STATE OF WISCONSIN
SUPREME COURT

Case No. 2013AP416

PEGGY Z. COYNE, MARY BELL, MARK W. TAYLOR, COREY OTIS, MARIE K. STANGEL, JANE WEIDNER and KRISTIN A. VOSS,

Plaintiffs-Respondents,

v.

SCOTT WALKER and SCOTT NEITZEL,

Defendants-Appellants-Petitioners,

and

ANTHONY EVERS,

Defendant-Respondent.

ON APPEAL FROM THE OCTOBER 30, 2012, DECISION BY THE DANE COUNTY CIRCUIT COURT, CASE NO. 11-CV-4573, THE HONORABLE AMY R. SMITH, PRESIDING

PLAINTIFFS-RESPONDENTS' BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court has set this case for oral argument.

Publication is warranted because the decision in this case will again inform the Legislature that, with regard to public instruction, the Wisconsin Constitution forbids it from granting powers to another state officer that are superior to the powers granted to and exercised by the Superintendent of Public Instruction in his supervision of public instruction.

ISSUES PRESENTED FOR REVIEW

The issue presented for review is:

> Does 2011 Wisconsin Act 21 (hereinafter referred to as "Act 21") unconstitutionally infringe the powers vested in the Superintendent of Public Instruction by Wis. Const. Art. X, §1, by granting powers to the Governor and the Secretary of Administration that are superior to the powers of the Superintendent of Public Instruction in determining what rules governing public education may be drafted and submitted to the Legislature?

The Circuit Court answered, "yes."

The Court of Appeals answered, "yes."

STATEMENT OF THE CASE

The Statement of the Case provided in the Defendant-Appellant State of Wisconsin's brief adequately describes the nature and procedural status of this case.

STATEMENT OF FACTS

This constitutional challenge to provisions of 2011 Wisconsin Act 21, as applied to the Superintendent of Public Instruction and the Department of Public Instruction through which he exercises his supervisory authority, was resolved by summary judgment. Thus, it was decided by the circuit court as a matter of law based on the provisions of the law, which are summarized in the Argument below.

ARGUMENT

I. SUMMARY OF ARGUMENT.

> Since Wisconsin achieved statehood in 1848, the administration at the state level of public education has been the duty of the Superintendent of Public Instruction ["Superintendent"], who is elected in a non-partisan statewide election pursuant to Art. X, § 1 of the Wisconsin Constitution.

Thompson v. Craney, 199 Wis. 2d 674, 546 N.W.2d 123 (1996).

Although the Wisconsin Constitution vests executive power in the Governor, the Governor's executive power does not extend to the supervision of public education. The Wisconsin Constitution vests that power in the Superintendent:

> The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law.

Wis. Const. Art. X, § 1.

Beginning with the first laws on public education enacted after the adoption of the Wisconsin Constitution, and consistent with Art. X, § 1 thereof, the Legislature has consistently granted rule-making powers to the Superintendent as part of his assigned powers and duties. *See Thompson*, 199 Wis. 2d at 693-94, *citing* Laws of 1848, at 127-29; *see also* Wis. Stat. §§ 15.37, 227.135.

In *Thompson*, this Court unanimously held that the Wisconsin Constitution prohibits the Legislature from conferring upon any other state officer a power over public education that is superior to the Superintendent's supervisory powers. *Thompson* is unequivocal on that point, declaring that

> beyond a reasonable doubt … the office of state Superintendent of Public Instruction was intended by the framers of the constitution to be a supervisory position, and … the 'other officers' mentioned in [Art. X, § 2] were intended to be subordinate to the state Superintendent of Public Instruction.

Id. at 698.

The Court, in holding that legislation creating a Secretary of Education, an Education Commission, and a Department of Education was unconstitutional, explained that:

> Because the education provisions of 1995 Wis. Act 27 give the former powers of the elected state Superintendent of Public Instruction to appointed "other officers" at the state level who are not subordinate to the superintendent, they are unconstitutional beyond a reasonable doubt. If changes such as those proposed in 1995 Wis. Act 27 are to be made in the structure of educational administration—and we express no judgment on the possible merits of the changes—they would require a constitutional amendment.

Id. at 698. This Court emphasized that "the constitutional difficulty with the education provisions of 1995 Wis. Act 27 is ***not that it takes power away from the office of the SPI***, but rather that it ***gives the power of supervision of public education to an 'other officer'*** instead of" the Superintendent. *Id*. at 698-99 (emphasis added).

Act 21 requires the Department of Public Instruction (the agency headed by the Superintendent) to obtain permission from the Governor before issuing a scope statement proposing an administrative rule, and to obtain the Governor's and, in some cases, the Secretary of Administration's approval of an administrative rule before submitting it to the Legislature.[1]

[1] Act 21, enacted on May 23, 2011, makes significant changes to chapter 227, subchapter II, of the Wisconsin Statutes, relating to the procedures for promulgating administrative rules. These changes apply to all state agencies authorized to promulgate administrative rules under the Wisconsin Statutes. The Plaintiffs challenged the constitutionality of Act 21 only as it applies to administrative rules promulgated by the DPI under the direction

Wis. Stat. §§ 227.135(2), .137(6) & (7), .185 (as amended by 2011 Wisconsin Act 21, §§ 4, 21, 26, 32). Act 21 thus makes the Superintendent's authority to promulgate rules, in the exercise of his supervision of public instruction, subordinate to the Governor's authority.[2]

In direct violation of *Thompson*, Act 21 grants unfettered discretion to the Governor to decide what rules the DPI may draft to implement and enforce the laws that ensure a uniform system of public education in Wisconsin. By making the Superintendent subordinate to the Governor in exercising rule-making authority, Act 21 is unconstitutional beyond a reasonable doubt as applied to the Superintendent and Department of Public Instruction.

II. BY AUTHORIZING THE GOVERNOR TO DETERMINE WHAT ADMINISTRATIVE RULES MAY BE DRAFTED AND SUBMITTED TO THE LEGISLATURE BY THE SUPERINTENDENT OF PUBLIC INSTRUCTION, ACT 21 VIOLATES WIS. CONST. ART. X, § 1.

A. Standard Of Review And Applicable Legal Principles.

This Court reviews the constitutionality of a statute *de novo*, but benefits from the analysis of the lower courts. *State v. Quintana*, 2008 WI

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and supervision of the Superintendent. They have not challenged Act 21 as it applies to other state agencies.

[2] Except as otherwise specified, references herein to the Governor's powers under Act 21 are intended also to refer to the powers of the Secretary of Administration under Act 21.

33, ¶¶ 11-12, 308 Wis. 2d 615, 748 N.W.2d 447. A party challenging the constitutionality of a statute must demonstrate that the statute is unconstitutional "beyond a reasonable doubt." *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, ¶ 68, 284 Wis. 2d 573, 701 N.W.2d 440. Legislative enactments are presumed constitutional, and any reasonable doubt is resolved in favor of upholding the statute's constitutionality.[3] *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 76, 350 Wis.2d 554, 835 N.W.2d 160.

B. Overview Of The Challenged Provisions Of Act 21.

Enacted in 2011, Act 21 made several changes to the administrative rulemaking process. The first change concerns "scope statements." The preparation of a "scope statement" is the significant first step in the preparation of an administrative rule. It describes in detail the nature of the rule that an agency plans to draft.[4]

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[3] The Court of Appeals noted in applying this standard that: "we perceive no dispute that, if we reject the Walker and Huebsch arguments we address below, Act 21 unconstitutionally interferes with the SPI's supervisory power under article X, section 1, by assigning supervisory power to the Governor that is not subservient to the SPI. Therefore, we proceed on the basis that, if we reject those arguments, Walker and Huebsch effectively concede that the Coyne parties have met their burden." *Coyne v. Walker*, 2015 WI App 21, ¶ 20, 361 Wis. 2d 225, 862 N.W.2d 606.

[4] Pursuant to Wis. Stat. § 227.135(1), a scope statement must include the following:
(a) A description of the objective of the rule.
(b) A description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives.
(c) The statutory authority for the rule.

Prior to Act 21, a scope statement prepared by DPI was submitted only to the Superintendent for his approval. However, under Act 21, the DPI must also submit proposed scope statements to the Governor for approval. *See* Wis. Stat. § 227.135 (2013-14). Even if the Superintendent has reviewed and approved the scope statement, the DPI may not draft a rule or proceed any further in the rule-making process until and unless the Governor approves the scope statement. *See* § 227.135(2). If the Governor does not approve the scope statement, the rule-making process stops, regardless of a decision by the Superintendent to the contrary.

If the Governor approves the scope statement and the agency drafts a rule, Act 21 further directs that the agency must submit the draft rule to the Governor, and must obtain the Governor's approval of the proposed rule, before it may be submitted to the Legislature for review. *See* Wis. Stat. §§ 227.185, .19. In addition, if the proposed rule could lead to a specified level of costs for businesses, municipalities, or individuals, the Secretary of Administration must also review and approve the proposed rule. *See* Wis.

(d) Estimates of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule.
(e) A description of all of the entities that may be affected by the rule.
(f) A summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

Stat. §§ 227.137. Again, if the Governor or Secretary of Administration do not approve the rule, the rule-making comes to a halt.

These requirements, as applied to rule-making by DPI at the direction of the Superintendent, violate Wis. Const. Art. X, § 1. As discussed below, Act 21 impermissibly gives the Governor authority superior to that of the Superintendent in determining what administrative rules are needed to implement and enforce state laws to provide for a uniform system of public education in Wisconsin. [5]

The State is simply wrong when it claims that "the Superintendent [will] have unchecked power over legislative rulemaking" if this Court determines that Act 21 violates Wis. Const. Art. X, § 1. Def. brief at p. 7. The statutory requirement that DPI must submit all proposed rules to the Legislature for review before they are promulgated remains in place. *See* Wis. Stat. § 227.19. That requirement is unaltered by Act 21 and is not challenged here. A holding by this Court that Act 21 is unconstitutional insofar as it grants powers to the Governor that are superior to the

[5] Under prior law, the Governor's involvement in the rulemaking process for DPI was limited to the potential veto of a legislative bill to block the promulgation of administrative rules. If the Governor vetoed such a bill and the legislature did not override the veto, the agency could proceed to promulgate the rule. If the Governor signed the rule-suspension bill, the legislature's objection was given effect. Thus, the exercise of veto authority allows the Governor to act as a check on the *Legislature*.

Superintendent's powers of rule-making in public instruction will have no effect on the Legislature's authority to accept or reject any rule proposed by the DPI.

C. Wis. Const. Art. X, § 1, Requires The Superintendent To Exercise Supervisory Authority In Matters Of Public Instruction, And To Be Subordinate To No Other State Officer In Exercising That Authority.

As this Court held in *Thompson*, the framers of the Wisconsin Constitution intended the Superintendent "to be a supervisory position, and that the 'other officers' mentioned in the provision were intended to be subordinate" to the Superintendent. 199 Wis. 2d at 698. Thus, the Legislature may not grant to any "other officer" authority over public education that is equal or superior to that of the Superintendent. 199 Wis. 2d at 699. That is precisely what Act 21 does with the rule-making.

1. The Superintendent's "supervision of public instruction" is accomplished largely through administrative rules.

The Superintendent has been responsible for supervising the state's public education system since Wisconsin achieved statehood in 1848. *Thompson*, 199 Wis. 2d at 678. In accordance with Wis. Const. Art. X, § 1, the Wisconsin Statutes assign to the Superintendent broad powers and duties to oversee the public education system. These powers and duties

include the authority to promulgate administrative rules to implement and enforce a system of public education, pursuant to state law. *See* Wis. Stat. Ch. 115, subch 2. (§§ 115.28 – 115.48).

As this Court has long recognized, "the delegation of the power to make rules and effectively administer a given policy is a necessary ingredient of an efficiently functioning government." *Gilbert v. State, Med. Examining B*d., 119 Wis. 2d 168, 184, 349 N.W.2d 68 (1984). The Legislature delegates to administrative agencies the powers and duties to make rules "to carry into effect the general legislative purpose, in the language of Chief Justice Marshall 'to fill up the details'; in the language of Chief Justice Taft 'to make public regulations interpreting the statute and directing the details of its execution.'" *Id.*

Under the Wisconsin Statutes, a "rule" is broadly defined to include any "regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency." Wis. Stat. § 227.01(13). Thus, to make or enforce any regulation, standard, statement of policy or general order of general application that implements, interprets, or makes specific a statute enforced or

administered by the Superintendent, the Superintendent *must* promulgate an administrative rule. Wis. Stat. §§ 227.01(13), 227.10.

Act 21 did not remove the Superintendent's powers and duties to promulgate administrative rules regarding public education. The Wisconsin Statutes continue to grant the Superintendent the power and duty to promulgate administrative rules in numerous areas relating to public instruction, including but not limited to the licensing of teachers, Wis. Stat. § 115.28(7); programs for children at risk of not graduating, § 118.153; licensing of principals, § 118.19; pupil assessment, § 118.30; high school graduation standards, § 118.30; intervention in low-performing schools, § 118.42; payment of state aid to schools, § 118.43; open enrollment waiting lists, § 118.51; Milwaukee parental choice program, § 119.23; annual school district reports, § 120.18; and school district standards, § 121.02. Under the Superintendent's direction and authority, the DPI has promulgated numerous administrative rules relating to public instruction. *See* Wis. Admin. Code Chs. PI 1 – 45.

2. Act 21 is unconstitutional because it makes the Superintendent's authority to supervise public instruction through rule-making subordinate to the approval of other state officers.

This Court has definitively held that Article X, § 1 of the Wisconsin Constitution prohibits the Legislature from making any other state officer

superior to the Superintendent in the supervision of public education. *Id*. at 678.

In *Thompson,* then-Governor Thompson argued that the reassignment of the supervision of public instruction to a newly-created Secretary of Education, to be appointed by the Governor, was allowed under the "other officers" language in Article X, § 1.[6] This Court specifically rejected that argument, holding that:

> [B]eyond a reasonable doubt … the office of state Superintendent of Public Instruction was intended by the framers of the constitution to be a supervisory position, and … the 'other officers' mentioned in [Art. X, § 2] were intended to be subordinate to the state Superintendent of Public Instruction . . .

Id. at 698. The Court concluded that the legislation creating a Secretary of Education was unconstitutional because it gave powers of the Superintendent to "'other officers' who were not subordinate to the Superintendent," and that "the legislature may not give equal or superior authority [to that of the Superintendent's] to any 'other officer . . .' " *Id*. at 699-700.

[6] Notably, many of those "former duties" removed from the Superintendent and granted to a Governor-appointed Secretary of Education in the act at issue in *Thompson* involved administrative rulemaking in public education. *See* 1995 Wis. Act 27, §§ 177m(2), 1801, 1815-20, 1824, 1826, 1828, 1830, 1833, 1839, 1856, 1878, 1890, 1921, 1926, 1927, 1928, 1942, 1982, 3847, 3848, 3849, 3853, 3858, 3871, 3951m, 3955, 9127, 9145(1), and 9154.

In other words, while the Legislature may generally delegate powers and duties to executive officers, that ability is limited when it comes to delegating authority in relation to the supervision of public instruction. The central holding of *Thompson* is that the Legislature may not delegate authority over public instruction to "other officers" in a way that makes them equal or superior to the Superintendent.

But that is precisely what Act 21 does. It requires the DPI, the agency directed by the Superintendent, to obtain the permission of the Governor before proposing administrative rules, and to obtain the Governor's and in some cases the Secretary of Administration's approval of administrative rules before submitting such rules to the Legislature. Beyond any doubt, Act 21 places the Governor and Secretary of Administration, i.e., "other officers," in a position superior to the Superintendent with respect to the primary means by which the Superintendent exercises his constitutional duty to supervise public instruction - administrative rule-making.

By eliminating the Superintendent's authority to make rules without obtaining the permission of the Governor and Administration Secretary, Act 21 effectively diminishes the Superintendent's role in public education to one that is essentially "merely exhortatory, or directed towards

encouraging education through, for example, public speaking or visits to schools, but not actual administration." *Thompson*, 199 Wis. 2d at 694. This Court in *Thompson* expressly rejected such a construction of the Superintendent's constitutionally vested power to supervise public instruction. *Id*.

The Legislature is free to add to, subtract from, or alter the Superintendent's powers and duties in supervising public instruction; what it may not do is to give superior powers over public instruction to another state officer:

> We note, however, that the constitutional difficulty with the education provisions of 1995 Wis. Act 27 is not that it *takes power away* from the office of the [Superintendent], but rather that it *gives the power* of *supervision of public education to an "other officer"* instead of the [Superintendent]. . . .
>
> **Under our holding in the present case, the legislature may not give equal or superior authority to any "other officer." . . . .**

Thompson, 199 Wis. 2d 674, 698-699 (emphasis added).

As the Court of Appeals succinctly observed, Article X, § 1 allows the Legislature to

> give, to not give, or to take away SPI supervisory powers, including rulemaking power. What the legislature may not do is give the SPI a supervisory power relating to education and then fail to maintain the SPI's supremacy with respect to that power.

Coyne v. Walker, 2015 WI App 21, ¶25, 361 Wis. 2d 225, 862 N.W.2d 606. The Court of Appeals is absolutely right. Because Act 21 places the

Governor in a superior position to the Superintendent regarding a power that the Legislature has granted to the Superintendent over public instruction, it is unconstitutional.

III. THIS CASE IS NEITHER ABOUT THE POWER OF THE LEGISLATURE TO ESTABLISH AN ADMINISTRATIVE RULE-MAKING PROCESS NOR ABOUT THE SEPARATION OF POWERS DOCTRINE.

A. The Case Is Not About The "Legislative" Character Of Administrative Rule Making.

The State strenuously argues that the constitutionality of Act 21 turns on whether the Legislature has delegated to the Governor powers superior to the Superintendent that are "legislative" in character. Nothing in the text of Wis. Const. Art. X, § 1, the historical materials, or this Court's construction of the provision in *Thompson* supports the State's strained effort to distinguish rule-making from other powers and duties the Legislature may delegate to the Superintendent to employ in the supervision of public instruction.

First, the text of Wis. Const. Art. X, § 1 expressly provides that the "supervision of public instruction" shall be vested in the Superintendent, whose "powers [and] duties…shall be prescribed by law." That provision contemplates that the Legislature will delegate to the Superintendent the powers and duties necessary to carry out his constitutional authority to

supervise public instruction. It does not qualify or limit the powers and duties that the Legislature may delegate to the Superintendent in supervising the public education system. Nor does it expressly exclude rule-making from those legislatively-delegated powers and duties that the Superintendent may exercise in his supervision of public instruction.[7]

The historical materials surrounding the creation and adoption of Article X, § 1 also undercut the State's argument. As this Court held in *Thompson*, "the surest guides to a proper interpretation of the role of the SPI are the constitutions of 1846 and 1848, the 1902 amendment, the accompanying debates, our legislature's first laws following adoption, and this court's prior interpretation of Article X, § 1." 199 Wis. 2d at 698.

As determined by this Court in *Thompson*, the records from debates at the Wisconsin constitutional conventions show that "the drafters of the Wisconsin Constitution intended the public schools to be under the supervision of the SPI, and that the SPI was to be an elected, not

[7] The State places great weight on dictionary definitions and etymology of the word "supervision," arguing that "supervision" should be narrowly construed as an enforcement function that excludes rule-making. Def. Br., pp. 16-18. This argument is reminiscent of the petitioner's arguments in *Thompson* that the Superintendent's supervisory authority was intended as merely "exhortatory." 199 Wis. 2d. at 694-95. This Court rejected that argument in *Thompson*, and it should reject the State's similar arguments here. Moreover, in addition to being at odds with *Thompson*, the State's effort to restrict "supervision" to an enforcement function begs the question, because the Wisconsin Statutes require agencies to promulgate rules as a prerequisite to carrying out enforcement activities. *See* Wis. Stat. §§ 227.01(13), 227.10.

appointed, public official." *Id.* at 685. Tellingly, the drafters rejected an early draft of Article X, § 1 that would have allowed the Governor to nominate and appoint the Superintendent with the advice of the Senate. *Id.* at 686-87. Instead, the drafters adopted a provision that required the Superintendent to be elected in a statewide election and thus directly accountable to the people. The history of the drafting of the Constitution thus strongly supports the conclusion that the drafters did not intend that the Superintendent would be required to obtain the Governor's approval before exercising his powers and duties, as prescribed by law, over public education.

Further, as this Court found in *Thompson*, the constitutional debates make clear the drafters' intent that the Superintendent would have a "direct role in advancing education":

> We note two consistent themes from these statements of the delegates: first, that the system of education required uniformity; second, that the SPI was to ***provide this uniformity*** in an ***active manner*** by ***implementing the system of education***.

Thompson, 199 Wis. 2d at 687, 688-89 (emphasis added). Similarly, the Court cited the debates as proof that the Superintendent was "not intended to simply be an advocate, but ***an officer with the ability to put plans into action***." *Id*. at 689 (emphasis added). These characterizations of the Superintendent's supervisory authority contradict the State's attempt

to construe it as somehow excluding statutorily prescribed rule-making powers.

As also discussed in *Thompson*, the first law passed by the Legislature in 1848 setting forth the duties of the Superintendent directed the Superintendent to "propose suitable ***forms and regulations*** for making all reports and conducting all necessary proceedings under this act." *Thompson*, 199 Wis. 2d at 694, *quoting* Laws of 1848, at 128-29. Thus, although the law pre-dated the Administrative Procedure Act and the modern practices of administrative rule-making, it unquestionably granted broad authority to the Superintendent, without supervision by any other officer, to engage in a form of rule-making in two key areas, i.e., the making of all reports and the conducting of all necessary procedures. Those are responsibilities that, if undertaken today, would require rule-making. *See* Wis. Stat. §§ 227.01(13) 227.10.

Likewise, the first law relating to public education passed after Article X, § 1 was amended in 1902 assigned rule-making powers to the Superintendent:

> An act adopted on March 27, 1903, titled "An Act relating to the duties, qualifications and salary of the state superintendent" included the following provisions:
>
> > Supervisory duties generally. SECTION 2. [The state superintendent of public instruction] shall have general supervision over the common schools of the state....

> Chapter 37, § 2, Laws of 1903. ***This act also gave the SPI the power to "revise, codify, and edit the school laws"***; to prescribe regulations for district libraries; to resolve appeals from school district decisions; and to apportion the school fund income. *Id*. Just as in the laws passed following the first constitution in 1848, this act did not provide for any "other officer" with supervisory powers superior or equal to the SPI.

Thompson at 696-97 (emphasis added). The 1903 act also authorized the Superintendent to prepare and distribute a list of books required to be used by districts in selecting books for school libraries; to "prepare for the use of school officers suitable forms for making reports and conducting various proceedings necessary to the proper conduct of annual and special meetings"; and to "prescribe rules of practice" relating to appeals made to the Superintendent, among other things. Ch. 37, Laws of 1903.

These are all duties involving the establishment of regulations, standards, statements of policy, or general orders of general application issued to implement, interpret, or make specific legislation, or to establish procedures for proceedings before the Superintendent. Thus, they would be deemed rule-making activities under current law. *See* Wis. Stat. §§ 227.01(13) 227.10. As this Court pointed out in *Thompson,* the 1903 act, like the 1848 act, "did not provide for any 'other officer' with supervisory powers superior or equal to" the Superintendent. 199 Wis. 2d at 697.

Thompson highlights these initial duties and powers delegated by the Legislature to the Superintendent as evidence that the framers of Article X,

§ 1 intended the Superintendent to be a "supervisory position," to whom the "other officers" mentioned in the provision are to be subordinate. *Id*. at 698. These initial duties and powers also contradict the State's argument that the framers intended to reserve the Legislature's authority to make the Superintendent subordinate to other officers when delegating duties and powers to the Superintendent to establish regulations, standards, statements of policy, or general orders of general application to implement, interpret, or make specific the laws relating to the public education system. The first laws grant such duties and powers to the Superintendent, and do not provide for any other "officer" to supervise the Superintendent in carrying them out.

B. The "Unduly Burden" Standard Proposed By The State Is Inapplicable Because This Case Does Not Raise A Separation Of Powers Claim And The Proposed Standard Is At Odds With *Thompson v. Craney*.

The State devotes a substantial portion of its brief to analyzing the constitutional issue raised in this case under the separation of powers doctrine. The State declares, without citing any authority, that the claim that Act 21 impermissibly intrudes upon the Superintendent's powers "is properly analyzed as a separation-of-powers claim." Def. Br. at 11. The State could not be more mistaken.

The issue presented in this case does not implicate the separation of powers doctrine at all. Thus, the test the State borrows from cases discussing that doctrine are unhelpful and inapplicable to this case.

The separation of powers refers to the constitutional "division of governmental powers among the judicial, legislative and executive branches." *State ex rel. Friedrich v. Circuit Court for Dane Cnty.*, 192 Wis. 2d 1, 13, 531 N.W.2d 32, 36 (1995). Although "each branch has a core zone of exclusive authority into which the other branches may not intrude," there are "'[g]reat borderlands of power'…in the interstices among the branches' core zones of exclusive authority." *Id*. The focus of the evaluation of a separation of powers claim is "whether one branch's exercise of power has impermissibly intruded on the constitutional power of the other branch." *Id*. In the specific context of a claim that legislation has impermissibly intruded into the judicial branch, the Court has articulated the test as whether the challenged legislation is "unreasonably burdening or substantially interfering with the judicial branch." *State ex rel. Friedrich v. Circuit Court for Dane Cnty.*, 192 Wis. 2d 1, 14, 531 N.W.2d 32, 36 (1995). The State proposes this "unreasonably burdening or substantially interfering" test as the standard for resolving the issue presented in this case.

First, as an initial matter, the State has waived this argument. The State did not argue in either the circuit court or the Court of Appeals that the issue presented in this case should be viewed as a separation of powers claim or that the "unreasonably burdening or substantially interfering" test is the appropriate standard to apply. So neither the circuit court nor the Court of Appeals considered whether the issue raises a separation of powers claim, whether the test now proposed by the State is the appropriate test, or whether Act 21 would be constitutional under the test proposed by the State. This Court should decline to address the State's separation-of-powers argument on grounds that the State has waived review. "It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *In re Ambac Assur. Corp.*, 2012 WI 22, ¶ 22, 339 Wis. 2d 48, 66, 810 N.W.2d 450, 459.

Even if the State properly preserved the issue, this case does not involve a claimed violation of the separation of powers. The Plaintiffs do not claim that the Legislature, in enacting Act 21, is exercising powers reserved to the executive branch. Nor have the Plaintiffs argued that the Legislature cannot enact restraints on the Superintendent's rule-making

authority, as the State implies. *See* Def. Br. at 29. Just as it was in *Thompson*, the constitutional difficulty here is "not that [the Act] takes power away from the office of the SPI, but rather that it gives the power of supervision of public education to an 'other officer' instead of the SPI." 199 Wis. 2d at 698-99.

Thompson is directly on point. It provides all the direction needed to resolve the issue now before this Court. This Court determined nearly twenty years ago in *Thompson* that, beyond a reasonable doubt, Article X, § 1 was intended to make the Superintendent the superior officer in the state in matters of public instruction. The Legislature may give the Superintendent powers, and may take powers away from the Superintendent.[8] But, as construed by this Court, Article X, § 1 requires that the Superintendent be subordinate to no other state officer in exercising his legislatively-prescribed duties and powers in matters of public instruction.

To the extent that *Thompson* sets out a test, it is a simple one: Does the challenged legislation make another state officer superior to the

[8] This Court stated in *Thompson* that "This case does not require us to decide the extent to which the SPI's powers may be reduced by the legislature, and we reserve judgment on that issue." 199 Wis. 2d at 700. Likewise, in this case, the issue does not require the Court to determine to what extent the Legislature may reduce the extensive rule-making powers and duties it has delegated by law to the Superintendent.

Superintendent in carrying out his statutory duties and powers to supervise public instruction? As discussed above, the answer to that question in this case is yes.

Thompson does not ask whether the legislation unreasonably burdens or interferes with the Superintendent's supervision of public instruction in an area involving the exercise of authority he shares with other state officers. Rather, it expressly rejects the notion that the Superintendent shares the power to supervise public instruction with any other state officer. 199 Wis. 2d at 682.

To be sure, the Superintendent is an executive branch officer who exercises powers and duties as prescribed by law. It is appropriate to characterize his supervisory powers over public instruction as executive powers. The executive, as defined in Black's Law Dictionary, is:

> [t]he branch of government responsible for effecting and enforcing the laws; the person or persons who constitute this branch. The executive branch is sometimes said to be the residue of all government after subtracting the judicial and legislative branches.

Executive, Black's Law Dictionary (10th ed. 2014). As discussed in *Thompson*, the Legislature may enact laws requiring other executive officers to effect and enforce laws relating to public education, but those officers must be *subordinate* to the Superintendent. *See Thompson*, 199 Wis. 2d at 696-96.

The Legislature is free to determine, as it does in many contexts, that the delegation of rule-making authority to the Superintendent is a necessary and proper way for the Superintendent to "effect and enforce" state laws relating to public instruction. Having determined to delegate rule-making authority to the Superintendent so that he may effect and enforce a uniform system of public education consistent with state law, the Legislature may not make the Superintendent subordinate to another officer in the exercise of that rule-making authority.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted this 1st day of September, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 5,410 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §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 this 1st day of September, 2015.

/s/ Susan M. Crawford .
Susan M. Crawford, SBN 1030716