The Race-based Mascot Bill:

A COMPARISON

of how well the Schultz Substitute Amendment & the Nass Substitute Amendment resolve concerns

Several concerns about Act 250 have been expressed frequently by Mukwonago representatives (McNulty, Hall, Nass, Craig, and/or Lazich). The six most frequently heard concerns are presented, and the extent to which the Schultz Substitute Amendment and the Nass Substitute Amendment resolve each concern are analyzed to determine which substitute amendment best addresses these concerns.

- Appendix 1 contains a description of the Review Process under the **Schultz Substitute Amendment**.
- Appendix 2 contains additional information regarding Concerns 5 & 6.

CONCERN # 1: "The 'unfair hearing officer' concern": "The hearing process for Mukwonago High School wasn't fair because the administrative law judge/hearing officer was a DPI employee."

SOLUTION: The **Schultz Substitute Amendment** and the **Nass Substitute Amendment** address this concern in the same way, by shifting the hearing process from the Department of Public Instruction (DPI) to the Division of Hearings and Appeals in the Department of Administration.

The Winner: A tie.

CONCERN # 2: "The 'unequal timing' concern": "Act 250 is unfair because all high schools aren't treated the same. Mukwonago High School must change its 'Indians' nickname now while the Menomonee Falls High School can continue using its identical nickname because they haven't had a complaint yet."

SOLUTION: The **Nass Substitute Amendment <u>totally ignores</u>** the 'unequal timing' issue. Just as was true with Act 250, timing will vary greatly since the timing for each school would still depend on when a resident is courageous enough to step forward and file a complaint with the State and be demonized by almost everyone within one's own community. So if Act 250 is "unfair" in regard to unequal timing, then so is the Nass Substitute Amendment.

The **Schultz Substitute Amendment <u>resolves</u>** the 'unequal timing' concern by treating all high schools with a race-based sports policy the same and having the 30 Wisconsin school boards and their communities engaged in a Review Process at the same time to evaluate the effect of their race-based sports policy.

The Winner: the Schultz Substitute Amendment

CONCERN # 3: "The 'local control' concern ": "Act 250 isn't fair because it doesn't provide for involvement by the local School Board prior to State involvement."

SOLUTION: The **Nass Substitute Amendment <u>totally ignores</u>** the 'local control' concern. Under the Nass Substitute Amendment just as under Act 250, a complaint is filed directly with the State and totally bypasses the local school board. So if Act 250 was "unfair" or inadequate regarding local control, then so is the Nass Substitute Amendment.

The **Schultz Substitute Amendment** **resolves** this concern because it does not bypass the local school board but starts and remains at the school board and community level by engaging the school board and community in a Review Process. The only way the State gets involved under the Schultz Substitute Amendment would be if the school board concludes that there's no problem with their race-based usage, in which case that decision can be appealed to the State level for an independent unbiased review of the board's decision by the Division of Hearings and Appeals. It's important to note that the school board is actually sitting in judgment of itself and of its own race-based policy, so it's reasonable to question a school board's ability to be objective and unbiased in reviewing itself. Providing for the ability to appeal a school board's decision regarding discrimination has been a long-standing part of Wisconsin Statutes (e.g., since 1985 with Wis.Stat. § 118.13).

The Winner: the Schultz Substitute Amendment

CONCERN # 4: "The 'one complainant' concern": "Mukwonago High School shouldn't have to change its race-based sports nickname due to a complaint from only one person."

SOLUTION: Under **Act 250**, one District resident can file a complaint with DPI.

The **Nass Substitute Amendment** requires that, in order to submit a complaint, the complainant must first obtain the signatures of school district electors with the number of signatures equaling at least ten percent of the school district's enrollment. In 97.4% White Mukwonago where about 470 signatures would be required before filing a race-based mascot complaint, an American Indian parent would need to get mostly signatures of White residents before being permitted to file a complaint regarding racial discrimination, harassment or stereotyping.

This Nass approach likely would be the only law in the entire nation that would require more than one person to file a discrimination or harassment complaint based on race, gender, religion, etc. The Nass approach also likely would be the only law in the entire nation that would require a minority to get permission from a certain number of non-minorities before being allowed to file a discrimination or harassment complaint.

Some have compared the Nass Substitute Amendment approach to sexual harassment in the workplace where a woman employee wouldn't be allowed to file a gender-based discrimination or harassment complaint unless she first gets written permission from a certain number of the male coworkers responsible for the harassment.

Others compare the Nass approach to a lone Catholic family living in an otherwise entirely Protestant community. The Catholic parent, in order to protect one's child at school, wouldn't be allowed to file a discrimination or harassment complaint based on religion unless the parent first obtains written permission from a certain number of those Protestant citizens responsible for the religion-based discrimination or harassment.

The female employee and the Catholic parent in these two examples would be putting themselves (and their children in the second case) at considerable risk if they had to seek such signatures. The American Indian parent and their family similarly would be put at extreme risk under the Nass Substitute Amendment.

The Nass Substitute Amendment will likely be found unconstitutional and is a throwback to earlier centuries when discrimination based on race, gender and religion was tolerated. But even if it were constitutional to require the female employee, the Catholic parent or the American Indian parent to get written approval from several others before being allowed to file a discrimination or harassment complaint based on gender, religion or race respectively, it certainly isn't good public policy. And it's certainly not acceptable in the year 2013.

The Nass approach will likely require extensive litigation which will consume substantial time and money from administrators, school board members and taxpayers in the Mukwonago School District or any other district to defend a race-based mascot policy. The Nass approach will also cost all Wisconsin taxpayers because some attorneys from the Attorney General's Office will be tied up in courts trying to defend an unconstitutional mascot law rather than using their time for other State legal matters.

The **Schultz Substitute Amendment** has no "complainant" or "complaint process" in the usual sense that Act 250 and the Nass Substitute Amendment use the term. Instead of an adversarial emotion-packed "complaint process" that often pits most of the community against a minority complainant under the Nass approach, the Schultz Substitute Amendment instead uses a rational and contemplative "Review Process" conducted entirely at the local school district level.

Only if the school board determines, based on a thorough evaluation of the evidence received, that their race-based sports policy doesn't promote discrimination, harassment and racial stereotyping might the matter wind up at the State level. If several residents believe the school board erred in that decision, those residents can obtain an independent unbiased review by the Division of Hearings and Appeals by filing an appeal petition with the number of signatures of school district electors equaling at least ten percent of the school district's enrollment. Alternatively, the Great Lakes Inter-Tribal Council can also request an independent unbiased review of that school board decision by filing a request for appeal.

The Winner: the Schultz Substitute Amendment

CONCERN # 5: "The 'shifting the burden of proof' concern": "The Act 250 process wasn't fair because you're supposed to be considered "innocent until proven guilty" but our School Board was presumed 'guilty' and had to prove its 'innocence'. The burden of proof is supposed to be on the complainant but the complainant didn't need to provide any evidence."

SOLUTION: In Wisconsin and other states as well is at the Federal level, the burden of proof can and often does shift under administrative law, especially shifting to an entity that requests a hearing. Consistent with that, under **Act 250**, the school board requesting a hearing has the burden of proving by clear and convincing evidence that their race-based sports policy does not promote discrimination, pupil harassment or stereotyping. The "clear and convincing" standard is a high legal standard, much higher than "a preponderance of the evidence" which is the legal standard in most civil matters.

The U.S. Supreme Court has placed a particularly high burden of proof on any government entity using a race-based policy to show under "strict scrutiny" why there's a "compelling government interest" in basing a policy on race rather than another alternative. There being a high burden on the school board is consistent with the Supreme Court's "strict scrutiny" philosophy that a government entity be required to justify basing a policy on race, especially when that policy targets a specific minority race and there's evidence that the policy harms members of the targeted race.

The **Nass Substitute Amendment** totally reverses the burden of proof so that the burden falls entirely on the complainant. The Nass approach also places the very high "clear and convincing" legal standard on the person rather than the government entity. This reversal of burden and especially the high legal standard imposed on the racial minority complainant instead of the government entity very likely will be found by the courts to be unconstitutional under the "strict scrutiny" legal standard.

The **Schultz Substitute Amendment** doesn't take the highly emotional and destructive adversarial complaint process called for under the Nass approach, but instead takes a more conservative approach with a Review Process conducted at the local level which requires that **both** sides submit evidence to support their position. Moreover, all evidence is made available for review by the general public so all members of the community can see and comment on the evidence submitted. This way, the burden of proof and the very high "clear and convincing" legal standard aren't imposed exclusively on either side,

as occurs under both Act 250 and the Nass Substitute Amendment. The Schultz Substitute Amendment instead is totally balanced with a decision being made locally by the local school board based on a preponderance of the evidence, which most people would consider to be "fair" to both sides. As is true of all discrimination decisions by school boards, the board's decision is appealable to the State level, with an independent unbiased review by the Division of Hearings and Appeals.

(See Appendix 2 for additional information regarding Concern 5.)

The Winner: the Schultz Substitute Amendment

Concern # 6: "the 'tribal approval' concern": "Schools using race-based sports identities should be exempt if they obtain approval from an American Indian tribe."

SOLUTION: Act 250, the Nass Substitute Amendment, and the Schultz Substitute Amendment each address this issue in some way but all do it very differently.

Act 250 provides for an exemption for any school district using a tribe-specific nickname, logo or mascot for which the use was approved by the namesake tribe(s). Other names are called "pan-Indian" names because they refer to all 566 federally recognized tribes and are the opposite of being tribe-specific. No one tribe has the authority to speak for other tribes in granting an "approval" over something that also refers to other tribes. Accordingly, pan-Indian nicknames are the ultimate stereotype because they reduce all 566 tribes with their many distinct cultures and languages into only one, thereby being by definition the ultimate stereotype.

The **Nass Substitute Amendment** exempts any school district that has entered into an agreement with a tribe having historical roots in Wisconsin. By allowing "approval" from any tribe with some historical roots in Wisconsin, this includes tribes that have little or no current connection to Wisconsin and may have been forced out of Wisconsin a couple of centuries ago. The inclusion of this provision in the Nass Substitute Amendment indicates how misinformed the author(s) are about American Indian tribes, about racial stereotypes, and the research that has documented the real harm to American Indian students and other minority students. Because American Indian students from several tribes and also other minority races typically are enrolled in a school and enrolled in schools encountered during athletic competition, approval from any one tribe must not be used to justify a school sports identity that is psychologically harmful to students of that tribe, other tribes, and other minorities.

The **Schultz Substitute Amendment** exempts from this Review Process any school district that has entered into an agreement with the Great Lakes Inter-Tribal Council (GLITC) or its designee under which the school board receives approval of their use of the identified nickname, logo, mascot, or team name. This provision is better than that in the Nass Substitute Amendment because it provides for involvement of the Great Lakes Inter-tribal Council which involves several tribes and whose inter-tribal nature will ensure that the interests of all tribes are considered, not just one tribe.

(See Appendix 2 for additional information regarding Concern 6.)

The Winner: Act 250 and the Schultz Substitute Amendment

Final results: The Schultz Substitute Amendment is better than the Nass Substitute Amendment on five of the six concerns (and a tie for the other concern).

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APPENDIX 1: Description of the Review Process in the Schultz Substitute Amendment

The Schultz Substitute Amendment

Review Process to Evaluate the Effect of Race-Based Nicknames, Logos, Mascots and Team Names

Step 1: By June 30, 2014, DPI compiles a **list of school districts** that use a nickname, logo, mascot or team name that DPI determines may be race-based. School boards of these school districts then conduct a review process that consists of (1) gathering and (2) evaluating evidence to determine whether their use **does** or **does not** promote discrimination, pupil harassment or stereotyping.

Step 2: After DPI notifies a school district that they are on the list, during an **"Initial Comment Period",** all interested parties may submit to the school board or DPI evidence pertaining to whether the school board's use **does** or **does not** promote discrimination, pupil harassment or stereotyping.

Step 3: At the conclusion of the Initial Comment Period, a **"Second Comment Period"** commences during which (1) all evidence received by the school board and DPI during the Initial Comment Period is made available to the public for review and (2) all interested parties may submit additional evidence or comments.

Step 4: At the conclusion of the Second Comment Period, the school board (1) evaluates all evidence received during the Initial Comment Period and Second Comment Period, (2) determines by a preponderance of the evidence whether the use **does** or **does not** promote discrimination, pupil harassment or stereotyping, and (3) issues its decision.

Step 5: (a) If the school board concludes based on its evaluation of the received evidence that the use **does** promote discrimination, pupil harassment or stereotyping, the school board must end usage within 12 months.

(b) If the school board concludes the use **does not** promote discrimination, pupil harassment or stereotyping, the board's local decision can be appealed to the State level upon receipt of (1) a petition signed by school district electors with the number of signatures equaling at least ten percent of the school district's enrollment or (2) a request from the Great Lakes Inter-Tribal Council (or its designee). If appealed, the Division of Hearings and Appeals then (1) schedules a contested case hearing to hear the appeal of the school board's decision within 30 days and (2) issues a decision and order within 45 days after the hearing. If the Division of Hearings and Appeals determines by a preponderance of the evidence that the use **does** promote discrimination, pupil harassment or stereotyping, the school board is ordered to end usage within 12 months.

Exempted from this Review Process is any school district that has entered into an agreement with the Great Lakes Inter-Tribal Council (GLITC) or its designee under which the school board receives approval of their use of the identified nickname, logo, mascot, or team name. The inter-tribal nature of the Great Lakes Inter-tribal Council and the fact that it involves several tribes will help ensure that the interests of all tribes are considered, not just one tribe.

The Schultz Substitute Amendment provides that decisions by DPI and the Division of Hearings and Appeals are subject to judicial review under Ch. 227.

The Schultz Substitute Amendment voids all rulings, decisions, orders and penalties previously issued under Act 250.

APPENDIX 2: Additional comments regarding Concerns 5 & 6

CONCERN # 5: "The 'shifting the burden of proof' concern":

Additional comments: Those making this claim appear to confuse criminal law with civil law and administrative law. "Guilt" and "innocence" and "innocent until proven guilty" are concepts in criminal law, not civil law or administrative law.
The shifting of the burden of proof under administrative law is specifically acknowledged on the State website at *http://dha.state.wi.us/home/HrgInfo.htm* in "*Information about the Administrative Hearing Process"* which says that while *"If a complaint has been filed against you, you do not have to 'prove your case.' …. However, if you request a hearing, you may have the burden of proof."* In the Mukwonago case, the Mukwonago School Board did request the Hearing so it's reasonable that the School Board had the burden of proof.
Judge Hassin in his decision in the Mukwonago lawsuit also confirmed that shifting the burden of proof to the Mukwonago School Board is totally legal and acceptable*: "The statute provides for a shifting of the burden of proof at the hearing. … This Court finds Wis. Stat. § 118.134 facially constitutional as related to the Plaintiffs due process and equal protection claims."* (Source: "Decision & Order" in the Schoolcraft case.)

Concern # 6: "the 'tribal approval' concern":

Additional comments: Act 250, the Nass Substitute Amendment, and the Schultz-Miller Substitute Amendment all three suffer from an implicit assumption that "approval" by an individual, a tribe or an American Indian organization reduces the harm from the race-based sports identity. While this assumption sounds reasonable to many people, especially European Americans, this assumption is blatantly false.

In fact, research has determined that those American Indians who support use of 'Indian' nicknames actually on average suffer an even greater reduction in self-esteem than American Indians who oppose 'Indian' nicknames. In other words, American Indians who support use of 'Indian' nicknames are the greatest victims. Thus, the greater the percentage of American Indians who support use of 'Indian' nicknames, the greater is the harm from the race-based sports identities.
Hence having "approval" from any source cannot justify a school practice that inflicts psychological harm on American Indian children.
Dr. Stephanie A. Fryberg is a social psychologist who has conducted numerous empirical research studies regarding the psychological impact of race-based sports identities. These studies have been replicated, subjected to peer review, and their credibility validated by the American Psychological Association (APA). The following statements from Dr. Fryberg discredit the claims of those who claim that "approval" can justify continued use of a race-based sports identity:

> *"... when exposed to an American Indian mascot, it was those [American Indians] who agreed with the use of American Indian mascots who reported depressed community efficacy scores compared to those who disagreed. Thus, claims on the part of [the] School Board that American Indians like being used as mascots should not be used to justify the use of American Indian mascots in schools. … Notably, however, this research shows that it is the very people who liked or agreed with the idea of American Indians being used as mascots who suffer the greatest psychological harm … My research suggests, in fact, that asking whether American Indians support 'Indian' nicknames or logos is the wrong question and the wrong focus. The right question and the right focus involves determining the <u>effect</u> such social representations have on people, or in this case on students. … This research provides empirical evidence that the continued use of the race-based ['Indians'] nickname/logo cannot be justified by the existence of American Indians who say they support the nickname/logo and that the rationale for keeping [an 'Indians']" nickname/logo should be focused on psychological consequences, not on attitudes or preferences. … This research provides empirical evidence to discredit the claim that the continued use of [an 'Indians'] nickname/logo is justified by the existence of polls showing that there are American Indians who support using 'Indian" nicknames and logos." (Source: Affidavit of Dr. Stephanie A. Fryberg in support of American Indian plaintiffs in a planned civil rights lawsuit against the Osseo-Fairchild School Board, April 22, 2005)*

Therefore the claim that "approval" by an individual, a tribe or an American Indian organization reduces the harm from a race-based sports identity and justifies an 'Indian' sports identity is totally discredited.

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This analysis and any errors in the above are the responsibility solely of
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