STATE OF WISCONSIN
SUPREME COURT

Case No. 17AP2278

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.

NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS AND COMMERCE IN SUPPORT OF THE PETITION TO TAKE JURISDICTION OF AN ORIGINAL ACTION

Lucas T. Vebber (State Bar No. 1067543)
Corydon J. Fish (State Bar No. 1095274)
501 E. Washington Ave.
Madison, WI 53703
Phone: 608-258-3400
Fax: 608-258.3413

Attorneys for Wisconsin Manufacturers and Commerce

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION AND INTEREST OF AMICUS CURIAE

Wisconsin Manufacturers and Commerce (WMC) is Wisconsin's chamber of commerce and manufacturers' association. With approximately 3,800 members statewide, WMC is the largest business trade association in Wisconsin. WMC members come from all sizes of business and every sector of Wisconsin's economy. Since our founding in 1911, WMC has been dedicated to making Wisconsin the most competitive state in the nation in which to conduct business.

As an organization, WMC advocates for members before the Legislature, administrative agencies and in the courts. WMC has significant experience with administrative rulemaking at various agencies. WMC members are subject to a variety of administrative rules that have the force of law, many of which significantly impact their ability to do business in Wisconsin. WMC has actively supported a number of administrative rulemaking reform efforts, including 2017 Wisconsin Act 57 (Act 57), which is the subject of the petition now before the Court.

Ensuring a consistent regulatory environment is critical to WMC's goal of making Wisconsin the most competitive state in the nation in which to conduct business. A consistent regulatory environment ensures transparency, accountability, and ample

opportunity for public oversight. In this case, this Court is asked to determine whether state law that was written to increase transparency, accountability and public oversight apply equally to all administrative agencies, or if one specific official or agency should be allowed to carve themselves out and be treated differently. This Court must grant the Petition to Take Jurisdiction of an Original Action so that this important question of law can be answered in the most expeditious manner possible.

HISTORY OF ADMINISTRATIVE RULEMAKING REFORM IN WISCONSIN

Act 57 is the culmination of a fifteen year administrative rulemaking reform effort pursued by Legislators and Governors of both parties. The common theme amongst all reform efforts over the past fifteen years has been to increase public involvement and oversight over administrative agencies, and to ensure agencies do not exceed the lawmaking authority granted to them by the Legislature.

The reforms in Act 57 built upon reforms originally put in place by 2003 Wisconsin Act 118 (Act 118). Act 118 required certain, but not all, agencies (notably, the departments of agriculture, trade, and consumer protection; commerce; natural resources; transportation; and workforce development) to prepare an economic impact report for

certain administrative rules. 2003 Wisconsin Act 118, § 159, *see also* Wis. Stat. § 227.137 (2003-04). Act 118 also required all agencies to (among other things): explain their statutory authority to promulgate a rule (2003 Wisconsin Act 118, § 161, *see also* Wis. Stat. 227.14(2)(a)1 (2003-04)), compare their proposed rule to similar requirements in neighboring states (2003 Wisconsin Act 118, § 163, see also Wis. Stat. § 227.14(2)(a)4 (2003-04)) as well as federal requirements (2003 Wisconsin Act 118, §162, see also Wis. Stat. § 227.14(2)(a)3 (2003-04)). Act 118 was signed into law by Governor Jim Doyle, a Democrat.

In 2011, the Legislature revisited those Act 118 reforms and passed another significant administrative rulemaking reform bill, 2011 Wisconsin Act 21 (Act 21). Act 21 limited agency powers by eliminating the concept of "implied" authority. Specifically, Act 21 provided that "[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter." 2011 Wisconsin Act 21, § 1r, *see also* Wis. Stat. § 227.10(2m)[1]. Act 21 also required gubernatorial approval of all scope statements, and modified the

[1] Unless as otherwise specifically noted, any statutory references in this brief are to the statutes current as of the date this brief was filed.

limited "economic impact report" requirement to instead require all agencies to prepare an "economic impact analysis." 2011 Wisconsin Act 21, §§ 7-18, *see also* Wis. Stat. § 227.137. Act 21 was signed into law by Governor Scott Walker, a Republican.

The current Legislature has passed two administrative rule reform bills this session. The first, signed into law as 2017 Wisconsin Act 39, simply provided that scope statements for administrative rules expire after 30 months. The second bill, the subject of the petition in this case, imposes more requirements on the administrative rulemaking process. That second bill, which became Act 57, was another significant administrative rule reform.

Act 57 made five important changes. First, it required agencies to submit scope statements to the Department of Administration (DOA) for review. 2017 Wisconsin Act 57, § 3, *see also* Wis. Stat. § 227.135(2). Specifically, under Act 57 DOA must "make a determination as to whether the agency has the explicit authority to promulgate the rule as proposed in the statement of scope". *Id*. This is an important safeguard in the rulemaking process because agencies and the general public should not invest significant time and resources on proposed rules that lack requisite statutory authority. Second, Act 57 provides for the Legislature to request a public hearing on a scope statement. 2017

Wisconsin Act 57, § 5, *see also* Wis. Stat. § 227.136. Third, Act 57 provides for additional oversight on the Economic Impact Analysis documents created by Act 21, allowing the Legislature to seek a third party to prepare an independent analysis. 2017 Wisconsin Act 57, § 9, *see also* Wis. Stat. § 227.137(4m)(a). Fourth, Act 57 provides that administrative rules with a $10 million or more implementation or compliance cost over a two-year period must be approved by the Legislature prior to promulgation. 2017 Wisconsin Act 57, § 11, *see also* Wis. Stat. § 227.139. Last, Act 57 allows the Legislature to permanently suspend certain rules during the promulgation process. 2017 Wisconsin Act 57, § 28, *see also* Wis. Stat. § 227.19(5)(dm).

As discussed *infra*, the Legislature intended for the Act 57 changes to apply uniformly to all agencies. The Legislature has the ability to limit rulemaking requirements to certain agencies, as they did for example in creating a limited Economic Impact Report as part of Act 118. They did not, however, limit Act 57 to exempt the Superintendent of Public Instruction (SPI) or the Department of Public Instruction (DPI). The SPI and DPI disagree with the law passed by the Legislature, and have outright ignored the additional Act 57 oversight requirements put on all administrative agencies. This Court

must grant the Petition to Take Jurisdiction of an Original Action to address this issue in the timeliest manner.

ARGUMENT

I. THIS CASE PRESENTS QUESTIONS OF LAW OF THE MOST SIGNIFICANT NATURE AND ANY DELAY WILL CAUSE SIGNIFICANT HARM TO OUR INSTITUTIONS OF GOVERNMENT.

"This court's authority for review is derived from the Wisconsin Constitution, which provides that the court has two types of jurisdiction: appellate and original. They are separate and distinct jurisdictions, serving different purposes. "The concept of original jurisdiction allows cases involving matters of great public importance to be commenced in the supreme court in the first instance."" *Ozanne v. Fitzgerald*, 2011 WI 43 at ¶98, 334 Wis.2d 70, 798 N.W.2d 436 (internal citations omitted) (Wis., 2011, Abrahamson, C.J., concurring in part, dissenting in part). This case deals with the power and authority to write law, surely a matter of great importance, and this Court should grant the Petition to Take Jurisdiction of an Original Action.

A. This Court's plurality opinion in *Coyne* created confusion and uncertainty that must be addressed.

The SPI and DPI have used this Court's decision in *Coyne v. Walker*, 2016 WI 38, 368 Wis.2d 444, 879 N.W.2d 520 (Wis., 2016), as grounds for disregarding certain Chapter 227 administrative

rulemaking requirements, including those contained in Act 57. However, while four justices concurred in the result of *Coyne*, there was no majority opinion. Of the four justices agreeing with the result, there were three separate opinions. As a result, in the wake of the plurality decision in *Coyne*, we are left with a somewhat confusing and cumbersome constitutional framework.

There are, however, some basic concepts upon which a majority of Justices in *Coyne* did agree. Most importantly for this case, the lead opinion and a dissent which was joined by two other Justices, agreed that rulemaking powers for the SPI and DPI do not come from the Constitution, but rather, from the Legislature. As the lead opinion in *Coyne* concluded, "to be clear, rulemaking is not a constitutional power of the SPI ... Consequently, any rulemaking power the SPI and DPI has is clearly a delegation of power from the Legislature not the Constitution." *Coyne*, 2016 WI 38, ¶¶36-37 (emphasis original). The Chief Justice's dissent, joined by two other Justices, similarly concluded: "The Superintendent did not get his powers to supervise DPI and to engage in rulemaking from the Constitution. The superintendent obtained those powers from the legislature through statutory enactment." *Id* at ¶203 (Roggensack, C.J., dissenting).

The continued reliance on the outcome of *Coyne* with no clear majority opinion has created significant confusion and uncertainty as to the current state of the law. This Court should grant the Petition to Take Jurisdiction of an Original Action in order to provide clarity on the law as quickly as possible.

B. Administrative rulemaking is a delegation of the Legislature's power to administrative agencies and they can condition that delegation of power as they see fit.

The ability to write laws is an awesome power. "The legislative power shall be vested in a senate and assembly." Wis. Const., Art. IV, § 1. The Legislature has delegated limited authority to administrative agencies in order "to facilitate administration of legislative policy." Wis. Stat. § 227.19(1)(b). To protect the public from abuses of the awesome lawmaking power delegated to certain officials and agencies, including the SPI and DPI, the Legislature has carefully crafted a process in Chapter 227 that must be followed when officials and agencies use that delegated authority to write laws. These procedures and requirements are the firewall that protects against an unconstitutional delegation of the Legislature's lawmaking authority to administrative agencies. Strict adherence to these requirements is therefore critical to the doctrine of separation of powers amongst the various branches of government.

The Legislature has so vehemently sought to protect Chapter 227 that "Pursuant to WIS. STAT. § 227.40(4)(a), a court shall declare a rule invalid if it finds that it was promulgated without complying with statutory rule-making procedures." *Cholvin v. DHFS*, 2008 WI App 127, ¶21, 313 Wis. 2d 749, 758 N.W.2d 118 (Wis. App., 2008). That is, any failure to comply with Chapter 227 requires a court to invalidate the rule.[2]

The reforms that became Act 57 were debated significantly by two consecutive legislatures.[3] The additional oversight requirements put into Chapter 227 by Act 57 were carefully crafted to increase accountability by adding an extra layer of oversight to ensure regulations proposed by agencies are within their statutory authority.

The petition now before this Court presents a troubling course of events that require immediate relief. One executive branch official has unilaterally decided to usurp the authority of the people of Wisconsin and to declare for himself what the process should be to write laws. The actions of the SPI and DPI offend the principles of separation of powers embedded in the constitution and offend the rule of law itself. No state

[2] "In any proceeding pursuant to this section for judicial review of a rule, *the court shall* declare the rule invalid if it finds that it violates constitutional provisions, exceeds statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures." Wis. Stat. § 227.40(4)(a)).

[3] During the 2015-16 session of the Legislature, proposals substantially similar to those contained in 2017 Wisconsin Act 57 were introduced: 2015 Assembly Bill 251 and 2015 Senate Bill 168.

agency or official is above the law. Our system of government simply cannot tolerate such arrogant disregard for the laws enacted by the people of Wisconsin. This Court must act to correct this illegal action and ensure that the duly enacted laws of Wisconsin are upheld. Granting the Petition to Take Jurisdiction of an Original Action will allow this Court to correct those wrongs and to ensure justice by upholding the requirements of Act 57 in the most expeditious manner possible.

C. The plain language of Act 57 requires it generally to apply to all state agencies, including the SPI and DPI.

The text of Act 57 is clear; its provisions apply to all administrative agencies. The landmark case, *State ex rel. Kalal v. Dane County Circuit Court*, clearly laid out that because of judicial deference to the Legislature, the courts "assume that the legislature's intent is expressed in the statutory language." *Kalal*, 2004 WI 58, ¶44, 271 Wis.2d 633, 681 N.W.2d 110 (Wis., 2004). If the meaning of the statute is plain, Wisconsin courts generally stop their interpretive inquiry. *Id.* ¶45 (internal citation omitted). Legislative intent is not the primary focus of inquiry because the enacted law, not the unenacted intent, is binding on the public. *Id*. at ¶44. With the exception of a minor amendment to Wis. Stat. § 227.12(4), which only applies to the

Department of Revenue, and an exemption from Wis. Stat. § 227.139 for some Department of Natural Resources regulations that implement the Federal Clean Air Act, Act 57 applies generally to all agencies.

The Legislature defined "agency" as "a board, commission, committee, department or officer in the state government, except the governor, a district attorney or a military or judicial officer." Wis. Stat. § 227.01(1). The SPI and DPI clearly fall into the definition of "agency" as an "officer" and "department," respectively.

The five significant changes provided by Act 57 discussed *supra* apply generally to "the agency" proposing the rule. No provision of Act 57 exempts either the SPI or DPI. Therefore, by the plain language of the statute, Act 57 applies to both the SPI and DPI. This Court should grant the Petition to Take Jurisdiction of an Original Action to ensure the plain language of the law is upheld.

D. The Legislature clearly intended for Act 57 to apply to both the SPI and DPI.

While the meaning of the statute is plain that Act 57 applies to the SPI and DPI, this is only further bolstered by a look at the Legislature's intent in enacting Act 57. The Legislature very clearly intended to include the SPI and DPI in the new Act 57 oversight requirements. The Legislature can, and in the past, has, set different

rulemaking requirements for different agencies. Even within Act 57, the requirement for the Legislature to approve any proposed rule costing $10 million or more over a two year period does not apply to certain rules proposed by the Department of Natural Resources to comply with the Federal Clean Air Act. If the Legislature had any intent or desire to exempt the SPI or DPI from the additional oversight and transparency requirements of Act 57, they could easily have done so, but alas, they did not.

Public statements of legislative authors and supporters of Act 57 confirm that this choice not to exempt the SPI and DPI was made deliberately, and that their intent was accurately reflected in the text of Act 57. Three Senators recently issued a public statement making it clear that Act 57 was meant to include rulemaking from the SPI and DPI, they stated: "The intent of the Legislature is the text of the laws we enact. Public officials are bound to those words and should enforce them." *Press Release* from Senators Nass, Craig and Stroebel dated November 12, 2017.[4]

It is worth noting that the Legislature considered an amendment to narrow the application of Act 57 requirements to specific agencies. Assembly Amendment 3 would have exempted rules promulgated by

[4] Available at: http://www.thewheelerreport.com/wheeler_docs/files/1121nass.pdf

the Department of Veteran's Affairs from part of Act 57. That amendment, however, was laid on the table and never adopted. *See* Assembly Amendment 3 to 2017 Senate Bill 15, *see also* Wisconsin State Assembly, Vote to Table Assembly Amendment 3 to 2017 Senate Bill 15, Sequence No. 97, June 14, 2017. Additionally, none of the 132 lawmakers in either house of the Legislature ever proposed an amendment to exempt DPI from Act 57. The intent of the Legislature with regard to the application of Act 57 could not be clearer, and this Court should grant the Petition to take Jurisdiction of an Original Action so that the intent of the Legislature may be enforced.

II. THIS CASE PRESENTS QUESTIONS OF LAW THAT REQUIRE THIS COURT TO UTILIZE ITS INSTITUTIONAL RESPONSIBILITY TO GRANT ORIGINAL JURISDICTION.

"The Supreme Court is not a fact-finding tribunal, and although it may refer issues of fact to a circuit court or referee for determination, it generally will not exercise its original jurisdiction in matters involving contested issues of fact." Wisconsin Supreme Court Internal Operating Procedures, III(B)(3).

Importantly, this case presents no questions of fact that must be determined by this Court. The only issues presented are whether the duly enacted laws of Wisconsin are to be enforced against all state agencies, as the Legislature has drafted them, or whether those laws

will be rewritten de facto to give one state agency special treatment, and whether a state official can simply ignore laws with which he or she personally disagrees.

The ongoing effort by the SPI and DPI to ignore the requirements of Act 57 require immediate action by this court. This case presents the Court with the opportunity to correct the confusion created by *Coyne*, enforce the laws of this state as they are written, and to remedy the ongoing unlawful activities of the SPI and DPI.

CONCLUSION

For the foregoing reasons, WMC respectfully requests this Court grant the Petition to Take Jurisdiction of an Original Action in this case.

Dated this 1st day of December, 2017,

Wisconsin Manufacturers and Commerce,

/s/ Lucas T. Vebber

Lucas T. Vebber (State Bar No. 1067543)
E-mail: lvebber@wmc.org

/s/ Corydon J. Fish

Corydon J. Fish (State Bar No. 1095274)
E-mail: cfish@wmc.org
501 E. Washington Ave.
Madison, WI 53703
Phone: 608-258-3400
Fax: 608-258.3413

FORM AND LENGTH CERTIFICATION

I hereby certify that this non-party brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 2,957 words, calculated using Microsoft Word.

Dated this 1st day of December, 2017,

Wisconsin Manufacturers and Commerce

/s/ Lucas T. Vebber

By Lucas T. Vebber (State Bar No. 1067543)
501 E. Washington Ave.
Madison, WI 53703
Phone: 608-258-3400
Fax: 608-258.3413
E-mail: lvebber@wmc.org

CERTIFICATE REGARDING ELECTRONIC BRIEF PURSUANT TO SECTION 809.19(12)(F), STATS.

I hereby certify that:

I have submitted an electronic copy of this non-party brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

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 parties.

Dated this 1st day of December, 2017,

Wisconsin Manufacturers and Commerce

/s/ Lucas T. Vebber

By Lucas T. Vebber (State Bar No. 1067543)
501 E. Washington Ave.
Madison, WI 53703
Phone: 608-258-3400
Fax: 608-258.3413
E-mail: lvebber@wmc.org

CERTIFICATE OF SERVICE

I, Lucas T. Vebber, attorney for Wisconsin Manufacturers and Commerce, hereby certify that on the 1st day of December, 2017, I caused three (3) true and correct copies of the foregoing non-party brief to be served upon counsel of record by placing the same in the U.S. Mail, first-class postage, as follows:

Atty. Richard M. Esenberg,
Atty. Brian McGrath
Atty. CJ Szafir
Wisconsin Institute for Law & Liberty
1139 E. Knapp Street
Milwaukee, WI 53202

Atty. Misha Tseytlin
Atty. Ryan J. Walsh
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Atty. Ryan Nilsestuen
Atty. Benjamin R. Jones
Wisconsin Department of Public Instruction
P. O. Box 7841
Madison, WI 53707-7841

/s/ Lucas T. Vebber

_____

By Lucas T. Vebber (State Bar No. 1067543)
501 E. Washington Ave.
Madison, WI 53703
Phone: 608-258-3400
Fax: 608-258.3413
E-mail: lvebber@wmc.org