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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' REPLY BRIEF

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INTRODUCTION

The overriding theme of Respondents' Brief is that the term "supervision" in Article X, Section 1 of the Wisconsin Constitution has an obvious and extremely broad meaning, although they can't quite explain to the Court what it is. They can cite a dictionary, and give some *ipse dixit* examples of things that definitely are supervision (apparently, all educational rulemaking) and things that definitely are not (educational rulemaking by somebody other than the Superintendent or DPI). But they never offer a coherent explanation for how to tell whether something is supervisory or not.

Thankfully, the Constitution itself provides the answer. Or rather, the Constitution makes clear that it isn't providing an answer, but directing the legislature to decide what constitutes the "supervision" that the Superintendent will perform. In other words, it anticipated that a term like "supervision" could leave a lot of unanswered questions, and instructed the legislature (not the courts) to fill in the blanks. Petitioners ask this Court to respect that the Constitution left the definition of "supervision" to the legislature.

ARGUMENT

I) THE GOVERNOR'S REVIEW HAS ALWAYS BEEN PART OF THIS ORIGINAL ACTION

The Respondents waste time reiterating, for the third time, their failed argument that the only question at issue in this case is whether they must submit statements of scope to the Department of Administration. (Resp. Br. 4-10.) This was the basis for their failed motion to dismiss and it is still wrong. The Petitioners are claiming that the Respondents must comply with the Chapter 227 rulemaking procedure as it currently exists, including Wis. Stat. § 227.135(2) (requiring gubernatorial approval of scope statements), and § 227.185 (requiring gubernatorial approval of final rules). This requires the Court to reconsider its decision in *Coyne v. Walker*.

This is not inconsistent with the Petitioners' referral to the REINS Act. The REINS Act made the statutes what they are. It is those statutes – including Wis. Stat §§ 227.135(2) and 227.185 – that the Petitioners are seeking to enforce. The Respondents' somewhat metaphysical[1] discussion

[1] The classic philosophical puzzle of Theseus' Ship examines a ship that is replaced plank by plank, with the discarded planks used to construct a replica. The question is whether either or both of the two resulting ships share an identity with the original. *See* Andre Gallois, *Identity Over Time*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., Winter 2016 ed.), https://plato.stanford.edu/archives/win2016/entries/identity-time/. Our task is more prosaic. Must the Respondents comply with Wis. Stat § 227.135(2) and 227.185, among other portions of the statutory rulemaking process?

of whether an Act that variously amends and reenacts parts of a comprehensive statutory scheme is a proper referent for that re-enacted scheme might be more relevant if the Petitioners were attempting to mask which parts of the scheme are at issue in this action. But the Petitioners have never "hidden the ball." Their challenge has encompassed the full suite of requirements from day one. (*See* Pet. ¶¶10-12, 14, 18, 23-24, 26-27; *see also, e.g.,* Pet. Br. 5 n.1.

II) *COYNE v. WALKER* SHOULD BE OVERRULED

The bulk of Respondents' brief is devoted to arguing that *Coyne v. Walker*, barely two years old and lacking a coherent majority, is settled and well-established law that should be left alone. But a proper analysis demonstrates that it is an aberration of constitutional law that ought to be corrected.

A) Developments in the Law Demonstrate *Coyne's* Invalidity

Respondents argue that the law has not developed in a way that would call into question *Coyne's* conclusion. But the trend in American governance has been toward the sharper curtailment of administrative agency authority. We are reaching consensus that the administrative state makes too much law. One of the primary ways to restore legislative

primacy is increased review of (and limitations on) administrative rule-making. *See generally* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2 (2017) (discussing recent legislative and judicial efforts to roll back the administrative state), Courts have become more vigilant protecting and maintaining the vital separation of powers that buttresses our modern democracy. For example, in *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 2, this Court ended the practice of allowing courts to defer to legal conclusions made by administrative agencies. The law has developed toward courts curbing power grabs by administrative agencies. *See*, *e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("There's an elephant in the room with us today. . . . [T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.").

That push is most obviously demonstrated in Wisconsin by the REINS Act itself. Respondents' insinuation that the Legislature was silent

in the face of the *Coyne* decision (Resp. Br. 15) is preposterous. In response to *Coyne*, the Legislature doubled down and passed the REINS Act as a way to further limit their delegation of legislative authority to administrative agencies. The Respondents complain that rulemaking must be accompanied by discernable standards but that applies to the agency making the rules. The legislature, in addition to specifying those standards, has added the additional safeguards of the Department of Administration's determination of legal authority and gubernatorial approval of scope statements and final rules.

Rather than supporting the result in *Coyne*, every legal weather vane points to a conclusion that the case was wrongly decided and cannot stand.

B) *Coyne* Creates Incoherence and Inconsistency

Respondents complain that the Legislature didn't follow the "legislative roadmap" that *Coyne* provided. But exactly which opinions provide such a map? The lead opinion? Justice Prosser's concurrence? Those were the opinions of individual justices. Justice Abrahamson's concurrence? Only two justices there. *Coyne* provides no legislative roadmap, just three paths proceeding in at-times opposite and incompatible

directions that only incidentally wind up in the same place. The single opinion with the most support was a dissent.

The disparate opinions that produced a result untethered to any reasoning cannot be reconciled. (*See* Pet. Br. 28-34.) It is the kind of decision that leads to confusion and therefore inconsistency in lower courts, creating the real possibility that attorneys and even judges will cite the lead opinion of a single justice as the binding, precedential reasoning of the Court. Even Respondents make that mistake. (*E.g.*, Resp. Br. 19, 29.)

Respondents argue that *Coyne* establishes that "supervision" in the language of Article X, Section 1, necessarily requires "rulemaking." (Resp. Br. 17-18.) They even claim that a majority of justices in *Coyne* reached that decision. That is false. Justice Gableman did conclude that "supervision" requires "rulemaking," but only because the legislature had required it. *Coyne*, 2016 WI 38, ¶33 (lead opinion). In his view, it could take rule-making authority away. *Id.*, ¶70. Justices Abrahamson and A.W. Bradley, though voicing agreement with portions of Justice Prosser's decision pertaining to the inherent authority of the Superintendent to make rules, seemingly declined to definitively resolve whether "supervision" must always include the power to make rules and merely said that

rulemaking was one part of supervising. *Id.*, ¶¶85-89, 107-09 (Abrahamson, J., concurring). Justice Prosser is, in fact, the only Justice who unreservedly concluded that the Superintendent must have "some" inherent authority to make rules but he disagreed with the proposition that no rulemaking may be given to other officers. *Id.*, ¶¶157-59 (Prosser, J., concurring). Although he objected to the Governor's unqualified ability to block rules, he did not opine on other legislative solutions. *Id.*, ¶150 (Prosser, J., concurring). There is no roadmap. There is no road.

There is no logical reason why "supervision" requires rulemaking. Rulemaking is by definition a legislative power, while supervision at most implies the enforcement of rules – an executive power. The Constitution does not grant legislative power to the Superintendent.

Coyne is also incoherent because it employs a methodology that uses "law office history" to reach a result that contradicts the plain language of the Constitution. Turning to external sources of interpretation as a way to specifically contradict the actual language used by the framers is an illegitimate approach to constitutional interpretation.

External aids can be helpful tools to interpret ambiguous provisions, but they should never be used to adopt a meaning contradicted by the actual

language. Judges are not historians and litigation is not a good vehicle for a thorough and dispassionate examination of the full historical record. Sometimes ambiguity requires extrinsic help, but allowing external materials to change the plain meaning of constitutional language permits judges to substitute their own opinions on how best to set up a government for the decisions of those who wrote and adopted our Constitution.

Tellingly, Respondents repeatedly emphasize "the framers' purpose and intent" (rather than the text) in their analysis of Article X, § 1 and accuse the Petitioners of "fail[ing] to apply this Court's three-part analysis applicable to the interpretation of constitutional provisions." (Resp. Br. 30.) Respondents misunderstand this Court's interpretative methodology (which has admittedly been inconsistent).

When interpreting the Wisconsin Constitution, the text of the relevant provision is paramount. While this Court sometimes looks to extrinsic, historical materials when analyzing the Constitution, these materials are simply aids to a proper understanding of the text. Use of these materials is only "necessary when the language of the [relevant] section considered [is] not plain in meaning." *Jacobs v. Major*, 139 Wis. 2d 492, 503, 407 N.W.2d 832 (1987); *see also, e.g.*, *Id.* at 504 ("[W]e are not

required to go behind the language of Art. I, sec. 3 to discover its intent since the meaning is plain on its face."); *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 ("The authoritative, and usually final, indicator of the meaning of a provision is the text – the actual words used. . . . In this case, we see little reason to extend our interpretation beyond the text [of the relevant constitutional provision]."). Petitioners saw little utility in devoting limited brief space to a discussion of Harvey Dow's personal correspondence, none of which is enacted law and which was seen by few who voted on the constitutional language at issue. *Cf. State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110 ("It is the enacted law, not the unenacted intent, that is binding on the public.").

More generally, any reliance on the "intent" and "purpose" of "the framers" is fundamentally flawed. "The framers" were individuals, each with a different "intent," as a cursory review of the state constitutional debates makes apparent. Attempting to discern with any certainty what the collective framers "intended" with respect to constitutional text is a doomed enterprise. *Cf.* Daniel R. Suhr, *Interpreting the Wisconsin Constitution*, 97

Marq. L. Rev. 93, 120 (2013) (arguing that "[i]t is not the intent of the legislators or voters but the text that they approved that is part of the state's fundamental law"); *cf., e.g., Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring) ("[I]t is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the only remnant of "history" that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law.").

Finally, *Coyne* creates inconsistency, because although all administrative agencies owe their existence and power to the legislature, it treats one – DPI – differently. It departs from settled law to say that the Legislature can grant a power (rulemaking) but cannot grant a limited version of that power. If that were true, then all of the restrictions on DPI's rulemaking would be unconstitutional. The Constitution requires neither of these inconsistencies.

C) *Coyne* Is Not Sound in Principle

Respondents' arguments boil down to one flawed sentence: "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." (Resp. Br. 21.) Later, they reiterate, "Simply put, in this dispute, as in *Coyne*, the power of the legislature is not at issue." (*Id.* at 22.)

The light dawns. This is exactly why *Coyne* is wrong and why Act 21 and the REINS Act are constitutional. Enacting rules with the force of law is a quintessentially legislative act. That power belongs exclusively to the legislature, meaning that all of these issues revolve tightly around the separation of powers and the self-evident ability of the legislature to place limitations on the exercise of power it lends to somebody else.

This mistake demonstrates why *Coyne* is not just a little wrong – not just one of multiple reasonable resolutions of an ambiguous question. Instead, *Coyne* represents a fundamental misunderstanding of the very structure of our state government. It cannot be allowed to persist.

Supervision includes rulemaking only if the legislature says it does. It may be a sufficient means of supervision, but is not a necessary one. And because it is not necessary, supervision can include rulemaking subject to the strictures of the legislature.

Finally, Respondents argue that the Legislature's delegation of authority to make rules to the Superintendent is flawed because the process under Act 21 and the REINS Act contains insufficient procedural

safeguards – namely that the Governor can approve or reject a proposed rule for any reason and he can effectively pocket veto it by taking no action. But that's not really their complaint. That argument is not limited to DPI and proves too much. The legislature has determined that *no* agency can make rules without gubernatorial approval. If that limitation on rulemaking is unconstitutional, then Chapter 227 is now unconstitutional in its entirety. No agency is empowered to make any rules.

But again, that really isn't their complaint. Their complaint is that the "procedural . . . safeguards against arbitrary, unreasonable or oppressive conduct," *DOA v. Dep't of Ind.*, 77 Wis. 2d 126, 135, 252 N.W.2d 126 (1977) (Resp. Br. 22) now includes (although it is not limited to) the Department of Administration's and Governor's review of the proposed rule. Although DPI might not welcome the additional oversight, there is no reason why these procedural safeguards cannot include – in addition to clearly stated direction for delegated rulemaking and the notice and comment requirements – gubernatorial approval. Respondents complain that the Governor has greater discretion to reject a proposed (or final) rule than the Joint Committee for Review of Administrative Rules, but so what? In delegating legislative authority to agencies, the legislature is attempting

to reprise the way in which it makes laws. Just as the passage of laws is subject to gubernatorial veto and override, so is the making of rules. The Governor is an independent check on agency authority – that is part of how checks and balances work.

Respondents' quotation of *DOA* omits the emphasized language: "[B]road grants of legislative powers will be permitted where there are procedural and judicial safeguards against arbitrary, unreasonable or oppressive conduct *of the agency*." *DOA*, 77 Wis. 2d at 135 (emphasis added) (quoting *Schmidt v. Department of Resource Development*, 39 Wis. 2d 46, 158 N.W.2d 306 (1968)). The governor, of course, is not an agency. *See* Wis. Stat. § 227.01(1) (expressly excluding the governor from the definition of "agency"). And his veto authority is not a "legislative power."

In sum, *Coyne* is a fractured, internally inconsistent, two-year-old decision with virtually no precedential reasoning. *Stare decisis* does not dictate that such a case must be permitted to endure.

III) THE PARTIES AGREE THAT *CRANEY* HAS NO APPLICATION HERE

Little needs to be said about *Thompson v. Craney*, as both parties agree it doesn't apply. (Pet. Br. 45-46; Resp. Br. 29.) Respondents erroneously claim that Article X, Section 1 "vests power." (*Id.* at 32, n.7.)

Of course, unlike every other vesting clause in the Constitution, Article X Section 1 doesn't vest power. (*See* Pet. Br. 21.)

Respondents also argue that the Governor was not in a superior position vis-à-vis the Superintendent in 1848 because the legislature gave the Superintendent some duties and directed him to perform "such other duties" as decided by the Governor. (*Id.* at 38.) But all that provision means is that some of what the Superintendent did as part of his supervision of public instruction could be directed by the Governor. That is the case currently – the Superintendent can do plenty of things without being directed or approved by the Governor. But the legislature decided that if the Superintendent wants to create new rules with the force of law, he can do it only with the cooperation of the Governor. So current practice is consistent with the earliest practice under the Constitution.

Finally, Respondents argue that what the Board of Education did ("evaluating and auditing the finances of the state's educational entities") was not the "supervis[ion] of public education." (Resp. Br. 40.) But Respondents play this game both ways. They want everything related to public education to count as "supervision" (so the Superintendent can act without interference), but not this (or other educational duties exercised by

other agencies). Yet there is no reason why evaluating and auditing educational finances wouldn't be supervision of public education. Or why licensing teachers, even locally, isn't a form of supervision. Or school building codes or school work rules. The answer is provided by the legislature. These things aren't within the supervisory authority because the legislature said they are not.

CONCLUSION

For the above reasons, this Court should declare that the Respondents must send their scope statements to the Department of Administration, await approval from the Governor before proceeding, and submit final rules to the Governor for approval.

Dated this 10th day of October, 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 produced with proportional serif font. This brief is 2,979 words long, calculated using the Word Count function of Microsoft Word 2010.

Dated: 10/8/2018

Electronically Signed by Richard M. Esenberg
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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, 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: 10/8/2018

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