STATE OF WISCONSIN

SUPREME COURT

APPEAL NO. 2017AP2278-OA

Kristi Koschkee, Amy Rosno, Christopher Martinson, and Mary Carney,

Petitioners,

v.

Tony Evers; in his official capacity as Wisconsin Superintendent of Public Instruction and Wisconsin Department of Public Instruction,

Respondents.

ORIGINAL ACTION

BRIEF AND APPENDIX OF THE WISCONSIN ASSOCIATION OF SCHOOL BOARDS, INC., AND THE WISCONSIN SCHOOL ADMINISTRATORS' ALLIANCE, INC., AS AMICI CURIAE

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STATEMENT OF INTEREST

Wisconsin Association of School Boards, Inc., (WASB) is a voluntary, nonstock corporation which includes the school boards of all 422 public school districts in Wisconsin. The Wisconsin School Administrators' Alliance, Inc., (SAA) is an alliance of five associations of public school administrators: Association of Wisconsin School Administrators (AWSA); Wisconsin Association of School Business Officials (WASBO); Wisconsin Association of School District Administrators (WASDA); Wisconsin Council of Administrators of Special Services (WCASS); and Wisconsin Association of School Personnel Administrators (WASPA).

WASB and SAA support, promote, and advance the interests of public education throughout the state. To this end, they support legislation that improves Wisconsin's public schools and the quality of education for Wisconsin school children.

WASB and SAA respectfully request the Wisconsin Supreme Court (Court) to deny the relief sought by the Petitioners. In doing so, WASB and SAA urge the Court to follow the doctrine of *stare decisis* and uphold the law settled by the

Court: Article X, § 1 of the Wisconsin Constitution (Constitution) vests the State Superintendent of Public Instruction (State Superintendent) superior and exclusive authority over the supervision of public instruction. In addition, WASB and SAA ask the Court to conclude that, if applied to the State Superintendent, the challenged provision of 2017 Wisconsin Act 57 ("REINS Act") violates Article X § 1 by delegating to the Governor superior authority to supervise public instruction.[1] Several parties with vested interests in education also submit herein a letter in support of this request. (*See* WASB/SAA App., p. 1.)

INTRODUCTION

Article X of the Constitution embodies the constitutional framework for Wisconsin's system of public instruction. At the pinnacle sits the State Superintendent who is vested (pursuant to Article X, § 1), with authority to exercise supervision over local officials charged with managing district schools.

[1] The State Superintendent and the Wisconsin Department of Public Instruction (DPI), are both Respondents in this action. Reference herein to the State Superintendent includes DPI.

The State Superintendent's authority is well-defined in the law, described by this Court as "a necessary position, separate and distinct from the 'other officers' mentioned in [Article X] . . . ." *Thompson v. Craney,* 199 Wis. 2d 674, 686, 546 N.W.2d 123 (1996). In *Craney*, this Court considered whether the other public officers, whose roles related to the supervision of public instruction, could be given equal or greater authority than the State Superintendent over the supervision of public instruction. Giving deference to the plain meaning and the historical understanding of the language in Article X as a whole, and appreciating the shared form of governance between the State Superintendent and local school officials, the Court concluded that such a grant of power was unconstitutional stating that the Legislature "may not give equal or superior authority to any 'other officer.'" *Id.* at 699.

In *Coyne v. Walker,* 2016 WI 38, 368 Wis. 2d 444, 870 N.W.2d 520, the Court again considered whether the Legislature could delegate superior supervisory authority over public instruction to the Governor or Secretary of

Administration and concluded that such delegation would be a violation of Article X, § 1. *Coyne,* 2016 WI 38 at 79.

In light of the *Craney* and *Coyne* decisions, *Amici Curiae,* WASB and SAA, respectfully submit, that if the REINS Act requires gubernatorial approval of scope statements for a proposed rule, it squarely contravenes past precedent and conflicts with Article X, § 1. Such a requirement would divest the State Superintendent of his supervisory authority by stripping him of the ability to carry out his statutorily-mandated duties and powers through rulemaking.

Further, such a reading of the REINS Act runs contrary to a uniform system of governance which has existed for almost 170 years with roots in the plain language of the Constitution, the drafters' intent, and the practices in existence at the time. During this time, a central, nonpartisan authority at the state level has provided leadership and guidance in a model of shared governance with local school officials.

For these reasons, *Amici* respectfully request that the Court deny the relief requested.

ARGUMENT

I. THE COURT'S PAST DECISIONS EXPLICITLY PROHIBIT THE LEGISLATURE FROM GIVING SUPERIOR AUTHORITY OVER THE SUPERVISION OF PUBLIC EDUCATION TO THE GOVERNOR.

In *Thompson v. Craney*, this Court considered the constitutionality of a provision of the 1995 budget bill, 1995 Wis. Act 27 (Act 27), which created a state Education Commission, Department of Education, and Secretary of Education, and made the State Superintendent the chair of the Education Commission. Act 27 gave the Secretary of Education and the Education Commission authority to exercise duties previously held by the State Superintendent. *Craney*, 199 Wis. 2d at 677-78.

In analyzing this shift in authority, the Court examined the words of the Constitution and its early amendments, the constitutional debates and practices in existence at the time of the conventions, and the first laws passed after the conventions. The analysis centered on the delegates' insistence that the State Superintendent have more than an advocate's role in public education, and instead be "an officer with the ability to put plans in action." *Craney,* 199 Wis. 2d. at 689.

In addition, the Court considered the role of the "other officers" referred to in the Constitution, finding that the framers intended these officers to be subordinate to the State Superintendent and that the power of supervision of public instruction "was not vested equally in the SPI [Superintendent of Public Instruction] and the 'other officers.'" *Id.* at 696. The Court held that the legislative provision in Act 27 was unconstitutional beyond a reasonable doubt because "the education provisions of 1995 Wis. Act 27 give the former powers of the elected state Superintendent of Public Instruction to appointed 'other officers' at the state level who are not subordinate to the superintendent. . . ." *Id.* at 698.

In *Coyne,* the Court considered whether 2011 Wisconsin Act 21 (Act 21) unconstitutionally vested in the Governor and the Secretary of Administration superior authority over the supervision of public instruction. Act 21 required the State Superintendent to obtain approval from the Governor, and in certain circumstances, the Secretary of Administration, before sending rules to the Legislature. In a lead decision issued by Justice Gableman, the Court concluded that Act 21 was

unconstitutional as applied to the State Superintendent because it delegated to other officers the power to determine whether the State Superintendent's rulemaking could proceed to the Legislature:

> Act 21 gives the Governor and Secretary of Administration the unchecked power to halt the SPI's and DPI's promulgation of rules on any aspect of public instruction, ranging from teachers' qualifications to the implementation of the school milk program to nonresident waiting list requirements for pupils. In other words, Act 21 improperly vests the Governor and Secretary of Administration with the supervision of public instruction in violation of Article X, § 1.

Coyne, 2016 WI 38 at ¶71. Justice Abrahamson, Justice Ann Walsh Bradley, and Justice Prosser concurred, concluding that Act 21 was unconstitutional as applied to the State Superintendent.

If the REINS Act requires similar gubernatorial approval, it must meet the same fate as the legislation in *Craney* and *Coyne*. To hold otherwise would require the Court to overrule *Coyne* and determine that Article X, § 1, and the historical evidence analyzed by the Court, no longer supports the Court's conclusion that this is prohibited by the Constitution. This departure from the doctrine of *stare decisis* is unsupported by any sound reason in law or policy.

The Petitioners disagree and urge that "the Court should not hesitate to abandon *Coyne*." (Pet. Br. 35). Petitioners' request, which is supported by less than two pages of argument, ignores that respect for prior decisions is fundamental to the rule of law and that any departure from them requires more than mere hesitation:

> Fidelity to precedent ensures that existing law will not be abandoned lightly. When existing law "is open to revision in every case, 'deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.'" *Consequently, this court has held that "any departure from the doctrine of stare decisis demands special justification."*

Johnson Controls, Inc. v. Emplrs. Ins., 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257, *cert denied*, 541 U.S. 1027 (2004) (emphasis added).

In determining whether to depart from *stare decisis*, the Court considers whether: changes or developments in the law have undermined the rationale behind a decision; there is a need to make a decision correspond to newly ascertained facts; or there is a showing that the precedent has become detrimental to coherence and consistency in the law. *Johnson Controls*, 2003 WI 108 at ¶98. In addition, the Court looks to whether the prior decision is unsound in principle, whether it

is unworkable in practice, and whether it was correctly decided and has produced a settled body of law. *Id.* at ¶99. None of these reasons support a departure from the Court's prior decisions.

Coyne mirrors a body of law settled since the early constitutional conventions where delegates spoke of the need for an independent officer to supervise education. *See Coyne,* 2016 WI 38 at ¶57 ("Harvey's stated purpose of amendment was to allow the Legislature to appoint public instruction officers, if necessary, in order to ensure that the officers supervising public instruction were *dedicated solely to the task of education* rather than using the office as a political stepping stone.") (Italics in original). In the first law passed setting forth the duties of the State Superintendent, the Legislature delegated to the State Superintendent duties that included apportioning school funds, proposing regulations, and adjudicating controversies arising under the school lands. *Craney,* 199 Wis. 2d at 694-95. The State Superintendent was viewed early on as an independent officer with superior authority over the supervision of public instruction.

Petitioners allege that *Coyne* should be overruled because it is "unsound in principle" and "unworkable in practice" and because there is no settled rule of law to be applied from it in light of the single lead opinion and the concurrences by three other justices. (Pet. Br. 35-36) Petitioners argument minimizes the unequivocal holding in *Coyne* reached by four justices that Act 21, which delegated to the Governor and Secretary of Administration the authority to block the State Superintendent's rulemaking, vested the Governor and Secretary of Administration with the supervision of public instruction in violation of Article X, § 1.

In the lead opinion, Justice Gableman stated that Article X, § 1 vests in the State Superintendent the supervision of public instruction and that his powers, duties, and compensation are prescribed by the Legislature. The opinion explains that the Legislature has mandated that these powers be carried out through the rulemaking process in Chapter 227 of the Wisconsin Statutes. The State Superintendent is statutorily required to promulgate rules to adopt statements of general policy and interpretations of statutes, and is explicitly directed

throughout the statutes to make rules regarding public instruction. The Court summarized the importance of rulemaking to the position of State Superintendent: "Under the current statutory prescription, the [State Superintendent] cannot carry out their duties and powers of supervision without rulemaking." *Coyne,* 2016 WI 38 at ¶37. Act 21 did not allow the State Superintendent to proceed with his rulemaking duties absent approval and therefore, it unconstitutionally vested the Governor and Secretary of Administration with the supervision of public instruction in violation of Article X, § 1.

In his concurrence, Justice Prosser recognized that constitutional officers must possess inherent authority to fulfill their responsibilities. Justice Prosser further recognized that "the very nature of the office of [State] superintendent required the ability to make rules, irrespective of a specific grant of authority from the legislature" and that the "constitution provides the initial authority to develop rules because the constitution states the superintendent's mission." *Coyne* 2016 WI 38 at ¶¶150, 152. Justice Prosser concluded that Act 21, as applied to the State Superintendent, was 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.* at ¶155. (Emphasis in the original)

Justice Abrahamson, joined by Justice Ann Walsh Bradley, unequivocally concluded that Act 21 was unconstitutional as applied to the State Superintendent because it gave equal or superior authority over the supervision of public instruction to officers other than those inferior to the State Superintendent. *Coyne,* 2016 WI 38 at ¶¶80, 84.

The Petitioners' attempt to parse the lead and concurring decisions ignores the rule of law set forth in all three decisions: Article X, § 1 of the Constitution prohibits the Legislature from giving the Governor superior authority over the supervision of public instruction. This is based on established precedent and should be upheld under principles of *stare decisis*.

II. THE ABILITY OF A CENTRAL NONPARTISAN AUTHORITY TO LEAD AND SUPERVISE AT THE STATE LEVEL THROUGH RULEMAKING IS ESSENTIAL FOR STRONG PUBLIC EDUCATION.

The concept of shared governance between local officials and the State Superintendent has continued uninterrupted for almost 170 years. In recognizing the primacy of the State Superintendent, *Amici* respectfully submit that the State Superintendent's role must be viewed in light of the historic and continuing role local officials play within the constitutional framework of Wisconsin's public school system. *See*, *e.g.*, *Kukor v. Grover*, 148 Wis. 2d 469, 499, 436 N.W.2d 568 (1989) (the principle of local control is a constitutionally based and protected precept). The dichotomy between state and local control is part and parcel of the Constitution and has been an "essential feature of our educational system" since the adoption of the Constitution. *Buse v. Smith,* 74 Wis. 2d 550, 572, 247 N.W. 2d 141 (1976) (citation omitted). At that time, local superintendents were entrusted with the administration of local schools. Today, "Wisconsin relies on 422 local school districts to administer its elementary and secondary programs. Twelve cooperative educational service agencies (CESAs)

furnish support activities to the local districts on a regional basis and the Department of Public Instruction, headed by the State Superintendent of Public Instruction, a nonpartisan constitutional officer, provides supervision and consultation for the districts." Wisconsin Legislative Reference Bureau, *State of Wisconsin 2015-2016 Blue Book,* 312 (2015).

The Wisconsin Constitution guarantees an equal educational opportunity free of charge for all children between the ages of 4 and 20. *See Kukor,* 148 Wis. 2d at 495. The State Superintendent, a constitutional officer whose position is dedicated solely to the task of public education and whose position is free from partisan influence, safeguards this fundamental right by ensuring quality schools and a strong education system. His tasks are numerous and his knowledge of public instruction is deep. He facilitates the partnership between the state and local school districts; interprets and enforces myriad education laws in areas such as finance, curriculum, and special education; ensures that teachers and administrators are appropriately licensed; and works to identify innovative educational methods. Rulemaking is an

essential part of these tasks and his sharp focus on education and comprehensive knowledge ensure that the complex framework of statutes and regulations complement one another instead of conflict, and provide direction to the 422 school districts responsible for public education.

The State Superintendent's activities are driven by his duty to supervise and direct the public schools in Wisconsin. Effective leadership at the local level hinges in large part on clear, comprehensive and consistent guidance from the State Superintendent and his agency. This guidance comes in many forms, not the least of which is administrative rulemaking.

The State Superintendent has devoted significant resources in exercising his supervisory authority over education through rulemaking. In fact, there are 162 pages of rules under Public Instruction in the Wisconsin Administrative Code regarding matters of education. (*See* WASB/SAA App., pp. 2-4, Wisconsin Administrative Code, Department of Public Instruction, Table of Contents). Over the last year alone, the State Superintendent has engaged in rulemaking with respect to complaint and appeal procedures, school district boundary

appeals, pupil nondiscrimination, school finance, state aid, robotics competition grants, high-cost special education aid, whole grade sharing, teacher licensing, and the special needs scholarship program. In addition, the State Superintendent has issued statements of scope with respect to library system standards, standards for disproportionality in special education, English language learners, and open enrollment. Finally, the State Superintendent has submitted proposed rules to Rules Clearinghouse with respect to funds for energy efficiency projects, school mental health programs, lifetime licenses, part time open enrollment, and the early college credit program.

Coyne's conclusion that the Constitution prohibits legislation that allows the Governor to halt these rulemaking efforts fits directly into the framers' intent to provide uniformity in public education. Shifting this authority to partisan or appointed officials will result in inconsistencies in a unique and complex system of rules, policies, funding, and supervision of public education. Public education will no longer be supervised exclusively by a nonpartisan, constitutional officer

whose singular focus is Wisconsin's public schools. Instead, public education will fall to the whim of the political party in office at the time and will be subject to political motivations and party lines. Such a result is problematic at the very least and unconstitutional beyond a reasonable doubt.

CONCLUSION

For the reasons set forth above, *Amici* respectfully request that this Court dismiss the Petition for Original Action.

Dated this 3rd day of December, 2018.

BOARDMAN & CLARK LLP

Attorneys for Wisconsin Association of School Boards, Inc., and School Administrators' Alliance, Inc.

/s/ Michael J. Julka

Michael J. Julka, State Bar No. 1015773
Richard F. Verstegen, State Bar No. 1023857
M. Tess O'Brien-Heinzen, State Bar No. 1022788

1 South Pinckney Street, Suite 410
P.O. Box 927
Madison, Wisconsin 53701-0927
Telephone: (608) 257-9521
Facsimile: (608) 283-17099

CERTIFICATION OF FORM AND LENGTH

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced using the following font: proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quote and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,880 words.

Dated: December 3, 2018.

/s/ Richard F. Verstegen

Richard F. Verstegen, State Bar No. 1023857

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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: December 3, 2018.

/s/ Richard F. Verstegen

Richard F. Verstegen, State Bar No. 1023857