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.

PETITION TO THE SUPREME COURT TO TAKE JURISDICTION OF AN ORIGINAL ACTION

RESPONDENTS' JOINT RESPONSE TO CROSS-MOTION TO STRIKE THE APPEARANCE BY ATTORNEYS NILSESTUEN AND JONES AND MEMORANDUM IN SUPPORT OF MOTION TO DENY SUBSTITUTION OF COUNSEL AND DISQUALIFY THE ATTORNEY GENERAL FROM REPRESENTING THE RESPONDENTS

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INTRODUCTION

The Attorney General and the Department of Justice (collectively, the "DOJ") are disqualified from representing the State Superintendent of Public Instruction and the Department of Public Instruction (collectively, the "SPI") due to their conflict of interest in this matter. Namely, the DOJ explicitly states it intends to take the exact position in this matter as it did representing the Governor in *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520 in spite of the fact that its client, the SPI, maintains the opposite, adverse position. Further, the DOJ's action exceeds its limited statutory authority.

STATEMENT OF ISSUES

Is the DOJ disqualified from representing the SPI under Wis. Stat. § 165.25(1m) due to the DOJ's inherent conflict of interest and lack of authority to dictate and misrepresent a client's position?

STATEMENT OF THE CASE

On October 30, 2012, the Dane County Circuit Court enjoined the Governor and Secretary of Administration from implementing provisions of 2011 Wisconsin Act 21 (Act 21) as applied to the SPI.

Coyne v. Walker, No. 11-CV-4573 (Wis. Cir. Ct. Dane County Oct. 30, 2012). Act 21 modified Wis. Stat. §§ 227.135, 227.137, 227.185, and 227.24 to provide the Governor and, in some instances, the Secretary of Administration discretionary authority to veto administrative rules promulgated by the SPI. The Governor, represented by the DOJ, argued that these provisions were constitutional. The SPI, represented by separate counsel, argued that the provisions were unconstitutional as applied to the SPI. The Dane County Circuit Court, Wisconsin Court of Appeals, and this Court all decided that these provisions violate the Wisconsin Constitution as applied to the SPI. *Coyne*, 368 Wis. 2d 444.

Subsequently, the Wisconsin Legislature enacted 2017 Wisconsin Act 57 (Act 57), which made additional changes to the rulemaking process. None of these changes substantively changed the provisions found to violate the Wisconsin Constitution as applied to the SPI in *Coyne*.

Nevertheless, the Petitioners ask this Court to take jurisdiction of an original action and issue a declaratory judgment that Act 57, referred to by the Petitioners as the "REINS Act," applies to the SPI

in its entirety. The Petitioners' argument is without merit, as fully set forth in the SPI's Response to the Petition.

ARGUMENT

I. The DOJ is disqualified from representing the SPI because doing so violates the Rules of Professional Conduct.

Never before has this Court permitted an attorney – in this case the Attorney General – to openly and actively pursue goals directly adverse to its client's explicit legal interest. And for good reason. The DOJ only has limited, specifically circumscribed authority under Wis. Stat. § 165.25(1m) to represent certain state actors. The DOJ is bound by the Rules of Professional Conduct (the Rules) in the course of that representation. Under any interpretation of the Rules, fundamental principles of legal ethics prohibit the DOJ from advancing a legal position that directly contradicts the position of the party it purports to represent. No "ethical screen" could possibly overcome this violation of basic legal ethics. *See* DOJ Resp. and Mem. at 7.

A. The DOJ's conflict of interest disqualifies it from representing the SPI.

"Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." SCR 20:1.7 ABA Comment [1].

A lawyer must act "with reasonable diligence" in representing a client, and "take whatever lawful and ethical measures are required to vindicate" the client's position. SCR 20:1.3; SCR 20:1.3 ABA Comment [1]. Conflicts of interest are prohibited to avoid even a "significant risk" that an attorney's representation of a client "will be materially limited." SCR 20:1.7.

Here, the DOJ's representation of SPI creates more than a risk of limited representation. The DOJ's conflict of interest is unambiguous and irreconcilable. The DOJ proudly declares its intent in this matter to advance the exact position it advanced on behalf of the Governor in *Coyne*, a position directly adverse to the SPI. *See Coyne*, 368 Wis. 2d 444. ¶ 10 (Superintendent Evers agrees with Coyne's position).

The Governor, who failed to prevail in *Coyne*, instructed the DOJ to represent the SPI in this matter. Walsh Decl. at ¶ 2. Both the Governor and the DOJ publicly and privately declare that they can find no legal basis as to why the provisions of Wis. Stat. §§ 227.135, 227.137, 227.185, and 227.24 as amended by Act 57 are unconstitutional. This position ignores this Court's decision in *Coyne*,

decided less than two years ago. Nilsestuen Aff. ¶¶ 8-13; *Coyne*, 368 Wis. 2d 444.

The DOJ states it will advance the Governor's position "notwithstanding any contrary views" of its actual client. DOJ Resp. and Mem. at 12. The DOJ unabashedly embraces this conflict of interest as its "solemn responsibility." DOJ Resp. and Mem. at 2. By adopting the adverse position of the Governor, the DOJ eliminates any pretense of loyalty or independent judgment in its representation of the SPI. The DOJ will misrepresent the position of the SPI and materially limit the SPI's legal interest with absolute certainty.

It is difficult to imagine a more blatant conflict of interest. Even a written waiver signed by the SPI could not remedy this conflict, as the DOJ still would not "provide competent and diligent representation" to the SPI. SCR 20:1.7(b); *See also*, *In re Disciplinary Proceedings Against McKloskey*, 2009 WI 65, 318 Wis. 2d 602, 768 N.W.2d 10 (representing two business partners in a collection action and taking actions under the direction of one partner to the detriment of the other).

B. The Rules state the SPI, not the DOJ, determines the ends of representation.

Regardless of the DOJ's prior legal representation relevant to this matter, the Rules do not allow the DOJ to act in direct opposition to its own client. A lawyer is a "representative of clients." Preamble: A Lawyer's Responsibilities [1]. A lawyer representing a client "zealously asserts the client's position under the rules of the adversary system." Preamble: A Lawyer's Responsibilities [2]. "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and … shall consult with the client as to the means by which they are to be pursued." SCR 20:1.2. The client has "ultimate authority to determine the purposes to be served by legal representation." SCR 20:1.2 ABA Comment [1].

Here, the DOJ claims not only that it is free from any duty to "zealously assert" the SPI's position, but that it *must* zealously assert the *opposite position*:

> 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 the DOJ's conclusion or the statute being challenged.
> …
> 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.

DOJ Resp. and Mem. at 9 & 22 (Emphasis added).[1] *See also*, Nilsestuen Aff. Ex. 3.

Instead of asserting this claimed duty as a basis for declining to represent the SPI, the DOJ instead concludes it must misrepresent the SPI's position in litigation. No interpretation of the Rules permits this conclusion. Under SCR 20:1.2, the SPI, not the DOJ, has the ultimate authority to decide the purposes of legal representation.

If the DOJ cannot zealously assert the SPI's position, the DOJ is obligated by the Rules to withdraw its representation, or else "the client may resolve the disagreement by discharging the lawyer." SCR 20:1.2 ABA Comment [2]; *See* SCR 20:1.16(a)("…a lawyer shall not represent a client … if … the representation will result in violation of the Rules of Professional Conduct or other law.). Despite Superintendent Evers invoking his right under the Rules to terminate

[1] The DOJ's claim that it must defend the constitutionality of a challenged statute is a red herring. The Petitioners request a declaration that Act 57 applies to the SPI. Petitioners do not attack any law as unconstitutional. Instead, the DOJ asserts that it is unable argue on behalf of the SPI that Act 57 is unconstitutional, and therefore the DOJ has the authority and duty to exclude the SPI's position altogether as part of its "representation."

the DOJ's representation, the DOJ has refused to do so. Nilsestuen Aff. ¶ 28.

C. The DOJ is not exempt from the Rules.

The DOJ argues that only some Rules apply to DOJ attorneys, and those select few Rules allow the DOJ to totally disregard the interests of the client. However, the DOJ does not have the authority to pick and choose which Rules do and do not apply.

For example, the DOJ relies on SCR 20:1.11(f) to conclude it may take an adverse position to its client. DOJ Resp. and Mem. at 30. Under that rule, the conflict created by one government lawyer serving on a case is not imputed on another, as long as the lawyer is "timely screened from any participation in the matter to which the conflict applies." SCR 20:1.11(f). The DOJ's reliance on this provision is both telling and misguided.

It is true, the DOJ could have ethically represented the SPI *if* it had timely screened the assigned assistant attorney general *and* that assistant attorney general complied with the other ethical obligations under the Rules. But that is not the case here. Instead, the DOJ created a "screen" between the attorneys in this matter "and the attorneys

involved in representing the Governor and the Secretary of Administration in *Coyne*." Yet that screen fails to address the ethical violation, because both sets of attorneys are advancing the exact same position: that of the Governor and the Petitioners. This defeats the entire purpose of the screening requirements under SCR 20:1.11(f).

Only one comment to the Rules comes close to justifying the DOJ's total disregard of the Rules in this case. Note 18 to the Rule's preamble states, in part, that "the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships." Preamble: A Lawyer's Responsibilities [18]. However, this note clarifies that any departure from the ordinary client-lawyer relationship must be based on provisions of "constitutional, statutory and common law." *Id.* As discussed in detail below, the DOJ has no common-law or constitutional powers. It only has those powers specifically circumscribed by law. Importantly, the DOJ lacks any specifically circumscribed authority to act in direct violation of the Rules.

The DOJ itself advises state attorneys that the Rules prohibit the conduct it now pursues in regard to the SPI:

> [A]lthough it is perfectly obvious under the statute that the Attorney General is the general and the legal adviser of the various departments and officers of the state government, and entitled to appear and represent them in court, this does not mean that the Attorney General, standing in the position of an attorney to a client, who happens to be an officer of the government, steps into the shoes of such client in wholly directing the defense and the legal steps to be taken in opposition or contrary to the wishes and demands of his client or the officer or department concerned.

Wisconsin Department of Justice, *Ethical Dilemmas for Government Lawyers: Defining Your Role When Representing A Client* (2017) (citing *State v. Hagan*, 44 N.D. 306, 311, 175 N.W. 372, 374 (1919), overruled on other grounds by *Benson v. N.D. Workmen's Comp. Bureau*, 283 N.W.2d 96 (N.D. 1979)). The DOJ also noted the need for independent counsel:

> When differing legal interests are concerned, that process can only adequately occur when the different interests are competently represented by independent counsel. The conflicts of interest rules of legal ethics are consistent with this republican and pluralistic government.
>
> …
>
> Public office or public agency clients are no less and perhaps more deserving of adequate if not full legal representation. Denying that to them … serves only the personal interest of the controlling government lawyer.

Id. Despite advising state government attorneys to avoid stepping "into the shoes" of the client, that is exactly what the DOJ attempts to do here.

Even the sources the DOJ offers in support of its position actually come to the opposite conclusion. For example, the 1970 Wisconsin Law Review article cited by the DOJ does not conclude that the DOJ has absolute authority over its government clients:

> [The Attorney General], like the private lawyer, represents a client who makes the ultimate decisions respecting the disposition of the litigation. It is the client who decides whether or not to settle the matter, and who decides major questions of strategy and tactics along the way.

Arlen C. Christenson, *The State Attorney General*, 1970 Wis. L. Rev. 298, 311; *See also*, *Helgeland v. Wis. Municipalities*, 2006 WI App 216, ¶¶ 24-25, 296 Wis. 2d 880, 724 N.W.2d 208 (attorney general presumed to properly represent the interests of the named defendant, as "[t]he attorney general is plainly not a party in this case").

II. The DOJ's representation violates the State Superintendent's authority to supervise public instruction.

The DOJ's interpretation of its authority under Wis. Stat. § 165.25(1m) is also impermissible because it interferes with the SPI's constitutional authority under Article X, § 1. The Wisconsin

Constitution vests authority in only four officers or bodies. Legislative power is vested in the state senate and assembly. Wis. Const. Art. IV, § 1. This Court has "superintending and administrative authority over all courts." Wis. Const. Art. VII, § 3. Executive power, with one important caveat, is vested in the Governor. Wis. Const. Art. V, § 1. And the SPI has the executive power to supervise public instruction. Wis. Const. Art. X, § 1. These officers and bodies should not "possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 4, 376 Wis. 2d 147, 897 N.W.2d 384 (citing Federalist No. 48, at 305 (James Madison)(Clinton Rossiter ed., 1961)). Here, the DOJ, under the guise of providing "representation" under Wis. Stat. § 165.25(1m), now seeks to diminish this constitutional authority by misrepresenting the SPI's position in a case that directly impacts the SPI's constitutional power.

In *Thompson v. Craney*, this Court unanimously held that the SPI may not be placed in an inferior position to "other officers" when it comes to the supervision of public instruction:

> [B]eyond a reasonable doubt[,] … the office of the 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.

Thompson v. Craney, 199 Wis. 2d 674, 698, 546 N.W.2d 123 (1996). The Court made clear that no law may give "equal or superior authority to any 'other officer'" without an amendment to the constitution. *Id*. at 699. Allowing the DOJ to dictate the SPI's legal position does just that. It would mean that, under Wis. Stat. § 165.25(1m), the DOJ can make final decisions regarding the supervision of public instruction whenever litigation is involved. After all, the outcomes of litigation directly impact the day-to-day supervision of public instruction. *See e.g.*, *Epstein v. Benson*, 2000 WI App 195, 238 Wis.2d 717, 618 N.W.2d 224 (rejecting the SPI's interpretation of conduct warranting license revocation). This is in direct violation of *Gabler*, *Craney*, and *Coyne.*

Other states have recognized the constitutional problem presented by an attorney general dictating the course of representation when the client is a constitutional officer, like the SPI. In *Tice v. Dep't of Transp.*, the Court of Appeals of North Carolina considered whether the attorney general could enter a consent judgment on behalf

of a state department over the objections of another constitutional officer, the governor. *Tice v. Dep't of Transp.*, 67 N.C. App. 48, 312 S.E.2d 241 (1984). The *Tice* court recognized that giving an attorney general the power to dictate another constitutional officer's legal position would allow the attorney general to dictate and supervise that officer:

> The constitutional independence of these offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers.

312 S.E.2d at 245 (internal citations omitted). As in *Tice*, the DOJ is attempting to insert its own legal position over that of a separately elected constitutional officer, the SPI. This Court has repeatedly rejected attempts by other constitutional officers to supervise the SPI. *Craney,* 199 Wis. 2d 674; *Coyne*, 368 Wis. 2d 444.

Therefore, the only constitutionally permissible interpretation of Wis. Stat. § 165.25(1m) is that the DOJ has the authority under Wis. Stat. § 165.25(1m) to *represent* the SPI, but may only do so to the extent the DOJ does not exert an "overruling influence" over the

SPI's own constitutional authority. If the DOJ's interpretation is correct, upon request, the DOJ may override the constitutional authority of any constitutional officer in litigation, not just the SPI.

III. The DOJ does not have the authority under state law to advance its own position.

A. The DOJ only has the power prescribed by law.

Unlike this Court or the SPI, the Attorney General has no constitutional power. The only power the Attorney General may exercise is that set by state law. Wis. Const. Art. VI, § 3 ("The powers, duties and compensation of the treasurer and attorney general shall be prescribed by law").

Further, Wisconsin is "one of a minority of states in which the [A]ttorney [G]eneral has no common-law powers." Scott Van Alstyne & Larry J. Roberts, *The Powers of the Attorney General in Wisconsin*, 1974 Wis. L. Rev. 721. Unlike Massachusetts and other states the DOJ relies on as examples, Wisconsin "has specifically circumscribed the powers and duties of the office of the Attorney General." *In re Sharp's Estate*, 63 Wis. 2d 254, 260-61, 217 N.W.2d 258 (1974). Instead, the Framers of the Wisconsin Constitution "intended the Wisconsin statutes to be the sole authority for the attorney general's powers."

State v. City of Oak Creek, 2000 WI 9, ¶ 25, 232 Wis. 2d 612, 605 N.W.2d 526. Therefore, the DOJ's authority in this case must be explicitly stated in statute. The statutes provide no authority for the Attorney General to "act for the state as *parens patriae*." *Sharp's Estate*, 63 Wis. 2d at 261.

B. The DOJ's limited statutory authority only allows it to represent the SPI and the DPI, the only named respondents to this action.

In order to advance its own position in this case (and avoid the significant ethical issues discussed above), the DOJ argues that it represents the "State" or "State's interests," rather than the SPI. DOJ Resp. and Mem. at 10. The DOJ further states that it alone can determine the "State's interests in this case." *Id*. at 12. This argument fails.

First, the Petition does not name the State as a party. Nor does it name the Attorney General or Governor as parties. Instead, only the SPI and the DPI are named respondents.

Second, the Governor did not appoint the DOJ to represent the State. Instead, the Governor "requested that the Department of Justice appear for and represent **the Department of Public Instruction and**

Superintendent Evers in his official capacity in the case Koschkee v. Evers in accordance with Wis. Stat. § 165.25(1m).” (Walsh Decl., Ex. 1) (emphasis added).

Third, the DOJ’s limited authority under Wis. Stat. § 165.25(1m) is to “represent” a delineated list of actors. Specifically, upon the Governor’s request, the DOJ can:

> [A]ppear 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 ….

Wis. Stat. 165.25(1m). By contrast, Wis. Stat. §§ 14.11(1) and 165.25(1) describe the DOJ’s ability to appear for and represent the state as a whole. Again, that did not occur here.

Importantly, Wis. Stat. § 165.25(1m) identifies the “state,” “state department,” and “official” as distinct entities, rather than subcomponents of the “state.” In other words, the Governor has the ability to appoint DOJ to represent the “state” or “state department” or “state agency.” Based on the plain reading of the statute and the Governor’s appointment, the DOJ cannot now claim that it represents the “state” in this matter.

The DOJ tries to avoid the plain language of the statute by claiming that the delineated list of actors are all one and the same, that "state agency" is no different than the state. DOJ Resp. and Mem. at 9. But this interpretation renders this list of state actors merely superfluous, contrary to canons of statutory interpretation. *See Marotz v. Hallman*, 2007 WI 89, ¶ 18, 302 Wis. 2d 428, 734 N.W.2d 411 ("In interpreting a statute, courts give effect to every word so that no portion of the statute is rendered superfluous.").

The DOJ also tries to avoid the plain language of Wis. Stat. § 165.25(1m) by relying on the opinion of the United States Supreme Court in *Will v. Michigan* for the proposition that in all matters, "a suit against a state official … is no different from a suit against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2034, 2312 (1989); *See* DOJ Resp. and Mem. at 10. This reliance is entirely misplaced. In *Will*, the U.S. Supreme Court held that although an action for damages against a state official is a suit against the state, an action for *prospective relief* is not an action against the state. Instead, it is an action against the official:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person … **because**

> **'official-capacity actions for prospective relief are not treated as actions against the State**.'

Will 491 U.S. at 71 (citing *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14, 105 S. Ct. 3099, 3106 (1985); *Ex parte Young*, 209 U.S. 123, 159–60, 28 S. Ct. 441, 454 (1908) (emphasis added). The Wisconsin Supreme Court adopted this holding in *Burkes v. Klauser*, 185 Wis. 2d 308, 352–53, 517 N.W.2d 503, 522 (1994). *See also*, *Soderlund v. Zibolski*, 2016 WI App 6, ¶ 24, 366 Wis. 2d 579, 874 N.W.2d 561.

Here, the Petitioners seek prospective, equitable relief from the SPI in his official capacity. The party is not the State, but is, of course, the SPI. *Id.*; *See also, Craney*, 199 Wis. 2d 674 (SPI is a necessary party representing interests distinct from Governor); *Tice* , 312 S.E.2d at 245 ("[W]hen the Attorney General represents a State department …, the traditional attorney-client relationship should exist); *Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp. 2d 276 (S.D.N.Y. 2001) (counsel's representation of state agencies not equivalent to representation of all of state government).

Further, in order for the Petitioners to bring this declaratory judgment action, the action *must* be brought against the SPI, not the State. If the State was the actual party, the defense of sovereign

immunity would prohibit this Court from exercising its jurisdiction. *See Lister v. Bd. of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 291, 240 N.W.2d 610, 617 (1976). To avoid a sovereign immunity defense, the Petitioners *must* bring this action against the SPI "on the theory that a suit against a state officer or agency is not a suit against the state when it is based on the premise that the officer or agency is acting outside the bounds of his or its constitutional or jurisdictional authority." *Id*. at 307-08.

The DOJ misconstrues other statutory provisions to support its argument. Specifically, the DOJ claims that because a department head may request DOJ representation under Wis. Stat. § 165.25(6)(a) and the Governor may require the DOJ to represent a department under Wis. Stat. § 165.25(1m), that therefore Wis. Stat. § 165.25(1m) provides the DOJ with authority to dictate the legal position of the represented party. DOJ Resp. and Mem. at 14-15. However, that is not a necessary or even logical conclusion. Instead, the different sections serve different purposes. The DOJ has discretion under Wis. Stat. § 165.25(6)(a) to represent a state official or department, whereas Wis.

Stat. § 165.25(1m) does not give the DOJ discretion. Under either statute, the DOJ only has authority to *represent* the relevant entity.

C. Under Wis. Stat. § 165.25(1m), the DOJ's limited authority in this Petition is to "appear for and represent" the SPI, not "appear in place of and ignore."

Because the DOJ is incorrect that the SPI is the Respondent in name only, the DOJ is incorrect to conclude it may unilaterally define the SPI's legal position. The DOJ does not have specifically circumscribed authority under Wis. Stat. § 165.25(1m) to act as *parens patriae* and "advance whatever legal positions DOJ determines to be in the best interest of the State" in direct opposition to the named state official and agency. DOJ Resp. and Mem. at 9-10. The DOJ's lack of authority is confirmed by other states which, like Wisconsin, have specifically circumscribed the powers of the attorney general.

Iowa's attorney general, like Wisconsin, does not have common-law powers. In *Motor Club of Iowa v. Dep't of Transp.*, the Iowa Supreme Court considered whether the attorney general had authority to continue prosecution of an appeal against the directive of a state agency. *Motor Club of Iowa v. Dep't of Transp.* 251 N.W.2d

510, 513 (Iowa 1977). In ignoring this directive, the attorney general argued "the State of Iowa is the real party in interest," and that as attorney general, he possessed "complete dominion over all litigation in which he appears in the interest of the State." *Id*. at 513.

The Iowa Supreme Court rejected this position, holding that, as in Wisconsin, the duties and powers of the attorney general are limited to those defined by statute. *Id*. at 514. As defined, the attorney general's duty is to "prosecute and defend all actions and proceedings brought by or against any state officer in his official capacity." *Id*. (citing Section 13.2 of the Iowa Code). The court held the scope of this duty was to appear and defend the department, "not to assert his vision of state interest." *Id*. Here, the DOJ is similarly exceeding its statutory authority by attempting to assert its own vision of the state interest.

Similarly, in *Chun v. Bd. of Trs. of the Employees' Ret. Sys.*, the Supreme Court of Hawaii considered a dispute in which the attorney general acted in opposition to the interests of a state agency. *Chun v. Bd. of Trs. of the Employees' Ret. Sys.*, 87 Haw. 152, 952 P.2d 1215 (1998). In that case, much like the Wisconsin DOJ, the Hawaii

attorney general asserted that she had "*the exclusive authority to represent the state's legal interests, control the state's participation in litigation*, and protect the rights of the public at large." *Id*. at 167-168 (emphasis in original).

The court in *Chun* disagreed. The court held that when representing a state agency, the attorney general may not "advance her view of the 'public welfare' when it squarely conflicts with the substantive position taken" by the named state agency the attorney general represents. *Id*. at 171. The court concluded that a government attorney participating in concurrent representation that may otherwise violate the code of ethics may do so "*so long as no prejudice is suffered by any of the clients.*" *Id.* at 173 (emphasis in original). That is plainly not the case here.

The prospect of an attorney general dictating the course of representation is even more problematic when the client is a constitutional officer, like the SPI. Other states provide attorneys general with more control over litigation on behalf of state actors. However, the source of authority for these attorneys general derives from common-law authority or unique characteristics of statutory law

in those states, neither of which are present in Wisconsin. Again, Wisconsin has rejected that approach.

For example, the DOJ relies upon *Feeney v. Commonwealth* as a "leading" case in support their position. DOJ Resp. and Mem. at 19. However, as noted in that case and the DOJ's own brief, Massachusetts statutory law *required* the attorney general to represent the state and its department heads in all proceedings, for the express purposes of "consolidating all the legal business of the Commonwealth in one office." *Id.*; *Feeney v. Commonwealth*, 373 Mass. 359, 366 N.E.2d 1262 (1977). The goal of this "clearly articulated" authority was "to set a unified and consistent legal policy for the Commonwealth." *Feeney*, 366 N.E.2d at 1265.

The DOJ has no such authority in Wisconsin. Unlike *Feeney*, the Wisconsin Constitution and statutes do not provide the DOJ with "complete responsibility" for all of Wisconsin's legal business. Rather, the Attorney General has only specifically circumscribed powers, making *Feeney* distinguishable from this matter.

As with its erroneous reliance upon *Feeney*, the DOJ continuously mischaracterizes further cases cited in support of its

argument. Each case cited by the DOJ regarding the broad authority of the attorney general is distinguishable from the instant case and none involve an attorney general constrained to specifically circumscribed powers. *See Manchester v. Rzewnicki*, 777 F. Supp. 319, 326-27 (D. Del. 1991) (the Code's provision of authority to represent state officials includes an exception for actions in which the State has a conflicting interest); *Superintendent of Ins. v. Attorney General*, 558 A.2d 1197, 1199-2000 (Me. 1989) (finding that the attorney general has powers and duties under common law); *State ex rel. Allain v. Miss. Pub. Serv. Com.*, 418 So. 2d 779, 781-82 (Miss. 1982) (finding that the attorney general has powers and duties under common law); *Conn. Com. on Special Revenue v. Conn. Freedom of Info. Com.*, 174 Conn. 308, 319-20, 387 A.2d 533, 537 (1978) (in regard to opposing state agencies, the attorney general can represent the interests of both agencies); *State ex rel. Morrison v. Thomas*, 80 Ariz. 327, 331-32, 297 P.2d 624, 627 (1956) (attorney general may represent the state as a distinct party over the objections of a state agency having no independent constitutional authority); *Piccirilli Bros. v. Lewis*, 282 Pa. 328, 336, 127 A. 832, 834-35 (1925) (statute

required representation by the attorney general and prohibited private representation absent written approval from the attorney general).

IV. The DOJ's position leads to absurd results.

To assert a claim for declaratory relief, there must be a "justiciable controversy." *Lister*, 72 Wis. 2d at 306. A "justiciable controversy" must be between two persons whose interests are adverse. *Id*. Ironically, if the DOJ is allowed to dictate the SPI's position as it intends, the interests of the Petitioners and SPI would no longer be adverse. Both parties would agree that Act 57 resolved the constitutional concerns recognized in *Coyne*, no justiciable controversy would remain, and the Petitioners would not be able to assert a claim for declaratory relief. Conversely, for the Petitioners to proceed, the SPI must assert its own adverse interests. The DOJ is unwilling to do so for the reasons set forth above. For this Petition to even exist, the DOJ may not appear on behalf of the SPI.

V. Nothing precludes Attorneys Nilsestuen and Jones from representing the SPI and the DPI.

The DOJ claims that Attorneys Nilsestuen and Jones are prohibited from representing the SPI in court. Yet the DOJ's position is not supported by the law and contradicts the DOJ's position in other

litigation. Beyond its misplaced reliance on Wis. Stat. § 20.930, the DOJ does not identify any statute that prohibits DPI attorneys from representing the agency and the SPI in this matter.

A. DPI attorneys are authorized to represent the SPI and the DPI under Wis. Stat. § 20.930.

The DOJ claims that the undersigned attorneys are prohibited from appearing in this case pursuant to Wis. Stat. § 20.930. *See* DOJ Resp. and Mem. at 13. The DOJ has its facts wrong. Even if one assumes that the Governor's approval is necessary for the DPI attorneys to appear, the Governor has already provided such approval. Pursuant to Wis. Stat. § 20.930, the Governor authorized the DPI to employ Attorney Nilsestuen to represent the DPI as Chief Legal Counsel on May 24, 2016. Kohout Aff. ¶¶ 4-5. The Governor also authorized the DPI to employ Attorney Jones to represent the DPI on October 19, 2016. *Id*. at ¶ 6-7.

Because the DOJ may not represent the Superintendent for the reasons described above, Attorneys Nilsestuen and Jones are the obvious and appropriate counsel:

> [W]here a conflict of interests appears between an agency in its role as an administrative decision-maker and the attorney general, also charged with protecting the public interest but

> in disagreement with the agency … then the agency should be represented by its internal departmental counsel or … be authorized to employ outside special counsel.

Van Alsytne at 748.

B. The DOJ's position is inconsistent.

Whatever claim the DOJ makes that "Wisconsin law usually forbids state departments and officials from independently litigating official-capacity suits through their own counsel" is undermined by the fact that the DOJ has previously forced the SPI to do just that. In *St. Augustine Sch. v. Evers*, 276 F. Supp. 3d 890 (E.D. Wis. 2017), the DOJ declined to represent the SPI in a case challenging the constitutionality of a statute regarding school district transportation. Contrary to the DOJ's claimed "obligation to defend the constitutionality of state law," DOJ Resp. and Mem. at 2, the DOJ declined to represent the SPI in *St. Augustine* because the DPI did not "have a legally defensible position" to defend the constitutionality of the challenged statute. Molly Beck, *DOJ Won't Represent State Education Agency in Lawsuit, but Scott Walker Blocking Use of*

Outside Counsel, Wisconsin State Journal, June 16, 2016.[2] A DPI attorney then represented the SPI in the Eastern District of Wisconsin pursuant to Wis. Stat. § 20.930. No additional appointment or approval of DPI counsel occurred. The SPI was not forced to abandon its position and prevailed in federal court. *St. Augustine Sch*, 276 F. Supp. 3d at 903; *see also, Coyne*, 368 Wis. 2d 444 (SPI represented by its counsel after DOJ declined to represent the SPI and the Governor declined to appoint special counsel).

Here, the DOJ has effectively declined to represent the legal position of the SPI, though now the DOJ has also declined to withdraw its representation. To avoid the numerous issues outlined above, the withdrawal of the DOJ in favor of DPI attorneys already authorized by Wis. Stat. § 20.930 is the necessary course of action.

VI. SPI Evers cannot intervene as an interested party, but the Governor can.

A. The DOJ can ethically represent the Governor or another party.

If the DOJ maintains that the interests of the State, the Governor, or any other party must be represented in this dispute, that

[2] The article is available at: http://host.madison.com/wsj/news/local/govt-and-politics/doj-won-t-represent-state-education-agency-in-lawsuit-but/article_ea9068eb-4429-55dc-80b6-5942cd817a65.html.

party may intervene under Wis. Stat. § 803.09(1). The movant would be required to meet four elements to intervene as a matter of right:

> (1) that the motion to intervene be made in a timely fashion; (2) that the movant claim an interest sufficiently related to the property or transaction which is the subject of the action; (3) that the movant be situated such that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that the movant's interest not be adequately represented by existing parties.

Helgeland, 296 Wis. 2d 880, ¶ 5 (internal citation omitted). The Governor meets these requirements. The Governor has a clear interest at stake: his ability to enforce Wis. Stat. §§ 227.135 and 227.137. The SPI, as a respondent, does not share that interest. And despite the DOJ's attempt to force its position on the SPI, no party represents the Governor.

More importantly, proceeding in this manner while allowing the SPI to represent his own legal position avoids all constitutional, statutory, common-law, and ethical issues raised by the DOJ's intended representation of the SPI.

B. SPI Evers, in his personal capacity, does not meet these requirements.

The DOJ argues the reverse: Dr. Evers must intervene in this Petition in his personal capacity if he wishes to advance his legal

position. This claim ignores the above-stated elements of intervention. The interest Dr. Evers has related to the subject of the action is in his official capacity as SPI. The disposition of the action would not impair Dr. Evers in his personal life, but would impair his ability to exercise his duty as a constitutional officer to supervise public instruction. Regarding the final element, Dr. Evers would have to advance the absurd argument that his personal interests would be inadequately represented by himself in his official capacity.

Therefore, the only way for the SPI to defend the legal position upheld by this court in *Coyne* is to appear in his official capacity represented by counsel capable of representing that position. The Governor could represent the alleged interests of the State as an intervener without employing an absurd construct of law.

CONCLUSION

The Rules are clear: all attorneys, including the Attorney General, are prohibited from representing a client if there is a conflict of interest. Here, the DOJ clearly has a conflict. It is attempting to ignore the interests of its current client, the SPI, and advance the interests of its former client, the Governor. And try as it might, the

DOJ does not have the statutory authority to eliminate the SPI from the attorney-client relationship. Nor can it rely on constitutional and common law authority, for it has none.

For all of the reasons above, the SPI respectfully request that this Court grant the Respondent's Motion to Deny Substitution of Counsel and deny the DOJ's Motion to Strike the Appearance of Attorneys Nilsestuen and Jones.

Dated this 5th day of March, 2018.

Respectfully submitted,

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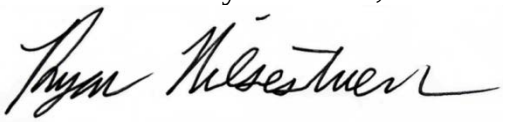
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of this brief is 6,279 words.

Dated this 5th day of March, 2018.



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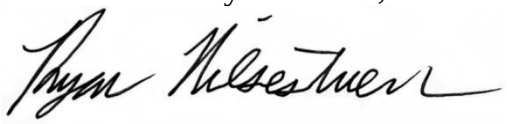
CERTIFICATION REGARDING ELECTRONIC BRIEF PURSUANT TO WIS. STAT. § 809.19(12)

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.

A copy of this certificate has been served with the paper copies of this brief filed with this Court and served on all opposing parties.

Dated this 5th day of March, 2018.



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