

Wisconsin Institute for Law & Liberty: WILL at Supreme Court tomorrow

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The News: Tomorrow at 1:30pm CST, in [Koschkee v. Taylor](#) (previously *Evers*), WILL President and General Counsel Rick Esenberg will appear at the Wisconsin Supreme Court on behalf of a group of taxpayers against attorneys for the Wisconsin Department of Public Instruction (state education agency) and interest groups.

The case is about a long dispute over the constitutional powers of the State Superintendent of Public Instruction in relation to the legislature and the governor. The issue came to a head in Fall 2017 when (then) State Superintendent Tony Evers ignored requirements of a new state law (REINS Act) that provided move oversight on all agencies' rule-making by the governor and department of administration.

WILL is asking the State Supreme Court to follow the text of the Constitution and clarify a previous Court case (*Coyne v. Walker*) which, while it produced a decision, did not produce a majority opinion establishing a principle or rule to follow.

Watch: Tomorrow, at 1:30pm CST, the oral argument will be broadcast live on WisconsinEye, [follow here.](#)

Who: Esenberg will speak on behalf of the petitioners, followed by Attorney Lester Pines on behalf of State Superintendent Taylor and the DPI, Attorney Jeffrey Mandel

on behalf of Peggy Coyne and other Amici, and Attorney Richard Versteegen or Michael Julka on behalf of the Wisconsin Association of School Boards.

Quotes: Kristi Koschkee, a plaintiff and public school teacher: *“I strongly object to the Department of Public Instruction violating the rule of law and am very thankful that the State Supreme Court will hear our case. There needs to be greater oversight on State Superintendent Taylor and her DPI so it is very frustrating that the REINS Act has not been followed.”*

Rick Esenberg, WILL President who will appear at the Supreme Court: *“We appreciate the Supreme Court’s willingness to hear this important case. The Coyne decision produced an outcome but not a majority opinion setting forth the reason that the legislature cannot control rule-making as it sees fit. When the legislature chooses to allow agencies to make rules, it has the right – and the duty – to properly control that rule-making. Because the power to make law is given to the legislature, it has broad authority to decide how rules are to be made and to structure public education as it sees fit.*

The Legal Dispute: What does the Wisconsin Constitution mean when it grants the State Superintendent of Public Instruction the “supervision of public instruction” – and, more specifically, does it permit the Superintendent of Public Instruction to ignore portions of the REINS Act?

The state Constitution, article 10, section 1 states (emphasis added):

“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.”

Advocates for the Department of Public Instruction (DPI) have long wanted a broad interpretation of “supervision of public instruction” to include the ability to unilaterally make and enforce certain policies. Others have countered that “supervision” should be resorted more to the management of schools as that is more consistent with the original intent and text of the provision.

In 2016, in *Coyne v. Walker*, a divided State Supreme Court held that a law requiring the DPI to obtain gubernatorial approval for regulations was an unconstitutional violation of the State Superintendent’s constitutional right to supervise public instruction. But while *Coyne* produced a decision, it produced no

majority for a legal rule or rationale.

Fast forward to 2017. The state legislature passed the REINS Act, which gave the state legislature more oversight over regulations promulgated by agencies. SPI and DPI ignored certain requirements, like sending the scope statements to the Governor for approval and the Department of Administration for review. Consequently, a group of taxpayers objected to DPI violating state law and a lawsuit was filed against DPI and SPI. WILL asked the Supreme Court to hear the case directly, bypassing the lower courts, so that the public can get clarity as soon as possible about what “supervision of public instruction” means.

What happens next: The Supreme Court of Wisconsin will likely render a decision by July 2019 around when the term ends.

Read more:

Summary of case and briefs: <http://www.will-law.org/our-cases/good-government/-koschkee-v-taylor/>

Washington Times, “Wisconsin Supreme Court will take case over Evers’ powers” <https://www.washingtontimes.com/news/2018/apr/13/-wisconsin-supreme-court-will-take-case-over-evers-/>