STATE OF WISCONSIN
SUPREME COURT
NO. 2017AP2278

Kristi Koschkee, Amy Rosno, Christopher Martinson and Mary Carney,

Petitioners,

v.

Tony Evers; in his official capacity as Wisconsin Superintendent of Public Instruction and Wisconsin Department of Public Instruction,

Respondents.

Original Action

PETITIONERS' BRIEF AND APPENDIX

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INTRODUCTION

In 1848, the people of Wisconsin adopted a constitution containing a provision establishing the office of the Superintendent of Public Instruction ("Superintendent"). Wis. Const. art. X, § 1. Although the supervision of public instruction was "vested" in this Superintendent and such other officers as the legislature might direct, the Constitution made clear that the definition of "supervision" was reserved to the legislature. The provision that created the office of Superintendent also explained that the office's "powers" and "duties" would be "prescribed by law" at a future date. *Id.* Later that year, the Wisconsin legislature obliged, passing a law which, among other things, directed the Superintendent to "perform such . . . duties as the . . . governor of this state may direct." Laws of 1848 at 129. From the very beginning, then, it was understood that the Superintendent was subordinate to the legislative branch and could be made answerable (or "subordinate") to the head of the executive branch.

Over the years, the legislature has repeatedly modified the powers and duties of the Superintendent. One such modification is the subject of this lawsuit. The legislature recently enacted the Regulations from the Executive in Need of Scrutiny ("REINS") Act, invoking its right to redefine

anew the Superintendent's role and relationship with the executive branch. *See* 2017 Wis. Act 57. Specifically, the legislature directed all state agencies, when exercising their legislatively-delegated authority to promulgate administrative rules, to submit information about those rules first to the Department of Administration ("DOA"), an executive-branch agency, and then to the Chief Executive, the governor, for his or her approval. *See* Wis. Stat. § 227.135(2). Rulemaking may not proceed until approved by the Governor, and the final rule may not be submitted to the legislature or implemented without gubernatorial approval. This rule applies to the Department of Public Instruction ("DPI"), a state agency created by the legislature and headed by the Superintendent, § 15.37, and to the Superintendent himself, also an "agency" as statutorily defined. *See* § 227.01(1) ("'Agency' means a[n] . . . officer in the state government . . . .").

But DPI and the Superintendent do not consider themselves bound by these laws. Relying on this Court's decision in *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, these entities believe they are entitled to bypass executive branch review of their administrative rules. They contend that the legislature may not qualify whatever power it chooses to grant the Superintendent by deploying another officer or

executive department official to act as a check upon the Superintendent's exercise of that power. In other words, any power granted to the Superintendent must be exclusive and unlimited by any other person. Put simply, the Superintendent contends that he need not take the bitter with the sweet.

But Article X, Section 1 makes clear that the *only* powers the Superintendent has are those given by the legislature. Nowhere does it state that no other officer may be given any authority that limits that of the Superintendent. And even if the Superintendent has some non-specific "right" to supervise, rulemaking is something else: a delegated legislative power. *Martinez v. DILHR*, 165 Wis. 2d 687, 698, 478 N.W.2d 582 (1992) (an agency has no inherent constitutional authority to make rules). Thus, the legislature may impose whatever procedural safeguards it desires on the exercise of rulemaking authority by DPI and the Superintendent.

The Constitution's "framers did not provide that the [Superintendent] constitutes the fourth branch of our state government," unaccountable to either the legislature or the governor. *Coyne*, 368 Wis. 2d 444, ¶249 (Ziegler, J., dissenting). Petitioners therefore ask this Court to

preserve the separation of powers and definitively rule that DPI and the Superintendent must comply with the REINS Act.

STATEMENT OF THE ISSUE

Must the Department of Public Instruction and the Superintendent comply with the REINS Act?

STATEMENT ON ORAL ARGUMENT & PUBLICATION

This case involves important questions of state constitutional and statutory law. Consistent with its usual practice, this Court should hear oral argument in this case and publish its decision.

STATEMENT OF THE CASE

On August 9, 2017, the Governor signed into law 2017 Wisconsin Act 57, also known as the REINS Act. As the name of the Act suggests, the legislature designed the law to provide an added measure of control over executive-branch rulemaking. This dispute focuses on changes the REINS Act made to the early stages of the rulemaking process: the preparation of statements of scope, the submission of these statements to

the Department of Administration, and the requirement of gubernatorial approval before any further work on the rule may be performed.[1]

When a state agency wishes to promulgate a rule, it must first prepare a "statement of scope" setting forth certain basic information about the proposed rule and then send that statement of scope to the Legislative Reference Bureau ("LRB") for publication in the Wisconsin Administrative Register. Wis. Stat. § 227.135(1).

The REINS Act added an intermediate step to this process. Effective September 1, 2017, *see* 2017 Wis. Act. 57, § 37,

> [a]n agency that has prepared a statement of the scope of the proposed rule shall present the statement to the department of administration, which shall make a determination as to whether the agency has the explicit authority to promulgate the rule as proposed in the statement of scope and shall report the statement of scope and its determination to the governor who, in his or her discretion, may approve or reject the statement of scope. The agency may not send the statement to the legislative reference bureau for publication . . . until the governor issues a written notice of approval of the statement.

Wis. Stat. § 227.135(2). The same provision also halts the rulemaking process until the Department of Administration ("DOA") and the Governor have performed their tasks: "No state employee or official may perform any

[1] Certain of these changes built on changes made by an earlier enactment, 2011 Wisconsin Act 21.

activity in connection with the drafting of a proposed rule . . . until the governor . . . approve[s] the statement." *Id.*

Once the rule is complete, it may not go into effect without gubernatorial approval:

> After a proposed rule is in final draft form, the agency shall submit the proposed rule to the governor for approval. The governor, in his or her discretion, may approve or reject the proposed rule. If the governor approves a proposed rule, the governor shall provide the agency with a written notice of that approval. No proposed rule may be submitted to the legislature for review under s. 227.19(2) unless the governor has approved the proposed rule in writing.

Wis. Stat. § 227.185. In utilizing the governor as a check on agency rulemaking (promulgating standards with the force of law), the legislature sought to check rulemaking in a way that is similar to the gubernatorial check on legislation: the veto.

Shortly after the effective date of the REINS Act, the Department of Public Instruction – a state agency – sent statements of scope to LRB for publication without first presenting them to DOA or obtaining written gubernatorial approval.

For example, on September 18, 2017, LRB published a statement of scope created by DPI in the Wisconsin Administrative Register as SS 101-

17. Wis. Admin. Reg. No. 741A3 (Sept. 18, 2017).[2] On October 4, 2017, Petitioners' counsel sent an Open Records Request to DPI, *see* Wis. Stat. §§ 19.31-39, asking for any documents that would reflect if and when DPI sent Statement of Scope SS 101-17 to DOA.[3] DPI responded to counsel's Open Records request on November 3, 2017.[4] The response does not show a copy of Statement of Scope SS 101-17 being sent to the Department of Administration.

On October 9, 2017, LRB published three more statements of scope created by DPI in the Wisconsin Administrative Register as SS 108-17, SS 109-17, and SS 110-17. Wis. Admin. Reg. No. 742A2 (Oct. 9, 2017).[5] On October 30, 2017, Petitioners' counsel sent an Open Records Request – this time to DOA – asking for copies of these scope statements if sent to DOA by DPI and for copies of any other scope statements sent to DOA by DPI

[2] A true and correct copy of SS 101-17 as published in the Administrative Register is included in the Appendix as Exhibit A (P. App. 101-02). This exhibit, along with all exhibits referenced in this brief, are matters of public record. Consequently, Petitioners request this Court take judicial notice of these documents under Wis. Stat. § 902.01(2)(b)-(4). *See, e.g.*, *State v. Vesper*, 2018 WI App 31, ¶17, n.4, ___ Wis. 2d ___, 912 N.W.2d 418 ("We may take judicial notice of public records.").

[3] A true and correct copy of the Open Records Request is included in the Appendix as Exhibit E (P. App. 109-10).

[4] A true and correct copy of this response is included in the Appendix as Exhibit F (P. App. 111-21).

[5] True and correct copies of SS 108-17, SS 109-17 and SS 110-17 as published in the Administrative Register are included in the Appendix as Exhibits B (P. App. 103-04), C (P. App. 105-06), and D (P. App. 107-08), respectively.

after September 1, 2017 (the effective date of the REINS Act).[6] DOA responded on November 1, 2017 stating that it had not received SS 101-17, SS 108-17, SS 109-17, or SS 110-17 from DPI and had not received any other scope statements from DPI since September 1, 2017.[7]

Notably, in each of the above statements of scope DPI declared that "[p]ursuant to *Coyne v. Walker*, the Department of Public Instruction is not required to obtain the Governor's approval for the statement of scope for this rule," referencing this Court's 2016 decision in *Coyne v. Walker*, 368 Wis. 2d 444. DPI, in other words, did not view itself bound by the REINS Act.

Consequently, on November 20, 2017, Petitioners filed a petition to this Court to take jurisdiction of this dispute as an original action with the aim of stopping the illegal expenditure of taxpayer funds by DPI and obtaining a declaration that DPI must comply with all portions of the REINS Act.

The four statements of scope discussed above are the statements Petitioners referenced in their petition to this Court. As of this date, DPI

[6] A true and correct copy of the Open Records Request is included in the Appendix as Exhibit G (P. App. 122-23).
[7] A true and correct copy of this response is included in the Appendix as Exhibit H (P. App. 124).

has now either withdrawn or indicated an intent not to pursue rules under each of them. *See* Public Notice: Withdrawal of CR 17-069, Wis. Admin. Reg. No. 742A4 (Oct. 23, 2017);[8] Public Notice: Recision [sic] of SS 108-17, 110-17, 125-17, and 021-18, Wis. Admin. Reg. No. 747B (Mar. 26, 2018); Public Notice: Withdrawal of CR 18-009 and 18-012, Wis. Admin. Reg. No. 747B (Mar. 26, 2018).[9]

But DPI has since created at least two new statements of scope – SS 039-18 and SS 037-18 – which are similar in nature to two of the withdrawn statements.[10] *Compare* SS 039-18, Wis. Admin. Reg. No. 748A1 (April 2, 2018) ("Relating to: The Early College Credit Program and Changes to PI 40 as a result of 2017 Wisconsin Act 59"), *and* SS 037-18, Wis. Admin. Reg. No. 748A1 (April 2, 2018) ("Relating to: Restoring Part Time Open Enrollment Rules"), *with* SS 109-17 ("Relating to: Changes to PI 40 as a result of 2017 Wisconsin Act 59"), *and* SS 110-17 ("Related to: Restoring part time open enrollment rules"). And with respect to these statements, DPI has again proceeded in defiance of the REINS Act.

[8] A true and correct copy of the October 23, 2017 Public Notice as published in the Administrative Register is included in the Appendix as Exhibit I (P. App. 125).
[9] A true and correct copy of the March 26, 2018 Public Notice as published in the Administrative Register is included in the Appendix as Exhibit J (P. App. 126).
[10] True and correct copies of SS 039-18 and SS 037-18 as published in the Administrative Register are included in the Appendix as Exhibits K (P. App. 127-28) and L (P. App. 129-30), respectively.

This time, as a response to another Open Records request by Petitioners' counsel discloses, DPI did present the statements of scope to DOA.[11] But it has made clear that it does not regard itself bound by the REINS Act's requirement of gubernatorial approval before rulemaking can proceed or its requirement of gubernatorial approval of final rules. The March 27, 2018 email from DPI to DOA presenting the statements contained the following warning:

> Note that the Governor, the Secretary of the Department of Administration, and the State Superintendent of Public Instruction are each permanently enjoined from implementing provisions of Wis. Stat. ch. 227 that require approval of the Governor or the Department of Administration over the Superintendent's rulemaking activities. *Coyne v. Walker*, No. 11-CV-4573 (Wis. Cir. Ct. Dane County Oct. 30, 2012), *aff'd*, 2016 WI 38, 368 Wis. 2d 444. This injunction prohibits the Department of Administration from submitting the enclosed statement of scope to the Governor for approval or rejection under Wis. Stat. § 227.135(2). The determination as to whether the DPI has authority to promulgate the rule as proposed in the statement of scope may be submitted to the DPI for consideration.

(P.App. 134.) Less than a week later, LRB simply published SS 039-18 and SS 037-18 in the administrative register without gubernatorial

[11] A true and correct copy of the Open Records Request is included in the Appendix as Exhibit M (P. App. 131-32). A true and correct copy of the response is included in the Appendix as Exhibit N (P. App. 133-55).

approval. Wis. Admin. Reg. No. 748A1 (April 2, 2018). The REINS Act was not followed.

On April 13, 2018, this Court granted Petitioners' Petition and assumed jurisdiction over this original action.

STANDARD OF REVIEW

This case requires the interpretation of state constitutional and statutory law. In a typical case this Court reviews such issues de novo. *Black v. City of Milwaukee*, 2016 WI 47, ¶21, 369 Wis. 2d 272, 882 N.W.2d 333. Because this is an original action, this Court is reviewing all questions in the first instance.

ARGUMENT

Neither a legislature, nor a governor, nor a court, the administrative state has always lacked a true home in our tripartite system of state government. Because our framers never created a "fourth branch" of government, it is able to accomplish its work without damage to the system only when kept firmly in check by each branch of government: the legislature, by carefully defining administrative authority; the executive, by vigilantly supervising administrative action; and the judiciary, by steadfastly proclaiming when administrative action has gone too far.

In recent years this Court has not hesitated to act when administrative activity threatened to upset the constitutional balance because of insufficient regard for the *judicial* power. *See, e.g.*, *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ___ Wis. 2d. ___, ___ N.W.2d ___ (agency legal interpretations not entitled to judicial deference); *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384 (administrative board lacked power to discipline members of judicial branch).

This dispute is of a piece with those cases, this time featuring attempts by administrative entities to flout the *legislative* power, and this Court's intervention is again needed. Specifically, this case concerns the extent to which the legislature may qualify rulemaking authority it has granted to DPI and the Superintendent. Its resolution therefore hinges on a proper understanding of how administrative rulemaking, DPI, and the Superintendent each fit into the broader constitutional context. This brief will therefore first summarize fundamental principles relating to each of these concepts. It will then apply those principles to the facts of this case, showing that DPI and the Superintendent *are* subject to the legislative will, expressed in this dispute via the REINS Act.

I) THE LEGISLATURE MAY BOTH DELEGATE RULEMAKING AUTHORITY TO EXECUTIVE BRANCH ENTITIES AND QUALIFY THAT DELEGATION OF AUTHORITY

As at the federal level, Wisconsin government consists of three separate branches of government: the legislative branch, the executive branch, and the judicial branch. *E.g.*, *Gabler*, 376 Wis. 2d 147, ¶¶3, 11. The Wisconsin Constitution leaves no ambiguity as to where the great governmental powers reside: "[t]he legislative power shall be vested in a senate and assembly," Wis. Const. art. IV, § 1, "[t]he executive power shall be vested in a governor," Wis. Const. art. V, § 1, and "[t]he judicial power of this state shall be vested in a unified court system," Wis. Const. art. VII, § 2; *see also Gabler*, 376 Wis. 2d 147, ¶11.

In this scheme it is the legislature – the senate and assembly – that makes law:

> The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate – is a power which is vested by our Constitution in the Legislature, and may not be delegated.

State v. Whitman, 196 Wis. 472, 220 N.W. 929, 941 (1928). The Wisconsin Constitution's assignment of all legislative authority to just one branch of government is an "essential precaution in favor of liberty." THE

FEDERALIST NO. 47 (James Madison); *Gabler*, 376 Wis. 2d 147, ¶5. This is so because "a government with shared legislative and executive power could first 'enact tyrannical laws' then 'execute them in a tyrannical manner.'" *Gabler*, 376 Wis. 2d 147, ¶5 (quoting 1 Montesquieu, The Spirit of the Laws 151-52 (Oskar Piest et al. eds., Thomas Nugent trans., 1949) (1748)). Our state Constitution thus keeps the lawmakers separate from the law enforcers in order to safeguard the populace.

Nevertheless, this Court has acknowledged that the legislature may grant to administrative agencies "the power to make rules and effectively administer a given policy." *Gilbert v. Wis. Medical Examining Board*, 119 Wis. 2d 168, 184, 349 N.W.2d 68 (1984). But rulemaking – unlike, for instance, enforcement – remains a legislative function. *See* Wis. Stat. § 227.19; *Martinez*, 165 Wis. 2d at 697 (agency rulemaking power derived from authority delegated by legislature). The source of agencies' legislative powers is the legislature. *Martinez*, 165 Wis. 2d at 698 ("As a legislative creation, [an agency] has no inherent constitutional authority to make rules, and, furthermore, its rulemaking powers can be repealed by the legislature."). And because it is a legislative function, its delegation must be carefully cabined and controlled. *See Gabler*, 376 Wis. 2d 147, ¶31

(quoting *Barland v. Eau Claire Cty*, 216 Wis. 2d 560, 573, 575 N.W.2d 691 (1998) ("'[C]ore zones of authority are to be 'jealously guarded' by each branch of government.'").

Certain limitations on this delegation of legislative authority are constitutionally-imposed. The legislature must clearly define the scope of delegated authority and provide clear standards for its exercise. *See Whitman*, 220 N.W. at 941-43; *Martinez*, 165 Wis. 2d at 701 ("[I]t is incumbent on the legislature, pursuant to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making."). Others are exercises of the legislature prerogative to decide what it will permit agencies to do and how it will permit them to do it. *Whitman*, 220 N.W. at 942 ("[T]he Legislature may withdraw powers which have been granted, prescribe the procedure through which granted powers are to be exercised, and, if necessary, wipe out the agency entirely."); *see also Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 56, 158 N.W.2d 306 (1968) ("The very existence of the administrative agency . . . is dependent upon the will of the legislature; its . . . powers, duties and scope of authority are fixed and circumscribed by the legislature and subject to legislative change.").

Chapter 227 of the Wisconsin Statutes, the principal chapter setting forth the elaborate process agencies must follow to promulgate administrative rules, is an essential "procedural safeguard" established by the legislature to prevent "abuse of power by administrative agencies." *Schmidt*, 39 Wis. 2d at 58 & n.1 (quoting *Whitman*, 220 N.W. at 942). By forcing administrative agencies to comply with procedural requirements designed to provide notice to the public and lawmakers, elicit feedback from interested parties, and allow for legislative and executive oversight, Chapter 227 ensures that administrative agencies do not take advantage of the combination of executive and legislative authority to escape accountability and tyrannize the public.

Unfortunately, Wisconsin agencies sometimes exceed the bounds of their authority and ignore the requirements imposed upon them by the legislature. In such instances it is the duty of the judicial branch to remind agencies that they "may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).

A) DPI Possesses Rulemaking Authority Only to the Extent Authorized by Statute

From a constitutional perspective, DPI is no different than any other state agency. The legislature brought DPI into existence, appointing the

superintendent of public instruction to be the agency's head. *See* Wis. Stat. § 15.37 ("There is created a department of public instruction under the direction and supervision of the state superintendent of public instruction.").

Thus, whatever dispute there may be about the scope of the *Superintendent's* authority, as a legislatively-created agency DPI "must conform precisely to the statute which grants [it] power. *Whitman*, 220 N.W. at 942 (1928); *see, e.g.*, *Stockbridge Sch. Dist. v. Dep't of Pub. Instruction Sch. Dist. Boundary Appeal Bd.*, 202 Wis. 2d 214, 228, 550 N.W.2d 96 (1996) (rejecting concerns about the exercise of power by a board within DPI because "the legislature has . . . provided the Board with specific factors . . . it *must* consider" before taking the feared action) (emphasis added). Again, this Court has "long recognized that administrative agencies are creations of the legislature and that they can exercise only those powers granted by the legislature." *Martinez*, 165 Wis. 2d at 697. DPI is not exempt from this principle. It must comply with the REINS Act.

B) The Superintendent of Public Instruction Possesses Rulemaking Authority Only to the Extent Authorized by Statute

The analysis of the Superintendent's authority begins at a different point, but the result is the same. Article X, Section 1 of the Wisconsin Constitution states in full:

> The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law. The state superintendent shall be chosen by the qualified electors of the state at the same time and in the same manner as members of the supreme court, and shall hold office for 4 years from the succeeding first Monday in July. The term of office, time and manner of electing or appointing all other officers of supervision of public instruction shall be fixed by law.

Wis. Const. art. X, § 1.[12]

[12] At times this Court has explained that in interpreting the Wisconsin Constitution it will consider, in addition to the text of the relevant provisions, "the constitutional debates and the practices in existence at the time of the writing of the constitutional provision and the interpretation of the provision by the Legislature as manifested in the laws passed following its adoption," *Coyne v. Walker*, 368 Wis. 2d 444, ¶51 (lead opinion), an approach that has been criticized as inconsistent with rule of law principles. *See* Daniel R. Suhr, *Interpreting the Wisconsin Constitution*, 97 Marq. L. Rev. 93 (2013).

At other times, however, this Court has indicated that the approach is not required. *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶57, n.25, 320 Wis. 2d 275, 768 N.W.2d 868 ("In this case, we see little reason to extend our interpretation beyond the text."); *Coyne*, 368 Wis. 2d 444, ¶91, n.14 (Abrahamson, J., concurring) (collecting cases showing "differences in methodology of interpreting the Wisconsin constitution"); *id.*, ¶249, n.2 (Ziegler, J., dissenting) ("I would be willing to reexamine the methodology this court currently employs when interpreting constitutional text."). In Petitioners' view, none of the historical materials cited in this area in cases like *Coyne* or *Thompson v. Craney*, 199 Wis. 2d 674, 646 N.W.2d 123

Unlike DPI, the Superintendent does not depend for his existence on the legislature or on any other branch of government and thus maintains a degree of independence. But like administrative agencies, the Superintendent (as well as the "other officers" mentioned in Article X, Section 1) has no inherent authority to do anything – he possesses only those powers granted to him by statute. The Constitution grants no powers at all but rather says that the "powers" and "duties" of such officers "shall be prescribed by law." Wis. Const. art. X, § 1; *see also Fortney v. Sch. Dist. of W. Salem*, 108 Wis. 2d 167, 182, 321 N.W.2d 225 (1982) ("Article X, section 1 confers no more authority upon [public instruction] officers than that delineated by statute."). This rule of Wisconsin law follows inexorably from two other undisputed legal propositions.

First, Article X, Section 1 is not a provision that "incorporates an ancient common law office, possessing defined powers and duties, into the constitution. Public instruction and its governance had no long-standing common law history at the time the Wisconsin Constitution was enacted." *Fortney*, 108 Wis. 2d at 182. Thus, when the framers of the Wisconsin Constitution created the office of the Superintendent of Public Instruction,

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(1996), overcome the plain meaning of the text of Article X, Section 1 of the Wisconsin Constitution.

they were writing on a blank slate. Any powers granted to the Superintendent would need to be expressed in the state's founding charter. *See Id.*

Second, that document is unambiguous as to the powers it grants the Superintendent: none whatsoever. Pursuant to Article X, Section 1, the Superintendent's "qualifications, *powers*, *duties* and compensation *shall be prescribed by law*," that is, by the legislature. Wis. Const. art. X, § 1 (emphases added); *Fortney*, 108 Wis. 2d at 182.[13] The Superintendent possesses no inherent powers and can exercise only those powers given to him by the legislature. While the Superintendent will make much of the fact that the Constitution "vest[s]" in him the supervision of public instruction, that very grant establishes that the legislature defines what "supervision" entails.

There is nothing particularly remarkable about that *verb*, "vests," which most reasonably means in this context "[t]o put in possession of" or

[13] In certain contexts this Court has interpreted the phrase "prescribed by law" to include sources of law besides statutory law, such as common law. *See, e.g.*, *Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶¶24-30, 374 Wis. 2d 513, 893 N.W.2d 212. In other contexts—such as determining the powers of the Attorney General—this Court has interpreted the phrase to include only statutory law. *See State v. City of Oak Creek*, 2000 WI 9, ¶19, 232 Wis. 2d 612, 605 N.W.2d 526. But it is established that the phrase as used in Article X, Section 1 means statutory law. *Fortney*, 108 Wis. 2d at 182. This stands to reason, as "public instruction and its governance had no long-standing common law history at the time the Wisconsin Constitution was enacted." *Id.*

"to give an immediate fixed right of present or future enjoyment." Noah Webster, *An American Dictionary of the English Language*, 1109 (Chauncey A. Goodrich ed., New York, Harper & Brothers, 1848). What is more important is the *noun*: what is being vested? For the three branches of government, the noun is "power": the legislative power, the executive power, and the judicial power. *See* Wis. Const. art. IV, § 1; art. V, §1; art. VII, § 2.

But unlike those provisions, Article X, § 1 does *not* use the word "power" in its vesting clause. Instead, it vests "supervision" and qualifies what powers that entails as those "prescribed by law." Wis. Const. art. X, § 1. Thus, whatever the "supervision of public instruction" is – an office, a position, or a guide to future legislatures as to the Superintendent's purpose – it is not a power.

> Article X, Section 1 vests the SPI with the supervision of public instruction and states that the SPI's 'powers . . . shall be prescribed by law,' not that its '*other* powers' shall be prescribed by law. Thus while it is true that Article X vests the SPI with '[t]he supervision of public instruction,' [the legislation under review] cannot be unconstitutional because the 'supervision of public instruction' is some independent *power* of the SPI.

Coyne v. Walker, 368 Wis. 2d 444, ¶245 (Ziegler, J., dissenting) (citations omitted)); *id.*, ¶143 (Prosser, J., concurring) ("[W]hile the supervision of

public instruction was vested in the state superintendent of public instruction, the constitution did not say, "The *power* to supervise public instruction is vested in the state superintendent of public instruction.").

Since statehood, the legislature has, consistent with the discussion above, given meaning to the "supervision of public instruction" by assigning to the Superintendent a variety of powers and duties. *See, e.g.*, Wis. Stat. § 115.28 ("General duties") (prescribing what the "[t]he state superintendent *shall*" do) (emphasis added); Wis. Stat. § 115.29 ("General powers") (prescribing what "[t]he state superintendent *may*" do) (emphasis added). And in many cases, the legislature has authorized the Superintendent to act via rulemaking. *E.g.*, Wis. Stat. § 115.31(8) ("The state superintendent shall promulgate rules to implement and administer this section.").

But, as is the case with administrative agencies, this power to make rules – to share in the creation of legally-binding prescriptions – comes from the legislature, and may be taken away by the legislature. *See* Wis. Const. art. X, § 1. It follows that the procedure for exercising this power may also be defined by the legislature. *Cf. Whitman*, 220 N.W. at 942. To rule otherwise would violate Article IV, Section 1 of the Wisconsin

Constitution, which vests the legislative power in the legislature alone, and thus collapse the separation of powers essential to our system of government.

Even if supervision implies the existence of "some inherent authority," *Coyne*, 368 Wis. 2d 444, ¶152 (Prosser, J., concurring), or "non-specific" executive authority to supervise, *id.*, ¶188 (Roggensack, C.J., concurring), it does not follow that this authority includes rulemaking or that all executive authority related to public instruction must be placed with or be subordinate to the Superintendent. As noted above, rule-making is a delegated legislative function. Nothing in the Constitution requires that the Superintendent – or anyone else – be given the power to create edicts that have the force of law. One can certainly supervise public education without making law. *See Id.*, ¶226 (Roggensack, C.J., dissenting) ("[S]imply because the legislature creates an opportunity or an obligation for the Superintendent, it does not follow that those opportunities and obligations are of constitutional magnitude."). As such, whatever core power of "supervision," the Superintendent has cannot include something he need not be permitted to do. Without more, the most reasonable interpretation is that the legislature can qualify or limit what it need not grant at all. *Cf.*

Mayo v. Wis. Injured Patients & Families Compensation Fund, 2018 WI 78, ¶64, __ Wis. 2d __, __ N.W.2d __ (if the legislature can eliminate a cause of action, it can limit it instead).

C) Participation in Rulemaking Is Not Limited to "Other Officers" Created for the Purpose of Supervising Public Instruction

Nor does Article X restrict the exercise of authority over public instruction to the Superintendent or "other officers" created pursuant to Article X. Even if "other officers" refers only to those created for the purpose of supervising public instruction, nothing in Article X, Section 1 suggests, much less compels the conclusion, that no other executive officer can have any authority touching upon public instruction.

Thompson v. Craney, 199 Wis. 2d 674, 646 N.W.2d 123 (1996), is not to the contrary. Like this case, *Craney* was an original action involving the constitutionality of legislation touching on the authority of the Superintendent. *Id.* at 678. Specifically, the legislature had created a new Department of Education ("DOE"), a Secretary of Education appointed by the governor to head the DOE, and an Education Commission designed to supervise the DOE. *Id.* The legislation made the Superintendent the Chair of the Education Commission, but eight other voting members were also

part of the Commission, none of whom were chosen by the Superintendent. *Id.* at 678-79. Additionally, some of the Superintendent's prior powers and duties were transferred to the Secretary of Education and the Education Commission. *Id.* at 677, 679.

This Court ruled that these changes violated the Wisconsin Constitution because "the 'other officers' mentioned in the provision were intended to be subordinate to the state Superintendent of Public Instruction," yet the legislation "[gave] the former powers of the elected state Superintendent of Public Instruction to appointed 'other officers' at the state level who are not subordinate to the superintendent." *Id.* at 677-78, 698; *see also Id.* at 693 ("[T]he 'other officers' mentioned in the amendment are solely local officials, subordinate to the SPI.").

Craney therefore stands for the limited proposition that where the legislature creates officers whose purpose relates to public education – such as the Secretary of Education in that case – those officers must be subordinate to the Superintendent. That conclusion may well be wrong. See Section IV, *infra*. But where, as here, the law simply authorizes an entity or official that is *not* created for the purpose of supervising public instruction to exercise generally applicable authority in some way that

touches upon the Superintendent or public education, *Craney* is not applicable.

The creation of the Superintendent and provision for the creation of other officers of public instruction does not imply that no other official or entity may check or influence their authority. There are numerous state agencies unconnected to DPI and the Superintendent that exercise authority in the realm of public instruction yet do not report to the Superintendent. For example, the Department of Safety and Professional Services writes the rules relating to school building codes, Wis. Admin. Code § SPS 378; the Department of Workforce Development writes rules relating to students working at their school during school hours, Wis. Admin. Code § DWD 270.19; and the Department of Transportation writes rules relating to school buses and the public transportation of students, Wis. Admin. Code § Trans 300. In the first law passed following the creation of the Superintendent, the Governor was authorized to "direct" the Superintendent to perform duties. Laws of 1848 at 129. The governor may also veto an appropriation of money or grant of authority to the Superintendent – or even alter that authority with a line item veto. Over the past 170 years, the legislature has created a State Board of Education, local school boards and

districts and local superintendents and an educational review board, among other entities, that could all act in the realm of public instruction without the leave of and even contrary to the wishes of the Superintendent. *See* pp. 48-49, *infra.*

Reading Article X, Section 1 to require such entities to be subordinate to the Superintendent would result in a huge consolidation of power in the hands of the Superintendent and would hamstring the legislature in its ability to delegate authority across state agencies, all in contravention of the Constitution's grant of authority to the legislature to define the Superintendent's powers. Such an absurd result is to be avoided. *Cf. State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory language is interpreted . . . reasonably, to avoid absurd or unreasonable results.").

This is so, incidentally, whether or not one concludes that "other officers" in whom the supervision of public instruction is "vested" must be officers *created* for that purpose. In *Coyne*, Justices Gableman, Abrahamson, and Walsh Bradley concluded that they must be. 368 Wis. 2d 444, ¶45 (lead opinion); *id.*, ¶¶110-13 (Abrahamson, J., concurring, joined by Walsh Bradley, J.). But the remainder of the Court (a majority) believed

that some authority may be given to officers other than the Superintendent or other Article X officers. *Id.*, ¶¶162-164 (Prosser, J., concurring); *id.*, ¶¶217-18 (Roggensack, C.J., dissenting); *id.*, ¶¶246-48 (Ziegler, J., dissenting).

II) COYNE V. WALKER DOES NOT PROVIDE A RULE OF LAW FOR THIS CASE AND SHOULD BE OVERRULED

A) *Coyne v. Walker* Does Not Provide a Rule of Law for this Case

In *Coyne v. Walker*, this Court split in several different directions. Four justices – Justice Gableman, Justice Abrahamson, Justice A.W. Bradley, and Justice Prosser – agreed that the legislation at issue was unconstitutional, but could not agree on why. *See Id.*, ¶79 (lead opinion); *id.*, ¶80 (Abrahamson, J., concurring, joined by A.W. Bradley, J.); *id.*, ¶170 (Prosser, J., concurring). The remaining three justices – Chief Justice Roggensack, Justice Ziegler, and Justice R.G. Bradley – all agreed that the legislation was permissible. *See Id.*, ¶174 (Roggensack, C.J., dissenting, joined by Ziegler and R.G. Bradley, JJ.); *Id.*, ¶235 (Ziegler, J., dissenting, joined by R.G. Bradley, J.). Because *Coyne* shares so many similarities with this case, it is instructive to review the reasoning set forth in these various opinions before examining how this case must be decided.

Justice Gableman authored *Coyne*'s lead opinion, though no other justices joined it. In Justice Gableman's view, Article X, Section 1 granted the legislature the authority both to give powers and duties to the Superintendent and to take them away. *Id.*, ¶70 (lead opinion). Justice Gableman also concluded that the rulemaking authority of the Superintendent and DPI came from the legislature, not the Constitution. *Id.*, ¶¶36-37 (lead opinion). Thus, the Superintendent need not be given the authority to make rules at all. Justice Gableman even agreed that the legislature could involve the Governor and the Secretary of Administration in the Superintendent's rulemaking process, such as by requiring the Superintendent to submit draft rules to the Governor for (non-binding) review. *Id.*, ¶69 (lead opinion).

But Justice Gableman believed that powers given by the legislature to the Superintendent became "supervisory power[s]" if "without [them] the [Superintendent] could not carry out his legislatively-mandated duties of supervision of public instruction." *Id.*, ¶32 (lead opinion). In other words, while the legislature was the master of deciding which powers to grant the superintendent, it is not the master of how they are to be exercised – even with respect to delegated legislative authority such as rulemaking.

He thought rulemaking somehow became supervision because the legislature had required the Superintendent to make rules. *Id.*, ¶37 (lead opinion). For him, Article X, Section 1's vesting of the supervision of public instruction in the Superintendent and other officers means that even delegated power to do some act that bears on public education must in all cases be made subordinate to the Superintendent. *Id.*, ¶63 (lead opinion). And because Act 21 allowed the governor and the Secretary of Administration – individuals who were not Article X officers, in Justice Gableman's view – to oversee the rulemaking process, it unconstitutionally vested the supervision of public instruction in them. *Id.*, ¶¶49-40, 65-66 (lead opinion).

Justice Prosser similarly concluded Act 21 was unconstitutional but wrote separately in part to register disagreement with *Craney*'s holding and to state that his "position [did] not depend on the superintendent of public instruction having superiority over all other officers who are or may be vested with supervision of public instruction." *Id.*, ¶¶157-59 (Prosser, J., concurring).

Unlike Justice Gableman, Justice Prosser believed that "a constitutional office must possess some inherent authority to proceed to

fulfill its responsibilities" and that "[f]or the superintendent of public instruction, the constitution provides the initial authority to develop rules because the constitution states the superintendent's mission." *Id.*, ¶152 (Prosser, J., concurring) (emphasis removed). While he did not explain what superior authority could be given to other officers or what inherent authority must be retained by the Superintendent, he believed the REINS Act went too far. For Justice Prosser, Act 21 was ultimately unconstitutional because "it would give a governor authority to obstruct the work of an independent constitutional officer to such an extent that the officer would be unable to discharge the responsibilities that the legislature has given him." *Id.*, ¶155 (Prosser, J., concurring). He seemed particularly concerned that there were no standards governing the Governor's approval or disapproval of rules and, he thought, no way to override his decision. *Id.*, ¶133 (Prosser, J., concurring).[14]

Justice Abrahamson, joined by Justice A.W. Bradley, agreed that Act 21 was unconstitutional but concurred in the mandate for two principal

[14] As to the latter point, Justice Prosser seems to have been mistaken. If the Governor blocked the Superintendent from exercising his legislatively delegated authority to create a rule, the legislature could pass a law (and override any veto) codifying the rule. Thus, in requiring gubernatorial approval of a final rule, the legislature mirrored the executive constraints on its own lawmaking, ensuring that administrative agencies could not exercise greater legislative authority than its own.

reasons. *Id.*, ¶80 (Abrahamson, J., concurring). First, she disagreed with the lead opinion's "unnecessary and overly broad assertion" that the legislature could give and take away the Superintendent's powers and duties, including rulemaking, preferring to "reserve judgment on that issue." *Id.*, ¶¶87-89 (Abrahamson, J., concurring). She did, however, indicate agreement with Justice Prosser that the Superintendent possessed certain inherent powers. *Id.*, ¶¶90-91, 109 (Abrahamson, J., concurring).

Second, unlike Justice Gableman and Justice Prosser, Justice Abrahamson believed *Craney* decided the case: as in *Craney*, Justice Abrahamson argued, the legislature had passed an unconstitutional law that "g[a]ve 'equal or superior authority' over the supervision of public instruction to officers other than those inferior to the superintendent." *Id.*, ¶84 (Abrahamson, J., concurring) (quoting *Craney*, 199 Wis. 2d at 699).

Chief Justice Roggensack, joined by Justice Ziegler and Justice R.G. Bradley, concluded that Act 21 was not unconstitutional. Chief Justice Roggensack principally argued that any rulemaking authority exercised by DPI and the Superintendent derived from statute and that *Craney* did not apply because the governor and the Secretary of Administration were not Article X officers. *Id.*, ¶¶173-74, 218, 227 (Roggensack, C.J., dissenting).

The Chief Justice did not believe that authority over public instruction is exclusive to the Superintendent or other officers under Article X. She concluded instead that the Constitution confers only "non-specific, executive authority" upon the Superintendent and distinguished that from legislatively-created powers of supervision that may be conferred on any other officer or entity. *Id.*, ¶¶188-89 (Roggensack, C.J., dissenting).

Justice Ziegler, finally, authored a separate dissent joined by Justice R.G. Bradley, stressing that the legislature's control over the Superintendent's powers and duties governed the case. *Id.*, ¶242 (Ziegler, J., dissenting). Notably, Justice Ziegler pointed out the "numerous significant areas of agreement" between the lead opinion and the three dissenting justices: that the legislature freely controlled the powers of the Superintendent, that the Superintendent's "ability to participate in the rulemaking process derives from statute, not the Wisconsin Constitution," and that *Craney* did not apply. *Id.*, ¶¶236, 239 (Ziegler, J., dissenting).

The outcome in *Coyne* is based on a foundation of differing premises, none of which has garnered the support of a majority of the Court. Three justices (Abrahamson, Walsh Bradley, Prosser) believed that the Superintendent has some inherent authority to make rules (although it is

not clear how far Justice Prosser believed this authority extends). But four justices (Roggensack, Ziegler, Gableman, Grassl Bradley) ruled he does not. Three justices (Abrahamson, Walsh Bradley, Gableman) believe that authority over public instruction must be given to officers created under Article X and that the Superintendent must be in control of the exercise of that power. One justice (Prosser) made clear that he was not endorsing that position (and thought *Craney* was wrongly decided on that point), and three justices (Roggensack, Ziegler, Grassl Bradley) expressly disagreed.

Where this Court has failed to reach consensus on important constitutional questions, it has often taken up subsequent cases presenting similar issues to create a precedential result. *See, e.g.*, *State v. Lynch*, 2016 WI 66, 371 Wis. 2d 1, 885 N.W.2d 89 (considering whether to overrule a line of cases after failing to reach agreement on that question a few years before); *State v. Mitchell*, 2018 WI 84, ___ Wis. 2d ___, ___ N.W.2d ___ (examining whether "implied consent" justified a warrantless blood draw of an unconscious individual after failing to reach agreement on that question the year before). This is such a case. *Coyne* does not clearly determine the outcome in this dispute because a different act of the legislature is at issue and because no single rule of law from *Coyne* may easily be applied to it.

B) *Coyne v. Walker* Should Be Overruled

If it is necessary to do so, the conditions for overturning precedent are plainly met here. In the first place, *stare decisis* ought not to apply at all because there is no "decision" to "let stand" – no opinion of the Court, other than Chief Justice Roggensack's dissent, garnered the support of more than two justices. And even if *stare decisis* applies, this Court should not hesitate to abandon *Coyne.*

Some of the important factors considered by this Court when deciding whether to overturn a case are "whether the prior decision is unsound in principle," "whether it is unworkable in practice," "whether the prior case was correctly decided," and "whether it has produced a settled body of law." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶99, 264 Wis. 2d 60, 665 N.W.2d 257 (citing *State v. Outagamie County*, 2001 WI 78, ¶30, 244 Wis. 2d 613, 628 N.W.2d 376 (lead opinion)).

All of these factors militate in favor of overturning *Coyne* in favor of issuing a precedential decision. *Coyne* is "unsound in principle" and "unworkable in practice" because the lead opinion and concurrences violate the plain language of the Constitution, because no single principle of law

justifies the result, and because there is no rule of law to be applied in future cases. For the same reasons, the case was not "correctly decided" – indeed, there is no "decision" to assess for that purpose. And because *Coyne* is a recent decision with no majority, it has not produced a settled body of law.

Finally, the fact that *Coyne* involved interpretation of the state Constitution rather than state statutes suggests that this Court's intervention is needed, because the legislature cannot easily account for the Court's lack of a decision. *Cf. Kimble v. Marvel Entm't, LLC*, ___ U.S. ___, 135 S. Ct. 2401, 2409 (2015) ("*[S]tare decisis* carries enhanced force when a decision . . . interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.").

For all of these reasons, Court should take a fresh look at the issues presented in *Coyne*. As will be shown below, the united dissenting justices in *Coyne* got it right.

III) DPI AND THE SUPERINTENDENT MUST COMPLY WITH THE REINS ACT

The ultimate question here is whether the DPI and the Superintendent must comply with the REINS Act. If so, they must present

each statement of scope to the Department of Administration for a determination as to whether they have the explicit authority to promulgate the rule proposed in the statement, and must refrain from sending a statement of scope to the Legislative Reference Bureau for publication until the Governor receives both the statement and the Department of Administration's authority determination and issues a written notice of approval of the statement. Until this gubernatorial approval is obtained, they may not work on the proposed rule.

A) DPI Must Comply with the Statutory Requirement that it Present Each Statement of Scope to the Department of Administration for a Determination as to Whether DPI Has the Explicit Authority to Promulgate the Rule Proposed in the Statement

The various principles discussed in Part I, *supra* – that DPI is an agency whose rulemaking authority comes from the legislature, that the Superintendent's powers, including rulemaking, come from the legislature, and that the reference to "other officers" in Article X, Section I is only a modest limitation on the legislature's ability to legislate in the area of supervision of public instruction – control the outcome of this case.

First, nothing in Article X, Section 1 of the Wisconsin Constitution allows DPI or the Superintendent to escape their statutory obligation to

present statements of scope to DOA for review, even if DOA must be subordinate to the Superintendent.

According to the lead opinion in *Coyne*:

> [A ruling of unconstitutionality as to Act 21's requirements] does not mean the Governor and the Secretary of Administration cannot be involved in the rule-drafting process at all; it simply means that they cannot be given the authority to halt the process. The Legislature can require whatever rulemaking steps it wants as long as the SPI and DPI are able to make the final decision on the contents of a proposed rule and submit that proposed rule to the Legislature at the end of the process. . . . [T]he Legislature could require the SPI to submit the draft rule to the Governor and allow the Governor to send the rule back to the SPI with requested changes (provided the SPI is not required to incorporate them). The Legislature could further require the SPI to hold additional hearings on the Governor's proposed changes, to prepare a detailed report on the Governor's proposed changes and a report on why the SPI does not agree with them, to have a personal consultation with the Governor, or to resubmit the rule to the Governor to get his written opinion on it and submit that opinion to the Legislature along with the draft rule.

Coyne, 368 Wis. 2d 444, ¶ 69 (lead opinion). In other words, combined with the dissenting justices, who believed the legislature held plenary authority over the rulemaking authority of the Superintendent, the reasoning of a majority of the justices in *Coyne* permits the legislature to require DPI to submit its statements of scope to DOA for review. Directing the Superintendent merely to obtain input from a state agency on its

authority to promulgate a rule cannot be considered unconstitutional even under a strong view of the Superintendent's authority. The Superintendent and DPI are subject to this portion of the REINS Act.

As noted above, it is unclear how the *Coyne* court would have resolved the question of whether a determination that a proposed rule is beyond DPI's authority precludes the rulemaking. Justice Prosser may well have concluded that such a well-defined limitation on the Superintendent's rulemaking was constitutional. Notably, while the Superintendent has now submitted scope statements to the DOA, he says he will only "consider" the DOA's determination and is not required to obtain gubernatorial approval even if a denial is based upon a determination that no authority exists.

B) DPI Must Comply with the Statutory Requirement that it Refrain from Sending a Statement of Scope to the Legislative Reference Bureau for Publication or Performing Further Work on the Rule until the Governor Issues a Written Notice of Approval of the Statement

The legislature's ability to define the extent of DPI's rulemaking authority and prescribe the powers of the Superintendent also resolves the question of whether these entities are required to comply with the REINS Act rule enjoining work on administrative rules pending gubernatorial approval. Three justices in *Coyne* agreed with this reasoning. *See Coyne*,

368 Wis. 2d 444, ¶¶217-22 (Roggensack, C.J., dissenting). The concerns of the justices who disagreed with this principle, while understandable, do not render the REINS Act unconstitutional.

First, Justice Gableman believed that because the legislature had ordered the Superintendent to engage in rulemaking, rulemaking not only became supervision but could not be checked by any officer other than the Superintendent. *Id.*, ¶4 (lead opinion).

But Justice Gableman's own reasoning shows why this is not so. As noted above, there is no reason to believe that whatever non-specific executive authority might be constitutionally conferred, that this constitutional authority includes delegation of the power to make law. But even if one could say that the legislature may have once defined the supervision of public instruction to require rulemaking by the Superintendent without the involvement of or oversight from any other person or entity, it has now altered that definition. In the REINS Act it "prescribed" that this rulemaking is subject to the governor's review – that the Superintendent's "supervisory power" in this regard is no more than the power to make rules approved by the governor. "[R]ulemaking is not some

unchangeable Platonic Form." *Coyne*, 368 Wis. 2d 444, ¶243 (Ziegler, J., dissenting).

Justice Prosser demonstrated concern that "a constitutional office must possess some inherent authority to proceed to fulfill its responsibilities." *Id.*, ¶152 (Prosser, J., concurring) (emphasis removed). But he did not provide any authority for that statement. Nor is it apparent why it must be true. The same article creating the Superintendent explained that these "responsibilities" ("duties") were yet to be defined *by the legislature*. Wis. Const. art. X, § 1. It cannot have escaped the notice of the framers of the state Constitution that, by giving the legislature both the legislative power and the authority to define the "powers" and "duties" of the Superintendent, significant legislative action was going to be required before the Superintendent was able to accomplish any tasks. Though a debate can be had about its wisdom, there is nothing inherently illogical about this scheme.

What has just been said also answers Justice Prosser's objection that it would be unconstitutional to "give a governor authority to obstruct the work of an independent constitutional officer to such an extent that the officer would be unable to discharge the responsibilities that the legislature

has given him." *Id.*, ¶155 (Prosser, J., concurring). As Justice Prosser's statement acknowledges, it is the legislature that assigns the Superintendent his or her responsibilities. If the legislature defines the responsibilities in such a way as to require gubernatorial approval, then the governor would be aiding, not obstructing, the fulfillment of these tasks.

Conferring a task or measure of authority on an office does not mean that it must be unlimited or cannot be checked by someone else. Legislative power is "vested" in the legislature but is still subject to the executive veto. No one supposes there is any inconsistency between vestment and veto. Executive power is "vested" in the governor, yet the legislature may cabin and control it in a number of ways. The mere "vesting" of "supervision" in an officer cannot do the work that the lead opinion and Justice Prosser's concurrence in *Coyne* need it to do. It does not require that no other office may exercise any authority or control over the matter to be supervised.

A further example of this principle is presented by judicial review of decisions made by the Superintendent in the exercise of his authority over the supervision of public instruction. *See, e.g.*, Wis. Stat. §§ 227.40, 227.52. Courts may invalidate those decisions in accordance with

legislative (and other) limitations on its exercise. But no one would claim that these courts are unconstitutionally supervising public instruction in violation of Article X, because it is accepted that to "supervise" public instruction means to "take actions specified by the legislature *subject to judicial review*." It is also undisputed that the governor can currently block the Superintendent's exercise of authority by vetoing the appropriation of funds or the conferral of authority. Similarly, the legislature has permissibly redefined the scope of the Superintendent's authority, explaining that such review now comes not just from the judicial branch, but also the head of the executive branch.

Finally, Justice Abrahamson and Justice A.W. Bradley, apart from voicing objections already addressed above, wrote that *Craney* controls this issue. But all that *Craney* held was that, pursuant to Article X, Section 1, "other officers" of supervision of public instruction – individuals who are "solely local officials, subordinate to the [Superintendent]" – must be just that – subordinate to the Superintendent. *Craney*, 199 Wis. 2d at 693. The governor is not some local official whose office exists for the purpose of aiding the Superintendent in the supervision of public instruction. He wields powers that affect *many* areas of state law, not merely public

education. He need not be subordinate to the Superintendent any more than this Court must be, or the Department of Transportation must be, *see* Wis. Admin. Code § Trans 300 (rules relating to school buses and the public transportation of students), or the secretary of state, treasurer, and attorney general must be, *see* Wis. Const. art. X, § 7 (explaining that the "secretary of state, treasurer, and attorney general, shall constitute a board of commissioners for the sale of the school and university lands and for the investment of the funds arising therefrom"), or the legislature itself must be.

Additional, persuasive evidence that no constitutional concern inheres in providing the governor with the authority to weigh in on matters affecting public education is that the legislature *has authorized such action before*. *See Coyne*, 368 Wis. 2d 444, ¶232, n.11 (quoting Laws of 1848, at 129) (explaining that early legislation assigned the Superintendent "such other duties as the legislature or *governor of this state may direct*") (emphasis added). If the REINS Act is unconstitutional, then so was an initial law passed following adoption of Article X, Section 1 of the Wisconsin Constitution. *See also* pp. 48-49, *infra* (explaining other ways in

which authority respecting public instruction has been given to those not subordinate to the Superintendent).

Ultimately, nothing in the Wisconsin Constitution prohibits the legislature from prescribing procedural mechanisms for the Superintendent's exercise of delegated rulemaking authority. The REINS Act is not unconstitutional. DPI and the Superintendent must halt work on any proposed rules and refrain from sending scope statements to the LRB until the Governor approves the scope statement.[15]

IV) IF THE REINS ACT IS UNCONSTITUTIONAL UNDER *THOMPSON V. CRANEY*, THIS COURT SHOULD OVERRULE THAT CASE

So far this brief has proceeded on the assumption that *Craney*'s rule preserving the Superintendent's superiority over "other officers" applies only to officers of supervision of public instruction, not officers like the governor. Four justices in *Coyne*, as mentioned above, also took this position. *See Coyne*, 368 Wis. 2d 444, ¶¶39-40 (lead opinion); *Id.*, ¶¶227-228 (Roggensack, C.J., dissenting) (joined by Ziegler and R.G. Bradley, JJ.).

[15] And, if this Court overrules *Coyne*, then DPI and the Superintendent must also submit any final rule to the governor for approval under Wis. Stat. § 227.185 before they submit it to the legislature for review under § 227.19(2).

But if this Court concludes that *Craney* prevents the legislature from granting to the governor and certain of his agencies executive oversight of rules promulgated by DPI and the Superintendent, then *Craney* must be overruled for three reasons.

First, such a rule would violate Article X, Section 1 of the Wisconsin Constitution, which simply provides that "[t]he supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law." Wis. Const. art. X, § 1. Read literally and fairly, the provision does not say anything about whether the Superintendent must be superior to "other officers." Instead, it grants full authority to the legislature to devise a system of supervision of public instruction as it sees fit. *See, e.g.*, *Coyne*, 368 Wis. 2d 444, ¶¶168-69 (Prosser, J., concurring). *Craney* is thus "unsound in principle," an important indicator that *stare decisis* is inappropriate. *Johnson Controls, Inc.*, 264 Wis. 2d 60, ¶99.

Second, and relatedly, this interpretation of *Craney* violates the rule of law stated in this Court's decision in *Fortney*, namely that "Article X, section 1 confers no more authority upon [public instruction] officers than

that delineated by statute." *Fortney*, 108 Wis. 2d at 182. It is true that the *Craney* Court attempted to reconcile its holding with *Fortney*, suggesting that the legislature could give and take away power but that it could not give power in a way that made the Superintendent subordinate to "other officers." *Craney*, 199 Wis. 2d at 699-700. But this approach is untenable, leading to inexplicably bizarre results.

For example, under this interpretation of *Craney*, even though the legislature could take away the Superintendent's rulemaking power entirely, it could not give the Superintendent a qualified version of this power – rulemaking subject to veto by the governor. Under this interpretation of *Craney*, even though the legislature itself could overrule the Superintendent's decisions with respect to individual rules, it could not delegate to another entity the ability to aid the legislature in making those decisions. And under this interpretation of *Craney*, even though the legislature need not grant the Superintendent authority over any particular issues or crises at all, it could not do so if the Superintendent were asked to share authority with another agency or officer. *Craney* is thus "unworkable in practice," another important indicator that *stare decisis* is inappropriate. *Johnson Controls, Inc.*, 264 Wis. 2d 60, ¶99

Finally, reading *Craney* to invalidate the REINS Act with respect to the Superintendent is not consistent with the longstanding historical interpretation of Article X, Section 1, and would cast into doubt the validity of numerous agency activities, further demonstrating that such a reading is "unworkable in practice."

For example, in 1915 the legislature created a State Board of Education, which managed and allocated the finances of the state's public educational activities. Laws of 1915, ch. 497. Today, the Superintendent has that power. In 1848, the legislature gave town superintendents, not the Superintendent, the exclusive power to license school teachers. Laws of 1848, 226. Between 1862 and 1868, county and town supervisors shared licensing certification. Laws of 1862, ch. 176; Laws of 1863, ch. 102; Laws of 1868, ch. 169. Seventy-three years later, in 1939, the legislature gave this duty to the Superintendent. Laws of 1939, ch. 53. None of those people were subordinate to the Superintendent.

Today, the SPI is not the sole officer who can promulgate rules relating to public instruction. As discussed above, agencies like the Department of Safety and Professional Services, the Department of Workforce Development, and the Department of Transportation all

promulgate rules that relate to public instruction. *See* p. 26, *supra*. Indeed, as Chief Justice Roggensack pointed out in *Coyne*, the legislature at one time conferred some statewide educational authority upon an "educational approval board," which was empowered to act independently of the Superintendent. 368 Wis. 2d 444, ¶201 (Roggensack, C.J., dissenting); *see* Wis. Stat. §§ 15.03, 15.357 (1967).

Moreover, the legislature often reserves certain responsibilities to local superintendents and school boards. The Superintendent cannot countermand what these "other officers" do. He may not interfere with hiring, textbook selection, curriculum, school administration, etc. except in discrete circumstances where the legislature has so directed. *See Coyne*, 368 Wis. 2d 444, ¶162 ("The framers understood th[at] . . . '[o]ther officers' would run the public schools in Green Bay, in Milwaukee, in Prairie du Chien, in Madison. . . . In the governance and operation of local schools, the superintendent was not 'superior.'") (Prosser, J., concurring).

Indeed, as noted above, the Superintendent does not even act free from interference within the executive branch. The Governor proposes – and may veto – his budget. The Governor may sign into law legislation that the Superintendent opposes and veto legislation that he has proposed or

supports. The Governor may veto any grant of rulemaking authority to the Superintendent. If he can do that without constitutional injury, the REINS Act cannot be unconstitutional.

None of this is consistent with the role the framers of our state Constitution established in Article X. If the Court concludes that *Craney* bars the REINS Act, it must overrule that case.

CONCLUSION

The REINS Act restructured executive branch rulemaking so that all proposed rules pass across the Executive's desk. This is well within the legislature's authority, as it need not grant rulemaking powers to executive agencies and entities at all. Nor does Article X, Section 1 of the Wisconsin Constitution grant the Superintendent some exemption from this law, as by the Constitution's terms the legislature prescribes the extent of the Superintendent's power.

This Court should therefore prevent the further illegal expenditure of funds by respondents by (1) declaring that respondents must comply with all portions of the REINS Act and (2) issuing an injunction enforcing that declaration.

Dated this 10th day of August, 2018.

Respectfully submitted,
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 10,659 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: 8/10/2018

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CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, and appendix, which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: 8/10/2018

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STATE OF WISCONSIN
SUPREME COURT

Case No. 2017AP2278

KRISTI KOSCHKEE, AMY ROSNO, CHRISTOPHER MARTINSON, and MARY CARNEY

Petitioners,

v.

ANTHONY EVERS, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, and the WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION

Respondents.

ORIGINAL ACTION

RESPONDENTS' BRIEF AND APPENDIX

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION

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INTRODUCTION

The Petitioners misrepresent the REINS Act, 2017 Wis. Act 57. The REINS Act modified the administrative rulemaking process in two limited ways: 1) agencies must submit scope statements outlining proposed rules to the Department of Administration (DOA) for review of statutory authority; and 2) agencies must hold a preliminary public comment and hearings period on proposed rules. There is no dispute between the parties that the Superintendent of Public Instruction (SPI) and the Department of Public Instruction (DPI) are complying with both requirements.

The REINS Act did not modify prior law requiring agencies to wait for gubernatorial approval before working on proposed rules and prior to finalizing those rules. This requirement, codified in Wis. Stat. §§ 227.135(2) and 227.185, was created by 2011 Wis. Act 21 (Act 21). In *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, this Court determined Act 21 is unconstitutional as applied to the SPI, including the requirement that the SPI and DPI wait for gubernatorial approval of proposed rules.

The Petitioners are asking this Court to reverse itself and, in effect, declare Act 21 constitutional. In doing so, the Petitioners ask this Court to overrule both *Coyne v. Walker* and *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996), as well as the constitutional analysis on which those cases rely. The doctrine of stare decisis compels this Court to stand by its

decisions, because the Petitioners fail to identify any change in law, fact, precedent, or other special justification to overturn these cases.

STATEMENT OF THE ISSUES

1. Must the Department of Public Instruction and the Superintendent comply with the REINS Act?

STATEMENT ON ORAL ARGUMENT & PUBLICATION

The importance of this case merits both oral argument and the publication of the court's opinion.

STATEMENT OF THE CASE

This case is an original action seeking declaratory relief from the Court. On November 20, 2017, the Petitioners filed with this Court a Petition to Supreme Court to Take Jurisdiction of an Original Action (Petition). Petitioners seek a declaratory judgment that Respondents SPI Tony Evers and DPI, are required to comply with provisions of the REINS Act, 2017 Wis. Act 57.

Applicable to this original action, the REINS Act requires agencies proposing a rule to submit a scope statement in advance to the Department of Administration (DOA) and to hold a preliminary public hearing and comment period on the statement of scope upon request of either cochairperson of the legislature's Joint Committee for Review of Administrative Rules (JCRAR). *Id.*

The Petitioners additionally seek a declaratory judgment that the SPI and DPI are required to comply with provisions of 2011 Wis. Act 21 (Act 21) that require agencies to obtain gubernatorial approval before publishing a scope statement or performing any work on a proposed rule. This Court held those provisions to be unconstitutional in *Coyne*, 2016 WI 38.

Shortly after the Petition was filed with this court, a dispute between the Respondents and the Department of Justice arose regarding who would represent the Respondents in this action. The Respondents disagreed with the Department of Justice regarding the Respondents' legal position based on this Court's decision in *Coyne*, and the Department's ability to represent Respondents in light of these disagreements. *Koschkee v. Evers*, 2018 WI 82, ¶¶ 4-6, 913 N.W.2d 878. This Court *sua sponte* raised the issue of whether the governor is a necessary party. *Id*., ¶ 6. On June 27, 2018, this Court issued an order resolving these two issues. It determined that Respondents could be represented by counsel of their own choosing, and further that the governor is not a necessary party. *Id*., ¶ 26.

In making its ruling that the governor is not a necessary party, the Court explained that "[t]his case raises the question of whether the DPI must submit a scope statement to the governor in the first instance" and will not "affect the governor's responsibilities" under Wis. Stat. § 227.135(2). *Id*., ¶ 20. The Court further elaborated that this case does not raise the question of what the governor does with a scope statement once submitted. *Id*.

ARGUMENT

I. THE SPI AND DPI ARE COMPLYING WITH THE REINS ACT.

a. The REINS Act did not create or modify the requirement under Wis. Stat. §§ 227.135(2) or 227.185 for agencies to obtain gubernatorial approval of scope statements and proposed rules.

The Petitioners contend the only issue presented in this matter is whether the SPI and DPI (collectively "SPI") must comply with the REINS Act. Pet. Br. at 36. However, the Petitioners continuously misrepresent what the REINS Act actually entails. Specifically, the Petitioners claim the SPI is not complying with two primary requirements of Wis. Stat. § 227.135(2): 1) the requirement to submit a scope statement to the Department of Administration (DOA); and 2) the requirement to wait for gubernatorial approval before publishing the scope statement or performing any work on the proposed rule. *See* Pet. Br. at 6-11.

However, the requirement to wait for gubernatorial approval is *not* part of the REINS Act. 2017 Wis. Act 57. The requirement to wait for gubernatorial approval was created by Act 21, and has not since been modified in any material way by the REINS Act or otherwise. *See* 2011 Wis. Act 21; 2017 Wis. Act 57.

To illustrate, the pre-REINS Act language of Wis. Stat. § 227.135(2) requiring agencies to wait for gubernatorial approval before publishing a scope statement reads as follows:

> … The agency may not send the statement to the legislative reference bureau for publication under sub. (3) until the governor issues a written notice of approval of the statement. …

Wis. Stat. § 227.135(2) (2015-16). After the passage of the REINS Act, Wis. Stat. § 227.135(2) states:

> … The agency may not send the statement to the legislative reference bureau for publication under sub. (3) until the governor issues a written notice of approval of the statement. …

Wis. Stat. § 227.135(2) (2017-18). The two versions are, of course, identical. In spite of this, the Petitioners claim falsely that the gubernatorial approval of scope statements is a unique creation or component of the REINS Act. Pet. Br. at 4-5.

Similarly, the pre-REINS Act language of Wis. Stat. § 227.135(2) requiring agencies to wait for gubernatorial approval before performing work on a rule states:

> … No state employee or official may perform any activity in connection with the drafting of a proposed rule except for an activity necessary to prepare the statement of the scope of the proposed rule until the governor and the individual or body with policy−making powers over the subject matter of the proposed rule approve the statement. …

Wis. Stat. § 227.135(2) (2015-16). After the passage of the REINS Act, Wis. Stat. § 227.135(2) states:

> … No state employee or official may perform any activity in connection with the drafting of a proposed rule, except for an activity necessary to prepare the statement of the scope of the proposed rule until the governor and the individual or body

> with policy−making powers over the subject matter of the proposed rule approve the statement. …

Wis. Stat. § 227.135(2) (2017-18) (emphasis added). An eagle-eyed observer will note, the REINS Act added a single comma between the words "rule" and "except." 2017 Wis. Act 57, § 3.

Again, the requirement to wait for gubernatorial approval is *not* part of the REINS Act. The requirement to wait is, in fact, a creation of Act 21. *See* 2011 Wis. Act 21, §§ 4, 32. The Dane County Circuit Court, Court of Appeals, and this Court interpreted this exact language to be unconstitutional as applied to the SPI. *Coyne*, 2016 WI 38. Apparently, for the Petitioners, a single comma is enough to nullify the interpretation of a statute by the entire judicial branch, such that reconsideration of the same language in Wis. Stat. § 227.135(2) is necessary.

Furthermore, the pre-REINS Act language of Wis. Stat. § 227.185 required agencies to wait for gubernatorial approval of a final rule draft before submission to the legislature:

> After a proposed rule is in final draft form, the agency shall submit the proposed rule to the governor for approval. The governor, in his or her discretion, may approve or reject the proposed rule. If the governor approves a proposed rule, the governor shall provide the agency with a written notice of that approval. No proposed rule may be submitted to the legislature for review under s. 227.19 (2) unless the governor has approved the proposed rule in writing.

Wis. Stat. § 227.185 (2015-16). After the passage of the REINS Act, Wis. Stat. § 227.185 states:

> After a proposed rule is in final draft form, the agency shall submit the proposed rule to the governor for approval. The governor, in his or her discretion, may approve or reject the proposed rule. If the governor approves a proposed rule, the governor shall provide the agency with a written notice of that approval. No proposed rule may be submitted to the legislature for review under s. 227.19 (2) unless the governor has approved the proposed rule in writing. The agency shall notify the joint committee for review of administrative rules whenever it submits a proposed rule for approval under this section.

Wis. Stat. § 227.185 (2017-18) (emphasis added); *See also* 2017 Wis. Act 57, § 21. Here, the REINS Act adds a notification provision that has absolutely no effect on the gubernatorial approval created by Act 21.

The Petitioners know that the REINS Act did not change any of the provisions of Wis. Stat. §§ 227.135(2) or 227.185 that this Court found to be unconstitutional in *Coyne*. They repeatedly misrepresent this fact to the Court to create the illusion of a novel question of law applicable to a "different act of the legislature." Pet. Br. at 34. The reality is that the REINS Act made limited changes to the rulemaking process, and that the SPI is complying fully with those changes.

b. The REINS Act created the requirement that agencies submit scope statements to the DOA for review and hold preliminary public hearing and comment periods upon request.

The REINS Act amended Wis. Stat. § 227.135(2) to require agencies to submit scope statements to the DOA. 2017 Wis. Act 57, § 3. The DOA then determines if there is legal authority to draft the rule as described by the scope statement. *Id*.

In this action, the SPI has not challenged its obligation to submit statements of scope to the DOA. The SPI does not identify any constitutional infirmity with the DOA performing an analysis of the legal authority of a proposed rule. The Legislative Council performs this same analysis and has done so since 1986 under Wis. Stat. § 227.15(2)(a). *See also* 1985 Wis. Act 182, § 26 ("The legislative council staff shall, within 20 working days following receipt of a proposed rule, … [r]eview the statutory authority under which the agency intends to promulgate the proposed rule."). Consistent with *Coyne*, this requirement does not give "the Governor the ability to supplant the policy choices of the SPI," and ensures "the SPI and DPI are able to make the final decision on the contents of a proposed rule and submit that proposed rule to the Legislature at the end of the process." *Coyne*, 2016 WI 38, ¶¶ 68-69.

The REINS Act also created Wis. Stat. § 227.136, which states that an agency that prepares a scope statement must hold a preliminary public hearing and comment period on the statement of scope upon request by either cochairperson of the JCRAR. 2017 Wis. Act 57, § 5. As with the submission of scope statements to the DOA, the SPI does not question the constitutionality or validity of this provision.

As the Petitioners correctly assert, these provisions of the REINS Act are distinguishable from the provisions of Act 21 held unconstitutional in *Coyne*, because these provisions direct the SPI "merely to obtain input from

a state agency on its authority to promulgate a rule…". Pet. Br. at 39. Unlike Act 21, this review does not delegate to any entity the unchecked, discretionary authority to prohibit the SPI from promulgating rules. Therefore, submitting scope statements to the DOA and preliminary public hearing comment periods are consistent with *Coyne*.

c. There is no dispute that the SPI is submitting scope statements to the DOA and holding preliminary public hearing and comment periods.

All scope statements that have been prepared by the SPI since the effective date of the REINS Act have been submitted to the DOA pursuant to Wis. Stat. § 227.135(2) or else legally nullified. Pet. Br. at 8-9. All scope statements referenced by the Petitioners as violating the REINS Act have been rescinded. *Id*. Furthermore, the SPI has held preliminary public hearing and comment periods when requested. The Petitioners concede that the SPI is in compliance with what the REINS Act actually requires. Pet. Br. 9.

However, the Petitioners falsely assert the SPI is not complying with the REINS Act. As the basis for this assertion, the Petitioners state that the SPI is not waiting for gubernatorial approval of scope statements under Wis. Stat. § 227.135(2), or gubernatorial approval of final rule drafts under Wis. Stat. § 227.185. Pet. Br. at 9-10. Again, these provisions are *not* part of the REINS Act, but are instead the exact provisions of Act 21 held unconstitutional by this Court. *Coyne*, 2016 WI 38. If the SPI were to proceed as requested by the Petitioners, the SPI would be in violation of the

permanent injunction upheld by this Court in *Coyne* prohibiting the SPI, as well as the governor, from adhering to these provisions. *Id*.

II. THIS COURT SHOULD UPHOLD COYNE UNDER THE DOCTRINE OF STARE DECISIS

There has never been a dispute between the parties regarding the application of the REINS Act. The only dispute between the parties is whether this Court should cast aside its decision in *Coyne* and reconsider whether Act 21 is constitutional as applied to the SPI. To be clear, this is not simply a request to overrule precedent as applied to a new set of facts or discrete question of law. Rather, the Petitioners are asking this Court to reexamine the same facts, legislative and constitutional history, legal arguments and rationale presented to and considered by this Court in *Coyne*. Pet. Br. at 39. In doing so, the Petitioners fail to identify any compelling reason or special justification as to why this Court should reverse its own decision.

a. This Court determined Act 21 is unconstitutional as applied to the SPI.

The majority of justices in *Coyne* established a clear rule of law: Act 21 is unconstitutional as applied to the SPI. " … Act 21 is void as applied to the SPI and his subordinates." *Coyne*, 2016 WI 38, ¶ 4. "… 2011 Wis. Act 21, which altered the process of administrative rulemaking, is unconstitutional as applied to the Superintendent of Public Instruction and the Department of Public Instruction." *Id*. at ¶ 80 (Abrahamson, J.,

concurring, joined by Walsh Bradley, J.). "In my view, the challenged sections of Act 21 are as unnecessary as they are unconstitutional." *Id*. at ¶ 170 (Prosser, J., concurring).

This Court unambiguously determined the provisions of Act 21 requiring the SPI to obtain gubernatorial approval during the rulemaking process are unconstitutional. In spite of this, the Petitioners claim *Coyne* does not provide a rule of law while simultaneously asking this Court to overrule *Coyne* to vacate the rule of law prohibiting the application of Act 21 to the SPI. Pet. Br. at 35. For this Court to overrule *Coyne*, the Petitioners must show more than their dissatisfaction with its result.

b. *Coyne* should be upheld under the doctrine of stare decisis.

"This court follows the doctrine of stare decisis scrupulously because of our abiding respect for the rule of law." *State v. Luedtke*, 2015 WI 42, ¶40, 363 Wis.2d 1, 863 N.W.2d 592 (citing *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis.2d 60, 665 N.W.2d 257). The doctrine of stare decisis is necessary to further "fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case." *Johnson Controls, Inc.*, 2003 WI 108, ¶95. "We need finality in our litigation." *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

"[A]ny departure from the doctrine of stare decisis demands special justification." *Johnson Controls, Inc*., 2003 WI 108, ¶ 96 (citation omitted).

"Failing to abide by stare decisis raises serious concerns as to whether the court is implementing principles ... founded in the law rather than in the proclivities of individuals. *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 42, 281 Wis. 2d 300, 697 N.W.2d 417 (citations omitted). "The decision to overturn a prior case must not be undertaken merely because the composition of the court has changed." *Johnson Controls, Inc.*, 2003 WI 108, ¶ 95.

Where this Court has previously interpreted the constitutionality of a statute, "the party challenging that interpretation must establish that [the Court's] prior interpretation was 'objectively wrong.'" *State v. Breitzman*, 2017 WI 100, ¶ 5, n.4, 378 Wis. 2d 431, 904 N.W.2d 93 (quoting *Romanshek*, 2005 WI 67, ¶ 45). Whether this Court "disagrees with its rationale" is an insufficient basis to overrule its previous interpretation. *Johnson Controls, Inc.*, 2003 WI 108, ¶ 93.

The burden is therefore on the Petitioners to show special justification to reverse this Court's interpretation of Wis. Stat. §§ 227.135(2) and 227.185, and Wis. Const. art. X, § 1, in *Coyne*. *See Breitzman*, 2017 WI 100, ¶5, n.4. This court considers the following five factors when determining whether to overrule prior case law: (1) changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and consistency in the

law; (4) the prior decision is unsound in principle; and (5) the prior decision is unworkable in practice. *Luedtke*, 2015 WI 42, ¶ 40.

The Petitioners fail to provide any justification for this Court to overturn *Coyne*, let alone the "special justification" necessary to overcome stare decisis. This failure is understandable, because a consideration of the relevant factors when determining whether to overrule prior case law demonstrates this court must uphold *Coyne*.

i. The Legislature has not modified the provisions of Act 21 found unconstitutional by this Court in any material way.

In *Coyne*, this Court declared Act 21 unconstitutional, and subsequent changes to Wis. Stat. ch. 227 by the REINS Act have done nothing to undermine this decision. *See* Part I, *supra*. For purposes of illustration, consider the relevant developments in the law that provided special justification to overcome stare decisis in *Johnson Controls, Inc.*, 2003 WI 108. In that case, this Court overturned *City of Edgerton v. General Casualty Co. of Wisconsin*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994). Of the many problems with *Edgerton*, the *Johnson Controls* court noted: the *Edgerton* decision relied upon a treatise's definition of "damages" which had subsequently been changed; the decision ignored a large body of law on the nature of damages; it relied upon federal court decisions which were later overturned; and a subsequent decision by the Court "effectively obliterated

its intellectual foundation." *Johnson Controls, Inc.*, 2003 WI 108, ¶¶ 55-60, 71.

In this case, the Petitioners fail to identify a single change or development in the law that affects this Court's decision in *Coyne*. The unchecked power for the governor to effectively "veto" the rulemaking process under Act 21 remains unaltered by the REINS Act. Wis. Stat. § 227.135(2); *See also*, Wis. Stat. § 990.001(7) ("A revised statute is to be understood in the same sense as the original unless the change in language indicates a different meaning so clearly as to preclude judicial construction."). Similarly, the REINS Act did not affect the governor's ability to "veto" proposed rules when presented in final draft form. Wis. Stat. § 227.185.

As a result, the REINS Act did nothing to alleviate the constitutional infirmities of Act 21 identified by this Court in *Coyne*, even though the Court provided a legislative roadmap for doing so. The REINS Act does nothing to provide a "mechanism for the SPI and DPI to proceed with rulemaking in the face of withheld approval" as suggested by Justice Gableman. *Coyne*, 2016 WI 38, ¶ 71. The REINS Act does not protect the SPI's ability to "set standards" and "bring uniformity to Wisconsin's public education system" to allay the concerns of Justices Abrahamson and Bradley. *Id*., ¶ 88. The REINS Act does not now "provide specific grounds upon which the governor

may choose not to approve a proposed rule," or otherwise restrain the governor's "unlimited discretion" as stated by Justice Prosser. *Id*., ¶ 136.

In short, the legislature has thus far declined to tailor the problematic provisions of Act 21 to this Court's constitutional interpretation. In modifying Wis. Stat. §§ 227.135(2) and 227.185 without altering the provisions of Act 21, the legislature effectively declined to alleviate the constitutional infirmities identified in *Coyne*. *See State v. Olson*, 175 Wis. 2d 628, 641, 498 N.W.2d 661 (1993) ("Legislative silence with regard to new court-made decisions indicates legislative acquiescence in those decisions") (citations omitted); *Cf., Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶¶ 11-12, 383 Wis. 2d 1, 914 N.W.2d 678 (Court overturned prior decision finding cap on medical malpractice noneconomic damages unconstitutional, in part because "the legislature undertook substantial investigative efforts to assure that any future legislation in regard to a cap would be constitutionally appropriate").

Therefore, the REINS Act provides no basis to overturn *Coyne*, the Court's rationale for finding Act 21 unconstitutional remains unaltered, and the legislature has expressed no concern or intent that the provisions of Act 21 should apply to the SPI. Consequently, the first factor under the doctrine of stare decisis demonstrates that *Coyne* should not be reversed.

ii. There are no new facts that would require this Court to evaluate Act 21 differently.

The SPI is in full compliance with the REINS Act. This is undisputed, except to the extent the Petitioners misrepresent what the REINS Act entails. Pet. Br. 8-11. The SPI is also in full compliance with the injunction upheld by this Court in *Coyne,* prohibiting the application of Act 21 to the SPI, the DOA, and the governor. 2016 WI 38, ¶ 1. The Petitioners have not alleged a single fact indicating this Court's decision in *Coyne* has created any inconsistency, difficulty, dispute, or any other factual basis constituting "special justification" to reverse its decision.

Perhaps the only fact that would have the potential to alter the outcome of *Coyne* is that two justices in the majority of *Coyne* have since left this Court. However, this fact weighs heavily against overturning *Coyne*, as "[n]o change in the law is justified by a change in the membership of the court." *Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 2006 WI 91, ¶ 32, 293 Wis. 2d 38, 717 N.W.2d 216.

iii. *Coyne* is sound in principle.

In *Coyne*, this Court settled the question as to whether the provisions of Act 21 are constitutional as applied to the SPI. *Coyne,* 2016 WI 38. In arguing the principle set forth by the case is unsound, the Petitioners' accurately summarize the extent of their argument – the "dissenting justices in *Coyne* got it right." Pet. Br. at 36. On its face, this argument fails to provide a "compelling reason" that would require this Court to overturn its decision. *See State v. Lynch*, 2016 WI 66, ¶¶ 208-209, 371 Wis. 2d 1, 885 N.W.2d 89

(Ziegler, J., dissenting) ("*Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent.* … [I]t is not alone sufficient that we would decide a case differently now than we did then.") (citing *Kimble v. Marvel Entm't, LLC*, 576 U.S. ——, 135 S.Ct. 2401, 2409, 192 L.Ed.2d 463 (2015) (emphasis in original)).

Setting aside the burden on the Petitioners to show "special justification" to overturn *Coyne*, this Court correctly decided that case in any event. The *Coyne* decision correctly identifies the constitutional infirmities that result from vesting the power to supervise public instruction in the governor, rather than the SPI as required under Wis. Const. art. X, § 1.

1. The supervision of public instruction necessarily involves rulemaking, regardless of whether rulemaking is a constitutional power.

In *Coyne*, this Court determined rulemaking is a necessary component of the SPI's supervision of public instruction:

> Because rulemaking is the only means by which the SPI and the DPI can currently perform most of their legislatively-mandated duties of supervision of public instruction, rulemaking is a supervisory power that the DPI and SPI must use to supervise public instruction.

Coyne, 2016 WI 38., ¶ 33. "[R]ulemaking is part of the 'supervision of public instruction' which Article X, Section 1 vests in the superintendent." *Id.*, ¶ 85 (Bradley, J., concurring). "It is self-evident that standards for schools

throughout Wisconsin could not be set without the power to make rules." *Id*., ¶ 150 (Prosser, J., concurring).

Without administrative rulemaking, the SPI could not carry out his or her constitutional duties to supervise the public education system. In Wis. Stat. ch. 42, which governs libraries, and Wis. Stat. chs. 115 through 121, which govern public instruction, the legislature has explicitly directed the SPI to engage in rulemaking in more than 70 instances.[1] For example, the SPI is required to engage in rulemaking to: set teaching licensing standards, Wis. Stat. § 115.28(7); establish the process to revoke teaching licenses, Wis. Stat. § 115.31(8); evaluate the effectiveness of teachers, Wis. Stat. § 115.413(3)(a); establish high school graduation standards, Wis. Stat. § 118.33(2); and implement and administer school district standards, Wis. Stat. § 121.02(5).

Though the Petitioners continue to assert the SPI's ability to make rules is not part of the SPI's supervisory power and deny the SPI has any supervisory power at all, this Court has settled this question in *Coyne:*

[1] *See* Wis. Stat. §§ 43.09(2); 43.11(3)(e); 43.24(1)(b); 43.24(2)(n); 43.70(3); 115.28(3m)(b); 115.28(5); 115.28(7)(a) and (c); 115.28(7)(e)2; 115.28(7)(h); 115.28(7m), 115.28(14)(a) and (b); 115.28(17)(a)-(c); 115.28(31); 115.28(59)(d); 115.29(4)(b); 115.31(8); 115.345(8); 115.36(3)(a)5; 115.366(1) and(2); 115.383(3)(c); 115.405(3); 115.415(3)(a); 115.42(4); 115.43(c); 115.435(3); 115.445(3); 115.745(3); 115.7915(10); 115.817(5)(b)3; 115.88(1m)(b);115.92(3); 115.955(7); 115.99; 118.045(3); 118.075(2)(f); 118.13(3)(a)2; 118.134(2) and (4)(a); 118.153(7); 118.19(3)(a), (4m), and (11); 118.20(7); 118.30(2)(b)2 and (3)(b); 118.33(2) and (4)(a); 118.35(2); 118.38(2)(bm); 118.42(4); 118.43(6m); 118.43(8)(b); 118.44(6)(e); 118.50(8); 118.51(d)1; 118.55(9); 118.60(11)(a); 119.23(11)(a); 120.13(19); 120.14(4); 120.18(3); 121.02(1)(a)2; 121.02(5); 121.05(4); 121.14(1)(a); and 121.54(9)(c).

"rulemaking is the means by which the Legislature has 'prescribed by law' that the SPI must carry out his Legislatively-defined duties of supervision." 2016 WI 38, ¶ 35. *See* Pet. Br. at 20, 23.

In addition to explicit statutory requirements, the SPI is required to issue as a rule "each statement of general policy and each interpretation of a statue which [he or she] specifically adopts to govern [his or her] enforcement or administration of that statute." Wis. Stat. § 227.10(1). A rule is defined as "a regulation, standard, statement of policy, or general order of general application which has the effect of law and which is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency." Wis. Stat. § 227.01(13).

In other words, the SPI cannot engage in policymaking, whether it is a general policy or standard on public libraries, school district standards, or school aid payments, without promulgating an administrative rule. *See* Wis. Admin. Code chs. 6, 8, and 14. "[T]he delegation of the power to make rules and effectively administer a given policy is a necessary ingredient of an efficiently functioning government." *Gilbert v. State, Med. Examining Bd.*, 119 Wis. 2d 168, 184, 349 N.W.2d 68 (1984). As such, this Court properly determined that rulemaking is necessary for the SPI to supervise public instruction.

2. Act 21 places the governor in a superior position to the SPI in the supervision of public instruction through rulemaking.

Coyne challenged Act 21's grant of plenary authority to the governor over the supervision of public instruction through rulemaking. *Coyne*, 2016 WI 38, ¶ 23. Justice Gableman determined that while the legislature has authority to give and take away rulemaking authority to the SPI, what the legislature may not do is to give the governor absolute control over the SPI's rulemaking activity. *Id*., ¶ 65. "By giving the governor the power to prevent the SPI's and DPI's proposed rules from being sent to the legislature, Act 21 gives the governor the authority to oversee, inspect, or superintend" public instruction." *Id*. Justices Abrahamson and A. Bradley agreed, stating that Act 21 gives "equal or superior authority over the supervision of public instruction to officers other than those inferior to the Superintendent." *Id*., ¶ 100. Similarly, Justice Prosser concludes that "a *constitutional* office must possess some inherent authority to proceed to fulfill its responsibilities," and that, "giving the governor complete authority to block a proposed rule by the superintendent of public instruction" is unconstitutional. *Id*. ¶154-155 (emphasis in original).

To sidestep the constitutional issues created by the governor having unchecked authority over the SPI, the Petitioners frame this case as a separation of powers issue between the SPI and the legislature. The Petitioners argue the dispute over Act 21 concerns "the extent to which the

legislature may qualify rulemaking authority it has granted to DPI and the Superintendent." Pet. Br. at 12. However, the dispute over Act 21 in *Coyne* and in this case has never concerned the separation of power between the executive and legislative branches.[2] The issue in *Coyne* is not concerning "procedural requirements designed to provide notice to the public and lawmakers, elicit feedback from interested parties, and allow for legislative … oversight." Pet. Br. at 16. There is no dispute in this action regarding these procedural checks.

Rather, the dispute in *Coyne* and in this case concerns "executive oversight" – the governor's authority over the SPI in the promulgation of rules that supervise public instruction. Pet. Br. at 16. More specifically, at issue is the governor's "complete authority to block a proposed rule by the superintendent of public instruction … even when the proposed rule is authorized – perhaps required – by statute and is submitted in complete conformity with statute." *Coyne*, 2016 WI 38, ¶ 154. The provisions of Act 21 found unconstitutional in *Coyne* delegated legislative power to the governor, *not* the legislature. *See* Wis. Stat. §§ 227.135(2) and 227.185.

In other words, this dispute concerns the power of two executive officers. By contrast, the separation of powers doctrine "is violated when one branch interferes with a constitutionally guaranteed 'exclusive zone' of

[2] The legislature has a long-standing process for the review of administrative rules, including review by the JCRAR. *See* Wis. Stat. § 227.19.

authority vested in another branch." *Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis.2d 687, 697, 478 N.W.2d 582 (1992).

Just like in *Thompson v. Craney*, the constitutional issue with Act 21 is "not that [the Act] takes power away from the office of the SPI, but rather that it gives the power of supervision of public education to an 'other officer' instead of the SPI." 199 Wis. 2d at 689-699. Simply put, in this dispute, as in *Coyne*, the power of the legislature is *not* at issue.

3. Act 21 fails to provide any safeguards on the governor's ability to prevent the SPI's promulgation of rules.

The Petitioners claim that because the legislature may define the procedure for exercising delegated legislative power, that the legislature can therefore condition the SPI's promulgation of all rules on the governor's discretionary approval. Pet. Br. at 22. This is simply not true. The legislature may only delegate its authority when there are "procedural and judicial safeguards against arbitrary, unreasonable or oppressive conduct..." *State Dept. of Admin. v. Dept. of Industry*, 77 Wis. 2d 126, 135, 252 N.W.2d 126 (1977) (citing *Schmidt v. Dept. of Local Affairs and Development*, 39 Wis. 2d 46, 158 N.W.2d 306 (1968)). This requirement applies to both the administrative agencies that promulgate the rules *and the entities to which the legislature delegates its authority to review the rules*. *Martinez*, 165 Wis. 2d at 698.

In *Coyne*, Justice Prosser expressed particular concern with the scope of authority Act 21 afforded the governor in this context:

> These changes in the law vest the governor with the power to suppress publication of the scope of a proposed rule and thus prevent the individual or body with policy-making power over the subject matter of the rule from approving any statement of scope.

2016 WI 38, ¶ 127. He noted that Act 21 gives the governor "absolute veto power," which is a "check without a balance." *Id*., ¶ 155. In Act 21, the legislature delegated authority to review rules to the governor without any "procedural and judicial safeguards against arbitrary, unreasonable or oppressive conduct..." *State Dept. of Admin. v. Dept. of Industry*, 77 Wis. 2d at 135.

In contrast, the legislature's delegation of power to the JCRAR illustrates appropriate procedural and judicial safeguards. After a legislative standing committee receives a proposed rule, it has 30 days, or in some cases up to 60 days, to review the proposed rule. Wis. Stat. § 227.19(4)(b)1. Based upon its review, the committee may object to the proposed rule. Wis. Stat. § 227.19(4)(d). Importantly, the committee's objection must be based on at least one of seven statutory reasons, which include: an absence of statutory authority, a failure to comply with legislative intent, and arbitrariness and capriciousness. *Id*. An objection does not stop the rule from being promulgated.

After the standing committee completes its review of the proposed rule, the committee must refer the rule within five days to JCRAR. Wis. Stat. §§ 227.19(4)(e) and (5)(a). JCRAR then has 30 days, or in some cases up to 60 days, to review the proposed rule. Wis. Stat. § 227.19(5)(b)1. JCRAR may only object to a rule based on the same seven statutory reasons as a standing committee may use. Wis. Stat. § 227.19(5)(d). If JCRAR objects to the proposed rule, it can only prevent the rule from being promulgated by introducing bills into both houses of the legislature. Wis. Stat. § 227.19(5)(e). If either bill passes both houses of the legislature and is signed by the governor, the proposed rule cannot be promulgated. Wis. Stat. § 227.19(5)(f). However, if both bills are defeated or fail to be enacted, the agency may promulgate the proposed rule. Wis. Stat. § 227.19(5)(f).

The consistent theme with these steps in the rulemaking process is that there are specific standards and procedures each entity must use when reviewing a proposed rule. At no point in the review process does a legislative entity, like JCRAR or a standing committee, have unqualified or unchecked power to reject a rule.

In *Martinez*, this Court unanimously upheld this statutory scheme in the face of a separation of powers and delegation of power challenge. 165 Wis. 2d 687. The Court in *Martinez* recognized that legislative power may be delegated "as long as adequate standards for conducting the allocated power are in place." *Id.* at 697. Because Wis. Stat. § 227.19 allowed JCRAR

to suspend a rule based on specific statutory grounds, the "law set forth adequate standards for JCRAR to follow when exercising its powers." *Id.* at 698. The JCRAR statutory scheme also "furthers bicameral passage, presentment and separation of powers principles by imposing *mandatory checks and balances* on any temporary rule suspension." *Id*. at 699 (emphasis added). The *Martinez* court also noted that it agreed "with the attorney general's statement that 'the legislature could empower itself or a committee of its members to affirm or set aside an agency's rule *if the legislature or the committee were subject to proper standards or safeguards*." *Id*. at 701, citing 63 Op. Att'y Gen. at 162. This Court, therefore, unanimously upheld JCRAR's suspension power because it was "delegated to [JCRAR] pursuant to legitimate *legislative standards*, and, furthermore, *sufficient procedural safeguards are available* to prevent unauthorized decisions by [JCRAR]." *Id*. at 702 (emphasis added).

The holding in *Martinez* makes it clear that *all* delegations of legislative power in the rulemaking process, including those to the governor in Act 21, must be subject to proper standards and safeguards in order to be constitutional. If a legislative entity's review of administrative rules must be subject to proper legislative standards and procedural safeguards, it is axiomatic that a delegation of power to a sister branch, like the governor in the executive branch, must also be subject to such standards and safeguards.

The governor's exercise of power under Act 21 is not constrained by *any* legislative standard or checked by *any* procedural safeguard. Act 21 simply states that a scope statement cannot be published "until the governor issues a written notice of approval of the statement." Wis. Stat. § 227.135(2). Similarly, Act 21 provides that "the governor, *in his or her discretion*, may approve or reject the proposed rule." Wis. Stat. § 227.185 (emphasis added). Unlike the delegation of authority to JCRAR, Act 21 "gives the Governor … the unchecked power to halt the SPI's and DPI's promulgation of rules on any aspect of public instruction…" *Coyne*, 2016 WI 38, ¶ 71.[3] No one – not even the legislature – can override the governor's decision to withhold his or her approval of a scope statement or proposed rule.[4] And the governor is not required to act within any timeframe.[5] The governor's power over rulemaking is absolute. Thus, Act 21 is an unconstitutional delegation of legislative power to the governor because it lacks any legislative standards and procedural safeguards. As Justice Prosser summarized: "Governing entails more than saying 'no.'" *Id*, ¶169.

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[3] The Petitioners try to avoid this infirmity by arguing that the legislature could simply pass a law to promulgate an administrative rule if the governor vetoed a rule. Pet. Br., 31, n.14. As discussed above, this Court has long held that *all* delegations of legislative power must contain safeguards.

[4] The legislature rejected an amendment to Act 21 which would have permitted the legislature to override the governor's decision. Assem. Amend. 13 – Assem. Sub. Amend. 1 – 2011 WI Assem. Bill 8.

[5] The legislature also rejected an amendment to Act 21 which would have deemed a proposed rule approved if the governor did not act within 30 days. Assem. Amend. 12 – Assem. Sub. Amend. 1 – 2011 WI Assem. Bill 8.

iv. *Coyne* has not created any incoherence or inconsistency in the law.

Coyne is sound in principle and is consistent and coherent with this Court's interpretation of Wis. Const. art. X, § 1 and the delegation of legislative power. *See Thompson*, 199 Wis. 2d at 698 ("…the office of state Superintendent of Public Instruction was intended by the framers of the constitution to be a supervisory position"). In contrast, the Petitioners argue in favor of *creating* incoherence and inconsistency by advocating for this Court to overrule multiple decisions of this Court, including this Court's stated analysis for interpreting provisions of the Wisconsin Constitution. Pet. Br. at 18, n.12. Rather than argue how *Coyne* is inconsistent with the law, the Petitioners argue their own superficial, conclusory reading of Article X, § 1 is sufficient to overrule *Coyne*. Pet. Br. at 18-22. In doing so, the Petitioners ignore the consistent, coherent analysis of Article X, § 1 articulated in *Thompson*, which is grounded in longstanding historical interpretations of that section, as discussed fully in Section IV, *infra*. 199 Wis. 2d at 680. But, in order to overturn *Coyne*, the Petitioners also see no problem in overruling what has served as the authoritative interpretation of Article X, § 1 for over 20 years.

In turn, rather than argue why the interpretation of Article X, § 1 in *Thompson* is inconsistent with the three-part analysis for interpreting provisions of the Wisconsin Constitution applied by this Court for more than

40 years, the Petitioners argue this Court should simply abandon that analysis altogether. *See* Pet. Br. at 18, n. 12 (arguing the three-part constitutional analysis first formalized in *Busé v. Smith* 74 Wis. 2d 550, 568, 247 N.W.2d 141 (1976), is "inconsistent with rule of law principles.") The Petitioners boldly assert the "historical materials cited in this area in cases like *Coyne* or *Thompson v. Craney*" are irrelevant. Pet. Br. at 18.

In other words, the Petitioners request to overturn *Coyne* does not merely challenge the doctrine of stare decisis. The Petitioners request to overturn *Coyne* also depends on overturning multiple decisions of this Court representing decades of settled law and entirely disregarding any historical context that could aid in interpreting the very constitutional provision at the heart of this dispute. The Petitioners utterly fail to demonstrate their desired outcome is the path to consistency and coherency.

v. The rule of law settled by *Coyne* works in practice.

Outside of the provisions of Act 21 that this Court declared unconstitutional, the SPI is promulgating rules pursuant to the procedural requirements prescribed by the legislature without issue. The legislature has not taken steps to modify the unconstitutional provisions of Act 21, though this Court provided guidance on how to appropriately do so. The DOA and the governor have not taken any action to violate the injunction upheld by this Court in *Coyne*, nor have they expressed any intent to do so. It appears

the legislative branch, the executive branch, and the SPI view *Coyne* as working just fine in practice.

Further, the decision in *Coyne* is very limited. The legislature is still free to review and block rules proposed by the SPI, as provided in Wis. Stat. § 227.19, because *Coyne* did not impact the legislature's "control over what powers the SPI and the other officers of supervision of public instruction possess in order to supervise public instruction." 2016 WI 38, ¶ 70. And, consistent with *Fortney v. School Dist. of West Salem*, 108 Wis. 2d 167, 321 N.W.2d 255 (1982), the legislature is still free to reduce the SPI's supervisory powers, as the legislature "may give, may not give, and may take away the powers and duties of the SPI and other officers of supervision of public instruction." *Coyne*, 2016 WI 38, ¶ 70.

III. *THOMPSON v. CRANEY* IS NOT APPLICABLE TO THIS DISPUTE AND, EVEN IF IT WERE, IT WAS CORRECTLY DECIDED.

In *Thompson*, this Court held that the SPI could not be inferior to an "other officer" in the supervision of public instruction. 199 Wis. 2d at 699. At issue in *Thompson* was whether the legislature could create a separate department of education to be headed by a gubernatorial appointee, the secretary of education, and nominally supervised by a state board of education appointed by the governor. *Id*. at 677-678. This Court unanimously held that this was unconstitutional. *Id*.

The Petitioners claim *Thompson* is unsound in principle, because Art. X, § 1 cannot be read to require the SPI to be in a superior position to "other officers." Pet. Br. at 46. In support of this claim, the Petitioners fail to apply this Court's three-part analysis applicable to the interpretation of constitutional provisions, and instead argue the three-part analysis should be ignored. Pet. Br. at 18, n. 12.

The interpretation of a constitutional provision "envisions more intense review of extrinsic sources." *Dairyland Greyhound Park*, 2006 WI 107, ¶ 115, 295 Wis. 2d 1 (Prosser, J., Wilcox, J., and Roggensack, J. concurring in part, dissenting in part). This review is focused on the framers' purpose and intent. *Id*. at ¶ 19 (citations omitted). To determine the framers' intent and purpose, the *Thompson* court considered the appropriate factors: (1) the plain meaning of the language; (2) the constitutional debates and practices of the time; and (3) the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption. *Thompson*, 199 Wis. 2d at 680 (citing *Polk County v. State Pub. Defender*, 188 Wis. 2d 665, 674, 524 N.W.2d 389 (1994)).

a. The plain language of Article X, § 1 supports *Thompson*.

Unlike the *Thompson* Court, the Petitioners show little regard for the framers' purpose and intent. Instead, the Petitioners rely on a brief, superficial examination of only the plain language of Art. X, § 1 to declare the SPI is not required to be superior to "other officers." Pet. Br. at 46. In

doing so, the Petitioners ignore the second and third factors of constitutional interpretation, which are the "surest guides to a proper interpretation of the role of the SPI." *Thompson*, 199 Wis. 2d at 698. But before addressing these factors, the Petitioners also misread the plain language of Art. X, § 1. The first sentence of Article X, § 1 reads:

> The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law.[6]

As defined by dictionaries contemporary to the constitutional debates, the term "supervision" means:

> To have or exercise the charge or oversight of; to oversee with the power of direction; to take care of with authority; as an officer superintends the building of a ship or the construction of a fort. God exercises a superintending care over all his creatures.

Thompson, 199 Wis.2d at 683 (quoting *Webster's An American Dictionary of the English Language*, new rev. ed. 1847-50).

This power of direction "shall be vested," thus making it mandatory that the power is vested in the SPI. "Vested" means "fixed; not contingent, as rights." Noah Webster, *Dictionary of the English Language: Abridged*

[6] Before the 1902 amendment, the first sentence of Article X, § 1 read: "The supervision of public instruction shall be vested in a state superintendent, and such other officers as the legislature shall direct."

from the American Dictionary (1845). As such, the legislature is not free to remove the SPI's power of supervision.[7]

Furthermore, the "state superintendent" and the "other officers" are not similar or interchangeable. By using the word "state," the framers meant for the SPI to have authority over the entire state, in stark contrast to "other officers." And "superintendent" means "one who has the oversight and charge of something with the power of direction." *Thompson*, 199 Wis. 2d at 683 (quoting *Webster's An American Dictionary of the English Language*, new rev. ed. 1847-50). The SPI, not "other officers," is the one who has oversight and charge of statewide public instruction. Simply put, the SPI cannot have "direction" and "oversight" of statewide public instruction if another officer is superior to him or her.

Even if Article X, § 1 is ambiguous, as the *Thompson* court determined,[8] the last sentence of Article X, § 1 refutes any argument that the legislature can make the *governor*, in particular, an "other officer of supervision of public instruction," let alone one superior to the SPI. The last

[7] Article X, § 1 is one of only four constitutional provisions that "vests" power. *See* Article IV, § 1 (vesting legislative power in the Senate and Assembly); Article V, § 1 (vesting executive power in the governor); and Article VII, § 2 (vesting judicial power in the courts).

[8] The *Thompson* court stated that the first sentence was ambiguous because "it can be read either as granting the power of supervision solely to the SPI, or as granting power to both the SPI and the 'other officers' referred to in the section." *Thompson*, 199 Wis.2d at 684.

sentence of Article X, § 1 reads: "The term of office, time and manner of electing or appointing *all other officers* of supervision of public instruction *shall be fixed by law*." (emphasis added). By replacing "all other officers of supervision of public instruction" with "governor," the last sentence of Article X, § 1 would read: "The term of office, time and manner of electing or appointing [the governor] *shall be fixed by law*." (emphasis added). This creates obvious conflicts: the governor's term of office is set by Article VI, § 1, not by law; the time and manner of electing the governor is set by Article VI, § 3 and Article XIII, § 1, not by law; and the legislature cannot, by law, set forth a manner for appointing the governor. Therefore, the plain language of Article X, § 1 demonstrates that the governor cannot be an "other officer."[9] *See also*, *Coyne*, 2016 WI 38, ¶ 45 ("When the plain language of Article X, § 1 is read within the context of the entire section, it becomes clear that the 'other officers' in whom the legislature may vest the supervision of public instruction are other officers *of supervision of public instruction.*")

b. Thompson follows the intent of the constitutional debates and the 1902 amendment.

The second step in analyzing a constitutional provision is to review the constitutional debates. After thoroughly reviewing the debates of the

[9] The structure of the Constitution itself also shows that the governor was not intended to be an "other officer" within the meaning of Article X, § 1. The governor's powers and duties are set forth only in Article V, not Article X. Clearly, by creating a separate articles for educational officers, the framers must have intended "other officers" to be distinct and separate from the governor.

1846 and 1847-48 constitutional conventions, the *Thompson* court correctly determined that "the drafters of the Wisconsin Constitution intended the public schools to be under the supervision of the SPI, and that the SPI was to be an elected, not appointed, public official." *Thompson*, 199 Wis. 2d at 685. In addition, the *Thompson* court determined that there was "nothing in the 1846 and 1848 debates which supports [the] contention that the SPI and the 'other officers' were intended to be coequal." *Id*. at 687.

The 1902 amendment to Article X, § 1 also demonstrates that the SPI was not meant to be equal with "other officers." When interpreting the intent of a constitutional amendment, this Court will look at the problem the amendment sought to address:

> But the intent [of a constitutional amendment] is to be ascertained, not alone by considering the words of any part of the instrument, but by ascertaining the general purpose of the whole, in view of the evil which existed calling forth the framing and adopting of such instrument, and the remedy sought to be applied; and when the intent of the whole is ascertained, no part is to be construed so that the general purpose shall be thwarted, but the whole is to be made to conform to reason and good discretion.

Thompson, 199 Wis. 2d at 691 (quoting *State ex. Rel. Ekern v. Zimmerman*, 187 Wis. 180, 184, 204 N.W. 803 (1925)). Superintendent Lorenzo Dow Harvey was the author and primary proponent of the 1902 amendment. As shown by his prolific correspondence, Harvey had two purposes for the amendment: (1) strengthen the position of SPI and (2) reform the county superintendency system.

One of the ways Harvey sought to strengthen the position of SPI was to make it nonpartisan:

> The very purpose of the amendment is to put the office on the same basis as the judiciary, where men will be selected because of their fitness, and voted [for] the same reason.
>
> The other side of the opposition is that the men who engineered the deal to nominate Mr. Cary and other men who are rollovers of this class, do not wish to see the office taken out of politics. They want to make it a part of the political machine, and it can be made a very effective part if it is organized for that purpose.

Letter from L.D. Harvey to Mrs. S.L. Graves (October 15, 1902). *See also*: Letter from L.D. Harvey to Miss Rose C. Swart (October 15, 1902)("You can see if the [SPI] is properly organized for political work, it can be a very effective part of the political machine."); Letter from L.D. Harvey to Thomas A. Fitzsimons (October 13, 1902)("[O]thers hope to defeat [the amendment] because they do not wish to see [the SPI] taken out of politics…"); Letter from L.D. Harvey to C.G. Shutts (October 15, 1902); and Letter from L.D. Harvey to T.W. Boyce (October 18, 1902). Harvey also stated the intent of the amendment in newspaper circulars:

> [The SPI's] various duties bring him into close official relations with people of all political opinions and in matters which should be decided without reference to political bias. Of all the officers in the state government it is the one which should be entirely free from political influences of bias. For this reason this officer should be chosen because of his professional and administrative ability in educational work and not because of his political belief. The office should be put upon the same plane with the judiciary, where men are elected because of their fitness, and at the spring election, when no political issues divide parties. The proposed amendment aims

> to take this office out of politics by putting the election in spring, at the same time the judges are elected.

The Daily Northwestern, Thursday Evening, January 30, 1902.

In addition to strengthening the position of the SPI, Harvey intended to provide the legislature with flexibility to address the problems associated with the county superintendency system, including removing the influence of partisan politics from it. *See* Letter from L.D. Harvey to C.G. Shutts (October 15, 1902). Harvey wanted the legislature to have the flexibility to reorganize the *local* school system in the future, not the ability to relegate the SPI to an inferior or meaningless position. Harvey's discussion of legislative flexibility never extended to the SPI. The attorney general recognized this in an opinion dated June 20, 1919:

> It seems perfectly clear to me that when the amendment of 1902 was proposed in the legislature and when it was adopted by the people the intent was to give the legislature full and complete power of determining the term of office and the time and manner of electing or appointing *county superintendents of schools*.

8 O.A.G. 509 (1919) (emphasis added). Therefore, the *Thompson* court determined the 1902 amendment "demonstrates that the 'other officers' mentioned in the amendment are solely local officials, subordinate to the [SPI." *Thompson*, 199 Wis. 2d at 693 (citations omitted).

c. *Thompson* correctly interpreted the first laws related to education.

The final step to interpret a constitutional provision is to review the first laws related to the provision. *Dairyland Greyhound Park*, 295 Wis. 2d at ¶ 117 (Prosser, J., Wilcox, J., and Roggensack, J. concurring in part, dissenting in part). When interpreting Article X, § 1, the *Thompson* court carefully examined the first laws related to education enacted after the 1848 convention and the 1902 amendment. *Thompson*, 199 Wis. 2d at 693-98.

The first law related to education set forth the duties of the SPI. *See* L. 1848, at 127-29. Significantly, the 1848 law provided that the SPI – not an "other officer" – had "general supervision over public instruction in this state." *Id*. And, as the *Thompson* court correctly observed, the 1848 law provided the SPI with "several duties which clearly included supervisory or administrative powers," including the power to "apportion school funds between townships, to propose regulations for making reports and conducting proceedings under the act, and to adjudicate controversies under the school lands." *Thompson*, 199 Wis. 2d at 694; L. 1848 at 127-29.

The first laws related to "other officers" demonstrates that those officers were inferior to the SPI. Specifically, the first laws created "common schools" which were overseen by elected town superintendents. L. 1848 at 209-26, 226-47. The 1848 law provided:

> The superintendent of common schools shall in all cases be under the control and direction of the state superintendent of public instruction and shall whenever called on by the state superintendent give any information in his possession relating to the several schools in town.

L. 1848 at 219.

The Petitioners ignore the 1848 law almost in its entirety, except for one provision, selectively conveyed to this Court, which states in full: "to perform such *other* duties as the legislature or governor of this state may direct." L. 1848 at 129 (emphasis added). The Petitioners omit the word "other," because that word requires the SPI to perform those duties as directed by the governor *other* than what the legislature has defined as the supervision of public instruction. That is, unlike Act 21, the 1848 law does not state that the duties and authority assigned to the SPI by the legislature to supervise public instruction are contingent upon, or subservient to, the absolute discretion of the governor. *Id*.

Regardless, the Petitioners interpretation of the 1848 law conflicts with the first law related to education passed after the 1902 amendment. Under that law, the legislature again reaffirmed that the SPI had "general supervision over the common schools of the state." L. 1903, Ch. 37. Absent from this law was any reference to performing any duties as directed by the governor. *Id*. The SPI also had the duty to: prohibit sectarian books and instruction; prescribe rules and regulations for managing school libraries and penalties for violations; to hear appeals and prescribe rules for such proceedings; and to apportion and distribute school fund income. *Id*. As the *Thompson* court observed, "Just as in the laws passed following the first

constitution in 1848, this act did not provide for any 'other officer' with supervision powers superior or equal to the SPI." *Thompson*, 199 Wis. 2d at 697. Simply put, the *Thompson* court carefully – and correctly – analyzed the first laws, which show the framers' intent that the SPI is superior to "other officers."[10]

d. *Thompson* is consistent with the longstanding historical interpretation of Article X, § 1.

By reviewing the plain language, constitutional debates, and first laws, the *Thompson* court properly interpreted Article X, § 1. This analysis is consistent with the longstanding historical interpretation of Article X, § 1, codified in Wis. Stat. § 118.01(1):

> Public education is a fundamental responsibility of the state. The constitution vests in the state superintendent the supervision of public instruction and directs the legislature to provide for the establishment of district schools. …

By contrast, school boards have supervisory power over their own local districts. Wis. Stat. § 120.12(2). This is consistent with the "other officers" language of Article X, § 1 and the legislature's power to create school districts under Wis. Const. art. X, § 3.

A review of Chapters 115-121 demonstrates this consistent interpretation: the SPI is the superior officer for the statewide supervision of

[10] The first law related to "other officers" after the 1902 amendment moved the election date of county superintendents to the spring, thus fulfilling Harvey's intent to make the positions nonpartisan. L. 1903, Ch. 307.

public instruction while local school boards oversee their local school districts. Because the legislature has consistently interpreted Article X, § 1 as making the SPI superior to "other officers," this interpretation is conclusive. *See State v. Coubal*, 248 Wis. 247, 256, 21 N.W.2d 381 (1946).

In an attempt to redefine what has been the longstanding historical interpretation of Article X, § 1, the Petitioners attempt to find "other officers" in history created by the legislature that were not subordinate to the SPI. Pet. Br. at 48. The Petitioners claim "[n]one of those people were subordinate to the [SPI]," even though each of the positions listed by the Petitioners was, in fact, subordinate to the SPI. *Id*.

The Petitioners first point to a statute from 1915 that created a State Board of Education. *Id*. (citing L. 1915, Ch. 497). This board did not supervise public instruction. Specifically, the board was responsible for evaluating and auditing the finances of the state's educational entities. L. 1915, Ch. 497. The State Board of Education did not supervise K-12 education. As the Attorney General stated in 1948:

> [T]he state board of education set up by ch. 497, Laws 1915, affords no precedent for claiming that power to supervise public instruction may be vested in such a board in any degree whatsoever, as the powers of that board were confined to the financial matters affecting the various educational units of the state and there was no attempt to give it any power directly to supervise public instruction.

37. O.A.G. 82, 85 (1948).

The Petitioners also claim that the Laws of 1848 gave authority to license school teachers to town superintendents, and that these individuals were not subordinate to the SPI. Pet. Br. at 48. However, the relevant licensing statutes demonstrate the opposite: the ability to license teachers to teach anywhere in the state has only been vested in the SPI. The first law related to "certifying" teachers only permitted town superintendents to certify teachers to teach in their *own* districts by issuing a certificate prescribed by the SPI.[11] L. 1848, Ch. 226. Between 1861 and 1863, further changes were made to local licensing: town superintendents were replaced with county superintendents; county superintendents were required to administer evaluations with standards established "under the advice and direction" of the SPI; and individuals could appeal license denials to the SPI. L. 1861, ch. 179; L. 1862, Chs. 102 and 176. Licenses issued by these local officials were only valid in their own districts. In 1868, the first statewide teacher license was created. L. 1868, Ch. 169. Notably, only the SPI had the authority to issue such a license and promulgate licensing rules, a power that continues to this day. *Compare Id.* and Wis. Stat. §§ 118.19-118.194. In 1939, the legislature abolished local teacher licensing, permitting only the SPI to issue any type of teaching license. Wis. Stat. § 39.15 (1939).

[11] The law specifically required town superintendents to evaluate teacher candidates to see if they had the "moral character, learning, and ability" to teach in their district. L. 1848 at 226. This is little different than school boards' current power to evaluate and hire teaching candidates. Wis. Stat. §§ 118.21 and 118.225.

Next, the Petitioners claim that the SPI is not superior to local school officers because he or she cannot "countermand" those officers. Pet. Br. at 49. This is simply untrue. Numerous actions by local board actions are reviewed by the SPI. *See e.g.,* Wis. Stat. § 118.33(4) (SPI reviews boards' high school graduation standards); Wis. Stat. § 118.51(9) (SPI hears appeals from school board open enrollment denials); and Wis. Stat. § 115.762 (SPI oversees local special education programs). More importantly, the SPI can withhold state funds from local school districts if "the scope and character of the work are not maintained in such manner as to meet the state superintendent's approval." Wis. Stat. § 121.006.

The Petitioners next assert that because other agencies promulgate rules that impact schools, *Thompson* is inconsistent with the historical interpretation of Article X, § 1. Statutes, not administrative rules, can be used to show a constitutional provisions' long-term interpretation. *See Coubal*, 248 Wis. at 256. Even if administrative rules are relevant, the three proffered examples are either unrelated to the supervision of public instruction or, at best, are tangentially related. For example, the Petitioners cites Wis. Admin. Code § DWD 270.19, which permits minors to perform "worklike activities" at school without compensation. This rule governs what constitutes child labor, not the supervision of public instruction (DWD Chapter 270 is titled "Child Labor"). Similarly, the Petitioners mention the Department of Safety and Professional Service's oversight of building codes for schools. Pet. Br.

at 26. These laws address how to build buildings, not how to educate children..

The Petitioners also claim *Thompson* is inconsistent with this Court's earlier decision in *Fortney*, 108 Wis. 2d 167. The Petitioners are only able to point to dicta in that case, which was decided before *Thompson* – as a single example of a "conflict" with *Thompson*. Pet. Br. at 46-47. But *Fortney* is inapplicable because it did not address the division of supervisory power between the SPI and "other officers." *Fortney* addressed, in part, whether a collective bargaining agreement was unconstitutional under Article X, § 1 as an infringement on the constitutional hiring and firing power of school boards. *Fortney*, 108 Wis. 2d at 181-82.

Finally, the Petitioners argue that the governor already supervises public instruction because the governor can veto bills affecting public instruction and he or she introduces the state budget. Pet. Br. at 49. This argument completely ignores the difference between enacting laws that supervise public instruction and executing laws that supervise public instruction. The constitution clearly provides the governor may veto legislation that has passed the legislature. This legislation might relate to public instruction, but this does not mean that the constitution gives the governor the power to supervise public instruction. Article X, § 1 gives that power to the SPI.

Therefore, the *Thompson* decision is consistent with this Court's mode of constitutional interpretation and the longstanding historical interpretation of Article X, § 1.

CONCLUSION

Since statehood, the supervision of public instruction has been vested in an independent, constitutional officer, the SPI. This Court has consistently recognized that important role. The Court has further recognized that a change to this role can only be implemented by the people of this State:

> Our constitution is the true expression of the will of the people: it must be adopted by the people of this State, and if it is to be changed, it must be ratified by the people of this State. By adopting our constitution, the people of Wisconsin gave the Legislature broad discretion to define the powers and duties of the Superintendent of Public Instruction and the other officers of public instruction. However, the will of the people as expressed by Article X, § 1 also requires the Legislature to keep the supervision of public instruction in the hands of the officers of supervision of public instruction. To do otherwise would require a constitutional amendment.

Coyne, 2016 WI 38, ¶ 79. The Petitioners fail to demonstrate how the SPI is out of compliance with the REINS Act, or why this Court should reverse its decisions in *Coyne* and *Thompson*. Therefore, this Court should deny the relief sought by the Petitioners.

Dated this 24th day of September, 2018.

Respectfully submitted,

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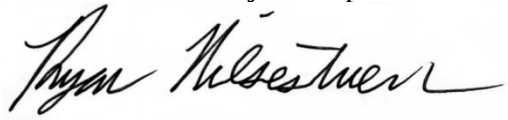
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 10,535 words.

Dated this 24th day of September, 2018.



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CERTIFICATION REGARDING ELECTRONIC BRIEF

PURSUANT TO WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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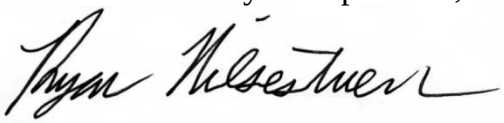

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STATE OF WISCONSIN
SUPREME COURT
NO. 2017AP2278

Kristi Koschkee, Amy Rosno, Christopher Martinson and Mary Carney,

Petitioners,

v.

Tony Evers; in his official capacity as Wisconsin Superintendent of Public Instruction and Wisconsin Department of Public Instruction,

Respondents.

Original Action

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The overriding theme of Respondents' Brief is that the term "supervision" in Article X, Section 1 of the Wisconsin Constitution has an obvious and extremely broad meaning, although they can't quite explain to the Court what it is. They can cite a dictionary, and give some *ipse dixit* examples of things that definitely are supervision (apparently, all educational rulemaking) and things that definitely are not (educational rulemaking by somebody other than the Superintendent or DPI). But they never offer a coherent explanation for how to tell whether something is supervisory or not.

Thankfully, the Constitution itself provides the answer. Or rather, the Constitution makes clear that it isn't providing an answer, but directing the legislature to decide what constitutes the "supervision" that the Superintendent will perform. In other words, it anticipated that a term like "supervision" could leave a lot of unanswered questions, and instructed the legislature (not the courts) to fill in the blanks. Petitioners ask this Court to respect that the Constitution left the definition of "supervision" to the legislature.

ARGUMENT

I) THE GOVERNOR'S REVIEW HAS ALWAYS BEEN PART OF THIS ORIGINAL ACTION

The Respondents waste time reiterating, for the third time, their failed argument that the only question at issue in this case is whether they must submit statements of scope to the Department of Administration. (Resp. Br. 4-10.) This was the basis for their failed motion to dismiss and it is still wrong. The Petitioners are claiming that the Respondents must comply with the Chapter 227 rulemaking procedure as it currently exists, including Wis. Stat. § 227.135(2) (requiring gubernatorial approval of scope statements), and § 227.185 (requiring gubernatorial approval of final rules). This requires the Court to reconsider its decision in *Coyne v. Walker*.

This is not inconsistent with the Petitioners' referral to the REINS Act. The REINS Act made the statutes what they are. It is those statutes – including Wis. Stat §§ 227.135(2) and 227.185 – that the Petitioners are seeking to enforce. The Respondents' somewhat metaphysical[1] discussion

[1] The classic philosophical puzzle of Theseus' Ship examines a ship that is replaced plank by plank, with the discarded planks used to construct a replica. The question is whether either or both of the two resulting ships share an identity with the original. *See* Andre Gallois, *Identity Over Time*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., Winter 2016 ed.), https://plato.stanford.edu/archives/win2016/entries/identity-time/. Our task is more prosaic. Must the Respondents comply with Wis. Stat § 227.135(2) and 227.185, among other portions of the statutory rulemaking process?

of whether an Act that variously amends and reenacts parts of a comprehensive statutory scheme is a proper referent for that re-enacted scheme might be more relevant if the Petitioners were attempting to mask which parts of the scheme are at issue in this action. But the Petitioners have never "hidden the ball." Their challenge has encompassed the full suite of requirements from day one. (*See* Pet. ¶¶10-12, 14, 18, 23-24, 26-27; *see also, e.g.,* Pet. Br. 5 n.1.

II) *COYNE v. WALKER* SHOULD BE OVERRULED

The bulk of Respondents' brief is devoted to arguing that *Coyne v. Walker*, barely two years old and lacking a coherent majority, is settled and well-established law that should be left alone. But a proper analysis demonstrates that it is an aberration of constitutional law that ought to be corrected.

A) Developments in the Law Demonstrate *Coyne's* Invalidity

Respondents argue that the law has not developed in a way that would call into question *Coyne's* conclusion. But the trend in American governance has been toward the sharper curtailment of administrative agency authority. We are reaching consensus that the administrative state makes too much law. One of the primary ways to restore legislative

primacy is increased review of (and limitations on) administrative rule-making. *See generally* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2 (2017) (discussing recent legislative and judicial efforts to roll back the administrative state), Courts have become more vigilant protecting and maintaining the vital separation of powers that buttresses our modern democracy. For example, in *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 2, this Court ended the practice of allowing courts to defer to legal conclusions made by administrative agencies. The law has developed toward courts curbing power grabs by administrative agencies. *See*, *e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("There's an elephant in the room with us today. . . . [T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.").

That push is most obviously demonstrated in Wisconsin by the REINS Act itself. Respondents' insinuation that the Legislature was silent

in the face of the *Coyne* decision (Resp. Br. 15) is preposterous. In response to *Coyne*, the Legislature doubled down and passed the REINS Act as a way to further limit their delegation of legislative authority to administrative agencies. The Respondents complain that rulemaking must be accompanied by discernable standards but that applies to the agency making the rules. The legislature, in addition to specifying those standards, has added the additional safeguards of the Department of Administration's determination of legal authority and gubernatorial approval of scope statements and final rules.

Rather than supporting the result in *Coyne*, every legal weather vane points to a conclusion that the case was wrongly decided and cannot stand.

B) *Coyne* Creates Incoherence and Inconsistency

Respondents complain that the Legislature didn't follow the "legislative roadmap" that *Coyne* provided. But exactly which opinions provide such a map? The lead opinion? Justice Prosser's concurrence? Those were the opinions of individual justices. Justice Abrahamson's concurrence? Only two justices there. *Coyne* provides no legislative roadmap, just three paths proceeding in at-times opposite and incompatible

directions that only incidentally wind up in the same place. The single opinion with the most support was a dissent.

The disparate opinions that produced a result untethered to any reasoning cannot be reconciled. (*See* Pet. Br. 28-34.) It is the kind of decision that leads to confusion and therefore inconsistency in lower courts, creating the real possibility that attorneys and even judges will cite the lead opinion of a single justice as the binding, precedential reasoning of the Court. Even Respondents make that mistake. (*E.g.*, Resp. Br. 19, 29.)

Respondents argue that *Coyne* establishes that "supervision" in the language of Article X, Section 1, necessarily requires "rulemaking." (Resp. Br. 17-18.) They even claim that a majority of justices in *Coyne* reached that decision. That is false. Justice Gableman did conclude that "supervision" requires "rulemaking," but only because the legislature had required it. *Coyne*, 2016 WI 38, ¶33 (lead opinion). In his view, it could take rule-making authority away. *Id.*, ¶70. Justices Abrahamson and A.W. Bradley, though voicing agreement with portions of Justice Prosser's decision pertaining to the inherent authority of the Superintendent to make rules, seemingly declined to definitively resolve whether "supervision" must always include the power to make rules and merely said that

rulemaking was one part of supervising. *Id.*, ¶¶85-89, 107-09 (Abrahamson, J., concurring). Justice Prosser is, in fact, the only Justice who unreservedly concluded that the Superintendent must have "some" inherent authority to make rules but he disagreed with the proposition that no rulemaking may be given to other officers. *Id.*, ¶¶157-59 (Prosser, J., concurring). Although he objected to the Governor's unqualified ability to block rules, he did not opine on other legislative solutions. *Id.*, ¶150 (Prosser, J., concurring). There is no roadmap. There is no road.

There is no logical reason why "supervision" requires rulemaking. Rulemaking is by definition a legislative power, while supervision at most implies the enforcement of rules – an executive power. The Constitution does not grant legislative power to the Superintendent.

Coyne is also incoherent because it employs a methodology that uses "law office history" to reach a result that contradicts the plain language of the Constitution. Turning to external sources of interpretation as a way to specifically contradict the actual language used by the framers is an illegitimate approach to constitutional interpretation.

External aids can be helpful tools to interpret ambiguous provisions, but they should never be used to adopt a meaning contradicted by the actual

language. Judges are not historians and litigation is not a good vehicle for a thorough and dispassionate examination of the full historical record. Sometimes ambiguity requires extrinsic help, but allowing external materials to change the plain meaning of constitutional language permits judges to substitute their own opinions on how best to set up a government for the decisions of those who wrote and adopted our Constitution.

Tellingly, Respondents repeatedly emphasize "the framers' purpose and intent" (rather than the text) in their analysis of Article X, § 1 and accuse the Petitioners of "fail[ing] to apply this Court's three-part analysis applicable to the interpretation of constitutional provisions." (Resp. Br. 30.) Respondents misunderstand this Court's interpretative methodology (which has admittedly been inconsistent).

When interpreting the Wisconsin Constitution, the text of the relevant provision is paramount. While this Court sometimes looks to extrinsic, historical materials when analyzing the Constitution, these materials are simply aids to a proper understanding of the text. Use of these materials is only "necessary when the language of the [relevant] section considered [is] not plain in meaning." *Jacobs v. Major*, 139 Wis. 2d 492, 503, 407 N.W.2d 832 (1987); *see also, e.g.*, *Id.* at 504 ("[W]e are not

required to go behind the language of Art. I, sec. 3 to discover its intent since the meaning is plain on its face."); *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶57 & n.25, 320 Wis. 2d 275, 768 N.W.2d 868 ("The authoritative, and usually final, indicator of the meaning of a provision is the text – the actual words used. . . . In this case, we see little reason to extend our interpretation beyond the text [of the relevant constitutional provision]."). Petitioners saw little utility in devoting limited brief space to a discussion of Harvey Dow's personal correspondence, none of which is enacted law and which was seen by few who voted on the constitutional language at issue. *Cf. State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110 ("It is the enacted law, not the unenacted intent, that is binding on the public.").

More generally, any reliance on the "intent" and "purpose" of "the framers" is fundamentally flawed. "The framers" were individuals, each with a different "intent," as a cursory review of the state constitutional debates makes apparent. Attempting to discern with any certainty what the collective framers "intended" with respect to constitutional text is a doomed enterprise. *Cf.* Daniel R. Suhr, *Interpreting the Wisconsin Constitution*, 97

Marq. L. Rev. 93, 120 (2013) (arguing that "[i]t is not the intent of the legislators or voters but the text that they approved that is part of the state's fundamental law"); *cf., e.g., Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring) ("[I]t is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the only remnant of "history" that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law.").

Finally, *Coyne* creates inconsistency, because although all administrative agencies owe their existence and power to the legislature, it treats one – DPI – differently. It departs from settled law to say that the Legislature can grant a power (rulemaking) but cannot grant a limited version of that power. If that were true, then all of the restrictions on DPI's rulemaking would be unconstitutional. The Constitution requires neither of these inconsistencies.

C) *Coyne* Is Not Sound in Principle

Respondents' arguments boil down to one flawed sentence: "However, the dispute over Act 21 in *Coyne* and in this case has never concerned the separation of power between the executive and legislative

branches." (Resp. Br. 21.) Later, they reiterate, "Simply put, in this dispute, as in *Coyne*, the power of the legislature is not at issue." (*Id.* at 22.)

The light dawns. This is exactly why *Coyne* is wrong and why Act 21 and the REINS Act are constitutional. Enacting rules with the force of law is a quintessentially legislative act. That power belongs exclusively to the legislature, meaning that all of these issues revolve tightly around the separation of powers and the self-evident ability of the legislature to place limitations on the exercise of power it lends to somebody else.

This mistake demonstrates why *Coyne* is not just a little wrong – not just one of multiple reasonable resolutions of an ambiguous question. Instead, *Coyne* represents a fundamental misunderstanding of the very structure of our state government. It cannot be allowed to persist.

Supervision includes rulemaking only if the legislature says it does. It may be a sufficient means of supervision, but is not a necessary one. And because it is not necessary, supervision can include rulemaking subject to the strictures of the legislature.

Finally, Respondents argue that the Legislature's delegation of authority to make rules to the Superintendent is flawed because the process under Act 21 and the REINS Act contains insufficient procedural

safeguards – namely that the Governor can approve or reject a proposed rule for any reason and he can effectively pocket veto it by taking no action. But that's not really their complaint. That argument is not limited to DPI and proves too much. The legislature has determined that *no* agency can make rules without gubernatorial approval. If that limitation on rulemaking is unconstitutional, then Chapter 227 is now unconstitutional in its entirety. No agency is empowered to make any rules.

But again, that really isn't their complaint. Their complaint is that the "procedural . . . safeguards against arbitrary, unreasonable or oppressive conduct," *DOA v. Dep't of Ind.*, 77 Wis. 2d 126, 135, 252 N.W.2d 126 (1977) (Resp. Br. 22) now includes (although it is not limited to) the Department of Administration's and Governor's review of the proposed rule. Although DPI might not welcome the additional oversight, there is no reason why these procedural safeguards cannot include – in addition to clearly stated direction for delegated rulemaking and the notice and comment requirements – gubernatorial approval. Respondents complain that the Governor has greater discretion to reject a proposed (or final) rule than the Joint Committee for Review of Administrative Rules, but so what? In delegating legislative authority to agencies, the legislature is attempting

to reprise the way in which it makes laws. Just as the passage of laws is subject to gubernatorial veto and override, so is the making of rules. The Governor is an independent check on agency authority – that is part of how checks and balances work.

Respondents' quotation of *DOA* omits the emphasized language: "[B]road grants of legislative powers will be permitted where there are procedural and judicial safeguards against arbitrary, unreasonable or oppressive conduct *of the agency*." *DOA*, 77 Wis. 2d at 135 (emphasis added) (quoting *Schmidt v. Department of Resource Development*, 39 Wis. 2d 46, 158 N.W.2d 306 (1968)). The governor, of course, is not an agency. *See* Wis. Stat. § 227.01(1) (expressly excluding the governor from the definition of "agency"). And his veto authority is not a "legislative power."

In sum, *Coyne* is a fractured, internally inconsistent, two-year-old decision with virtually no precedential reasoning. *Stare decisis* does not dictate that such a case must be permitted to endure.

III) THE PARTIES AGREE THAT *CRANEY* HAS NO APPLICATION HERE

Little needs to be said about *Thompson v. Craney*, as both parties agree it doesn't apply. (Pet. Br. 45-46; Resp. Br. 29.) Respondents erroneously claim that Article X, Section 1 "vests power." (*Id.* at 32, n.7.)

Of course, unlike every other vesting clause in the Constitution, Article X Section 1 doesn't vest power. (*See* Pet. Br. 21.)

Respondents also argue that the Governor was not in a superior position vis-à-vis the Superintendent in 1848 because the legislature gave the Superintendent some duties and directed him to perform "such other duties" as decided by the Governor. (*Id.* at 38.) But all that provision means is that some of what the Superintendent did as part of his supervision of public instruction could be directed by the Governor. That is the case currently – the Superintendent can do plenty of things without being directed or approved by the Governor. But the legislature decided that if the Superintendent wants to create new rules with the force of law, he can do it only with the cooperation of the Governor. So current practice is consistent with the earliest practice under the Constitution.

Finally, Respondents argue that what the Board of Education did ("evaluating and auditing the finances of the state's educational entities") was not the "supervis[ion] of public education." (Resp. Br. 40.) But Respondents play this game both ways. They want everything related to public education to count as "supervision" (so the Superintendent can act without interference), but not this (or other educational duties exercised by

other agencies). Yet there is no reason why evaluating and auditing educational finances wouldn't be supervision of public education. Or why licensing teachers, even locally, isn't a form of supervision. Or school building codes or school work rules. The answer is provided by the legislature. These things aren't within the supervisory authority because the legislature said they are not.

CONCLUSION

For the above reasons, this Court should declare that the Respondents must send their scope statements to the Department of Administration, await approval from the Governor before proceeding, and submit final rules to the Governor for approval.

Dated this 10th day of October, 2018.

Respectfully submitted,
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief produced with proportional serif font. This brief is 2,979 words long, calculated using the Word Count function of Microsoft Word 2010.

Dated: 10/8/2018

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CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: 10/8/2018

Electronically Signed by Richard M. Esenberg
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STATE OF WISCONSIN
SUPREME COURT

Case No. 2017AP2278-OA

KRISTI KOSCHKEE, AMY ROSNO, CHRISTOPHER MARTINSON, and MARY CARNEY,

Petitioners,

v.

TONY EVERS, in his official capacity as Wisconsin Superintendent of Public Instruction and WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION,

Respondents.

ORIGINAL ACTION

BRIEF OF AMICI PEGGY COYNE, MARY BELL, MARK W. TAYLOR, COREY OTIS, MARIE STANGEL, JANE WEIDNER, AND KRISTIN A. VOSS

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INTRODUCTION

In the case the Court must answer this question:

> Can the Legislature, without violating the Wisconsin Constitution, grant the Governor, a partisan executive officer, direct control over the non-partisan Superintendent of Public Instruction ("SPI"), by requiring the SPI to get the Governor's permission before submitting scope statements for administrative rules or, subsequently, the rules themselves to the Legislature for approval?

The Coyne amici assert that the answer is, resoundingly, no. The Legislature cannot constitutionally do so.

In 1848, Wisconsin's Constitutional Convention rejected a proposal to give the Governor executive authority over public education. Instead, it submitted to the voters a proposed constitution that vested the executive authority over public education in the hands of an elected SPI. The voters adopted the proposed 1848 constitution, creating a governor who had vested executive authority over all aspects of state government save one: public education. That vested executive authority is exercised by the SPI.

In 1902, the citizens of Wisconsin amended our Constitution to ensure that, unlike the governor, the elected SPI was to be a non-partisan officer.

Because the SPI is the officer vested by Art. X, § 1 of the Wisconsin Constitution with the authority to supervise public education, past and

current statutes have created the mechanism through which the SPI supervises the state's public schools: proposing administrative rules, which when approved by the legislature are enforced by the SPI. *See* Wis. Stat. Ch. 115, subch 2. (§§ 115.28 - 115.48).

Until 1994, the Legislature never sought to give the Governor the right to stop the SPI's ability to propose scope statements and administrative rules. The Legislature's first attempt to do so was declared unconstitutional in *Thompson v. Craney,* 199 Wis. 2d 674, 546 N.W.2d 123 (1996) ("*Craney*"). Its second try, by amending Wis. Stat. §§ 227.135(2) and 227.185 through 2011 Wisconsin Act 21 ("Act 21"), was held to be unconstitutional in *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520 ("*Coyne*"). The Legislature's third effort was through 2017 Wisconsin Act 57 ("Act 57"), the subject of this case. It, too, is unconstitutional as applied to the SPI.

Wis. Stat. § 227.135(2), as amended in 2011 by Act 21 to create § 227.135 (2013-2014), stated, in relevant part:

> An agency that has prepared a statement of the scope of the proposed rule shall present the statement to the governor and to the individual or body with policy-making powers over the subject matter of the proposed rule for approval. **The agency may not send the statement to the legislative reference bureau for publication under sub. (3) until the governor issues a written notice of approval of the statement.** (emphasis added)

Act 57, Section 3, enacted in 2017, amended § 227.135(2) making a cosmetic change to it that directed that scope statements be submitted to the Department of Administration for review and the result of that review be reported to the Governor:

> An agency that has prepared a statement of the scope of the proposed rule **shall present the statement to the department of administration, which shall make a determination as to whether the agency has the explicit authority to promulgate the rule as proposed in the statement of scope and shall report the statement of scope and its determination to the governor** who, in his or her discretion, may approve or reject the statement of scope. **The agency may not send the statement to the legislative reference bureau for publication under sub. (3) until the governor issues a written notice of approval of the statement.** (emphasis added)

Most importantly, as the Court can certainly see, the words of the statute that are actually material to this case, "*The agency may not send the statement to the legislative reference bureau for publication under sub. (3) until the governor issues a written notice of approval of the statement,"* were unchanged in 2017 by the Act 57 amendment. Those very words and the authority they granted to the Governor to block scope statements from being submitted to the legislative reference bureau, a key step in the development of administrative rules, were found in *Coyne* in 2016 to be unconstitutional as applied to the SPI.

Likewise, the relevant words in Wis. Stat. § 227.185 (2013-2014), "*No proposed rule may be submitted to the legislature for review under s. 227.19(2)*

unless the governor has approved the proposed rule in writing," were unchanged by the Act 57 amendment in 2017. They, too, were declared the year before in *Coyne* to be unconstitutional as applied to the SPI.

Thus, in this original action, the Court is reviewing the same statutory language that it determined two years ago in *Coyne* was unconstitutional as applied to the SPI, but which the Legislature nevertheless left untouched a year later when it amended the very statutes containing that language. While doing its review, the Court should heed this admonition from the Honorable Daniel Kelly:

> There is no end to the mischief the judiciary causes when it abandons its role of declaring what the law is, and instead arrogates to itself the power to develop new law in place of what it received from the ultimate law givers – the people of the State of Wisconsin and the United States.[1]

The Petitioners are asking the Court to do just that: develop new law in place of what the Court received from the "ultimate law givers – the people of the State of Wisconsin," who during the 1848 constitutional convention created the SPI with vested authority over public education after rejecting a proposal that education is to be supervised by the Governor, and who in 1902 adopted an amendment to ensure that the SPI would always be a non-partisan executive officer. Despite what the people

[1] Application of the Honorable Daniel Kelly to Governor Scott Walker for appointment to the Wisconsin Supreme Court, p. 15.

of Wisconsin unequivocally decided in 1848 and 1902, the Petitioners want the Court to conclude that the Legislature can constitutionally ignore the people's choices by placing the partisan Governor in charge of the very mechanism that the non-partisan SPI uses to supervise public education: the development and submission of proposed administrative rules.

The Court must not accept the Petitioners' invitation to make new law. The expressed will of the "ultimate law givers" must be upheld.

ARGUMENT

I. The Governor, a partisan elected officer, cannot be given supervisory authority over the non-partisan Superintendent of Public Instruction. Attempts to give him that authority have twice been declared unconstitutional.

Unlike other states, Wisconsin's Constitution places the supervision of education in the hands of an elected non-partisan executive with vested authority separate from the executive powers of the elected partisan Governor. Art. X, § 1 states:

> Superintendent of Public Instruction. The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law. The state superintendent shall be chosen by the qualified electors of the state at the same time and in the same manner as members of the supreme court, and shall hold office for 4 years from the succeeding first Monday in July. The term of office, time and manner of election or appointing all other officers of supervision of public instruction shall be fixed by law.

The words of Art. X, § 1, are clear: the supervision of public instruction is "vested" in a "state superintendent...." The only other entities with vested authority granted by the Wisconsin Constitution are the Judiciary (Art. VII, Sec. 2), the Legislature (Art. IV, Sec. 1), and the Governor (Art. V, Sec. 1).

Prior to the 1902 Amendment, the SPI could be a partisan whom the voters considered in the November election. The 1902 Amendment to Art. X, § 1, changed that. Through it, the SPI became a non-partisan constitutional officer, just like Wisconsin's Supreme Court justices:

> The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties, and compensation shall be prescribed by law. **The state superintendent shall be chosen by the qualified electors of the state at the same time and in the same manner as members of the supreme court, and shall hold office for four years from the succeeding first Monday in July. . .** The term of office, time and manner of electing or appointing all other officers of supervision of public instruction shall be fixed by law. (emphasis added)

The effect of placing the Superintendent on the non-partisan election cycle was an unambiguous directive from the people of this state: public education is to be supervised by an elected non-partisan executive officer.

II. Applying Wis. Stat. §§ 227.135(2) and 227.185 to the Superintendent and DPI is unconstitutional, because it grants the Governor, a partisan executive officer, supervisory authority over public education.

Rulemaking is a key mechanism for setting and implementing policies. There is no doubt that the "supervision of public instruction" is accomplished through administrative rules through which the SPI implements his or her policy choices. The Legislature recognizes that.

Many sections of Chapter 115 direct the Superintendent to promulgate rules and give the Superintendent considerable discretion over the content of those rules. For example, under Wis. Stat. § 115.28(3m)(b), the Superintendent "shall ... [p]romulgate rules establishing procedures for the reorganization of cooperative educational service agencies and boundary appeals." The Superintendent shall "make rules for the examination and certification of school nurses." Wis. Stat. § 115.28(7m). In these and many other circumstances, the SPI is free to propose rules that best fit his or her policy goals.

During the 1848 Convention, the education committee recommended that the Constitution task the Governor with appointing the Superintendent. That structure would have subordinated the Superintendent to the Governor. Ray Brown, *The Making of the Wisconsin Constitution Part Two*, 1952 Wis. L. Rev. 23, 55. The Convention rejected the

committee's proposal. *Id.* Instead, it created an SPI independent of gubernatorial supervision.

Through the adoption of the 1848 Constitution, the framers placed the SPI beyond the control of the Governor. The express purpose of the 1902 amendment was "to strengthen the position of the SPI by making the office non-partisan. . ." *Craney*, 199 Wis. 2d at 693.

Applying Wis. Stat. §§ 227.135(2) and 227.185, as amended by Act 57, to the SPI, would grant the Governor power to control the development and adoption of the administrative rules that implement educational policy, making the non-partisan Superintendent's supervision of public education subordinate to the partisan Governor and substituting the Governor's partisan driven policy choices for the SPI's non-partisan ones. If this Court allows that, it will have approved legislation that specifically accomplished what the 1848 constitutional convention rejected. Also, by allowing a partisan officer, the Governor, to supervise the non-partisan SPI, it will have negated the primary purpose of the 1902 amendment.

To avoid that result, this Court should reaffirm its holdings in *Coyne* and *Craney* and continue to protect the independent and non-partisan status of the SPI.

III. There is no reason to overrule *Coyne v. Walker* or *Thompson v. Craney*.

The four justice majority in *Coyne* held as follows:

> It is granting the Governor and Secretary of Administration the power to make the decision on whether the rulemaking process can proceed that causes the constitutional infirmity. This unchecked power to stop a rule also gives the Governor the ability to supplant the policy choices of the SPI.

Coyne, 2016 WI 38, ¶ 68. Despite those well-written and easily understandable words, Petitioners assert that there is no clear majority holding in *Coyne*. The Court can plainly see that the Petitioners' assertion is wrong. There were concurring opinions in *Coyne*, but it is undeniable that the four justices agreed on that seminal and decisive conclusion as to why allowing the Governor absolute control over the submission of scope statements and the proposal of administrative rules by the SPI violated the Constitution.

Coyne followed the precedent set in *Craney*—a unanimous 1996 decision, which concluded:

> **[T]he office of state Superintendent of Public Instruction was intended by the framers of the constitution to be a supervisory position, and that the "other officers" mentioned in the provision were intended to be subordinate to the state Superintendent of Public Instruction. Because the education provisions of 1995 Wis. Act 27 give the former powers of the elected state Superintendent of Public Instruction to appointed "other officers" at the state level who are not subordinate to the superintendent, they are unconstitutional beyond a reasonable doubt. . .**

> **Under our holding in the present case, the legislature may not give equal or superior authority to any "other officer."**

Craney, 199 Wis. 2d at 698–99 (emphasis added) (footnote omitted).

The Act 21 amendments to Wis. Stat. §§ 227.135(2) and 227.185 did exactly what *Craney* determined was unconstitutional; they gave superior authority to the Governor over the SPI. The majority decision in *Coyne,* holding them to be unconstitutional as applied to the SPI, was correct. And, because the Act 57 amendments to Wis. Stat. §§ 227.135(2) and 227.185 did not substantively change those statutes and left the Governor with the same power over the SPI that *Coyne* declared unconstitutional, *Coyne* controls the outcome of this case.

IV. The doctrine of *stare decisis* requires the Court follow the holdings of *Coyne* and *Craney*.

"This court follows the doctrine of *stare decisis* scrupulously because of [its] abiding respect for the rule of law." *Johnson Controls, Inc. v. Employers Ins. of Wausau,* 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257. Although not an "inexorable command," the doctrine "reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Id.* at ¶ 97.

In cases interpreting the Constitution, precedent is accorded even greater weight.

> Decisions on constitutional questions that have long been considered the settled law of the state should not be lightly set aside, [even] though this court as presently constituted might reach a different conclusion if the proposition were an original one . . . The legislature must of necessity take the decisions of this court for its guidance on questions of constitutional law. When it has done so, the court should not hold that it pinned its faith to a shadow, unless some doctrine vicious in principle or fraught with grave consequences has been enunciated.

State v. Frear, 142 Wis. 320, 125 N.W. 961, 964 (1910) (emphasis added).[2] Consequently, "any departure from the doctrine of stare decisis demands special justification." *State v. Luedtke,* 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 863 N.W.2d 592 (citation omitted).

This Court has identified several factors that it applies when considering whether a "special justification" exists, including whether:

> (1) changes or developments in the law have undermined the rationale behind a decision;
>
> (2) there is a need to make a decision correspond to newly ascertained facts;
>
> (3) there is a showing that the precedent has become detrimental to coherence and consistency in the law; or,
>
> (4) Additional relevant considerations include whether the precedent was wrongly decided, is unsound in principle or unworkable in practice.

Luedtke, 2015 WI 42, ¶ 94.

No "special justification" exists in this case because none of those factors apply:

---

[2] The doctrine of stare decisis is a fundamental part of the judicial heritage of Wisconsin. *See, Fisher v Horicon Iron & Mfg. Co.*, 10 Wis. 351, 353, 355 (1860).

(1) There have been no substantial changes in the law that undermine the rationales of Coyne and Thompson. The changes to Wis. Stat. §§ 227.135(2) and 227.185 did not make them substantively or materially different than the version of those statutes found to be unconstitutional by Coyne as applied to the SPI.

(2) The Petitioners allege no newly ascertained facts requiring Coyne or Craney to be overruled. Instead they argue that the ideology of Act 57 is paramount, characterizing Act 57 (the so-called Regulations In Need of Executive Scrutiny Act i.e, "the REINS Act") as "ensur[ing] that administrative agencies do not take advantage of the combination of executive and legislative authority to escape accountability and tyrannize the public."[3] Petitioner's Brief at 16. The ideological preferences of the Petitioners are not "newly ascertained facts."

(3) Overruling Coyne and Craney and applying Wis. Stat. §§ 227.135(2) and 227.185, as amended by Act 57, to the SPI would be highly detrimental to coherence and consistency in the law.

(4) The Petitioners have not shown that either Craney or Coyne was wrongly decided. Nor have they shown that they are unsound or unworkable.

(5) Overruling Craney, Coyne, or both would signal—contrary to established precedent—that a change of personnel on the Court is now a legitimate factor on which the Court may rely to overturn prior well-reasoned and longstanding decisions.[4]

Because no justification, much less a special one, for overruling *Craney* or *Coyne* exists, the Court should decline the Petitioners' invitation for it to do so.

[3] The SPI is an elected official holding statewide office. Were he or she to "tyrannize the public" the voters could easily remedy that problem.

[4] "The decision to overturn a prior case must not be undertaken merely because the composition of the court has changed." Johnson Controls v. Employers Insurance of Wausau, 264 Wis. 2d. at 116-117 (citations omitted).

CONCLUSION

Despite the cosmetic changes made by Act 57, Wis. Stat. §§ 227.135(2) and 227.185 remain unconstitutional as applied to the Superintendent of Public Instruction. The Court should so rule and dismiss this original action with prejudice.

Respectfully submitted this 3rd day of December, 2018.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 2,928 words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

I further certify that a copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of December, 2018.

/s/ Lester A. Pines

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STATE OF WISCONSIN
SUPREME COURT

APPEAL NO. 2017AP2278-OA

Kristi Koschkee, Amy Rosno, Christopher Martinson, and Mary Carney,
Petitioners,

v.

Tony Evers; in his official capacity as Wisconsin Superintendent of Public Instruction and Wisconsin Department of Public Instruction,
Respondents.

ORIGINAL ACTION

BRIEF AND APPENDIX OF THE WISCONSIN ASSOCIATION OF SCHOOL BOARDS, INC., AND THE WISCONSIN SCHOOL ADMINISTRATORS' ALLIANCE, INC., AS AMICI CURIAE

Dated: December 3, 2018

Respectfully submitted,

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STATEMENT OF INTEREST

Wisconsin Association of School Boards, Inc., (WASB) is a voluntary, nonstock corporation which includes the school boards of all 422 public school districts in Wisconsin. The Wisconsin School Administrators' Alliance, Inc., (SAA) is an alliance of five associations of public school administrators: Association of Wisconsin School Administrators (AWSA); Wisconsin Association of School Business Officials (WASBO); Wisconsin Association of School District Administrators (WASDA); Wisconsin Council of Administrators of Special Services (WCASS); and Wisconsin Association of School Personnel Administrators (WASPA).

WASB and SAA support, promote, and advance the interests of public education throughout the state. To this end, they support legislation that improves Wisconsin's public schools and the quality of education for Wisconsin school children.

WASB and SAA respectfully request the Wisconsin Supreme Court (Court) to deny the relief sought by the Petitioners. In doing so, WASB and SAA urge the Court to follow the doctrine of *stare decisis* and uphold the law settled by the

Court: Article X, § 1 of the Wisconsin Constitution (Constitution) vests the State Superintendent of Public Instruction (State Superintendent) superior and exclusive authority over the supervision of public instruction. In addition, WASB and SAA ask the Court to conclude that, if applied to the State Superintendent, the challenged provision of 2017 Wisconsin Act 57 ("REINS Act") violates Article X § 1 by delegating to the Governor superior authority to supervise public instruction.[1] Several parties with vested interests in education also submit herein a letter in support of this request. (*See* WASB/SAA App., p. 1.)

INTRODUCTION

Article X of the Constitution embodies the constitutional framework for Wisconsin's system of public instruction. At the pinnacle sits the State Superintendent who is vested (pursuant to Article X, § 1), with authority to exercise supervision over local officials charged with managing district schools.

[1] The State Superintendent and the Wisconsin Department of Public Instruction (DPI), are both Respondents in this action. Reference herein to the State Superintendent includes DPI.

The State Superintendent's authority is well-defined in the law, described by this Court as "a necessary position, separate and distinct from the 'other officers' mentioned in [Article X] . . . ." *Thompson v. Craney,* 199 Wis. 2d 674, 686, 546 N.W.2d 123 (1996). In *Craney*, this Court considered whether the other public officers, whose roles related to the supervision of public instruction, could be given equal or greater authority than the State Superintendent over the supervision of public instruction. Giving deference to the plain meaning and the historical understanding of the language in Article X as a whole, and appreciating the shared form of governance between the State Superintendent and local school officials, the Court concluded that such a grant of power was unconstitutional stating that the Legislature "may not give equal or superior authority to any 'other officer.'" *Id.* at 699.

In *Coyne v. Walker,* 2016 WI 38, 368 Wis. 2d 444, 870 N.W.2d 520, the Court again considered whether the Legislature could delegate superior supervisory authority over public instruction to the Governor or Secretary of

Administration and concluded that such delegation would be a violation of Article X, § 1. *Coyne,* 2016 WI 38 at 79.

In light of the *Craney* and *Coyne* decisions, *Amici Curiae,* WASB and SAA, respectfully submit, that if the REINS Act requires gubernatorial approval of scope statements for a proposed rule, it squarely contravenes past precedent and conflicts with Article X, § 1. Such a requirement would divest the State Superintendent of his supervisory authority by stripping him of the ability to carry out his statutorily-mandated duties and powers through rulemaking.

Further, such a reading of the REINS Act runs contrary to a uniform system of governance which has existed for almost 170 years with roots in the plain language of the Constitution, the drafters' intent, and the practices in existence at the time. During this time, a central, nonpartisan authority at the state level has provided leadership and guidance in a model of shared governance with local school officials.

For these reasons, *Amici* respectfully request that the Court deny the relief requested.

ARGUMENT

I. THE COURT'S PAST DECISIONS EXPLICITLY PROHIBIT THE LEGISLATURE FROM GIVING SUPERIOR AUTHORITY OVER THE SUPERVISION OF PUBLIC EDUCATION TO THE GOVERNOR.

In *Thompson v. Craney*, this Court considered the constitutionality of a provision of the 1995 budget bill, 1995 Wis. Act 27 (Act 27), which created a state Education Commission, Department of Education, and Secretary of Education, and made the State Superintendent the chair of the Education Commission. Act 27 gave the Secretary of Education and the Education Commission authority to exercise duties previously held by the State Superintendent. *Craney*, 199 Wis. 2d at 677-78.

In analyzing this shift in authority, the Court examined the words of the Constitution and its early amendments, the constitutional debates and practices in existence at the time of the conventions, and the first laws passed after the conventions. The analysis centered on the delegates' insistence that the State Superintendent have more than an advocate's role in public education, and instead be "an officer with the ability to put plans in action." *Craney,* 199 Wis. 2d. at 689.

In addition, the Court considered the role of the "other officers" referred to in the Constitution, finding that the framers intended these officers to be subordinate to the State Superintendent and that the power of supervision of public instruction "was not vested equally in the SPI [Superintendent of Public Instruction] and the 'other officers.'" *Id.* at 696. The Court held that the legislative provision in Act 27 was unconstitutional beyond a reasonable doubt because "the education provisions of 1995 Wis. Act 27 give the former powers of the elected state Superintendent of Public Instruction to appointed 'other officers' at the state level who are not subordinate to the superintendent. . . ." *Id.* at 698.

In *Coyne,* the Court considered whether 2011 Wisconsin Act 21 (Act 21) unconstitutionally vested in the Governor and the Secretary of Administration superior authority over the supervision of public instruction. Act 21 required the State Superintendent to obtain approval from the Governor, and in certain circumstances, the Secretary of Administration, before sending rules to the Legislature. In a lead decision issued by Justice Gableman, the Court concluded that Act 21 was

unconstitutional as applied to the State Superintendent because it delegated to other officers the power to determine whether the State Superintendent's rulemaking could proceed to the Legislature:

> Act 21 gives the Governor and Secretary of Administration the unchecked power to halt the SPI's and DPI's promulgation of rules on any aspect of public instruction, ranging from teachers' qualifications to the implementation of the school milk program to nonresident waiting list requirements for pupils. In other words, Act 21 improperly vests the Governor and Secretary of Administration with the supervision of public instruction in violation of Article X, § 1.

Coyne, 2016 WI 38 at ¶71. Justice Abrahamson, Justice Ann Walsh Bradley, and Justice Prosser concurred, concluding that Act 21 was unconstitutional as applied to the State Superintendent.

If the REINS Act requires similar gubernatorial approval, it must meet the same fate as the legislation in *Craney* and *Coyne*. To hold otherwise would require the Court to overrule *Coyne* and determine that Article X, § 1, and the historical evidence analyzed by the Court, no longer supports the Court's conclusion that this is prohibited by the Constitution. This departure from the doctrine of *stare decisis* is unsupported by any sound reason in law or policy.

The Petitioners disagree and urge that "the Court should not hesitate to abandon *Coyne*." (Pet. Br. 35). Petitioners' request, which is supported by less than two pages of argument, ignores that respect for prior decisions is fundamental to the rule of law and that any departure from them requires more than mere hesitation:

> Fidelity to precedent ensures that existing law will not be abandoned lightly. When existing law "is open to revision in every case, 'deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.'" *Consequently, this court has held that "any departure from the doctrine of stare decisis demands special justification."*

Johnson Controls, Inc. v. Emplrs. Ins., 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257, *cert denied*, 541 U.S. 1027 (2004) (emphasis added).

In determining whether to depart from *stare decisis*, the Court considers whether: changes or developments in the law have undermined the rationale behind a decision; there is a need to make a decision correspond to newly ascertained facts; or there is a showing that the precedent has become detrimental to coherence and consistency in the law. *Johnson Controls*, 2003 WI 108 at ¶98. In addition, the Court looks to whether the prior decision is unsound in principle, whether it

is unworkable in practice, and whether it was correctly decided and has produced a settled body of law. *Id.* at ¶99. None of these reasons support a departure from the Court's prior decisions.

Coyne mirrors a body of law settled since the early constitutional conventions where delegates spoke of the need for an independent officer to supervise education. *See Coyne,* 2016 WI 38 at ¶57 ("Harvey's stated purpose of amendment was to allow the Legislature to appoint public instruction officers, if necessary, in order to ensure that the officers supervising public instruction were *dedicated solely to the task of education* rather than using the office as a political stepping stone.") (Italics in original). In the first law passed setting forth the duties of the State Superintendent, the Legislature delegated to the State Superintendent duties that included apportioning school funds, proposing regulations, and adjudicating controversies arising under the school lands. *Craney,* 199 Wis. 2d at 694-95. The State Superintendent was viewed early on as an independent officer with superior authority over the supervision of public instruction.

Petitioners allege that *Coyne* should be overruled because it is "unsound in principle" and "unworkable in practice" and because there is no settled rule of law to be applied from it in light of the single lead opinion and the concurrences by three other justices. (Pet. Br. 35-36) Petitioners argument minimizes the unequivocal holding in *Coyne* reached by four justices that Act 21, which delegated to the Governor and Secretary of Administration the authority to block the State Superintendent's rulemaking, vested the Governor and Secretary of Administration with the supervision of public instruction in violation of Article X, § 1.

In the lead opinion, Justice Gableman stated that Article X, § 1 vests in the State Superintendent the supervision of public instruction and that his powers, duties, and compensation are prescribed by the Legislature. The opinion explains that the Legislature has mandated that these powers be carried out through the rulemaking process in Chapter 227 of the Wisconsin Statutes. The State Superintendent is statutorily required to promulgate rules to adopt statements of general policy and interpretations of statutes, and is explicitly directed

throughout the statutes to make rules regarding public instruction. The Court summarized the importance of rulemaking to the position of State Superintendent: "Under the current statutory prescription, the [State Superintendent] cannot carry out their duties and powers of supervision without rulemaking." *Coyne,* 2016 WI 38 at ¶37. Act 21 did not allow the State Superintendent to proceed with his rulemaking duties absent approval and therefore, it unconstitutionally vested the Governor and Secretary of Administration with the supervision of public instruction in violation of Article X, § 1.

In his concurrence, Justice Prosser recognized that constitutional officers must possess inherent authority to fulfill their responsibilities. Justice Prosser further recognized that "the very nature of the office of [State] superintendent required the ability to make rules, irrespective of a specific grant of authority from the legislature" and that the "constitution provides the initial authority to develop rules because the constitution states the superintendent's mission." *Coyne* 2016 WI 38 at ¶¶150, 152. Justice Prosser concluded that Act 21, as applied to the State Superintendent, was unconstitutional

because "it would give a governor authority to obstruct the work of an independent constitutional officer to such an extent that the officer would be unable to discharge the responsibilities that *the legislature* has given him." *Id.* at ¶155. (Emphasis in the original)

Justice Abrahamson, joined by Justice Ann Walsh Bradley, unequivocally concluded that Act 21 was unconstitutional as applied to the State Superintendent because it gave equal or superior authority over the supervision of public instruction to officers other than those inferior to the State Superintendent. *Coyne,* 2016 WI 38 at ¶¶80, 84.

The Petitioners' attempt to parse the lead and concurring decisions ignores the rule of law set forth in all three decisions: Article X, § 1 of the Constitution prohibits the Legislature from giving the Governor superior authority over the supervision of public instruction. This is based on established precedent and should be upheld under principles of *stare decisis*.

II. THE ABILITY OF A CENTRAL NONPARTISAN AUTHORITY TO LEAD AND SUPERVISE AT THE STATE LEVEL THROUGH RULEMAKING IS ESSENTIAL FOR STRONG PUBLIC EDUCATION.

The concept of shared governance between local officials and the State Superintendent has continued uninterrupted for almost 170 years. In recognizing the primacy of the State Superintendent, *Amici* respectfully submit that the State Superintendent's role must be viewed in light of the historic and continuing role local officials play within the constitutional framework of Wisconsin's public school system. *See*, *e.g.*, *Kukor v. Grover*, 148 Wis. 2d 469, 499, 436 N.W.2d 568 (1989) (the principle of local control is a constitutionally based and protected precept). The dichotomy between state and local control is part and parcel of the Constitution and has been an "essential feature of our educational system" since the adoption of the Constitution. *Buse v. Smith,* 74 Wis. 2d 550, 572, 247 N.W. 2d 141 (1976) (citation omitted). At that time, local superintendents were entrusted with the administration of local schools. Today, "Wisconsin relies on 422 local school districts to administer its elementary and secondary programs. Twelve cooperative educational service agencies (CESAs)

furnish support activities to the local districts on a regional basis and the Department of Public Instruction, headed by the State Superintendent of Public Instruction, a nonpartisan constitutional officer, provides supervision and consultation for the districts." Wisconsin Legislative Reference Bureau, *State of Wisconsin 2015-2016 Blue Book,* 312 (2015).

The Wisconsin Constitution guarantees an equal educational opportunity free of charge for all children between the ages of 4 and 20. *See Kukor,* 148 Wis. 2d at 495. The State Superintendent, a constitutional officer whose position is dedicated solely to the task of public education and whose position is free from partisan influence, safeguards this fundamental right by ensuring quality schools and a strong education system. His tasks are numerous and his knowledge of public instruction is deep. He facilitates the partnership between the state and local school districts; interprets and enforces myriad education laws in areas such as finance, curriculum, and special education; ensures that teachers and administrators are appropriately licensed; and works to identify innovative educational methods. Rulemaking is an

essential part of these tasks and his sharp focus on education and comprehensive knowledge ensure that the complex framework of statutes and regulations complement one another instead of conflict, and provide direction to the 422 school districts responsible for public education.

The State Superintendent's activities are driven by his duty to supervise and direct the public schools in Wisconsin. Effective leadership at the local level hinges in large part on clear, comprehensive and consistent guidance from the State Superintendent and his agency. This guidance comes in many forms, not the least of which is administrative rulemaking.

The State Superintendent has devoted significant resources in exercising his supervisory authority over education through rulemaking. In fact, there are 162 pages of rules under Public Instruction in the Wisconsin Administrative Code regarding matters of education. (*See* WASB/SAA App., pp. 2-4, Wisconsin Administrative Code, Department of Public Instruction, Table of Contents). Over the last year alone, the State Superintendent has engaged in rulemaking with respect to complaint and appeal procedures, school district boundary

appeals, pupil nondiscrimination, school finance, state aid, robotics competition grants, high-cost special education aid, whole grade sharing, teacher licensing, and the special needs scholarship program. In addition, the State Superintendent has issued statements of scope with respect to library system standards, standards for disproportionality in special education, English language learners, and open enrollment. Finally, the State Superintendent has submitted proposed rules to Rules Clearinghouse with respect to funds for energy efficiency projects, school mental health programs, lifetime licenses, part time open enrollment, and the early college credit program.

Coyne's conclusion that the Constitution prohibits legislation that allows the Governor to halt these rulemaking efforts fits directly into the framers' intent to provide uniformity in public education. Shifting this authority to partisan or appointed officials will result in inconsistencies in a unique and complex system of rules, policies, funding, and supervision of public education. Public education will no longer be supervised exclusively by a nonpartisan, constitutional officer

whose singular focus is Wisconsin's public schools. Instead, public education will fall to the whim of the political party in office at the time and will be subject to political motivations and party lines. Such a result is problematic at the very least and unconstitutional beyond a reasonable doubt.

CONCLUSION

For the reasons set forth above, *Amici* respectfully request that this Court dismiss the Petition for Original Action.

Dated this 3rd day of December, 2018.

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CERTIFICATION OF FORM AND LENGTH

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Dated: December 3, 2018.

/s/ Richard F. Verstegen

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Dated: December 3, 2018.

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