STATE OF WISCONSIN
SUPREME COURT

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.

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
APPEAL NO. 2011AP2917

PLAINTIFFS-RESPONDENTS-PETITIONERS, JAMES R. SCHOOLCRAFT AND CRAIG VERTZ'S PETITION FOR REVIEW

CRIVELLO CARLSON, S.C.
710 N. Plankinton Avenue, Suite 500
Milwaukee, WI 53203
(414) 271-7722
jnichols@crivellocarlson.com
shall@crivellocarlson.com
dmullin@crivellocarlson.com

JEFFREY T. NICHOLS
State Bar No. 1001631

SAMUEL C. HALL, JR.
State Bar No. 1045476

DANIEL K. MULLIN
State Bar No. 1068953

Attorneys for Plaintiffs-Respondents-Petitioners,
James R. Schoolcraft and Craig Vertz

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PETITION FOR REVIEW

James R. Schoolcraft and Craig Vertz, Plaintiffs-Respondents-Petitioners, hereby petition the Supreme Court of the State of Wisconsin, pursuant to Wis. Stat. § 808.10 and Wis. Stat. § (Rule) 809.62, to review the decision and order of the Court of Appeals, District II, in *Schoolcraft v. State of Wisconsin Dep't of Public Instruction*, Appeal No. 2011AP2917, filed on January 3, 2013.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Pursuant to Wis. Stat. § 809.62(a), the Plaintiffs-Respondents-Petitioners, James R. Schoolcraft and Craig Vertz (hereinafter referred to collectively as "Schoolcraft") respectfully request the Court review the following issues:

1. Does Schoolcraft have standing to proceed with a federal civil rights lawsuit brought pursuant to 42 U.S.C. § 1983 to challenge the constitutionality of a state law and state action that has unconstitutionally deprived him of municipal tax dollars?

TRIAL COURT ANSWERED: Yes.

COURT OF APPEALS ANSWERED: No.

2. Did the enforcement of Wis. Stat. § 118.134 by DPI, Dr. Tony Evers and Mr. Paul Sherman against the Mukwonago Area School District (hereinafter referred to as the "District") and its taxpaying residents, including Schoolcraft, violate the Fourteenth Amendment of the United States Constitution on an as-applied basis?

TRIAL COURT ANSWERED: Yes.

COURT OF APPEALS ANSWERED: The Court of Appeals did not reach this issue based on its determination on the standing issue.

3. Does the enforcement of Wis. Stat. § 118.134 against school districts throughout the State and their taxpayers facially violate the Fourteenth Amendment of the United States Constitution?

TRIAL COURT ANSWERED: No.

COURT OF APPEALS ANSWERED: The Court of Appeals did not reach this issue based on its determination on the standing issue.

STATEMENT OF THE CASE

The Court of Appeals decision should be reviewed by this Court in order to reverse a holding that violates the Supremacy Clause, well-settled United States Supreme Court precedent and this Court's own precedent. The Court of Appeals improperly applied exhaustion requirements and state law standing requirements to this federal civil rights lawsuit brought pursuant to 42 U.S.C. § 1983. Specifically, the Court of Appeals' requirement that Schoolcraft utilize mechanisms authorized by Chapter 227 of Wisconsin Statutes in order to avail himself of standing to file his § 1983 case violates federal supremacy.

The instant appeal arises from a lawsuit filed by Schoolcraft against Defendants-Appellants, State of Wisconsin Department of Public Instruction, Tony Evers and Paul Sherman (collectively the "State"), alleging that Wis. Stat. § 118.134, Wisconsin's law regarding school nicknames and logos, is unconstitutional. (R. at 10; Pet. App. 29-38.) Specifically, Schoolcraft 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.)

At the trial court, prior to addressing the merits of Schoolcraft's constitutional claims, the Circuit Court addressed a motion to dismiss filed by the State. The State maintained that Schoolcraft lacked standing to bring this federal civil rights lawsuit because Schoolcraft did not directly participate in the allegedly

unconstitutional administrative hearing or appeal the order issued against the District and its taxpayers. The State maintained this position while acknowledging that there was no mechanism to provide Schoolcraft personally with notice of the administrative proceedings or hearing and no guarantee that Schoolcraft would have been permitted to intervene and appear at the hearing conducted by the DPI employee who evinced bias.

After briefing and argument on the State's motion, the Circuit Court denied the motion to dismiss and ruled that Schoolcraft did have standing to bring the civil rights suit based on non-derivative taxpayer standing and this Court's ruling in *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878, 419 N.W.2d 249 (1988). The trial court also acknowledged that if Schoolcraft did not have standing to challenge the constitutionality of the law and DPI officials' conduct, then the state law and action would go unchecked from constitutional scrutiny because the District itself, as a subdivision of the State, could not assert such claims against the State or its employees. In essence, if Schoolcraft did not have standing under Wisconsin law, the trial court questioned whether anyone would.

After discovery was conducted and briefing on the merits, the Circuit Court granted Schoolcraft's motion for summary judgment and held that the enforcement of Wis. Stat. § 118.134 violated Schoolcraft's Fourteenth Amendment procedural due process rights on an as-applied basis. Specifically, the Circuit Court ruled that there was an impermissible risk of bias on the part of Paul Sherman, who was the

DPI employee that conducted the hearing and issued the order compelling the District's taxpayers to fund a change in nickname and logo.

The State appealed the summary judgment decision and also challenged the Circuit Court's order that Schoolcraft had standing to bring this action. The Court of Appeals reversed the Circuit Court and ruled that Schoolcraft did not have standing. The Court of Appeals reasoned that Schoolcraft should have sought to become a party to the administrative proceedings conducted pursuant to Chapter 227 of the Wisconsin Statutes or should have at least filed a petition for review of the administrative proceedings pursuant to Wis. Stat. § 227.53(1), in order to avail himself of standing to bring his civil rights claim.

The Court of Appeals explained:

> Wisconsin Stat. ch. 227 sets forth the consent to sue a state agency and constitutes the exclusive method for judicial review of agency determinations. Compliance is a jurisdictional matter. Where a method of review is prescribed by statute, that method is exclusive and judicial review cannot be pursued through other means. This includes the remedies of reversal or remand when an agency's actions amount to a constitutional violation.

(Pet. App. 5.) (internal citations omitted).

The foregoing is contrary to Supremacy Clause and well-settled United States Supreme Court precedent that have long opposed states' efforts to burden, frustrate or discriminate against federal claims, such as those brought pursuant to 42 U.S.C. § 1983. For those reasons and those detailed further below, Schoolcraft respectfully requests that this Court grant his petition for review.

STATEMENT OF FACTS

Schoolcraft and Vertz are adult residents of the State of Wisconsin and taxpayers within the District. (R. at 10; Pet. App. 30.) 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 nickname. (R. at 10; Pet. App. 39.) On July 23, 2010, Paul 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 the newly enacted Wis. Stat. § 118.134. (R. at 37; Pet. App. 9.)

On August 11, 2010, Sherman advised the District and Barbara Munson, a non-resident, non-attorney, advocate for Koepke, that a hearing would be held on August 27, 2010. (R. at 37; Pet. App. 10.) No notice of any kind was given to District residents, including Schoolcraft. (R. at 23; Pet. App. 96.) 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 was not given an opportunity to be heard or present evidence at the August 27, 2010 hearing. (R. at 23; Pet. App. 97). 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 District to change its "Indians" nickname and logo. (R. at 10; Pet. App. 35.) By the time that this action was commenced, the District had already spent $17,000.00 of local taxpayer money 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 in total. (Id.)

Sherman had been appointed to hear complaints filed under Wis. Stat. § 118.134 by Dr. Tony Evers, the State Superintendent. (R. at 23; Pet. App. 94.)

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; Pet. App. 49-50.)

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 **all** Indian nicknames and logos, Sherman also met and interacted with Munson, the non-attorney, non-resident advocate for Koepke on a number of occasions *ex parte* prior to the August 23, 2010 hearing. (R. at 23; Pet. App. 67, 91.)

Sherman took up his post with the DPI in October of 2007. (R. at 23; Pet. App. 90). 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; Pet. App. 67, 91.)

In addition, Munson had been a paid consultant to the DPI on issues relating to the very issue that was the subject of the hearing before Sherman – the use of Indian nicknames and logos – when Munson served as the chairperson on the taskforce for the Wisconsin Indian Education Association. (R. at 23; Pet. App. 63-65.)

Most recently, Munson served on a three-person panel along with JP Leary, one of Sherman's co-workers at the DPI, jointly presenting at the National Indian Education Association Annual Convention in San Diego, California, between October 7 and October 10, 2010 (while the DPI order in this matter was released on October 8, 2010). (R. at 34; Pet. App. 141-142.) The panel presented on the efforts taken by Munson and the DPI, among others, to have Wis. Stat. § 118.134 enacted and to have Indians nicknames eliminated. (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; Pet. App. 134-140.) 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; Pet. App. 139.) With the Mukwonago decision released during the conference, as a coincidence or not, one can only imagine the story that was told by Munson and Leary in San Diego.

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; Pet. App. 22-24.) Specifically, the Circuit Court noted that Sherman responded with "I don't know"

on at least four occasions when asked what evidence 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; Pet. App. 23-24.) 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; Pet. App. 14.)

STATEMENT ON CRITERIA FOR REVIEW

Section 809.62(1), Wis. Stats., sets forth the criteria for this Court's review of a Court of Appeals decision:

> The following, while neither controlling nor fully measuring the court's decision, indicate criteria that will be considered:
>
> (a) A real and significant question of federal or state constitutional law is presented.
>
> (b) The petition...demonstrates the need for the Supreme Court to consider establishing, implementing or changing a policy within its authority.
>
> (c) A decision by the Supreme Court would help develop, clarify or harmonize the law, and
>
> (1) The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
>
> (2) The question presented is a novel one, the resolution of which will have the statewide impact; or
>
> (3) The question presented is not factual in nature, but rather is a question of law of a type that is likely to recur unless resolved by the Supreme Court.

(d) The court of appeals' decision is in conflict with the controlling opinions of the United States Supreme Court or the Supreme Court or other court of appeals decisions.

(e) The court of appeals' decision is in accord with opinions of the Supreme Court or the court of appeals, but due to the passage of time or changing circumstances, such opinions are ripe for re-examinations.

Wis. Stat. § 809.62(1).

As further demonstrated in the sections below, the present case falls within the criteria outlined in Wis. Stats. §§ 809.62(1)(a), (c) and (d). Specifically, the case raises significant questions of both federal and state law on the issues of standing, federal supremacy and the constitutional issues on the merits. The Court of Appeals decision concluded that state law exclusive remedy provisions and standing principles prevented Schoolcraft from bringing a claim based on a federal statute for violation of a federal civil right. Any relationship between Chapter 227 and claims asserted pursuant to 42 U.S.C. § 1983 is certainly a significant question worthy of this Court's review.

Further, the merits of Schoolcraft's Fourteenth Amendment civil rights claim also present significant questions of law. The trial court ruled as a matter of law that Mr. Sherman showed an impermissible risk of bias such that his involvement as adjudicator in the administrative proceeding violated Schoolcraft's and other local taxpayers' constitutional rights. The standard of impartiality by which state officials in judicial or quasi-judicial roles should be held to is an important constitutional question with far-reaching implications.

A published decision from this Court will also assist with the development of the law on relatively novel issues. Specifically, through the appeal, this Court is asked to address any relationship between state law exhaustion and standing principles to federal civil rights claims and also to address the constitutionality of a new law and its application. Importantly, there is at least one other pending lawsuit[1] challenging the constitutionality of Wis. Stat. § 118.134 and its enforcement by Dr. Evers and Mr. Sherman and there is the potential for more to follow[2]. The Court's review of this matter is further supported because the issues raised are questions of law with few, if any, unresolved factual questions in the record.

Finally, the Court of Appeals' decision stands in contradiction to Article VI, Clause II of the United States Constitution (hereinafter "the Supremacy Clause") and the United States Supreme Court holdings in *Patsy v. Bd. of Regents of State of Florida*, 457 U.S. 496 (1982); *Felder v. Casey*, 487 U.S. 131 (1988); and *Howlett v. Rose*, 496 U.S. 356 (1990). Further, even if Wisconsin's state law standing principles are applied to suits brought pursuant to 42 U.S.C. § 1983, the Court of Appeals decision stands in contradiction to this Court's finding of non-derivative taxpayer standing in *City of Appleton*. This Court's review of the Court of Appeals decision is necessary to preserve the supremacy of federal law in this

[1] *Butler v. State of Wisconsin Dep't. of Public Instruction*, Green Lake County Circuit Court Case No. 2011-CV-197.

[2] The American Indian Sports Team Mascots has identified approximately 60 schools in the State of Wisconsin who allegedly use race-based nicknames or logos: http://aistm.org/wisconsin.htm (last accessed Jan. 31, 2013).

case and others and to properly apply concurrent jurisdiction over this § 1983 claim.

ARGUMENT

I. SCHOOLCRAFT HAS STANDING TO PURSUE THIS CIVIL RIGHTS ACTION PURSUANT TO 42 U.S.C. § 1983.

A. The Supremacy Clause Prevents State Courts from Applying State Law Standing Principals or Exhaustion Principles to Bar a Civil Rights Claim Brought Pursuant to 42 U.S.C. § 1983.

Wisconsin state courts have concurrent jurisdiction over claims brought pursuant to 42 U.S.C. § 1983. *Howlett*, 496 U.S. at 375; *Felder*, 487 U.S. at 139. However, in accord with the Supremacy Clause, when proceeding in state courts, federal law provides the essential elements of a 42 U.S.C. § 1983 claim and state law may not alter the elements or the defenses. *Howlett*, 496 U.S. at 375-376.

"[W]here state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" *Felder*, 487 U.S. at 138 (quoting *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 296 (1949)). Under the requirements of federal supremacy, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Id.* (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

To determine whether supremacy requires that the state's laws yield to federal law, the United States Supreme Court has instructed that courts consider the breadth, scope and historical application of the federal law. *Patsy*, 457 U.S. at

501-502. On the question of supremacy of 42 U.S.C. § 1983, the Supreme Court has reiterated on multiple occasions that this federal civil rights statute is to be afforded the utmost deference and is only to be impacted by state law in extremely limited contexts.

In reviewing the legislative history of 42 U.S.C. § 1983, the Supreme Court held that "[t]he 1871 Congress (which enacted the law) intended § 1 to 'throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights and to provide these individuals immediate access to the federal courts notwithstanding any provisions of state law to the contrary." *Patsy*, 457 U.S. at 504 (quoting Cong. Globe, 42d Cong., 1st Sess., 476 (1871) (remarks by Rep. Lowe)).

The United States Supreme Court also reversed a holding from this Court that barred a § 1983 claim based on Wisconsin's requirement for plaintiffs to file a notice of claim prior to bringing a suit against the government. *Felder*, 487 U.S. at 138. In *Felder*, the Court considered whether the notice of claim requirements of Wis. Stat. § 893.80 were properly imposed on plaintiffs who filed their actions pursuant to 42 U.S.C. § 1983 in Wisconsin state courts. *Id.*

Importantly, before the case was appealed to the United States Supreme Court, Chief Justice Abrahamson recognized the federal supremacy associated with the § 1983 claims in *Felder*. In her dissent, then-Justice Abrahamson wrote:

> I cannot join the majority in concluding that the notice of claim provision (sec. 893.80)...was intended to or should somehow override a federally created remedy designed to vindicate civil rights.

Felder v. Casey, 139 Wis. 2d 614, 631, 408 N.W.2d 19, 27 (1987) (Abrahamson, J., dissenting).

However, once *Felder* was appealed to the United States Supreme Court, in considering the congressional intent of 42 U.S.C. § 1983, the Court again recognized:

> As we have repeatedly emphasized, "the central objective of the Reconstruction-Era civil rights statutes...is to ensure that individuals whose federal constitutional or statutory right are abridged may recover damages or secure injunctive relief." *Burnett v. Grattan*, 468 U.S. 42, 55 (1984). Thus, § 1983 provides a "uniquely federal remedy against incursions...upon rights secured by the Constitution and laws of the Nation," *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) and is to be accorded "a sweep as broad as its language." *U.S. v. Price*, 383 U.S. 787, 801 (1966).

Felder, 487 U.S. at 139.

In discussing § 1983 claims, the Court recalled "the dominant characteristic of civil rights actions: *they belong in court*." *Id.* at 148 (quoting *Burnett*, 468 U.S. at 50) (emphasis in original). Claims brought under § 1983 "exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable *in the first instance*." *Id.* (emphasis in original).

The Supreme Court ultimately concluded that the notice-of-claim requirements of Wis. Stat. § 893.80 could not limit or bar a § 1983 claim. Contrary to Wisconsin's position, the Court concluded that the state statute amounted to more than simply prescribing rules and procedures governing

lawsuits filed in state courts. *Id.* at 147. Instead, the Supreme Court held that the authority of a state to set rules and procedures governing litigation "does not extend so far as to permit States to place conditions on the vindication of a federal right." *Id.*

With the central purpose of 42 U.S.C. § 1983 in mind, the United States Supreme Court recognized that:

> Given the evil at which the federal civil rights legislation was aimed, there is simply no reason to suppose that Congress meant "to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary," *Patsy*, 457 U.S. at 504, yet contemplated that those who sought to vindicate their federal rights in state courts could be required to seek redress in the instance from the very state officials whose hostility to those rights precipitated their injuries.

Felder, 487 U.S. at 147.

Through its holding in *Felder* the United States Supreme Court concluded that the notice-of-claim requirements served as an impermissible exhaustion requirement because "it forces injured persons to seek satisfaction from those alleged to have caused the injury in the first place." *Id.* at 149. The Court expressly reiterated that plaintiffs need not exhaust state administrative remedies before filing § 1983 suits. *Id.*

The Court of Appeals ruling in this case applied a jurisdictional exhaustion requirement. In barring Schoolcraft's claim for lack of standing, the Court of Appeals held:

> A plaintiff must point to a legislative enactment authorizing suit against the state to maintain his or her action. Wisconsin Stat. ch. 227 sets forth the consent to sue a state agency and constitutes the exclusive method for judicial review of

> agency determinations. Compliance is a jurisdictional matter. Where a method of review is prescribed by statute, that method is exclusive and judicial review cannot be pursued through other means. This includes the remedies of reversal or remand when an agency's actions amount to a constitutional violation.
>
> Schoolcraft and Vertz did not avail themselves of the remedy of judicial review set forth in Wis. Stat. ch. 227. The 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. 5.) (internal citations omitted).

Federal supremacy requires that because this action was filed pursuant to 42 U.S.C. § 1983, the intent of the state legislature when enacting Wis. Stat. § 118.134 must be secondary to the intent of Congress in enacting § 1983. Further, the Court of Appeals' reference to its holding being a "jurisdictional matter" is of no consequence. *Howlett*, 496 U.S. at 382-383 ("the force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word 'jurisdiction.'").

The fact that the legislature explicitly chose Chapter 227 as the exclusive method of review of Wis. Stat. § 118.134 is convenient for the State. Chapter 227 of Wisconsin Statutes provides for an incredibly limited statute of limitations of 30 days to seek judicial review. Wis. Stat. § 227.53(1)(a)(2). Notably, the United States Supreme Court in *Felder* rejected the *de facto* 120-day statute of limitation that would have been imposed if Wis. Stat. § 893.80 applied to § 1983 claims. *Felder*, 487 U.S. at 152. Further, while the State and the Court of Appeals suggest that Schoolcraft could have attempted to intervene in the contested hearing that

Mr. Sherman conducted, there was no certainly no guarantee that Mr. Sherman would have allowed the intervention.

Most importantly, however, it does not matter that the legislature selected Chapter 227 as the exclusive method of review in Wis. Stat. § 118.134. The Supreme Court's rationale for not requiring an exhaustion of state remedies prior to bringing a § 1983 lawsuit could not be more clearly demonstrated than it is here. To avail himself of standing, the Court of Appeals would require that Schoolcraft go to the state administrative adjudicator who was in the process of violating his constitutional rights to seek permission to intervene and participate in a hearing laden with unconstitutional bias. Then, after the unconstitutional decision was issued by Mr. Sherman, the Court of Appeals would impose a requirement on Schoolcraft to petition for judicial review in state court within 30 days pursuant to Wis. Stat. § 227.53(1) and raise any constitutional issues there.

The foregoing is expressly contrary to the Supremacy Clause and United States Supreme Court precedent that has, on the whole, been extremely protective of the congressional intent of 42 U.S.C. § 1983. The Court of Appeals ruling expressly applied an exclusive remedy provision to Schoolcraft's civil rights claim. Through the Court of Appeals' attempt to apply the provisions of Chapter 227, the court also essentially adopted a thirty day statute of limitations to bring a constitutional challenge under 42 U.S.C. § 1983. The Court of Appeals ruling that

Schoolcraft was without standing to bring his federal civil rights action is contrary to federal supremacy and should be reviewed by this Court.

B. Under Wisconsin Law, Chapter 227 Exhaustion and Exclusive Remedy Provisions Cannot be Applied to Bar a Civil Rights Claim Brought Pursuant to 42 U.S.C. § 1983.

Even under current Wisconsin law, exhaustion and exclusive remedy provisions are inapplicable in this case 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 does not provide the exclusive remedy before constitutional 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 under Wisconsin law 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. Schoolcraft filed this action and challenged the constitutionality of the statute itself and the constitutionality of the manner in which the hearing was held.

This 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.

The Court of Appeals held that Schoolcraft was 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. However, even under state law, Chapter 227 does not provide for the exclusive remedy for agency determinations in all circumstances. *State ex rel. First Nat'l Bank of Wisconsin Rapids v. M & I Peoples Bank of Colma*, 82 Wis. 2d 529, 545, 263 N.W.2d 196 (1978). Specifically, this 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 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., 78 Wis. 2d at 425-426 (quoting *Kmiec*, 60 Wis. 2d at 645.)

The foregoing situation manifests itself in this case on appeal. The Court of Appeals faults Schoolcraft for not seeking review of the DPI's decision pursuant to Chapter 227 (within the narrow 30 day limitation). However, as this Court in *Nodell*, *Kmiec*, and *First National Bank* 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 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 other 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, the Court of Appeals' ruling would require any person whose constitutional rights were violated by a statute and an administrative decision to which the person was not entitled to notice of, to independently learn of the decision and bring an action under Chapter 227 within an extremely narrow

statutory time period. Such a process and result defies common sense and offends traditional notions of due process in and of itself.

C. Schoolcraft has Standing to Pursue this Civil Rights Claim Under Wisconsin Law Based on Non- Derivative Taxpayer Standing and this Court's Ruling in *City of Appleton*.

Schoolcraft has standing to pursue this civil rights and declaratory judgment action because he already has and will sustain an additional loss in the future, however slight, if the District is required to comply with Mr. Sherman's order compelling the changing of the 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*, 142 Wis. 2d at 878.

Wisconsin 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, individually and as a representative of similarly situated taxpayers, has standing because he has shown that the decision and action taken by Sherman and DPI has and will have some effect on his tax dollars. Who, if not Schoolcraft, as an individual taxpayer 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 has a cognizable interest at stake in order to have standing. The Circuit Court correctly held that Schoolcraft did show at least a slight loss based on the expenditure of his taxpayer funds to comply with Mr. Sherman's order and that Chapter 227 did not bar this action commenced pursuant to 42 U.S.C. § 1983.

Therefore, even if state law standing principles are applied to this case, the Court of Appeals decision warrants review in light of this Court's holding in *City of Appleton*.

II. THE CIRCUIT COURT CORRECTLY DETERMINED THAT WIS. STAT. § 118.134 WAS UNCONSTITUTIONAL AS APPLIED 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 local taxpayers because: (1) he did not receive notice of the hearing, (2) he did not have an opportunity to present evidence; and (3) he was not afforded an impartial decision-maker as required for procedural due process. 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, are entitled to a fair hearing, which requires, *inter alia*, the right to be heard before an impartial decision-maker. *Theodore Fleisner, Inc. v. DILHR*, 65 Wis. 2d 317, 326, 222 N.W.2d 600 (1974).

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.*, 257 Wis. 2d 255, 650 N.W.2d 864 (Ct. App. 2002). 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 been rebutted based on the evidence assembled and that Sherman "showed an impermissible risk of bias." (R. 37; Pet. App. 22.)

"[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 this 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 a resident of a fair hearing. *Id.* at 19. This 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* and the factual record in this case supports the finding 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; Pet. App. 22-23.) 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; Pet. App. 103.)

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; Pet. App. 94.)

Sherman also had met and interacted *ex parte* with Munson, who was openly adverse to Mukwonago, on a number of occasions prior to the August 23, 2010 hearing. This includes 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; Pet. App. 67, 91.) 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,[3] on the recent change to Wisconsin law and the efforts taken by Munson and the DPI to have Wis. Stat. § 118.134 enacted. (R. at 34; Pet. App. 134-140.)

[3] 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.)

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; Pet. App. 107.)

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 the District 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; Pet. App. 22-23.) Specifically, Sherman even admitted that there was no way for Mukwonago to know what evidence or testimony Sherman wanted to hear. (R. at 23; Pet. App. 103.)

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 adjudicator 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, the Circuit Court correctly held that Schoolcraft was denied his procedural due process rights because Sherman exhibited an impermissible risk of bias in a hearing and ruling that deprived him of his local tax dollars.

III. WIS. STAT. § 118.134 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Equal Protection Clause of the Fourteenth Amendment directs that no state shall "deny to any person within its jurisdiction equal protection of the laws." U.S. Const., Amend. XIV § 1. It is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Importantly, while the Equal Protection Clause historically has primarily protected suspect classifications, its protections are undeniably offered to individuals as well under the class-of-one theory. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citing *Sioux City*

Bridge Co. v. Dakota County, 260 U.S. 441 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336 (1989)).

The record establishes that Schoolcraft is similarly situated with Rain Koepke, as they were both residents within District. However, under Wis. Stat. § 118.134, by virtue of Rain Koepke filing a complaint with the Department, Mr. Koepke was placed in an unequal and elevated position as compared to Schoolcraft and all other taxpayers within the District. Mr. Koepke was given notice regarding the proceedings, was permitted to present witnesses (including witnesses from outside of the District) and had the opportunity to present other evidence and arguments through a non-attorney representative. Schoolcraft's Equal Protection rights were violated because he and other taxpayers within the District were discriminated against and were not afforded the same right to be heard pursuant to Wis. Stat. § 118.134, despite the fact that the decision by the Department negatively impacted his and other local taxpayers within the District: namely their property rights associated with their tax dollars.

Additionally, Schoolcraft's equal protection rights were violated based on the discriminatory treatment that the residents of the Mukwonago Area School District have faced as compared to the residents within other school districts throughout Wisconsin, some of whom use the exact same nickname and similar logos. In this regard, Schoolcraft is similarly situated to the taxpayers within neighboring school districts with similar nicknames and logos, such as

Menomonee Falls. By virtue of the Statute requiring that a complaint be filed by a resident of a district, the law creates the inevitability that some districts with the same or substantially similar race-based nicknames will not face state scrutiny, while taxpayers within districts like Mukwonago are forced to incur the costs associated with facing legal challenges from DPI and, without exception, changing nicknames and logos based on DPI orders. At the same time, school districts with non-race-based[4], nicknames do not face scrutiny under the law.

Schoolcraft continues to maintain that strict scrutiny should be applied to the equal protection claim based on the inverse racial classifications associated with the law and current administrative code provisions. However, even under the lowest level of equal protection scrutiny, no rational basis exists to explain the State's distinction between districts and taxpayers who are subjected to DPI scrutiny like Mukwonago and other districts and their taxpayers who utilize the same exact nickname and similar logos, yet face no such scrutiny. Accordingly, Wis. Stat. § 118.134 violates the Equal Protection Clause of the Fourteenth Amendment on its face and as it was applied in this case.

[4] For example: Hurley "Midgets."

CONCLUSION

For the foregoing reasons, James R. Schoolcraft and Craig Vertz respectfully request that the Supreme Court for the State of Wisconsin grant their petition for review.

Respectfully submitted this 1st day of February, 2013.

SAMUEL C. HALL, JR.
Counsel of Record
State Bar No. 1045476
JEFFREY T. NICHOLS
State Bar No. 1001631
DANIEL K. MULLIN
State Bar No. 1068953
Attorney for Plaintiffs-Respondents-Petitioners
Crivello Carlson, S.C.
710 N. Plankinton Avenue, Suite 500
Milwaukee, Wisconsin 53203
(414) 271-7722
shall@crivellocarlson.com
jnichols@crivellocarlson.com
dmullin@crivellocarlson.com

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, maximum of 60 characters per full line of body text. The length of this brief is 7,656 words.

Respectfully submitted this 1st day of February, 2013.

SAMUEL C. HALL, JR.
Counsel of Record
State Bar No. 1045476
JEFFREY T. NICHOLS
State Bar No. 1001631
DANIEL K. MULLIN
State Bar No. 1068953
Attorney for Plaintiffs-Respondents-Petitioners
Crivello Carlson, S.C.
710 N. Plankinton Avenue, Suite 500
Milwaukee, Wisconsin 53203
(414) 271-7722
shall@crivellocarlson.com
jnichols@crivellocarlson.com
dmullin@crivellocarlson.com

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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 this 1st day of February, 2013.

SAMUEL C. HALL, JR.
Counsel of Record
State Bar No. 1045476
JEFFREY T. NICHOLS
State Bar No. 1001631
DANIEL K. MULLIN
State Bar No. 1068953
Attorney for Plaintiffs-Respondents-Petitioners
Crivello Carlson, S.C.
710 N. Plankinton Avenue, Suite 500
Milwaukee, Wisconsin 53203
(414) 271-7722
shall@crivellocarlson.com
jnichols@crivellocarlson.com
dmullin@crivellocarlson.com