STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 12

WISCONSIN ELECTIONS COMMISSION and MEAGAN WOLFE, in her official capacity as administrator of the Wisconsin Elections Commission,

Plaintiffs,

v. Case No. 23-CV-2428

DEVIN LEMAHIEU, in his official capacity as majority leader of the Wisconsin Senate; and ROBIN VOS and CHRIS KAPENGA, in their official capacities as co-chairs of the Legislature's Joint Committee on Legislative Organization,

Defendants.

PLAINTIFFS WISCONSIN ELECTIONS COMMISSION AND MEAGAN WOLFE'S BRIEF IN SUPPORT OF JUDGMENT ON THE PLEADINGS

INTRODUCTION

The Administrator of the Wisconsin Elections Commission, Meagan Wolfe, holds her position pursuant to law. While she holds over, there is no vacancy, meaning that the Commission has no duty to appoint an administrator to a new term, and the Joint Committee on Legislative Organization has no power to act. There has not been a vote by the Commission to appoint Administrator Wolfe to a new term, which means that the Senate cannot reject her nomination or remove her.

In their Answer and Counterclaim, Defendants concede almost all the legal points in Plaintiffs' Complaint. Those concessions make clear that Plaintiffs are correct on the law, and are entitled to a declaratory judgment on each of these issues.

Defendants' only point of dispute does not assist them. Bringing a counterclaim for mandamus and declaratory relief, they argue that under a different sentence of Wis. Stat. § 15.61(1)(d), *State ex rel. Kaul v. Prehn,* 2022 WI 50, 402 Wis. 2d 539, 976 N.W.2d 821, and distinguishable caselaw, the Commission has a mandatory duty during a holdover to appoint someone to a new term. That is incorrect.

The sentence in Wis. Stat. § 15.61(1)(b)1. Defendants rely on is a description of who makes the appointment and for what term, not a command to appoint; it is found throughout Wisconsin statutes. *Prehn* holds that, during a holdover, the appointing authority has an option, not a duty, to appoint someone to a new term, and *Prehn* cites Wis. Stat. § 15.07, which has the same grammatical structure as the phrase in Wis. Stat. § 15.61(1)(b).1. that Defendants rely on here. Defendants' other cited cases simply confirm Plaintiffs' interpretation, and their absurdity and separation of powers arguments enjoy no support.

As to their counterclaim, there is no duty to appoint during a holdover, and Defendants come nowhere close to meeting the standard for mandamus relief.

Plaintiffs are entitled to a declaratory judgment, as well as judgment in their favor on Defendants' counterclaim, and permanent injunctive relief.

FACTUAL AND LEGAL BACKGROUND

The Commission administers Wisconsin's elections in accordance with state statutes. Wis. Stat. §§ 15.61, 5.05(2w). The administrator is the "chief election officer of [the] state" charged with implementing the Commission's directives and performing tasks as delegated by the Commission and required by statute. Wis. Stat. § 5.05(2w), (3d), (3g).

Administrator Wolfe was appointed by the Commission and began serving in her role, first as Interim Administrator, in March 2018. (Doc. 4 ¶ 7; Compl. Ex. C:1.) The Senate confirmed her nomination in May 2019. (Doc. 4 ¶ 7; Doc. 21 ¶ 7.) Her term expired on July 1, 2023, pursuant to Wis. Stat. § 15.61(1)(b)1.

On June 27, 2023, the Commission voted on whether to appoint Administrator Wolfe to a new term. Three members voted in favor of reappointment, and three members abstained. (Doc. 4 ¶ 9; Doc. 21 ¶ 9.) No member opposed Administrator Wolfe's reappointment. (*See* Doc. 4 ¶ 9). The administrator "shall be appointed by a majority of the members of the

commission" under Wis. Stat. § 15.61(1)(b)1. Because a majority did not vote in favor of appointing Administrator Wolfe to a new term, the Commission's vote did not effectuate an appointment. Wis. Stat. § 15.61(1)(b)1; (Doc. 4: ¶ 10; Doc. 21 ¶ 18).

Administrator Wolfe has continued to hold her office as a holdover and to fulfill the duties of the position. (Doc. 4 ¶ 7; Doc. 21 ¶¶ 7, 17.) The Commission has the power to remove an administrator at its pleasure, Wis. Stat. § 15.61(1)(b)2., but no member of the Commission has moved to remove Administrator Wolfe. (Doc. 4 ¶ 8; Doc. 21 ¶ 8.)

The Senate has the power to confirm or reject an appointee to the administrator position, but only once an appointment is made. Wis. Stat. § 15.61(1)(b)1. Although the Commission did not appoint anyone to a new term, on June 28, 2023, the Senate passed a resolution stating that it considered Administrator Wolfe to have been nominated for the term that expires on July 1, 2027. (Doc. 4 ¶ 11.)

On September 14, the Senate voted to deem Administrator Wolfe to have been nominated and to reject Administrator Wolfe's reappointment to the administrator position. (Doc. 4 ¶ 15.)

Under Wisconsin statutes, the Legislature's Joint Committee on Legislative Organization, headed by Defendant Co-Chairs Robin Vos and Chris Kapenga, appoints an interim administrator where there is a vacancy and the

Commission fails to appoint someone for 45 days. Wis. Stat. § 15.61(1)(b)1. That role is not triggered where there is no vacancy.

Plaintiffs filed this action on September 14 (Doc. 4) and moved for a temporary injunction on October 11 (Doc. 5). Defendants responded with a counterclaim for declaratory judgment and a writ of mandamus, seeking to require the Commission to vote on an interim and permanent administrator. (Doc. 21.) On October 27, this Court granted Plaintiffs' requested temporary injunction. (Doc. 45.) The parties now cross-move for judgment on the pleadings.

LEGAL STANDARDS

"A judgment on the pleadings is essentially a summary judgment decision without affidavits and other supporting documents." *McNally v. Cap. Cartage, Inc.*, 2018 WI 46, ¶ 23, 381 Wis. 2d 349, 912 N.W.2d 35. The court first determines whether the complaint has stated a claim. *Id.* The next step is to examine the responsive pleading to determine whether there is an issue of material fact. *Id.* Judgment on the pleadings is proper only if no genuine issues of material fact exist. *Id.*

Declaratory judgments are available to "[a]ny person . . . whose rights, status or other legal relations are affected by a statute." Wis. Stat. § 806.04(2). To maintain a declaratory judgment action, a justiciable controversy must exist, which means that: (1) a claim of right is asserted against one who has an

interest in contesting it; (2) the controversy is between persons whose interests are adverse; (3) the party seeking declaratory relief has a legal interest in the controversy; and (4) the issues involved are ripe for judicial determination. *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶ 41, 255 Wis. 2d 447, 649 N.W.2d 626.

The writ of mandamus is an "extraordinary" remedy, available only in clear instances free from doubt. *Lake Bluff Hous. Partners v. City of South Milwaukee*, 197 Wis. 2d 157, 170, 540 N.W.2d 189 (1995). Plaintiffs must show that all of the following prerequisites are satisfied: (1) the claim is based on a "clear, specific legal right which is free from substantial doubt"; (2) the alleged duty of the defendant is "positive and plain"; (3) plaintiffs will be "substantially damaged" by defendants' nonperformance of the purported duty; and (4) the plaintiffs have no other adequate remedy at law. *State ex rel. Zignego v. Wis. Elections Comm'n*, 2020 WI App 17, ¶ 30, 391 Wis. 2d 441, 941 N.W.2d 284 (citation omitted).

Even if all the mandamus elements are met, the writ should not issue when "inequitable." *Vretenar v. Hebron*, 144 Wis. 2d 655, 662, 424 N.W.2d 714 (1988) (citation omitted). This includes consideration of "[t]he rights of the public and of third persons." *State ex rel. Sullivan v. Hauerwas*, 254 Wis. 336, 340, 36 N.W.2d 427 (1949).

ARGUMENT

Defendants concede that Administrator Wolfe is lawfully holding over, the Senate has no power to fire her without an appointment, and the Joint Committee on Legislative Organization has no power to appoint an interim administrator during a holdover. Defendants' remaining argument—that the Commission has a mandatory duty to appoint someone during a holdover—fares no better. Under Wis. Stat. § 15.61, *Prehn*, and the cases Defendants rely on, the Commission has no duty to appoint while there is a holdover. Defendants' absurdity and separation of powers theories are also unsupported.

As to their mandamus counterclaim, Defendants have not shown there is any duty for the Commission to appoint during a holdover, much less the clear and plain type of mandatory duty required for mandamus relief.

I. Defendants concede that Administrator Wolfe is lawfully holding over, there is no vacancy in the position, the Joint Committee on Legislative Organization has no power to appoint a second administrator, the Commission did not nominate Administrator Wolfe to a new term, and the Senate cannot reject her without an appointment.

At the time Plaintiffs filed their suit, the Senate had taken or threatened to take action to fire Administrator Wolfe based on several legal assertions. Defendants' Answer concedes that Administrator Wolfe is lawfully holding over; there is no vacancy; the Joint Committee on Legislative Organization has no power to appoint an interim administrator; the Commission did not reappoint Administrator Wolfe to a new term; and the Senate cannot remove

her without an appointment. Those concessions reinforce that Plaintiffs are correct on the law and are entitled to a declaratory judgment as to each point.

A. As Defendants concede, Administrator Wolfe is holding over and, during the holdover, there is no vacancy.

First, as Defendants now concede, Administrator Wolfe is lawfully holding over and there is no vacancy in the position. (Doc. 21 ¶ 17.)

When an appointee continues to serve beyond the expiration of their term, they lawfully hold over in that office. *Prehn*, 402 Wis. 2d 539, ¶ 28. Here, Administrator Wolfe's statutory term ended July 1, 2023, and she has legally held over since that time. *See* Wis. Stat. § 15.61(1)(b)1. Defendants concede that she is a lawful holdover. (Doc. 21 ¶ 17.)

Defendants now also concede that, while Administrator Wolfe holds over, there is no vacancy in the administrator position. (Doc. 21 ¶ 22.) That is consistent with *Prehn*, where the court held that there is no vacancy in an office when an incumbent holds over. *Prehn*, 402 Wis. 2d 539, ¶¶ 16, 32, 33. That is true even if the statutes provide that the incumbent serves for a term provided for by law. *Id.* ¶¶ 30, 35.

B. As Defendants recognize, the statutory requirements triggered by a vacancy are not in play because there is no vacancy.

Defendants also concede that the statutory requirements triggered under Wis. Stat. § 15.61(1)(d) by a vacancy are not in play because there is no vacancy during a holdover. (*See* Doc. 21 ¶¶ 17–18.)

The Commission must appoint a new administrator when there is a vacancy in the administrator position: "[i]f a vacancy occurs in the administrator position, the commission shall appoint a new administrator, and submit the appointment for senate confirmation." Wis. Stat. § 15.61(1)(b)1. And, if a vacancy occurs and the Commission does not appoint someone "at the end of the 45-day period," the Joint Committee on Legislative Organization shall appoint an interim administrator. Wis. Stat. § 15.61(1)(b)1.

Under *Prehn*, neither provision is triggered while there is a holdover because there is no vacancy to start the clock. *Prehn*, 402 Wis. 2d 539, ¶¶ 16, 32, 33. Defendants agree that the Joint Committee on Legislative Organization has no power to appoint a second administrator while Administrator Wolfe is holding over. (Doc. 21:7.)

C. As Defendants agree, the Commission did not appoint anyone to a new term, and the Senate cannot vote on a non-existing appointment.

Defendants further agree that the Commission did not vote to appoint anyone to a new term, and that the Senate cannot reject Administrator Wolfe without an appointment. (Doc. 21 ¶¶ 19.)

The Commission appoints an administrator by a vote of a "majority of the members of the Commission." Wis. Stat. § 15.61(1)(b)1. The Commission is a six-member body. Wis. Stat. § 15.61(1)(a). With a six-member Commission, at least four votes are required to make a majority of the members. It is undisputed that four members of the Commission have not voted to appoint Administrator Wolfe or anyone else to a new term. Defendants concede that the Commission did not vote to appoint someone to a new term. (Doc. 21 ¶ 18.)

Because there has been no appointment by the Commission, the Senate has no power to vote to confirm or reject Administrator Wolfe. Wis. Stat. § 15.61(1)(b)1. (administrator appointed with the "advice and consent of the senate").

Defendants assert, despite the Senate's votes on September 14, that the Senate vote was "symbolic" (Doc. 21 ¶ 15) or "effectively a vote of no confidence." (Doc. 22:12.) That recharacterization is irrelevant: what matters is that, as Defendants concede, the Senate lacks the power to reject Administrator Wolfe where there is no pending appointment. (Doc. 21 ¶ 19.)

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Defendants' concessions simply reflect the correctness of Plaintiffs' positions, as a matter of law, that (1) Administrator Wolfe is lawfully holding over in office; (2) there is no vacancy while she is holding over; (3) the Joint Committee on Legislative Organization has no power to act while Administrator Wolfe is holding over; (4) the Commission has not voted to appoint Administrator Wolfe to a new term; and (5) the Senate cannot remove Administrator Wolfe where the Commission has not made an appointment. Plaintiffs are entitled to declaratory judgment on each of these points.

II. The Commission has no duty to appoint an administrator during the pendency of a holdover.

Having conceded the legal issues above, Defendants argue that the first sentence of Wis. Stat. § 15.61(1)(b)1., which provides that "[t]he 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 . . . to serve for a 4-year term," creates a mandatory duty for the Commission to appoint someone at the end of a term, even when there is a holdover. They rely on *Prehn*, other case law, policy arguments and a separation of powers theory, but none of that supports that reading. The Commission has no duty to appoint during the pendency of a holdover.

A. The standard phrase in Wis. Stat. § 15.61(1)(b)1. regarding who appoints, and for what term, creates no duty to appoint during a holdover.

A plain language reading of Wis. Stat. § 15.61(1)(b)1. requires no appointment where there is no vacancy. Defendants' reading is unpersuasive and premised on a misstatement of the Commission's position.

1. Plaintiffs' interpretation of Wis. Stat. § 15.61(1)(b)1. is supported by plain language and context.

The plain text of Wis. Stat. § 15.61(1)(b)1. only requires an appointment during a vacancy, and thus no appointment during a holdover. The statute creates a duty to appoint only where there is a vacancy. The language Defendants point to simply spells out who the appointing authority is and the term of office.

Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language "is given its common, ordinary, and accepted meaning," unless the statute makes clear that a special or technical meaning applies. *Id.* Further, "[c]ontext is important to meaning." *Id.* ¶ 46. "Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*

The Commission's interpretation of Wis. Stat. § 15.61(1)(b)1. is supported by the plain statutory text. The provision contains one duty to appoint, and that duty arises when there is a vacancy: "If a vacancy occurs . . . the commission shall appoint a new administrator, and submit the appointment for senate confirmation, no later than 45 days after the date of the vacancy. If the commission has not appointed a new administrator at the end of the 45-day period, [JCLO] shall appoint an interim administrator to serve until a new administrator has been confirmed by the senate." Wis. Stat. § 15.61(1)(b)1.

This provision states in active voice that the Commission shall appoint and sets a deadline to do so and consequences if the Commission does not make an appointment. The provision is clear: it is triggered only "if a vacancy occurs." Wis. Stat. § 15.61(1)(b)1.

Defendants point to a different sentence that they argue creates a mandatory duty to appoint when there is no vacancy: the 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., (Doc. 21:9; 22:16.) That sentence does not do the work they ask of it, for three reasons.

First, that sentence has no features creating a duty. It does not instruct the Commission to do anything and has no deadline or consequences if no appointment is made. It simply tells the reader who appoints the administrator and describes the length of a term.

Defendants' argument pretends that the time period of the term of appointment is instead a deadline for the appointing authority, as if the statute said, "once an administrator's 4-year term expires, the Commission shall appoint a new administrator." The actual statute does not so read.

Second, the structure and language are different from the sentence in the same provision that does create a duty to appoint. "Under the related-statutes canon of statutory construction, statutes in the same chapter 'contain[ing] the same subject matter . . . must be considered in pari materia and construed together.'" *James v. Heinrich,* 2021 WI 58, ¶ 19, 397 Wis. 2d 517, 960 N.W.2d 350 (alteration in original) (citations omitted). Here, one sentence in Wis. Stat. § 15.61(1)(b)1. imposes a duty on the Commission to make an appointment *if there is a vacancy*, using active voice and including a deadline and consequences if the appointment is not made. That language is very different from the passive "shall be appointed by" language relied on by Defendants. The difference in language in the same subsection shows legislative intent not to impose a duty when there is no vacancy.

Third, Defendants read words into the provision that do not exist. Courts do not "read words into a statute;" they "interpret the words the legislature actually enacted into law." *State v. Fitzgerald*, 2019 WI 69, ¶ 30, 387 Wis. 2d 384, 929 N.W.2d 165. Defendants' interpretation runs afoul of that principle by requiring this Court to insert the words "even if there is no vacancy" into the sentence.

In short, when the statutes require the Commission to appoint a new administrator, they say so explicitly. Wisconsin Stat. § 15.61(1)(b)1. imposes a duty to appoint in the event of a vacancy, but not where there is a holdover after the expiration of a term.

2. Plaintiffs' interpretation of Wis. Stat. § 15.61(1)(b)1. is also supported by surrounding statutes.

Plaintiffs' interpretation of Wis. Stat. § 15.61(1)(b)1. is also supported by comparison to closely related statutes throughout the same chapter. *See Kalal*, 271 Wis. 2d 633, ¶ 46 (statutory language is interpreted in the context in which it is used, not in isolation but as part of a whole, and in relation to the language of surrounding or closely related statutes).

Wisconsin Stat. ch. 15 sets out the structure of the executive branch. It contains dozens of examples of the "shall be appointed by" phrasing to describe who appoints a particular official to a position, and for what term. For example, Wis. Stat. § 15.61(1)(b) says that "[t]he ethics 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." Wisconsin Stat. § 15.31 says that "[t]here is created a department of military affairs under the direction and supervision of the adjutant general who shall be appointed by the governor for a 5-year term." Section 15.137(5)(b) provides 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."

Despite the ubiquitousness of this phrasing in Wisconsin statutes, Defendants have identified no case in which this "shall be appointed by" language has been interpreted to create a duty to appoint at the expiration of a term, even where there is a holdover. Viewed in context and throughout the statutory chapter, the phrase "shall be appointed by" is merely descriptive: it simply explains who appoints a particular kind of appointee, and for what term.

3. Defendants' contrary statutory interpretation arguments are unpersuasive and premised on a misstatement of the Commission's position.

In contrast to Plaintiffs' reading, Defendants' interpretation of Wis. Stat. § 15.61(1)(b)1. finds no textual support in the statutes and relies on a strawman argument about the Commission's position. They begin with the premise that the question is whether the Commission has the *power* to appoint during a holdover, but that is not the issue in this case. The question is whether the Commission *must* make an appointment, and Defendants offer no support for their position on that question.

Defendants attempt to change the issue presented in the Complaint into whether the Commission has any power to make an appointment during a holdover (Doc. 22:15, 17), then make arguments about surplusage (Doc. 22:16) and absurdity (Doc. 22:16–17) based on that premise. But "plaintiffs are the masters of their complaints." *Daniel v. Armslist, LLC*, 2019 WI 47, ¶ 89, 386 Wis. 2d 449, 926 N.W.2d 710. Defendants' suggested issue is not the question that Plaintiff's complaint presents. Plaintiffs' complaint seeks a ruling on whether the Commission *must* appoint an administrator while there is a holdover and thus no vacancy. (Doc. 4 ¶ 20, Prayer for Relief, 1.d.) Defendants point to the statements of two individual Commissioners that they believe the Commission cannot make an appointment during a holdover. (Doc.

22:15.) These opinions are irrelevant to the legal issues presented by Plaintiffs, including the Commission as an agency, in this case.

On the legal question presented—whether the Commission *must* make an appointment during a holdover—Defendants fail to make a single statutory interpretation argument in support of their theory that the Commission has such a duty. (Doc. 22:15–19.) This is unsurprising, because the canons of statutory construction provide them no help.

Even though they've failed to establish that there is any duty to appoint during a holdover, Defendants fast-forward to an argument that this supposed duty is "mandatory." (Doc. 22:20–21.) Again relying on the phrase "shall be appointed by," they assert that the word "shall" suggests mandatory action. (Doc. 22:20.) However, whether "shall" in Wis. Stat. § 15.61(1)(b)1. is mandatory or directory is beside the point, because the phrase creates no duty to appoint when there is no vacancy.

B. Under *Prehn*, an appointing authority has an option, not a duty, to make an appointment during a holdover.

Defendants' reading relies heavily on *Prehn*, but they misread the case. Not only did *Prehn* not hold what they assert, it specifically recognized that, when there is a holdover, the appointing authority has an option, not a duty, to make a new appointment.

Prehn addressed the legal status of Frederick Prehn, an appointee to the Natural Resources Board, appointed by the Governor under Wis. Stat. § 15.07 and confirmed by the Senate. Prehn's term had ended on May 1, 2021, and he had held over since that time. *Prehn*, 402 Wis. 2d 539, ¶ 16. The Attorney General brought a quo warranto to remove Prehn, arguing that a vacancy arose at the expiration of his term and the Governor could appoint a provisional appointee. *Id.*

The supreme court held that, while Prehn held over, there was no vacancy in the office, and the Governor could not appoint a provisional appointee. *Id.* ¶ 24. Moreover, the holdover enjoyed the same for-cause protection he did before his term ended. *Id.* ¶ 41.

Defendants combine excerpts from *Prehn* to claim that the case "confirmed that when an incumbent's term expires, the Governor 'must nominate' a successor." (Doc. 22:18 (citing *Prehn* at ¶¶ 18, 23).) That is not what *Prehn* says. Neither the paragraphs Defendants cite nor any other passage of *Prehn* even hinted that the Governor has any sort of general duty to nominate appointees during a holdover.

In fact, *Prehn* held the opposite. At three points in the decision, the *Prehn* court described the Governor's ability to appoint someone during a holdover as a *choice*. The court stated that, during a holdover, "[b]ecause Prehn's term expired, the governor now has the prerogative to appoint a successor;" 402 Wis.

2d 539 ¶¶ 29, 23 (same); and that the "Governor *may* nominate a replacement to DNR Board members once their terms expire," *id.* ¶ 53 (emphasis added). Defendants' brief vaguely suggests that the Governor's "prerogative" amounts to a requirement to do something (Doc. 22:18), but "prerogative" means an "exclusive or special right, power, or privilege," not a duty. *Prerogative*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/prerogative (last visited Nov. 3, 2023).

Prehn's holding is particularly applicable because in reaching that conclusion, the court cited to Wis. Stat. § 15.07. 402 Wis. 2d 539 ¶¶ 23, 29. That provision features the same grammatical structure as the phrase in Wis. Stat. § 15.61(1)(b)1. that Defendants now rely on. Defendants hang their hats on the fact that the Administrator "shall be appointed by a majority of the members of the Commission . . . to serve for a 4-year term," Wis. Stat. § 15.61(1)(b)1., to assert that the Commission has a duty to appoint during a holdover. *Prehn* construed the same phrasing—members "shall be nominated by the governor . . . to serve for terms prescribed by law," *Id.* ¶ 23 (quoting Wis. Stat. § 15.07)—to mean that, during a holdover, the appointing authority has an option, not a duty, to appoint.

Defendants point out that the Governor has made appointments since *Prehn* when someone was holding over and there was no vacancy. (Doc. 22:19.) That's not the point. The question in this litigation is whether an appointing

authority is required to make an appointment if there is no vacancy, and *Prehn* says an authority is not.

Under *Prehn*, the Commission had no duty to appoint.

C. The cases Defendants rely on support Plaintiffs' view, not Defendants'.

Defendants' cited cases also do not further their argument. The cases discussing appointments and holdovers are legally distinguishable and support Plaintiffs' position, and other cases are not about appointments during holdovers or even appointments at all.

The three cases involving appointments during a holdover all support Plaintiffs' position here.

Defendants' first case (Doc. 22:21), *State ex rel. Johnson v. Nye*, 148 Wis. 659, 135 N.W. 126, 129 (1912), discussed the Governor's duty to appoint someone to a state commission under a statute that expressly required him to make an appointment by an annual deadline. The statute created an initial deadline for the Governor to make an appointment to the grain board—"On or before the first Monday in February, 1910, the Governor shall appoint three commissioners"—and then set an annual deadline for the Governor to make an appointment as each term expired—"In January, 1911, and annually thereafter there shall be appointed in the same manner one commissioner for the term of three years." *Id.* And even given those deadlines, the *Johnson* court

still found the statute to be only directory, not mandatory. *Id.* It would not have supported mandamus relief. The present case is even further afield from a mandatory duty; language like this is nowhere to be found in Wis. Stat. § 15.61(1)(b)1.

Defendants' second case, *Hanabusa v. Lingle*, 198 P.3d 604, 608–09 (Haw. 2008) (Doc. 22:21–22), involved an effort to compel an appointment where a statutory change arguably terminated the appointees' holdover status. The court and parties agreed that the governor had no duty to make an appointment if the appointees were lawfully holding over, but the court concluded that a change in the statutes meant that those appointees could not hold over beyond the end of their terms. *Id.* at 612–13 ("[The governor] contended that this statutory provision (the holdover provision) explicitly authorized the holdovers of the six regents whose terms expired on June 30, 2008. We disagree."). Here, in contrast, Defendants concede that Administrator Wolfe is lawfully holding over. Under *Hanabusa*'s reasoning, there is no duty to appoint in this situation.

Defendants' final case mentioning appointments and holdovers, *State ex rel. Hartman v. Thompson*, 627 So. 2d 966 (Ala. Civ. App. 1993), came from a jurisdiction applying the de facto holdover rule that the *Prehn* majority rejected. There, the appointing authority argued he had no duty to appoint during a holdover on the theory there was no vacancy in office. *Hartman*,

627 So. 2d at 968. The Alabama court of appeals explained that some jurisdictions follow a *de jure* rule for holdovers, under which there is no vacancy during a holdover—and thus no duty to appoint. *Id.* at 969. But the court chose instead to follow the *de facto* rule: under that rule, a holdover continues in the role, but there is still a vacancy in the office as a matter of law. *Id.* at 969–70. Because the court held there was a vacancy under that rule, the appointing authority had a duty to appoint. *Id.*

Hartman's reasoning explains why the case at bar is distinguishable from the outcome there. The *Prehn* court could have adopted the de facto rule, under which a legal vacancy exists while a holdover serves. But the court made a different choice for Wisconsin. *See Prehn*, 402 Wis. 2d 539, ¶¶ 64–66 (Dallet, J., dissenting) (advocating for a de facto holdover rule). The *Prehn* majority adopted the de jure rule, under which there is no vacancy during a holdover. *See id.*, ¶¶ 24, 28. There is no duty to appoint under that circumstance.

Defendants cite two other cases for the general proposition that employers or others may have a duty to select someone (Doc. 22:21), but neither discusses holdovers or any duty to appoint in the absence of a vacancy. *Kraus v. City of Waukesha Police & Fire Comm'n*, 2003 WI 51, ¶ 18, 261 Wis. 2d 485, 662 N.W.2d 294; *Bell v. Pers. Bd. of Wis.*, 259 Wis. 602, 604, 49 N.W.2d 889 (1951). The other cases they mention about a "duty" (Doc. 22:20–21) are not about appointments. *State v. Hoppmann*, 207 Wis. 481, 240 N.W. 884, 885

(1932); *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015); *Kuhnert v. Advanced Laser Machining, Inc.*, 2011 WI App 23, 331 Wis. 2d 625, 794 N.W.2d 805.

D. The ruling Plaintiffs seek does not create absurd results.

Lacking any statutory or case law support for their theory, Defendants move on to an absurd results argument, asserting that with a holdover rule, an administrator can have "life tenure." (Doc. 22:16.) They say that this was not a concern in *Prehn* because there, "the board member would be ousted if the Senate confirmed the governor's nominee." (Doc. 22:17 (citing *Prehn*, 402 Wis. 2d 539, ¶¶ 54–55).) This argument does not assist them, either.

Just as in *Prehn*, Administrator Wolfe is removable. Wisconsin Stat. § 15.61(1)(b)1. specifically includes a removal process that may be invoked for a confirmed appointee. And the practical effect of the holding in *Prehn*—that an appointing authority can continue a holdover by simply not appointing someone to a new term—was apparent to the court and parties when that case was presented. While sometimes, as in *Prehn*, the appointing authority will desire to select someone else to serve the new term, in other cases, it will allow

the holdover to continue to serve. Here, the appointing authority (the Commission) has opted to allow the holdover to continue to serve.[1]

E. Defendants' separation of powers argument forgets that the Senate has no constitutional power of advice and consent.

Defendants conclude with a separation of powers argument, that the Senate's confirmation power is being usurped. But no provision of Wisconsin's constitution creates an "advice and consent" role for the Senate, much less one that must be exercised every four years.

The Wisconsin Constitution vests power in three separate governmental branches: legislative power in the Legislature, judicial power in the Judiciary, and executive power in the Executive. Wis. Const. art. IV, § 1, art. V, § 1, art. VII, § 2. Executive power is "power to execute or enforce the law as enacted," *Service Employees International Union*, 2020 WI 67, ¶ 1, 393 Wis. 2d 38, 946 N.W.2d 35, and the ability to execute enacted law to address particular circumstances is *the* "essential attribute[]" of the Executive Branch. *Id.* ¶ 104. State administrative agencies (including the Commission) are "part of the executive branch" and carry out executive functions. *Id.* ¶ 60. Choosing an administrator is part of the Commission's executive responsibilities.

[1] The Legislature, an intervenor in *Prehn*, even advocated for this rule allowing holdovers to continue serving past the expiration of a term; it is unreasonable for its representatives to now complain about this rule just because there is a holdover they would prefer to remove.

Defendants argue that allowing a holdover without the Senate's ability to reconfirm or reject Administrator Wolfe intrudes on legislative power expressed in the Wisconsin Constitution. But they identify neither a specific constitutional role nor a source for that power. *See Friedrich v. Dane Cnty. Cir. Ct.*, 192 Wis. 2d 1, 16, 24, 531 N.W.2d 32 (1995) (requiring plaintiff to explain specific constitutional arena that is intruded upon). The Legislature has no constitutional role to appoint executive branch appointees, and, unlike the U.S. Constitution, the Wisconsin Constitution includes no advice and consent role for the Senate (or any legislative body).

The cases they cite do not support their proposition: *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 13, 391 Wis. 2d 497, 942 N.W.2d 900, says nothing about executive appointments or their review by the Legislature, and *State ex rel. Reynolds v. Smith*, 22 Wis. 2d 516, 519, 126 N.W.2d 215 (1964), simply states that when a statute provides for the Senate to review an appointment, that statute must be followed. *Reynolds* does not give the Legislature any more powers of review than the statutes afford, and here, as discussed above, the statutes are being fully complied with.

III. Defendants cannot meet the standard for mandamus relief.

Defendants' counterclaim seeks a writ of mandamus ordering the Commission to appoint an administrator to replace Administrator Wolfe. A writ of mandamus is appropriate to compel governmental officials to perform

their statutory duties. *State ex rel. Lewandowski v. Callaway*, 118 Wis. 2d 165, 171, 346 N.W.2d 457 (1984). But the duty to act must be based on "clear and unequivocal," and based on a "specific legal right that is free from substantial doubt." *Id.*; *Klein v. Wis. Dep't of Revenue*, 2020 WI App 56, ¶ 36, 394 Wis. 2d 66, 949 N.W.2d 608.

The Commission's duty to appoint an Administrator when there is a holdover is not clear, unequivocal, or plain. Rather, it is nonexistent. Defendants focus on the premise that "shall" can make something mandatory, but they fail to prove their underlying premise: that there is any duty in the first place. In contrast, the statutes are clear that Commission has the *option* of appointing a new administrator during a holdover. And when the question of whether to perform the governmental action at all is up to the relevant officials, like the Commission's choice in this case, mandamus is not proper. *State ex rel. Lewandowski*, 118 Wis. 2d at 171. Without a clear and unequivocal duty, free from any doubt, that the government has failed to perform, mandamus relief must be denied. *Lake Bluff Hous. Partners*, 540 N.W.2d at 189.

Further, mandamus is such a drastic remedy that it only may be used when no other plain, adequate, and complete remedy exists, including declaratory relief. *State ex rel. Ryan v. Pietrzykowski*, 42 Wis. 2d 457, 462,

167 N.W.2d 242 (1969). Defendants provide no explanation for why mandamus is necessary here.

IV. Plaintiffs are entitled to a permanent injunction.

Plaintiffs request permanent injunctive relief in addition to the sought-after declaratory relief. An injunction is a preventive order aimed at future conduct. *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). To obtain a permanent injunction, Plaintiffs must show (1) a "sufficient probability" that Defendants' future conduct will cause injury absent an injunction; (2) the injury is irreparable and not compensable in damages; and (3) on balance and based on competing interests, equity favors an injunction. *Id.*

Plaintiffs meet all three elements. First, an injunction is needed to prevent probable future attempts to remove Administrator Wolfe. The pleadings demonstrate that Defendants' positions on whether Administrator Wolfe lawfully holds her office and on the Legislature's proper role in filling the administrator position have shifted over the course of several months, even since they answered the Complaint. (*See* Docs. 4; 21.) Defendants' concessions on these issues do not bind their conduct. *See Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1030 (W.D. Wis. 2022). Without an injunction, there is no reason to believe that Defendants will discontinue their efforts to remove Administrator Wolfe.

Second, Plaintiffs' injury would be irreparable because no remedy would restore Administrator Wolfe's ability to serve the Commission and the public. As this Court stated, "money damages are neither appropriate nor ascertainable for the harm Plaintiffs claim." *Wis. Elections Comm'n v. Devin LeMahieu*, No. 23-CV-2428 (Oct. 27, 2023), Doc. 45.

Third, the balance of equities favors a permanent injunction. Administrator Wolfe, the Commission, local elections officials, and the public have shared interests in stability and certainty, goals that will serve effective elections administration in Wisconsin overall. Plaintiffs are entitled to permanent injunctive relief that preserves Administrator Wolfe's role as the lawful administrator and prevents future actions to remove her from having legal effect.

* * *

The Commission and Administrator Wolfe's position is a straightforward reading of the statutes and *Prehn*. Plaintiffs are entitled to a declaratory judgment on each of the issues identified in the Complaint's Prayer for Relief: (1) Administrator Wolfe is lawfully holding over and there is no vacancy; (2) the Commission has no duty to make an administrator appointment while Administrator Wolfe is holding over; (3) the Joint Committee on Legislative Organization has no power to appoint an interim administrator while Administrator Wolfe is holding over; (4) the Commission's June 27, 2023, vote

did not appoint Administrator Wolfe to a new term; and (5) the Senate cannot remove Administrator Wolfe where there is no appointment by the Commission.

Plaintiffs are also entitled to judgment rejecting the claims in Defendants' counterclaim and denying their request for mandamus relief. And this Court should issue a permanent injunction to ensure that its rulings are followed.

CONCLUSION

The Court should grant judgment in favor of Plaintiffs Wisconsin Elections Commission and Meagan Wolfe, and reject the mandamus and declaratory judgment claims in Defendants' counterclaim.

Dated this 6th day of November 2023.

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