STATE OF WISCONSIN
SUPREME COURT

Case 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 OF AMICI PEGGY COYNE, MARY BELL, MARK W. TAYLOR, COREY OTIS, MARIE STANGEL, JANE WEIDNER, AND KRISTIN A. VOSS

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INTRODUCTION

In the case the Court must answer this question:

> Can the Legislature, without violating the Wisconsin Constitution, grant the Governor, a partisan executive officer, direct control over the non-partisan Superintendent of Public Instruction ("SPI"), by requiring the SPI to get the Governor's permission before submitting scope statements for administrative rules or, subsequently, the rules themselves to the Legislature for approval?

The Coyne amici assert that the answer is, resoundingly, no. The Legislature cannot constitutionally do so.

In 1848, Wisconsin's Constitutional Convention rejected a proposal to give the Governor executive authority over public education. Instead, it submitted to the voters a proposed constitution that vested the executive authority over public education in the hands of an elected SPI. The voters adopted the proposed 1848 constitution, creating a governor who had vested executive authority over all aspects of state government save one: public education. That vested executive authority is exercised by the SPI.

In 1902, the citizens of Wisconsin amended our Constitution to ensure that, unlike the governor, the elected SPI was to be a non-partisan officer.

Because the SPI is the officer vested by Art. X, § 1 of the Wisconsin Constitution with the authority to supervise public education, past and

current statutes have created the mechanism through which the SPI supervises the state's public schools: proposing administrative rules, which when approved by the legislature are enforced by the SPI. *See* Wis. Stat. Ch. 115, subch 2. (§§ 115.28 - 115.48).

Until 1994, the Legislature never sought to give the Governor the right to stop the SPI's ability to propose scope statements and administrative rules. The Legislature's first attempt to do so was declared unconstitutional in *Thompson v. Craney,* 199 Wis. 2d 674, 546 N.W.2d 123 (1996) ("*Craney*"). Its second try, by amending Wis. Stat. §§ 227.135(2) and 227.185 through 2011 Wisconsin Act 21 ("Act 21"), was held to be unconstitutional in *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520 ("*Coyne*"). The Legislature's third effort was through 2017 Wisconsin Act 57 ("Act 57"), the subject of this case. It, too, is unconstitutional as applied to the SPI.

Wis. Stat. § 227.135(2), as amended in 2011 by Act 21 to create § 227.135 (2013-2014), stated, in relevant part:

> An agency that has prepared a statement of the scope of the proposed rule shall present the statement to the governor and to the individual or body with policy-making powers over the subject matter of the proposed rule for approval. **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.** (emphasis added)

Act 57, Section 3, enacted in 2017, amended § 227.135(2) making a cosmetic change to it that directed that scope statements be submitted to the Department of Administration for review and the result of that review be reported to the Governor:

> An agency that has prepared a statement of the scope of the proposed rule **shall present the statement to the department of administration, which shall make a determination as to whether the agency has the explicit authority to promulgate the rule as proposed in the statement of scope and shall report the statement of scope and its determination to the governor** who, in his or her discretion, may approve or reject the statement of scope. **The agency may not send the statement to the legislative reference bureau for publication under sub. (3) until the governor issues a written notice of approval of the statement.** (emphasis added)

Most importantly, as the Court can certainly see, the words of the statute that are actually material to this case, "*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,"* were unchanged in 2017 by the Act 57 amendment. Those very words and the authority they granted to the Governor to block scope statements from being submitted to the legislative reference bureau, a key step in the development of administrative rules, were found in *Coyne* in 2016 to be unconstitutional as applied to the SPI.

Likewise, the relevant words in Wis. Stat. § 227.185 (2013-2014), "*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," were unchanged by the Act 57 amendment in 2017. They, too, were declared the year before in *Coyne* to be unconstitutional as applied to the SPI.

Thus, in this original action, the Court is reviewing the same statutory language that it determined two years ago in *Coyne* was unconstitutional as applied to the SPI, but which the Legislature nevertheless left untouched a year later when it amended the very statutes containing that language. While doing its review, the Court should heed this admonition from the Honorable Daniel Kelly:

> There is no end to the mischief the judiciary causes when it abandons its role of declaring what the law is, and instead arrogates to itself the power to develop new law in place of what it received from the ultimate law givers – the people of the State of Wisconsin and the United States.[1]

The Petitioners are asking the Court to do just that: develop new law in place of what the Court received from the "ultimate law givers – the people of the State of Wisconsin," who during the 1848 constitutional convention created the SPI with vested authority over public education after rejecting a proposal that education is to be supervised by the Governor, and who in 1902 adopted an amendment to ensure that the SPI would always be a non-partisan executive officer. Despite what the people

[1] Application of the Honorable Daniel Kelly to Governor Scott Walker for appointment to the Wisconsin Supreme Court, p. 15.

of Wisconsin unequivocally decided in 1848 and 1902, the Petitioners want the Court to conclude that the Legislature can constitutionally ignore the people's choices by placing the partisan Governor in charge of the very mechanism that the non-partisan SPI uses to supervise public education: the development and submission of proposed administrative rules.

The Court must not accept the Petitioners' invitation to make new law. The expressed will of the "ultimate law givers" must be upheld.

ARGUMENT

I. The Governor, a partisan elected officer, cannot be given supervisory authority over the non-partisan Superintendent of Public Instruction. Attempts to give him that authority have twice been declared unconstitutional.

Unlike other states, Wisconsin's Constitution places the supervision of education in the hands of an elected non-partisan executive with vested authority separate from the executive powers of the elected partisan Governor. Art. X, § 1 states:

> Superintendent of Public Instruction. The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law. The state superintendent shall be chosen by the qualified electors of the state at the same time and in the same manner as members of the supreme court, and shall hold office for 4 years from the succeeding first Monday in July. The term of office, time and manner of election or appointing all other officers of supervision of public instruction shall be fixed by law.

The words of Art. X, § 1, are clear: the supervision of public instruction is "vested" in a "state superintendent...." The only other entities with vested authority granted by the Wisconsin Constitution are the Judiciary (Art. VII, Sec. 2), the Legislature (Art. IV, Sec. 1), and the Governor (Art. V, Sec. 1).

Prior to the 1902 Amendment, the SPI could be a partisan whom the voters considered in the November election. The 1902 Amendment to Art. X, § 1, changed that. Through it, the SPI became a non-partisan constitutional officer, just like Wisconsin's Supreme Court justices:

> The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties, and compensation shall be prescribed by law. **The state superintendent shall be chosen by the qualified electors of the state at the same time and in the same manner as members of the supreme court, and shall hold office for four years from the succeeding first Monday in July. . .** The term of office, time and manner of electing or appointing all other officers of supervision of public instruction shall be fixed by law. (emphasis added)

The effect of placing the Superintendent on the non-partisan election cycle was an unambiguous directive from the people of this state: public education is to be supervised by an elected non-partisan executive officer.

II. Applying Wis. Stat. §§ 227.135(2) and 227.185 to the Superintendent and DPI is unconstitutional, because it grants the Governor, a partisan executive officer, supervisory authority over public education.

Rulemaking is a key mechanism for setting and implementing policies. There is no doubt that the "supervision of public instruction" is accomplished through administrative rules through which the SPI implements his or her policy choices. The Legislature recognizes that.

Many sections of Chapter 115 direct the Superintendent to promulgate rules and give the Superintendent considerable discretion over the content of those rules. For example, under Wis. Stat. § 115.28(3m)(b), the Superintendent "shall ... [p]romulgate rules establishing procedures for the reorganization of cooperative educational service agencies and boundary appeals." The Superintendent shall "make rules for the examination and certification of school nurses." Wis. Stat. § 115.28(7m). In these and many other circumstances, the SPI is free to propose rules that best fit his or her policy goals.

During the 1848 Convention, the education committee recommended that the Constitution task the Governor with appointing the Superintendent. That structure would have subordinated the Superintendent to the Governor. Ray Brown, *The Making of the Wisconsin Constitution Part Two*, 1952 Wis. L. Rev. 23, 55. The Convention rejected the

committee's proposal. *Id.* Instead, it created an SPI independent of gubernatorial supervision.

Through the adoption of the 1848 Constitution, the framers placed the SPI beyond the control of the Governor. The express purpose of the 1902 amendment was "to strengthen the position of the SPI by making the office non-partisan. . ." *Craney*, 199 Wis. 2d at 693.

Applying Wis. Stat. §§ 227.135(2) and 227.185, as amended by Act 57, to the SPI, would grant the Governor power to control the development and adoption of the administrative rules that implement educational policy, making the non-partisan Superintendent's supervision of public education subordinate to the partisan Governor and substituting the Governor's partisan driven policy choices for the SPI's non-partisan ones. If this Court allows that, it will have approved legislation that specifically accomplished what the 1848 constitutional convention rejected. Also, by allowing a partisan officer, the Governor, to supervise the non-partisan SPI, it will have negated the primary purpose of the 1902 amendment.

To avoid that result, this Court should reaffirm its holdings in *Coyne* and *Craney* and continue to protect the independent and non-partisan status of the SPI.

III. There is no reason to overrule *Coyne v. Walker* or *Thompson v. Craney.*

The four justice majority in *Coyne* held as follows:

> It is granting the Governor and Secretary of Administration the power to make the decision on whether the rulemaking process can proceed that causes the constitutional infirmity. This unchecked power to stop a rule also gives the Governor the ability to supplant the policy choices of the SPI.

Coyne, 2016 WI 38, ¶ 68. Despite those well-written and easily understandable words, Petitioners assert that there is no clear majority holding in *Coyne*. The Court can plainly see that the Petitioners' assertion is wrong. There were concurring opinions in *Coyne*, but it is undeniable that the four justices agreed on that seminal and decisive conclusion as to why allowing the Governor absolute control over the submission of scope statements and the proposal of administrative rules by the SPI violated the Constitution.

Coyne followed the precedent set in *Craney*—a unanimous 1996 decision, which concluded:

> **[T]he office of state Superintendent of Public Instruction was intended by the framers of the constitution to be a supervisory position, and that the "other officers" mentioned in the provision were intended to be subordinate to the state Superintendent of Public Instruction. Because the education provisions of 1995 Wis. Act 27 give the former powers of the elected state Superintendent of Public Instruction to appointed "other officers" at the state level who are not subordinate to the superintendent, they are unconstitutional beyond a reasonable doubt. . .**

> **Under our holding in the present case, the legislature may not give equal or superior authority to any "other officer."**

Craney, 199 Wis. 2d at 698–99 (emphasis added) (footnote omitted).

The Act 21 amendments to Wis. Stat. §§ 227.135(2) and 227.185 did exactly what *Craney* determined was unconstitutional; they gave superior authority to the Governor over the SPI. The majority decision in *Coyne,* holding them to be unconstitutional as applied to the SPI, was correct. And, because the Act 57 amendments to Wis. Stat. §§ 227.135(2) and 227.185 did not substantively change those statutes and left the Governor with the same power over the SPI that *Coyne* declared unconstitutional, *Coyne* controls the outcome of this case.

IV. The doctrine of *stare decisis* requires the Court follow the holdings of *Coyne* and *Craney*.

"This court follows the doctrine of *stare decisis* scrupulously because of [its] abiding respect for the rule of law." *Johnson Controls, Inc. v. Employers Ins. of Wausau,* 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257. Although not an "inexorable command," the doctrine "reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Id.* at ¶ 97.

In cases interpreting the Constitution, precedent is accorded even greater weight.

> Decisions on constitutional questions that have long been considered the settled law of the state should not be lightly set aside, [even] though this court as presently constituted might reach a different conclusion if the proposition were an original one . . . The legislature must of necessity take the decisions of this court for its guidance on questions of constitutional law. When it has done so, the court should not hold that it pinned its faith to a shadow, unless some doctrine vicious in principle or fraught with grave consequences has been enunciated.

State v. Frear, 142 Wis. 320, 125 N.W. 961, 964 (1910) (emphasis added).[2] Consequently, "any departure from the doctrine of stare decisis demands special justification." *State v. Luedtke,* 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 863 N.W.2d 592 (citation omitted).

This Court has identified several factors that it applies when considering whether a "special justification" exists, including whether:

> (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; or,
>
> (4) Additional relevant considerations include whether the precedent was wrongly decided, is unsound in principle or unworkable in practice.

Luedtke, 2015 WI 42, ¶ 94.

No "special justification" exists in this case because none of those factors apply:

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[2] The doctrine of stare decisis is a fundamental part of the judicial heritage of Wisconsin. *See, Fisher v Horicon Iron & Mfg. Co.*, 10 Wis. 351, 353, 355 (1860).

(1) There have been no substantial changes in the law that undermine the rationales of Coyne and Thompson. The changes to Wis. Stat. §§ 227.135(2) and 227.185 did not make them substantively or materially different than the version of those statutes found to be unconstitutional by Coyne as applied to the SPI.

(2) The Petitioners allege no newly ascertained facts requiring Coyne or Craney to be overruled. Instead they argue that the ideology of Act 57 is paramount, characterizing Act 57 (the so-called Regulations In Need of Executive Scrutiny Act i.e, "the REINS Act") as "ensur[ing] that administrative agencies do not take advantage of the combination of executive and legislative authority to escape accountability and tyrannize the public."[3] Petitioner's Brief at 16. The ideological preferences of the Petitioners are not "newly ascertained facts."

(3) Overruling Coyne and Craney and applying Wis. Stat. §§ 227.135(2) and 227.185, as amended by Act 57, to the SPI would be highly detrimental to coherence and consistency in the law.

(4) The Petitioners have not shown that either Craney or Coyne was wrongly decided. Nor have they shown that they are unsound or unworkable.

(5) Overruling Craney, Coyne, or both would signal—contrary to established precedent—that a change of personnel on the Court is now a legitimate factor on which the Court may rely to overturn prior well-reasoned and longstanding decisions.[4]

Because no justification, much less a special one, for overruling *Craney* or *Coyne* exists, the Court should decline the Petitioners' invitation for it to do so.

[3] The SPI is an elected official holding statewide office. Were he or she to "tyrannize the public" the voters could easily remedy that problem.

[4] "The decision to overturn a prior case must not be undertaken merely because the composition of the court has changed." Johnson Controls v. Employers Insurance of Wausau, 264 Wis. 2d. at 116-117 (citations omitted).

CONCLUSION

Despite the cosmetic changes made by Act 57, Wis. Stat. §§ 227.135(2) and 227.185 remain unconstitutional as applied to the Superintendent of Public Instruction. The Court should so rule and dismiss this original action with prejudice.

Respectfully submitted this 3rd day of December, 2018.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 2,928 words.

I further 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.

I further certify that a copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of December, 2018.

/s/ Lester A. Pines

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