PETITION FOR REVIEW
INDEX TO APPENDIX

COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP416 Cir. Ct. No. 2011CV4573

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

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 MICHAEL HUEBSCH,

DEFENDANTS-APPELLANTS,

ANTHONY EVERS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: AMY SMITH, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 SHERMAN, J. Scott Walker and Michael Huebsch, Governor and Secretary of Administration, respectively, of the State of Wisconsin, appeal from a summary judgment order holding that provisions in 2011 Wis. Act 21 involving the process of drafting and promulgating administrative rules are unconstitutional and, therefore, void as applied to Wisconsin's State Superintendent of Public Instruction (SPI), and permanently enjoining Walker and Huebsch from implementing the provisions with respect to the SPI. For the reasons discussed below, we affirm the circuit court.

BACKGROUND

¶2 In 2011, the Wisconsin legislature enacted, and Walker signed into law, Act 21, which made several changes to administrative rulemaking.[1] Pertinent here, Act 21 adds a procedural requirement that all state agencies, as well as the SPI, submit proposed scope statements *to the Governor* for approval. *See* WIS. STAT. § 227.135 (2013-14).[2] Under Act 21, rulemaking cannot proceed further

[1] The facts are not disputed.

[2] WISCONSIN STAT. § 227.135 provides:

> **Statements of scope of proposed rules. (1)** An agency shall prepare a statement of the scope of any rule that it plans to promulgate. The statement shall include all of the following:
>
> (a) A description of the objective of the rule.
>
> (b) A description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives.
>
> (c) The statutory authority for the rule.

(continued)

until the Governor approves the scope statement. *See* § 227.135(2). Additionally, Act 21 directs that if the Governor approves the scope statement and a rule is drafted, the Governor must also approve the draft version of the rule before the proposed rule may be submitted to the legislature for review. *See* WIS. STAT. §§ 227.185 and 227.19. If the proposed rule could lead to a level of costs for businesses, municipalities, or individuals specified in the law, the Secretary of Administration must also review and approve the proposed rule before it can proceed to the legislature.

¶3 Shortly after Act 21 was enacted, Peggy Z. Coyne, Mary Bell, Mark W. Taylor, Corey Otis, Marie K. Stangel, Jane Weidner, and Kristin A. Voss (the Coyne parties) filed an action for declaratory judgment, asking the circuit court to declare Act 21 unconstitutional as it applies to the SPI. Walker and Huebsch challenged the Coyne parties' standing in a motion to dismiss, which the circuit court denied. Thereafter, both parties moved the circuit court for summary judgment. The circuit court granted summary judgment in favor of the Coyne

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> (d) Estimates of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule.
>
> (e) A description of all of the entities that may be affected by the rule.
>
> (f) A summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted. References to the relevant statutes prior to the enactment of 2011 Wis. Act 21, where they differ from the 2013-14 version, will be referenced to the 2009-10 version and noted accordingly.

parties, concluding that parts of Act 21 are unconstitutional as applied to the SPI. Walker and Huebsch appeal.

DISCUSSION

¶4 On appeal, Walker and Huebsch renew their argument that the Coyne parties lack standing. Also, Walker and Huebsch make several arguments supporting their view that Act 21, as applied to the SPI, is constitutional. In the latter respect, they first argue that administrative rulemaking is not a supervisory power of the SPI within the meaning of article X, section 1 of the Wisconsin Constitution, but is instead a legislative power that may be delegated by the legislature with qualifications. *See* WIS. CONST. art. X, § 1. Second, Walker and Huebsch argue that even if rulemaking relating to education is a supervisory power of the SPI, Act 21 is constitutional because it does not give such powers to any other officers. Third, Walker and Huebsch argue that, even if rulemaking is a supervisory power and even if Act 21 gives such power to other officers, Act 21 is still constitutional because the role of the SPI is still the superior role.[3]

A. Standing

¶5 Before we reach the constitutionality of Act 21, we first address the preliminary question of whether the Coyne parties have standing to bring the present action. In the circuit court, Walker and Huebsch challenged the standing of the Coyne parties in a motion to dismiss prior to filing a responsive pleading. *See* WIS. STAT. § 802.06(2). The circuit court denied the motion. Walker and

[3] Walker and Huebsch state that if Act 21 is unconstitutional under ***Thompson v. Craney,*** 199 Wis. 2d 674, 699, 546 N.W.2d 123 (1996), they may ask the Wisconsin Supreme Court to consider re-examining ***Thompson***.

Huebsch then answered the complaint and asserted affirmative defenses. The answer and affirmative defenses did not reassert the challenge to the standing of the Coyne parties. In their later motion for summary judgment, Walker and Huebsch did not raise the issue of standing, and the circuit court did not address standing in its decision and order on motions for summary judgment. Therefore, we address the issue of standing in the context of a challenge to the complaint. *See* ***Town of Eagle v. Christensen***, 191 Wis. 2d 301, 315, 529 N.W.2d 245 (Ct. App. 1995).

¶6 Whether a party has standing to seek declaratory relief presents a question of law, which we review *de novo*. ***Chenequa Land Conservancy, Inc. v. Village of Hartland***, 2004 WI App 144, ¶11-12, 275 Wis. 2d 533, 685 N.W.2d 573. When a standing argument comes before us upon a motion to dismiss, we take all claims in the complaint as true. ***McConkey v. Van Hollen***, 2010 WI 57, ¶14 n.5, 326 Wis. 2d 1, 783 N.W.2d 855. We construe the complaint in favor of the complaining party. ***Town of Eagle***, 191 Wis. 2d at 316. We do not construe standing narrowly or restrictively. ***Id.***

¶7 "Unlike the federal courts, which can only hear 'cases' and 'controversies,' standing in Wisconsin is not a matter of jurisdiction." ***McConkey***, 326 Wis. 2d 1, ¶15. Rather, it is sound judicial policy, the purpose of which is to ensure that the issues and arguments presented will be carefully developed, zealously argued, and allow the court to understand the consequences of its decision. ***Id.***, ¶15-16. In ***Wisconsin's Envtl. Decade, Inc., v. PSC***, 69 Wis. 2d 1, 10, 230 N.W.2d 243 (1975), the supreme court set forth a two-step analysis for a challenge to standing: "(1) Does the challenged action cause the petitioner injury in fact? and (2) is the interest allegedly injured arguably within the zone of

interests to be protected or regulated by the statute or constitutional guarantee in question?"

¶8 The Coyne parties stated their claim for standing in their complaint on three different grounds: as taxpayers,[4] as public school teachers, and as parents. Walker and Huebsch challenged the Coyne parties' standing on each of the three grounds. Applying the two-part test and case law specific to taxpayer standing, we agree with the Coyne parties that they have standing as taxpayers, and therefore do not address whether they also have standing as teachers and parents.

¶9 The supreme court has held that a taxpayer has standing to challenge the constitutionality of a statute when "'any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss. The fact that the ultimate pecuniary loss to the individual taxpayer may be almost infinitesimal is not controlling.'" ***City of Appleton v. Town of Menasha***, 142 Wis. 2d 870, 879-80, 419 N.W.2d 249 (1988) (quoted source omitted). This statement of law in ***City of Appleton*** is consistent with the two-part test for standing because the expenditure of public funds is treated as a pecuniary loss.

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[4] The complaint alleges that all of the Coyne parties are taxpayers. With respect to their standing as taxpayers, the complaint alleges:

> 25. The enactment of Act 21 will result in the Defendants' disbursement of tax revenues to meet the increased costs of the Department of Public Instruction, the Department of Administration, and the Governor's office to implement the unconstitutional procedures for the promulgation of administrative rules relating to public education by the DPI.

¶10 Walker argues that "Act 21 does not require the expenditure of public funds." Whatever the merits of this factual assertion, it is part of an argument that Walker forfeited after moving to dismiss by failing to litigate whether the standing-related allegations in the complaint were true.

¶11 As we have explained, Walker moved to dismiss based on the pleadings, but did not subsequently seek to litigate whether the standing-related allegations in the complaint were true. Accordingly, under the law we have described, we must accept as true the allegation in the complaint that Act 21 will result in the expenditure of funds and construe the complaint in favor of the Coyne parties. What remains is the question of whether this alleged fact, if true, along with the allegation that Act 21 is unconstitutional, is sufficient to confer standing on the Coyne parties.

¶12 Walker and Huebsch sum up the law on taxpayer standing by stating: "These cases stand at most for the principle that taxpayer standing may exist if the portion of the statute claimed to be unconstitutional by its terms or implementation directly requires the expenditure of tax funds." Walker and Huebsch then assert that this legal standard is not met because "the challenged portions of Act 21 do not implicate any taxpayer funding." But Walker and Huebsch do not explain why the *allegations in the complaint*, if true, do not meet this standard.[5] In the complaint the Coyne parties assert that Act 21 will result in

[5] In his reply brief, Walker asserts: "There must be more than just an allegation that there will be an illegal expenditure of funds." Walker does not, however, further explain this legal assertion or supply authority for it. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we do not consider arguments unsupported by legal authority or otherwise undeveloped).

the disbursement of tax revenues to "implement the unconstitutional procedures for the promulgation of administrative rules" and to "meet the increased costs of the Department of Public Instruction." Walker and Huebsch may disagree with the accuracy of these allegations, but for purposes of a challenge to standing, their opportunity to litigate the accuracy of these claims has passed.

¶13 In sum, because the Coyne parties have alleged in their complaint that Act 21 will cause the illegal expenditure of public funds affecting them as taxpayers and causing them to sustain a pecuniary loss, we conclude that the Coyne parties have sufficiently alleged standing as taxpayers. Because they have standing as taxpayers, it is unnecessary for us to address whether or not the Coyne parties also have standing as teachers and/or parents. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

B. Constitutionality of Act 21

¶14 Having determined that the Coyne parties have standing to challenge the constitutionality of Act 21, we address the main issue before us, which is whether Act 21 is unconstitutional as applied to the SPI. There are no facts in dispute and, thus, we are presented solely with a question of constitutional law that we decide de novo. *See* ***Martinez v. DILHR***, 165 Wis. 2d 687, 695, 478 N.W.2d 582 (1992).

¶15 Litigants asserting a constitutional challenge face a high standard. ***Bostco LLC v. Milwaukee Metro. Sewerage Dist.***, 2013 WI 78, ¶76, 350 Wis. 2d 554, 835 N.W.2d 160. Legislative enactments are presumed constitutional, and any reasonable doubt is resolved in favor of upholding the

statute's constitutionality. ***Id.*** To meet his or her burden when challenging the constitutionality of a statute, the party raising the constitutional challenge must prove that the statute is unconstitutional beyond a reasonable doubt. ***Martinez***, 165 Wis. 2d at 695. "'[P]art of a statute may be unconstitutional, and the remainder may still have effect, provided the two parts are distinct and separable and are not dependent upon each other.'" ***State v. Hezzie R.***, 219 Wis. 2d 848, ¶13, 580 N.W.2d 660 (1998) (quoted source omitted).

C. Rule Promulgation Process and Act 21

¶16 We first briefly summarize, for background, the rule promulgation process and how Act 21 significantly changes that part of the process relevant to the issues before us.[6] This appeal concerns those provisions which grant to the Governor (and in some cases the Secretary of Administration) the power to block approval of proposed rules promulgated by the SPI.

¶17 The rulemaking process begins with drafting and publishing a "scope" statement, which is a statement that explains what the proposed rule will cover, along with other information required by statute. WIS. STAT. § 227.135. Once the scope statement is published, the agency proceeds to prepare a draft rule. *See* WIS. STAT. § 227.14. Before Act 21, the promulgating agency may not begin drafting a rule until the agency has received approval of the scope statement by the head of the agency proposing to promulgate the rule, and until the approved scope statement is published. *See* § 227.135 (2009-10). After Act 21, an additional

[6] *See* Ronald Sklansky, *Changing the Rules on Rulemaking*, WISCONSIN LAWYER, Vol. 84, No. 8 (Aug. 2011).

approval is required at this stage; the Governor must also approve a scope statement. *See* § 227.135(2). Whether or not to approve a scope statement is a matter for the Governor's discretion. *See id.*

¶18 Both before and after Act 21, an agency prepares a draft of a proposed rule and, thereafter, the rule is submitted to the joint legislative council, where the council staff reviews the proposed rule to ensure that the proposed rule complies with both procedural and substantive requirements. WIS. STAT. § 227.15. The promulgating agency must then provide notice of and a public hearing on the proposed rule. Public comment may cause the agency to prepare successive drafts, which require additional notice and public hearings. WIS. STAT. §§ 227.16-18. When the proposed rule is in final form, it is subject to further review, including the preparation of an economic impact analysis.[7] *See* WIS. STAT. § 227.137.

¶19 Prior to Act 21, once the proposed rule was in final form and accompanied by an economic impact statement, the rule was submitted directly to the chief clerk of each house of the legislature for review. *See* WIS. STAT. § 227.19 (2009-10). After Act 21, the proposed rule must be submitted to and approved by the Governor in writing before it may be submitted to the legislature for review. *See* WIS. STAT. § 227.185. The Governor has the discretion to either

[7] Prior to Act 21, the economic impact analysis was referred to as an economic impact report. Although not relevant to the issue before us, we note that Act 21 made changes to how the economic impact analysis is to be prepared. To clarify, the constitutional challenge that we conclude is successful relates solely to the changed rulemaking procedures we describe, and not other features of Act 21.

approve the proposed rule, or not. ***Id.*** If the Governor does not approve in writing, the process comes to a halt.

¶20 Because the Coyne parties have the burden of demonstrating unconstitutionality beyond a reasonable doubt, we would normally begin our analysis with a discussion as to whether they met that burden. However, here we perceive no dispute that, if we reject the Walker and Huebsch arguments we address below, Act 21 unconstitutionally interferes with the SPI's supervisory power under article X, section 1, by assigning supervisory power to the Governor that is not subservient to the SPI. Therefore, we proceed on the basis that, if we reject those arguments, Walker and Huebsch effectively concede that the Coyne parties have met their burden.

D. Whether Rulemaking is a Supervisory Power

¶21 First, Walker and Huebsch argue that "administrative rule[]making is an exercise of legislative power that may be delegated with qualifications by the legislature, not a supervisory power belonging to the Superintendent." We conclude, however, that whether rulemaking is a supervisory power has been resolved in favor of the SPI in ***Thompson v. Craney***, 199 Wis. 2d 674, 546 N.W.2d 123 (1996).

¶22 In ***Thompson,*** the Wisconsin Supreme Court held that certain provisions of 1995 Wis. Act 27 unconstitutionally violated article X, section 1 of the Wisconsin Constitution.[8] ***Thompson,*** 199 Wis. 2d at 678. Act 27 created a

[8] WISCONSIN CONST. art. X, § 1 provides:

(continued)

State Education Commission, a State Department of Education, and the position of State Secretary of Education. ***Id.*** at 677-78. The elected SPI became a member of and chair of the new Education Commission, but the new state agency and its secretary were largely under the control of the Governor, rather than the SPI. ***Id.*** at 678-79. The ***Thompson*** court concluded that this scheme "unconstitutionally gives the former powers of the elected [S]tate Superintendent of Public Instruction to appointed 'other officers' at the state level who are not subordinate to the superintendent." ***Id.*** at 678. The ***Thompson*** court concluded, therefore, that "the education provisions of 1995 Wis. Act 27 [were] void." ***Id.***

¶23 The ***Thompson*** decision is complicated, and we do not endeavor to fully summarize it here. Rather, at this juncture, we focus on the portion of ***Thompson*** that refutes Walker and Huebsch's assertion that rulemaking is not a supervisory power.

¶24 In the course of its analysis, the ***Thompson*** court considered "the first law passed by the legislature [in 1848] setting forth the duties of the SPI." ***Id.*** at 693. The petitioner in ***Thompson***, then Governor Thompson, argued that this 1848 law "shows that the SPI's duties in 1848 were 'exhortatory,' or directed

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> **Superintendent of public instruction.** SECTION 1. 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 electing or appointing all other officers of supervision of public instruction shall be fixed by law.

towards encouraging education through, for example, public speaking or visits to schools, but not actual administration." ***Id.*** at 694. The ***Thompson*** court rejected this argument, pointing out that the 1848 law stated: "The superintendent shall have a general supervision over public instruction in this state." ***Id.*** The ***Thompson*** court went on to explain that many of the duties given to the SPI in the 1848 law were clearly supervisory or administrative: "[t]he SPI was required to apportion school funds between townships, *to propose regulations for making reports and conducting proceedings under the act*, and to adjudicate controversies arising under the school lands." ***Id.*** at 694-95 (emphasis added). Thus, one of the three listed examples of "clearly [] supervisory" power highlighted by the ***Thompson*** court was rulemaking. ***Id.***

¶25 The ***Thompson*** decision also refutes what appears to be a closely related argument advanced by Walker and Huebsch. As we understand the argument, Walker and Huebsch take the position that, if the reason the SPI has a "supervisory" power is because the legislature gave it to the SPI, then that power is one the legislature is free to divvy up as the legislature sees fit. If that is what Walker and Huebsch mean to argue, we read ***Thompson*** as rejecting the argument. The ***Thompson*** court wrote: "Under our holding in the present case, the legislature may not give equal or superior [supervision of public instruction] authority to any 'other officer.'" ***Id.*** at 699. The ***Thompson*** court also explained:

> [T]he constitutional difficulty with the education provisions of the 1995 Wis. Act 27 is not that it takes power away from the office of the SPI, but rather that it gives the power of supervision of public education to an "other officer" instead of the SPI. As this court has previously stated, the plain language of [a]rticle X, [section] 1, makes the powers of the SPI and the other officers subject to limitation by legislative act....

Id. at 698-99. In sum, the legislature has the authority to give, to not give, or to take away SPI supervisory powers, including rulemaking power. What the legislature may not do is give the SPI a supervisory power relating to education and then fail to maintain the SPI's supremacy with respect to that power.

¶26 Before moving on, we note that earlier statements in the ***Thompson*** decision reinforce our interpretation of the ***Thompson*** court's discussion of rulemaking as a supervisory power. For example, when the ***Thompson*** court examined the constitutional debates, the court wrote: "We note two consistent themes from these statements of the delegates: first, that *the* system of education required uniformity; second, that the SPI was to provide this uniformity *in an active manner* by implementing the system of education." ***Id.*** at 688-89 (emphasis added). The court goes on to say that the SPI, under the constitution, is "an officer with the *ability to put plans into action.*" ***Id.*** at 689 (emphasis added). In our view, rulemaking is one tool the SPI uses to actively promote uniformity and put educational plans into action.

E. The Governor's Role

¶27 Walker and Huebsch argue that, even if rulemaking is a supervisory power, the role Act 21 gives the Governor in rulemaking does not unconstitutionally impede the SPI's rulemaking supervisory power. According to Walker and Huebsch: "Act 21 does not strip away any of the powers or duties of the Superintendent with respect to the supervision of public instruction. All of the policy-making, supervisory functions remain with the Superintendent both before and after Act 21." If Walker and Huebsch mean to suggest that the power relative to rulemaking given to the Governor under Act 21 is subservient to the power relative to rulemaking retained by the SPI under Act 21, we disagree.

¶28 The practical effect of Act 21, with respect to administrative rules proposed by the SPI, is to give the Governor the ability to halt the process of drafting and promulgating administrative rules affecting education at two key stages in the process. The Governor can halt rulemaking earlier on, when a scope statement is prepared, and later just prior to the rule being submitted to the legislature for approval. *See infra* ¶¶17-19. Thus, Act 21 gives the Governor the power to decide that there will be no rule or rule change on a particular subject, irrespective of the judgment of the SPI. Similarly, the Governor may use his approval authority to leverage changes to proposed rules, again irrespective of the SPI's judgment.

¶29 In this regard, Walker and Huebsch attempt to persuade us that the scenario here is different than in ***Thompson***. They argue that, even if we conclude that rulemaking is an SPI supervisory power within the meaning of article X, section 1, Act 21 nonetheless does not strip away that power. According to Walker and Huebsch, unlike here, the "holding in [***Thompson***] is tied to circumstances where the supervisory powers *with respect to public instruction* are given to other officers." They assert that, unlike the law at issue in ***Thompson***, Act 21 does not give others supervisory power. We have trouble understanding this argument. The obvious purpose and effect of the part of Act 21 that we address today is to give the Governor substantial power to shape rulemaking with respect to public instruction. Thus, to the extent we understand Walker and Huebsch's argument differentiating ***Thompson*** in this regard, we reject it.

¶30 Whether or not the powers that are assigned to the Governor reduce the SPI's primacy over supervision of public instruction will be resolved in our

discussion of Walker and Huebsch's final argument, which they have characterized as the ***Thompson*** "'superiority test.'"

F. The Superiority Test

¶31 We, like Walker and Huebsch, read the main thrust of the supreme court's reasoning in ***Thompson*** as recognizing the constitutional directive that the SPI have a superior role in supervising public education.[9] Walker and Huebsch argue, however, that the requirement that the SPI be superior to any other officers in the supervision of public instruction applies to "the sum total of the Superintendent's supervisory powers, not to limitations on its exercise." Walker and Huebsch go on to argue that, as long as the legislature does not transfer "each and every one" of the SPI's supervisory powers to another, article X, section 1 is not violated. In our view, this approach cannot be reconciled with several of the specific holdings of ***Thompson***. In particular, the ***Thompson*** court made clear that it was not ruling on the ability of the legislature to limit the powers and duties of the SPI, but rather on the legislature's power to assign these powers and duties to some other entity not subject to the SPI's authority. *See* ***Thompson***, 199 Wis. 2d at 698-99. We see nothing in ***Thompson*** that supports the sort of stick-counting approach advocated by Walker and Huebsch. It is true, as Walker and Huebsch suggest, that the law at issue in ***Thompson*** was a far more sweeping attempt to shift power from the SPI to the Governor. But the court's basic analysis was to

[9] Walker and Huebsch write in their brief-in-chief: "[The] provisions in Act 21 do not make the [SPI] inferior or equal to another officer in the aggregate with respect to the supervision of public instruction. [Rather,] Act 21 'passes' the [***Thompson***] 'superiority' test." Later, Walker and Huebsch write: "Act 21 does not violate [***Thompson***] because the [SPI] still exercises superior authority with respect to rule[]making."

assess whether the law gave supervisory power relating to public instruction to others "not subordinate to the [S]uperintendent." *See* ***id.*** at 678, 698.

¶32 According to Walker and Huebsch, ***Thompson*** did not undercut two prior supreme court decisions that "acknowledged that the Legislature may limit the [SPI's] authority or provide that such authority may be shared by others." As we have already discussed, we have no doubt that the legislature may limit the powers and duties of the SPI and, moreover, the legislature's power to do so is not in dispute here. What remains is Walker and Huebsch's assertion that these pre-***Thompson*** cases stand for the proposition that the SPI's supervisory authority "may be shared by others." We now address both cases with respect to that assertion.

¶33 Walker and Huebsch point to ***Fortney v. School Dist. of West Salem,*** 108 Wis. 2d 167, 321 N.W.2d 225 (1982). Relevant here, part of that decision addresses whether a collective bargaining agreement, under which arbitration took place, was unconstitutional under article X, section 1, as an infringement on the constitutional hiring and firing power of school boards. ***Id.*** at 181-82. We acknowledge that ***West Salem*** provides support for Walker and Huebsch's contention that the legislature has the authority to limit the powers and duties of educational officers under the constitutional provision. However, to the extent ***West Salem*** addresses the sharing of supervisory power, it does so with respect to "other officers," which the ***Thompson*** court later ruled was not permitted with respect to the SPI. ***West Salem*** is simply not germane to the issue before us, which is the assignment of certain powers to the Governor that are not subordinate to those of the SPI in the area of public educational supervision.

¶34 Walker and Huebsch also cite ***Burton v. State Appeal Bd.,*** 38 Wis. 2d 294, 156 N.W.2d 386 (1968), as authority for their proposition that "the Legislature may require the Superintendent to share his authority." However, the supreme court in ***Thompson*** said otherwise respecting the issue in ***Burton***:

> Nothing in ***Burton*** is contrary to our holding in the present case. While the officers on the appeal board in ***Burton*** could cast a vote on an appeal board along with the SPI, they were *clearly still subject to the SPI's authority* because they were appointed to the board by the SPI, and served only to review a single dispute.

Thompson, 199 Wis. 2d at 699 n.10 (emphasis added).

¶35 Walker and Huebsch argue that, under Act 21, "the Superintendent still exercises superior authority with respect to rule[]making." Whether this is intended as a stand-alone argument, or is offered to buttress an argument we have already addressed, we are uncertain. The argument, in its entirety, reads:

> [The Coyne parties'] main argument against Act 21 is that it intrudes upon the Superintendent's supervisory authority by allowing the Governor to reject a scope statement or proposed rule. Act 21, §§ 4, 9; WIS. STAT. §§ 227.185, 227.135, and 227.137(7). But this does not put the Superintendent in an inferior position to the Governor. The Superintendent, through his leadership of DPI, is the *only* officer that can determine the content of a proposed rule or scope statement. It is the Superintendent (or DPI) which drafts the scope statement (WIS. STAT. § 227.135(1)), drafts the economic impact analysis, if any, (WIS. STAT. § 227.137(2)), and drafts the proposed rule (WIS. STAT. § 227.14(1)).
>
> The Governor, on the other hand, has no power to draft a scope statement or an economic impact analysis. The Governor has no power to fashion the text of a proposed rule. It is only the Superintendent who can draft these documents.
>
> What the Governor may do under Act 21—reject a scope statement or the text of a final rule—is the functional equivalent of a veto. Concluding this limited power makes

> the Governor "superior" to the Superintendent in the rule[]making context is analogous (and equally misguided) to saying the Governor has superior legislative power to the Legislature because he can veto legislation.
>
> Accordingly, Act 21's inclusion of the Governor in the rule[]making process does not violate the rule in ***Thompson v. Craney.***

We reject this argument for reasons that should be obvious by now. The argument's premise, that the Governor's new power conferred by Act 21 gives the Governor "no power to fashion the text of a proposed rule," is a premise Walker and Huebsch do not attempt to explain or defend. So far as we can tell, it is a premise that ignores reality. It seems beyond reasonable dispute that a Governor at loggerheads with an SPI over the content of a proposed rule, or proposed rule change, could use the threat to withhold approval as a means of affecting the rule content. Moreover, the analogy to the Governor's power to veto legislation is unpersuasive. As here, the threat of a Governor's veto *can* shape proposed legislation toward the Governor's preference. And, by constitutional design, a Governor's veto can be overridden by the legislature. Here, the Governor's approval authority is not similarly limited.

¶36 In sum, we affirm the circuit court's conclusion that the Coyne parties have met their burden of demonstration, beyond a reasonable doubt, that particular provisions of Act 21 listed in the circuit court's order that give to the Governor (and in limited cases, the Secretary of Administration) the power to intervene in the process of drafting and promulgating administrative rules are unconstitutional as applied to the SPI. The constitutionality of such provisions as they apply to any officer or agency other than the SPI is not before us and we render no opinion thereupon. The order of the circuit court, by not disturbing Act 21 in any other respect, implies that these provisions are severable. No party has raised severability as an issue and we do not address it here.

CONCLUSION

¶37 For the reasons stated above, we affirm the order of the circuit court.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT COUNTY OF DANE
BRANCH 4

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

Plaintiffs,

Case No. 11-CV-4573
Case Code: 30701

v.

SCOTT WALKER,
MICHAEL HUEBSCH, and
ANTHONY EVERS,

Defendants.

DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This case is before the court on dueling motions for summary judgment. Plaintiffs filed their Motion for Summary Judgment on February 3, 2012, and Defendants (other than Superintendent Evers)[1] filed their Motion for Summary Judgment on May 25, 2012. Also on May 25, 2012, Defendants submitted a response brief. Plaintiffs filed a reply brief on June 8, 2012, and Defendants filed a reply brief on June 22, 2012. On July 9, 2012, Superintendent Evers filed a brief in support of Plaintiff's motion. Defendants submitted a final reply brief on August 6, 2012. Consistent with its June 21, 2012 Scheduling Order, the court issues this Decision to address both motions.

For the reasons stated below, Plaintiffs' Motion for Summary Judgment is **GRANTED**, and Defendants' Motion for Summary Judgment is **DENIED**.

[1] As noted elsewhere in this Decision, Superintendent Evers is a named defendant in this action, and remains so aligned as a party in the case caption. However, the court concludes that Superintendent Evers is in a practical sense more aligned with Plaintiffs in this case. Therefore, where the term "Defendants" is used in this Decision, it relates to Governor Walker and Secretary Huebsch.

BACKGROUND

Article 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." Interpreting this provision, the Wisconsin Supreme Court held that "the legislature may not give equal or superior authority to any 'other officer.'" *Thompson v. Craney*, 199 Wis. 2d 674, 699, 546 N.W.2d 123 (1996).

On May 23, 2011, Governor Scott Walker signed into law 2011 Wisconsin Act 21 ("Act 21"). Act 21 requires all state agencies—including the Department of Public Instruction, headed by the State Superintendent of Public Instruction Anthony Evers—to submit scope statements and proposed administrative rules to the Governor for approval. No further rule drafting activities may occur until the Governor approves the scope statement. In addition, if proposed administrative rules may lead to $20,000,000 or more in costs for businesses, municipalities or individuals, the proposed rule requires further review and approval by the Secretary of the Department of Administration ("DOA"). In such cases, the agency may not submit the proposed rule to the Legislature for review without the DOA Secretary's approval.

Plaintiffs ask the court to declare that Act 21 violates Article X, §1 of the Wisconsin Constitution, and to enjoin its implementation. In his Answer filed October 21, 2011, State Superintendent Evers admitted Plaintiffs' allegations and requested the same relief.

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2) (2010). All doubts as to the existence of a genuine issue

of material fact must be resolved against the moving party. *Kraemer Bros., Inc. v. U.S. Fire Ins. Co.*, 89 Wis. 2d 555, 566, 278 N.W.2d 857 (Wis. 1979). The "inferences to be drawn from the underlying facts contained in the moving party's material must be viewed in the light most favorable to the party opposing the motion." *Id.* at 567 (citation omitted).

If the pleadings are sufficient, the court considers the moving party's proof to determine whether that party presents a *prima facie* case for summary judgment. *Id.* If the moving party so presents, the opposing party must show, by affidavit or other proof, the existence of disputed material facts, or undisputed material facts that allow for reasonable conflicting inferences. *Id.*

"Legislative acts are presumed constitutional..." *GTE Sprint Communications Corp. v. Wisconsin Bell, Inc.*, 155 Wis. 2d 184, 192, 454 N.W.2d 797, 800 (1990). The party challenging a legislative enactment "must prove it unconstitutional beyond a reasonable doubt." *Id.*

ANALYSIS

The court first looks at the pleadings in this case. The court concludes that Plaintiffs have stated a claim, and that Defendants' Answer has asserted a defense. Therefore, the court turns its attention to the summary judgment submissions by the parties.

Plaintiffs contend that Act 21 is unconstitutional because it gives superior authority over public instruction to officers other than the Superintendent. In *Thompson*, the Wisconsin Supreme Court invalidated a statute because it gave "equal or superior authority to" other officers. *Thompson*, 199 Wis. 2d at 699. Because Act 21 gives the Governor, and in some cases the Secretary of DOA, the power to block the Superintendent from pursuing the approval of administrative rules, Plaintiffs maintain that Act 21 gives superior authority over public instruction to these officers, and is thus unconstitutional.

Defendants respond by arguing that 1) since the plain language of Article X §1 provides that the Superintendent's powers and duties are to "be prescribed by law," the Legislature has ample discretion in modifying or reducing the Superintendent's role; 2) constitutional debates indicate that the framers intended the Legislature to prescribe the Superintendent's duties; 3) the first education statute passed after the constitutional provision took effect illustrates that rulemaking is not an essential component of the Superintendent's duty to supervise public instruction; 4) the Superintendent under Act 21 still plays the greatest role in the supervision of public instruction; 5) other state constitutions give the ultimate power over superintendent-like positions to their legislatures; 6) rulemaking is a form of legislative power that the Legislature may delegate to agencies and other officers in any manner of its choosing; 7) since the Legislature can constitutionally block proposed rules, the ability to block rules was already with "other officers;" 8) the Legislature has previously reduced the Superintendent's powers by taking away authority over physical education, music education, and technical schools; 9) *Thompson* is distinguishable and does not control this case; and 10) ruling Act 21 unconstitutional would overturn *Fortney v. School District of West Salem*, 108 Wis. 2d 167, 321 N.W.2d 225 (1982).

Plaintiffs' reply brief argues that "[d]espite the unambiguous holding in *Thompson v. Craney*, the Defendants try to obfuscate the issue by claiming that this case is about the legislature's power to determine how administrative rules are adopted and then reviewed by the legislature." (Reply Brief, p. 4.) In the Plaintiffs' view, "[t]he Defendants essentially claim that the legislature's authority to set the process for the adoption and review of administrative rules is unfettered, to the point where it can allow other executive branch officers to control the Superintendent's policy choices." (*Id.*, p. 4-5.)

Plaintiffs also dispute Defendants' argument that the Legislature is composed of "other officers." According to the Defendants, because these legislative "other officers" can block rules, it makes no difference whether the Legislature gives other officers (such as the Governor and the DOA Secretary) the ability to block rules too. (Response Brief, p. 27.) Plaintiffs contend that adopting this argument would overrule *Thompson*, because the *Thompson* court rejected an argument that the legislature can allocate power between the Superintendent and other executive officers however it wishes, ruling instead that the Superintendent must be superior to the other officers. (Reply Brief, p. 7.) Because the Governor via Act 21 can stop the Superintendent from "even beginning the process of adopting rules by not approving the scope statement," and can block proposed rules, Plaintiffs argue that Act 21 unconstitutionally allows the Governor to stop the Superintendent from implementing his policy choices. (*Id.*, p. 4, 7.)

In addition to reiterating some earlier arguments, Defendants' reply brief avers that "Act 21 has nothing *whatsoever* to do with the supervision of public instruction." (Reply Brief, p. 4) (italics in original). That is, "[a]dministrative rule-making is not a means by which the Superintendent supervises public instruction; it is a delegation by the Legislature of some of its legislative powers." (*Id.*) Defendants summarize their argument as follows:

> (1) the Legislature prescribes the powers and duties of the Superintendent; (2) the Superintendent does not have any inherent powers; (3) the Legislature may delegate its constitutional, legislative powers of rule-making through the state's administrative rule-making process; (4) the Superintendent has no entitlement to participate in the administrative rule-making process nor to dictate how that process is to be established; and (5) the Legislature's administrative rule-making process does not impair, impact or impede the Superintendent's ability to supervise public instruction.

(*Id.*)

For the reasons stated below, the court determines that Act 21 is unconstitutional.[2] In this Decision, the court first explains why it holds that Act 21 is unconstitutional. Next, the court responds to the various arguments advanced by the Defendants.

In the court's view, the feature that renders Act 21 unconstitutional beyond a reasonable doubt is the fact that Act 21 permits the Governor, and the DOA Secretary under certain circumstances, to stop the Superintendent from starting and/or pursuing the process of rulemaking. Under Act 21, before a scope statement can be sent to the Legislature, the Governor must approve it in writing. The Governor is thereby able to block proposed rules. Act 21 conveys similar authority to the DOA Secretary to block proposed rules under certain circumstances.

Administrative rulemaking is an important way in which a Superintendent exercises his or her constitutional authority over the supervision of public instruction. Because Act 21 allows the Governor to bar the Superintendent from proposing rules, or from even beginning the process of rulemaking by submitting a scope statement to the Legislature, Act 21 places the Governor in a position superior to the Superintendent in the supervision of public instruction. Similarly, by requiring the DOA Secretary's approval to pursue proposed rules having certain fiscal implications, Act 21 places the DOA Secretary in a position superior to the Superintendent in the supervision of public instruction for those situations. Under the analysis set forth in *Thompson*, Act 21 as applied to this case violates the Wisconsin Constitution.

The court has considered Defendants' numerous arguments, none of which the court finds to be persuasive. The court analyzes these arguments, below.

[2] This Decision is limited to Act 21 in the context of this case (*e.g.*, to the Superintendent and DPI). This Decision does not address Act 21 as applied to other agencies.

Defendants' first argument is that the plain language of Article X, §1 places the duties of the Superintendent within the discretion of the Legislature. (Response Brief, p. 8.) The plain meaning of a constitutional provision is one of the three factors courts use in determining the provision's constitutionality. *State v. Beno*, 116 Wis. 2d 122, 136-37, 341 N.W.2d 668 (1984). The first sentence of Article X, § 1 reads as follows: "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."

Defendants argue that because the constitutional text itself "does *not* define any specific powers or duties of the Superintendent...this can only mean that the Legislature was authorized...to prescribe the powers and duties of the Superintendent, both by adding new powers and by reducing any already given powers." (Response Brief, p. 10) (italics in original). However, the constitutional text does provide that "supervision of public instruction" is "vested" with the Superintendent. The question is thus whether proposing administrative rules, and scope statements that precede these proposed rules, are fundamental components of the supervision of public instruction.

The court believes that they are. The idea that rulemaking "has nothing *whatsoever* to do with the supervision of public instruction" is impossible for this court to accept. (Reply Brief, p. 4.) The Superintendent supervises public instruction by leading the Department of Public Instruction (hereafter "DPI"), which operates—as most state government agencies do—by proposing, then upon promulgation implementing, administrative rules.

Chapter 115 of the Wisconsin Statutes, which establishes the powers and duties of the Superintendent, is replete with requirements that the Superintendent promulgate rules in specific areas. Two of the statutes in this chapter alone, taken together, include no fewer than 16

references to rules that the Superintendent is to promulgate. Wis. Stat. §§ 115.28, 115.29.[3] This establishes beyond doubt that rulemaking is a fundamental part of what it means to supervise public instruction at the present time. As discussed below, the first statute passed after the 1902 amendment illustrates that rulemaking was a component of the supervision of public instruction at that time as well.

Second, Defendants contend that constitutional debates prove that the framers intended the Legislature to prescribe the powers and duties of the Superintendent. (Response Brief, p. 12.) Such debates are the second source examined by courts in evaluating a law's constitutionality. *Beno*, 116 Wis. 2d at 137. The court finds this argument undeveloped and unpersuasive. Courts are not required to consider undeveloped arguments. In any case, since the constitutional text itself provides that the Legislature prescribes the Superintendent's powers and duties, it is unnecessary to show that this was the framers' intent.

Third, Defendants argue that the first statute passed after the constitution was adopted illustrates the power of the Legislature to shape the Superintendent's duties and powers. (Response Brief, p. 12.) The "earliest interpretation of" a constitutional provision "by the legislature as manifested in the first law passed following the adoption of the constitution" is the third source used by courts to determine whether a statute is constitutional. *Beno*, 116 Wis. 2d at 137. The first statute gave the Superintendent various responsibilities, and also required him to "perform such other duties as the legislature or governor of this state may direct." (Laws of 1848, p. 127 (Aug. 16, 1848.)) A book published in the 1920s asserted that the statute "did not confer any real powers of control on the Superintendent," who "had absolutely no power to

[3] In addition, the Wisconsin Administrative Code provides many examples of how the Superintendent has used rulemaking to supervise public instruction. (Superintendent's Brief, p. 4.) The code includes rules relating to various matters relevant to the supervision of public instruction, such as high school equivalency diplomas, special education aid, and the Milwaukee Parental Choice Program. Wis. Admin. Code §§ PI5, 30, 35.

enforce his views." Conrad E. Patzer, *Public Education in Wisconsin* 38, 248 (1924). According to Defendants, this illustrates that "[t]here is a difference between the supervision of public instruction (which is clearly vested in the Superintendent) and the power to create laws (a power which is just as clearly vested in the legislature.)" (Response Brief, p. 15.)

A major problem with this argument is that it contradicts the Wisconsin Supreme Court's finding in *Thompson* that the Superintendent "was not intended to be simply an advocate, but an officer with the ability to put plans into action." *Thompson*, 199 Wis. 2d at 689. Today, putting plans into action necessarily involves proposing, then implementing, administrative rules.

Moreover, the Superintendent contends that the first laws passed after the adoption of the constitution, and after the amendment in 1902, directed the Superintendent to engage in rulemaking. (Superintendent's Brief, p. 3.) As summarized by the *Thompson* court, the first law passed after the constitution's adoption required the Superintendent to "apportion school funds between townships, propose regulations for making reports and conducting proceedings under the act, and to adjudicate controversies arising under the school lands." 199 Wis. 2d at 695. The Superintendent maintains that "[a]ll of these acts require the creation and administering of rules." (Superintendent's Brief, p. 4.) In addition, the first law passed after the 1902 amendment to Article X, § 1 provided that the Superintendent "had the power to 'revise, codify, and edit the school laws,'" and to "prescribe regulations for district libraries; to resolve appeals from school district decisions; and to apportion the school fund income." *Thompson*, 199 Wis. 2d at 697.

These statutes suggest that rulemaking has always been an essential aspect of the Superintendent's duty to supervise public instruction. While it may be unclear whether the 1848 statute empowered the Superintendent to engage in rulemaking, there is no doubt that the first statute passed after the 1902 amendment required rulemaking. The statute's directives to

"revise, codify, and edit the school laws" and (as paraphrased in *Thompson*) "prescribe regulations for district libraries" necessarily entail some form of rulemaking. *Id.*

Fourth, Defendants state that under Act 21, the Superintendent still has the greatest role in the supervision of public instruction. (Response Brief, p. 12.) Plaintiffs had argued that "[a]dministrative rules are the principal legal means by which the Superintendent carries out his constitutionally vested responsibility to supervise public instruction." (Summary Judgment Brief, p. 5.) Defendants aver that this seems hard to believe, given the fact that the Administrative Procedure Act was not passed until 1943, and the Department of Public Instruction only came into being in 1971. Did Superintendents lack the means to carry out their duties before then?

Not necessarily. As noted above, Superintendents were required to engage in rulemaking in some form from at least the time of the first statute passed after the 1902 amendment. In addition, regardless of what was involved in supervising public instruction before the advent of modern rulemaking, rulemaking is surely a key component of supervising public instruction today. *See* Ch. 115, Wis. Stats.

Defendants also quote from the current Superintendent's Inaugural Address, which mentioned a number of goals for his term, but said nothing about promulgating administrative rules. (Response Brief, p. 17.) Similarly, Defendants cite a "long list" in which the Superintendent detailed his activities, "none of which involved the promulgation of administrative rules." (*Id.*, p. 18.) The court does not find these data points particularly instructive or persuasive. These statements were presumably meant for consumption by members of the general public, who would be unlikely to understand or appreciate any reference the Superintendent made to rulemaking. Moreover, it is likely that accomplishing the goals he

listed would necessitate promulgating and implementing new rules, even if that detail was not included in his public addresses or press releases.

This court finds that Defendants' general argument that the Superintendent still would have the greatest role in the supervision of public instruction post-Act 21 is unpersuasive, as it fails to answer this fundamental question: Does Act 21 impermissibly and unconstitutionally grant other officers superior authority over the Superintendent? Whether or not the Superintendent still possesses a key role in public instruction supervision after implementing Act 21 is not particularly material or responsive to this question.

Fifth, Defendants discuss other state constitutions with similar provisions, to underline the fact that other states' legislatures define the powers and duties of superintendents. (*Id.*) The court does not find the quotes from other constitutions to be helpful in deciding this case, which requires analysis and application of Wisconsin law.

Sixth, Defendants maintain that rulemaking is a form of legislative power that the Legislature may delegate to other agencies in whatever manner the Legislature sees fit. (*Id.*, p. 23-27.)[4] Yet even if the Superintendent has no inherent power to promulgate rules on his or her own, the fact remains that *pursuing* the promulgation of rules is among the Superintendent's core functions, as defined by the relevant statutes. See, *e.g.*, Wis. Stat. §§ 115.28, 115.29. Once this role has been assigned to the Superintendent as part of his or her duty to supervise public instruction, giving another officer the power to block the Superintendent from even starting the process of proposing new rules is unconstitutional, because it thereby gives superior authority over public instruction to another officer.

[4] Defendants attempt to support this contention by drawing on *E.B. v. State*, 111 Wis. 2d 175, 330 N.W.2d 584 (1983). (Brief in Reply to Superintendent's Brief, p. 2-3.) *E.B.* dealt with the separation of powers between the judiciary and the legislature, with respect to the judiciary's ability to establish its own procedures. Since that area of the law is not closely analogous to the issues in this case, the court does not find this argument convincing.

Seventh, Defendants argue that because the Legislature can constitutionally block rules, this means that the power to veto rules was already with "other officers." (Response Brief, p. 27.) If this is the case, according to Defendants, then there could be nothing unconstitutional about the Legislature designating other officers, such as the Governor or DOA Secretary, to veto proposed rules as well. Yet it is not reasonable to consider the Legislature, or a legislative committee, to be "officers." The term "officer" refers to an individual person, not an organization or institution. Describing either the Legislature or the Joint Committee for Review of Administrative Rules as an "officer" defies common sense. Moreover, the term "officers," as it is used in Article X, §1, clearly refers to executive branch officials. As the Legislature is a separate branch of government and mentioned separately in Article X, §1, the framers must not have meant the term "officers" to encompass the Legislature or legislative committees.

In any event, the idea that the Legislature can designate anyone it chooses to veto the Superintendent's proposed rules is inconsistent with *Thompson*, which prohibited giving superior power over public instruction to other executive officers. Since the Legislature defines the Superintendent's powers and duties, it only makes sense that the Legislature could allow itself (or one of its committees) to block rules proposed by the Superintendent. What contravenes *Thompson* is granting this veto power to other executive officers, because this gives those executive officers greater authority over public instruction than the Superintendent.

Eighth, Defendants contend that since the Legislature has previously reduced the Superintendent's power—by removing authority over musical, physical and vocational education—it must be constitutional to give the Governor veto power over rulemaking. (Response Brief, p. 28.) However, music education, physical education and vocational colleges are peripheral to the core task given to the Superintendent: the supervision of public education in

grade schools and high schools. There is a difference between reducing the Superintendent's power (as in the above examples) and giving other officers superior authority over public instruction in general (as in *Thompson* and this case). *Thompson*, 199 Wis. 2d at 698-700.

Ninth, Defendants attempt to distinguish *Thompson*, arguing that it is inapplicable to this case. Defendants maintain that *Thompson* "did not concern how the powers or duties of the Superintendent were to be prescribed by law." (Response Brief, p. 31.) In addition, Defendants state that the statute struck down by Thompson "was a legislative action which directly centered upon who would be setting the policies for public instruction in Wisconsin," which is "plainly not something contemplated or even implied in Act 21." (*Id.*, p. 32.)

The court disagrees. As explained above, rulemaking is a key mechanism for setting and implementing policies. It should be noted that many of the sections of Chapter 115 directing the Superintendent to promulgate rules give the Superintendent considerable discretion on the content of these 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 statute does not elaborate. Also without elaborating, another section in the same statute directs the Superintendent to "make rules for the examination and certification of school nurses." Wis. Stat. § 115.28(7m). In these and many other situations, the Superintendent enjoys a wide margin of freedom to propose rules that best fit his or her policy goals. It is not the case that rulemaking simply implements the detailed policy choices already made by the Legislature. On the contrary, the Legislature often leaves those choices for the Superintendent. Because Act 21 grants veto power over these policy choices to the Governor and in some cases the Secretary of DOA, it makes the Superintendent subordinate to the Governor and DOA Secretary in public instruction-related policymaking.

Finally, Defendants aver that declaring Act 21 unconstitutional would amount to overturning *West Salem*. (Response Brief, p. 35.) That case, which related to school boards rather than the Superintendent, included the following passage:

> 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. Therefore, consistent with our holding that the arbitrator's decision and award violates no statutory provision relating to the powers and duties of the Board, we hold that it does not violate the Wisconsin Constitution.

108 Wis. 2d at 182. Defendants point to this language as proof that the Superintendent has no inherent powers. Defendants suggest that ruling Act 21 unconstitutional would only be possible by holding that the Superintendent has inherent powers. (Response Brief, p. 30.)

This is not the case any more than it was in *Thompson*, and the court is not persuaded by Defendants' arguments in this regard. In *Thompson*, the Supreme Court held that "the constitutional difficulty with the education provisions of 1995 Wis. Act 27 is not that it takes power away from the office of the [Superintendent], but rather that it gives the power of supervision of public education to an 'other officer' instead of the" Superintendent. 199 Wis. 2d at 698-99 (emphasis added). The *Thompson* court then quoted the passage from *West Salem* reproduced above, and explained: "This case does not require us to decide the extent to which the [Superintendent]'s powers may be reduced by the legislature, and we reserve judgment on that issue." *Id.* at 699-700.

Act 21, like the statute in *Thompson*, involves not taking away some specific power from the Superintendent, but rather giving another officer superior authority over public instruction. Since rulemaking is one of the key ways the Superintendent supervises public instruction, giving the Governor, and in some cases the DOA Secretary, the right to veto any attempts at submitting

scope statements or proposing new rules grants these officers superior authority over the supervision of public instruction. Under *Thompson*, this is unconstitutional.

Plaintiffs have established their entitlement to summary judgment. Plaintiffs have established that Act 21, as applied to the rulemaking activities of the Superintendent of Public Instruction, is unconstitutional beyond a reasonable doubt.

CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Summary Judgment is **GRANTED**, and Defendants' Motion for Summary Judgment is **DENIED**. This court declares Act 21 as applied to rulemaking activities of the Superintendent of Public Instruction **VOID**.

Plaintiffs are **ORDERED** to draft any Order(s) necessary to effect the intent of this Decision.

Dated this 30th day of October, 2012.

BY THE COURT:

Hon. Amy R. Smith
Circuit Court Judge, Branch 4

cc: Attorney Lester Pines
Attorney Maria Lazar
Attorney Janet A. Jenkins

STATE OF WISCONSIN CIRCUIT COURT BRANCH 4 DANE COUNTY

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

Plaintiffs,

v.

Case No. 11-CV-4573

SCOTT WALKER, Governor of the State of Wisconsin in his official capacity, MICHAEL HUEBSCH, Secretary of the Department of Administration in his official capacity, and ANTHONY EVERS, State Superintendent of Public Instruction in his official capacity,

Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Pursuant to this Court's Decision and Order on Motions for Summary Judgment dated October 30, 2012, which is incorporated herein, and Wis. Stats. §§ 806.04(1), (2) & (8),

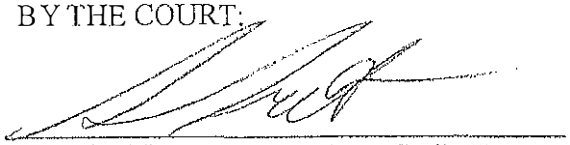
IT IS HEREBY ORDERED that all provisions of 2011 Wisconsin Act 21 which require approval of the Governor or the Secretary of the Department of Administration over the administrative rule-making activities in which the State Superintendent of Public Instruction engages or supervises, with respect to the supervision of public instruction, including the relevant parts of 2011 Wisconsin Act 21, secs. 4, 5, 6, 21, 26, 27, 32, and 61, are hereby DECLARED VOID.

IT IS FURTHER ORDERED that the Defendants, in their official capacities, are PERMANENTLY ENJOINED from implementing the above provisions of Act 21, as they relate to the State Superintendent of Public Instruction.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.

Dated this 26 day of November, 2012.

BY THE COURT:



THE HONORABLE AMY R. SMITH
Circuit Court Judge, Branch 4