STATE OF WISCONSIN
SUPREME COURT
NO. 2017AP2278

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.

Original Action

BRIEF IN OPPOSITION TO RESPONDENTS' SECOND MOTION TO DISMISS

Richard M. Esenberg, WI Bar No. 1005622
Brian McGrath, WI Bar No. 1016840
CJ Szafir, WI Bar No. 1088577
WISCONSIN INSTITUTE FOR LAW & LIBERTY
1139 E. Knapp Street
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385
Attorneys for Petitioners

INTRODUCTION

This is the second time Respondents Tony Evers and the Wisconsin Department of Public Instruction ("DPI") have moved to dismiss this case. The first time, there wasn't even a case yet to dismiss. Respondents' second attempt is no more appropriate, and is frivolous, to boot.

In their Petition to this Court to take jurisdiction of this original action, Petitioners framed the issue as follows: "Must DPI comply with the REINS Act?" (Pet. to Supreme Ct. to Take Juris. of an Orig. Action ("Pet.") 3.) The Petition and Memorandum in Support of this Petition made clear that this question included examination of a number of different REINS Act requirements, including whether DPI is required to forward scope statements to the Department of Administration ("DOA") and whether Respondents may proceed with various rulemaking steps before receiving gubernatorial approval. (*See, e.g.*, Mem. in Supp. of Pet. 5-18.)

In their Memorandum supporting the Petition, Petitioners also asked the Court to reconsider the outcome in *Coyne v. Walker*, 2016 WI 38, 368 Wis.2d 444, 879 N.W.2d 250. They said that "this Court should undertake a fresh constitutional analysis of Article X, Section 1 (Superintendent of Public Instruction) and Article IV, Section 1 (Legislative Power) of the

Wisconsin Constitution to determine whether there is anything in the Constitution that prevents the Legislature from placing limits such as a gubernatorial veto on DPI's rule-making authority." (*Id.*, 15.) If this Court concludes that nothing in the Constitution precludes such a veto, then the Respondents would have to comply with the REINS Act's requirement of gubernatorial approval of scope statements before they can proceed with rulemaking as well as other legal requirements requiring gubernatorial approval of final rules.

This Court's order assuming jurisdiction of the action did not narrow this issue in any way. (*See* Order (April 13, 2018); *see also Id.* at 2 (Walsh Bradley, J., dissenting) ("This case presents the issue of whether the Department of Public Instruction must comply with a newly enacted procedure by which administrative agencies must obtain approval from the Department of Administration and the Governor prior to promulgating administrative rules.").)

Respondents rely – out of context – in this Court's June 27, 2018 order pertaining to unrelated preliminary motions to claim falsely that this Court restricted the issues in this case to a single issue: whether they must merely take the formal step of submitting scope statements to the DOA.

They then argue that this issue is moot and not justiciable because they are now submitting scope statements to the DOA. Although they do not explain how, they seem to believe that this language implicitly or indirectly removed from the case the question of whether they must obtain gubernatorial approval for rulemaking, *as the REINS Act requires*.

But the Court did not so limit the issues and the Respondents have not agreed that they must obtain gubernatorial approval for rulemaking. In fact, the submissions of scope statements that they now claim moot the case explicitly say that they need not comply with statutory requirements of gubernatorial approval. Their claim that there is not a current and sharply contested dispute over whether the Respondents must comply with these provisions of the REINS Act is preposterous.

I) RESPONDENTS' ACTIONS DO NOT MOOT THIS CASE

Respondents argue that this case lacks a justiciable controversy and is moot because "DPI is in full compliance with its duty under Wis. Stat. § 227.135(2) to submit statements of scope to the Department of Administration" and "DPI does not otherwise challenge the validity of this requirement." (Resp. Br. in Support of Mot. to Dismiss 3.) Respondents incorrectly assume that this Court restricted this original action to that

issue. *See* Section III, *infra*. But even if this Court did restrict the issues, this case would not be moot; voluntary cessation of illegal activity does not moot a case.

Dismissing this case would violate the commonsense rule, enforced at the federal level, that "voluntary cessation of a challenged practice does not moot a case unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___ U.S. ___, 137 S. Ct. 2012, 2019 n.1 (2017) (alteration in original) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

The reason for the rule is obvious. If a party could moot a suit simply by ceasing challenged conduct, he "could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Consequently, "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment

seems timed to anticipate suit, and there is probability of resumption." *U.S. v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952).

Several of the scope statements identified in the Petition were withdrawn after petitioners filed suit. (Aff. of Carl Bryan, ¶¶4-7, Exs. 1 & 2.) DPI subsequently submitted scope statements to the DOA pursuant to Wis. Stat. § 227.135(2) for ten proposed rules. (*Id.*, ¶¶12-14, Ex. 5.) If this Court declines to definitively rule on the question of whether respondents must submit scope statements to DOA for review, nothing would keep respondents from resuming their unlawful practice of bypassing DOA after this case is over. This issue is therefore not moot.[1]

II) THE ISSUE – WHETHER RESPONDENTS MUST COMPLY WITH THE ENTIRE REINS ACT – IS NOT MOOTED IF THE RESPONDENTS COMPLY WITH ONLY ONE PROVISION OF THE REINS ACT

In their Petition for an Original Action, Petitioners raised exactly one issue in their statement of "Issues Presented by the Controversy" – "Must DPI comply with the REINS Act?" (Pet. 3.) Immediately prior to that statement, the Petitioners stated that if this Court took jurisdiction, they would "ask the Court to issue a declaratory judgment that DPI is required to

[1] Even if this issue is moot, this Court should exercise its discretion to rule on it anyway because of its great public importance, frequent occurrence, likelihood of repetition, and potential ability to evade appellate review. *See In re Meister*, 2016 WI 22, ¶18 n.10, 367 Wis. 2d 447, 876 N.W.2d 746.

comply with the REINS Act *in full* and to enjoin DPI from proposing or promulgating any rules without *full compliance with the REINS Act*." (*Id.* (emphases added).) The "Statement of Relief Sought" emphasized that Petitioners sought to ensure *complete* compliance with all provisions of the REINS Act:

> If this Court takes jurisdiction of this matter, the Petitioners will ask the Court to issue a declaratory judgment that DPI is required to comply with *all portions* of the REINS Act and that any rules promulgated by DPI *without such full compliance* are invalid and may not be enforced by DPI. The Petitioners will also request that this Court issue an injunction requiring DPI to comply with the REINS Act *in full* in proposing or promulgating any rules.

(*Id.*, 9 (emphases added).) The Petitioners did not ask the Court to enforce merely *one* provision of the REINS Act against the Respondents, but *all* of the provisions of the REINS Act.

In particular, the Petition highlighted three requirements of the REINS Act that DPI was not following: the requirement of submitting scope statements to DOA and the requirements to wait for gubernatorial approval of the statement before performing any more work on the rule, including publishing the statement with the Legislative Reference Bureau.

Wis. Stat. § 227.135(2), as amended by the REINS Act, requires any agency that wishes to promulgate a rule to first submit a statement of scope

for the proposed rule to the DOA, which determines whether the agency has the explicit authority to promulgate the proposed rule. (*See* Pet. ¶9.) The Respondents were not complying with this requirement (*see Id.*, ¶¶15-23), until after the Petition was filed (*see* Aff. of Carl Bryan, ¶¶4-7, 12-14).

Wis. Stat. § 227.135(2) also provides that "No state employee or official may perform any activity in connection with the drafting of a proposed rule, except for an activity necessary to prepare the statement of the scope of the proposed rule until the Governor and the individual or body with policy-making powers over the subject matter of the proposed rule approve the statement." (*See* Pet., ¶26.) The Respondents are also not complying with this requirement. (*See Id.*, ¶¶15-27; Wis. Admin. Reg. No. 748A1 (April 2, 2018); Pet. Br. 10-11.)

Finally, aside from the general prohibition on working on a rule until it is approved by the Governor, agencies like DPI "may not send the statement to the legislative reference bureau for publication . . . until the Governor issues a written notice of approval of the statement." Wis. Stat. § 227.135(2). (*See* Pet., ¶11.) The Respondents are also not complying with this requirement. (*See Id.*, ¶¶15; Wis. Admin. Reg. No. 748A1 (April 2, 2018); Pet. Br. 10-11.)

All three of these requirements (submitting scope statements to DOA; getting gubernatorial approval before performing any work on the rule; getting gubernatorial approval before publishing the rule) are by necessity sub-issues of the issue as stated in the Petition – "Must DPI comply with the REINS Act?" To comply with the law, Respondents must comply with all constituent parts of that law, not just one of them. Under Wis. Stat. § (Rule) 809.62(2)(a),[2] "[t]he statement of an issue shall be deemed to comprise every subsidiary issue as determined by the court."

Despite Respondents' claims to the contrary, their own affidavit demonstrates that they are not complying with all of the provisions of the REINS Act and that therefore there are still live disputes between the parties. The letter DPI sent to DOA accompanying its new proposed scope statements on March 27, 2018 indicates that DPI will ignore any approval or disapproval from the Governor and continue with its rulemaking because of *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d. 444, 879 N.W.2d 520. (Aff. of Carl Bryan, Ex. 5.) DPI's letter states:

[2] While Wis. Stat. § (Rule) 809.62 applies by its terms to petitions for review, there is no reason why its commonsense provisions wouldn't be equally as applicable to petitions for original actions. For example, the Court here added additional issues to be briefed (Order (Feb. 14, 2018)), which is not expressly provided for in the original action statute, § 809.70, but does appear in § 809.62.

> Note that the Governor, the Secretary of the Department of Administration, and the State Superintendent of Public Instruction are each permanently enjoined from implementing provisions of Wis. Stat. ch. 227 that require approval of the Governor or the Department of Administration over the Superintendent's rulemaking activities. *Coyne v. Walker*, No. 11-CV-4573 (Wis. Cir. Ct. Dane County Oct. 30, 2012), *aff'd*, 2016 WI 38, 368 Wis. 2d 444. This injunction prohibits the Department of Administration from submitting the enclosed statement of scope to the Governor for approval or rejection under Wis. Stat. § 227.135(2). The determination as to whether the DPI has authority to promulgate the rule as proposed in the statement of scope may be submitted to the DPI for consideration.

(*Id.*)

And in fact, DPI is sending scope statements to the LRB for publication without gubernatorial approval, in violation of the second and third REINS Act requirements. (Wis. Admin. Reg. No. 748A1 (April 2, 2018); *see* Pet. Br. 10-11.)

That same letter also identifies the validity of *Coyne* as an impediment to requiring the Respondents to comply with the REINS Act. (Aff. of Carl Bryan, Ex. 5.) Respondents take the position that *Coyne* prohibits the application of the REINS Act to themselves, while Petitioners argue that *Coyne* does not dictate any result here and, in the alternative, should be overruled. (*See* Pet. Br. 28-36.) That also creates a live dispute between the parties. *Cf. State v. Denny*, 2017 WI 17, ¶¶111-130, 373 Wis.

2d 390, 891 N.W.2d 144 (Abrahamson, J., dissenting) (noting that the majority had overruled a prior decision and denied a motion to strike that argument from the State's opening brief because the State's petition had not specifically mentioned that possibility).

Respondents' entire argument is based on a misleading reading of this Court's June 27, 2018 order on the issues of representation of the Respondents and whether the Governor is a necessary party. They attempt to persuade this Court to ignore viable issues by claiming, without logical support, that this Court narrowed the issues in this case to merely whether DPI must submit scope statements to the DOA.

In short, Respondents are putting words in this Court's mouth by misconstruing an unsigned, interlocutory order. This Court has never limited the issue in this case to anything narrower than what the Petition states – "Must DPI comply with the REINS Act?"

If this Court were going to limit the issues at play in this case, it would have done so in its order granting the Petition for an Original Action. For example, in *State v. Olson*, 2000 WI 27, 233 Wis. 2d 312, 607 N.W.2d 276, this Court granted a petition for review as to one issue, but denied it as to two others. In contrast, the order here simply says that "the petition for

leave to commence an original action is granted, and this court assumes jurisdiction over this action." (Order 2 (April 13, 2018).) Far from limiting the issues, the Court in fact *expanded* the issues in the very next paragraph, instructing the parties to brief the issues of Respondents' representation and whether the Governor was a necessary party. *Id.*; *see generally* § (Rule) 809.62(6) (noting that the supreme court can grant a petition "upon such conditions as it considers appropriate, including the filing of additional briefs").

Instead, Respondents point to an innocuous phrase in this Court's later ruling on those additional issues, claiming that the phrase limited the issues. They deliberately misread the Court, which said "X is in issue," as saying "Only X is in issue." That is a logical fallacy; saying "Elvis is in the building" does not mean "Only Elvis is in the building."

Here is what the Court actually wrote, in explaining why the Governor is not a necessary party to this case:

> This case raises the question of whether DPI must submit a scope statement to the governor in the first instance. It does not raise the question of what the governor does with a scope statement if submitted. A declaration in this case will not affect the governor's responsibilities under the REINS Act.

> The governor will still review a scope statement if he receives one whatever the outcome of this case.[3]

Koschkee v. Evers, 2018 WI 82, ¶20, ___ Wis. 2d ___, 913 N.W.2d 878.

Here is what the Respondents are pretending the Court wrote (alterations in italics):

> *The only issue* this case raises is whether DPI must submit a scope statement to the governor in the first instance. It does not raise the question of what *DPI can or cannot do after the scope statement is submitted*. A declaration in this case will not affect *DPI's* responsibilities under the REINS Act. *DPI can proceed regardless of what the governor does with the scope statement* whatever the outcome of this case.

Did you follow their sleight-of-hand? This Court stated that *an* issue in this case is submitting the scope statement to DOA, and the Respondents are pretending the Court said that is the *only* issue. Yes, the paragraph says that the provisions of the REINS Act defining the Governor's responsibilities are not at issue (which is consistent with the Petition's issue statement). But nothing in paragraph 20 says that the provisions of the REINS Act defining *DPI's* additional responsibilities (don't do any work and don't have LRB publish the scope statement until the Governor approves the statement) are not at issue.

[3] The Court is right. The outcome of this case will not require the Governor to take any particular action on a submitted scope statement. He may approve or disapprove it as he sees fit. This case is about the Respondents' obligations, including whether they must obtain gubernatorial approval before publication of a scope statement.

The Respondents' argument is frivolous. It requires deliberately misreading this Court's decision. It tries to insert limiting language into this Court's decision that simply doesn't exist. It should be rejected.[4]

CONCLUSION

The question of whether Respondents must send scope statements to DOA should be heard and decided by this Court because they can't moot the issue by their own voluntary cessation of illegal actions. This Court should also hear and decide the remaining issues (including whether Respondents must cease work until the Governor approves a scope statement; whether they must wait until receiving gubernatorial approval before publishing a scope statement; and whether *Coyne* dictates the result here and/or should be overruled) because those are sub-issues of whether

[4] Respondents also briefly argue that if this Court attempts to resolve issues beyond the necessity of submitting statements of scope to DOA, that "would necessarily require the consideration of contingent and uncertain facts," such as what the Governor or DOA will do with statements of scope they receive. (Resp. Br. in Support of Mot. to Dismiss 8.) This is incorrect. The questions in this case focus on whether Respondents must submit statements of scope to DOA and whether they must wait for the Governor's approval before proceeding with various steps of the rulemaking process. Petitioners claim that Respondents are bound by all portions of the REINS Act, and Respondents claim that they are not so bound and have issued statements to that effect. (*See* Aff. of Carl Bryan, Ex. 5.) As suggested by this court's June 27, 2018 order, what DOA and/or the Governor do with scope statements they receive does not bear on this legal question, which is ripe for the Court's review. *See Koschkee v. Evers, 2018 WI 82, ¶20, ___ Wis. 2d ___, 913 N.W.2d 878.*

Respondents must comply with the REINS Act, and this Court has not limited the issues.

If Respondents truly wish to eliminate the controversy in this case, they should amend their response to Petitioners' petition to this Court and concede that they are not only bound by law to send scope statements to DOA for review, but also bound to refrain from proceeding with rulemaking under a statement of scope until the Governor has approved that statement of scope and bound to comply with all other portions of the REINS Act. If they are not prepared to do that, this controversy is still live and Respondents should stop wasting this Court's time with frivolous motion practice.

Dated this 17th day of August, 2018.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Petitioners

Richard M. Esenberg, WI Bar No. 1005622
Brian McGrath, WI Bar No. 1016840
CJ Szafir, WI Bar No. 1088577
1139 E. Knapp St.
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385