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

COURT-INVITED AMICUS BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF GRANTING THE PETITION FOR ORIGINAL ACTION

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INTRODUCTION

The petition to commence an original action challenges the Department of Public Instruction's ("DPI") repeated refusal to comply with the REINS Act, a law—effective on September 1, 2017—requiring agencies to submit their scope statements to the Department of Administration ("DOA"), which must then send the statements to the Governor, with a recommendation, for approval. In recent months, DPI has published numerous scope statements without sending them to DOA, each time purporting to justify its actions by citing *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520. This Court should grant the petition because DPI is violating a duly enacted statute, making essential a "speedy and authoritative determination by this court." *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50–51 (1939). In addition, the Governor is not a necessary party in this case.

STATEMENT OF INTEREST

This Court has ordered that the Attorney General "may file [this] amicus brief responding to the petition to commence an original action." Order, *Koschkee v. Evers*, No. 2017AP2278 (Wis. Feb. 14, 2018) (hereinafter "Order 2-14-18"). In addition, this case implicates the constitutionality of a state law, and when a law's constitutionality is at issue, the Wisconsin Department of Justice ("DOJ"), through the Attorney General, is "entitled to be heard." Wis. Stat. § 806.04(11); *see also State v. City of Oak Creek*, 2000 WI 9,

¶ 35, 232 Wis. 2d 612, 605 N.W.2d 526. DOJ also has an interest in this case given that it is the lawful representative of the respondents, DPI and Superintendent Evers. *See* Pet. 1. DOJ has the duty to "appear for and represent . . . any state department, agency, [or] official" when "requested by the governor." Wis. Stat. § 165.25(1m). The Governor has made such a request here. *See* Walsh Decl. Ex. 1, *Koschkee v. Evers*, No. 2017AP2278 (Wis. Dec. 12, 2017).

STATEMENT

A. Wisconsin's recently enacted "REINS Act" ("Regulations from the Executive in Need of Scrutiny") requires each agency to follow certain rulemaking procedures. 2017 Wis. Act 57, § 3. Under Wisconsin law, when an agency wishes to promulgate a new rule, it must first prepare a "statement of the scope" for the proposed rule that includes, among other things, the "statutory authority for the rule" and estimates the "resources necessary to develop the rule." Wis. Stat. § 227.135(1). The REINS Act added the requirement that every executive agency must submit each "statement of scope" to DOA; DOA, in turn, will "make a determination as to whether the agency has the explicit authority to promulgate the rule," and then forward the determination to the Governor, who "may approve or reject the statement of scope." 2017 Wis. Act 57, § 3, *codified at* Wis. Stat. § 227.135(2). Only after the agency completes this process and obtains gubernatorial "approv[al]" may it

continue with the rulemaking process. Wis. Stat. § 227.135(2)–(3).[1]

In recent months, DPI has issued numerous scope statements, while steadfastly refusing to comply with the REINS Act's requirements, each time citing this Court's pre–REINS Act decision in *Coyne*. P.App.101–108. DPI published the most recent of its scope statements in February 2018. *See* Wis. DPI, Statement of Scope 021-18, Related to Accountability Systems Under the Every Student Succeeds Act.[2] And because DPI has not submitted its scope statements to DOA under the REINS Act, DOA has not forwarded such statements to the Governor. *See* Pet. 7.

B. On November 20, 2017, Kristi Koschkee, Amy Rosno, Chrisopher Martinson, and Mary Carney ("Petitioners") filed a petition to commence an original action in this Court, naming DPI and Superintendent Evers, in his official capacity, ("Respondents") and alleging that Respondents have repeatedly violated the REINS Act. *See* Pet. 1–2. Soon after, both DOJ and Attorneys Nilsestuen/Jones submitted motions and briefing, each arguing that they have the legal authority to represent

[1] Seven years before enacting the REINS Act, the Legislature made several changes to the rulemaking process in 2011 Wisconsin Act 21. *See generally Coyne*, 2016 WI 38, ¶¶ 5–8 (lead op.). The REINS Act superseded several of Act 21's changes, producing—as relevant here—the regime described above.

[2] https://docs.legis.wisconsin.gov/code/register/2018/746B/register/ss/ss_021_18/ss_021_18.

Respondents. *See* Motions, *Koschkee v. Evers*, No. 2017AP2278 (Wis. Nov. 29, 2017; Dec. 12, 2017; Dec. 18, 2017). This Court discussed the various filings on the representation question in its February 14, 2018 order.

Also in its February 14 order, this Court, recognizing the "unique circumstances of this case" (the still-pending representation question): (1) required Respondents (speaking by limited court permission through Attorneys Nilsestuen and Jones) to opine upon the representation issue; (2) permitted the Attorney General thereafter to file a response; (3) required Respondents (speaking by limited court permission through Attorneys Nilsestuen and Jones) to respond to the petition; (4) permitted the Attorney General to file an amicus brief responding to the petition; and (5) required Petitioners, Respondents (speaking by limited court permission through Attorneys Nilsestuen and Jones), and the Attorney General (if he chooses to file an amicus brief) to discuss whether the Governor is a necessary party. Order 2-14-2018.

ARGUMENT

I. The Petition Satisfies This Court's Criteria For Granting A Petition For An Original Action

A. The Constitution authorizes this Court to "hear original actions and proceedings," in addition to "appellate" proceedings. Wis. Const. art. VII, § 3; *see also* Wis. Stat. § (Rule) 809.70 (listing required contents of the petition). "The criteria for the granting of a petition to commence an

original action are a matter of case law." Jay E. Grenig, 1 *Wis. Pleading & Practice Forms* § 2:53.50 (5th ed.).

This Court is more likely to grant a petition when the issues involved are of statewide "importance." *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50–51 (1938). This Court often hears original actions raising constitutional questions involving the separation of powers. *See, e.g.*, *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 7, 334 Wis. 2d 70, 798 N.W.2d 436 (lower court enjoining publication of a bill); *Joni B. v. State*, 202 Wis. 2d 1, 4–5, 549 N.W.2d 411 (1996) (statute limiting court's power to appoint counsel); *Citizens Utility Bd. v. Klauser*, 194 Wis. 2d 484, 488, 534 N.W.2d 608 (1995) (Governor's partial-veto power); *Demmith v. Wis. Judicial Conf.*, 166 Wis. 2d 649, 653–54, 480 N.W.2d 502 (1992) (Legislature's regulation of bail). Most relevant here, this Court has decided the constitutionality of certain restrictions on DPI in an original action. *See Thompson v. Craney*, 199 Wis. 2d 674, 677–79 & n.2, 546 N.W.2d 123 (1996).

This Court is also more likely to consider an original action that presents an "exigency," *Heil*, 284 N.W. at 50–51 (citation omitted), such as repeated and/or imminent violations of constitutional or statutory provisions, *see, e.g.*, *Demmith*, 166 Wis. 2d at 673–74 (challenge to bail schedule, which "law enforcement officers across the state use . . . every day"); *Labor & Farm Party v. Elections Bd.*, 117 Wis. 2d 351, 354, 344 N.W.2d 177 (1984) (ballot-access case,

heard as original action because of the "shortness of time available before the ballots [we]re to be printed"). Such cases are more likely to merit original consideration because a "speedy and authoritative determination by this court" could avoid ongoing "flagrant and patent" illegality. *Heil*, 284 N.W. at 50 (citation omitted).

This Court is also more inclined to grant a petition where a "speedy and authoritative resolution" is actually possible due to limited factual disputes. *See Joni B.*, 202 Wis. 2d at 7 ("parties d[id] not dispute the relevant facts"); *State ex rel. La Follette v. Stitt,* 114 Wis. 2d 358, 361, 338 N.W.2d 684 (1983) ("facts are undisputed"); *City of Hartford v. Kirley*, 172 Wis. 2d 191, 195, 493 N.W.2d 45 (1992) ("stipulated facts"); *see also Heil*, 284 N.W. at 46 (grant less likely "where questions of fact are involved" (citation omitted)).

Finally, this Court may consider "the dispatch within which the petitioners filed their petition." *Labor & Farm Party*, 117 Wis. 2d at 354.

B. The petition here satisfies this Court's original-action criteria. The petition presents an issue of great "importance," *Heil*, 284 N.W. at 50–51, relating directly to the separation of powers, *see, e.g.*, *Thompson*, 199 Wis. 2d at 679 & n.2: whether DPI has constitutional authority to ignore the Legislature's dictates, as embodied in the REINS Act. The dispute here is one of "exigency," *Heil*, 284 N.W. at 50–51 (citation omitted), given DPI's repeated and on-going

violation of the REINS Act. DPI has already issued numerous scope statements without submitting those statements to DOA, contrary to the REINS Act's requirements. *See* P.App.101–108. DPI continued this course of conduct even after the filing of the petition. *See supra* p. 3. This "flagrant and patent" violation of the REINS Act "call[s] for [a] speedy and authoritative determination by this court in the first instance." *Heil*, 284 N.W. at 50 (citation omitted). Moreover, so far as DOJ can determine, this case does not involve material disputes of fact. *See Joni B.*, 202 Wis. 2d at 7. DPI's scope statements, for example, are judicially noticeable under Wis. Stat. § 902.01(2)(b). *See* P.App.101–108 (scope statements); Wis. State Legislature, All Scope Statements (last visited Mar. 5, 2018);[3] *Johns v. State*, 14 Wis. 2d 119, 125, 109 N.W.2d 490 (1961) (judicial notice of state records). Finally, Petitioners filed their petition with "dispatch." *Labor & Farm Party*, 117 Wis. 2d at 354.

While some Justices of this Court raised ripeness concerns in *Coyne*, *see* 2016 WI 38, ¶¶ 250–53 (Ziegler, J., dissenting), no such objections appear warranted here. These Justices believed the issue in *Coyne*—whether the Governor would violate DPI's constitutional authority if he were to veto certain proposed rules—was unripe because "we do not know what the substance of [any rejected] rule will

[3] https://docs.legis.wisconsin.gov/code/scope_statements/all.

be, whether the rule impinges on any constitutional powers of the Governor, what reasons, if any, the Governor might have for rejecting a proposed rule, . . . and so on." *Id.* ¶ 253. But here DPI is not even *submitting* its scope statements to DOA; DPI has *already* failed to submit numerous scope statements to DOA, each time offering the same justification. *See* P.App.101–108. As this Court has explained, "[t]he basic rationale of the 'ripeness' doctrine is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative or . . . legislative policies." *Lister v. Bd. of Regents*, 72 Wis. 2d 282, 309, 240 N.W.2d 610 (1976). Given DPI's repeated actions over multiple rulemakings—in serial violation of the REINS Act—no improper "entangl[ement]" would result from this Court ruling on the merits of the claimed justification for those actions.

II. The Governor Is Not A Necessary Party

A. Whether a person is a necessary party to a case is governed by Wis. Stat. § 803.03. Under that statute, "[a] person who is subject to service of process shall be joined as a party" in one of three circumstances. Wis. Stat. § 803.03(1).

First, a person is a necessary party if "[i]n the person's absence," "complete relief cannot be accorded among those already [named as] parties." Wis. Stat. § 803.03(1)(a). For

example, a non-party possessor of marital property was a necessary party to an action involving the property between the divorcing spouses. *See In re Marriage of Zabel*, 210 Wis. 2d 336, 343–44, 565 N.W.2d 240 (Ct. App. 1997).

Second, a person must be joined if "[t]he person claims an interest relating to the subject of the action," such that the court's "disposition of the action in the person's absence may" "impair or impede the person's ability to protect that interest." Wis. Stat. § 803.03(1)(b)1. An Indian tribe, for example, was a necessary party in an action challenging the renewal of the State's gaming compact because the tribe had an interest in the compact as a casino owner. *See Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App 259, ¶¶ 18–19, 258 Wis. 2d 210, 655 N.W.2d 474. Notably, "[t]he inquiry of whether a movant is a necessary party under § 803.03(1)(b)1[ ] is in all significant respects the same inquiry under Wis. Stat. § 803.09(1) as to whether a movant is entitled to intervene in an action as a matter of right, *including the factor of whether the interest of a movant is adequately represented by existing parties*." *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶¶ 131–37, 307 Wis. 2d 1, 745 N.W.2d 1 (emphasis added) (quoting, with approval, *Helgeland v. Wis. Municipalities*, 2006 WI App 216, ¶ 46, 296 Wis. 2d 880, 724 N.W.2d 208).

Third and finally, a person must be joined if "[t]he person claims an interest relating to the subject of the action," such that the court's "disposition of the action in the

person's absence may" "subject" an already named party "to a substantial risk of incurring double, multiple or otherwise inconsistent obligations" vis-à-vis the "claimed interest." Wis. Stat. § 803.03(1)(b)2. In an action challenging the validity of an insurance policy, for instance, all beneficiaries were necessary parties because adjudicating their interests piecemeal could expose a defendant–insurance company to "inconsistent obligations." *See Maldonado-Vinas v. Nat'l W. Life Ins. Co.*, 862 F.3d 118, 122–23 (1st Cir. 2017) (interpreting Fed. R. Civ. P. 19(a)(1)(B)(ii), the federal analogue to Wis. Stat. § 803.03(1)(b)2).

B. Here, the Governor is not a necessary party.

First, the Court can afford "complete relief" to Petitioners without the Governor being joined as a party. *See* Wis. Stat. § 803.03(1)(a). Petitioners' prayers for relief are directed only at Respondents. They ask this Court to declare that DPI is lawfully subject to the REINS Act and to enjoin Respondents to comply with that law. Pet. 9. So only Respondents need to be named as parties for the Court to award the complete relief that Petitioners seek. *Compare Marriage of Zabel*, 210 Wis. 2d at 343–44.

Second, the Governor's interests are already protected in this litigation. Wis. Stat. § 803.03(1)(b)1. The Governor has "an interest relating to the subject of the action" here, *id.*, because this case involves the constitutionality of the REINS Act. The Governor has "[t]he executive power . . . vested in" him, Wis. Const. art. V, § 1, and thus "shall take

care that the laws be faithfully executed," *id.* § 4, including discharging his responsibilities under the REINS Act. Those interests are fully protected here because DOJ will defend the REINS Act's constitutionality. *Helgeland*, 2008 WI 9, ¶ 131 (party not necessary party if, among other things, his "interest . . . is adequately represented by existing parties" (citation omitted)). Assuming this Court agrees with DOJ on the representation issue, DOJ will file briefs in this case on behalf of Respondents, and in so doing will "defend the statute," as it does in the usual course. *Id.* ¶ 108; *accord* Memo Supporting Cross-Motion to Strike 1, *Koschkee v. Evers*, No. 2017AP2278 (Wis. Dec. 12, 2017).

Even if this Court were to rule against DOJ on the representation issue, the Governor would likely not be a necessary party under Subsection 803.03(1)(b)1, although that would be a closer question. Respondents' hand-picked attorneys have made clear that they would not defend the constitutionality of the REINS Act. *See* Mot. to Respond, *Koschkee v. Evers*, No. 2017AP2278 (Wis. Dec. 18, 2017). If this Court permits those attorneys to represent Respondents, DOJ would then be forced to speak on behalf of the State in a non-party capacity, *see* Wis. Stat. § 806.04(11), and so would defend the constitutionality of state law only as a non-party. While under these circumstances DOJ would not be one of the "existing parties," *Helgeland*, 2008 WI 9, ¶ 131 (citation omitted), DOJ regularly submits non-party briefs in cases where the State is not a party,

including where the State has enforcement responsibility relating to the statute under constitutional challenge. *See, e.g.*, State's Amicus Br., *Voters With Facts v. City of Eau Claire*, No. 2015AP1858 (Wis. Jan. 19, 2018); State's Amicus Br., *Milewski v. Town of Dover*, No. 2015AP1523 (Wis. Dec. 19, 2016). This Court generally does not require the State's (including its agencies') intervention as a necessary party in such cases.

Third and finally, the absence of the Governor from this case would not "subject" "any of the persons already [named as] parties [ ] to a substantial risk of [untenable] obligations." Wis. Stat. § 803.03(1)(b)2. The only obligation at issue here is DPI's responsibility to follow the REINS Act: submitting its scope statements to DOA, which must then prepare a recommendation for submission to the Governor for his approval. *See supra* pp. 2–3. Should this Court conclude that the REINS Act constitutionally applies to DPI, then it would enter an order to that effect, thereby binding Respondents and fully protecting Petitioners' interests. *See supra* pp. 10–11. If, alternatively, this Court rules against Petitioners, it would dismiss the petition and the Governor would continue not to receive DPI-prepared scope statements from DOA and would thus have nothing to do under the REINS Act with regard to DPI. *Compare* Defs. Walker & Neitzel's Resp. to Pet. for Supp. Relief 10, *Coyne v. Walker*, No. 2011CV4573 (Dane Cnty. Cir. Ct. Jan. 29, 2018) ("DPI has not submitted any scope statements or proposed

rules to the DOA or Governor since the REINS Act was passed. As such, neither Defendant is in any position to review DPI's scope statements or proposed rules." (citation omitted)), *with* Order, *Coyne*, No. 2011CV4573 (Dane. Cnty. Cir. Ct. Feb. 9, 2018) (dismissing DPI's request for supplemental relief against the Governor). In that case, DPI would continue to act in precisely the manner that it wishes and would thus suffer no prejudice from the Governor not being a party here.

CONCLUSION

This Court should grant the petition to commence an original action.

Dated: March 5, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,968 words.

Dated: March 5, 2018.

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MISHA TSEYTLIN
Solicitor General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 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. § (Rule) 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 the court and served on all opposing parties.

Dated: March 5, 2018.

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MISHA TSEYTLIN
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