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

RESPONSE TO THE PETITION

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION

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INTRODUCTION

The Petitioners ask this Court to take a simple, but unprecedented, action: reverse this Court's holding in *Coyne v. Walker,* a decision from just two years ago, and upend the Court's longstanding interpretation of Article X, § 1 of the Wisconsin Constitution. *See Coyne v. Walker,* 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520. The Petitioners argue that non-material, non-substantive amendments made by 2017 Wisconsin Act 57 (Act 57) to Wis. Stat. §§ 227.135 and 227.185 undo this Court's decision in *Coyne*, requiring a "re-do" of that case. Specifically, the Petitioners rely on Justice Prosser's "narrow" concurrence in *Coyne*.

But the law and the facts are not in the Petitioners' favor. Since statehood, the supervision of public instruction has been vested in the State Superintendent of Public Instruction (SPI). Wis. Const. Art. X, § 1. This Court has repeatedly affirmed our founders' intention that the SPI, not the Governor, has this vested authority. Beyond conclusory statements, the Petitioners offer no support for their position that the Court should radically change this long-standing interpretation.

The Petitioners also fail to avoid the simple fact that a *majority* of this Court already ruled that the Governor cannot "veto" administrative rules promulgated by the SPI to supervise public instruction. *Coyne*, 368 Wis. 2d 444. Justice Prosser's concurrence, even if it somehow controlled the immediate case, was anything but narrow: it argued that the entire scheme established by 2011 Wisconsin Act 21 (Act 21) was unconstitutional, not just as it was applied to the SPI. *Id*. at ¶¶ 154-55 (Prosser, J., concurring).

The Petitioners attempt to relabel arguments this Court has already rejected by relying on non-material, non-substantive amendments to the affected statute. But a constitutional power cannot be undone so easily. Nor can the Petitioners undermine this Court's authority to interpret that power. As this Court has repeatedly and consistently ruled, the power to supervise public instruction in vested in the SPI and "other officers of public instruction."

STATEMENT OF THE ISSUES

The issues presented for this Court are:

1. Whether the Court should grant the Petition for Original Jurisdiction which asks the Court to review a matter already decided just two years ago in *Coyne v. Walker*.

2. Whether the Governor, who plays a key role in the statutory scheme at issue under Wis. Stat. § 227.135 and who was party in the prior action, is a mandatory party.

3. Whether this case is appropriate for the Court to exercise original jurisdiction when the Petition for Original Jurisdiction raises questions of fact, this Court is not a fact-finding body, and this Court's internal procedures prevent original jurisdiction where there are questions of fact.

ARGUMENT

This Court has long recognized that original jurisdiction is only appropriate in limited, exceptional circumstances. *See Petition of Heil*, 230 Wis. 428, 284 N.W. 42 (1938). The *Heil* court cautioned that it is inappropriate to exercise this power for the "mere consideration of convenience or expediency." *Id.* at 51. Beyond conclusory arguments, the Petitioners fail to meet the requirements set by *Heil*. More importantly, the Petitioners' argument is foreclosed by issue preclusion. Having had the same question decided before –

whether the Governor can veto the SPI's administrative rules – the Petitioners cannot now have a second kick at the can.

I. THE DOCTRINE OF ISSUE PRECLUSION PROHIBITS RELITIGATION OF THE ISSUES PREVIOUSLY RESOLVED BY COYNE.

The doctrine of issue preclusion "is designed to limit the relitigation of issues that have been actually litigated in a previous action." *Lindas v. Cady*, 183 Wis. 2d 547, 558, 515 N.W.2d 458, 463 (1994). This doctrine applies to issues "that have been contested in a previous action between the same or different parties." *Michelle T. by Sumpter v. Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327, 329 (1993) (citations omitted).

In considering whether to apply issue preclusion against a nonparty to the prior action, the Court applies a test of fundamental fairness. *Jensen v. Milwaukee Mut. Ins. Co.*, 204 Wis. 2d 231, 237, 554 N.W.2d 232, 234 (Ct. App. 1996) (citing *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 551, 525 N.W.2d 723, 727 (1995)). This test serves to balance interests of "judicial efficiency and finality" and the "protection against repetitious or harassing litigation" against the

right to litigate a claim. *Michelle T.*, 173 Wis. 2d at 688. The test involves "some or all" of the following factors:

> (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Jensen, 204 Wis. 2d at 237-38. All of these factors weigh against the Petitioners.

A. **The issues raised by the Petitioners are identical to the issues litigated in *Coyne*, which supports the preclusion of these issues.**

The factor that is of primary relevance to this matter is that the issue previously decided in *Coyne* and the issue to be precluded do not involve "two distinct claims or intervening contextual shifts in the law." *Jensen*, 204 Wis. 2d at 238. Though the Petitioners repeatedly refer to the SPI's position as an attack on the "new" "REINS Act," the Petitioners have merely placed a new label on provisions at the heart

of the *Coyne* dispute, which remain unchanged and unconstitutional as applied to the SPI.

The procedural history of *Coyne* is important. On October 30, 2012, the Dane County Circuit Court issued a declaratory judgment and final order permanently enjoining the Governor and Secretary of Administration from applying specific provisions of Act 21 to the SPI. Act 21 modified or created Wis. Stat. §§ 227.135, 227.137, 227.185, and 227.24 granting the Governor and, in some cases, the Secretary of Administration, discretionary authority to veto administrative rules promulgated by the SPI. 2011 Wis. Act 21, §§ 4-6, 21, 26-27, 32, and 61. The circuit court found this unchecked veto authority unconstitutional:

> In the court's view, the feature that renders Act 21 unconstitutional beyond a reasonable doubt is the fact that Act 21 permits the Governor, and the DOA Secretary under certain circumstances, to stop the Superintendent from starting and/or pursuing the process of rulemaking.

Coyne v. Walker, No. 11-CV-4573 (Wis. Cir. Ct. Dane County Oct. 30, 2012). The Court of Appeals agreed with the circuit court's analysis. *Coyne v. Walker*, 2015 WI App 21, 361 Wis. 2d 225, *review*

granted, 2015 WI 78, 865 N.W.2d 502, and *aff'd*, 2016 WI 38, 368 Wis. 2d 444.

On May 19, 2016, a majority of this Court affirmed the lower courts, upholding the permanent injunction of those provisions of Act 21 that provide the Governor and Secretary of Administration "veto" authority over the SPI's administrative rules, namely Wis. Stat. §§ 227.135 and 227.185. *Coyne*, 368 Wis. 2d 444,

Act 57 did nothing to modify those provisions of Act 21 that provide the Governor the authority to "veto" proposed scope statements. Act 21, Section 4 created Wis. Stat. § 227.135(2) to require state agencies to submit scope statements to the Governor for approval in "his or her discretion." Wis. Stat. § 227.135(2) (2016). No work can be done in connection with drafting a proposed rule until the governor approves the statement. Wis. Stat. § 227.135(2) (2016). This was the first level of "veto" that this Court determined to be unconstitutional as applied to the SPI.

Act 57 did not affect this "veto." Instead, it only added an additional procedural step by requiring agencies to first submit scope statements to the Department of Administration (DOA) for a

determination if there is "legal authority" to draft the rule. Wis. Stat. § 227.135(2) (2017). The DOA then forwards the rule to the Governor who, as was provided by Act 21, may approve or reject the scope statement "in his or her discretion."[1] *Id*. The unchecked power for the Governor to "veto" the rulemaking process at this point under Act 21, which was explicitly enjoined by this court, remains unaltered by Act 57.

Similarly, Act 57 did not affect the Governor's ability to "veto" proposed rules when presented in final draft form. Wis. Stat. § 227.185 (2017). The language of that statute remains unchanged with the exception of the addition of the last sentence, a notification provision:

> **227.185 Approval by governor.** After a proposed rule is in final draft form, the agency shall submit the proposed rule to the governor for approval. The governor, in his or her discretion, may approve or reject the proposed rule. If the governor approves a proposed rule, the governor shall provide the agency with a written notice of that approval. No proposed rule may be submitted to the legislature for review under s. 227.19 (2) unless the governor has approved the

[1] The State Superintendent and the DPI do not see any constitutional infirmity with the DOA only doing an analysis of the legal authority of the rule. This legal analysis is identical to that of the Legislative Council under Wis. Stat. § 227.15(2)(a). Further, the *Coyne* court recognized that the "Legislature can require whatever rulemaking steps it wants as long as the SPI and DPI are able to make the final decision on the contents of the proposed rule and submit that proposed rule to the Legislature at the end of the process." *Coyne*, 368 Wis. 2d 444, ¶ 69. However, the requirement for the Governor's approval was unaffected by Act 57 and, as a result, it is still permanently enjoined per this court's order.

> proposed rule in writing. The agency shall notify the joint committee for review of administrative rules whenever it submits a proposed rule for approval under this section.

2017 Wis. Act 57, § 21 (emphasis in original). This minor change by Act 57 is immaterial and does not address or even relate to the constitutional issue enjoined by this Court. In short, the Petitioners argue that adding a non-substantive notification requirement somehow cures the constitutionality infirmity. Pet'rs' Mem. at 11-12. This argument is nothing more than unsupported rhetoric.

Act 57 did not alter the constitutional infirmity of the enjoined statutory scheme set forth in Wis. Stat. §§ 227.135, 227.137, 227.185, and 227.24. Act 57 contains "no mechanism for the SPI and DPI to proceed with rulemaking in the face of withheld approval by the Governor." *Coyne*, 368 Wis. 2d 444, ¶ 71. Act 57 did not eliminate the provisions that make the SPI subordinate to the Governor in the SPI's exercise of rulemaking authority. *Coyne*, 368 Wis. 2d 444, ¶ 85 (Abrahamson, J., concurring). Act 57 did not eliminate the Governor's absolute veto power over the proposed rules of the SPI, an independent constitutional officer. *See id.*, ¶ 155 (Prosser, J., concurring).

Therefore, Wis. Stat. §§ 227.135, 227.137, 227.185, and 227.24, as enacted and amended by Act 21, remain unchanged and unconstitutional as applied to the SPI. All Act 57 does is provide a new brand name, "the REINS Act," for those provisions adjudicated unconstitutional in *Coyne*.

Act 57 does not create a claim distinct from *Coyne*, and it does not constitute an intervening contextual shift in law. The degree to which the claims of the Petitioners are redundant to the claims considered in *Coyne*, along with the recency of the decision, weigh heavily in favor of precluding the issues resolved by *Coyne*.

B. **Additional factors of fundamental fairness support issue preclusion.**

The other factors of fundamental fairness espoused in *Jensen* support the preclusion of the issues previously decided in *Coyne*. Regarding whether the party against whom preclusion is sought, as a matter of law, could have obtained review of the judgment, the Petitioners were afforded that opportunity by Wis. Stat. § 803.09. That statute provided the opportunity for the Petitioners to intervene in the action in *Coyne*. The Petitioners had the opportunity to defend the constitutionality of Wis. Stat. §§ 227.135, 227.137, 227.185, and

227.24 as applied to the SPI in that action. This factor weighs in favor of precluding the issues resolved by *Coyne*. Even if the Petitioners were denied intervention on the grounds that the existing parties in *Coyne* adequately represented the Petitioners, those grounds support precluding those issues already competently litigated from being re-litigated.

As to the quality or extensiveness of proceedings between courts, the proceedings in *Coyne* were far more extensive. Again, that case was litigated in circuit court, the Court of Appeals, and this Court. As such, this factor weighs in favor of precluding the issues resolved by this very Court in *Coyne*.

With respect to whether burdens of persuasion have shifted, there has been no change to the burden of proof or standard of review that would apply to the Petitioners' claims, and so this factor weighs in favor of precluding the issues resolved by *Coyne*. If anything, the plaintiffs in *Coyne* had a *higher* burden of proof: they (and the SPI) had to prove that the provisions in Act 21 were "unconstitutional beyond a reasonable doubt." *Coyne*, 368 Wis. 2d 444, ¶ 30.

Regarding other matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, the Governor, as represented by the Attorney General, the SPI, taxpayers, and numerous amici curiae, including the Petitioners' counsel, argued extensively, over the course of many years, as to whether the Governor may veto rules promulgated by the SPI. The Court answered the question presented in the negative. Allowing the relitigation of this matter by these same parties is fundamentally unfair, regardless of whether the Petitioners disagree with that decision.

Because the fundamental issue raised by the Petitioners was fully and fairly litigated before, the Petitioners are now estopped from raising the same issue here. As such, the Court should decline to take original jurisdiction on this basis alone.

II. IF ANY ISSUE RAISED BY THE PETITIONERS IS NOT PRECLUDED, THE PETITIONERS FAIL TO DEMONSTRATE WHY THIS COURT SHOULD EXERCISE ORIGINAL JURISDICTION.

A. The Petition does not meet the requirements under *Petition of Heil* for this Court to take original jurisdiction.

As set forth in *Petition of Heil*, this Court will take a petition for original jurisdiction when the "questions presented are of such importance as under the circumstances to call for a speedy and authoritative determination by this court in the first instance." *Heil*, 230 Wis. at 446. "Mere expedition of causes, convenience of parties to actions, and the prevention of a multiplicity of suits are matters which form no basis for the exercise of original jurisdiction of this court." *Id*. at 448. In other words, the possibility that a case might eventually end up with this Court is not a basis for original jurisdiction.

Again, the Petitioners do not raise any issues not previously decided by this Court. Even if these issues are not precluded, or if there are any issues this Court considers to be outside the scope of *Coyne*, the Petitioners provide no basis to conclude that the Petition addresses matters of such importance and of immediate or pressing need. For example, whether or not the SPI must submit rules to the DOA for a determination of statutory authority is a question of minimal importance, given that this legal analysis is identical to that

of the Legislative Council under Wis. Stat. § 227.15(2)(a) currently applicable to the SPI.

The Governor, SPI, and the DOA are all operating in compliance with the injunction upheld by this Court, and there is no reason this Court should bypass "the principal function of the circuit court to try cases" for any issue not otherwise precluded. *State ex rel. Atty. Gen. v. John F. Jelke Co.*, 230 Wis. 497, 503, 284 N.W. 494, 497 (1939). The bare conclusion that the Petitioners disagree with the decision of this Court in *Coyne* falls far short of raising a question of such importance as to require a speedy and authoritative determination. Nor do the Petitioners put forth any evidence demonstrating exigent circumstances. Simply put, the Petition is long on rhetoric, short on the law, and nonexistent on facts to support the Court taking original jurisdiction.

The Petition's lack of a "question…of such importance" is further illustrated by the situations where this Court has taken up original jurisdiction. For example, in *State ex rel. Ozanne v. Fitzgerald*, this Court took original jurisdiction to decide whether a circuit court could enjoin the publication of 2011 Wis. Act 10. *State*

ex rel. Ozanne v. Fitzgerald, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436. As Justice Prosser wrote in his concurrence, original jurisdiction was appropriate for a variety of compelling reasons:

> The ligation presents issues of exception constitutional importance. It is of high public interest. It implicates the powers of all three branches of government. It affects most public employees in Wisconsin as well as taxpayers.

Ozanne, 334 Wis. 2d 70, ¶ 19 (Prosser, J., concurrence). The same cannot be said of the Petition. Unlike the enactment of 2011 Wis. Act 10, the Petition here does not implicate the constitutional powers of all three branches.[2] More importantly, the constitutionality of Wis. Stat. §§ 227.135 and 227.185 as applied to the SPI was already heard in *Coyne*. One would be hard-pressed to find public interest in the procedural intricacies of administrative rulemaking. Beyond conclusory statements, the Petition does not raise an issue that affects a large swath of people like "most public employees" or all taxpayers.

Finally, the Petitioners make a conclusory argument that the SPI's rulemaking constitutes an "illegal" expenditure of taxpayer

[2] The central question only concerns the executive branch: whether the Governor may veto rules promulgated by the SPI to supervise public instruction. While the Petitioners try to paint this is a question of legislative power, the Petitioners ignore the fact that the power has been *delegated*, hence it is not exercised by the Legislature.

funds. Pet. at 8. Even if true, this is no basis for original jurisdiction. The *Heil* Court rejected this as a basis for original jurisdiction, holding that the court will only take the "exceptional or flagrant cases." *Heil*, 230 Wis. at 447. No such case exists here.

B. **The Legislature established an exclusive remedy to challenge the validity of administrative rules.**

Original jurisdiction is also inappropriate in this matter because state law provides an exclusive remedy to challenge the validity of administrative rules promulgated by the SPI. Except when a rule's invalidity is raised as a defense, a declaratory action in circuit court is the exclusive means to review the validity of a rule:

> …the **exclusive means** of judicial review of the validity of a rule shall be an action for declaratory judgment as to the validity of the rule **brought in the circuit court for the county** where the party asserting the invalidity of the rule resides or has its principal place of business or, if that party is a nonresident or does not have its principal place of business in this state, in the circuit court for the county where the dispute arose. The officer or other agency whose rule is involved shall be the party defendant.

Wis. Stat. § 227.40(1) (Emphasis added). Here, the Petitioners are attempting to bypass that statutory mandate by bringing an original action. It should be noted that the Petitioners' argument that multiple rules may be invalid is no basis for original action. Section 227.40(1)

still applies. Again, the "prevention of a multiplicity of suits" is "no basis for the exercise of original jurisdiction of this court." *Heil*, 230 Wis. at 448.

C. **There is no basis under the doctrine of stare decisis to overturn *Coyne*.**

The Petitioners' argument appears to be little more than asking this Court to revisit and re-do *Coyne.* Yet the Petitioners only offer a cursory and unsupported discussion of why they think this is appropriate under the doctrine of stare decisis. It is not appropriate.

Under the doctrine of stare decisis, this Court will abide by prior decisions unless there is "special justification" to overturn a prior decision. *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 96, 264 Wis. 2d 60, 665 N.W.2d 257. "This court follows the doctrine of stare decisis scrupulously because of our abiding respect for the rule of law." *State v. Luedtke,* 2015 WI 42, ¶40, 362 Wis.2d 1, 863 N.W.2d 592 (citing *Johnson*, 264 Wis. 2d 60, ¶ 94). The reasons for stare decisis are well known:

> [1] the desirability that the law furnish a clear guide for conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; [2] the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition

> in every case; and [3] the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Id., ¶ 95 (citing *Moragane v. States Marine Lines, Inc.*, 398 U.S. 375, 403, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970).

The decision to depart from precedent is not made lightly; it must be carefully explained and have sufficient justification. *Id*., ¶ 94. Stare decisis "reflects a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Id.*, ¶ 97 (citing *Agostini v. Felton,* 521 U.S. 203, 235, 117 S. Ct. 1997 (1997). "The decision to overturn a prior case must not be undertaken merely because the composition of the court has changed." *Id*., ¶ 95. "Failing to abide by stare decisis raises serious concerns as to whether the court is 'implementing principles ... founded in the law rather than in the proclivities of individuals.'" *Progressive N. Ins. Co. v. Romanshek,* 2005 WI 67, ¶ 42, 281 Wis. 2d 300, 697 N.W.2d 417 (citing *Payne v. Tennessee,* 501 U.S. 808, 853, 111 S. Ct. 2597 (1991)). In other words, simply disagreeing with *Coyne* is an insufficient basis for this Court to overturn that decision. *Id*., ¶ 45.

There are five factors that the Court examines when it considers whether to overturn a prior precedent: (1) changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and consistency in the law; (4) the prior decision is unsound in principle; and (5) the prior decision is unworkable in practice. *Luedtke*, 362 Wis.2d 1, ¶ 40.

This Court normally does not address undeveloped arguments. *Lands' End, Inc. v. City of Dodgeville*, 2016 WI 64, ¶ 85, 370 Wis. 2d 500, 533. Here, the Petitioners fail to apply - let alone mention – these factors. And for good reason: the factors do not support overturning *Coyne*.

1. There have been no changes or developments in the law to undermine the rationale behind *Coyne*.

In *Johnson Controls*, this Court overturned *City of Edgerton v. General Casualty Co. of Wisconsin*, 184 Wis.2d 750, 517 N.W.2d 463 (1994). The *Johnson Controls* decision, with its detailed analysis, is instructive. Of the many problems with *Edgerton*, the *Johnson Controls* court noted: the *Edgerton* decision relied upon a treatise's

definition of "damages" which had subsequently been changed; the decision ignored a large body of law on the nature of damages; it relied upon federal court decisions which were later overturned; and a subsequent decision by the Court "effectively obliterated its intellectual foundation." *Johnson Controls*, 264 Wis. 2d 60, ¶¶ 55-60, 71. Here, the Petitioners can point to no such changes. *Coyne* was based on this Court's longstanding interpretation of Article X, § 1. The minor, immaterial changes by Act 57 have no effect on this interpretation.

2. There are no newly ascertained facts.

The Petitioners do not identify any newly ascertained facts with which *Coyne* conflicts. Therefore, this factor demonstrates that *Coyne* should be upheld.

3. *Coyne* is consistent with *Thompson*, which has been established law for more than 20 years, and there are no conflicting decisions.

One of the primary reasons the *Johnson Controls* court cited for overturning *Edgerton* was that the *Edgerton* decision could not be reconciled with *General Casualty Co. of Wisconsin v. Hills*, 209 Wis.2d 167, 561 N.W.2d 718 (1997), a case decided less than three

years after *Edgerton*, without creating "arbitrary and illogical distinctions" between types of environmental cleanup costs that were considered "damages" under the federal Comprehensive Environmental Response, Compensation, and Liability Act. *Johnson Controls*, 264 Wis. 2d 60, ¶ 105. By contrast, there are no conflicting decisions since *Coyne* was decided and, as a result, *Coyne* is not detrimental to coherence and consistency in the law.

4. *Coyne* is sound in principle.

The fourth factor asks whether the prior decision is unsound in principle. In other words, it asks whether the decision was properly decided. Again, *Johnson Controls* is illustrative. There, the court noted the numerous problems with the *Edgerton* decision, including: it misapplied and misconstrued prior cases, it ignored established law, and it was based, in part, on an outdated treatise's definition of damages. *Johnson Controls*, 264 Wis. 2d 60, ¶¶ 38-57. There are no such errors with *Coyne* because the *Coyne* court carefully and correctly applied the proper constitutional analysis. This analysis is identical to that conducted by the unanimous *Thompson* court. *See*

Coyne, 368 Wis. 2d 444, ¶¶ 45-63 (Adopting and applying *Thompson*'s analysis of Article X, § 1).

5. *Coyne* provides a simple, workable standard.

The final stare decisis factor looks at whether the prior decision is workable in practice. In *Johnson Controls*, the Court recognized that the standard created by the divided *Edgerton* court created confusion and was unworkable. *Johnson Controls*, 264 Wis. 2d 60, ¶¶ 3-4. Therefore, the court abandoned it to create a rule that was "clear, comprehensive, and logical." *Johnson Controls*, 264 Wis. 2d 60, ¶ 112.

Coyne creates a simple, workable rule: the Governor cannot "veto" administrative rules promulgated by the SPI to supervise public instruction. That is all. The Petitioners provide no support for their conclusory argument that *Coyne* will "confuse" judges and the Legislature. Despite what some may say about lawyers and politicians, *Coyne*'s simple rule is easy for anyone to follow.

III. THE PETITION IS DEFECTIVE BECAUSE THE PETITIONERS FAILED TO COMPLY WITH WIS. STAT. § 806.04(11).

A. The Governor and Secretary of Administration should be made parties to this proceeding.

Under Wis. Stat. § 806.04(11), the Governor should have been made a party to this proceeding. The Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, sets clear guidelines on who should be made a party in a declaratory action. Specifically, Wis. Stat. § 806.04(11) provides that certain persons "shall be made parties who have…any interest which would be affected by the declaration" and whose rights may be prejudiced by the declaration.

Besides the SPI, the only named respondent, the statutes at issue necessarily involve two other officers: the Governor and the Secretary of Administration. Specifically, the Governor is charged with approving or rejecting scope statements and proposed rules before they may be worked on or approved by the legislature. Wis. Stat. §§ 227.135 and 227.185. The Secretary of Administration is charged with determining whether an agency has the authority to promulgate a rule and make a report to the Governor. *Id*. The Governor and the Secretary of Administration have an "interest which would be affected" by a declaration in this case. It would, after all, directly affect their duties and power. This conclusion is further supported by the fact that the Governor and the Secretary of

Administration were parties in *Coyne*, which already decided the very issue in question here. As such, the Governor and the Secretary of Administration are mandatory parties under Wis. Stat. § 806.04(11).

B. **The Petition should be denied because the Court lacks subject matter jurisdiction due to the Petitioners' failure to timely serve the Joint Committee for Review of Administrative Rules.**

As fully set forth in the Respondent's Motion to Dismiss, this Court lacks subject matter jurisdiction to hear the Petition. Specifically, the Petitioners failed to serve the Joint Committee for Review of Administrative Rules ("JCRAR") within 90 days of filing the Petition. This failure deprives the Court of subject matter jurisdiction. *See* Resp.'s Mot. to Dismiss and Mem. in Supp.

IV. **THE PETITION RAISES DISPUTES OF FACT AND, AS A RESULT, THE COURT IS NOT THE PROPER VENUE TO HEAR THE PETITION.**

As this Court's internal operating procedures state, this Court does not take petitions for original jurisdiction if there are questions of fact raised. Wisconsin Supreme Court Internal Operating Procedures III.B3. *See also*, *Green v. State Elections Bd*., 2006 WI 120, ¶ 1, 297 Wis. 2d 300, 723 N.W.2d 418 ("this court is not a fact-

finding tribunal) (citing *In re Exercise of Original Jurisdiction*, 201 Wis. 123, 128, 229 N.W. 643, 645 (1930) ("This court will with the greatest reluctance grant leave for the exercise of its original jurisdiction … where questions of fact are involved.").

There are two primary areas where the factual record in this case is undeveloped or disputed or both. First, the Petition asks this Court to determine whether the SPI must comply with Act 57 in its entirety. Pet. at 9. Yet the Petitioners only provide some evidence regarding the application of Wis. Stat. § 227.135, which governs gubernatorial review of scope statements. Specifically, the Petitioners' evidence consists of responses to two public records requests. The Petitioners have provided no evidence of how the SPI is (or is not) complying with other sections of Chapter 227 affected by Act 57.

Second, the Petitioners have provided no evidence regarding their standing. For example, the Petitioners allege that they are affected by rules currently being promulgated by the SPI. Pet. at 8. But they provide no support for these conclusory statements.

Only through discovery can these factual issues be determined. This Court is not a fact-finding body. *Green*, 297 Wis. 2d 300, ¶ 1. Instead, it is "primarily an appellate court, and it should not be burdened with matters not clearly within its province if it is to discharge in a proper and efficient manner its primary function." *Heil*, 230 Wis. at 448. As such, it is not appropriate for the Court to hear this petition.

CONCLUSION

The declaratory judgment and injunction affirmed by this Court in *Coyne v. Walker* cannot be overturned by minor, non-material amendments. As Justice Gableman succinctly wrote, only the people of the State of Wisconsin through a constitutional amendment can give the Governor the power to oversee the SPI's rulemaking:

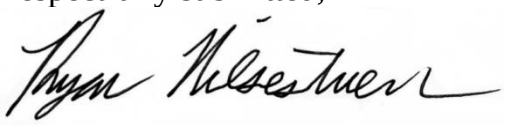
> Our constitution is the true expression of the will of the people: it must be adopted by the people of this State, and if it is to be changed, it must be ratified by the people of this State. By adopting our constitution, the people of Wisconsin gave the Legislature broad discretion to define the powers and duties of the Superintendent of Public Instruction and the other officers of public instruction. However, the will of the people as expressed by Article X, § 1 also requires the Legislature to keep the supervision of public instruction in the hands of the officers of supervision of public instruction. To do otherwise would require a

> constitutional amendment. Because Act 21 does not allow the SPI and DPI to proceed with their duties of supervision without the Governor's, and in some circumstances the Secretary of Administration's approval, Act 21 unconstitutionally vests the Governor and Secretary of Administration with the supervision of public instruction in violation of Article X, § 1. Accordingly, the court of appeals is affirmed.

Coyne, 368 Wis. 2d 444, ¶ 79.

Dated this 5th day of March, 2018.

Respectfully submitted,



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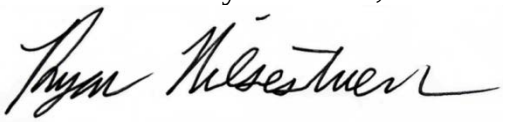
FORM AND LENGTH CERTIFICATION

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 6,092 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.

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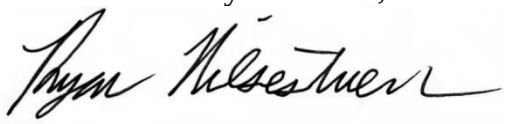

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