STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP2917

JAMES R. SCHOOLCRAFT
and CRAIG VERTZ,

Plaintiffs-Respondents-Petitioners,

MUKWONAGO AREA
SCHOOL DISTRICT,

Involuntary-Plaintiff,

v.

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

Defendants-Appellants.

DEFENDANTS-APPELLANTS' RESPONSE IN OPPOSITION TO PETITION FOR REVIEW AND SUPPLEMENTAL APPENDIX

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Defendants-Appellants.

DEFENDANTS-APPELLANTS' RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

Pursuant to Wis. Stat. § (Rule) 809.62(3), Defendants-Appellants State of Wisconsin Department of Public Instruction ("DPI"), Tony Evers, and Paul A. Sherman (collectively, "Defendants"), by their undersigned counsel, respectfully submit this response and a supplemental appendix in opposition to the petition for review filed by Plaintiffs-Respondents-Petitioners

James R. Schoolcraft and Craig Vertz (collectively, "Petitioners"). The January 3, 2013, *per curiam* unpublished decision of the court of appeals presents no "special and important reasons" justifying supreme court review. Wis. Stat. § (Rule) 809.62(1r). The petition for review should be denied.

The underlying court of appeals decision involves the application of well-settled law. The decision is grounded in the straightforward application of long-standing principles governing the scope of Wis. Stat. ch. 227 judicial review and taxpayer standing. In light of these principles, the court of appeals correctly held that Petitioners do not have standing to pursue their constitutional claims. (Pet. App. 002, ¶ 1.) Specifically, "Schoolcraft and Vertz did not avail themselves of the remedy of judicial review set forth in Wis. Stat. ch. 227." (Pet. App. 005, ¶ 12.)

Review of the court of appeals' decision does not present an avenue for this Court to apply the operative provisions of the race-based mascot law, Wis. Stat. § 118.134, for the first time, to weigh in on the statute's facial constitutionality, or to review how DPI applied the statute to the Mukwonago Area School District's (the "District's") use of the "Indians" nickname and logo. The court of appeals' *per curiam* unpublished decision is grounded in civil procedure, not the substance of Wis. Stat. § 118.134 or how it has been applied by DPI.

The case presents no important question of state or federal constitutional law and no compelling issue of statewide concern. The court of appeals did not review the merits of the circuit court's erroneous ruling that a DPI administrator, Paul A. Sherman, showed an impermissible risk of bias or was partial in his role as administrative law judge, thereby resulting in a due process violation as to the District. (Pet App. 003, ¶ 4 n.2) ("Whether or not Sherman performed his duties

impartially does not direct our decision; we therefore do not reach the merits of that claim.") Instead, the court of appeals correctly held that Petitioners lack standing.

This is a case correctly decided by the court of appeals through the application of established procedural law, namely, chapter 227 of the Wisconsin Statutes. The court of appeals' decision is not authored and will not be published; it has no precedential or persuasive value. *See* Wis. Stat. § (Rule) 809.23(3). Accordingly, the petition for review should be denied.

For the first time in this case, Petitioners attempt to raise an argument that the Supremacy Clause of the United States Constitution somehow: (1) provides that Petitioners have standing under state law principles to assert federal civil rights claims in state court; and (2) grants Petitioners the ability to circumvent the procedural rules in chapter 227 of the Wisconsin Statutes that one must follow to seek judicial review of a decision of a state administrative agency. (Petition for Review at 14-20.) Not only was this novel argument not raised below, it is also meritless.

There is a fatal flaw in all of Petitioners' constitutional claims: Wis. Stat. § 118.134 has never been applied by DPI *to Petitioners*. The statute creates a procedure whereby a school district resident can file a complaint with the State Superintendent of Public Instruction to challenge a school district's use of a race-based nickname, mascot, logo, or team name as promoting discrimination, pupil harassment, or stereotyping. Wis. Stat. § 118.134(1), (2)(a). The State Superintendent (or in this case, his designee, Mr. Sherman) determines whether a contested case hearing is necessary. Wis. Stat. § 118.134(1)(b), (1m). The parties to the administrative proceeding before DPI are the complainant and the school district. Wis. Stat. § 118.134.

In this case, DPI ordered that the District's use of the "Indians" nickname and logo must cease. (Pet. App. 002, ¶ 2); (*see also* Pet. App. 039-45 (October 8, 2010, Findings of Fact, Conclusions of Law, and Order of DPI, *In the Matter of The Mukwonago School District Nickname and Logo*, Complaint # 10-LC-03).) In doing so, DPI applied Wis. Stat. § 118.134 to the District, not to Petitioners.

Thus, Petitioners were not parties to the contested case before DPI. They could have sought to participate as parties in that proceeding pursuant to Wis. Stat. § 227.44(2m) ("Any person whose substantial interest may be affected by the decision following the hearing shall, upon the person's request, be admitted as a party."). They did not. Likewise, Petitioners could have petitioned for judicial review of DPI's decision in circuit court under Wis. Stat. § 227.53 as "person[s] aggrieved" and could have pursued their constitutional claims in that venue. *See* Wis. Stat. §§ 227.53(1), 227.57(8). They did not pursue that opportunity, either.

The District chose not to file a petition for judicial review of DPI's order and did not participate in the instant litigation. (Petitioners named the District as an involuntary plaintiff. *See* Pet. App. 030.) The District raised no constitutional issues in the administrative

proceeding before DPI.[1] Petitioners' case, therefore, has been an ongoing effort to appeal DPI's order after the District abandoned its right to do so. Petitioners filed this lawsuit after the time to file a petition for judicial review in circuit court had passed. As the court of appeals correctly held, "[t]he legislature cannot have intended that a person can disregard the mechanisms in place to challenge a rule or statute and attempt an end-run collateral attack on the statute's constitutionality." (Pet. App. 005, ¶ 12.)

Petitioners would like this Court to establish a rule whereby any taxpayer dissatisfied with an order of a state agency can make an end-run around chapter 227 of the Wisconsin Statutes and pursue a civil rights action to allegedly vindicate federal procedural due process rights. The potential for taxpayer litigation against the State of Wisconsin and its agencies that this Court could unleash by taking jurisdiction of this case and ruling in Petitioners' favor would be tremendous.

Aside from their standing arguments, Petitioners also petition to have this Court review the circuit court's ruling on their as-applied procedural due process claim. (Petition for Review at 25-30.) The court of appeals did not address that issue because its ruling was based upon

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[1]The District is an arm of the state and is generally prohibited from challenging the constitutionality of state law. *See Columbia Cnty. v. Bd. of Trs. of the Wis. Ret. Fund*, 17 Wis. 2d 310, 317, 116 N.W.2d 142 (1962). However, this Court has recognized exceptions to that rule when an arm of the state raises the unconstitutionality of a state law as a defense. *See Fulton Found. v. Wis. Dep't of Taxation*, 13 Wis. 2d 1, 13, 109 N.W.2d 285 (1961); *Associated Hosp. Serv., Inc. v. City of Milwaukee*, 13 Wis. 2d 447, 468-70, 109 N.W.2d 271 (1961). Accordingly, it is possible that the District might have raised the unconstitutionality of Wis. Stat. § 118.134 as a defense before DPI, and its failure to raise constitutional issues in the administrative proceeding waived those issues. *Omernick v. DNR*, 100 Wis. 2d 234, 246-50, 301 N.W.2d 437 (1981); *Bidstrup v. DHFS*, 2001 WI App 171, ¶ 22, 247 Wis. 2d 27, 632 N.W.2d 866.

standing. This Court's job is not error correction. *See State v. Mosley*, 102 Wis. 2d 636, 665-66, 307 N.W.2d 200 (1981). If the Court takes this case to address standing, it should not also reach the merits of a constitutional challenge that the court of appeals never addressed.[2]

Finally, Petitioners would like this Court to rule on their facial constitutional challenges to Wis. Stat. § 118.134, which they lost in circuit court. (Petition for Review at 30-32.) The circuit court declared that Wis. Stat. § 118.134 "is facially constitutional as to [Petitioners]' procedural due process and equal protection claims." (Supp. App. 002 (November 2, 2011, Order for Judgment); R. 43 at 4.); (*see also* Pet. App. 016-17; Pet. App. 025-27.) Petitioners did not appeal the circuit court's judgment as to their facial challenges. (Petitioners do not point this out in their Petition for Review, nor do they include the circuit court's November 2, 2011, Order for Judgment in their Appendix.) They should not now be permitted to pursue an appeal on their facial claims because they forfeited that right by not timely appealing the circuit court's ruling.

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[2]In any event, the circuit court's Order for Judgment held that the District was denied procedural due process, not Petitioners:

> a. Plaintiffs' Motion for Summary Judgment is GRANTED as to Plaintiffs' as-applied challenge to Wis. Stat. § 118.134 under procedural due process. The Court finds that Defendant Paul A. Sherman was not a fair and non-biased decision maker and that the Mukwonago Area School District (the "District") was denied procedural due process. Accordingly, the Court DECLARES that Defendant State of Wisconsin Department of Public Instruction ("DPI") did not constitutionally apply Wis. Stat. § 118.134 to the District . . . .

(Supp. App. 002); (R. 43 at 4).

For the reasons stated above, the petition for review should be denied.

Dated this 12th day of February, 2013.

Respectfully submitted,

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kawskicp\cases\schoolcraft - dpi, mascot\supreme court\pleadings\response in opposition to petition for review.doc

CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this response is 1,534 words.

Dated this 12th day of February, 2013.

CLAYTON P. KAWSKI
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this response in opposition to petition for review, excluding the supplemental appendix, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b).

I further certify that:

This electronic response in opposition to petition for review is identical in content and format to the printed form of the response in opposition to petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this response in opposition to petition for review filed with the court and served on all opposing parties.

Dated this 12th day of February, 2013.

CLAYTON P. KAWSKI
Assistant Attorney General

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with Defendants-Appellants' Response in Opposition to Petition for Review, either as a separate document or as a part of the response, is a supplemental appendix that complies with Wis. Stat. § 809.19(2)(a), and that contains:

(1) A table of contents;

(2) Relevant trial court record entries;

(3) The findings or opinions of the trial court; and

(4) Portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the supplemental appendix are reproduced using first names and last initials, instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality, and with appropriate references to the record.

Dated this 12th day of February, 2013.

CLAYTON P. KAWSKI
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this supplemental appendix, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(13).

I further certify that:

This electronic supplemental appendix is identical in content to the printed form of the supplemental appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this supplemental appendix filed with the court and served on all opposing parties.

Dated this 12th day of February, 2013.

CLAYTON P. KAWSKI
Assistant Attorney General

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS TO
SUPPLEMENTAL APPENDIX

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 9 | WAUKESHA COUNTY

JAMES R. SCHOOLCRAFT,
and CRAIG VERTZ,

Plaintiffs,

MUKWONAGO AREA SCHOOL DISTRICT,

Involuntary Plaintiff,

v.

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

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

Defendants.

ORDER FOR JUDGMENT

WHEREAS, Plaintiffs filed a Motion for Summary Judgment on June 1, 2011; and

WHEREAS, Plaintiffs filed a brief in support of their Motion for Summary Judgment on June 1, 2011; Defendants filed a brief in opposition to Plaintiffs' Motion for Summary Judgment on July 1, 2011; and Plaintiffs filed a reply brief in support of their Motion for Summary Judgment on July 11, 2011; and

WHEREAS, after considering the parties' briefs, the Court entered a Decision and Order regarding Plaintiffs' Motion for Summary Judgment on September 29, 2011. The Court's Decision and Order is hereby incorporated as if set forth fully herein by this reference.

NOW, THEREFORE, IT IS ORDERED that, for the reasons stated in the Court's September 29, 2011, Decision and Order, Plaintiffs' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART, as follows:

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a. Plaintiffs' Motion for Summary Judgment is GRANTED as to Plaintiffs' as-applied challenge to Wis. Stat. § 118.134 under procedural due process. The Court finds that Defendant Paul A. Sherman was not a fair and non-biased decision maker and that the Mukwonago Area School District (the "District") was denied procedural due process. Accordingly, the Court DECLARES that Defendant State of Wisconsin Department of Public Instruction ("DPI") did not constitutionally apply Wis. Stat. § 118.134 to the District; and

b. Plaintiffs' Motion for Summary Judgment is DENIED as to Plaintiffs' as-applied and facial challenges to Wis. Stat. § 118.134 under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and as to Plaintiffs' facial challenge to Wis. Stat. § 118.134 under procedural due process. The Court DECLARES that Wis. Stat. § 118.134 is facially constitutional as to Plaintiffs' procedural due process and equal protection claims. The Court further DECLARES that DPI's application of Wis. Stat. § 118.134 to the District did not violate the Equal Protection Clause.

IT IS FURTHER ORDERED that DPI is permanently enjoined from enforcing its October 8, 2010, Findings of Fact, Conclusions of Law, and Order as to the District.

IT IS FURTHER ORDERED that this case is DISMISSED with prejudice.

THIS ORDER IS A FINAL ORDER AND IS INTENDED BY THE COURT TO BE AN APPEALABLE ORDER WITHIN THE MEANING OF WIS. STAT. § 808.03(1).

Dated this 2nd day of NOV, 2011.

The Honorable Donald J. Hassin, Jr.
Circuit Court Judge, Branch 9