STATE OF WISCONSIN
SUPREME COURT

Case No. 2017AP2278

KRISTI KOSCHKEE, AMY ROSNO, CHRISTOPHER MARTINSON, and MARY CARNEY

Petitioners,

v.

ANTHONY EVERS, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, and the WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION

Respondents.

ORIGINAL ACTION

RESPONDENTS' BRIEF AND APPENDIX

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION

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INTRODUCTION

The Petitioners misrepresent the REINS Act, 2017 Wis. Act 57. The REINS Act modified the administrative rulemaking process in two limited ways: 1) agencies must submit scope statements outlining proposed rules to the Department of Administration (DOA) for review of statutory authority; and 2) agencies must hold a preliminary public comment and hearings period on proposed rules. There is no dispute between the parties that the Superintendent of Public Instruction (SPI) and the Department of Public Instruction (DPI) are complying with both requirements.

The REINS Act did not modify prior law requiring agencies to wait for gubernatorial approval before working on proposed rules and prior to finalizing those rules. This requirement, codified in Wis. Stat. §§ 227.135(2) and 227.185, was created by 2011 Wis. Act 21 (Act 21). In *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, this Court determined Act 21 is unconstitutional as applied to the SPI, including the requirement that the SPI and DPI wait for gubernatorial approval of proposed rules.

The Petitioners are asking this Court to reverse itself and, in effect, declare Act 21 constitutional. In doing so, the Petitioners ask this Court to overrule both *Coyne v. Walker* and *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996), as well as the constitutional analysis on which those cases rely. The doctrine of stare decisis compels this Court to stand by its

decisions, because the Petitioners fail to identify any change in law, fact, precedent, or other special justification to overturn these cases.

STATEMENT OF THE ISSUES

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

STATEMENT ON ORAL ARGUMENT & PUBLICATION

The importance of this case merits both oral argument and the publication of the court's opinion.

STATEMENT OF THE CASE

This case is an original action seeking declaratory relief from the Court. On November 20, 2017, the Petitioners filed with this Court a Petition to Supreme Court to Take Jurisdiction of an Original Action (Petition). Petitioners seek a declaratory judgment that Respondents SPI Tony Evers and DPI, are required to comply with provisions of the REINS Act, 2017 Wis. Act 57.

Applicable to this original action, the REINS Act requires agencies proposing a rule to submit a scope statement in advance to the Department of Administration (DOA) and to hold a preliminary public hearing and comment period on the statement of scope upon request of either cochairperson of the legislature's Joint Committee for Review of Administrative Rules (JCRAR). *Id.*

The Petitioners additionally seek a declaratory judgment that the SPI and DPI are required to comply with provisions of 2011 Wis. Act 21 (Act 21) that require agencies to obtain gubernatorial approval before publishing a scope statement or performing any work on a proposed rule. This Court held those provisions to be unconstitutional in *Coyne*, 2016 WI 38.

Shortly after the Petition was filed with this court, a dispute between the Respondents and the Department of Justice arose regarding who would represent the Respondents in this action. The Respondents disagreed with the Department of Justice regarding the Respondents' legal position based on this Court's decision in *Coyne*, and the Department's ability to represent Respondents in light of these disagreements. *Koschkee v. Evers*, 2018 WI 82, ¶¶ 4-6, 913 N.W.2d 878. This Court *sua sponte* raised the issue of whether the governor is a necessary party. *Id*., ¶ 6. On June 27, 2018, this Court issued an order resolving these two issues. It determined that Respondents could be represented by counsel of their own choosing, and further that the governor is not a necessary party. *Id*., ¶ 26.

In making its ruling that the governor is not a necessary party, the Court explained that "[t]his case raises the question of whether the DPI must submit a scope statement to the governor in the first instance" and will not "affect the governor's responsibilities" under Wis. Stat. § 227.135(2). *Id*., ¶ 20. The Court further elaborated that this case does not raise the question of what the governor does with a scope statement once submitted. *Id*.

ARGUMENT

I. THE SPI AND DPI ARE COMPLYING WITH THE REINS ACT.

a. The REINS Act did not create or modify the requirement under Wis. Stat. §§ 227.135(2) or 227.185 for agencies to obtain gubernatorial approval of scope statements and proposed rules.

The Petitioners contend the only issue presented in this matter is whether the SPI and DPI (collectively "SPI") must comply with the REINS Act. Pet. Br. at 36. However, the Petitioners continuously misrepresent what the REINS Act actually entails. Specifically, the Petitioners claim the SPI is not complying with two primary requirements of Wis. Stat. § 227.135(2): 1) the requirement to submit a scope statement to the Department of Administration (DOA); and 2) the requirement to wait for gubernatorial approval before publishing the scope statement or performing any work on the proposed rule. *See* Pet. Br. at 6-11.

However, the requirement to wait for gubernatorial approval is *not* part of the REINS Act. 2017 Wis. Act 57. The requirement to wait for gubernatorial approval was created by Act 21, and has not since been modified in any material way by the REINS Act or otherwise. *See* 2011 Wis. Act 21; 2017 Wis. Act 57.

To illustrate, the pre-REINS Act language of Wis. Stat. § 227.135(2) requiring agencies to wait for gubernatorial approval before publishing a scope statement reads as follows:

> … The agency may not send the statement to the legislative reference bureau for publication under sub. (3) until the governor issues a written notice of approval of the statement. …

Wis. Stat. § 227.135(2) (2015-16). After the passage of the REINS Act, Wis. Stat. § 227.135(2) states:

> … The agency may not send the statement to the legislative reference bureau for publication under sub. (3) until the governor issues a written notice of approval of the statement. …

Wis. Stat. § 227.135(2) (2017-18). The two versions are, of course, identical. In spite of this, the Petitioners claim falsely that the gubernatorial approval of scope statements is a unique creation or component of the REINS Act. Pet. Br. at 4-5.

Similarly, the pre-REINS Act language of Wis. Stat. § 227.135(2) requiring agencies to wait for gubernatorial approval before performing work on a rule states:

> … No state employee or official may perform any activity in connection with the drafting of a proposed rule except for an activity necessary to prepare the statement of the scope of the proposed rule until the governor and the individual or body with policy−making powers over the subject matter of the proposed rule approve the statement. …

Wis. Stat. § 227.135(2) (2015-16). After the passage of the REINS Act, Wis. Stat. § 227.135(2) states:

> … No state employee or official may perform any activity in connection with the drafting of a proposed rule, except for an activity necessary to prepare the statement of the scope of the proposed rule until the governor and the individual or body

> with policy−making powers over the subject matter of the proposed rule approve the statement. …

Wis. Stat. § 227.135(2) (2017-18) (emphasis added). An eagle-eyed observer will note, the REINS Act added a single comma between the words "rule" and "except." 2017 Wis. Act 57, § 3.

Again, the requirement to wait for gubernatorial approval is *not* part of the REINS Act. The requirement to wait is, in fact, a creation of Act 21. *See* 2011 Wis. Act 21, §§ 4, 32. The Dane County Circuit Court, Court of Appeals, and this Court interpreted this exact language to be unconstitutional as applied to the SPI. *Coyne*, 2016 WI 38. Apparently, for the Petitioners, a single comma is enough to nullify the interpretation of a statute by the entire judicial branch, such that reconsideration of the same language in Wis. Stat. § 227.135(2) is necessary.

Furthermore, the pre-REINS Act language of Wis. Stat. § 227.185 required agencies to wait for gubernatorial approval of a final rule draft before submission to the legislature:

> 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 (2015-16). After the passage of the REINS Act, Wis. Stat. § 227.185 states:

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

Wis. Stat. § 227.185 (2017-18) (emphasis added); *See also* 2017 Wis. Act 57, § 21. Here, the REINS Act adds a notification provision that has absolutely no effect on the gubernatorial approval created by Act 21.

The Petitioners know that the REINS Act did not change any of the provisions of Wis. Stat. §§ 227.135(2) or 227.185 that this Court found to be unconstitutional in *Coyne*. They repeatedly misrepresent this fact to the Court to create the illusion of a novel question of law applicable to a "different act of the legislature." Pet. Br. at 34. The reality is that the REINS Act made limited changes to the rulemaking process, and that the SPI is complying fully with those changes.

b. The REINS Act created the requirement that agencies submit scope statements to the DOA for review and hold preliminary public hearing and comment periods upon request.

The REINS Act amended Wis. Stat. § 227.135(2) to require agencies to submit scope statements to the DOA. 2017 Wis. Act 57, § 3. The DOA then determines if there is legal authority to draft the rule as described by the scope statement. *Id*.

In this action, the SPI has not challenged its obligation to submit statements of scope to the DOA. The SPI does not identify any constitutional infirmity with the DOA performing an analysis of the legal authority of a proposed rule. The Legislative Council performs this same analysis and has done so since 1986 under Wis. Stat. § 227.15(2)(a). *See also* 1985 Wis. Act 182, § 26 ("The legislative council staff shall, within 20 working days following receipt of a proposed rule, … [r]eview the statutory authority under which the agency intends to promulgate the proposed rule."). Consistent with *Coyne*, this requirement does not give "the Governor the ability to supplant the policy choices of the SPI," and ensures "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." *Coyne*, 2016 WI 38, ¶¶ 68-69.

The REINS Act also created Wis. Stat. § 227.136, which states that an agency that prepares a scope statement must hold a preliminary public hearing and comment period on the statement of scope upon request by either cochairperson of the JCRAR. 2017 Wis. Act 57, § 5. As with the submission of scope statements to the DOA, the SPI does not question the constitutionality or validity of this provision.

As the Petitioners correctly assert, these provisions of the REINS Act are distinguishable from the provisions of Act 21 held unconstitutional in *Coyne*, because these provisions direct the SPI "merely to obtain input from

a state agency on its authority to promulgate a rule…". Pet. Br. at 39. Unlike Act 21, this review does not delegate to any entity the unchecked, discretionary authority to prohibit the SPI from promulgating rules. Therefore, submitting scope statements to the DOA and preliminary public hearing comment periods are consistent with *Coyne*.

c. There is no dispute that the SPI is submitting scope statements to the DOA and holding preliminary public hearing and comment periods.

All scope statements that have been prepared by the SPI since the effective date of the REINS Act have been submitted to the DOA pursuant to Wis. Stat. § 227.135(2) or else legally nullified. Pet. Br. at 8-9. All scope statements referenced by the Petitioners as violating the REINS Act have been rescinded. *Id*. Furthermore, the SPI has held preliminary public hearing and comment periods when requested. The Petitioners concede that the SPI is in compliance with what the REINS Act actually requires. Pet. Br. 9.

However, the Petitioners falsely assert the SPI is not complying with the REINS Act. As the basis for this assertion, the Petitioners state that the SPI is not waiting for gubernatorial approval of scope statements under Wis. Stat. § 227.135(2), or gubernatorial approval of final rule drafts under Wis. Stat. § 227.185. Pet. Br. at 9-10. Again, these provisions are *not* part of the REINS Act, but are instead the exact provisions of Act 21 held unconstitutional by this Court. *Coyne*, 2016 WI 38. If the SPI were to proceed as requested by the Petitioners, the SPI would be in violation of the

permanent injunction upheld by this Court in *Coyne* prohibiting the SPI, as well as the governor, from adhering to these provisions. *Id*.

II. THIS COURT SHOULD UPHOLD COYNE UNDER THE DOCTRINE OF STARE DECISIS

There has never been a dispute between the parties regarding the application of the REINS Act. The only dispute between the parties is whether this Court should cast aside its decision in *Coyne* and reconsider whether Act 21 is constitutional as applied to the SPI. To be clear, this is not simply a request to overrule precedent as applied to a new set of facts or discrete question of law. Rather, the Petitioners are asking this Court to reexamine the same facts, legislative and constitutional history, legal arguments and rationale presented to and considered by this Court in *Coyne*. Pet. Br. at 39. In doing so, the Petitioners fail to identify any compelling reason or special justification as to why this Court should reverse its own decision.

a. This Court determined Act 21 is unconstitutional as applied to the SPI.

The majority of justices in *Coyne* established a clear rule of law: Act 21 is unconstitutional as applied to the SPI. " … Act 21 is void as applied to the SPI and his subordinates." *Coyne*, 2016 WI 38, ¶ 4. "… 2011 Wis. Act 21, which altered the process of administrative rulemaking, is unconstitutional as applied to the Superintendent of Public Instruction and the Department of Public Instruction." *Id*. at ¶ 80 (Abrahamson, J.,

concurring, joined by Walsh Bradley, J.). "In my view, the challenged sections of Act 21 are as unnecessary as they are unconstitutional." *Id*. at ¶ 170 (Prosser, J., concurring).

This Court unambiguously determined the provisions of Act 21 requiring the SPI to obtain gubernatorial approval during the rulemaking process are unconstitutional. In spite of this, the Petitioners claim *Coyne* does not provide a rule of law while simultaneously asking this Court to overrule *Coyne* to vacate the rule of law prohibiting the application of Act 21 to the SPI. Pet. Br. at 35. For this Court to overrule *Coyne*, the Petitioners must show more than their dissatisfaction with its result.

b. *Coyne* should be upheld under the doctrine of stare decisis.

"This court follows the doctrine of stare decisis scrupulously because of our abiding respect for the rule of law." *State v. Luedtke*, 2015 WI 42, ¶40, 363 Wis.2d 1, 863 N.W.2d 592 (citing *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis.2d 60, 665 N.W.2d 257). The doctrine of stare decisis is necessary to further "fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case." *Johnson Controls, Inc.*, 2003 WI 108, ¶95. "We need finality in our litigation." *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

"[A]ny departure from the doctrine of stare decisis demands special justification." *Johnson Controls, Inc*., 2003 WI 108, ¶ 96 (citation omitted).

"Failing to abide by stare decisis raises serious concerns as to whether the court is implementing principles ... founded in the law rather than in the proclivities of individuals. *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 42, 281 Wis. 2d 300, 697 N.W.2d 417 (citations omitted). "The decision to overturn a prior case must not be undertaken merely because the composition of the court has changed." *Johnson Controls, Inc.*, 2003 WI 108, ¶ 95.

Where this Court has previously interpreted the constitutionality of a statute, "the party challenging that interpretation must establish that [the Court's] prior interpretation was 'objectively wrong.'" *State v. Breitzman*, 2017 WI 100, ¶ 5, n.4, 378 Wis. 2d 431, 904 N.W.2d 93 (quoting *Romanshek*, 2005 WI 67, ¶ 45). Whether this Court "disagrees with its rationale" is an insufficient basis to overrule its previous interpretation. *Johnson Controls, Inc.*, 2003 WI 108, ¶ 93.

The burden is therefore on the Petitioners to show special justification to reverse this Court's interpretation of Wis. Stat. §§ 227.135(2) and 227.185, and Wis. Const. art. X, § 1, in *Coyne*. *See Breitzman*, 2017 WI 100, ¶5, n.4. This court considers the following five factors when determining whether to overrule prior case law: (1) changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and consistency in the

law; (4) the prior decision is unsound in principle; and (5) the prior decision is unworkable in practice. *Luedtke*, 2015 WI 42, ¶ 40.

The Petitioners fail to provide any justification for this Court to overturn *Coyne*, let alone the "special justification" necessary to overcome stare decisis. This failure is understandable, because a consideration of the relevant factors when determining whether to overrule prior case law demonstrates this court must uphold *Coyne*.

i. The Legislature has not modified the provisions of Act 21 found unconstitutional by this Court in any material way.

In *Coyne*, this Court declared Act 21 unconstitutional, and subsequent changes to Wis. Stat. ch. 227 by the REINS Act have done nothing to undermine this decision. *See* Part I, *supra*. For purposes of illustration, consider the relevant developments in the law that provided special justification to overcome stare decisis in *Johnson Controls, Inc.*, 2003 WI 108. In that case, this Court overturned *City of Edgerton v. General Casualty Co. of Wisconsin*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994). Of the many problems with *Edgerton*, the *Johnson Controls* court noted: the *Edgerton* decision relied upon a treatise's definition of "damages" which had subsequently been changed; the decision ignored a large body of law on the nature of damages; it relied upon federal court decisions which were later overturned; and a subsequent decision by the Court "effectively obliterated

its intellectual foundation." *Johnson Controls, Inc.*, 2003 WI 108, ¶¶ 55-60, 71.

In this case, the Petitioners fail to identify a single change or development in the law that affects this Court's decision in *Coyne*. The unchecked power for the governor to effectively "veto" the rulemaking process under Act 21 remains unaltered by the REINS Act. Wis. Stat. § 227.135(2); *See also*, Wis. Stat. § 990.001(7) ("A revised statute is to be understood in the same sense as the original unless the change in language indicates a different meaning so clearly as to preclude judicial construction."). Similarly, the REINS Act did not affect the governor's ability to "veto" proposed rules when presented in final draft form. Wis. Stat. § 227.185.

As a result, the REINS Act did nothing to alleviate the constitutional infirmities of Act 21 identified by this Court in *Coyne*, even though the Court provided a legislative roadmap for doing so. The REINS Act does nothing to provide a "mechanism for the SPI and DPI to proceed with rulemaking in the face of withheld approval" as suggested by Justice Gableman. *Coyne*, 2016 WI 38, ¶ 71. The REINS Act does not protect the SPI's ability to "set standards" and "bring uniformity to Wisconsin's public education system" to allay the concerns of Justices Abrahamson and Bradley. *Id*., ¶ 88. The REINS Act does not now "provide specific grounds upon which the governor

may choose not to approve a proposed rule," or otherwise restrain the governor's "unlimited discretion" as stated by Justice Prosser. *Id*., ¶ 136.

In short, the legislature has thus far declined to tailor the problematic provisions of Act 21 to this Court's constitutional interpretation. In modifying Wis. Stat. §§ 227.135(2) and 227.185 without altering the provisions of Act 21, the legislature effectively declined to alleviate the constitutional infirmities identified in *Coyne*. *See State v. Olson*, 175 Wis. 2d 628, 641, 498 N.W.2d 661 (1993) ("Legislative silence with regard to new court-made decisions indicates legislative acquiescence in those decisions") (citations omitted); *Cf., Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶¶ 11-12, 383 Wis. 2d 1, 914 N.W.2d 678 (Court overturned prior decision finding cap on medical malpractice noneconomic damages unconstitutional, in part because "the legislature undertook substantial investigative efforts to assure that any future legislation in regard to a cap would be constitutionally appropriate").

Therefore, the REINS Act provides no basis to overturn *Coyne*, the Court's rationale for finding Act 21 unconstitutional remains unaltered, and the legislature has expressed no concern or intent that the provisions of Act 21 should apply to the SPI. Consequently, the first factor under the doctrine of stare decisis demonstrates that *Coyne* should not be reversed.

ii. There are no new facts that would require this Court to evaluate Act 21 differently.

The SPI is in full compliance with the REINS Act. This is undisputed, except to the extent the Petitioners misrepresent what the REINS Act entails. Pet. Br. 8-11. The SPI is also in full compliance with the injunction upheld by this Court in *Coyne,* prohibiting the application of Act 21 to the SPI, the DOA, and the governor. 2016 WI 38, ¶ 1. The Petitioners have not alleged a single fact indicating this Court's decision in *Coyne* has created any inconsistency, difficulty, dispute, or any other factual basis constituting "special justification" to reverse its decision.

Perhaps the only fact that would have the potential to alter the outcome of *Coyne* is that two justices in the majority of *Coyne* have since left this Court. However, this fact weighs heavily against overturning *Coyne*, as "[n]o change in the law is justified by a change in the membership of the court." *Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 2006 WI 91, ¶ 32, 293 Wis. 2d 38, 717 N.W.2d 216.

iii. *Coyne* is sound in principle.

In *Coyne*, this Court settled the question as to whether the provisions of Act 21 are constitutional as applied to the SPI. *Coyne,* 2016 WI 38. In arguing the principle set forth by the case is unsound, the Petitioners' accurately summarize the extent of their argument – the "dissenting justices in *Coyne* got it right." Pet. Br. at 36. On its face, this argument fails to provide a "compelling reason" that would require this Court to overturn its decision. *See State v. Lynch*, 2016 WI 66, ¶¶ 208-209, 371 Wis. 2d 1, 885 N.W.2d 89

(Ziegler, J., dissenting) ("*Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent.* … [I]t is not alone sufficient that we would decide a case differently now than we did then.") (citing *Kimble v. Marvel Entm't, LLC*, 576 U.S. ——, 135 S.Ct. 2401, 2409, 192 L.Ed.2d 463 (2015) (emphasis in original)).

Setting aside the burden on the Petitioners to show "special justification" to overturn *Coyne*, this Court correctly decided that case in any event. The *Coyne* decision correctly identifies the constitutional infirmities that result from vesting the power to supervise public instruction in the governor, rather than the SPI as required under Wis. Const. art. X, § 1.

1. The supervision of public instruction necessarily involves rulemaking, regardless of whether rulemaking is a constitutional power.

In *Coyne*, this Court determined rulemaking is a necessary component of the SPI's supervision of public instruction:

> Because rulemaking is the only means by which the SPI and the DPI can currently perform most of their legislatively-mandated duties of supervision of public instruction, rulemaking is a supervisory power that the DPI and SPI must use to supervise public instruction.

Coyne, 2016 WI 38., ¶ 33. "[R]ulemaking is part of the 'supervision of public instruction' which Article X, Section 1 vests in the superintendent." *Id.*, ¶ 85 (Bradley, J., concurring). "It is self-evident that standards for schools

throughout Wisconsin could not be set without the power to make rules." *Id*., ¶ 150 (Prosser, J., concurring).

Without administrative rulemaking, the SPI could not carry out his or her constitutional duties to supervise the public education system. In Wis. Stat. ch. 42, which governs libraries, and Wis. Stat. chs. 115 through 121, which govern public instruction, the legislature has explicitly directed the SPI to engage in rulemaking in more than 70 instances.[1] For example, the SPI is required to engage in rulemaking to: set teaching licensing standards, Wis. Stat. § 115.28(7); establish the process to revoke teaching licenses, Wis. Stat. § 115.31(8); evaluate the effectiveness of teachers, Wis. Stat. § 115.413(3)(a); establish high school graduation standards, Wis. Stat. § 118.33(2); and implement and administer school district standards, Wis. Stat. § 121.02(5).

Though the Petitioners continue to assert the SPI's ability to make rules is not part of the SPI's supervisory power and deny the SPI has any supervisory power at all, this Court has settled this question in *Coyne:*

[1] *See* Wis. Stat. §§ 43.09(2); 43.11(3)(e); 43.24(1)(b); 43.24(2)(n); 43.70(3); 115.28(3m)(b); 115.28(5); 115.28(7)(a) and (c); 115.28(7)(e)2; 115.28(7)(h); 115.28(7m), 115.28(14)(a) and (b); 115.28(17)(a)-(c); 115.28(31); 115.28(59)(d); 115.29(4)(b); 115.31(8); 115.345(8); 115.36(3)(a)5; 115.366(1) and(2); 115.383(3)(c); 115.405(3); 115.415(3)(a); 115.42(4); 115.43(c); 115.435(3); 115.445(3); 115.745(3); 115.7915(10); 115.817(5)(b)3; 115.88(1m)(b);115.92(3); 115.955(7); 115.99; 118.045(3); 118.075(2)(f); 118.13(3)(a)2; 118.134(2) and (4)(a); 118.153(7); 118.19(3)(a), (4m), and (11); 118.20(7); 118.30(2)(b)2 and (3)(b); 118.33(2) and (4)(a); 118.35(2); 118.38(2)(bm); 118.42(4); 118.43(6m); 118.43(8)(b); 118.44(6)(e); 118.50(8); 118.51(d)1; 118.55(9); 118.60(11)(a); 119.23(11)(a); 120.13(19); 120.14(4); 120.18(3); 121.02(1)(a)2; 121.02(5); 121.05(4); 121.14(1)(a); and 121.54(9)(c).

"rulemaking is the means by which the Legislature has 'prescribed by law' that the SPI must carry out his Legislatively-defined duties of supervision." 2016 WI 38, ¶ 35. *See* Pet. Br. at 20, 23.

In addition to explicit statutory requirements, the SPI is required to issue as a rule "each statement of general policy and each interpretation of a statue which [he or she] specifically adopts to govern [his or her] enforcement or administration of that statute." Wis. Stat. § 227.10(1). A rule is defined as "a 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).

In other words, the SPI cannot engage in policymaking, whether it is a general policy or standard on public libraries, school district standards, or school aid payments, without promulgating an administrative rule. *See* Wis. Admin. Code chs. 6, 8, and 14. "[T]he 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 Bd.*, 119 Wis. 2d 168, 184, 349 N.W.2d 68 (1984). As such, this Court properly determined that rulemaking is necessary for the SPI to supervise public instruction.

2. Act 21 places the governor in a superior position to the SPI in the supervision of public instruction through rulemaking.

Coyne challenged Act 21's grant of plenary authority to the governor over the supervision of public instruction through rulemaking. *Coyne*, 2016 WI 38, ¶ 23. Justice Gableman determined that while the legislature has authority to give and take away rulemaking authority to the SPI, what the legislature may not do is to give the governor absolute control over the SPI's rulemaking activity. *Id*., ¶ 65. "By giving the governor the power to prevent the SPI's and DPI's proposed rules from being sent to the legislature, Act 21 gives the governor the authority to oversee, inspect, or superintend" public instruction." *Id*. Justices Abrahamson and A. Bradley agreed, stating that Act 21 gives "equal or superior authority over the supervision of public instruction to officers other than those inferior to the Superintendent." *Id*., ¶ 100. Similarly, Justice Prosser concludes that "a *constitutional* office must possess some inherent authority to proceed to fulfill its responsibilities," and that, "giving the governor complete authority to block a proposed rule by the superintendent of public instruction" is unconstitutional. *Id*. ¶154-155 (emphasis in original).

To sidestep the constitutional issues created by the governor having unchecked authority over the SPI, the Petitioners frame this case as a separation of powers issue between the SPI and the legislature. The Petitioners argue the dispute over Act 21 concerns "the extent to which the

legislature may qualify rulemaking authority it has granted to DPI and the Superintendent." Pet. Br. at 12. However, the dispute over Act 21 in *Coyne* and in this case has never concerned the separation of power between the executive and legislative branches.[2] The issue in *Coyne* is not concerning "procedural requirements designed to provide notice to the public and lawmakers, elicit feedback from interested parties, and allow for legislative … oversight." Pet. Br. at 16. There is no dispute in this action regarding these procedural checks.

Rather, the dispute in *Coyne* and in this case concerns "executive oversight" – the governor's authority over the SPI in the promulgation of rules that supervise public instruction. Pet. Br. at 16. More specifically, at issue is the governor's "complete authority to block a proposed rule by the superintendent of public instruction … even when the proposed rule is authorized – perhaps required – by statute and is submitted in complete conformity with statute." *Coyne*, 2016 WI 38, ¶ 154. The provisions of Act 21 found unconstitutional in *Coyne* delegated legislative power to the governor, *not* the legislature. *See* Wis. Stat. §§ 227.135(2) and 227.185.

In other words, this dispute concerns the power of two executive officers. By contrast, the separation of powers doctrine "is violated when one branch interferes with a constitutionally guaranteed 'exclusive zone' of

[2] The legislature has a long-standing process for the review of administrative rules, including review by the JCRAR. *See* Wis. Stat. § 227.19.

authority vested in another branch." *Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis.2d 687, 697, 478 N.W.2d 582 (1992).

Just like in *Thompson v. Craney*, the constitutional issue with Act 21 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 689-699. Simply put, in this dispute, as in *Coyne*, the power of the legislature is *not* at issue.

3. Act 21 fails to provide any safeguards on the governor's ability to prevent the SPI's promulgation of rules.

The Petitioners claim that because the legislature may define the procedure for exercising delegated legislative power, that the legislature can therefore condition the SPI's promulgation of all rules on the governor's discretionary approval. Pet. Br. at 22. This is simply not true. The legislature may only delegate its authority when there are "procedural and judicial safeguards against arbitrary, unreasonable or oppressive conduct..." *State Dept. of Admin. v. Dept. of Industry*, 77 Wis. 2d 126, 135, 252 N.W.2d 126 (1977) (citing *Schmidt v. Dept. of Local Affairs and Development*, 39 Wis. 2d 46, 158 N.W.2d 306 (1968)). This requirement applies to both the administrative agencies that promulgate the rules *and the entities to which the legislature delegates its authority to review the rules*. *Martinez*, 165 Wis. 2d at 698.

In *Coyne*, Justice Prosser expressed particular concern with the scope of authority Act 21 afforded the governor in this context:

> These changes in the law vest the governor with the power to suppress publication of the scope of a proposed rule and thus prevent the individual or body with policy-making power over the subject matter of the rule from approving any statement of scope.

2016 WI 38, ¶ 127. He noted that Act 21 gives the governor "absolute veto power," which is a "check without a balance." *Id*., ¶ 155. In Act 21, the legislature delegated authority to review rules to the governor without any "procedural and judicial safeguards against arbitrary, unreasonable or oppressive conduct..." *State Dept. of Admin. v. Dept. of Industry*, 77 Wis. 2d at 135.

In contrast, the legislature's delegation of power to the JCRAR illustrates appropriate procedural and judicial safeguards. After a legislative standing committee receives a proposed rule, it has 30 days, or in some cases up to 60 days, to review the proposed rule. Wis. Stat. § 227.19(4)(b)1. Based upon its review, the committee may object to the proposed rule. Wis. Stat. § 227.19(4)(d). Importantly, the committee's objection must be based on at least one of seven statutory reasons, which include: an absence of statutory authority, a failure to comply with legislative intent, and arbitrariness and capriciousness. *Id*. An objection does not stop the rule from being promulgated.

After the standing committee completes its review of the proposed rule, the committee must refer the rule within five days to JCRAR. Wis. Stat. §§ 227.19(4)(e) and (5)(a). JCRAR then has 30 days, or in some cases up to 60 days, to review the proposed rule. Wis. Stat. § 227.19(5)(b)1. JCRAR may only object to a rule based on the same seven statutory reasons as a standing committee may use. Wis. Stat. § 227.19(5)(d). If JCRAR objects to the proposed rule, it can only prevent the rule from being promulgated by introducing bills into both houses of the legislature. Wis. Stat. § 227.19(5)(e). If either bill passes both houses of the legislature and is signed by the governor, the proposed rule cannot be promulgated. Wis. Stat. § 227.19(5)(f). However, if both bills are defeated or fail to be enacted, the agency may promulgate the proposed rule. Wis. Stat. § 227.19(5)(f).

The consistent theme with these steps in the rulemaking process is that there are specific standards and procedures each entity must use when reviewing a proposed rule. At no point in the review process does a legislative entity, like JCRAR or a standing committee, have unqualified or unchecked power to reject a rule.

In *Martinez*, this Court unanimously upheld this statutory scheme in the face of a separation of powers and delegation of power challenge. 165 Wis. 2d 687. The Court in *Martinez* recognized that legislative power may be delegated "as long as adequate standards for conducting the allocated power are in place." *Id.* at 697. Because Wis. Stat. § 227.19 allowed JCRAR

to suspend a rule based on specific statutory grounds, the "law set forth adequate standards for JCRAR to follow when exercising its powers." *Id.* at 698. The JCRAR statutory scheme also "furthers bicameral passage, presentment and separation of powers principles by imposing *mandatory checks and balances* on any temporary rule suspension." *Id*. at 699 (emphasis added). The *Martinez* court also noted that it agreed "with the attorney general's statement that 'the legislature could empower itself or a committee of its members to affirm or set aside an agency's rule *if the legislature or the committee were subject to proper standards or safeguards*." *Id*. at 701, citing 63 Op. Att'y Gen. at 162. This Court, therefore, unanimously upheld JCRAR's suspension power because it was "delegated to [JCRAR] pursuant to legitimate *legislative standards*, and, furthermore, *sufficient procedural safeguards are available* to prevent unauthorized decisions by [JCRAR]." *Id*. at 702 (emphasis added).

The holding in *Martinez* makes it clear that *all* delegations of legislative power in the rulemaking process, including those to the governor in Act 21, must be subject to proper standards and safeguards in order to be constitutional. If a legislative entity's review of administrative rules must be subject to proper legislative standards and procedural safeguards, it is axiomatic that a delegation of power to a sister branch, like the governor in the executive branch, must also be subject to such standards and safeguards.

The governor's exercise of power under Act 21 is not constrained by *any* legislative standard or checked by *any* procedural safeguard. Act 21 simply states that a scope statement cannot be published "until the governor issues a written notice of approval of the statement." Wis. Stat. § 227.135(2). Similarly, Act 21 provides that "the governor, *in his or her discretion*, may approve or reject the proposed rule." Wis. Stat. § 227.185 (emphasis added). Unlike the delegation of authority to JCRAR, Act 21 "gives the Governor … the unchecked power to halt the SPI's and DPI's promulgation of rules on any aspect of public instruction…" *Coyne*, 2016 WI 38, ¶ 71.[3] No one – not even the legislature – can override the governor's decision to withhold his or her approval of a scope statement or proposed rule.[4] And the governor is not required to act within any timeframe.[5] The governor's power over rulemaking is absolute. Thus, Act 21 is an unconstitutional delegation of legislative power to the governor because it lacks any legislative standards and procedural safeguards. As Justice Prosser summarized: "Governing entails more than saying 'no.'" *Id*, ¶169.

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[3] The Petitioners try to avoid this infirmity by arguing that the legislature could simply pass a law to promulgate an administrative rule if the governor vetoed a rule. Pet. Br., 31, n.14. As discussed above, this Court has long held that *all* delegations of legislative power must contain safeguards.

[4] The legislature rejected an amendment to Act 21 which would have permitted the legislature to override the governor's decision. Assem. Amend. 13 – Assem. Sub. Amend. 1 – 2011 WI Assem. Bill 8.

[5] The legislature also rejected an amendment to Act 21 which would have deemed a proposed rule approved if the governor did not act within 30 days. Assem. Amend. 12 – Assem. Sub. Amend. 1 – 2011 WI Assem. Bill 8.

iv. *Coyne* has not created any incoherence or inconsistency in the law.

Coyne is sound in principle and is consistent and coherent with this Court's interpretation of Wis. Const. art. X, § 1 and the delegation of legislative power. *See Thompson*, 199 Wis. 2d at 698 ("…the office of state Superintendent of Public Instruction was intended by the framers of the constitution to be a supervisory position"). In contrast, the Petitioners argue in favor of *creating* incoherence and inconsistency by advocating for this Court to overrule multiple decisions of this Court, including this Court's stated analysis for interpreting provisions of the Wisconsin Constitution. Pet. Br. at 18, n.12. Rather than argue how *Coyne* is inconsistent with the law, the Petitioners argue their own superficial, conclusory reading of Article X, § 1 is sufficient to overrule *Coyne*. Pet. Br. at 18-22. In doing so, the Petitioners ignore the consistent, coherent analysis of Article X, § 1 articulated in *Thompson*, which is grounded in longstanding historical interpretations of that section, as discussed fully in Section IV, *infra*. 199 Wis. 2d at 680. But, in order to overturn *Coyne*, the Petitioners also see no problem in overruling what has served as the authoritative interpretation of Article X, § 1 for over 20 years.

In turn, rather than argue why the interpretation of Article X, § 1 in *Thompson* is inconsistent with the three-part analysis for interpreting provisions of the Wisconsin Constitution applied by this Court for more than

40 years, the Petitioners argue this Court should simply abandon that analysis altogether. *See* Pet. Br. at 18, n. 12 (arguing the three-part constitutional analysis first formalized in *Busé v. Smith* 74 Wis. 2d 550, 568, 247 N.W.2d 141 (1976), is "inconsistent with rule of law principles.") The Petitioners boldly assert the "historical materials cited in this area in cases like *Coyne* or *Thompson v. Craney*" are irrelevant. Pet. Br. at 18.

In other words, the Petitioners request to overturn *Coyne* does not merely challenge the doctrine of stare decisis. The Petitioners request to overturn *Coyne* also depends on overturning multiple decisions of this Court representing decades of settled law and entirely disregarding any historical context that could aid in interpreting the very constitutional provision at the heart of this dispute. The Petitioners utterly fail to demonstrate their desired outcome is the path to consistency and coherency.

v. The rule of law settled by *Coyne* works in practice.

Outside of the provisions of Act 21 that this Court declared unconstitutional, the SPI is promulgating rules pursuant to the procedural requirements prescribed by the legislature without issue. The legislature has not taken steps to modify the unconstitutional provisions of Act 21, though this Court provided guidance on how to appropriately do so. The DOA and the governor have not taken any action to violate the injunction upheld by this Court in *Coyne*, nor have they expressed any intent to do so. It appears

the legislative branch, the executive branch, and the SPI view *Coyne* as working just fine in practice.

Further, the decision in *Coyne* is very limited. The legislature is still free to review and block rules proposed by the SPI, as provided in Wis. Stat. § 227.19, because *Coyne* did not impact the legislature's "control over what powers the SPI and the other officers of supervision of public instruction possess in order to supervise public instruction." 2016 WI 38, ¶ 70. And, consistent with *Fortney v. School Dist. of West Salem*, 108 Wis. 2d 167, 321 N.W.2d 255 (1982), the legislature is still free to reduce the SPI's supervisory powers, as the legislature "may give, may not give, and may take away the powers and duties of the SPI and other officers of supervision of public instruction." *Coyne*, 2016 WI 38, ¶ 70.

III. *THOMPSON v. CRANEY* IS NOT APPLICABLE TO THIS DISPUTE AND, EVEN IF IT WERE, IT WAS CORRECTLY DECIDED.

In *Thompson*, this Court held that the SPI could not be inferior to an "other officer" in the supervision of public instruction. 199 Wis. 2d at 699. At issue in *Thompson* was whether the legislature could create a separate department of education to be headed by a gubernatorial appointee, the secretary of education, and nominally supervised by a state board of education appointed by the governor. *Id*. at 677-678. This Court unanimously held that this was unconstitutional. *Id*.

The Petitioners claim *Thompson* is unsound in principle, because Art. X, § 1 cannot be read to require the SPI to be in a superior position to "other officers." Pet. Br. at 46. In support of this claim, the Petitioners fail to apply this Court's three-part analysis applicable to the interpretation of constitutional provisions, and instead argue the three-part analysis should be ignored. Pet. Br. at 18, n. 12.

The interpretation of a constitutional provision "envisions more intense review of extrinsic sources." *Dairyland Greyhound Park*, 2006 WI 107, ¶ 115, 295 Wis. 2d 1 (Prosser, J., Wilcox, J., and Roggensack, J. concurring in part, dissenting in part). This review is focused on the framers' purpose and intent. *Id*. at ¶ 19 (citations omitted). To determine the framers' intent and purpose, the *Thompson* court considered the appropriate factors: (1) the plain meaning of the language; (2) the constitutional debates and practices of the time; and (3) the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption. *Thompson*, 199 Wis. 2d at 680 (citing *Polk County v. State Pub. Defender*, 188 Wis. 2d 665, 674, 524 N.W.2d 389 (1994)).

a. The plain language of Article X, § 1 supports *Thompson*.

Unlike the *Thompson* Court, the Petitioners show little regard for the framers' purpose and intent. Instead, the Petitioners rely on a brief, superficial examination of only the plain language of Art. X, § 1 to declare the SPI is not required to be superior to "other officers." Pet. Br. at 46. In

doing so, the Petitioners ignore the second and third factors of constitutional interpretation, which are the "surest guides to a proper interpretation of the role of the SPI." *Thompson*, 199 Wis. 2d at 698. But before addressing these factors, the Petitioners also misread the plain language of Art. X, § 1. The first sentence of Article X, § 1 reads:

> 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.[6]

As defined by dictionaries contemporary to the constitutional debates, the term "supervision" means:

> To have or exercise the charge or oversight of; to oversee with the power of direction; to take care of with authority; as an officer superintends the building of a ship or the construction of a fort. God exercises a superintending care over all his creatures.

Thompson, 199 Wis.2d at 683 (quoting *Webster's An American Dictionary of the English Language*, new rev. ed. 1847-50).

This power of direction "shall be vested," thus making it mandatory that the power is vested in the SPI. "Vested" means "fixed; not contingent, as rights." Noah Webster, *Dictionary of the English Language: Abridged*

[6] Before the 1902 amendment, the first sentence of Article X, § 1 read: "The supervision of public instruction shall be vested in a state superintendent, and such other officers as the legislature shall direct."

from the American Dictionary (1845). As such, the legislature is not free to remove the SPI's power of supervision.[7]

Furthermore, the "state superintendent" and the "other officers" are not similar or interchangeable. By using the word "state," the framers meant for the SPI to have authority over the entire state, in stark contrast to "other officers." And "superintendent" means "one who has the oversight and charge of something with the power of direction." *Thompson*, 199 Wis. 2d at 683 (quoting *Webster's An American Dictionary of the English Language*, new rev. ed. 1847-50). The SPI, not "other officers," is the one who has oversight and charge of statewide public instruction. Simply put, the SPI cannot have "direction" and "oversight" of statewide public instruction if another officer is superior to him or her.

Even if Article X, § 1 is ambiguous, as the *Thompson* court determined,[8] the last sentence of Article X, § 1 refutes any argument that the legislature can make the *governor*, in particular, an "other officer of supervision of public instruction," let alone one superior to the SPI. The last

[7] Article X, § 1 is one of only four constitutional provisions that "vests" power. *See* Article IV, § 1 (vesting legislative power in the Senate and Assembly); Article V, § 1 (vesting executive power in the governor); and Article VII, § 2 (vesting judicial power in the courts).

[8] The *Thompson* court stated that the first sentence was ambiguous because "it can be read either as granting the power of supervision solely to the SPI, or as granting power to both the SPI and the 'other officers' referred to in the section." *Thompson*, 199 Wis.2d at 684.

sentence of Article X, § 1 reads: "The term of office, time and manner of electing or appointing *all other officers* of supervision of public instruction *shall be fixed by law*." (emphasis added). By replacing "all other officers of supervision of public instruction" with "governor," the last sentence of Article X, § 1 would read: "The term of office, time and manner of electing or appointing [the governor] *shall be fixed by law*." (emphasis added). This creates obvious conflicts: the governor's term of office is set by Article VI, § 1, not by law; the time and manner of electing the governor is set by Article VI, § 3 and Article XIII, § 1, not by law; and the legislature cannot, by law, set forth a manner for appointing the governor. Therefore, the plain language of Article X, § 1 demonstrates that the governor cannot be an "other officer."[9] *See also*, *Coyne*, 2016 WI 38, ¶ 45 ("When the plain language of Article X, § 1 is read within the context of the entire section, it becomes clear that the 'other officers' in whom the legislature may vest the supervision of public instruction are other officers *of supervision of public instruction.*")

b. Thompson follows the intent of the constitutional debates and the 1902 amendment.

The second step in analyzing a constitutional provision is to review the constitutional debates. After thoroughly reviewing the debates of the

[9] The structure of the Constitution itself also shows that the governor was not intended to be an "other officer" within the meaning of Article X, § 1. The governor's powers and duties are set forth only in Article V, not Article X. Clearly, by creating a separate articles for educational officers, the framers must have intended "other officers" to be distinct and separate from the governor.

1846 and 1847-48 constitutional conventions, the *Thompson* court correctly determined 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 appointed, public official." *Thompson*, 199 Wis. 2d at 685. In addition, the *Thompson* court determined that there was "nothing in the 1846 and 1848 debates which supports [the] contention that the SPI and the 'other officers' were intended to be coequal." *Id*. at 687.

The 1902 amendment to Article X, § 1 also demonstrates that the SPI was not meant to be equal with "other officers." When interpreting the intent of a constitutional amendment, this Court will look at the problem the amendment sought to address:

> But the intent [of a constitutional amendment] is to be ascertained, not alone by considering the words of any part of the instrument, but by ascertaining the general purpose of the whole, in view of the evil which existed calling forth the framing and adopting of such instrument, and the remedy sought to be applied; and when the intent of the whole is ascertained, no part is to be construed so that the general purpose shall be thwarted, but the whole is to be made to conform to reason and good discretion.

Thompson, 199 Wis. 2d at 691 (quoting *State ex. Rel. Ekern v. Zimmerman*, 187 Wis. 180, 184, 204 N.W. 803 (1925)). Superintendent Lorenzo Dow Harvey was the author and primary proponent of the 1902 amendment. As shown by his prolific correspondence, Harvey had two purposes for the amendment: (1) strengthen the position of SPI and (2) reform the county superintendency system.

One of the ways Harvey sought to strengthen the position of SPI was to make it nonpartisan:

> The very purpose of the amendment is to put the office on the same basis as the judiciary, where men will be selected because of their fitness, and voted [for] the same reason.
>
> The other side of the opposition is that the men who engineered the deal to nominate Mr. Cary and other men who are rollovers of this class, do not wish to see the office taken out of politics. They want to make it a part of the political machine, and it can be made a very effective part if it is organized for that purpose.

Letter from L.D. Harvey to Mrs. S.L. Graves (October 15, 1902). *See also*: Letter from L.D. Harvey to Miss Rose C. Swart (October 15, 1902)("You can see if the [SPI] is properly organized for political work, it can be a very effective part of the political machine."); Letter from L.D. Harvey to Thomas A. Fitzsimons (October 13, 1902)("[O]thers hope to defeat [the amendment] because they do not wish to see [the SPI] taken out of politics…"); Letter from L.D. Harvey to C.G. Shutts (October 15, 1902); and Letter from L.D. Harvey to T.W. Boyce (October 18, 1902). Harvey also stated the intent of the amendment in newspaper circulars:

> [The SPI's] various duties bring him into close official relations with people of all political opinions and in matters which should be decided without reference to political bias. Of all the officers in the state government it is the one which should be entirely free from political influences of bias. For this reason this officer should be chosen because of his professional and administrative ability in educational work and not because of his political belief. The office should be put upon the same plane with the judiciary, where men are elected because of their fitness, and at the spring election, when no political issues divide parties. The proposed amendment aims

> to take this office out of politics by putting the election in spring, at the same time the judges are elected.

The Daily Northwestern, Thursday Evening, January 30, 1902.

In addition to strengthening the position of the SPI, Harvey intended to provide the legislature with flexibility to address the problems associated with the county superintendency system, including removing the influence of partisan politics from it. *See* Letter from L.D. Harvey to C.G. Shutts (October 15, 1902). Harvey wanted the legislature to have the flexibility to reorganize the *local* school system in the future, not the ability to relegate the SPI to an inferior or meaningless position. Harvey's discussion of legislative flexibility never extended to the SPI. The attorney general recognized this in an opinion dated June 20, 1919:

> It seems perfectly clear to me that when the amendment of 1902 was proposed in the legislature and when it was adopted by the people the intent was to give the legislature full and complete power of determining the term of office and the time and manner of electing or appointing *county superintendents of schools*.

8 O.A.G. 509 (1919) (emphasis added). Therefore, the *Thompson* court determined the 1902 amendment "demonstrates that the 'other officers' mentioned in the amendment are solely local officials, subordinate to the [SPI." *Thompson*, 199 Wis. 2d at 693 (citations omitted).

c. *Thompson* correctly interpreted the first laws related to education.

The final step to interpret a constitutional provision is to review the first laws related to the provision. *Dairyland Greyhound Park*, 295 Wis. 2d at ¶ 117 (Prosser, J., Wilcox, J., and Roggensack, J. concurring in part, dissenting in part). When interpreting Article X, § 1, the *Thompson* court carefully examined the first laws related to education enacted after the 1848 convention and the 1902 amendment. *Thompson*, 199 Wis. 2d at 693-98.

The first law related to education set forth the duties of the SPI. *See* L. 1848, at 127-29. Significantly, the 1848 law provided that the SPI – not an "other officer" – had "general supervision over public instruction in this state." *Id*. And, as the *Thompson* court correctly observed, the 1848 law provided the SPI with "several duties which clearly included supervisory or administrative powers," including the power to "apportion school funds between townships, to propose regulations for making reports and conducting proceedings under the act, and to adjudicate controversies under the school lands." *Thompson*, 199 Wis. 2d at 694; L. 1848 at 127-29.

The first laws related to "other officers" demonstrates that those officers were inferior to the SPI. Specifically, the first laws created "common schools" which were overseen by elected town superintendents. L. 1848 at 209-26, 226-47. The 1848 law provided:

> The superintendent of common schools shall in all cases be under the control and direction of the state superintendent of public instruction and shall whenever called on by the state superintendent give any information in his possession relating to the several schools in town.

L. 1848 at 219.

The Petitioners ignore the 1848 law almost in its entirety, except for one provision, selectively conveyed to this Court, which states in full: "to perform such *other* duties as the legislature or governor of this state may direct." L. 1848 at 129 (emphasis added). The Petitioners omit the word "other," because that word requires the SPI to perform those duties as directed by the governor *other* than what the legislature has defined as the supervision of public instruction. That is, unlike Act 21, the 1848 law does not state that the duties and authority assigned to the SPI by the legislature to supervise public instruction are contingent upon, or subservient to, the absolute discretion of the governor. *Id*.

Regardless, the Petitioners interpretation of the 1848 law conflicts with the first law related to education passed after the 1902 amendment. Under that law, the legislature again reaffirmed that the SPI had "general supervision over the common schools of the state." L. 1903, Ch. 37. Absent from this law was any reference to performing any duties as directed by the governor. *Id*. The SPI also had the duty to: prohibit sectarian books and instruction; prescribe rules and regulations for managing school libraries and penalties for violations; to hear appeals and prescribe rules for such proceedings; and to apportion and distribute school fund income. *Id*. As the *Thompson* court observed, "Just as in the laws passed following the first

constitution in 1848, this act did not provide for any 'other officer' with supervision powers superior or equal to the SPI." *Thompson*, 199 Wis. 2d at 697. Simply put, the *Thompson* court carefully – and correctly – analyzed the first laws, which show the framers' intent that the SPI is superior to "other officers."[10]

d. *Thompson* is consistent with the longstanding historical interpretation of Article X, § 1.

By reviewing the plain language, constitutional debates, and first laws, the *Thompson* court properly interpreted Article X, § 1. This analysis is consistent with the longstanding historical interpretation of Article X, § 1, codified in Wis. Stat. § 118.01(1):

> Public education is a fundamental responsibility of the state. The constitution vests in the state superintendent the supervision of public instruction and directs the legislature to provide for the establishment of district schools. …

By contrast, school boards have supervisory power over their own local districts. Wis. Stat. § 120.12(2). This is consistent with the "other officers" language of Article X, § 1 and the legislature's power to create school districts under Wis. Const. art. X, § 3.

A review of Chapters 115-121 demonstrates this consistent interpretation: the SPI is the superior officer for the statewide supervision of

[10] The first law related to "other officers" after the 1902 amendment moved the election date of county superintendents to the spring, thus fulfilling Harvey's intent to make the positions nonpartisan. L. 1903, Ch. 307.

public instruction while local school boards oversee their local school districts. Because the legislature has consistently interpreted Article X, § 1 as making the SPI superior to "other officers," this interpretation is conclusive. *See State v. Coubal*, 248 Wis. 247, 256, 21 N.W.2d 381 (1946).

In an attempt to redefine what has been the longstanding historical interpretation of Article X, § 1, the Petitioners attempt to find "other officers" in history created by the legislature that were not subordinate to the SPI. Pet. Br. at 48. The Petitioners claim "[n]one of those people were subordinate to the [SPI]," even though each of the positions listed by the Petitioners was, in fact, subordinate to the SPI. *Id*.

The Petitioners first point to a statute from 1915 that created a State Board of Education. *Id*. (citing L. 1915, Ch. 497). This board did not supervise public instruction. Specifically, the board was responsible for evaluating and auditing the finances of the state's educational entities. L. 1915, Ch. 497. The State Board of Education did not supervise K-12 education. As the Attorney General stated in 1948:

> [T]he state board of education set up by ch. 497, Laws 1915, affords no precedent for claiming that power to supervise public instruction may be vested in such a board in any degree whatsoever, as the powers of that board were confined to the financial matters affecting the various educational units of the state and there was no attempt to give it any power directly to supervise public instruction.

37. O.A.G. 82, 85 (1948).

The Petitioners also claim that the Laws of 1848 gave authority to license school teachers to town superintendents, and that these individuals were not subordinate to the SPI. Pet. Br. at 48. However, the relevant licensing statutes demonstrate the opposite: the ability to license teachers to teach anywhere in the state has only been vested in the SPI. The first law related to "certifying" teachers only permitted town superintendents to certify teachers to teach in their *own* districts by issuing a certificate prescribed by the SPI.[11] L. 1848, Ch. 226. Between 1861 and 1863, further changes were made to local licensing: town superintendents were replaced with county superintendents; county superintendents were required to administer evaluations with standards established "under the advice and direction" of the SPI; and individuals could appeal license denials to the SPI. L. 1861, ch. 179; L. 1862, Chs. 102 and 176. Licenses issued by these local officials were only valid in their own districts. In 1868, the first statewide teacher license was created. L. 1868, Ch. 169. Notably, only the SPI had the authority to issue such a license and promulgate licensing rules, a power that continues to this day. *Compare Id.* and Wis. Stat. §§ 118.19-118.194. In 1939, the legislature abolished local teacher licensing, permitting only the SPI to issue any type of teaching license. Wis. Stat. § 39.15 (1939).

[11] The law specifically required town superintendents to evaluate teacher candidates to see if they had the "moral character, learning, and ability" to teach in their district. L. 1848 at 226. This is little different than school boards' current power to evaluate and hire teaching candidates. Wis. Stat. §§ 118.21 and 118.225.

Next, the Petitioners claim that the SPI is not superior to local school officers because he or she cannot "countermand" those officers. Pet. Br. at 49. This is simply untrue. Numerous actions by local board actions are reviewed by the SPI. *See e.g.,* Wis. Stat. § 118.33(4) (SPI reviews boards' high school graduation standards); Wis. Stat. § 118.51(9) (SPI hears appeals from school board open enrollment denials); and Wis. Stat. § 115.762 (SPI oversees local special education programs). More importantly, the SPI can withhold state funds from local school districts if "the scope and character of the work are not maintained in such manner as to meet the state superintendent's approval." Wis. Stat. § 121.006.

The Petitioners next assert that because other agencies promulgate rules that impact schools, *Thompson* is inconsistent with the historical interpretation of Article X, § 1. Statutes, not administrative rules, can be used to show a constitutional provisions' long-term interpretation. *See Coubal*, 248 Wis. at 256. Even if administrative rules are relevant, the three proffered examples are either unrelated to the supervision of public instruction or, at best, are tangentially related. For example, the Petitioners cites Wis. Admin. Code § DWD 270.19, which permits minors to perform "worklike activities" at school without compensation. This rule governs what constitutes child labor, not the supervision of public instruction (DWD Chapter 270 is titled "Child Labor"). Similarly, the Petitioners mention the Department of Safety and Professional Service's oversight of building codes for schools. Pet. Br.

at 26. These laws address how to build buildings, not how to educate children..

The Petitioners also claim *Thompson* is inconsistent with this Court's earlier decision in *Fortney*, 108 Wis. 2d 167. The Petitioners are only able to point to dicta in that case, which was decided before *Thompson* – as a single example of a "conflict" with *Thompson*. Pet. Br. at 46-47. But *Fortney* is inapplicable because it did not address the division of supervisory power between the SPI and "other officers." *Fortney* addressed, in part, whether a collective bargaining agreement was unconstitutional under Article X, § 1 as an infringement on the constitutional hiring and firing power of school boards. *Fortney*, 108 Wis. 2d at 181-82.

Finally, the Petitioners argue that the governor already supervises public instruction because the governor can veto bills affecting public instruction and he or she introduces the state budget. Pet. Br. at 49. This argument completely ignores the difference between enacting laws that supervise public instruction and executing laws that supervise public instruction. The constitution clearly provides the governor may veto legislation that has passed the legislature. This legislation might relate to public instruction, but this does not mean that the constitution gives the governor the power to supervise public instruction. Article X, § 1 gives that power to the SPI.

Therefore, the *Thompson* decision is consistent with this Court's mode of constitutional interpretation and the longstanding historical interpretation of Article X, § 1.

CONCLUSION

Since statehood, the supervision of public instruction has been vested in an independent, constitutional officer, the SPI. This Court has consistently recognized that important role. The Court has further recognized that a change to this role can only be implemented by the people of this State:

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

Coyne, 2016 WI 38, ¶ 79. The Petitioners fail to demonstrate how the SPI is out of compliance with the REINS Act, or why this Court should reverse its decisions in *Coyne* and *Thompson*. Therefore, this Court should deny the relief sought by the Petitioners.

Dated this 24th day of September, 2018.

Respectfully submitted,

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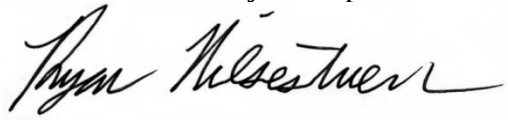
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 10,535 words.

Dated this 24th day of September, 2018.



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CERTIFICATION REGARDING ELECTRONIC BRIEF

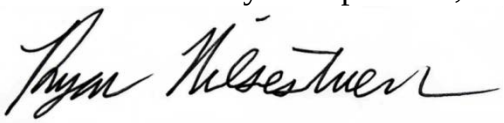
PURSUANT TO WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with this Court and served on all opposing parties.

Dated this 24th day of September, 2018.



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