STATE OF WISCONSIN
IN SUPREME COURT
Appeal No. 2013AP416

PEGGY Z. COYNE, MARY BELL,
MARK W. TAYLOR, COREY OTIS,
MARIE K, STANGEL, JANE WEIDNER
AND KRISTIN A. VOSS,

Plaintiffs-Respondents-Respondents,

v.

SCOTT WALKER AND MICHAEL HUEBSCH,

Defendants-Appellants-Petitioners

and

ANTHONY EVERS

Defendant-Respondent-Respondent

AMICI CURIAE BRIEF ON BEHALF OF THE WISCONSIN INSTITUTE FOR LAW AND LIBERTY, THE HONORABLE JASON FIELDS, AND THE HONORABLE SCOTT JENSEN

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Interest of Amicus

The Wisconsin Institute for Law & Liberty ("WILL") is a non-profit, public interest law firm dedicated to promoting the public interest in free markets, limited government, individual liberty, and a robust civil society. In late 2012, WILL announced the launching of an education reform initiative, aiming to advance the public interest by ensuring that all children have access to high-quality schools and empowering parents to make decisions over their child's education. To this end, it engages in strategic litigation, public advocacy, and policy research. In particular, the WILL education initiative seeks to address the regulatory obstacles to reform created by entrenched bureaucracies. WILL believes that the decision below unduly privileges the authority of the Superintendent of Public Instruction and improperly burdens the ability of the legislature to define and appropriately limit whatever policy-making authority that the legislature may choose to give him.

Jason Fields is a former Democratic member of the State Assembly. He represented most of the north side of Milwaukee from 2005-2012. Today, he works in the private sector in Milwaukee and is a prominent and

engaged civic leader, deeply concerned about the quality of education in the City of Milwaukee and throughout our state.

Scott Jensen is a former Republican member of the State Assembly. He represented parts of Waukesha County, including Brookfield, from 1992-2006 while serving as Speaker of the Assembly from 1995-2002. Today, he remains actively involved in state government and is a leader in the education reform movement, both in Wisconsin and nationally.

Messrs. Jensen and Fields have a vested interest in protecting the legislature's constitutional authority to reform the regulatory process, including in the critical area of K-12 education. They believe that the legislature should be the body to determine if, when, and how state agencies will be permitted to make rules and that the Superintendent has no constitutional right to make rules or policy. In addition, as experienced legislators, they understand that effective control of agency rule-making process requires the involvement of the executive branch.

ARGUMENT

I. Wisconsin Has Traditionally Recognized the Legislature's Ability to Structure Public Education.

Art. X, § 1 of the Wisconsin Constitution provides that "[t]he supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct ...." The powers and duties of the state superintendent and these "other officers" "shall be prescribed by law," *i.e.*, established by the legislature. This language establishes that the state superintendent has whatever "supervisory" and other authority[1] that the legislature chooses to confer upon him and that, should it wish, the legislature may require him to share that authority with others – indeed, that the legislature may place at least some administrative ("supervisory") duties in "other officers."

Subject to the limitation recognized in *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996), the legislature has done precisely that for much of the state's history. It has added to and subtracted from the state superintendent's legal authority as current conditions and legislative judgment required. For example, in 1915 the legislature created a State

[1] In *Thompson v. Craney*, 199 Wis. 2d 674, 683 546 N.W.2d 123 (1996), this Court observed that to "superintend" was defined in the mid-nineteenth century as "to have or exercise the charge or oversight of" and "to oversee with power of direction." No one suggests that "superintending" includes the power to make law.

Board of Education, which managed and allocated the finances of the state's public educational activities. L. 1915, c. 497. Today, the Superintendent has that power.

In 1848, the legislature gave the town superintendents, not the Superintendent, the exclusive power to license school teachers. L. 1848, 226. Between 1862 and 1868, county and town supervisors shared licensing certification. L. 1862, c. 176; L. 1863, c. 102; L. 1868, c. 169. Seventy-three years later, in 1939, the legislature gave this duty to the Superintendent. L. 1939, c. 53.

Today, the Superintendent is not even the sole officer who can promulgate rules relating to public instruction. For example:

- The Department of Safety and Professional Services writes the rules relating to school building codes. Wis. Admin. Code § SPS 378.

- The Department of Workforce Development writes rules relating to students working at their school during school hours. Wis. Admin. Code § DWD 270.19.

- The Department of Transportation writes rules relating to school buses and the public transportation of students. Wis. Admin. Code § Trans 300.

The legislature often reserves certain responsibilities to local superintendents and school boards. The Superintendent cannot countermand what these other "officers" do. Indeed, the Superintendent does not even act free from interference within the executive branch. The Governor proposes – and may veto – his budget. The Governor may sign into law legislation that the Superintendent opposes and veto legislation that he has proposed or supports.

This Court has also acknowledged this substantial legislative flexibility. For example, in *Fortney v. School District of West Salem*, 108 Wis. 2d 167, 321 N.W.2d 225 (1982), the Court emphasized the plenary authority of the legislature to define the powers of the state superintendent and "other officers:"

> Public instruction and its governance had no long-standing common law history at the time the Wisconsin Constitution was enacted. Furthermore, Article X, section 1, explicitly provides that the powers and duties of the school superintendent and other officers charged by the legislature with governing school systems "shall be prescribed by law." Because the constitution explicitly authorized the legislature to set the powers and duties of public instruction officers, Article X, section 1 confers no more authority upon those officers than that delineated by statute.

Id. at 182

This all is perfectly consistent with the language of Art. X, § 1. The legislature has the authority to restructure the role of the state superintendent and involve others as it may, from time to time, choose.

II. Constitutional Restrictions on the Authority of the Legislature to Structure Public Education are Quite Limited.

However, in *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996), this Court recognized a limitation on that authority. The *Thompson* Court was faced with a legislative effort, not to adjust the role of the state Superintendent, but to render the office almost completely superfluous. The law at issue in that case gave *all* authority over public education to the newly created Education Commission and Department of Education to be controlled by the Governor. *See* 1995 Wis. Act 27. The Superintendent was made subordinate in *everything* having to do with public education. As this Court saw it, the legislature had attempted to create officials "who would replace" the Superintendent. 199 Wis. 2d at 693.

In the Court's judgment, that went too far. It concluded that the Constitution required that the state superintendent retain "general supervision over the common schools." *Id.* at 697. It identified the defect

in Act 27 as giving "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. The problem, it said, was not that power was taken away from the Superintendent, but that "the power of supervision" was given to others. *Id.* In other words, Art. X, § 1 was violated not because "some authority" was taken away from the superintendent but that "all authority" was. *Thompson* did not hold that no power may be taken at all.

A. *Thompson did not hold that the Superintendent must be "superior" in everything.*

It is important to recognize several significant limitations on *Thompson*'s holding. The Court expressly reserved judgment on "the extent to which the [state superintendent's] powers may be reduced by the legislature." *Id.* at 699-700. It did not say that no single supervisory power could ever be given to someone else who might be seen as "superior" to the superintendent in the exercise of *that particular power* – even if the superintendent remained superior with respect to the general duty of supervision. That question was not before it and, as we have seen, there is a long history of the legislature doing precisely that. It did not say, as the

Court of Appeals did, that the Governor may never be given or exercise authority in a way that might potentially impede the preferences of the Superintendent in the exercise of some particular power. Indeed, as long as the Governor can propose and veto the Superintendent's budget or veto legislative enactments that are supported by the Superintendent, he or she will have such power.

B. Thompson only dealt with supervisory powers.

Under Art. X, § 1 only "supervisory" powers are vested in the Superintendent. As noted in Thompson, the powers initially conferred on the Superintendent were "supervisory" and "administrative." 199 Wis. 2d at 694-695. It observed that to "superintend" was defined in the mid-nineteenth century as "to have or exercise the charge or oversight of" and "to oversee with power of direction." *Id.* at 683. Particularly in light of the fact – conceded here by all – that the legislature retains the right to set educational policy, "superintending" is a managerial concept.

The legislature may grant other types of powers to the Superintendent, but restricting them or giving them to someone else raises no constitutional questions. The *Thompson* Court did not say that the Superintendent had constitutionally-protected legislative powers or any

inherent rule-making authority. It did not say that, should the legislature delegate rule-making authority to the Superintendent, it could not choose to ensure accountability by structuring that grant of legislative (not supervisory) power in a way that allows the Governor to serve as a check on the making of law just as he serves as a check on laws passed by the legislature. Put colloquially, it never said that the Superintendent would not have to take the bitter with the sweet.

When Art. X, § 1 was adopted in 1848 and when it was amended in 1903, the Superintendent had no power to promulgate rules. The historical record is clear that, except for a few isolated and very specific legislative grants of authority, the Superintendent never had rule-making power until after the adoption of the Administrative Procedure Act in 1943. Today, he does not have rule-making authority other than when – and to the extent – the legislature gives it to him.

Rulemaking is neither "supervisory" nor "administrative," but a "quasi-legislative" function in which the Superintendent (or other agency) is empowered to engage in what comes very close to law-making. It is policy-making, which is an exclusively legislative function. See *Martinez*

v. DILHR, 165 Wis. 2d 687, 697, 478 N.W.2d 582, 585 (1992) (stating that rulemaking authority is derived solely from delegation by the legislature).

The power to make law and policy is granted exclusively to the two chambers of the legislature. Wis. Const. Art. IV, § 1 ("[T]he legislative power shall be fully vested in the senate and assembly."). The legislature can, subject to certain limits, delegate that authority to agencies, but when it does so it has not conferred or defined the ability to "supervise." Thus, any rulemaking authority granted by the legislature to the Superintendent is separate and apart from his vested "supervisory" duties.

C. Thompson does not limit power sharing.

Finally, with respect to whether someone has, even with respect to "the general power of supervision" been made "superior" to the Superintendent, the *Thompson* Court never said that any sharing of authority with another officer – any arrangement that might permit some other officer to block or compromise the exercise of a power that might otherwise be exercised by the Superintendent in an unfettered manner – violates the constitution.

III. The Court of Appeals Misapplied *Thompson*.

Yet the Court of Appeals' decision extends *Thompson* in all of these ways. It held that no single power may be taken away from the Superintendent and given to another officer in a way that might make this officer "superior" in some way to the Superintendent or require the Superintendent to share that single power in some way with someone else.

It held that this proscription applies even to rule-making – a delegation of a legislative power that the Superintendent did not have at the time that Art. X, § 1 was enacted. It did not explain why the delegation of a law-making power is "supervisory." It relied entirely on *Thompson*'s recognition that the supervisory power is not merely "exhortatory" and that the Superintendent, shortly after enactment of the state Constitution, was given the power to "propose" regulations.

This is awfully thin gruel. It is one thing to say that, because supervisory duties are not merely exhortatory that there is some core power or balance of power that the Superintendent must retain. It is quite another to say that this core includes rule-making (something that the Superintendent could not do at the time the relevant constitutional language was adopted and amended) such that it cannot be subject to checks and

balances by some other officer. To conflate this distinction would call into question the legislature's ability to limit the rule-making authority of other constitutional officers, such as the Attorney General or Secretary of State – each of whom presumably has some core constitutional authority.

Thompson's prohibition against any other officer having a potential to block or qualify whatever the Superintendent might do is necessarily limited. It would be directly inconsistent with the ability of the Governor to veto the conferral of rule-making authority on the Superintendent in the first place – stopping him from making rules and implementing policy choices.

The Court of Appeals held that, even with respect to this single grant of legislative power, the Superintendent is made "subordinate" because, even though the Governor may not promulgate rules, he may block them. This might then be used as leverage to force the Superintendent to compromise or tailor a rule so as to satisfy gubernatorial objections. This, in the Court of Appeals' view, makes the Superintendent "subordinate" with respect to rule making.

But even if the legislature was forbidden to make the Superintendent subordinate in the exercise of a single duty and even if whatever limitations

on the legislature to be found in Art. X, § 1 could be applied to a delegation of rule-making (a legislative power) as well as a "supervisory" power, nothing in *Thompson* forbids this type of power *sharing*. This Court never said that giving any authority to someone else that might be used to limit the Superintendent's unfettered discretion is unconstitutional. We would, for example, not say that the Governor is "superior" to the legislature because he can veto legislation. As noted above, the Constitution itself gives the Governor power that might be used to limit or qualify the Superintendent's exercise even of his supervisory duties.

IV. This Court Should Grant Review to Clarify *Thompson.*

Amici believe that the Court of Appeals misinterpreted *Thompson*. Correcting this error would have beneficial impact beyond the context of rulemaking. As Justices Wilcox and Steinmetz suggested in their *Thompson* concurrence, the Court's language – as opposed to its result – may have been overly broad and might be misinterpreted to hamper future legislative initiatives in the area of K-12 education. 199 Wis. 2d at 705-711 (Wilcox, J., concurring). Although they agreed with the result, Justices Wilcox and Steinmetz worried that the majority opinion – to the extent it could be read to establish the Superintendent as the sole authority over

public instruction – would "impair[] the ability of the legislature to improve the institution of public instruction in this state." *Id.* at 711. This, in their view, would be would be inconsistent with Art. X, § 1's clear purpose to "increase legislative flexibility to administer future change in the educational system." *Id.* at 701-702

The invalidation of Act 21 as it applies to the Superintendent is an example of what Justices Wilcox and Steinmetz feared. It is an example of an ongoing confusion about the scope of *Thompson* that continues to plague policymakers in this area. For example, the current state Superintendent Tony Evers has publicly stated that he may implement instructional standards without legislative authorization and, perhaps, even over legislative objection. There are other potential issues. If, for example, the legislature creates an independent board to establish accountability standards for schools, must it be controlled by the Superintendent? If the legislature establishes "recovery school districts" to replace or supplement failing local districts must these districts be controlled by the Superintendent? Curtailing such legislative reforms takes the "superintending" authority too far.

CONCLUSION

For the reasons set forth herein, *Amici* urge this Court to grant the petition for review.

Dated: April 3, 2015.

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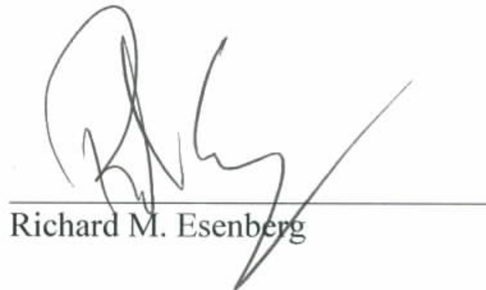
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,750 words.

Dated: April 3, 2015



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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: April 3, 2015

RICHARD ESENBERG

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 2015, (10) copies of the Motion and Brief of Amicus Curiae, the Wisconsin Institute for Law & Liberty, the Hon. Jason Fields, and the Hon. Scott Jensen were filed in the Wisconsin Supreme Court via hand delivery, one (1) copy of the motion and brief were served upon parties of record via first-class mail.

Dated: April 3, 2015

RICHARD ESENBERG