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You are hereby notified that the Court has entered the following order:

No. 2017AP2278-OA Koschkee v. Evers

On November 20, 2017, a petition for leave to commence an original action was filed on behalf of petitioners, Kristi Koschkee, Amy Rosno, Christopher Martinson, and Mary Carney. The respondents named in the petition are Tony Evers, in his official capacity as Wisconsin Superintendent of Public Instruction, and the Wisconsin Department of Public Instruction (DPI). The parties and the Attorney General have also filed various motions.

On February 14, 2018, this court issued an order directing the parties and the Attorney General to file briefs addressing various issues, including why, given Wis. Stat. § 165.25(1m), Evers and DPI believe they have the right to counsel of their choice and whether the Governor is a necessary party to this action. The court having considered all filings,

IT IS ORDERED that the petition for leave to commence an original action is granted, and this court assumes jurisdiction over this action.

IT IS FURTHER ORDERED that on May 15, 2018, at 9:30 a.m. the court will hear oral argument on two issues: (1) whether Evers and DPI have the right to counsel of their choice or are represented by the Attorney General and the Wisconsin Department of Justice and (2) whether the Governor is a necessary party to this action. Since the parties and the Attorney General have previously filed briefs on these issues, no further briefing is required at this time. As was stated in this court's February 14, 2018 order, without deciding the representation issue, due to the unique circumstances of this case, the court, on its own authority, authorizes Attorneys Nilsestuen and Jones to present oral argument on behalf of Evers and DPI on these two issues. The court has allotted sixty minutes of oral argument time for these two issues. The parties and the Attorney General shall submit a proposed division of the oral argument time on or before April 23, 2018, which the court will then consider in establishing a final division of oral argument time.

IT IS FURTHER ORDERED that all pending motions are held in abeyance pending further order of the court.

IT IS FURTHER ORDERED that a briefing schedule and date for oral argument on the merits of the original action petition will be scheduled at a later date.

ANN WALSH BRADLEY, J. (*dissenting*). This court has historically exercised its original jurisdiction very sparingly, guided by the principles set forth in Petition of Heil, 230 Wis. 428, 284 N.W.2d 42 (1939). Heil explained that the court's original jurisdiction may rightly be invoked when "the remedy in the lower courts is entirely lacking or absolutely inadequate, and hence jurisdiction must be taken or justice will be denied." Id. at 440. The Heil court further noted that the "[m]ere expedition of causes, convenience of parties to actions, and the prevention of a multiplicity of suits are matters which form no basis for the exercise of original jurisdiction of this court." Id. at 448. In my view, this matter does not pass muster under Heil. Accordingly, I would deny the petition for leave to commence an original action.

This case presents the issue of whether the Department of Public Instruction must comply with a newly enacted procedure by which administrative agencies must obtain approval from the Department of Administration and the governor prior to promulgating administrative rules. It appears to be the very issue we recently decided in Coyne v. Walker, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520.[1] The petitioners have candidly stated that their primary reason for invoking this court's original jurisdiction is to induce the court to "revisit" Coyne.[2]

[1] In Coyne, we considered the constitutionality of procedures related to the promulgation of administrative rules to require state agencies to obtain the approval of the Governor and Secretary of Administration before submitting a proposed rule to the legislature. Coyne v. Walker, 2016 WI 38, ¶¶6-8, 368 Wis. 2d 444, 879 N.W.2d 520. We determined that the procedure was unconstitutional as applied to the Superintendent of Public Instruction because it

Coyne began as a declaratory judgment action filed in Dane County Circuit Court. The circuit court's grant of summary judgment was affirmed by the court of appeals, and the case reached this court by means of a petition for review. There is no reason why this matter could not follow the same time-honored path through the circuit court and court of appeals before making its way to this court. The remedy in the lower courts is plainly not "entirely lacking or absolutely inadequate."

The petitioners have not demonstrated that there is a need to hasten the ultimate outcome of the litigation. When grappling with issues presented to it, this court almost always benefits from the circuit court's resolution of disputed issues of fact and the reasoned analyses of both the circuit court and the court of appeals. The court would benefit from the lower courts' analyses here.

So why is the court revisiting Coyne, which was decided a mere 16 months prior to the filing of this original action? Some observers suggest that it is because the composition of the court has changed, "giving [Petitioners'] group a chance to revisit the issue and possibly win."[3]

However, the law is clear: "No change in the law is justified by a change in the membership of the court . . . ." Bartholomew v. Wis. Patients Comp. Fund and Compcare Health Servs. Ins. Corp., 2006 WI 91, ¶32, 293 Wis. 2d 38, 717 N.W.2d 216. Indeed, we should adhere to our precedent to foster confidence in the reliability of court decisions, promote consistent development of legal principles, and contribute to the actual and perceived integrity of the Wisconsin judiciary. See Johnson Controls, Inc. v. Emp'rs Ins. of Wausau, 2003 WI 108, ¶95, 264 Wis. 2d 60, 665 N.W.2d 257.

Rather than granting the petition for leave to commence an original action, I would allow the case to come to us through the normal appellate channels. Accordingly, I respectfully dissent.

"vests the Governor and Secretary of Administration with the supervision of public instruction in violation of Article X, § 1" of the Wisconsin Constitution. Id., ¶ 79. Compare 2017 Wis. Act 57, § 3 (requiring an agency proposing a rule to submit the proposed rule to the "department of administration, which shall make a determination as to whether the agency has the explicit authority to promulgate the rule as proposed in the statement of scope and shall report the statement of scope and its determination to the governor who, in his or her discretion, may approve or reject the statement of scope.").

[2] See Tom Daykin and Jason Stein, State Superintendent of Public Instruction chief Tony Evers ignores new law on rule making, lawsuit says, Milwaukee Journal-Sentinel, Nov. 20, 2017, https://www.jsonline.com/story/news/politics/elections/2017/11/20/wisconsin-department-public-instruction-evers-ignore-new-law-rule-making-suit-says/877761001/.

[3] Id.

I am authorized to state that Justice SHIRLEY S. ABRAHAMSON joins this dissent.

Sheila T. Reiff
Clerk of Supreme Court