WISCONSIN COURT OF APPEALS
DISTRICT II

Appeal No. 2011AP002917

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.

Appeal from a Final Judgment of the Circuit Court of
Waukesha County, the Honorable Donald J. Hassin, Jr. Presiding,
Circuit Court Case No. 2010-CV-4804

BRIEF OF AMICI CURIAE GREAT LAKES INTER-TRIBAL COUNCIL AND WISCONSIN INDIAN EDUCATION ASSOCIATION

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INTERESTS OF AMICI

Great Lakes Inter-tribal Council ("GLITC") is a nonprofit, inter-tribal organization composed of the eleven federally recognized Indian tribes in Wisconsin and one tribe in Michigan's Upper Peninsula. GLITC is governed by a Board of Directors composed of the highest elected officials of its twelve member tribes. The Wisconsin Indian Education Association ("WIEA") was formed in 1985 to promote educationally related opportunities for American Indian people in Wisconsin. Both Amici have actively supported the elimination of race-based nicknames, logos and mascots from Wisconsin public schools.

ARGUMENT

In 2010, the State Legislature approved Senate Bill 25 and the governor signed it into law as 2009 Act 250, codified at Wis. Stat. § 118.134 (hereinafter "SB 25," "Act 250" or "Section 118.134"). Respondents disagree with the statute's presumption that race-based mascots, logos and nicknames[1] promote discrimination, pupil harassment and stereotyping. They also disagree with hearing examiner Paul Sherman's determination that the Mukwonago School District ("District") failed to overcome the presumption. Finally, they disagree with the District School Board's decision to comply with the DPI order rather than devote District

[1] Amici will sometimes use "mascot" as a shorthand for mascots, logos and nicknames

resources to litigation. Instead of seeking judicial review under ch. 227, the procedure prescribed by the Legislature, Respondents sued the Department of Public Instruction ("DPI"), Superintendent Tony Evers and Paul A. Sherman ("Appellants") under the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging that Appellants violated their rights under the Fourteenth Amendment of the U.S. Constitution.

Like the Respondents, Judge Hassin disagrees with Section 118.134, which he calls "uncommonly silly."[2] According to Judge Hassin, the DPI violated the Respondents' Fourteenth Amendment right of Due Process because Sherman knew the DPI opposed Indian mascots, was paid by DPI and, under post-hearing cross-examination, declined to explain how the District might have prevailed. While purportedly striking down Section 118.134 only as applied to Mukwonago, Judge Hassin's radical reimagining of Section 1983 invites a collateral attack on *every* adverse DPI Section 118.134 decision.

Judge Hassin's decision is conceptually, analytically and legally wrong. The Plaintiffs were not even parties to the hearing at which their Due Process rights were supposedly violated. No one challenged Sherman's

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[2] Slip. Op. p. 21. Section 118.134 embodies legislative judgments that: (1) mascots presumptively promote discrimination, pupil harassment and stereotyping; (2) discrimination, pupil harassment and stereotyping are bad things; and (3) school districts should, therefore, eliminate them if they cannot overcome the presumption. Judge Hassin does not say which of these judgments is silly or wherein their silliness lies.

impartiality before or during the hearing. The conjuring of "evidence of impermissible bias" from DPI policy and Sherman's resolutely *impartial* post-hearing testimony has no apparent precedent in the annals of Due Process jurisprudence. Judge Hassin's decision not only subverts the Wisconsin Legislature's efforts to eliminate racial bias from education but also remakes the Civil Rights Act of 1871 into an instrument hostile to its essential anti-discrimination purpose.

The Court should reverse Judge Hassin's decision because (1) Section 118.134 is a legitimate exercise of legislative power under Wis. Const. art. X, § 3 entitled to respect, not ridicule, from the judiciary, (2) the DPI's policy encouraging school districts to eliminate race-based mascots cannot serve as "evidence of impermissible bias," as Judge Hassin supposed, because the same policy informs Section 118.134 and (3) Respondents failed to state, much less prove, a Due Process violation pursuant to 42 U.S.C. § 1983.

I. Section 118.134 Is a Legitimate Exercise of Legislative Power Entitled to Respect, Not Ridicule, from the Judiciary

A. A Brief Overview of the Mascot Issue

Most Americans of European descent ("Euro-Americans") are familiar with fictitious Hollywood depictions of 18th and 19th Century Indians, especially the High Plains tribes who hunted the buffalo and fought

the U.S. cavalry. They know little, however, of Indians living today and even less about their tribes. [3] The cultures, languages and political systems of Britain, France and Germany are far more familiar.

For all their ignorance of modern, living Indians, Euro-Americans have nonetheless found ancient, dead Indians useful for one very curious purpose – to serve as mascots for their games. At elementary schools, high schools and colleges across the Nation, "Indians," "Braves," "Chieftains" and "Warriors" abound, often accompanied by feathered headdresses, war clubs, tomahawks and other accessories associated with the celluloid Indians of popular imagination. No other ethnic group is routinely singled out for mascot treatment at the hands of the majority society.

While sharing in the dominant culture, Indians today cherish important values and practices of their respective tribes. By reducing Indians to a one-dimensional caricature, mascots prevent Euro-Americans from recognizing what they have in common with their indigenous fellow citizens. At the same time, mascots perpetuate lack of awareness of the diverse tribal identities that distinguish Indians from each other.

The apparent idea behind Indian mascots is that a school's "Indians," "Braves" or "Warriors" are fierce and courageous competitors.

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[3] The federal government currently recognizes 566 tribal entities. To be fair, tribal members make up less than one percent of the U.S. population, and many live on reservations in remote rural areas. Most Americans have likely never met an Indian.

Since ferocity and courage in competition are widely regarded as admirable, it is sometimes asserted that Indian mascots "honor" Indians. If honor depended solely on the intentions of the giver, then an Indian mascot might be an honor, albeit an exceedingly insensitive, uninformed and meaningless one. But an honor depends very much on the perception of the putative honoree. Living Indians overwhelmingly repudiate the "honor" of serving as mascots for Euro-Americans' entertainments. The National Congress of American Indians ("NCAI"), the oldest and most representative national Indian organization, expresses the sentiments of the overwhelming majority of Indians in its 1998 resolution: "The use of Native American mascots, logos and symbols depicting American Indian people are offensive to us, and such depictions are inaccurate, unauthentic representations of the rich diversity and complex history of the more than 560 Indian Tribes in the United States and perpetuate cultural and racial stereotypes."[4]

Some Non-Indians assert that efforts to eliminate Indian mascots are misguided exercises in political correctness. They criticize Indians for "making a fuss over nothing" and attempting to coerce the majority into conformity with exaggerated Indian sensibilities. This criticism reflects a

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[4] http://www.ncai.org/attachments/PolicyPaper_xxgSJZZhcugIijBDbNsolTeMqtXOaUYhIPQfJhGIVbXTMNybuhZ_NCAI%20Position%20on%20Sports%20Mascots.pdf

fundamental misunderstanding. Indians do not seek to eradicate mascots to score points at the expense of other ethnic communities or to soothe hurt feelings. They oppose mascots because mascots cause real and lasting harm, especially to Indian children.

Documentation of the damage done by Indian mascots is extensive and growing.[5] In a 2001 statement, the U.S. Civil Rights Commission[6] found that Indian mascots "create a racially hostile educational environment that may be intimidating for Indian students" and called for an end to their use.[7] In 2002, the American Psychological Association ("APA"),[8] citing peer-reviewed academic studies, recommended the "immediate retirement" of Indian mascots, declaring that "the continued use of American Indian mascots, symbols, images, and personalities establishes an unwelcome and often times hostile learning environment for American Indian students that affirms negative images/stereotypes that are promoted in mainstream society."[9]

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[5] See academic studies collected at http://www.indianmascots.com/education/research/

[6] The Commission was created by the Civil Rights Act of 1957, Pub. L. 85-315 http://www.usccr.gov/about/index.php

[7] http://aistm.org/fr.usccr.htm

[8] According to its website, the APA is "the largest scientific and professional organization representing psychology in the United States." http://www.apa.org/about/index.aspx

[9] http://www.apa.org/about/policy/mascots.pdf. For a list of the many other Indian, professional and educational organizations opposing race-based mascots, see Appendix E

The Amici acknowledge the sincere emotions associated with school mascots. In many communities, the public high school virtually defines "community" in its most meaningful sense. The Amici do not belittle this sentiment but deny that it deserves priority over the State's obligation to provide Indian and non-Indian youth with an educational experience free of discrimination, stereotypes and harassment. Countless school districts have replaced old mascots with new ones. Community members rapidly form an attachment to the new mascot for a very obvious reason: Their real allegiance is not to a mascot randomly chosen by an unknown administrator in the distant past but to the children who represent the community in interscholastic competition.[10]

B. Section 118.134 Was Enacted Pursuant to the Legislature's Constitutional Duty to Provide a System of Public Education Free of Discrimination

When they adopted their Constitution in 1848, the People of Wisconsin made the establishment of a public education system the Legislature's responsibility and created the position of superintendent to

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to the March 8, 2012 report to the Oregon Board of Education, available at http://www.ode.state.or.us/superintendent/priorities/native-american-mascot-report.pdf.

[10] In the past month, the voters of North Dakota retired the "Fighting Sioux" by referendum vote and Oregon eliminated race-based mascots. As in Wisconsin, the affected schools will survive and prosper with new nicknames.

supervise public instruction. Wis. Const., art. X, §§ 1, 3.[11] The Legislature's first school anti-discrimination law, Wis. Stat. § 118.13, enacted in 1985,[12] (1) prohibits discrimination in public schools based on race and other grounds, (2) requires school districts to adopt policies and procedures to consider complaints, (3) provides for appeals to the DPI superintendent, (4) directs the superintendent to review school policies for compliance and (5) directs the school superintendent to "[p]eriodically review school district programs, activities and services to determine whether the school boards are complying with this section."[13] In 1989, in the wake of lawless, racially motivated interference with the exercise of treaty-reserved Chippewa fishing rights,[14] the Legislature enacted 1989 Act 31, Wis. Stat. § 21.01(1)(L)4, which requires school districts to include instruction in the "history, culture and tribal sovereignty" of Wisconsin tribes.

The enactment of Section 118.134 did not come easily. Substantially identical versions of Act 250 were introduced during the 1999, 2001, 2003,

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[11] Art. X, § 1 provided, and still provides: "The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct"; Article X, § 3 provided, and still provides: "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein...."

[12] 1985 Act. 29

[13] Wis. Stat. § 118.13(3)(b)(1)

[14] See *Lac du Flambeau Band v. Stop Treaty Abuse Wisconsin, Inc.*, 41 F.3d 1190 (7th Cir. 1994)

2005, 2007 and 2009 legislative sessions.[15] At its January 13, 2010 hearing on Senate Bill 25,[16] the Senate Education Committee heard extensive evidence of the discriminatory effects of race-based mascots logos and their deleterious impact on children.[17] Section 118.134 reflects the Legislature's finding that race-based logos presumptively promote discrimination. The Supreme Court's observations in *Kimel v. Florida Board of Regents*[18] relating to the deference due Congress also applies to the Wisconsin Legislature in this case:

> It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference. (Citations omitted.)

Section 118.134 is not an unconstitutional law, as the Respondents believe, or a silly law, as Judge Hassin believes. It is, rather, a principled, even courageous, effort by the Legislature to carry out its responsibility under Wis. Const. X, § 3, and U.S. Const. amend. XIV, to provide the State's schoolchildren with a public education free of discrimination.

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[15] 1999 SB 217/AB 433, 2001 SB 25/AB 92, 2003 AB 357, 2005 SB 172/AB 395, 2007 SB 132/AB 176, 2009 SB25/AB 35.

[16] Record of Committee Proceedings, http://docs.legis.wisconsin.gov/2009/proposals/SB25

[17] The entire six-hour hearing is available in video and audio at the Wisconsineye.com website, http://www.wiseye.org/Programming/VideoArchive/EventDetail.aspx?evhdid=2455

[18] 528 U.S. 62, 80-81 120 S.Ct. 631 (2000)

II. The DPI'S Mascot Policy Cannot Pose an Impermissible Risk of Bias Because It Is the Same Policy That Informs Section 118.134

According to Judge Hassin, Mr. Sherman showed an impermissible risk of bias because "Sherman knew that the Department publicly and actively supported the total eradication of Indian nicknames. Sherman's deposition indicates he was fully aware of the Department and Evers position on Indian nicknames." (Op. p. 16) Judge Hassin's statement is based on the false premise that the DPI's policy is inconsistent with Section 118.134.

The State Constitution vests the responsibility for the supervision of public instruction in the DPI.[19] The Legislature has expressly empowered the DPI to "spread as widely as possible a knowledge of the means and methods which may be employed to improve the schools" and "give the public information upon the ... subject of education."[20] By constitutional and statutory mandate, the DPI serves as the official repository of educational expertise in the State of Wisconsin.

Long before Act 250 became law, the DPI recognized the potential discriminatory effects of race-based mascots. Pursuant to Section 118.13, the DPI issued regulations that defined "discrimination" to mean "any action, policy or practice, including bias, stereotyping and pupil

[19] Art. X, § 1

[20] Wis. Stat. § 115.28(1), (4)

harassment, which is detrimental to a person or group of persons and differentiates or distinguishes among persons ...."[21] In 1992, Attorney General James Doyle concluded in a formal opinion that "Wisconsin Administrative Code chapter PI 9 is consistent with legislative intent, and American Indian logos, mascots and nicknames used by public schools may violate section 118.13, whether or not they are intended to be discriminatory."[22] State Superintendent Herbert Grover informed school districts of the Attorney General's opinion and urged them to review their mascots. In 1994, Superintendent John Benson called Indian mascots "entirely inappropriate" and urged districts to eliminate them.[23] In 2005, Superintendent Elizabeth Burmaster, citing the position taken by the American Psychological Association, stated that Indian logos "do not support sound educational practice" and encouraged school districts to find positive alternatives.[24] DPI actively supported predecessor bills as well as Act 250 itself, including, specifically, the hearing provisions challenged in this case.[25]

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[21] Wis. Admin. Code PI 9.02(5) (1986).

[22] 80 Op. Att'y Gen. 321-26 (1992)

[23] http://www.indianmascots.com/education/materials/

[24] *Id. See also*, Legislative Council Staff Memorandum, http://legis.wisconsin.gov/lc/committees/study/2006/STR/files/memo5_str.pdf

[25] See note 17, testimony of Paul Sherman, J.P. Leary.

The "clear and convincing" evidentiary standard of Section 118.134 reflects the Legislature's *strong presumption* that Indian mascots are discriminatory. Far from evidencing an "impermissible risk of bias" in a Section 118.134 hearing, the DPI policy is in perfect accord with the policy that informs the statute itself. There is no contradiction between DPI policy encouraging elimination of mascots and DPI's strict and fair application of the procedures prescribed by Section 118.134.

III. The Respondents Failed to State a Due Process Claim Pursuant to 42 U.S.C. § 1983

As discussed above, the hearing procedures prescribed by Section 118.134 are entirely consistent with DPI policy. Moreover, the same statute that vests the Superintendent of DPI with the "general supervision" of public schools also authorizes the superintendent to "[e]xamine and determine all appeals which by law are made to the state superintendent and prescribe rules of practice in respect thereto, not inconsistent with law."[26] That an administrative agency may appoint, *and pay*, a hearing examiner without calling into question the fairness of a contested hearing is a fundamental premise of state and federal administrative procedures acts.[27] State law and DPI rules include detailed

[26] Wis. Stats. § 115.28(1) and (5).

[27] 5 U.S.C. § 556(b); Wis. Stat. § 227.46(1);

provisions to assure an examiner's impartiality.[28] Ignoring these basic features of administrative law, Judge Hassin insinuates that Sherman was pressured to rule against the District for fear that he would otherwise lose his job. From this unexplained and unsupported insinuation, Judge Hassin somehow fashions an "impermissible risk of bias," ignoring completely the impartiality provisions of the administrative law and the utter lack of evidence that Evers had supervisory authority over Sherman, much less that Sherman felt threatened by Evers.

Equally erroneous was Judge Hassin's criticism of Sherman for declining, under interrogation by Respondents' counsel, to describe a theoretical winning strategy for the District. Advising the parties is not the hearing examiner's role. Contested cases are decided on their unique facts within their unique contexts. The quality and quantity of evidence that may be sufficient to overcome the statutory presumption of Section 118.134 will become known when (1) a DPI decision is subjected to Ch. 227 judicial review and (2) the court either affirms a DPI decision in favor of a district or reverses an adverse DPI decision, pursuant to the standards of Wis. Stat. § 227.57. In the meantime, courts should protect hearing examiners from phony civil rights lawsuits.

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[28] Wis. Admin. Code Pi 1.07(3); Wis. Stat. § 227.46(6); See also, 5 U.S.C. § 556(b)

Finally, Respondents assert that an impermissible risk of bias arose from the fact that, on several occasions unrelated to the challenged proceedings, Sherman "met and interacted with" Barbara Munson, WIEA Indian Mascot and Logo Task Force chair. Under this theory, a similar impermissible risk of bias would arise whenever a judge finds that an advocate in a particular case is an attorney with whom the judge has "met and interacted."

CONCLUSION

The Legislature acted pursuant to its constitutional responsibility for public education when it enacted Section 118.134. The DPI acted pursuant to its constitutional and statutory responsibility for public education when it adopted a policy encouraging school districts to eliminate race-based mascots and when it supported the enactment of Act 250. The hearing examiner acted pursuant to his constitutional and statutory responsibility when he determined, pursuant to the evidence presented at a contested case hearing, that the District had not overcome the statutory presumption of its logo's discriminatory effect.

The Civil Rights Act of 1871 was enacted to complement the Fourteenth Amendment by providing a federal remedy for state-sanctioned discrimination, not to empower those seeking to undermine the State's own efforts to eradicate discrimination. This Court should (1) reverse the trial

court, (2) affirm the primacy of the legislative branch in matters of public policy and the respect due its legislative acts and (3) clarify that Chapter 227 judicial review, not a third-party lawsuit, is the appropriate means of challenging DPI determinations under Section 118.134.

Dated this 14th day of June, 2012.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Response conforms to s. 809.19(8)(b) and s. 809.62(4) for a brief and appendix produced with a proportional serif font. The length of this response (excluding table of contents, table of authorities, signature and certifications) is 2996 words.

By: 
Brian L. Pierson

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this response to petition for review, excluding the appendix, if any, which complies with the requirements of s. 809.62(4). I further certify that:

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

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

By: Brian Pierson
Brian L. Pierson

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