**No. 2017AP2278**

# In the Supreme Court of Wisconsin

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

On Petition To The Supreme Court To Take Jurisdiction Of An Original Action

## RESPONDENTS' JOINT RESPONSE TO MOTION TO DENY SUBSTITUTION OF COUNSEL AND MEMORANDUM IN SUPPORT OF CROSS-MOTION TO STRIKE THE APPEARANCE BY ATTORNEYS RYAN NILSESTUEN AND BENJAMIN R. JONES


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## INTRODUCTION

Attorney Ryan Nilsestuen asks this Court to strike the appearance of the Wisconsin Department of Justice (DOJ) on behalf of two state parties, justifying this unprecedented request by noting that Superintendent Tony Evers objects to DOJ's intention to defend the constitutionality of a state law. But Nilsestuen overlooks a basic structural fact of our State's legal system: whenever DOJ represents a state party in its official capacity, DOJ decides the litigation position for the State, without regard to whether the state party sued is a department, a department head, or a single line employee. Here, DOJ clearly has authority to represent Respondents—the Superintendent of Public Instruction (Superintendent) and Department of Public Instruction (DPI)—under Section 165.25(1m) of the Wisconsin Statutes, and it is thus DOJ's solemn responsibility to advance what *DOJ* determines to be the State's interests in this litigation, including fulfilling

DOJ's usual obligation to defend the constitutionality of state law.

And while Superintendent Evers clearly lacks any legal authority to control this litigation for Respondents in their official capacities, DOJ would have no objection to Evers' participation in this case in his personal capacity, in whatever manner this Court deems appropriate.

## STATEMENT OF THE CASE

### A. Statutory Background

As relevant to this case, there are at least two statutorily prescribed circumstances under which DOJ can represent departments, such as DPI, in litigation. DOJ can "appear for and represent the state, any state department, agency, official, employee or agent" when "requested by the governor or either house of the legislature." Wis. Stat. § 165.25(1m). Alternatively, DOJ can "appear for and defend any state department, or any state officer, employee, or agent of the department in any civil action" upon "request of the

head of any department of state government." *Id.* § 165.25(6)(a); *see also id.* § 165.25(1) (providing also that DOJ "shall . . . appear for the state and . . . defend all actions . . . in the . . . supreme court, in which the state is interested or a party").

Under certain circumstances, the Governor can approve a department, such as DPI, to be represented by special counsel instead of by DOJ. *See* Wis. Stat. § 14.11(2). Absent such an appointment of special counsel by the Governor, however, DPI and the Superintendent have no independent authority to litigate in court on their own behalf without DOJ's representation. *See* Wis. Stat. §§ 115.28–.29, 20.930; *compare* Wis. Stat. § 73.03(22) (granting the Department of Revenue power "[t]o appear by its counsel and represent the state in all matters before the tax appeals commission" and providing that "a member of the staff of the department may appear for the department" in courts "with the consent of the attorney general").

### B. Factual Background

Petitioners Kristi Koschkee, Amy Rosno, Christopher Martinson, and Mary Carney filed a petition for an original action in this Court against the Superintendent and DPI, in their official capacities, seeking a declaratory judgment and injunction requiring DPI to comply with the REINS Act, 2017 Wisconsin Act 57, in its administrative rulemaking. Pet. 2–3.

On November 20, 2017, Petitioners served the petition on DPI. Nilsestuen Aff. ¶ 4. In discussions with DPI following service of the petition, DOJ asked whether DPI would be requesting representation from DOJ under Section 165.25(6)(a), or whether DPI would be requesting permission from the Governor to obtain special counsel, *see* Wis. Stat. §§ 14.11, 20.930. Nilsestuen Aff. Ex. 3. During this correspondence, DOJ stated that if it were to appear in this litigation, it would take the position that the REINS Act is constitutional. Nilsestuen Aff. Ex. 3. DPI responded that it was not requesting representation from DOJ because DOJ's

position that the REINS Act is lawful would not, in DPI's view, be effective legal representation. Nilsestuen Aff. Ex. 5. DOJ stated that it was not taking a view as to whether DPI should request special counsel or whether the Governor should give DPI permission to obtain such counsel. Nilsestuen Aff. Ex. 3. The Governor subsequently requested, under Section 165.25(1m), that DOJ represent DPI and the Superintendent. Walsh Decl. Ex. 1.

On November 22, 2017, Nilsestuen, Chief Legal Counsel at DPI, filed a notice of appearance, stating that Nilsestuen and Benjamin R. Jones "are representing" DPI and the Superintendent, in his official capacity, in this case. Letter Notice of Appearance, *Koschkee v. Evers*, No. 17AP2278 (Wis. Nov. 22, 2017); *see infra* p. 32 n.1. On the same day, Solicitor General Misha Tseytlin and Chief Deputy Solicitor General Ryan J. Walsh filed a notice of appearance and substitution of counsel under Section 165.25(1m), replacing Nilsestuen and Jones as counsel for DPI and the

Superintendent. Notice of Appearance and Substitution of Counsel, *Koschkee v. Evers*, No. 17AP2278 (Wis. Nov. 22, 2017). Nilsestuen then filed a motion to deny the substitution of counsel and to disqualify DOJ from appearing on behalf of Respondents. Motion, *Koschkee v. Evers*, 17AP2278 (Wis. Nov. 29, 2017).

On November 30, 2017, the plaintiffs in *Coyne v. Walker* filed a petition for supplemental relief with the Dane County Circuit Court, seeking a ruling that the Superintendent and DPI are not subject to 2017 Wisconsin Act 57 in administrative rulemaking. Petition for Supplemental Relief, *Coyne v. Walker*, No. 11-cv-4573 (Dane Cnty. Cir. Ct. Nov. 30, 2017). In *Coyne*, three non-controlling opinions joined in total by four Justices of this Court produced a mandate affirming the Court of Appeals' decision that 2011 Wisconsin Act 21 could not validly be applied to "the Superintendent of Public Instruction and his subordinates." 2016 WI 38, ¶ 4, 368 Wis. 2d 444, 879 N.W.2d 520 (opinion of Gableman, J.); *see id.* ¶ 80

(Abrahamson, J., joined by A.W. Bradley, J., concurring); *id.* ¶¶ 170–72 (Prosser, J., concurring). In their recent filing, the *Coyne* plaintiffs argued that the circuit court should enjoin the REINS Act because that Act allegedly suffers from the same infirmity as Act 21. Petition for Supplemental Relief, 1–2, *Coyne v. Walker*, No. 11-cv-4573 (Dane Cnty. Cir. Ct. Nov. 30, 2017). The Superintendent, who was also sued in his official capacity in *Coyne,* was represented by Nilsestuen and another DPI attorney in that case (with permission of the Governor) and took the position that Act 21 was unconstitutional. *See* 2016 WI 38, ¶ 10. Out of an abundance of caution and in light of these recent filings in *Coyne*, DOJ has instituted an ethical screen between (1) the lawyers involved in representing the Governor and the Secretary of Administration in *Coyne* and (2) those involved in representing Respondents in this case.

## ARGUMENT

### I. Under Section 165.25(1m)'s Unambiguous Terms, DOJ "Represent[s]" Respondents

#### A. DOJ "Represent[s]" Any State Department Or Official When "Requested" To Do So "By The Governor Or Either House Of The Legislature" And Has The Legal Duty To Control The Litigation In That Capacity

The Attorney General of Wisconsin and DOJ derive their powers from "statutory law." *State v. City of Oak Creek*, 2000 WI 9, ¶ 19, 232 Wis. 2d 612, 605 N.W.2d 526. The Constitution provides that "'[t]he powers, duties and compensation of the . . . attorney general shall be prescribed by law.'" *Id.* (quoting Wis. Const. art. VI, § 3). Exercising its authority under Article VI, Section 3, the Legislature has enacted several laws empowering DOJ to undertake representation of state parties. *In re Sharp's Estate*, 63 Wis. 2d 254, 263, 217 N.W.2d 258 (1974) ("Only the legislature may create or limit the non-constitutionally created powers and duties of the Attorney General."). The most relevant of those provisions in this case is Section 165.25. It states, among

other things, that DOJ "shall . . . appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in . . . the supreme court." Wis. Stat. § 165.25(1). The statute also provides for DOJ's representation by request. DOJ "shall . . . [i]f requested by the governor or either house of the legislature, appear for and represent the state, any state department, agency, official, employee or agent, whether required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested." *Id.* § 165.25(1m). By contrast, under Section 165.25(6)(a), DOJ "may appear for and defend any state department, or any state officer, employee, or agent of the department" "[a]t the request of the head of any department of state government." *Id.* § 165.25(6)(a).

When DOJ represents a state party, DOJ is duty-bound to advance whatever legal positions DOJ determines to be in

the best interest of the State, including defending the constitutionality of any state laws being challenged, even if the department, department head, or line employee being represented disagrees with DOJ's conclusion or the statute being challenged. That conclusion follows from (1) the nature of DOJ's representation of a state party in its official capacity and (2) the statutory text, and is confirmed by (3) the practices of the federal Department of Justice and of other States.

1. *Nature of DOJ's Representation.* DOJ represents state departments, agencies, or officials in litigation *in their official capacities*. That is because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (citation omitted). And in an action "against the State itself," *id.*, representation of the State traditionally falls to "[t]he attorney-general," who "is the law officer of the government"

and "elected for the purpose of prosecuting and defending all suits for or against the State," *Orton v. State*, 12 Wis. 509, 511 (1860); *see also State ex rel. Attorney Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 731 (1892) (Pinney, J., concurring) ("the attorney general [is] the proper law officer of the state" and represents its interests in litigation).

It has long been established that, "[i]n part because of his status as an elected public official, [the Attorney General] also uses his functional roles to represent the public interest as he sees it, sometimes in opposition to other state administrative agencies." Arlen C. Christenson, *The State Attorney General,* 1970 Wis. L. Rev. 298, 310. In contrast to the rule in the "usual attorney-client relationship," "[t]he conduct of the litigation" in cases under Section 165.25 "is uniquely in the hands of the attorney general" because DOJ is representing parties in their *official* capacities. *Helgeland v. Wis. Municipalities*, 2006 WI App 216, ¶ 59, 296 Wis. 2d 880, 724 N.W.2d 208 (Dykman, J., concurring in part and

dissenting in part), *aff'd*, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1. "[W]hat issues [DOJ] raises or does not raise are up to [DOJ]. [DOJ] determines how the case will be defended, for better or worse." *Id.*; *Helgeland*, 2008 WI 9, ¶ 208 (Prosser, J., dissenting). As the Seventh Circuit put it, Wisconsin DOJ "always assumes control" of litigation when DOJ appears for state parties in the appellate courts. *Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1185 (7th Cir. 1998).

2. *Statutory Text*. Three statutory points make plain that DOJ has the obligation to litigate a case based upon DOJ's views of the State's best interests, notwithstanding any contrary views that the nominal "client" department, official, or employee may have.

First, Wisconsin law usually forbids state departments and officials from independently litigating official-capacity suits through their own counsel, making clear that departments and officials do not control litigation brought against them. *See* Wis. Stat. §§ 14.11, 20.930; *accord* Wis.

Stat. §§ 115.28–.29 (giving DPI and the Superintendent no independent authority to litigate in court on their own behalf). State departments and agencies can exercise power "*only* when acting within the scope of their [delegated] authority." *Orton*, 12 Wis. at 510 (emphasis added). There is no statute (and Nilsestuen cites none) giving DPI or the Superintendent power to litigate official-capacity suits independently. *Compare* Wis. Stat. § 73.03(22) (granting the Department of Revenue power under certain circumstances "[t]o appear by its counsel and represent the state in all matters before the tax appeals commission"). And Section 20.930 suggests that they cannot, since it forbids any "state agency" from "employ[ing] any attorney" unless the Governor has so approved. *Id.* § 20.930; *see id.* § 20.001(1) ("In this chapter . . . '[s]tate agency' means any . . . department . . . ."). In addition, under Section 14.11, the Governor must approve any separate representation of a state party. As those statutes reflect, the "authority" to litigate on behalf of state parties "is plainly and

distinctly given to another office[ ] of the government"—DOJ. *Orton*, 12 Wis. at 512. Hence, it has long been settled that "[a]bsent special statute with respect to individual departments . . . or absent appointment of special counsel in appropriate matters," DOJ officials "are the only attorneys authorized to appear in the courts of the state in state matters." 52 Op. Wis. Att'y Gen. 394, 402 (1963).

It follows from the fact that departments cannot independently litigate through their own counsel that they do not control the litigation when DOJ counsel is imposed upon them. That is why, for example, when DOJ cannot or will not accept the requested representation, and the Governor does not appoint special counsel, "the agency or officer involved cannot be represented and presumably will have to abandon its position." *See* Christenson, *supra*, at 315.

Second, and relatedly, the contrast between Section 165.25(1m) and Section 165.25(6)(a) makes plain that, at least when requested to represent a department or

official under Section 165.25(1m), DOJ can—and, indeed, *must*—take legal positions in the best interest of the State without regard to whether the nominal state party agrees. While Section 165.25(6)(a) permits DOJ to represent an agency "[a]t the request of the head of any department of state government," Section 165.25(1m) directs DOJ's representation of an agency or official "[i]f requested by the governor or either house of the legislature." The differences in these provisions make plain that a major purpose of Section 165.25(1m) is to permit DOJ's representation of a state department *over the department head's objection*, even where the request comes from an entity that lacks any direct authority to oversee the department (for example, from the State Assembly, acting alone). *See also id.* § 165.25(1) (DOJ "shall" represent "the state" in this Court in all "civil or criminal" actions "in which the state is . . . a party.").

Third, because Section 165.25 calls for DOJ's representation not only for "state department[s]" and

"agenc[ies]" but even for individual state "employee[s] or agent[s]," any argument that a represented state party can control as "client" the litigation positions of DOJ would lead to absurd results. If, for example, the Assembly requested under Section 165.25(1m) that DOJ appear for and represent a DPI line employee sued in his official capacity for committing a simple tort while working, and that employee insisted on arguing that Wisconsin's statutes prohibiting the relevant tortious conduct are unconstitutional in some respect, no one would seriously contend that DOJ would be forced to advance that constitutional argument in court. For the same reason, DOJ cannot be forced to advance arguments at the behest of a "client" department, such as DPI, but instead must make whatever arguments DOJ deems to be in the State's best interests.

3. *Nationwide Practice*. Wisconsin is not alone in empowering its DOJ to take legal positions in official-capacity

suits that accord with DOJ's assessment of the State's interests, without regard to the views of the nominal client.

The federal system, like Wisconsin law, imposes upon its Department of Justice the obligation to take whatever position is best for the government, notwithstanding the perspective of the client agency. As the U.S. Supreme Court held in 1866, "it is clear that all [federal-party] suits, so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General." *The Confiscation Cases*, 74 U.S. 454, 458–59 (1868); Robert Kramer & Nathan Siegel, *The Attorney General of England and the Attorney General of the United States*, 1960 Duke L.J. 524, 532 ("[T]he Attorney General . . . has the ultimate responsibility for all government litigation that reaches the Supreme Court."). Hence the federal DOJ's Office of Legal Counsel, in an important memorandum issued in 1982, explained that "[b]ecause of his unique responsibilities in representing government-wide interests as well as those of

particular 'client' agencies, the final judgment concerning the best interests of the United States must be reserved to the Attorney General." *The Attorney General's Role as Chief Litigator for the United States*, 6 U.S. Op. Off. Legal Counsel 47, 55 (1982). The need for this litigation authority is "because of th[e] diversity of [the Department's] functions" and because "situations may arise where the Attorney General is faced with conflicting demands, *e.g.*, where a 'client' agency desires to circumvent the law, or dissociate itself from legal or policy judgments to which the Executive subscribes." *Id.* at 62. Consistent with its responsibility to advance arguments that it determines to be in the best interest of the United States, the federal Department of Justice takes litigation positions at odds with the opinions of the "client" agency. Just last month, for example, the federal Department of Justice, representing the Securities and Exchange Commission, took the position that the Commission's procedure for appointing administrative law

judges is unconstitutional. *See* Resp. Br., *Lucia v. SEC*, No. 17-130 (U.S. Nov. 2017), https://goo.gl/rko4FD; *see also Role of the Solicitor General*, 1 Op. Off. Legal Counsel 228, 230 (1977).

Many States follow the same rule, making clear that their departments of justice have a duty in litigation to take whatever legal positions they think are in their States' interests. A leading case is *Feeney v. Massachusetts*, 366 N.E.2d 1262 (Mass. 1977). The question there was whether the Massachusetts Attorney General could represent an agency "without the consent and over the expressed objections of the state officers against whom the judgment . . . was entered." *Id.* at 362–63. The Massachusetts Supreme Judicial Court held that the Attorney General could do so, explaining that "the Legislature . . . consolidated the responsibility for all legal matters involving the Commonwealth in the office of the Attorney General" and had "empowered, and perhaps required, the Attorney General to

set a unified and consistent legal policy for the Commonwealth"—even if that meant "chart[ing] a course of legal action which is opposed by the administrative officers he represents." *Id.* at 364 (citation omitted). Many other States are in accord. *See Manchester v. Rzewnicki*, 777 F. Supp. 319, 326–27 (D. Del. 1991); *Superintendent of Ins. v. Attorney Gen.*, 558 A.2d 1197, 1200 (Me. 1989); *State ex rel. Allain v. Miss. Pub. Serv. Comm'n*, 418 So. 2d 779, 782 (Miss. 1982); *Conn. Comm'n on Special Revenue v. Conn. Freedom of Info. Comm'n*, 387 A.2d 533, 537 (Conn. 1978); *State ex rel. Morrison v. Thomas*, 297 P.2d 624, 627 (Ariz. 1956); *Piccirilli Bros. v. Lewis*, 127 A. 832, 834–35 (Pa. 1925).

### B. DOJ "Represent[s]" Respondents In This Case Because The Governor Has Requested That DOJ Do So

Application of the above-described principles to this case is straightforward. On November 20, both the Superintendent and DPI became "required to appear as [ ] part[ies] . . . in a[ ] civil . . . matter" because they were named

as Respondents in the petition for an original action. Wis. Stat. § 165.25(1m). Although the Superintendent declined to request DOJ's representation under Section 165.25(6)(a), the Governor requested on November 22 that "the Department of Justice appear for and represent the Department of Public Instruction and Superintendent Tony Evers in his official capacity [in this case] in accordance with Wis. Stat. 165.25(1m)." Walsh Decl. Ex. 1. After receiving that request, two of the undersigned lawyers from DOJ filed a notice of appearance and substitution of counsel, agreeing to "appear for and represent" the Superintendent and DPI, in their official capacities, under Section 165.25(1m). It is clear, therefore, that the undersigned attorneys are the lawful counsel for Respondents in this case.

As DOJ attorneys "appear[ing] for and represent[ing]" Respondents in this case, Wis. Stat. § 165.25(1m), the undersigned attorneys can (and must) "assume[ ] control" of this litigation on behalf of the State, *Wisconsin Right to Life*,

138 F.3d at 1185, and make arguments that DOJ determines will best "protect and guard the interests and rights of the people," *Orton*, 12 Wis. at 511. The legal positions of the Superintendent and DPI, in their official capacities, "are up to [DOJ]." *Helgeland*, 2006 WI App 216, ¶ 59 (Dykman, J., concurring in part and dissenting in part); *Helgeland*, 2008 WI 9, ¶ 208 (Prosser, J., dissenting). And here, the "obligation of" DOJ is particularly "clear": its attorneys must make any reasonable defense of the statute whose constitutionality is under attack, "regardless of whether" Superintendent Evers holds different "views." *Helgeland*, 2008 WI 9, ¶ 108; *City of Oak Creek,* 2000 WI 9, ¶ 23 n.14.

### C. Superintendent Evers Lacks Legal Authority To Terminate DOJ's "Represent[ation]"

On November 28, Superintendent Evers sent a letter to DOJ, purporting to "terminat[e] any representation provided by the Wisconsin Department of Justice in this matter." Nilsestuen Aff., Ex. 9. Noting that DPI "would not be

requesting representation" from DOJ, Evers stated that he had directed his "chief legal counsel, Attorney Ryan Nilsestuen, to represent [Respondents] in this matter." Nilsestuen Aff., Ex. 9.

Superintendent Evers' attempt to terminate DOJ's representation, and appoint Nilsestuen and Jones in DOJ's stead, lacks any legal basis. Evers has "referred to no provision of law" authorizing him to override DOJ's representation under Section 165.25(1m) or to litigate this matter independently through his own counsel, "and we know of none." *Orton*, 12 Wis. at 510. Indeed, he plainly lacks any such authority. *See supra* pp. 12–14; Wis. Stat. § 20.930; *see also* Wis. Stat. § 14.11; *accord* Wis. Stat. §§ 115.28–.29 (giving DPI and the Superintendent no independent authority to litigate in court on their own behalf). That power—to "protect and guard the interests and rights of the people" by controlling state-party litigation—resides in DOJ. *Orton*, 12 Wis. at 511.

Superintendent Evers' claim that he can terminate DOJ's representation not only lacks any statutory basis but also conflicts directly with the foundational principles articulated above. Given that DOJ is obliged to advance DOJ's understanding of the State's interests in official-capacity suits, even when that position conflicts with the views of the nominal client department, department head, or line employee, it would be nonsensical to permit the department, department head, or line employee to terminate DOJ's representation based upon a disagreement with DOJ's legal positions. *See supra* pp. 14–16. Evers' view that he can terminate DOJ's representation also cannot account for the difference between Section 165.25(6)(a), under which DOJ comes to represent a department only at the "request of the head of a[ ] department," and Section 165.25(1m), under which DOJ comes to represent a department at the request of "the governor or either house of the legislature"—even over the objection of the department head. The clear import of

these provisions is that DOJ can represent departments even where the department head disagrees, meaning that the department head has no authority to terminate DOJ representation.

## II. DOJ's Representation Of Respondents Complies With All Ethics Rules

In his Motion, Nilsestuen also argues that (A) DOJ's defense of the REINS Act, on behalf of Respondents here, would violate the ethics rule requiring respect for a client's decisions concerning the objectives of representation, and (B) DOJ is conflicted out of representing DPI and the Superintendent here in light of the *Coyne* litigation. Both contentions are legally erroneous.

### A. DOJ's Representation Of Respondents Is Ethical Without Regard To Superintendent Evers' Disagreement With DOJ's Decision To Defend The Constitutionality Of The REINS Act

Nilsestuen argues that DOJ cannot ethically represent Respondents pursuant to SCR 20:1.2(a) and SCR 20:1.4—

which require an attorney to consult with, and abide by, a client's decisions "concerning the objectives of representation"—because DOJ will be defending the constitutionality of the REINS Act, contrary to Superintendent Evers' beliefs that the REINS Act is unconstitutional. *See* Mot. 7. Nilsestuen's argument misunderstands the nature of the attorney-client relationship in DOJ's representation of DPI and the Superintendent in their official capacities.

As explained in detail above, when DOJ represents any state party in that party's official capacity—be it DPI, the Superintendent, or a single line employee—DOJ's responsibility is to the State as the client, and DOJ determines that client's best interests for purposes of the litigation. *See supra* Part I.A. After all, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will*,

491 U.S. at 71 (citation omitted); *Lister v. Bd. of Regents*, 72 Wis. 2d 282, 302–03, 240 N.W.2d 610 (1976) (case is brought against official based on a legal "fiction"). The obligation of the State (through DOJ) is "to protect and guard the interests and rights of the people," *Orton*, 12 Wis. at 511; *see also Helgeland*, 2008 WI 9, ¶ 108—including by defending the constitutionality of a state statute whose validity has been called into question by the litigation, *City of Oak Creek*, 2000 WI 9, ¶ 23 n.14. As the Massachusetts Supreme Judicial Court explained, "the Attorney General is empowered, when he appears for State officers, to decide matters of legal policy which would normally be reserved to the client in an ordinary attorney-client relationship." *Feeney*, 366 N.E.2d at 1266; *see also, e.g.*, *Superintendent of Ins.*, 558 A.2d at 1203; *Allain*, 418 So. 2d at 782; *Conn. Comm'n,* 387 A.2d at 537.

This Court's ethics rules and the Third Restatement of the Law Governing Lawyers make this same point. The preamble to Chapter 20 of this Court's rules explains that "the

responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts." Chapter SCR 20, pmbl. ¶ 18,; *see also* Am. Bar Ass'n, *Model Rules of Professional Conduct*, pmbl. ¶ 18 (2007 ed.). The Third Restatement of the Law Governing Lawyers is in accord: "A lawyer representing a governmental client . . . possesses such rights and responsibilities as may be defined by law to make decisions on behalf of the governmental client that are [normally] within the authority of a client" in other contexts. Restatement (Third) of the Law Governing Lawyers § 97(1) (2000). When a "government lawyer [is] empowered by law to make decisions in a representation that [normally]

are within the authority of a client," the attorney's duties run *not* to the interests of the named state parties but to the interests of the public: "The lawyer must exercise such powers to advance the *governmental and public objectives* of the governmental client as defined in statutory, regulatory, and other law." *Id.* § 97 cmt. g (emphasis added). In fact, a "lawyer who represents a governmental official in the person's public capacity" would violate SCR 20:1.2(a) if the lawyer were to seek to forward "the personal interests of the occupant of the office" if those "differ[ed]" from the "public interests as determined by appropriate governmental officers." *Id.* § 97 cmt. c.

Accordingly, there is no ethical bar preventing DOJ, as counsel for DPI and the Superintendent in this case, from taking the position that the REINS Act is constitutional. Far from it: DOJ has a *duty* to make arguments on behalf of the State that in DOJ's view are in the best interests of the State. *Orton*, 12 Wis. at 511. Here, as in the vast majority of cases,

those interests favor a defense of the state statute under constitutional attack. *See Helgeland*, 2008 WI 9, ¶ 108. Indeed, DOJ attorneys would be in violation of SCR 20:1.2(a) if they advanced "the personal interests" of *Evers*, to the extent those "differ[ed]" from the "public interests as determined by [DOJ]." Restatement, *supra*, § 97 cmt. c.

### B. DOJ's Representation Of Respondents Through Solicitor General Tseytlin And Chief Deputy Solicitor General Walsh Is Authorized Under SCR 10:1.11(f)

Nilsestuen also claims that "DOJ's representation" of the Governor and Secretary of Administration in *Coyne* "prohibit[s]" DOJ from representing the Superintendent in this case because of the Governor's and Secretary's "advers[ity]" to the Superintendent in *Coyne*, citing SCR 20:1.7 and SCR 20:1.9(a). Mot. 6–8. This Court's rules prevent an attorney from representing one client who is "directly adverse to another client," SCR 20:1.7(a)(1), or representing a party with "interests [that] are materially

adverse" to the interests of a former client "in the same or a substantially related matter," SCR 20:1.9(a), and the conflicts of attorneys in private firms are generally imputed to each member of the firm, SCR 20:1.10(a). But SCR 20:1.11(f) provides an explicit exception: "The conflicts of a lawyer currently serving as an officer or employee of the government are not imputed to the other lawyers in the agency." SCR 20:1.11(f); *accord* Model Rule 1.11 Am. Bar Ass'n cmt. ¶ [2]; *Missouri v. LeMasters*, 456 S.W.3d 416, 421–22 (Mo. 2015); *Colorado v. Shari*, 204 P.3d 453, 459–60 (Colo. 2009).

DOJ is representing Respondents through undersigned counsel: Solicitor General Tseytlin and Chief Deputy Solicitor General Walsh. These attorneys have never been involved in the *Coyne* case, meaning that any even arguable conflict that any DOJ attorney has due to DOJ's representation of the Governor and Secretary of Administration in *Coyne* has no application under SCR 20:1.11(f). And, as noted above, out of an abundance of caution, DOJ has established a screen

between undersigned counsel in this case and the attorneys involved in representing the Governor and the Secretary of Administration in *Coyne*. *See supra* p. 7.

## III. The Court Should Strike Nilsestuen and Jones' Appearance On Behalf Of Respondents

For all the foregoing reasons, this Court should not only deny Nilsestuen's motion to terminate DOJ's representation but also strike Nilsestuen and Jones' appearance on behalf of Respondents.[*] After all, no statute empowers the Superintendent or DPI to litigate this case through their own counsel independent of DOJ. *See supra* p. 13.

[*] There is some confusion as to whether Nilsestuen and Jones are purporting to appear for and represent *only* the Superintendent or *both* the Superintendent and DPI. In his letter to this Court, Nilsestuen stated that he and Jones would be seeking to represent the Superintendent. Letter Notice of Appearance, *Koschkee v. Evers*, No. 17AP2278 (Wis. Nov. 22, 2017). The body of the letter did not mention DPI. *Id.* Nevertheless, Nilsestuen's motion indicates that he (as well as Jones, presumably) claims to represent both Respondents in this matter. Mot. 3; *see also* Nilsestuen Aff., Ex. 9 (letter of Superintendent Evers). Notwithstanding this lack of clarity, undersigned counsel are proceeding on the assumption that Nilsestuen and Jones are purporting to appear for and represent both Respondents.

This is not to say, however, that Evers lacks recourse for conveying his personal views of this case. Like any interested person in a pending case, he is free to seek permission from this Court to appear in this case, in his private capacity. Respondents would not oppose any such appearance by Evers, so long as that appearance was not sought on behalf of Respondents in their official capacities.

## CONCLUSION

Nilsestuen's motion should be denied, and DOJ's cross-motion should be granted.

Dated: December 11, 2017.

Respectfully submitted,

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