STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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September 29, 2015

Ms. Diane M. Fremgen
Clerk of Supreme Court
Post Office Box 1688
Madison, WI 53701-1688

RECEIVED 9/30/15

Re: *Peggy Z. Coyne, et al. v. Scott Walker, et al.*
Case No. 2013AP416

Dear Ms. Fremgen:

Enclosed please find an original and nine (9) copies of a Response to Plaintiffs-Respondents' Motion to File a Supplemental Brief and to Re-Set the Date for Oral Argument in the above-entitled matter. Copies are being mailed this date to counsel of record.

Sincerely,

Daniel P. Lennington
Assistant Attorney General
State Bar #1088694

DPL:ajw

Enclosures

c: Lester A. Pines/Susan Crawford
Kurt C. Kobelt/Jina L. Jonen
Janet A. Jenkins/Ryan Nilsetuen
Richard M. Esenberg/C.J. Szafir

STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP416

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

Plaintiffs-Respondents,

v.

SCOTT WALKER and SCOTT NEITZEL,

Defendants-Appellants-Petitioners,

and

ANTHONY EVERS,

Defendant-Respondent.

RESPONSE TO PLAINTIFFS-RESPONDENTS' MOTION TO FILE A SUPPLEMENTAL BRIEF AND TO RE-SET THE DATE FOR ORAL ARGUMENT

It is no surprise that Petitioners' position is—and has been—that if *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996), requires this Court to invalidate 2011 Wisconsin Act 21, then *Thompson* must be overruled. If *Thompson* truly elevates the Superintendent above all other

state officials, and endows that Superintendent with not only executive power, but also legislative rulemaking power, and that the legislature is powerless to impose even modest procedural safeguards upon that official, then *Thompson* and its reasoning must be abandoned.

This position is not new, and has been part of this case from the beginning. The Petition for Review filed with this Court is clear: "Should this Court accept the court of appeals' view that *Thompson v. Craney* prohibits not only limits on the core power of the Superintendent to supervise public instruction, but also to any legislative delegation regarding the rulemaking process, *Thompson v. Craney* was wrongly decided." (Pet. 4.) And again, the Petition called for a re-evaluation of *Thompson* when it stated: "If, however, the court of appeals correctly held that *Thompson v. Craney* requires a finding that Act 21, with respect to the Superintendent, is unconstitutional, Petitioners request that this Court re-examine that opinion and reconsider the prior analysis of the original intent and meaning of Wis. Const. art. X, § 1." (*Id.* at 23.)

This Court granted the Petition. Then, Petitioners proceeded to make the very same argument questioning Respondents' broad reading of *Thompson*, which, as Petitioners' opening brief explains, endows the Superintendent with "superior" powers rendering "*Thompson* inconsistent with well-established principles of shared power under Wisconsin's separation-of-powers

doctrine." (Pet'rs' Br. 41.) Furthermore, Petitioners argued that if Respondents were correct, "*Thompson* would clearly be wrongly decided, not only because it would be inconsistent with separation-of-powers principles, but also because it would be inconsistent with the plain language of Article X, § 1 that gives the legislature the authority to prescribe by law the powers and duties of the Superintendent and other officers." (*Id.* at 42.) The opening brief goes on to call Respondents' interpretation of *Thompson* "constitutionally untenable." (*Id.*)

Now, Respondents come to this Court surprised that *Thompson's* continued validity is somehow in question.[1] But from the first decision in this case, in Dane County Circuit Court, Judge Smith concluded that "[u]nder *Thompson*, this [Act 21] is unconstitutional." (Order 15, Oct. 30, 2012.) If that is really what *Thompson* means, then it must be overruled.

Worse, the court of appeals took *Thompson* one step further, and crafted out of whole cloth a wide-ranging but

[1]Given the uncontested procedural history of this case, Petitioners specifically object to Respondents' *ad hominem* attack: "The State's only possible motivation for holding back its challenge to *Thompson* until its reply brief was an improper one, i.e., to ensure that neither Plaintiffs-Respondents nor Defendant-Respondent would have an opportunity to respond to that argument." (Motion ¶ 8.) It is hard to imagine how such a statement, attacking the character and motivation of the Attorney General, the Deputy Attorney General, and the other attorneys for the State, meets the civility standards of SCR 62.02(1).

three-page section entitled, "If *Thompson* granted the Superintendent with constitutional rulemaking powers, then *Thompson* should be overruled" and thus Respondents should need no more than three pages to respond.

Finally, Petitioners do not oppose rescheduling the oral argument in this case to accommodate the drafting and filing of Respondents' sur-reply brief if their motion is granted by this Court.

Dated this 29th day of September, 2015.

Respectfully submitted,

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