

# WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES MAY 2018

The case listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This case originated in Dane County.

## **TUESDAY, MAY 15, 2018**

9:30 a.m. 17AP2278-OA

Kristi Koschkee v. Tony Evers

**Note:** The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Hannah McClung, (WISC-TV) (608) 271-4321. The synopsis provided is not a complete analysis of the issues presented.

**Wisconsin Supreme Court**  
**Tuesday, May 15, 2018**  
**9:30 a.m.**

2017AP2278-OA

Koschkee v. Evers

**Supreme Court case type:** Original Action

**Circuit Court:** Dane County

**Long caption:** 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

**Issue presented:** The underlying issue in this original action is whether the state Department of Public Instruction (DPI) and State Superintendent of Public Instruction Tony Evers must comply with the REINS (Regulations from the Executive in Need of Scrutiny) Act.

Passed in 2017, the REINS Act requires any agency that proposes to promulgate a rule to first submit a statement of scope for the proposed rule to the state Department of Administration (DOA) for a determination as to whether the agency has the explicit authority to promulgate such a rule.

However, before reaching the underlying issue, the Supreme Court will hear argument on only two questions:

- whether Evers and DPI have the right to counsel of their choice, or are represented by the Attorney General and the Wisconsin Department of Justice (DOJ); and
- whether Gov. Scott Walker is a necessary party to this action.

**Some background:** On Nov. 20, 2017, the Wisconsin Institute for Law & Liberty (WILL) filed a petition for an original action on behalf of plaintiffs Kristi Koschkee, Amy Rosno, Christopher Martinson, and Mary Carney. According to the petition, Koschkee and Rosno are licensed school teachers; Martinson is a member of the New London School Board; and Carney is a parent of a child attending a parochial school in Wisconsin as well as a member of the Marshfield School Board.

WILL asserts that in September and October of 2017, after the effective date of the REINS Act, DPI forwarded a statement of scope for a proposed rules to the Legislative Reference Bureau without first submitting statements of scope to DOA. Nor did the proposed rules receive approval from Gov. Scott Walker because they were never sent to his office subsequent to the DOA as required under the REINS Act, WILL says.

The petitioners seek a declaratory judgment stating that Evers is required to comply with all portions of the REINS Act and they want an injunction preventing Evers from enforcing any rules promulgated without full compliance.

Evers argues that the REINS Act attempts to impose authority already deemed unconstitutional in a prior Wisconsin Supreme Court decision, Coyne v. Walker, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520. WILL and the petitioners contend that Coyne did not clearly settle the issue now presented.

### **Representation:**

Soon after WILL filed its petition, a dispute arose over who would represent Evers and DPI. Ryan Nilsestuen and Benjamin R. Jones, attorneys for the DPI, filed a letter notice of representation for Evers on Nov. 22, 2017. The Solicitor General's office of the DOJ promptly filed a Notice of Appearance and Substitution of Counsel saying they, rather than DPI attorneys, would be representing Evers.

DOJ argues that only it is authorized to represent Evers and DPI under Wis. Stat. § 165.25 (1m), and because the governor asked it to do so. DOJ argues that when acting pursuant to that statutory grant, DOJ has analogous powers to the U.S. Attorney General or of the numerous states that have held that their attorneys general, not the nominal state party, determine the official parties' litigation positions.

Evers contends that DOJ's representation violates his authority to supervise public instruction and interferes with his authority under Art. X § 1 of the Wisconsin Constitution. He says DOJ publicly voiced a position in conflict with his interest in the underlying case about the constitutionality of the REINS Act.

Due to the unique circumstances of this case, the Supreme Court has authorized Nilsestuen and Jones, to represent Evers and DPI on the two issues being argued.

### **Is the Governor a Necessary Party?**

The petitioners and DOJ have both filed briefs saying the governor is not a necessary party to this action. Evers says the governor is a necessary party.

The petitioners contend: "Whether this Court modifies, clarifies, upholds, distinguishes, or reverses Coyne will not turn on whether the Governor is a party. The result will be determined by the Court's decision based on the law, and the law does not change based upon the identities of the parties." The DOJ bolsters that argument, saying its request for relief is directed only at Evers.

Evers contends that the governor and the DOA secretary should be made parties to the proceeding. He says in addition to the superintendent, the statutes at issue necessarily involve the governor and the secretary of administration, and that both of them have an interest which would be affected by a declaration in this case.

Evers says this conclusion is further supported by the fact that the governor and the secretary of administration were both parties in Coyne, which Evers contends has already decided the underlying issue here.

The underlying issue involving the REINS Act is not scheduled as a topic of this oral argument. A decision by the Supreme Court is expected to determine who may provide representation to Evers and DPI, and whether the governor is a necessary party to the case.