STATE OF WISCONSIN
SUPREME COURT
NO. _____

Kristi Koschkee, Amy Rosno
Christopher Martinson, and
Mary Carney

Petitioners,

v.

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

Respondents.

MEMORANDUM IN SUPPORT OF PETITION TO SUPREME COURT TO TAKE JURISDICTION OF AN ORIGINAL ACTION

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INTRODUCTION

The Wisconsin Legislature has recently taken steps to put specific limits on agency rule-making authority in this State. The Legislature first passed 2011 Wis. Act 21 and more recently passed 2017 Wis. Act 57 (commonly referred to as the REINS Act[1]). Act 21 imposed procedural checks and balances on agencies when they promulgate rules. It was a step by legislators "to jealously guard their constitutional policy-making authority." Ronald Sklansky,[2] *Changing the Rules on Rulemaking*, WISCONSIN LAWYER, August 2011. There is no doubt that rule-making is a legislative function, *see* Wis. Stat. § 227.19; *Martinez v. DILHR*, 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992) (agency rule-making power derived from authority delegated by Legislature), and while delegation of that function to agencies may be an unavoidable feature of modern public policy, the Legislature remains the master of its terms.

The REINS Act, passed in August of this year, adds further procedural constraints on agency rule-making. State Senator Devin LeMahieu, one of the co-authors of the legislation, explained that "State

[1] REINS stands for Regulations from the Executive In Need of Scrutiny. The key sections of the REINS Act for purposes of this action are codified in Wis. Stat. §§ 227.135 and 227.136.

[2] Sklansky is a retired senior staff attorney for the Wisconsin Legislative Council, the nonpartisan service agency of the Wisconsin Legislature.

agencies currently have the power to pass harmful regulations with little oversight from the legislature that can cost Wisconsin businesses and citizens tens of millions of dollars in compliance and lost revenue."[3] According to Senator LeMahieu, "The REINS Act improves transparency in the rule making process and gives the legislature more power to hold unelected bureaucrats accountable." *Id.*

Among other things, the REINS Act requires that statements of scope for proposed rules be submitted to the Department of Administration for a determination of the agency's authority to promulgate the proposed rule. The Department of Administration's report is then forwarded to the Governor, who has the discretion to approve or reject the statement of scope. While the Legislature also retains the power to block rulemaking,[4] the further safeguards in the REINS Act "ensure[] state agencies are not proposing rules that go beyond the legislature's intent or the agency's authority."[5]

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[3] M.D. Kittle, *REINS Act, Aimed At Checking 'Rogue Bureaucrats,' On Verge Of Becoming Law*, MACIVER NEWS SERVICE, June 12, 2017, http://www.maciverinstitute.com/2017/06/reins-act-aimed-at-checking-rogue-bureaucrats-on-verge-of-becoming-law/.

[4] *See* Wis. Stat. § 227.19.

[5] Statement of State Senator Luther Olsen, http://legis.wisconsin.gov/senate/14/olsen/media/1422/71017-reins-act.pdf.

The Superintendent of Public Instruction and the Department of Public Instruction (collectively "DPI") take the position that because the Superintendent is an independent constitutional officer, DPI is exempt from Act 21 and the REINS Act (or at least the portions of them that permit the involvement of any other part of the executive branch in DPI's rule-making) and has refused to comply with certain of the procedural steps required by the Legislature for rule-making, namely submission of statements of scope to the Department of Administration and to the Governor. In so doing, it relies on *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, which held that certain provisions of Act 21 could not be applied to DPI. However, there were multiple opinions in *Coyne* and none of them had the support of the majority of the Court.

This case challenges DPI's contention that it is exempt from those sections of the REINS Act requiring submission of scope statements to the Department of Administration and the Governor. As a result, it involves a significant issue of interpretation of the Wisconsin Constitution. It will require this Court to determine the applicability of *Coyne* here and, if it wishes, to revisit the fractured outcome in that case.

Time is of the essence. The REINS Act became effective on September 1, 2017. DPI has already submitted statements of scope for proposed new rules without complying with the REINS Act. Given its position that it need not comply with the law, it will likely continue to do so in the future. Rules promulgated by DPI affect hundreds of school districts, tens of thousands of teachers and administrators, and hundreds of thousands of parents and students throughout the State of Wisconsin. The Wisconsin citizens affected by these rules and the public at large are entitled to certainty as to the legality and enforceability of such rules. Such certainty can only be achieved by a prompt decision from this Court regarding DPI's responsibility to comply with the REINS Act. Thus, this case implicates the sovereign rights of the people of this State and qualifies for original jurisdiction by this Court. *See Petition of Heil*, 230 Wis. 428, 443, 284 N.W.42 (1939).

This Court should accept this matter as an original action because only this Court can determine with finality the effect of its decision in *Coyne* on this matter and because it is important to determine with finality whether DPI is required to comply with legislative limits placed on its rule-making authority.

ARGUMENT - THIS COURT SHOULD ACCEPT THIS CASE AS AN ORIGINAL ACTION TO DETERMINE WHETHER DPI MUST COMPLY WITH ALL SECTIONS OF THE REINS ACT

I. The REINS Act Requires Agencies to Submit Statements of Scope to the Department of Administration for Review Regarding the Agency's Authority and to the Governor for Approval.

No administrative agency has the legal power to promulgate rules beyond the agency's authority. Wis. Stat. § 227.40(4); *Seider v. O'Connell*, 2000 WI 76, ¶23, 236 Wis. 2d 211, 612 N.W.2d 659. Moreover, agencies have no implied rule-making powers, and all rules must be based on an express grant of rule-making authority by the Legislature. Wis. Stat. § 227.11(2). The Legislature commands the process to be followed in exercising this authority. As amended by the REINS Act, Wisconsin Statute § 227.135(2) provides:

> 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.

The statute has four important steps: (1) once an agency has prepared a statement of scope, it sends the statement to the Department of Administration for an independent review of agency authority; (2) the Department of Administration then issues a report on agency authority and forward the statement of scope and its report to the Governor; (3) the Governor approves or rejects the statement of scope; and (4) the agency sends the statement of scope to the Legislative Reference Bureau only after gubernatorial approval. It is the first three of these steps that DPI is skipping and that are at issue here.

II. DPI Is Refusing to Comply with the REINS Act Based on *Coyne*.

DPI is not sending its statements of scope to the Department of Administration as required under the REINS Act. In September and October 2017 (after the effective date of the REINS Act), DPI forwarded statements of scope for proposed rules to the Legislative Reference Bureau, but did not first submit the statements of scope to the Department of Administration as required by the REINS Act.

For example, as set forth in the Petition for an Original Action filed herewith, statements of scope created by DPI were published by the Legislative Reference Bureau on September 18 and October 9, 2017. (*See*

Petition, Ex. A-D.) None of those statements of scope were first sent to the Department of Administration for review. (*See* Petition, Ex. F & H.)

Moreover, by refusing to send its statements of scope to the Department of Administration (step one above), DPI is also causing them to not be sent to the Governor. Under § 227.135(2), the Department of Administration prepares a report on agency authority to promulgate the proposed rule and then sends the report and the statement of scope to the governor (step two). If the statement of scope is not sent to the Department of Administration, step two cannot occur and the statement of scope never goes to the Governor. Further, if step two does not occur then step three (gubernatorial review) also cannot occur.

DPI is skipping these steps and sending its statements of scope directly to the Legislative Reference Bureau (step four). But under the REINS Act, it is only after the Department of Administration has reported on the agency's authority to promulgate the rule and after the Governor has issued a written notice of approval that the agency may take the next necessary step and submit the statement of scope to the Legislative Reference Bureau. DPI is avoiding these requirements.

DPI takes the position, based on *Coyne*, that it is not required to receive approval from the Governor for statements of scope and by implication that it is not required to submit statements of scope to the Department of Administration (the prerequisite to gubernatorial approval). The DPI statements of scope attached to the Petition all state as follows:

> **Date Statement Approved by Governor:** Pursuant 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. Coyne v. Walker, 368 Wis.2d 444.

Based on this assertion by DPI, the statements of scope attached to the Petition were never submitted to the Department of Administration by DPI as required under the REINS Act, never reviewed to determine whether DPI had the legal authority to adopt the proposed rules within those statements of scope, and never approved by the Governor.

III. This Court's Decision in *Coyne*.

Coyne v. Walker, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, was a taxpayer challenge asserting that the sections of 2011 Wis. Act 21 that allowed the Governor to veto statements of scope and proposed rules prepared by DPI and allowed the Secretary of the Department of Administration to veto rules proposed by DPI if their exceeded $20,000,000, were unconstitutional. 2016 WI 38, ¶¶6-7. There were five

separate opinions in the case: the lead opinion by Justice Gableman, a concurrence by Justice Abrahamson (joined by Justice A.W. Bradley), a concurrence by Justice Prosser, a dissent by Chief Justice Roggensack (joined by Justices Ziegler and R. Bradley) and a dissent by Justice Ziegler (joined by Justice R. Bradley).

The result of the multiple opinions was that the challenged sections of Act 21 were held unconstitutional as applied to DPI, but not for any reason agreed upon by a majority of the Court. The multiple writings left a number of legal principles in doubt. For example, although the Court struck down the mandate of gubernatorial approval of rules and scope statements, a majority of the Court seemed to believe that the Legislature could vest rule-making powers regarding public education in an officer other than the Superintendent. *See Id.*, ¶¶218-224, 232 (Roggensack, CJ, joined by Ziegler and R. Bradley, JJ. dissenting); *Id.*, ¶¶157-168 (Prosser, J., concurring) (rejecting the contrary conclusion in *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W. 2d 123 (1996)). At least five justices, including the lead opinion, reaffirmed that the Constitution gives the Legislature "the ultimate authority to determine what the superintendent may or may not do by prescribing the superintendent's powers and duties." *Id.*, ¶¶49, 70, 79;

see id., ¶152 (Prosser, J. concurring); *Id.*, ¶206 (Roggensack, CJ, joined by Ziegler and R. Bradley, JJ. dissenting).

Justice Prosser rejected the challenged sections of Act 21 only because they gave the Governor the blanket authority to veto proposed rules, which in Justice Prosser's mind obstructed rule-making responsibilities that the Legislature had otherwise granted to DPI. *Id.*, ¶¶154-56 (Prosser, J., concurring). Because of the extremely limited nature of Justice Prosser's opinion, the applicability of *Coyne* to the provisions of the REINS Act is uncertain.

IV. This Court Should Take this Case to Determine Whether DPI Is Required to Forward Statements of Scope to the Department of Administration for an Independent Review of Agency Authority.

Under Wis. Stat. § 227.135(1)(c), agencies must set forth in the statement of scope for a proposed rule the statutory authority on which the agency relies. To make sure that administrative agencies do not exceed their authority, § 227.135(2) (as modified by the REINS Act) now requires that prior to taking any other action, the agency must first submit its statement of scope for a proposed rule to the Department of Administration, which makes an independent determination of whether the agency has the explicit authority to promulgate the rule proposed in the statement of scope.

This process adopted by the Legislature of requiring an independent determination of an agency's authority to promulgate a rule is an important part of the REINS Act and is intended to protect the public from overreach by administrative agencies. It is a deliberate check on agency power. By requiring agency authority to be independently reviewed by the Department of Administration, the Legislature is attempting to ensure that agencies do not promulgate rules beyond their authority. There is nothing in *Coyne* preventing the Legislature from protecting the public from overreach by administrative agencies, including DPI, by requiring an independent review and report on agency authority by the Department of Administration. What Justices Gableman, Abrahamson, A.W. Bradley and Prosser appeared to agree on in *Coyne*, and only in broad terms, is that the challenged sections of Act 21 were unconstitutional because they gave the Governor an absolute veto over all rules sought to be promulgated by DPI.

But under the REINS Act, the Department of Administration does not have the authority to quash or veto proposed rules. The Department of Administration simply reports if there is a problem with the agency's asserted authority. The requirement that agencies (including DPI) send

statements of scope to the Department of Administration for review and a report raises no constitutional concerns under *Coyne*.

Nevertheless, the DPI has not been sending its statements of scope to the Department of Administration. Instead, it has been bypassing the Department of Administration (and the Governor) and simply sending its statements of scope directly to the Legislative Reference Bureau. Given this course of conduct, it is the obvious intent of DPI to begin drafting proposed rules based on the above statements of scope without ever having the independent review of authority required by the REINS Act. This Court should take this case as an original action to review DPI's conduct in that regard and declare whether DPI must comply with the REINS Act.

V. This Court Should Take this Case to Determine Whether DPI's Statements of Scope Must Be Forwarded to the Governor for Approval as Required by the REINS Act.

The REINS Act, like Act 21, requires that statements of scope be forwarded to the Governor for approval prior to publishing the scope statement in the Administrative Register and prior to performing any further work on the proposed rule. Wis. Stat. § 227.135(2) expressly states that "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."[6]

The issue of requiring gubernatorial approval of DPI scope statements was addressed in *Coyne* but not in the context of the REINS Act and not with a conclusion agreed upon by a majority of this Court.

Context matters. For example, Justice Prosser believed that some "supervisory" authority (if, indeed, rulemaking can be regarded as an exercise of "supervisory" authority) may be placed in another officer. 2016 WI 35, ¶¶143, 147, 166 (Prosser, J., concurring). He believed, however, that some core authority must be retained by the SPI. *Id.*, ¶152 (Prosser, J., concurring).

Although the REINS Act, like Act 21, states specifically that the Department of Administration shall send its report regarding agency

[6] Under § 227.135(2), any work performed by any employee of DPI prior to receiving such approvals on the proposed rules would be an unlawful expenditure of taxpayer funds. The Petitioners, as taxpayers, are harmed by this illegal expenditure of taxpayer funds and suffer a pecuniary loss as a result of the expenditure. *See S.D. Realty Co. v. Sewerage Comm'n of Milwaukee*, 15 Wis. 2d 15, 20-21, 112 N.W.2d 177 (1961). Further, each of the Petitioners is affected in different ways by the rules DPI promulgates and is entitled to certainty as to the lawfulness of DPI rules promulgated after the REINS Act. *See* Wis. Stat. § 806.04(2) ("Any person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.").

authority to the Governor (who may then approve or reject the statement of scope) it does so as part of the process requiring an independent review of agency authority. While the Governor is not limited to approving or rejecting the statement of scope on that basis, it would certainly be a good reason for the Governor to reject a statement of scope. It is not clear that a gubernatorial veto of a DPI statement of scope based upon lack of agency authority would run afoul of the need to retain some core authority in the SPI that so concerned Justice Prosser.

And therein lies the need for review. Given the narrow nature of Justice Prosser's opinion in *Coyne*, there is no clear path for lower courts to follow in deciding this dispute. Only this Court can determine with finality whether DPI is bound by all portions of the REINS Act and how this Court's prior decision in *Coyne* affects that issue.

VI. This Court Should Take this Case to Determine if the Portion of the REINS Act Requiring Gubernatorial Approval of a Statement of Scope Is Constitutional.

But there is a more fundamental point. *Coyne* was a fractured decision that yielded a result but not a rule of law. Petitioners respectfully believe that the result was wrong. Rulemaking is a legislative, not a supervisory function, and is a delegated – not vested – power that can be

withheld or modified by the Legislature. If, in fact, some power can be given to another officer as Justice Prosser believed, why can't the Legislature enlist the Governor or Department of Administration in a process it has created to protect against agency overreach? Given the Legislature's intent to constrain rule-making by all agencies including DPI, and given the lack of guidance that exists from the multiple opinions in *Coyne*, this Court should undertake a fresh constitutional analysis of Article X, Section 1 (Superintendent of Public Instruction) and Article IV, Section 1 (Legislative Power) of the Wisconsin Constitution to determine whether there is anything in the Constitution that prevents the Legislature from placing limits such as a gubernatorial veto on DPI's rule-making authority. The Petitioners believe that the result of such a fresh analysis will be that there are no constitutional concerns here.

Agency rule-making is a "quasi-legislative" function, permitting agencies to promulgate legal rules that have the force and effect of law. [7] Administrative agencies, as part of the executive branch, only have the ability to "make law" (as opposed to implementing laws passed by the

[7] 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." Wis. Stat. § 227.01(13) (emphasis added).

Legislature) to the extent that the Legislature chooses to delegate such authority to them. *See Martinez v. DILHR*, 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992) (stating that rulemaking authority is derived solely from delegation by the Legislature).

To say that the Legislature may not constrain such delegated authority through statutes because the Superintendent has some vested constitutional responsibility regarding the supervision of public instruction ignores that the power to make law and policy is granted exclusively to the two chambers of the Legislature. Wis. Const. Art. IV, § 1 ("[T]he legislative power shall be fully vested in the senate and assembly."). It further ignores that the Constitution expressly cabins the Superintendent's authority to the Legislature's pleasure. Wis. Const. Art. X, § 1 ("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 as prescribed by law.") (Emphasis added.) The Legislature can, subject to certain limits, [8] delegate that authority to agencies, but when it does so any rulemaking

[8] "[A] delegation of legislative power to a subordinate agency will be upheld if the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the board or agency acts within that legislative purpose." *In re Klisurich*, 98 Wis. 2d 274, 280, 296 N.W.2d 742 (1980).

authority granted by the Legislature to the Superintendent is separate and apart from his vested constitutional duties.

Rule-making is a separate delegated power and one that DPI shares with numerous other agencies. With respect to that power delegated by the Legislature, DPI stands in the same position as every other agency – the extent of its power is subject to increase, decrease, modification, constraint and change, at the discretion of the Legislature. Under these principles, all parts of the REINS Act are constitutional including requiring gubernatorial approval of statements of scope.

This Court does not lightly abandon precedent. *See generally Bartholomew v. Wis. Patients Compensation Fund*, 2006 WI 91, ¶¶31-51, 293 Wis. 2d 38, 717 N.W.2d 216 (discussing *stare decisis*). But *Coyne* did not result in a majority opinion establishing a principle on which the public has – or could – rely. Four justices seemed to believe that some measure of authority over public education could be placed in another officer. Although a majority believed that the Governor could not block rule-making under Act 21, an overlapping majority reaffirmed the notion that the Legislature has substantial – perhaps even plenary – power over DPI. When differing majorities have affirmed principles that seem to be in

tension for reasons that no majority has endorsed, there is no settled principle. *Stare decisis* ought not to apply because there is no "decision" to "let stand."

Coyne left the Legislature wondering just what it could do to cabin DPI's discretion and ensure that it adheres to the policy directions chosen by the Legislature. To be sure, the Legislature could countermand specific DPI rule-making. It could withdraw rule-making authority altogether. These are important tools, but they are inadequate to the task. The Legislature cannot micromanage administrative agencies. Requiring the Legislature to react to overreach after it has occurred or hamstringing the agency in impractical ways as opposed to allowing it to create checks and balances that operate a structural restraint is inconsistent with the recognition by majorities of this Court in *Coyne* that the Superintendent is *not* the only officer in whom power over public education may be vested.

This doctrinal inconsistency matters. The Legislature and public need a rule of law and not merely an outcome. The Petitioners request that this Court take this case as an original action to declare that the REINS Act in total is constitutional and binding on DPI.

CONCLUSION

Based upon the above, the Petitioners ask this Court to take this matter as an original action in order to issue a declaratory judgment that DPI is required to comply with all portions of the REINS Act and that any rules promulgated by DPI without such full compliance are invalid and may not be enforced by DPI.

Dated this 20th day of November, 2017.

Respectfully submitted,
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