STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

CASE NO. 2011-AP-2917

JAMES R. SCHOOLCRAFT
and CRAIG VERTZ

Plaintiffs-Respondents,

THE MUKWONAGO AREA SCHOOL DISTRICT

Involuntary Plaintiff,

v.

STATE OF WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, TONY EVERS and PAUL A. SHERMAN

Defendants-Appellants.

Case No. 10-CV-4804
Case Code: 30704

ON APPEAL FROM A NOVEMBER 2, 2011, ORDER FOR JUDGMENT BY THE WAUKESHA COUNTY CIRCUIT COURT, HON. DONALD J. HASSIN, JR., PRESIDING
CASE NO. 2010-CV-4804

RESPONSE BRIEF OF PLAINTIFFS-RESPONDENTS

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STATEMENT OF THE ISSUES

1. Whether the hearing held by Paul Sherman violated Plaintiffs-Respondents' Procedural Due Process rights such that Wis. Stat. § 118.134 was unconstitutional as-applied in this case?

   Trial Court answer: Yes.

2. Whether Chapter 227 can preempt taxpayers from challenging the constitutionality of a statute?

   Trial Court answer: No.

3. Whether Plaintiffs-Respondents' have a legal interest in the controversy that is the subject of Plaintiffs-Respondents' Declaratory Judgment Complaint such that they could commence the action alleging that Wis. Stat. § 118.134 is unconstitutional and violated their rights under 42 U.S.C. § 1983?

   Trial Court answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiffs-Respondents believe oral argument may benefit the Court as this is an issue of first impression.

Plaintiffs-Respondents believe that the opinion should be published because the case is one of first impression – the interpretation and constitutionality of Wis. Stat. § 118.134.

STATEMENT OF THE CASE

The instant appeal arises from a lawsuit filed by Plaintiffs-Respondents, James R. Schoolcraft and Craig Vertz (Schoolcraft and Vertz, respectively), against Defendants-Appellants, State of Wisconsin Department of Public Instruction, Tony Evers and Paul Sherman (collectively DPI) alleging that Wis. Stat. § 118.134, Wisconsin's statute regarding school nicknames and logos, is unconstitutional. (R. at 10; R-App. 1 – 10.) Specifically, Schoolcraft and Vertz contended that Wis. Stat. § 118.134 violated the Procedural Due Process and the Equal Protection guarantees of the Fourteenth Amendment, both facially and as applied in this case. (Id.)

I. PROCEDURAL POSTURE AND DISPOSITION OF TRIAL COURT

The appeal before this Court stems from the circuit court's November 2, 2011 Order for Judgment following the Court's September 29, 2011 Decision and Order granting Plaintiffs-Respondents' Motion for Summary Judgment concluding that Wis. Stat. § 118.134 was applied unconstitutionally because it violated Schoolcraft's and Vertz's procedural due process rights as applied in this case. (R. at 37; R-App. 194 – 215.)

II. STATEMENT OF FACTS

Schoolcraft and Vertz are adult residents of the State of Wisconsin and taxpayers within the Mukwonago Area School District (District). (R. at 10; R.-App. 2.) Schoolcraft's children were previously enrolled in the District, and Vertz's children are currently enrolled in the District. (Id.)

On July 21, 2010, Rain Koepke (Koepke), a District resident at the time, filed a complaint with the State Superintendent of Public Instruction regarding the Mukwonago High School Indians logo and mascot. (R. at 10; R-App. 11.) On July 23, 2010, Paul Sherman (Sherman), a School Administration Consultant working for DPI, sent a letter to an administrator for the District advising that a complaint had been filed pursuant to newly enacted Wis. Stat. § 118.134. (R. at 37; R-App. 196.)

On August 11, 2010, Sherman advised the District and Barbara Munson (Munson), a non-resident, non-attorney, advocate for Koepke, that a hearing would be held on August 27, 2010. (R. at 37; R-App. 197.) No notice of any kind was given to any District residents, including Schoolcraft and Vertz. (R. at 23; R-App. 68.) On that point, Sherman testified specifically as follows:

> Q: At the hearing -- with respect to the hearing itself, it's my understanding that notice of the hearing was only sent to Ms. Munson and to the school district; is that correct?
>
> A: To my knowledge, that's who I sent notices to.

Q: And your notice was essentially a letter, correct?

A: Correct.

Q: And that was sent to the district and Ms. Munson and that was it, correct?

A: That's correct.

Q: Are you aware of any other notice that was issued with respect to the hearing?

A: No, I'm not.

(Id.)

Schoolcraft and Vertz were not given an opportunity to be heard or present evidence at the August 27, 2010 hearing. (R. at 23; R-App. 69). On that point, Sherman testified as follows:

Q: Was there any ability to take testimony from interested parties that were just members of the public at this hearing?

A: No, there wasn't.

(Id.)

On October 8, 2010, Sherman issued DPI's Findings of Fact, Conclusions of Law and Order Compelling the Mukwonago Area School District to change its Indians nickname and logo. (R. at 10; R.-App. 7.) By the time that this action was commenced, the District had already spent $17,000.00 as a result of the application of Wis. Stat. § 118.134, and it is expected that the District's changing of the nickname and logo will cost the District's taxpayers approximately $100,000.00. (Id.)

Sherman had been appointed to hear complaints filed under Wis. Stat. § 118.134 by Dr. Tony Evers (Evers), the State Superintendent, the most senior employee at the DPI. (R. at 23; R. App. 66.) Evers conceded at his deposition that the DPI as an organization has supported the elimination of all race-based nicknames:

> Q: My question is, prior to that time, my understanding is that you had come out and you had been an advocate for getting rid of all race-based nicknames; is that true?
>
> A: I know the department did when I was deputy state superintendent. I don't recall me personally -- I-- I don't recall me personally advocating after I was elected state superintendent. When I was deputy state superintendent, I do recall the state superintendent sending out a letter on this issue, advocating for the elimination of that...

(R. at 23; R-App. 21-22.)

Sherman was aware that the DPI, his employer, publicly and actively supported the total eradication of Indian nicknames before the August 27, 2010 hearing and before Wis. Stat. § 118.134 was enacted by the legislature. On that point, Sherman testified specifically as follows:

> Q: You've never indicated one way or another to anyone prior to this hearing your position as to whether it's good or bad?
>
> A: To any person?
>
> Q: To any person publicly, how does that sound?
>
> A: Publicly, no.
>
> Q: Okay. You know Dr. Evers or the DPI has?
>
> A: Yes.

Q: Okay. And prior to this hearing, you know the DPI has come out and said we want you all to get rid of the race-based nicknames?

A: Yes.

Q: You knew that going in?

A: Yes.

Q: True?

A: Yes.

Q: And the DPI is your employer?

A: Yes.

(Id.)

In addition to knowing that his employer, DPI, publicly and actively supported the elimination of Indian nicknames and mascots, Sherman also met and interacted with Munson, the non-attorney, non-resident advocate for Koepke on a number of occasions prior to the August 23, 2010 hearing. (R. at 23; R-App. 39, 63.)

Sherman took up his post with the DPI in October of 2007. (R. at 23; R-App. 62). Sherman has known Munson since November of 2007, when the two met one another when Sherman was on hand, in his official capacity on behalf of the DPI, to hear Munson's testimony before the state senate on a bill that was a predecessor to the current Wis. Stat. § 118.134. (R. at 23; R-App. 39, 63.)

In addition, Munson had been a consultant to the DPI on issues relating to the very issue that was the subject of the hearing before Sherman – the use of Indian nickname and logo – when Munson served as the chairperson on the taskforce for the Wisconsin Indian Education Association. (R. at 23; R-App. 35-37.) Most recently, Munson served on a three-person panel along with JP Leary (Leary), one of Sherman's co-workers at the DPI, who presented at the National Indian Education Association Annual Convention held in San Diego, CA between October 7 and October 10, 2010. (R. at 34; R-App. 113 – 114.) The panel presented on the history of Wisconsin law and the efforts taken by Munson and the DPI, among others, to have Wis. Stat. § 118.134 enacted. (Id.)

In the weeks and months after the August 23, 2010 hearing presided over by Sherman and before the October 8, 2010 decision, Munson exchanged emails with Leary of the DPI leading up to and in preparation for the NIEA convention. (R. at 34; R-App. 106-112.) Perhaps most telling is an email from Leary to Munson, and others, where Leary provides a draft of the presentation that the panel will be presenting along with the following note: "[m]y hope is that we can use this slideshow simply as a way to structure the story that we tell." (R. at 34; R-App. 111.)

With regard to the hearing itself, as the circuit court noted, Sherman could not articulate what evidence or proof would have been sufficient for

Mukwonago to meets its burden of proof under the statute. (R. at 37; R-App. 209-211.) Specifically, the circuit court noted that Sherman responded with "I don't know" on at least four occasions when asked what the District would have needed to present to meet its burden of proof and also avoided answering other questions that were related to the same subject. (R. at 37; R-App. 210-211.) Finally, the circuit court also noted that Sherman acknowledged that he "could see it that way" when asked whether he believed that others might have concerns regarding the appearance of impropriety because he was presiding over the hearing. (R. at 37; R-App. 201.)

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT WIS. STAT. § 118.134 WAS UNCONSTITUTIONAL AS APPLIED IN THIS CASE IN VIOLATION OF PROCEDURAL DUE PROCESS PROTECTIONS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Wisconsin Statute Section 118.134 was unconstitutionally applied to Schoolcraft and Vertz because (1) they did not receive notice of any hearing, (2) they did not have an opportunity to present evidence and (3) they were not afforded an impartial decision-maker as required for

procedural due process.[1] The Fourteenth Amendment to the United States Constitution provides that no state may "deprive any person of life, liberty or property without due process of law." U.S. Const. Amend. XIV, § 1. Procedural due process requires that individuals who may be deprived of property, such as Schoolcraft and Vertz, are entitled to a fair hearing, which requires (1) the right to receive notice, (2) the right to present evidence and (3) the right to be heard before an impartial decision-maker. *Aurora v. Labor & Indus. Review Comm'n*, 2010 WI App 173, ¶ 29, 330 Wis. 2d 804, 794 N.W.2d 520 (citing *Theodore Fleisner, Inc. v. DILHR*, 65 Wis. 2d 317, 326, 222 N.W.2d 600 (1974)).

A. Impartial Decision Maker

The circuit court correctly found that Sherman was not a "fair and impartial decision-maker," which is a necessary component of procedural due process. *Bunker v. Labor and Industry Review Com'n,* 2002 WI App 216, ¶ 19, 257 Wis. 2d 255, 650 N.W.2d 864. Moreover, the circuit court correctly acknowledged the presumption that a decision-maker is presumed to be fair and impartial, and that the record revealed that presumption had

[1] DPI argues, for the first time on appeal, that DPI never applied Wis. Stat. § 118.134 to *Plaintiffs-Respondents*, seeking to distinguish between DPI's order compelling the District to take action and not Schoolcraft and Vertz, such that, under DPI's view, Schoolcraft and Vertz cannot sustain a procedural due process claim. This case, like all other taxpayer standing cases, involve monetary loss ultimately to be borne on the part of the taxpayer(s) bringing suit, which necessarily results in the deprivation of property requiring adherence to due process protections. This argument raised within the procedural due process section of Defendants-Appellants' brief is largely a regurgitation of the arguments raised with regard to the standing section of Defendants-Appellants' brief and are similarly unavailing.

been rebutted and that Sherman "showed an impermissible risk of bias." (R. 37; R-App. 209.)

"[D]ue process and fair play can be violated 'when there is bias or unfairness in fact [, or when]...the risk of bias is impermissibly high.'" *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 25, 498 N.W.2d 842 (1993)(quoting *Guthrie v. Wisconsin Employment Relations Commn*, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983)).

In *Marris*, the issue before the Wisconsin Supreme Court relevant to this appeal was whether the chairperson of the Board of Review for the City of Cedarburg prejudged the matter or created an impermissibly high risk of bias such that it deprived the resident a fair hearing. *Id.* at 19.

The Wisconsin Supreme Court observed that "[s]ince biases may distort judgment, impartial decision-makers are needed to ensure both sound fact-finding and rational decision-making as well as to ensure public confidence in the decision-making process." *Id.* at 25-26.

The record in *Marris* included a tape recording of a closed-door meeting by the zoning board, which contained three statements that the resident found objectionable. *Id.* at 27 – 28. The resident argued that, in totality, the comments suggested that the chairperson of the Board had prejudged her case.

With regard to the case at bar, the circuit court's analysis of *Marris* combined with the factual record supports the circuit court's conclusion that Sherman "showed an impermissible risk of bias," such that Sherman was not an impartial decision-marker as required by the procedural due process protections afforded by the Fourteenth Amendment.

Specifically, the circuit court found that (1) "Sherman knew that the DPI had publicly and actively supported the total eradication of Indian nicknames"; (2) Sherman did not know and could not articulate "how the District was supposed to determine what evidence could lead to a positive result" in favor of the District; and (3) Sherman could not answer questions "about the type of evidence the District should have submitted to prevail." (R. at 37; R-App. 209-210.) Moreover, even Sherman himself acknowledged that he understood that outside observers could see the appearance of impropriety with regard to having him, a DPI employee appointed by the chief executive of DPI, an organization that had taken a public position favoring the elimination of nicknames like Mukwonago's, sit as the decision maker for the statutorily-prescribed hearing. (R. at 23; R-App. 75.)

Like in *Marris*, the totality of the circumstances with regard to the relationship between Sherman and the DPI, the DPI's public stance on the issue and the DPI's long-standing relationship with Munson, the non-

attorney, non-resident advocate for the complainant, create the impermissibly high risk of bias.

Sherman's awareness of the DPI's active and public position with regard to the total elimination of Indian nicknames supports a finding that Sherman "showed an impermissible risk of bias." In addition to knowing that his employer, the DPI, publicly and actively supported the total eradication of Indian nicknames, he had been appointed to oversee the hearing by the most senior person within the DPI. (R. at 23; R. App. 66.)

In addition to his knowledge before the hearing of the DPI's position with regard to the nickname issue, Sherman also had met and interacted with Munson, who was openly adverse to Mukwonago, on a number of occasions prior to the August 23, 2010 hearing, including an initial meeting where Sherman was present, in his official capacity on behalf of the DPI, when the state senate was hearing testimony from Munson in relation to a bill that was a predecessor to the current Wis. Stat. § 118.134. (R. at 23; R-App. 39; 63.) His familiarity with Munson and Munson's past consultant relationship with the DPI is yet another basis for finding that Sherman "showed an impermissible risk of bias."

Moreover, after the August 27, 2010 hearing and before Sherman authored his opinion, Munson was corresponding with one of Sherman's co-workers at the DPI in preparation for a presentation Munson was putting

on with Sherman's co-worker, in San Diego,[2] on the recent change to Wisconsin law and the efforts taken by Munson and the DPI, among others, to have Wis. Stat. § 118.134 enacted. (R. at 34; R-App. 106-112.) Munson and Sherman's co-worker were at the annual meeting when the October 8, 2010 decision was released; how foolish would DPI and Munson have looked touting their accomplishments with regard to the enactment of the new law during the presentation only to have one of DPI's own employees render a decision in a case involving Mukwonago that would be adverse to Munson and DPI's public positions on the issue?

Not surprisingly, Sherman acknowledged the potential appearance of impropriety that him presiding over the hearing may have caused. (R. at 23; R-App. 79.)

Further, as a separate basis for concluding that Sherman "showed an impermissible risk of bias," the circuit court aptly noted that Sherman avoided questions and could not otherwise articulate an answer when asked what evidence Mukwonago would have needed to show to meet its burden of proof when answering "I don't know" to several questions that were posed on that subject. (R. at 37; R-App. 209-210.) Specifically, Sherman even admitted that there was no way for Mukwonago to know what evidence or testimony Sherman wanted to hear. (R. at 23; R-App. 75.)

[2] It is not known by the Plaintiffs-Respondents who paid for Munson's travel expenses for the San Diego conference, but it is known that DPI had paid for lodging costs for Munson on a previous occasion. (R. at 34; R-App. 108.)

In sum, the circuit court applied the proper standard of law in determining whether Sherman exhibited an impermissible risk of bias that resulted in a procedural due process violation. The circuit court correctly concluded from the record and the undisputed testimony from the person who was supposed to be the impartial decision-maker that (1) Sherman knew his employer's position on the issue before the hearing (to get rid of all race-based nicknames), (2) Sherman was appointed to his position as decision maker by his employer's chief executive, (3) Sherman knew, and had a pre-existing relationship with, the complainant's non-attorney, non-resident advocate, and (4) even with the benefit of hindsight, retrospect and legal representation, Sherman could not articulate how Mukwonago could have met its burden of proof in order for Mukwonago to prevail at the hearing. For all these reasons, this Court should affirm the decision of the circuit court and hold that Schoolcraft and Vertz were denied their procedural due process rights because Sherman exhibited an impressible risk of bias.

B. Notice and Opportunity to be Heard and Present Evidence

Schoolcraft and Vertz, as taxpayers within the District responsible for paying for any nickname or logo change, had, and continue to have, a property interest and will sustain a pecuniary loss to the extent the District is required to comply with DPI's order compelling the change in the high

school nickname and logo. As a result, they were entitled to notice of any hearing that may adversely affect their property taxes and an opportunity to be heard and present evidence to ensure protection of their procedural due process rights afforded by the Fourteenth Amendment.

It is undisputed that Schoolcraft and Vertz were not notified of the August 27, 2010 hearing. (R. at 23; R-App. 68.) It goes without saying that Schoolcraft and Vertz were not afforded an opportunity to be heard and present evidence. (R. at 23; R-App. 69.)

In fact, despite hearing from Koepke through his non-attorney representative, Sherman never intended to afford interested persons, including Mukwonago school district residents, the opportunity to present evidence or testify at the August 27, 2010 hearing. (Id.)

Schoolcraft and Vertz have the same Constitutional right as Koepke to receive notice, appear, speak and present evidence or argument at a fair hearing. Because Schoolcraft and Vertz were not given notice or an opportunity to be heard, they were wholly and arbitrarily denied due process of law.

II. CHAPTER 227 DOES NOT BAR THIS 42 U.S.C. § 1983 CONSTITUTIONAL CHALLENGE OF STATE LAW OR STATE ACTION.

Schoolcraft and Vertz's declaratory judgment complaint seeking a declaration that Wis. Stat. § 118.134 violates 42 U.S.C. § 1983 should not

be barred by a strict application of Chapter 227 of the Wisconsin Statutes. When an administrative agency has no authority to declare unconstitutional the very statute that confers the agency with the authority to make the initial administrative decision, the exclusive method of review, which requires the exhaustion of administrative remedies before judicial review of a state agency can be had, (collectively "exclusive remedy"), is inapplicable because the administrative agency cannot afford the party adequate relief. *Nodell Inv. Corp. v. Glendale*, 78 Wis. 2d 416, 425-426, 254 N.W.2d 310 (1952)(quoting *Kmiec v. Town of Spider Lake*, 60 Wis. 2d 640, 645, 211 N.W.2d 471 (1973)). Chapter 227 cannot provide the exclusive remedy before judicial review can be had in this case because the DPI has no authority to declare the statute unconstitutional, such that the statutory remedy is not plain, speedy or adequate, as required for Chapter 227's review process to apply.

A 42 U.S.C. § 1983 civil rights challenge is not contemplated by Chapter 227 of the Wisconsin Statutes and would not be appropriately addressed through such an administrative review. To be clear, this action is not an appeal of the October 8, 2010 order, and this action does not assert that the DPI, through Sherman, did not have statutory authority to preside over the hearing. Even if the Court would assume that Schoolcraft and Vertz have a theoretical ability to appeal the DPI order under Chapter 227,

Schoolcraft and Vertz are also nonetheless permitted to bring this action in order to challenge the constitutionality of Wis. Stat. § 118.134 and its application under federal law, separate from the merits of the DPI order issued in this case; federal supremacy dictates as much. Schoolcraft and Vertz are not contesting that Sherman or the DPI exercised discretion in violation of the statute as contemplated by Wis. Stat. § 227.55(8); rather, Schoolcraft and Vertz are challenging the constitutionality of the statute itself, and the constitutionality of the manner in which the hearing was held. In that instance, Chapter 227 does not prevent Schoolcraft and Vertz from asserting their constitutional rights.

At the outset, it should be noted that the Wisconsin Supreme Court "has recognized that it need not apply the exhaustion doctrine in a rigid, unbending way." *County of Sauk v. Trager*, 118 Wis. 2d 204, 214, 346 N.W.2d 756 (1984). "In exercising its discretion in whether to apply the exhaustion doctrine, the court should balance the litigant's need for judicial review, the agency's interest in precluding the litigant from defending the action and the public's interest in the sound administration of justice." *Id.* Courts should also be reluctant to apply the exhaustion doctrine when the question raised is one of law and when the merits of the case appear strong. *See id.* at 216.

DPI argues that Schoolcraft and Vertz were required to commence an action pursuant to Chapter 227 of Wisconsin Statutes to review the DPI order in this matter rather than commence this action pursuant to 42 U.S.C. § 1983 to challenge the constitutionality of a state law. In support of its argument, DPI largely relies on the Supreme Court's ruling in *State ex rel. the First National Bank of Wisconsin Rapids v. M&I Peoples Bank of Coloma*, 82 Wis. 2d 529, 263 N.W.2d 196 (1978). DPI's suggestion that the procedures in Chapter 227 provide the only remedy to Schoolcraft and Vertz fails for many of the exceptions noted within the court's decision.

Generally, courts have recognized that Chapter 227 provides the mechanism for judicial review of state agency determinations. *See* Wis. Stat. § 227.52. However, the foregoing statutory provisions do not provide for the exclusive remedy for agency determinations in all circumstances. *First National Bank*, 82 Wis. 2d at 545. Specifically, the Supreme Court has recognized that reviews pursuant to Chapter 227 are not required when such a review could not provide the requested remedy. *Id.* Specifically, the Supreme Court has noted that:

> "[A] challenge to the constitutional validity of a zoning ordinance presents a question of law. Such a challenge may properly be made by commencing an action for declaratory judgment and the exhaustion of remedies is not applicable..." The reason for this exception is that an appeal to the administrative agency would not have afforded the party adequate relief since the administrative agency has no right to repeal or declare unconstitutional zoning ordinances enacted by the

> legislative body from which the board derives its existence.

Nodell Inv. Corp. v. Glendale, 78 Wis. 2d 416, 425-426, 254 N.W.2d 310 (1952)(quoting *Kmiec v. Town of Spider Lake*, 60 Wis. 2d 640, 645, 211 N.W.2d 471 (1973)).

The foregoing situation manifests itself in the case on appeal. DPI contends that Schoolcraft and Vertz should have sought review of the DPI's decision pursuant to Chapter 227, although, through that review, a remand to the DPI may have been ordered by the circuit court. However, as the court in *Nodell*, *Kmiec*, and *First National Bank* all noted, when the agency to whom the matter would be remanded has no authority to declare unconstitutional the very statute under which it is conferred with the authority to make the initial administrative decision, the remedy outlined in Chapter 227 is not exclusive because the administrative agency cannot afford the party adequate relief.

Further, Chapter 227 should not bar this case based on the fact that statutory notice of the adverse decision was not provided to Schoolcraft or Vertz or to the taxpayers within the District. The Wisconsin Supreme Court has expressly acknowledged that the remedies outlined in Chapter 227 should not be required in cases where parties do not receive statutory notice and the aggrieved party did not receive actual notice until after the

deadline to appeal had expired. *First National Bank*, 82 Wis. 2d at 546. *See also Perkins v. Paecock*, 263 Wis. 644, 658, 58 N.W.2d 536 (1953).

As a practical matter, DPI's position would require any person whose constitutional rights were affected by a statute and an administrative decision to which the person was not a party and of which the person has no knowledge or notice, to bring an action under Chapter 227 within the statutory time period as prescribed by Chapter 227. Such a process and such a result defies common sense and offends traditional notions of due process.

Accordingly, this Court should hold that the circuit court correctly concluded that Chapter 227 did not provide the only method by which Schoolcraft and Vertz could challenge the constitutionality of Wis. Stat. § 118.134.

III. SCHOOLCRAFT AND VERTZ HAVE STANDING TO PURSUE THIS DECLARATORY JUDGMENT ACTION.

Schoolcraft and Vertz have standing to pursue this declaratory judgment action because they already have or will sustain a loss, however slight, if the District is required to comply with DPI's order compelling the changing of the Indians nickname and logo. Wisconsin courts are lenient when determining whether taxpayers have standing, especially when the taxpayers are challenging the constitutionality of the statute because

without granting the taxpayers standing to bring such a challenge, an unconstitutional statute could remain on the books without being subject to judicial review. *City of Appleton v. Menasha*, 142 Wis. 2d 870, 878, 419 N.W.2d 249 (1988).

Wisconsin law has a long-standing tradition of extending taxpayer standing in order to challenge the constitutionality of statutes. *Id.* The reason for such an approach is because "unless a taxpayer has standing to make the challenge in state courts, no one else [including the school district or municipality] would be able to do so." *Id.* That is particularly important, and courts are even more inclined to find that taxpayers have standing where, as here, taxpayers are challenging the constitutionality of statutes: "if an injured taxpayer is denied standing to challenge the constitutionality of a statute, the legislature could violate the constitutional limitations of its powers. . . with impunity." *Id.* (citing *Columbia County v. Board of Trustees*, 17 Wis. 2d 310, 319-20, 116 N.W.2d 142 (1962)).

In order for a taxpayer to have standing, a taxpayer must have a personal stake in the outcome of the case and prove that he or she has "sustained or will sustain, some pecuniary loss." *S.D. Realty Co. v. Sewerage Com. of Milwaukee*, 15 Wis. 2d 15, 21, 112 N.W.2d 177 (1961)(citing *McClutchery v. Milwaukee County*, 239 Wis. 139, 140, 300 N.W.2d 224 (1941)) Wisconsin courts have held that taxpayers have

standing to challenge the constitutionality of the statute "[i]f the taxpayer shows *even a slight loss*." *City of Appleton*, 142 Wis. 2d at 877 (emphasis added).

In this case, Schoolcraft and Vertz, individually and as representatives of similarly situated taxpayers, have standing because they have shown that the decision and action taken by Sherman and DPI will have some effect on their tax dollars. Who, if not Schoolcraft and Vertz, as individual taxpayers within the District, will bear the cost of complying with DPI's decision compelling the District to change its nickname and logo?

This issue requires the Court to determine, in a general sense, whether Schoolcraft and Vertz have a cognizable interest at stake in order to have standing. The irony of DPI's position that Schoolcraft and Vertz do not have non-derivative taxpayer standing is highlighted by DPI's argument with regard to the application of Chapter 227. With regard to Chapter 227, DPI asserts that Schoolcraft and Vertz were required to pursue the relief they seek under Chapter 227 as individuals with "substantial interests" that were adversely affected by administrative decisions. (Appellant's B. pp. 30 – 31). Apparently, under the DPI's logic, Schoolcraft and Vertz have "substantial interests" under Chapter 227 but cannot show "even a slight loss" to have standing to challenge the constitutionality of Wis. Stat. §

118.134. However, the circuit court correctly held that Schoolcraft and Vertz could show at least a slight loss based on the expenditure of taxpayer funds to comply with DPI's order and that Chapter 227 did not apply to this action commenced pursuant to 42 U.S.C. § 1983.

This Court should hold that the circuit court correctly concluded that Schoolcraft and Vertz have non-derivative standing to pursue this declaratory judgment complaint challenging the constitutionality of the statute because (1) they have shown that they have or will sustain some loss, however slight, if the District is required to comply with DPI's order, and (2) if Schoolcraft and Vertz did not have standing, the constitutionality of Wis. Stat. § 118.134 would evade judicial review.

CONCLUSION

Based on the foregoing, Schoolcraft and Vertz respectfully request that this Court affirm the decision and order of the circuit court.

Respectfully submitted and dated at Milwaukee, Wisconsin this 16th day of May, 2012.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in § 809.19(8)(b) and (c), Stats, for a brief produced with the following font:

> Proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, and maximum of 60 characters per full line of body text. The length of this brief is 4,866 words and contains 22 pages.

Respectfully submitted and dated at Milwaukee, Wisconsin this 16th day of May, 2012.

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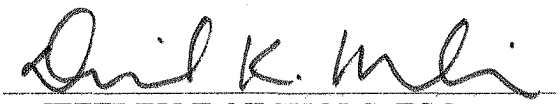
By: 

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PROOF OF SERVICE

The undersigned, counsel for Plaintiffs-Respondents James Schoolcraft and Craig Vertz, hereby certifies that on this date, three copies of the Brief delivered by U.S. Mail to Defendants-Appellants' Counsel at the following address: Wisconsin Department of Justice, 17 West Main Street, Madison, Wisconsin, 53702.

The undersigned, counsel for Plaintiffs-Respondents James Schoolcraft and Craig Vertz, hereby also certifies that on this date, three copies of the Brief delivered by U.S. Mail to Involuntary Plaintiff, Mukwonago Area School District, at the following address: 385 County Road NN E, Mukwonago, Wisconsin, 53149-2038

Dated at Milwaukee, Wisconsin this 16th day of May, 2012.

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ELECTRONIC CERTIFICATION

I hereby certify I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §.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.

Respectfully submitted and dated at Milwaukee, Wisconsin this 16th day of May, 2012.

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