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

PETITIONERS' BRIEF AND APPENDIX

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INTRODUCTION

In 1848, the people of Wisconsin adopted a constitution containing a provision establishing the office of the Superintendent of Public Instruction ("Superintendent"). Wis. Const. art. X, § 1. Although the supervision of public instruction was "vested" in this Superintendent and such other officers as the legislature might direct, the Constitution made clear that the definition of "supervision" was reserved to the legislature. The provision that created the office of Superintendent also explained that the office's "powers" and "duties" would be "prescribed by law" at a future date. *Id.* Later that year, the Wisconsin legislature obliged, passing a law which, among other things, directed the Superintendent to "perform such . . . duties as the . . . governor of this state may direct." Laws of 1848 at 129. From the very beginning, then, it was understood that the Superintendent was subordinate to the legislative branch and could be made answerable (or "subordinate") to the head of the executive branch.

Over the years, the legislature has repeatedly modified the powers and duties of the Superintendent. One such modification is the subject of this lawsuit. The legislature recently enacted the Regulations from the Executive in Need of Scrutiny ("REINS") Act, invoking its right to redefine

anew the Superintendent's role and relationship with the executive branch. *See* 2017 Wis. Act 57. Specifically, the legislature directed all state agencies, when exercising their legislatively-delegated authority to promulgate administrative rules, to submit information about those rules first to the Department of Administration ("DOA"), an executive-branch agency, and then to the Chief Executive, the governor, for his or her approval. *See* Wis. Stat. § 227.135(2). Rulemaking may not proceed until approved by the Governor, and the final rule may not be submitted to the legislature or implemented without gubernatorial approval. This rule applies to the Department of Public Instruction ("DPI"), a state agency created by the legislature and headed by the Superintendent, § 15.37, and to the Superintendent himself, also an "agency" as statutorily defined. *See* § 227.01(1) ("'Agency' means a[n] . . . officer in the state government . . . .").

But DPI and the Superintendent do not consider themselves bound by these laws. Relying on this Court's decision in *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, these entities believe they are entitled to bypass executive branch review of their administrative rules. They contend that the legislature may not qualify whatever power it chooses to grant the Superintendent by deploying another officer or

executive department official to act as a check upon the Superintendent's exercise of that power. In other words, any power granted to the Superintendent must be exclusive and unlimited by any other person. Put simply, the Superintendent contends that he need not take the bitter with the sweet.

But Article X, Section 1 makes clear that the *only* powers the Superintendent has are those given by the legislature. Nowhere does it state that no other officer may be given any authority that limits that of the Superintendent. And even if the Superintendent has some non-specific "right" to supervise, rulemaking is something else: a delegated legislative power. *Martinez v. DILHR*, 165 Wis. 2d 687, 698, 478 N.W.2d 582 (1992) (an agency has no inherent constitutional authority to make rules). Thus, the legislature may impose whatever procedural safeguards it desires on the exercise of rulemaking authority by DPI and the Superintendent.

The Constitution's "framers did not provide that the [Superintendent] constitutes the fourth branch of our state government," unaccountable to either the legislature or the governor. *Coyne*, 368 Wis. 2d 444, ¶249 (Ziegler, J., dissenting). Petitioners therefore ask this Court to

preserve the separation of powers and definitively rule that DPI and the Superintendent must comply with the REINS Act.

STATEMENT OF THE ISSUE

Must the Department of Public Instruction and the Superintendent comply with the REINS Act?

STATEMENT ON ORAL ARGUMENT & PUBLICATION

This case involves important questions of state constitutional and statutory law. Consistent with its usual practice, this Court should hear oral argument in this case and publish its decision.

STATEMENT OF THE CASE

On August 9, 2017, the Governor signed into law 2017 Wisconsin Act 57, also known as the REINS Act. As the name of the Act suggests, the legislature designed the law to provide an added measure of control over executive-branch rulemaking. This dispute focuses on changes the REINS Act made to the early stages of the rulemaking process: the preparation of statements of scope, the submission of these statements to

the Department of Administration, and the requirement of gubernatorial approval before any further work on the rule may be performed.[1]

When a state agency wishes to promulgate a rule, it must first prepare a "statement of scope" setting forth certain basic information about the proposed rule and then send that statement of scope to the Legislative Reference Bureau ("LRB") for publication in the Wisconsin Administrative Register. Wis. Stat. § 227.135(1).

The REINS Act added an intermediate step to this process. Effective September 1, 2017, *see* 2017 Wis. Act. 57, § 37,

> [a]n agency that has prepared a statement of the scope of the proposed rule shall present the statement to the department of administration, which shall make a determination as to whether the agency has the explicit authority to promulgate the rule as proposed in the statement of scope and shall report the statement of scope and its determination to the governor who, in his or her discretion, may approve or reject the statement of scope. The agency 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). The same provision also halts the rulemaking process until the Department of Administration ("DOA") and the Governor have performed their tasks: "No state employee or official may perform any

[1] Certain of these changes built on changes made by an earlier enactment, 2011 Wisconsin Act 21.

activity in connection with the drafting of a proposed rule . . . until the governor . . . approve[s] the statement." *Id.*

Once the rule is complete, it may not go into effect without gubernatorial approval:

> 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 proposed rule in writing.

Wis. Stat. § 227.185. In utilizing the governor as a check on agency rulemaking (promulgating standards with the force of law), the legislature sought to check rulemaking in a way that is similar to the gubernatorial check on legislation: the veto.

Shortly after the effective date of the REINS Act, the Department of Public Instruction – a state agency – sent statements of scope to LRB for publication without first presenting them to DOA or obtaining written gubernatorial approval.

For example, on September 18, 2017, LRB published a statement of scope created by DPI in the Wisconsin Administrative Register as SS 101-

17. Wis. Admin. Reg. No. 741A3 (Sept. 18, 2017).[2] On October 4, 2017, Petitioners' counsel sent an Open Records Request to DPI, *see* Wis. Stat. §§ 19.31-39, asking for any documents that would reflect if and when DPI sent Statement of Scope SS 101-17 to DOA.[3] DPI responded to counsel's Open Records request on November 3, 2017.[4] The response does not show a copy of Statement of Scope SS 101-17 being sent to the Department of Administration.

On October 9, 2017, LRB published three more statements of scope created by DPI in the Wisconsin Administrative Register as SS 108-17, SS 109-17, and SS 110-17. Wis. Admin. Reg. No. 742A2 (Oct. 9, 2017).[5] On October 30, 2017, Petitioners' counsel sent an Open Records Request – this time to DOA – asking for copies of these scope statements if sent to DOA by DPI and for copies of any other scope statements sent to DOA by DPI

[2] A true and correct copy of SS 101-17 as published in the Administrative Register is included in the Appendix as Exhibit A (P. App. 101-02). This exhibit, along with all exhibits referenced in this brief, are matters of public record. Consequently, Petitioners request this Court take judicial notice of these documents under Wis. Stat. § 902.01(2)(b)-(4). *See, e.g.*, *State v. Vesper*, 2018 WI App 31, ¶17, n.4, ___ Wis. 2d ___, 912 N.W.2d 418 ("We may take judicial notice of public records.").

[3] A true and correct copy of the Open Records Request is included in the Appendix as Exhibit E (P. App. 109-10).

[4] A true and correct copy of this response is included in the Appendix as Exhibit F (P. App. 111-21).

[5] True and correct copies of SS 108-17, SS 109-17 and SS 110-17 as published in the Administrative Register are included in the Appendix as Exhibits B (P. App. 103-04), C (P. App. 105-06), and D (P. App. 107-08), respectively.

after September 1, 2017 (the effective date of the REINS Act).[6] DOA responded on November 1, 2017 stating that it had not received SS 101-17, SS 108-17, SS 109-17, or SS 110-17 from DPI and had not received any other scope statements from DPI since September 1, 2017.[7]

Notably, in each of the above statements of scope DPI declared that "[p]ursuant to *Coyne v. Walker*, the Department of Public Instruction is not required to obtain the Governor's approval for the statement of scope for this rule," referencing this Court's 2016 decision in *Coyne v. Walker*, 368 Wis. 2d 444. DPI, in other words, did not view itself bound by the REINS Act.

Consequently, on November 20, 2017, Petitioners filed a petition to this Court to take jurisdiction of this dispute as an original action with the aim of stopping the illegal expenditure of taxpayer funds by DPI and obtaining a declaration that DPI must comply with all portions of the REINS Act.

The four statements of scope discussed above are the statements Petitioners referenced in their petition to this Court. As of this date, DPI

[6] A true and correct copy of the Open Records Request is included in the Appendix as Exhibit G (P. App. 122-23).
[7] A true and correct copy of this response is included in the Appendix as Exhibit H (P. App. 124).

has now either withdrawn or indicated an intent not to pursue rules under each of them. *See* Public Notice: Withdrawal of CR 17-069, Wis. Admin. Reg. No. 742A4 (Oct. 23, 2017);[8] Public Notice: Recision [sic] of SS 108-17, 110-17, 125-17, and 021-18, Wis. Admin. Reg. No. 747B (Mar. 26, 2018); Public Notice: Withdrawal of CR 18-009 and 18-012, Wis. Admin. Reg. No. 747B (Mar. 26, 2018).[9]

But DPI has since created at least two new statements of scope – SS 039-18 and SS 037-18 – which are similar in nature to two of the withdrawn statements.[10] *Compare* SS 039-18, Wis. Admin. Reg. No. 748A1 (April 2, 2018) ("Relating to: The Early College Credit Program and Changes to PI 40 as a result of 2017 Wisconsin Act 59"), *and* SS 037-18, Wis. Admin. Reg. No. 748A1 (April 2, 2018) ("Relating to: Restoring Part Time Open Enrollment Rules"), *with* SS 109-17 ("Relating to: Changes to PI 40 as a result of 2017 Wisconsin Act 59"), *and* SS 110-17 ("Related to: Restoring part time open enrollment rules"). And with respect to these statements, DPI has again proceeded in defiance of the REINS Act.

[8] A true and correct copy of the October 23, 2017 Public Notice as published in the Administrative Register is included in the Appendix as Exhibit I (P. App. 125).
[9] A true and correct copy of the March 26, 2018 Public Notice as published in the Administrative Register is included in the Appendix as Exhibit J (P. App. 126).
[10] True and correct copies of SS 039-18 and SS 037-18 as published in the Administrative Register are included in the Appendix as Exhibits K (P. App. 127-28) and L (P. App. 129-30), respectively.

This time, as a response to another Open Records request by Petitioners' counsel discloses, DPI did present the statements of scope to DOA.[11] But it has made clear that it does not regard itself bound by the REINS Act's requirement of gubernatorial approval before rulemaking can proceed or its requirement of gubernatorial approval of final rules. The March 27, 2018 email from DPI to DOA presenting the statements contained the following warning:

> 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.

(P.App. 134.) Less than a week later, LRB simply published SS 039-18 and SS 037-18 in the administrative register without gubernatorial

[11] A true and correct copy of the Open Records Request is included in the Appendix as Exhibit M (P. App. 131-32). A true and correct copy of the response is included in the Appendix as Exhibit N (P. App. 133-55).

approval. Wis. Admin. Reg. No. 748A1 (April 2, 2018). The REINS Act was not followed.

On April 13, 2018, this Court granted Petitioners' Petition and assumed jurisdiction over this original action.

STANDARD OF REVIEW

This case requires the interpretation of state constitutional and statutory law. In a typical case this Court reviews such issues de novo. *Black v. City of Milwaukee*, 2016 WI 47, ¶21, 369 Wis. 2d 272, 882 N.W.2d 333. Because this is an original action, this Court is reviewing all questions in the first instance.

ARGUMENT

Neither a legislature, nor a governor, nor a court, the administrative state has always lacked a true home in our tripartite system of state government. Because our framers never created a "fourth branch" of government, it is able to accomplish its work without damage to the system only when kept firmly in check by each branch of government: the legislature, by carefully defining administrative authority; the executive, by vigilantly supervising administrative action; and the judiciary, by steadfastly proclaiming when administrative action has gone too far.

In recent years this Court has not hesitated to act when administrative activity threatened to upset the constitutional balance because of insufficient regard for the *judicial* power. *See, e.g.*, *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ___ Wis. 2d. ___, ___ N.W.2d ___ (agency legal interpretations not entitled to judicial deference); *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384 (administrative board lacked power to discipline members of judicial branch).

This dispute is of a piece with those cases, this time featuring attempts by administrative entities to flout the *legislative* power, and this Court's intervention is again needed. Specifically, this case concerns the extent to which the legislature may qualify rulemaking authority it has granted to DPI and the Superintendent. Its resolution therefore hinges on a proper understanding of how administrative rulemaking, DPI, and the Superintendent each fit into the broader constitutional context. This brief will therefore first summarize fundamental principles relating to each of these concepts. It will then apply those principles to the facts of this case, showing that DPI and the Superintendent *are* subject to the legislative will, expressed in this dispute via the REINS Act.

I) THE LEGISLATURE MAY BOTH DELEGATE RULEMAKING AUTHORITY TO EXECUTIVE BRANCH ENTITIES AND QUALIFY THAT DELEGATION OF AUTHORITY

As at the federal level, Wisconsin government consists of three separate branches of government: the legislative branch, the executive branch, and the judicial branch. *E.g.*, *Gabler*, 376 Wis. 2d 147, ¶¶3, 11. The Wisconsin Constitution leaves no ambiguity as to where the great governmental powers reside: "[t]he legislative power shall be vested in a senate and assembly," Wis. Const. art. IV, § 1, "[t]he executive power shall be vested in a governor," Wis. Const. art. V, § 1, and "[t]he judicial power of this state shall be vested in a unified court system," Wis. Const. art. VII, § 2; *see also Gabler*, 376 Wis. 2d 147, ¶11.

In this scheme it is the legislature – the senate and assembly – that makes law:

> The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate – is a power which is vested by our Constitution in the Legislature, and may not be delegated.

State v. Whitman, 196 Wis. 472, 220 N.W. 929, 941 (1928). The Wisconsin Constitution's assignment of all legislative authority to just one branch of government is an "essential precaution in favor of liberty." THE

FEDERALIST NO. 47 (James Madison); *Gabler*, 376 Wis. 2d 147, ¶5. This is so because "a government with shared legislative and executive power could first 'enact tyrannical laws' then 'execute them in a tyrannical manner.'" *Gabler*, 376 Wis. 2d 147, ¶5 (quoting 1 Montesquieu, The Spirit of the Laws 151-52 (Oskar Piest et al. eds., Thomas Nugent trans., 1949) (1748)). Our state Constitution thus keeps the lawmakers separate from the law enforcers in order to safeguard the populace.

Nevertheless, this Court has acknowledged that the legislature may grant to administrative agencies "the power to make rules and effectively administer a given policy." *Gilbert v. Wis. Medical Examining Board*, 119 Wis. 2d 168, 184, 349 N.W.2d 68 (1984). But rulemaking – unlike, for instance, enforcement – remains a legislative function. *See* Wis. Stat. § 227.19; *Martinez*, 165 Wis. 2d at 697 (agency rulemaking power derived from authority delegated by legislature). The source of agencies' legislative powers is the legislature. *Martinez*, 165 Wis. 2d at 698 ("As a legislative creation, [an agency] has no inherent constitutional authority to make rules, and, furthermore, its rulemaking powers can be repealed by the legislature."). And because it is a legislative function, its delegation must be carefully cabined and controlled. *See Gabler*, 376 Wis. 2d 147, ¶31

(quoting *Barland v. Eau Claire Cty*, 216 Wis. 2d 560, 573, 575 N.W.2d 691 (1998) ("'[C]ore zones of authority are to be 'jealously guarded' by each branch of government.'").

Certain limitations on this delegation of legislative authority are constitutionally-imposed. The legislature must clearly define the scope of delegated authority and provide clear standards for its exercise. *See Whitman*, 220 N.W. at 941-43; *Martinez*, 165 Wis. 2d at 701 ("[I]t is incumbent on the legislature, pursuant to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making."). Others are exercises of the legislature prerogative to decide what it will permit agencies to do and how it will permit them to do it. *Whitman*, 220 N.W. at 942 ("[T]he Legislature may withdraw powers which have been granted, prescribe the procedure through which granted powers are to be exercised, and, if necessary, wipe out the agency entirely."); *see also Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 56, 158 N.W.2d 306 (1968) ("The very existence of the administrative agency . . . is dependent upon the will of the legislature; its . . . powers, duties and scope of authority are fixed and circumscribed by the legislature and subject to legislative change.").

Chapter 227 of the Wisconsin Statutes, the principal chapter setting forth the elaborate process agencies must follow to promulgate administrative rules, is an essential "procedural safeguard" established by the legislature to prevent "abuse of power by administrative agencies." *Schmidt*, 39 Wis. 2d at 58 & n.1 (quoting *Whitman*, 220 N.W. at 942). By forcing administrative agencies to comply with procedural requirements designed to provide notice to the public and lawmakers, elicit feedback from interested parties, and allow for legislative and executive oversight, Chapter 227 ensures that administrative agencies do not take advantage of the combination of executive and legislative authority to escape accountability and tyrannize the public.

Unfortunately, Wisconsin agencies sometimes exceed the bounds of their authority and ignore the requirements imposed upon them by the legislature. In such instances it is the duty of the judicial branch to remind agencies that they "may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).

A) DPI Possesses Rulemaking Authority Only to the Extent Authorized by Statute

From a constitutional perspective, DPI is no different than any other state agency. The legislature brought DPI into existence, appointing the

superintendent of public instruction to be the agency's head. *See* Wis. Stat. § 15.37 ("There is created a department of public instruction under the direction and supervision of the state superintendent of public instruction.").

Thus, whatever dispute there may be about the scope of the *Superintendent's* authority, as a legislatively-created agency DPI "must conform precisely to the statute which grants [it] power. *Whitman*, 220 N.W. at 942 (1928); *see, e.g.*, *Stockbridge Sch. Dist. v. Dep't of Pub. Instruction Sch. Dist. Boundary Appeal Bd.*, 202 Wis. 2d 214, 228, 550 N.W.2d 96 (1996) (rejecting concerns about the exercise of power by a board within DPI because "the legislature has . . . provided the Board with specific factors . . . it *must* consider" before taking the feared action) (emphasis added). Again, this Court has "long recognized that administrative agencies are creations of the legislature and that they can exercise only those powers granted by the legislature." *Martinez*, 165 Wis. 2d at 697. DPI is not exempt from this principle. It must comply with the REINS Act.

B) The Superintendent of Public Instruction Possesses Rulemaking Authority Only to the Extent Authorized by Statute

The analysis of the Superintendent's authority begins at a different point, but the result is the same. Article X, Section 1 of the Wisconsin Constitution states in full:

> 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. The state superintendent shall be chosen by the qualified electors of the state at the same time and in the same manner as members of the supreme court, and shall hold office for 4 years from the succeeding first Monday in July. The term of office, time and manner of electing or appointing all other officers of supervision of public instruction shall be fixed by law.

Wis. Const. art. X, § 1.[12]

[12] At times this Court has explained that in interpreting the Wisconsin Constitution it will consider, in addition to the text of the relevant provisions, "the constitutional debates and the practices in existence at the time of the writing of the constitutional provision and the interpretation of the provision by the Legislature as manifested in the laws passed following its adoption," *Coyne v. Walker*, 368 Wis. 2d 444, ¶51 (lead opinion), an approach that has been criticized as inconsistent with rule of law principles. *See* Daniel R. Suhr, *Interpreting the Wisconsin Constitution*, 97 Marq. L. Rev. 93 (2013).

At other times, however, this Court has indicated that the approach is not required. *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶57, n.25, 320 Wis. 2d 275, 768 N.W.2d 868 ("In this case, we see little reason to extend our interpretation beyond the text."); *Coyne*, 368 Wis. 2d 444, ¶91, n.14 (Abrahamson, J., concurring) (collecting cases showing "differences in methodology of interpreting the Wisconsin constitution"); *id.*, ¶249, n.2 (Ziegler, J., dissenting) ("I would be willing to reexamine the methodology this court currently employs when interpreting constitutional text."). In Petitioners' view, none of the historical materials cited in this area in cases like *Coyne* or *Thompson v. Craney*, 199 Wis. 2d 674, 646 N.W.2d 123

Unlike DPI, the Superintendent does not depend for his existence on the legislature or on any other branch of government and thus maintains a degree of independence. But like administrative agencies, the Superintendent (as well as the "other officers" mentioned in Article X, Section 1) has no inherent authority to do anything – he possesses only those powers granted to him by statute. The Constitution grants no powers at all but rather says that the "powers" and "duties" of such officers "shall be prescribed by law." Wis. Const. art. X, § 1; *see also Fortney v. Sch. Dist. of W. Salem*, 108 Wis. 2d 167, 182, 321 N.W.2d 225 (1982) ("Article X, section 1 confers no more authority upon [public instruction] officers than that delineated by statute."). This rule of Wisconsin law follows inexorably from two other undisputed legal propositions.

First, Article X, Section 1 is not a provision that "incorporates an ancient common law office, possessing defined powers and duties, into the constitution. Public instruction and its governance had no long-standing common law history at the time the Wisconsin Constitution was enacted." *Fortney*, 108 Wis. 2d at 182. Thus, when the framers of the Wisconsin Constitution created the office of the Superintendent of Public Instruction,

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(1996), overcome the plain meaning of the text of Article X, Section 1 of the Wisconsin Constitution.

they were writing on a blank slate. Any powers granted to the Superintendent would need to be expressed in the state's founding charter. *See Id.*

Second, that document is unambiguous as to the powers it grants the Superintendent: none whatsoever. Pursuant to Article X, Section 1, the Superintendent's "qualifications, *powers*, *duties* and compensation *shall be prescribed by law*," that is, by the legislature. Wis. Const. art. X, § 1 (emphases added); *Fortney*, 108 Wis. 2d at 182.[13] The Superintendent possesses no inherent powers and can exercise only those powers given to him by the legislature. While the Superintendent will make much of the fact that the Constitution "vest[s]" in him the supervision of public instruction, that very grant establishes that the legislature defines what "supervision" entails.

There is nothing particularly remarkable about that *verb*, "vests," which most reasonably means in this context "[t]o put in possession of" or

[13] In certain contexts this Court has interpreted the phrase "prescribed by law" to include sources of law besides statutory law, such as common law. *See, e.g.*, *Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶¶24-30, 374 Wis. 2d 513, 893 N.W.2d 212. In other contexts—such as determining the powers of the Attorney General—this Court has interpreted the phrase to include only statutory law. *See State v. City of Oak Creek*, 2000 WI 9, ¶19, 232 Wis. 2d 612, 605 N.W.2d 526. But it is established that the phrase as used in Article X, Section 1 means statutory law. *Fortney*, 108 Wis. 2d at 182. This stands to reason, as "public instruction and its governance had no long-standing common law history at the time the Wisconsin Constitution was enacted." *Id.*

"to give an immediate fixed right of present or future enjoyment." Noah Webster, *An American Dictionary of the English Language*, 1109 (Chauncey A. Goodrich ed., New York, Harper & Brothers, 1848). What is more important is the *noun*: what is being vested? For the three branches of government, the noun is "power": the legislative power, the executive power, and the judicial power. *See* Wis. Const. art. IV, § 1; art. V, §1; art. VII, § 2.

But unlike those provisions, Article X, § 1 does *not* use the word "power" in its vesting clause. Instead, it vests "supervision" and qualifies what powers that entails as those "prescribed by law." Wis. Const. art. X, § 1. Thus, whatever the "supervision of public instruction" is – an office, a position, or a guide to future legislatures as to the Superintendent's purpose – it is not a power.

> Article X, Section 1 vests the SPI with the supervision of public instruction and states that the SPI's 'powers . . . shall be prescribed by law,' not that its '*other* powers' shall be prescribed by law. Thus while it is true that Article X vests the SPI with '[t]he supervision of public instruction,' [the legislation under review] cannot be unconstitutional because the 'supervision of public instruction' is some independent *power* of the SPI.

Coyne v. Walker, 368 Wis. 2d 444, ¶245 (Ziegler, J., dissenting) (citations omitted)); *id.*, ¶143 (Prosser, J., concurring) ("[W]hile the supervision of

public instruction was vested in the state superintendent of public instruction, the constitution did not say, "The *power* to supervise public instruction is vested in the state superintendent of public instruction.").

Since statehood, the legislature has, consistent with the discussion above, given meaning to the "supervision of public instruction" by assigning to the Superintendent a variety of powers and duties. *See, e.g.*, Wis. Stat. § 115.28 ("General duties") (prescribing what the "[t]he state superintendent *shall*" do) (emphasis added); Wis. Stat. § 115.29 ("General powers") (prescribing what "[t]he state superintendent *may*" do) (emphasis added). And in many cases, the legislature has authorized the Superintendent to act via rulemaking. *E.g.*, Wis. Stat. § 115.31(8) ("The state superintendent shall promulgate rules to implement and administer this section.").

But, as is the case with administrative agencies, this power to make rules – to share in the creation of legally-binding prescriptions – comes from the legislature, and may be taken away by the legislature. *See* Wis. Const. art. X, § 1. It follows that the procedure for exercising this power may also be defined by the legislature. *Cf. Whitman*, 220 N.W. at 942. To rule otherwise would violate Article IV, Section 1 of the Wisconsin

Constitution, which vests the legislative power in the legislature alone, and thus collapse the separation of powers essential to our system of government.

Even if supervision implies the existence of "some inherent authority," *Coyne*, 368 Wis. 2d 444, ¶152 (Prosser, J., concurring), or "non-specific" executive authority to supervise, *id.*, ¶188 (Roggensack, C.J., concurring), it does not follow that this authority includes rulemaking or that all executive authority related to public instruction must be placed with or be subordinate to the Superintendent. As noted above, rule-making is a delegated legislative function. Nothing in the Constitution requires that the Superintendent – or anyone else – be given the power to create edicts that have the force of law. One can certainly supervise public education without making law. *See Id.*, ¶226 (Roggensack, C.J., dissenting) ("[S]imply because the legislature creates an opportunity or an obligation for the Superintendent, it does not follow that those opportunities and obligations are of constitutional magnitude."). As such, whatever core power of "supervision," the Superintendent has cannot include something he need not be permitted to do. Without more, the most reasonable interpretation is that the legislature can qualify or limit what it need not grant at all. *Cf.*

Mayo v. Wis. Injured Patients & Families Compensation Fund, 2018 WI 78, ¶64, __ Wis. 2d __, __ N.W.2d __ (if the legislature can eliminate a cause of action, it can limit it instead).

C) Participation in Rulemaking Is Not Limited to "Other Officers" Created for the Purpose of Supervising Public Instruction

Nor does Article X restrict the exercise of authority over public instruction to the Superintendent or "other officers" created pursuant to Article X. Even if "other officers" refers only to those created for the purpose of supervising public instruction, nothing in Article X, Section 1 suggests, much less compels the conclusion, that no other executive officer can have any authority touching upon public instruction.

Thompson v. Craney, 199 Wis. 2d 674, 646 N.W.2d 123 (1996), is not to the contrary. Like this case, *Craney* was an original action involving the constitutionality of legislation touching on the authority of the Superintendent. *Id.* at 678. Specifically, the legislature had created a new Department of Education ("DOE"), a Secretary of Education appointed by the governor to head the DOE, and an Education Commission designed to supervise the DOE. *Id.* The legislation made the Superintendent the Chair of the Education Commission, but eight other voting members were also

part of the Commission, none of whom were chosen by the Superintendent. *Id.* at 678-79. Additionally, some of the Superintendent's prior powers and duties were transferred to the Secretary of Education and the Education Commission. *Id.* at 677, 679.

This Court ruled that these changes violated the Wisconsin Constitution because "the 'other officers' mentioned in the provision were intended to be subordinate to the state Superintendent of Public Instruction," yet the legislation "[gave] 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." *Id.* at 677-78, 698; *see also Id.* at 693 ("[T]he 'other officers' mentioned in the amendment are solely local officials, subordinate to the SPI.").

Craney therefore stands for the limited proposition that where the legislature creates officers whose purpose relates to public education – such as the Secretary of Education in that case – those officers must be subordinate to the Superintendent. That conclusion may well be wrong. See Section IV, *infra*. But where, as here, the law simply authorizes an entity or official that is *not* created for the purpose of supervising public instruction to exercise generally applicable authority in some way that

touches upon the Superintendent or public education, *Craney* is not applicable.

The creation of the Superintendent and provision for the creation of other officers of public instruction does not imply that no other official or entity may check or influence their authority. There are numerous state agencies unconnected to DPI and the Superintendent that exercise authority in the realm of public instruction yet do not report to the Superintendent. For example, the Department of Safety and Professional Services writes the rules relating to school building codes, Wis. Admin. Code § SPS 378; the Department of Workforce Development writes rules relating to students working at their school during school hours, Wis. Admin. Code § DWD 270.19; and the Department of Transportation writes rules relating to school buses and the public transportation of students, Wis. Admin. Code § Trans 300. In the first law passed following the creation of the Superintendent, the Governor was authorized to "direct" the Superintendent to perform duties. Laws of 1848 at 129. The governor may also veto an appropriation of money or grant of authority to the Superintendent – or even alter that authority with a line item veto. Over the past 170 years, the legislature has created a State Board of Education, local school boards and

districts and local superintendents and an educational review board, among other entities, that could all act in the realm of public instruction without the leave of and even contrary to the wishes of the Superintendent. *See* pp. 48-49, *infra.*

Reading Article X, Section 1 to require such entities to be subordinate to the Superintendent would result in a huge consolidation of power in the hands of the Superintendent and would hamstring the legislature in its ability to delegate authority across state agencies, all in contravention of the Constitution's grant of authority to the legislature to define the Superintendent's powers. Such an absurd result is to be avoided. *Cf. State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory language is interpreted . . . reasonably, to avoid absurd or unreasonable results.").

This is so, incidentally, whether or not one concludes that "other officers" in whom the supervision of public instruction is "vested" must be officers *created* for that purpose. In *Coyne*, Justices Gableman, Abrahamson, and Walsh Bradley concluded that they must be. 368 Wis. 2d 444, ¶45 (lead opinion); *id.*, ¶¶110-13 (Abrahamson, J., concurring, joined by Walsh Bradley, J.). But the remainder of the Court (a majority) believed

that some authority may be given to officers other than the Superintendent or other Article X officers. *Id.*, ¶¶162-164 (Prosser, J., concurring); *id.*, ¶¶217-18 (Roggensack, C.J., dissenting); *id.*, ¶¶246-48 (Ziegler, J., dissenting).

II) COYNE V. WALKER DOES NOT PROVIDE A RULE OF LAW FOR THIS CASE AND SHOULD BE OVERRULED

A) *Coyne v. Walker* Does Not Provide a Rule of Law for this Case

In *Coyne v. Walker*, this Court split in several different directions. Four justices – Justice Gableman, Justice Abrahamson, Justice A.W. Bradley, and Justice Prosser – agreed that the legislation at issue was unconstitutional, but could not agree on why. *See Id.*, ¶79 (lead opinion); *id.*, ¶80 (Abrahamson, J., concurring, joined by A.W. Bradley, J.); *id.*, ¶170 (Prosser, J., concurring). The remaining three justices – Chief Justice Roggensack, Justice Ziegler, and Justice R.G. Bradley – all agreed that the legislation was permissible. *See Id.*, ¶174 (Roggensack, C.J., dissenting, joined by Ziegler and R.G. Bradley, JJ.); *Id.*, ¶235 (Ziegler, J., dissenting, joined by R.G. Bradley, J.). Because *Coyne* shares so many similarities with this case, it is instructive to review the reasoning set forth in these various opinions before examining how this case must be decided.

Justice Gableman authored *Coyne*'s lead opinion, though no other justices joined it. In Justice Gableman's view, Article X, Section 1 granted the legislature the authority both to give powers and duties to the Superintendent and to take them away. *Id.*, ¶70 (lead opinion). Justice Gableman also concluded that the rulemaking authority of the Superintendent and DPI came from the legislature, not the Constitution. *Id.*, ¶¶36-37 (lead opinion). Thus, the Superintendent need not be given the authority to make rules at all. Justice Gableman even agreed that the legislature could involve the Governor and the Secretary of Administration in the Superintendent's rulemaking process, such as by requiring the Superintendent to submit draft rules to the Governor for (non-binding) review. *Id.*, ¶69 (lead opinion).

But Justice Gableman believed that powers given by the legislature to the Superintendent became "supervisory power[s]" if "without [them] the [Superintendent] could not carry out his legislatively-mandated duties of supervision of public instruction." *Id.*, ¶32 (lead opinion). In other words, while the legislature was the master of deciding which powers to grant the superintendent, it is not the master of how they are to be exercised – even with respect to delegated legislative authority such as rulemaking.

He thought rulemaking somehow became supervision because the legislature had required the Superintendent to make rules. *Id.*, ¶37 (lead opinion). For him, Article X, Section 1's vesting of the supervision of public instruction in the Superintendent and other officers means that even delegated power to do some act that bears on public education must in all cases be made subordinate to the Superintendent. *Id.*, ¶63 (lead opinion). And because Act 21 allowed the governor and the Secretary of Administration – individuals who were not Article X officers, in Justice Gableman's view – to oversee the rulemaking process, it unconstitutionally vested the supervision of public instruction in them. *Id.*, ¶¶49-40, 65-66 (lead opinion).

Justice Prosser similarly concluded Act 21 was unconstitutional but wrote separately in part to register disagreement with *Craney*'s holding and to state that his "position [did] not depend on the superintendent of public instruction having superiority over all other officers who are or may be vested with supervision of public instruction." *Id.*, ¶¶157-59 (Prosser, J., concurring).

Unlike Justice Gableman, Justice Prosser believed that "a constitutional office must possess some inherent authority to proceed to

fulfill its responsibilities" and that "[f]or the superintendent of public instruction, the constitution provides the initial authority to develop rules because the constitution states the superintendent's mission." *Id.*, ¶152 (Prosser, J., concurring) (emphasis removed). While he did not explain what superior authority could be given to other officers or what inherent authority must be retained by the Superintendent, he believed the REINS Act went too far. For Justice Prosser, Act 21 was ultimately unconstitutional because "it would give a governor authority to obstruct the work of an independent constitutional officer to such an extent that the officer would be unable to discharge the responsibilities that the legislature has given him." *Id.*, ¶155 (Prosser, J., concurring). He seemed particularly concerned that there were no standards governing the Governor's approval or disapproval of rules and, he thought, no way to override his decision. *Id.*, ¶133 (Prosser, J., concurring).[14]

Justice Abrahamson, joined by Justice A.W. Bradley, agreed that Act 21 was unconstitutional but concurred in the mandate for two principal

[14] As to the latter point, Justice Prosser seems to have been mistaken. If the Governor blocked the Superintendent from exercising his legislatively delegated authority to create a rule, the legislature could pass a law (and override any veto) codifying the rule. Thus, in requiring gubernatorial approval of a final rule, the legislature mirrored the executive constraints on its own lawmaking, ensuring that administrative agencies could not exercise greater legislative authority than its own.

reasons. *Id.*, ¶80 (Abrahamson, J., concurring). First, she disagreed with the lead opinion's "unnecessary and overly broad assertion" that the legislature could give and take away the Superintendent's powers and duties, including rulemaking, preferring to "reserve judgment on that issue." *Id.*, ¶¶87-89 (Abrahamson, J., concurring). She did, however, indicate agreement with Justice Prosser that the Superintendent possessed certain inherent powers. *Id.*, ¶¶90-91, 109 (Abrahamson, J., concurring).

Second, unlike Justice Gableman and Justice Prosser, Justice Abrahamson believed *Craney* decided the case: as in *Craney*, Justice Abrahamson argued, the legislature had passed an unconstitutional law that "g[a]ve 'equal or superior authority' over the supervision of public instruction to officers other than those inferior to the superintendent." *Id.*, ¶84 (Abrahamson, J., concurring) (quoting *Craney*, 199 Wis. 2d at 699).

Chief Justice Roggensack, joined by Justice Ziegler and Justice R.G. Bradley, concluded that Act 21 was not unconstitutional. Chief Justice Roggensack principally argued that any rulemaking authority exercised by DPI and the Superintendent derived from statute and that *Craney* did not apply because the governor and the Secretary of Administration were not Article X officers. *Id.*, ¶¶173-74, 218, 227 (Roggensack, C.J., dissenting).

The Chief Justice did not believe that authority over public instruction is exclusive to the Superintendent or other officers under Article X. She concluded instead that the Constitution confers only "non-specific, executive authority" upon the Superintendent and distinguished that from legislatively-created powers of supervision that may be conferred on any other officer or entity. *Id.*, ¶¶188-89 (Roggensack, C.J., dissenting).

Justice Ziegler, finally, authored a separate dissent joined by Justice R.G. Bradley, stressing that the legislature's control over the Superintendent's powers and duties governed the case. *Id.*, ¶242 (Ziegler, J., dissenting). Notably, Justice Ziegler pointed out the "numerous significant areas of agreement" between the lead opinion and the three dissenting justices: that the legislature freely controlled the powers of the Superintendent, that the Superintendent's "ability to participate in the rulemaking process derives from statute, not the Wisconsin Constitution," and that *Craney* did not apply. *Id.*, ¶¶236, 239 (Ziegler, J., dissenting).

The outcome in *Coyne* is based on a foundation of differing premises, none of which has garnered the support of a majority of the Court. Three justices (Abrahamson, Walsh Bradley, Prosser) believed that the Superintendent has some inherent authority to make rules (although it is

not clear how far Justice Prosser believed this authority extends). But four justices (Roggensack, Ziegler, Gableman, Grassl Bradley) ruled he does not. Three justices (Abrahamson, Walsh Bradley, Gableman) believe that authority over public instruction must be given to officers created under Article X and that the Superintendent must be in control of the exercise of that power. One justice (Prosser) made clear that he was not endorsing that position (and thought *Craney* was wrongly decided on that point), and three justices (Roggensack, Ziegler, Grassl Bradley) expressly disagreed.

Where this Court has failed to reach consensus on important constitutional questions, it has often taken up subsequent cases presenting similar issues to create a precedential result. *See, e.g.*, *State v. Lynch*, 2016 WI 66, 371 Wis. 2d 1, 885 N.W.2d 89 (considering whether to overrule a line of cases after failing to reach agreement on that question a few years before); *State v. Mitchell*, 2018 WI 84, ___ Wis. 2d ___, ___ N.W.2d ___ (examining whether "implied consent" justified a warrantless blood draw of an unconscious individual after failing to reach agreement on that question the year before). This is such a case. *Coyne* does not clearly determine the outcome in this dispute because a different act of the legislature is at issue and because no single rule of law from *Coyne* may easily be applied to it.

B) *Coyne v. Walker* Should Be Overruled

If it is necessary to do so, the conditions for overturning precedent are plainly met here. In the first place, *stare decisis* ought not to apply at all because there is no "decision" to "let stand" – no opinion of the Court, other than Chief Justice Roggensack's dissent, garnered the support of more than two justices. And even if *stare decisis* applies, this Court should not hesitate to abandon *Coyne.*

Some of the important factors considered by this Court when deciding whether to overturn a case are "whether the prior decision is unsound in principle," "whether it is unworkable in practice," "whether the prior case was correctly decided," and "whether it has produced a settled body of law." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶99, 264 Wis. 2d 60, 665 N.W.2d 257 (citing *State v. Outagamie County*, 2001 WI 78, ¶30, 244 Wis. 2d 613, 628 N.W.2d 376 (lead opinion)).

All of these factors militate in favor of overturning *Coyne* in favor of issuing a precedential decision. *Coyne* is "unsound in principle" and "unworkable in practice" because the lead opinion and concurrences violate the plain language of the Constitution, because no single principle of law

justifies the result, and because there is no rule of law to be applied in future cases. For the same reasons, the case was not "correctly decided" – indeed, there is no "decision" to assess for that purpose. And because *Coyne* is a recent decision with no majority, it has not produced a settled body of law.

Finally, the fact that *Coyne* involved interpretation of the state Constitution rather than state statutes suggests that this Court's intervention is needed, because the legislature cannot easily account for the Court's lack of a decision. *Cf. Kimble v. Marvel Entm't, LLC*, ___ U.S. ___, 135 S. Ct. 2401, 2409 (2015) ("*[S]tare decisis* carries enhanced force when a decision . . . interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.").

For all of these reasons, Court should take a fresh look at the issues presented in *Coyne*. As will be shown below, the united dissenting justices in *Coyne* got it right.

III) DPI AND THE SUPERINTENDENT MUST COMPLY WITH THE REINS ACT

The ultimate question here is whether the DPI and the Superintendent must comply with the REINS Act. If so, they must present

each statement of scope to the Department of Administration for a determination as to whether they have the explicit authority to promulgate the rule proposed in the statement, and must refrain from sending a statement of scope to the Legislative Reference Bureau for publication until the Governor receives both the statement and the Department of Administration's authority determination and issues a written notice of approval of the statement. Until this gubernatorial approval is obtained, they may not work on the proposed rule.

A) DPI Must Comply with the Statutory Requirement that it Present Each Statement of Scope to the Department of Administration for a Determination as to Whether DPI Has the Explicit Authority to Promulgate the Rule Proposed in the Statement

The various principles discussed in Part I, *supra* – that DPI is an agency whose rulemaking authority comes from the legislature, that the Superintendent's powers, including rulemaking, come from the legislature, and that the reference to "other officers" in Article X, Section I is only a modest limitation on the legislature's ability to legislate in the area of supervision of public instruction – control the outcome of this case.

First, nothing in Article X, Section 1 of the Wisconsin Constitution allows DPI or the Superintendent to escape their statutory obligation to

present statements of scope to DOA for review, even if DOA must be subordinate to the Superintendent.

According to the lead opinion in *Coyne*:

> [A ruling of unconstitutionality as to Act 21's requirements] does not mean the Governor and the Secretary of Administration cannot be involved in the rule-drafting process at all; it simply means that they cannot be given the authority to halt the process. 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 a proposed rule and submit that proposed rule to the Legislature at the end of the process. . . . [T]he Legislature could require the SPI to submit the draft rule to the Governor and allow the Governor to send the rule back to the SPI with requested changes (provided the SPI is not required to incorporate them). The Legislature could further require the SPI to hold additional hearings on the Governor's proposed changes, to prepare a detailed report on the Governor's proposed changes and a report on why the SPI does not agree with them, to have a personal consultation with the Governor, or to resubmit the rule to the Governor to get his written opinion on it and submit that opinion to the Legislature along with the draft rule.

Coyne, 368 Wis. 2d 444, ¶ 69 (lead opinion). In other words, combined with the dissenting justices, who believed the legislature held plenary authority over the rulemaking authority of the Superintendent, the reasoning of a majority of the justices in *Coyne* permits the legislature to require DPI to submit its statements of scope to DOA for review. Directing the Superintendent merely to obtain input from a state agency on its

authority to promulgate a rule cannot be considered unconstitutional even under a strong view of the Superintendent's authority. The Superintendent and DPI are subject to this portion of the REINS Act.

As noted above, it is unclear how the *Coyne* court would have resolved the question of whether a determination that a proposed rule is beyond DPI's authority precludes the rulemaking. Justice Prosser may well have concluded that such a well-defined limitation on the Superintendent's rulemaking was constitutional. Notably, while the Superintendent has now submitted scope statements to the DOA, he says he will only "consider" the DOA's determination and is not required to obtain gubernatorial approval even if a denial is based upon a determination that no authority exists.

B) DPI Must Comply with the Statutory Requirement that it Refrain from Sending a Statement of Scope to the Legislative Reference Bureau for Publication or Performing Further Work on the Rule until the Governor Issues a Written Notice of Approval of the Statement

The legislature's ability to define the extent of DPI's rulemaking authority and prescribe the powers of the Superintendent also resolves the question of whether these entities are required to comply with the REINS Act rule enjoining work on administrative rules pending gubernatorial approval. Three justices in *Coyne* agreed with this reasoning. *See Coyne*,

368 Wis. 2d 444, ¶¶217-22 (Roggensack, C.J., dissenting). The concerns of the justices who disagreed with this principle, while understandable, do not render the REINS Act unconstitutional.

First, Justice Gableman believed that because the legislature had ordered the Superintendent to engage in rulemaking, rulemaking not only became supervision but could not be checked by any officer other than the Superintendent. *Id.*, ¶4 (lead opinion).

But Justice Gableman's own reasoning shows why this is not so. As noted above, there is no reason to believe that whatever non-specific executive authority might be constitutionally conferred, that this constitutional authority includes delegation of the power to make law. But even if one could say that the legislature may have once defined the supervision of public instruction to require rulemaking by the Superintendent without the involvement of or oversight from any other person or entity, it has now altered that definition. In the REINS Act it "prescribed" that this rulemaking is subject to the governor's review – that the Superintendent's "supervisory power" in this regard is no more than the power to make rules approved by the governor. "[R]ulemaking is not some

unchangeable Platonic Form." *Coyne*, 368 Wis. 2d 444, ¶243 (Ziegler, J., dissenting).

Justice Prosser demonstrated concern that "a constitutional office must possess some inherent authority to proceed to fulfill its responsibilities." *Id.*, ¶152 (Prosser, J., concurring) (emphasis removed). But he did not provide any authority for that statement. Nor is it apparent why it must be true. The same article creating the Superintendent explained that these "responsibilities" ("duties") were yet to be defined *by the legislature*. Wis. Const. art. X, § 1. It cannot have escaped the notice of the framers of the state Constitution that, by giving the legislature both the legislative power and the authority to define the "powers" and "duties" of the Superintendent, significant legislative action was going to be required before the Superintendent was able to accomplish any tasks. Though a debate can be had about its wisdom, there is nothing inherently illogical about this scheme.

What has just been said also answers Justice Prosser's objection that it would be unconstitutional to "give a governor authority to obstruct the work of an independent constitutional officer to such an extent that the officer would be unable to discharge the responsibilities that the legislature

has given him." *Id.*, ¶155 (Prosser, J., concurring). As Justice Prosser's statement acknowledges, it is the legislature that assigns the Superintendent his or her responsibilities. If the legislature defines the responsibilities in such a way as to require gubernatorial approval, then the governor would be aiding, not obstructing, the fulfillment of these tasks.

Conferring a task or measure of authority on an office does not mean that it must be unlimited or cannot be checked by someone else. Legislative power is "vested" in the legislature but is still subject to the executive veto. No one supposes there is any inconsistency between vestment and veto. Executive power is "vested" in the governor, yet the legislature may cabin and control it in a number of ways. The mere "vesting" of "supervision" in an officer cannot do the work that the lead opinion and Justice Prosser's concurrence in *Coyne* need it to do. It does not require that no other office may exercise any authority or control over the matter to be supervised.

A further example of this principle is presented by judicial review of decisions made by the Superintendent in the exercise of his authority over the supervision of public instruction. *See, e.g.*, Wis. Stat. §§ 227.40, 227.52. Courts may invalidate those decisions in accordance with

legislative (and other) limitations on its exercise. But no one would claim that these courts are unconstitutionally supervising public instruction in violation of Article X, because it is accepted that to "supervise" public instruction means to "take actions specified by the legislature *subject to judicial review*." It is also undisputed that the governor can currently block the Superintendent's exercise of authority by vetoing the appropriation of funds or the conferral of authority. Similarly, the legislature has permissibly redefined the scope of the Superintendent's authority, explaining that such review now comes not just from the judicial branch, but also the head of the executive branch.

Finally, Justice Abrahamson and Justice A.W. Bradley, apart from voicing objections already addressed above, wrote that *Craney* controls this issue. But all that *Craney* held was that, pursuant to Article X, Section 1, "other officers" of supervision of public instruction – individuals who are "solely local officials, subordinate to the [Superintendent]" – must be just that – subordinate to the Superintendent. *Craney*, 199 Wis. 2d at 693. The governor is not some local official whose office exists for the purpose of aiding the Superintendent in the supervision of public instruction. He wields powers that affect *many* areas of state law, not merely public

education. He need not be subordinate to the Superintendent any more than this Court must be, or the Department of Transportation must be, *see* Wis. Admin. Code § Trans 300 (rules relating to school buses and the public transportation of students), or the secretary of state, treasurer, and attorney general must be, *see* Wis. Const. art. X, § 7 (explaining that the "secretary of state, treasurer, and attorney general, shall constitute a board of commissioners for the sale of the school and university lands and for the investment of the funds arising therefrom"), or the legislature itself must be.

Additional, persuasive evidence that no constitutional concern inheres in providing the governor with the authority to weigh in on matters affecting public education is that the legislature *has authorized such action before*. *See Coyne*, 368 Wis. 2d 444, ¶232, n.11 (quoting Laws of 1848, at 129) (explaining that early legislation assigned the Superintendent "such other duties as the legislature or *governor of this state may direct*") (emphasis added). If the REINS Act is unconstitutional, then so was an initial law passed following adoption of Article X, Section 1 of the Wisconsin Constitution. *See also* pp. 48-49, *infra* (explaining other ways in

which authority respecting public instruction has been given to those not subordinate to the Superintendent).

Ultimately, nothing in the Wisconsin Constitution prohibits the legislature from prescribing procedural mechanisms for the Superintendent's exercise of delegated rulemaking authority. The REINS Act is not unconstitutional. DPI and the Superintendent must halt work on any proposed rules and refrain from sending scope statements to the LRB until the Governor approves the scope statement.[15]

IV) IF THE REINS ACT IS UNCONSTITUTIONAL UNDER *THOMPSON V. CRANEY*, THIS COURT SHOULD OVERRULE THAT CASE

So far this brief has proceeded on the assumption that *Craney*'s rule preserving the Superintendent's superiority over "other officers" applies only to officers of supervision of public instruction, not officers like the governor. Four justices in *Coyne*, as mentioned above, also took this position. *See Coyne*, 368 Wis. 2d 444, ¶¶39-40 (lead opinion); *Id.*, ¶¶227-228 (Roggensack, C.J., dissenting) (joined by Ziegler and R.G. Bradley, JJ.).

[15] And, if this Court overrules *Coyne*, then DPI and the Superintendent must also submit any final rule to the governor for approval under Wis. Stat. § 227.185 before they submit it to the legislature for review under § 227.19(2).

But if this Court concludes that *Craney* prevents the legislature from granting to the governor and certain of his agencies executive oversight of rules promulgated by DPI and the Superintendent, then *Craney* must be overruled for three reasons.

First, such a rule would violate Article X, Section 1 of the Wisconsin Constitution, which simply provides that "[t]he 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. Read literally and fairly, the provision does not say anything about whether the Superintendent must be superior to "other officers." Instead, it grants full authority to the legislature to devise a system of supervision of public instruction as it sees fit. *See, e.g.*, *Coyne*, 368 Wis. 2d 444, ¶¶168-69 (Prosser, J., concurring). *Craney* is thus "unsound in principle," an important indicator that *stare decisis* is inappropriate. *Johnson Controls, Inc.*, 264 Wis. 2d 60, ¶99.

Second, and relatedly, this interpretation of *Craney* violates the rule of law stated in this Court's decision in *Fortney*, namely that "Article X, section 1 confers no more authority upon [public instruction] officers than

that delineated by statute." *Fortney*, 108 Wis. 2d at 182. It is true that the *Craney* Court attempted to reconcile its holding with *Fortney*, suggesting that the legislature could give and take away power but that it could not give power in a way that made the Superintendent subordinate to "other officers." *Craney*, 199 Wis. 2d at 699-700. But this approach is untenable, leading to inexplicably bizarre results.

For example, under this interpretation of *Craney*, even though the legislature could take away the Superintendent's rulemaking power entirely, it could not give the Superintendent a qualified version of this power – rulemaking subject to veto by the governor. Under this interpretation of *Craney*, even though the legislature itself could overrule the Superintendent's decisions with respect to individual rules, it could not delegate to another entity the ability to aid the legislature in making those decisions. And under this interpretation of *Craney*, even though the legislature need not grant the Superintendent authority over any particular issues or crises at all, it could not do so if the Superintendent were asked to share authority with another agency or officer. *Craney* is thus "unworkable in practice," another important indicator that *stare decisis* is inappropriate. *Johnson Controls, Inc.*, 264 Wis. 2d 60, ¶99

Finally, reading *Craney* to invalidate the REINS Act with respect to the Superintendent is not consistent with the longstanding historical interpretation of Article X, Section 1, and would cast into doubt the validity of numerous agency activities, further demonstrating that such a reading is "unworkable in practice."

For example, in 1915 the legislature created a State Board of Education, which managed and allocated the finances of the state's public educational activities. Laws of 1915, ch. 497. Today, the Superintendent has that power. In 1848, the legislature gave town superintendents, not the Superintendent, the exclusive power to license school teachers. Laws of 1848, 226. Between 1862 and 1868, county and town supervisors shared licensing certification. Laws of 1862, ch. 176; Laws of 1863, ch. 102; Laws of 1868, ch. 169. Seventy-three years later, in 1939, the legislature gave this duty to the Superintendent. Laws of 1939, ch. 53. None of those people were subordinate to the Superintendent.

Today, the SPI is not the sole officer who can promulgate rules relating to public instruction. As discussed above, agencies like the Department of Safety and Professional Services, the Department of Workforce Development, and the Department of Transportation all

promulgate rules that relate to public instruction. *See* p. 26, *supra*. Indeed, as Chief Justice Roggensack pointed out in *Coyne*, the legislature at one time conferred some statewide educational authority upon an "educational approval board," which was empowered to act independently of the Superintendent. 368 Wis. 2d 444, ¶201 (Roggensack, C.J., dissenting); *see* Wis. Stat. §§ 15.03, 15.357 (1967).

Moreover, the legislature often reserves certain responsibilities to local superintendents and school boards. The Superintendent cannot countermand what these "other officers" do. He may not interfere with hiring, textbook selection, curriculum, school administration, etc. except in discrete circumstances where the legislature has so directed. *See Coyne*, 368 Wis. 2d 444, ¶162 ("The framers understood th[at] . . . '[o]ther officers' would run the public schools in Green Bay, in Milwaukee, in Prairie du Chien, in Madison. . . . In the governance and operation of local schools, the superintendent was not 'superior.'") (Prosser, J., concurring).

Indeed, as noted above, the Superintendent does not even act free from interference within the executive branch. The Governor proposes – and may veto – his budget. The Governor may sign into law legislation that the Superintendent opposes and veto legislation that he has proposed or

supports. The Governor may veto any grant of rulemaking authority to the Superintendent. If he can do that without constitutional injury, the REINS Act cannot be unconstitutional.

None of this is consistent with the role the framers of our state Constitution established in Article X. If the Court concludes that *Craney* bars the REINS Act, it must overrule that case.

CONCLUSION

The REINS Act restructured executive branch rulemaking so that all proposed rules pass across the Executive's desk. This is well within the legislature's authority, as it need not grant rulemaking powers to executive agencies and entities at all. Nor does Article X, Section 1 of the Wisconsin Constitution grant the Superintendent some exemption from this law, as by the Constitution's terms the legislature prescribes the extent of the Superintendent's power.

This Court should therefore prevent the further illegal expenditure of funds by respondents by (1) declaring that respondents must comply with all portions of the REINS Act and (2) issuing an injunction enforcing that declaration.

Dated this 10th day of August, 2018.

Respectfully submitted,
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 10,659 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: 8/10/2018

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CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, and appendix, which complies with the requirements of section 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: 8/10/2018

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