¶¶21, 31 (citing *John Doe 67C v. Archdiocese of Milwaukee*, 2005 WI 124, ¶19, 284 Wis. 2d 307, 700 N.W.2d 180).

2. Legal Standard for a Writ of Quo Warranto.

A writ of quo warranto is a type of special action brought to determine whether a person lawfully holds office. An action for a writ of quo warranto "may be brought by the attorney general in the name of the state . . . in the following cases:

> (a) When any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state; or
>
> (b) When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall work a forfeiture of office; or
>
> (c) When any association or number of persons shall act, within this state, as a corporation without being duly incorporated."

Wis. Stat. § 784.04.

Proceedings in a quo warranto action must be expedited. *See* Wis. Stat. § 784.07. Courts determine the "right of the defendant as justice shall require," Wis. Stat. § 784.08, and if a defendant is adjudged to have unlawfully held office,

> judgment shall be rendered that the defendant be excluded from the office, franchise or privilege and that the plaintiff recover costs against the defendant. The court may also, in its discretion, fine the defendant a sum not exceeding $2,000 . . .

Wis. Stat. § 784.13.

III. ANALYSIS

Prehn advances four arguments in support of its motion to dismiss. The Court begins its analysis by discussing Prehn's first three arguments, all of which appear to have been obviated by the State's submission of proof of service on Prehn.

1. The State Properly Served Prehn.

Prehn's first basis on which to dismiss the complaint is insufficiency of summons and process. Prehn Mtn., dkt. 18:1. On September 3, 2021, the State filed an affidavit of service which asserts that Prehn was personally served. Dkt. 33; *See also* dkt. 34 (the State also effected substitute service on Prehn's wife). Prehn does not provide any contradictory evidence, and accordingly, the Court concludes that Prehn has been properly served.

2. The Court has Jurisdiction over Prehn.

Prehn's second basis on which to dismiss the complaint was a "lack of jurisdiction over Mr. Prehn." Prehn Mtn., dkt. 18:1. Because the Court has already concluded that Prehn was properly served with the summons in this matter on September 3, the Court has personal jurisdiction over Prehn. Wis. Stat. § 801.11(1)(a).

3. All Necessary Parties have been Joined.

Prehn's third basis on which to dismiss the complaint is "failure to join a party under Wis. Stat. §§ 803.03 & 784.03." Prehn Mtn., dkt. 18. Prehn does not state which party, and in any event the Court has already concluded that Wis. Stat. § 803.03 does not require joining either of the two

proposed intervenors in this case. Dkt. 57 (Trans. of oral arguments on motions to intervene.) The Court now also concludes that Wis. Stat. § 784.03 does not require joining any additional parties.[4]

4. The State's Complaint Fails to State a Claim upon which Relief may be Granted.

Next, the Court discusses Prehn's fourth argument, which is that the State has failed to state a claim upon which relief may be granted. Both of the State's claims allege that Prehn unlawfully holds office. Thus, to determine whether the State has stated a claim upon which relief may be granted, the Court must determine whether Prehn lawfully holds office.

The State advances three arguments in support of its claim that Prehn unlawfully holds a seat on the Board: First, that the Board seat is "vacant" because Prehn's term "expired," and the Governor has already appointed a new person to that vacant Board seat. Second, that even if the Board seat is not "vacant," as a holdover official, Prehn does not serve for a "fixed term" and therefore the Governor has lawfully removed Prehn pursuant to Wis. Stat. § 17.07(4). Third, principles of the Wisconsin Constitution require an interpretation of these statutes consistent with Prehn's removal.

A. Only "Vacant" Offices may be filled by Appointments.

i. The General Rules for Appointments, Vacancies, and the Board.

Before discussing the State's first argument for why Prehn unlawfully holds office, the Court provides a summary of Wisconsin's statutory scheme for appointment and removal.

[4] Wis. Stat. § 784.03 reads: "When an action shall be brought by the attorney general by virtue of this chapter, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the state as plaintiff."

Presumably, Prehn is arguing that the Governor's putative appointee Sandra Naas must be joined as a party, but the State does not bring this action on the relation of Sandra Naas and does not seek a declaratory judgment that Sandra Naas is the lawful officeholder; only that Prehn is the unlawful officeholder. *See* Cmplt., dkt. 2.

The Board consists of seven members appointed to staggered six-year terms. Wis. Stat. § 15.34(2)(a). The purpose of the Board is to direct and supervise the Wisconsin Department of Natural Resources. Wis. Stat. § 15.34(1).

The Wisconsin Constitution grants to the legislature the power to "declare the cases in which any office shall be deemed vacant." Wis. Const., art. XIII, § 4(1). The legislature has done so in Chapter 17. Chapter 17 of the Wisconsin Statutes sets forth the rules for the appointments and removals of appointive state officers, such as those who serve on the Board. A state officer may only be appointed to a fill a "vacancy" in a state office. Wis. Stat. § 17.20. This is true whether the officer is appointed on a general or interim basis. *Id. (1)& (2).*

If an office is not vacant, an officeholder may still be removed. Appointive officers may be removed by any of the ways provided in Wis. Stat. § 17.07

As such, "vacancy" is a critical concept to understanding the appointment and removal of state officer. This case concerns parties' interpretations of all of these statutes.

ii. The Expiration of the Term of an Appointive Office does not Create a Vacancy.

The State's first argument is that Prehn's office must have become vacant upon expiration of his term because it is the only reasonable interpretation of the combination of the statute governing vacancy of appointive offices and the statute governing the expiration of the terms of the Board. The Court begins with the statutes themselves because "[i]t is the text of statutes that reflects the policy choices of the legislature, and therefore 'statutory interpretation focuses primarily on the language of the statute.'" *Service Emps. Int'l Union, Local 1 ("SEIU") v. Vos*, 2020 WI 67, ¶28, 393 Wis. 2d 38, 946 N.W.2d 35 (quoting *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.) Furthermore, when interpreting

statutes, "[c]ontext is important to meaning. . . Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole." *Kalal*, 2004 WI 58, ¶46.

The first statute the State cites is Wisconsin Stat. § 17.03 which states "Except as otherwise provided, a public office is vacated when" and provides fourteen ways an appointive public office may become vacant.[5] Only two of these ways are relevant to this case:

(3) if "[t]he incumbent is removed," or

(13) if "[a]ny other event occurs which is declared by any special provision of law to create a vacancy." Wis. Stat. §§ 17.03(3) and (13).

The second statute the State cites is Wis. Stat. § 15.07(1)(c). It provides (footnote added)

> Except as provided under par. (cm),[6] fixed terms of members of boards shall expire on May 1 and, if the term is for an even number of years, shall expire in an odd-numbered year.

The State argues that "the only reasonable way to read these statutes" is that expiration of Prehn's term on May 1, 2021 must have created a vacancy in Prehn's seat on the Board. State Resp. Br. at 4; State Br. at 8-9. Dr. Prehn obviously disputes this, and argues that unless the

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[5] A summary of these possible ways:

(1) The incumbent dies.
(2) The incumbent resigns.
(3) The incumbent is removed.
(4) The incumbent ceases to be a resident of the relevant jurisdiction.
(5) The incumbent is convicted of treason or another serious crime.
(6) A competent tribunal voids the appointment.
(7) The officer refuses to take the oath of office.
(8) The incumbent refuses or neglects to file an additional bond when required.
(9) The officer declines the office in writing.
(10) For elective offices, if the incumbent's term expires.
(11) For school board seats, if the district fails to elect new board members.
(12) The office is newly-created.
(13) "Any other event occurs which is declared by any special provision of law to create a vacancy."

See Wis. Stat. § 17.03.

[6] Sub. (cm) refers to "the 3 members of the land and water conservation board" and is not at issue.

legislature stated it explicitly in Wis. Stat. §17.03, "holding over" does not create a vacancy.

Both parties have valid points.

First, when the legislature chose to make elective offices vacant upon the expiration of a term (Wis. Stat. § 17.03(10)), the legislature also declined to create a similar measure for appointive offices. This may indicate a conscious decision to which the Court should give effect. *State ex rel. Riegert v. Koepke,* 13 Wis. 2d 519, 522 (1961) ("One of the well-known and often-applied canons of statutory interpretation is that . . . the expression of one thing excludes another.")

Second, courts presume to give effect to common law rules unless statutes clearly express otherwise. *Gaugert v. Duve,* 2001 WI 83, ¶41, 244 Wis. 2d 691, 628 N.W.2d 861. The State's interpretation, including its citations to authorities from South Carolina, Colorado, and Connecticut, runs contrary to Wisconsin's longstanding common law rule in favor of the implied holdover of state officers:

> The general trend of decisions in this country is to the effect that, where the written law contains no provision, either express or implied, to the contrary, an officer holds his office until his successor is elected and qualified. This rule of construction prevents the inconvenience and annoyance resulting from the suspension of official functions because there is no officer authorized to discharge such functions.

State ex rel. Pluntz v. Johnson, 176 Wis. 107, 186 N.W.2d 729, 730 (1922); *See State ex rel. Martin v. Heil,* 242 Wis. 41, 51, 7 N.W.2d 375 ("There is . . . little practical objection in an administrative office to permitting a sheriff or clerk of court to give continuity to the administration of his office by continuing until a successor is elected and qualified.") There appears to be no clear expression that Wis. Stat. § 15.07(1)(c), which governs the Board, was intended to abrogate that rule.

However, the State does have valid arguments that a vacancy is created when a person holds over. First, the phrase "unless otherwise provided" in Wis. Stat. §17.03, could reasonably

be interpreted as referencing the specific statute governing the DNR Board. That section provides for six year fixed terms. *See* Wis. Stat. § 15.07(1)(c).

Second, Prehn asserts as further proof of the legislature's intent two statutes in which it explicitly disallowed holdover in appointive office, citing Wis. Stat. §§ 15.61(1)(b)1 and 15.62(1)(b)1, which govern the elections and ethics commissions, respectively. These offices have slightly more complex rules, but none that explicitly prohibits holdover. Like Wis. Stat. § 15.07(1)(c), both require a vacancy before a new officer may take office.

On the other hand, other appointment statutes cited by the State do include express holdover provisions. For example, members of the council on recycling "shall serve a 4-year term expiring on the date that the next term of governor commences . . . or until a successor is appointed," Wis. Stat. § 15.347(17)(c); local election officials "shall hold office for 2 years and until their successors are appointed and qualified," Wis. Stat. § 7.30(6)(a); a local "weed commissioner shall hold office for one year and until a successor has qualified or the [local executive] . . . determines not to appoint a weed commissioner," Wis. Stat. § 66.0517(2)(a); and first-class city commissioners serve "for 5 years . . . and until a successor is appointed and qualified," Wis. Stat. § 62.50(1h); see also, e.g., Wis. Stat. § 62.14(1) (allowing officeholders to hold over "until their successors are qualified"). "When the legislature uses different terms in a statute—particularly in the same section—[courts] presume it intended the terms to have distinct meanings." *Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2019 WI 24, ¶ 29, 385 Wis. 2d 748, 924 N.W.2d 153 (citation omitted).

Further, "[o]ne of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning." *State v. Neill*, 2020 WI 15, ¶ 23, 390 Wis. 2d 248, 938 N.W.2d 521 (citation omitted). "[R]ather, [courts] interpret the words the legislature actually

enacted into law." Id. (citation omitted). Here, both in Wis. Stat. ch. 15 and in other similar term-setting statutes, the Legislature has expressly authorized some appointments to hold over. Not so with the gubernatorial appointment to the Board.

Third, in *State ex. Rel. Stark v. Hines*, 194 Wis. 34, 215 N.W.447, 448 (1927), the Wisconsin Supreme Court held that a municipal judge by accepting the office of city attorney, created a vacancy in the office of the judge. Although there was no explicit statute creating an exception, the Court held that under the common-law rule, he created a vacancy in the office of judge by accepting the incompatible office of city attorney.

Therefore, there must be some situations in which a vacancy occurs even if not referenced in the statutes. This is made apparent by Prehn's position. Prehn appears to argue that even confirmation of a successor is not reason for removal, claiming that he is entitled to his office as long as he so chooses: "Resignation is a choice, not required by law." Prehn Resp. Br. at 2. This position would defy both the legislature and the executive branch, if it was true. Once in, a Board member could decide to stay on as long as he or she wished. While it is doubtful our legislature intended to create such a result, that issue is not before the Court.

In addition, *Thompson* does not reach the question of how exactly "confirmation" of a subsequent appointee could create a "vacancy" despite "confirmation" not being set forth in either Wis. Stat. § 17.03 or "any other" provision of law in Wis. Stat. § 17.03(10). And, without a vacancy, an official cannot be removed. Wis. Stat. § 17.20. Thus, the implied holding of *Thompson* must be that these statutes are sufficiently ambiguous to compel the extraordinary step of judicially re-writing "confirmation" into the vacancy statute.

Thus, one logical interpretation of the statutes is that a fixed term appointment results in a vacancy after the term ends. However, as discussed below, the Supreme Court has held otherwise.

iii. Statutory Amendments to Wis. Stat. Ch. 17 have not Superseded the Law Interpreted by *Thompson v. Gibson.*

In *State ex rel. Thompson v. Gibson,* 22 Wis. 2d 275, 294, 125 N.W.2d 636 (1964), our supreme court analyzed a nearly identical patchwork of appointment, holdover, and removal rules, then rejected the argument that expiration of a term of appointive office creates a vacancy. An explanation of *Thompson* is illustrative:

On October 1, 1963, the term of J. Jay Keliher, state auditor of Wisconsin, expired. Keliher did not leave office. Keliher had been appointed by the Governor and confirmed by the senate and, for reasons unstated, decided to hold over in the position of state auditor. One week later, the Governor of Wisconsin appointed John Gibson to the very same office. Two men now claimed the title of state auditor, but Gibson had not been confirmed by the senate. Their dispute went to the Wisconsin Supreme Court, which ruled in favor of the holdover Keliher because

> [i]t is clear from the language of sec. 17.20(2), Stats.,[1963-64] that this section applies only where there are 'vacancies' in the appointive offices. The attorney general contends that there can be no vacancy when there is an incumbent lawfully holding over after expiration of his term, while the appointees argue that a vacancy does exist under such circumstances. Under sec. 10, art. XIII, of the Wisconsin Constitution, the power to declare when an office shall be deemed to be vacant is vested in the legislature. . .
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> Since the legislature has the power to declare the circumstances under which an office shall be deemed vacant, and has so declared in sec. 17.03, Stats., and since there is no provision in that statute, or any other, providing that a vacancy exists when a lawful appointee holds over, it cannot be said that an office is 'vacant' for the purposes of sec. 17.20, where the incumbent holds over after expiration of his term.

Thompson, 22 Wis. 2d at 290-91. Here, like Keliher, Prehn's term has expired. Like Gibson, Sandra Naas has been appointed to the same office, and like Gibson, has not been confirmed by

the senate. Prehn's motion to dismiss thus begs the question of how there could be a vacancy in this case where none existed in *Thompson*?

The State's answer is that "the backdrop [was] a completely different removal law." State Resp. Br. at 22. The Court turns to the statutes for vacancy and appointment as they existed at the time of *Thompson*:

Both past and present versions of Wis. Stat. § 17.03 provide for "any other event" to create vacancy. In *Thompson,* the statute read:

> (10) On the happening of any other event which is declared by any special provision of law to create a vacancy.

Wis. Stat. § 17.03(10) (1963-64). The modern version of that statute, which was renumbered[7] Sub. (13), is practically identical: a vacancy occurs upon:

> (13) Any other event occurs which is declared by any special provision of law to create a vacancy.

Wis. Stat. § 17.03(13). Thus, the *Thompson* court had the opportunity to create a vacancy upon the "other event" of the expiration of Keliher's term of office as state auditor,[8] but declined to do so.

Both past and present versions of Wis. Stat. § 17.20 require a "vacancy" as a necessary predicate for any sort of appointment.[9] The State further cites the repeal of Wis. Stat. § 14.22

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[7] *See* 1983 Wisconsin Act 484, §§ 139-140.

[8] Keliher's term was unique in that the legislature specified it "end[ed] October 1, 1963." Wis. Stat. § 15.21 (1963-64). Subsequent auditors served a perhaps less-definite "term of 6 years." *Id.*

[9] *Compare* Wis. Stat. §§ 17.20(1)-(2) (1963-64):

> (1) General. Vacancies in appointive state offices shall be filled by appointment …
> (2) Interim vacancies; terms. Vacancies occurring during the recess of the legislature in the office of any officer appointed by the governor by and with the advice and consent of the senate shall be filled by appointment…

with Wis. Stat. §§ 17.20(1), (2)(a), and (2)(b) (2019-20)

> (1) General. Vacancies in appointive state offices shall be filled by appointment …

(1963-64) as materially altering the statutory scheme of appointment, but that statute, too, was predicated on there first being a vacancy, or some other authorization to make an appointment:

> Whenever the governor is authorized to make any appointment to office … he may make appointment thereto, subject to the approval of the senate at the next succeeding session of the legislature.

Wis. Stat. § 14.22 (1963-64) (repealed by Ch. 418, Laws of 1977).

In conclusion, although the statutes analyzed in *Thompson* have changed several times in the intervening half-century, these changes have no operative effect as to whether a vacancy exists and cannot alter *Thompson*'s holding. *See e.g. Illinois Council on Long Term Care Inc. v. Shalala*, 143 F.3d 1072, 1076 (7th Cir. 1998) ("The operative language is the same now as it was when [precedent] came down. The Supreme Court is jealous of its powers and insists that the inferior courts are not authorized to declare the reasoning of its opinions outdated and their holdings passé.") (collecting cases). Accordingly, the Court is bound by the holding of *Thompson v. Gibson* to conclude that there is no vacancy in the Board seat.

B. The Governor must Show Cause to Remove Prehn because Prehn Serves in an Office that is Filled by Appointment of the Governor for a Fixed Term with Advice and Consent of the senate.

The State's second argument is that even if the Board seat is not vacant, because the term to which Prehn was appointed has expired, Prehn now serves at the pleasure of the Governor and may be removed from his office at any time.[10] This argument relies on interpreting Wis. Stat. § 17.07, which provides for the manner in which appointive state officers may be removed from

> (2)(a) Vacancies occurring in the office of any officer normally nominated by the governor, and with the advice and consent of the senate appointed, may be filled by a provisional appointment …
> (2)(b) A vacancy occurring in the membership of the professional standards council for teachers may be filled by a provisional appointment …

[10] A lay person might consider holding over grounds to find "good cause" or at least raise an ethical or moral issue, but they apparently would be mistaken under the current state of affairs.

office. The statute reads, in relevant part, that "[r]emovals from . . . appointive state officers may be made as follows: …"

> (3) State officers serving in an office that is filled by appointment of the governor for a fixed term by and with the advice and consent of the senate, or serving in an office that is filled by appointment of any other officer or body for a fixed term subject to the concurrence of the governor, by the governor at any time, for cause.
>
> …
>
> (4) State officers serving in an office that is filled by appointment of the governor with the advice and consent of the senate to serve at the pleasure of the governor, or serving in an office that is filled by appointment of any other officer or body for an indefinite term subject to the concurrence of the governor, by the governor at any time.

Wis. Stat. §§ 17.07(3) and (4).

The State argues that usage of the present-tense verb "serving" in Wis. Stat. § 17.07 compels the interpretation "that to have 'for cause' protection, an office must currently be filled for a fixed term, and once that term is over, the protection goes with it." State Br. at 21-22 (citing as a comparison *Town of Somerset v. Wisconsin Dep't of Natural Resources,* 2011 WI App 55, ¶¶9-10, 332 Wis. 2d 777, 798 N.W.2d 282, plus three United States Supreme Court decisions to support what the State labels "basic rules of grammar.") Whether or not these rules are "basic," they are not Wisconsin's rules. *See In re Marriage of Meister,* 2016 WI 22, ¶¶29-30, 367 Wis. 2d 447, 876 N.W.2d 746 (discussing, then applying, the "rule of last antecedent.")[11]

The Court reads these statutes to mean the legislature has drawn a distinction between two sorts of appointive officers, based on the manner in which the officer is appointed. The first sort

[11] The rule of last antecedent means that "qualifying words or phrases modify the words or phrases immediately preceding them and not words of phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing." *Id.* ¶29, fn.13 (quoted source omitted).

of officer, who may be removed only "for cause,"[12] serves in an office "filled by appointment of the governor for a fixed term." The second sort of officer, who may be removed "at any time," serves in an office "filled by appointment of the governor … to serve at the pleasure of the governor." Thus, the only practical difference between these two sorts of appointive officers is whether the office in which they are serving has been filled for a fixed term or not. The office in which Prehn is serving is the Board, which is filled for a fixed term of six years, and not at the pleasure of the governor. Wis. Stat. §§ 15.07(1)(c) and 15.34(2)(a).

C. The Court may not Modify past Interpretations of the Supreme Court.

The State's third argument arises under two principles set forth by the Wisconsin Constitution. These principles are that the Governor, as the chief executive, must be allowed to remove executive officers, State Br. at 27-32; *See* Wis. Const., art. V, § 1; *See e.g. SEIU*, 2020 WI 67, ¶60 ("[S]tate administrative agencies are considered part of the executive branch.") (citation omitted) and second, that the legislature, as a separate branch of government, must not control the executive's appointments. State Br. at 33-37; *See e.g. SEIU*, 2020 WI 67, ¶107 ("If the legislature can regulate the necessary predicate to executing the law, then the legislature can control the execution of the law itself. Such power would demote the executive branch to a wholly-owned subsidiary of the legislature.")

To be clear, the State does not claim that any of the appointment or removal statutes discussed are necessarily unconstitutional. State Br. at 25. Rather, the State urges the Court to interpret these statutes with the above principles in mind and consistent with the "cardinal rule of statutory interpretation . . . A court should avoid interpreting a statute in such a way that would

[12] "Cause" means "inefficiency, neglect of duty, official misconduct, or malfeasance in office. Wis. Stat. § 17.001. The complaint does not allege facts from which the Court might infer "cause" to remove Prehn. *See* Cmplt., dkt. 2.

render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional." *American Fam. Mut. Ins. Co. v. Wisconsin Dep't of Rev.,* 222 Wis. 2d 650, ¶44, 586 N.W.2d 872 (1998). The State further urges the Court to consider numerous decisions addressing holdovers in the offices of other states and of the federal government several of which reach the result the State seeks.

These arguments are compelling but unavailing. *Cook v. Cook,* 208 Wis. 2d 166, ¶51, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case."); *See Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015) ("[T]he idea that today's Court should stand by yesterday's decisions … is a foundation stone of the rule of law.") (citations omitted). Even assuming the State's interpretations to be correct and just, this Court would decline to remedy one constitutional misstep with another by overruling the precedent of the Supreme Court.

ORDER

For the reasons as stated, Dr. Frederick Prehn's motion to dismiss is hereby GRANTED. The complaint in this matter is DISMISSED with prejudice. In light of this ruling, the Legislative's motion to stay is denied as moot. The Court is granting the motions by the amicus to allow them to file amicus briefs, and will accept the briefs as filed. The hearing scheduled for Monday, September 20 is canceled in light of the Court's decision.

This is a final order for purposes of appeal. Wis. Stat. § 808.03(1).