UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

St. Augustine School and
Joseph and Amy Forro,

Plaintiffs,

v. Case No. 16-CV-575

Tony Evers, in his official capacity,
as Superintendent of Public Instruction and
Friess Lake School District,

Defendants.

BRIEF IN OPPOSITION TO DEFENDANT TONY EVERS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT AGAINST HIM

INTRODUCTION

The Defendants Friess Lake School District ("Friess Lake") and Tony Evers, as Wisconsin Superintendent of Public Instruction ("Superintendent Evers"), intentionally disregarded established precedent from the Wisconsin Supreme Court interpreting the Wisconsin Statutes governing transportation of children who attend private schools. They applied a religious test to conclude that two legally-independent schools were nevertheless religiously affiliated and could not have overlapping attendance areas. As a result, Plaintiffs Joseph and Amy Forro were denied state-funded transportation of their children to Plaintiff St. Augustine School. In doing so, the Defendants violated state law that limits their inquiry to whether or not schools are commonly owned and managed, depriving the Plaintiffs of their constitutional rights. The facts and law that underlie the case are more fully set forth in the Plaintiffs' Brief in Support of Summary Judgment filed on December 19, 2016 (Dkt #23).

The Plaintiffs brought this action in state court, but the Defendants jointly removed it to this court. (Dkt #1.)[1] Now, after invoking federal jurisdiction, Evers moves to dismiss because he says he cannot be subjected to federal jurisdiction. He argues that the Eleventh Amendment bars declaratory and injunctive relief against him for unlawfully imposing a religious test to deny transportation to the Forros' children to St. Augustine. Having sought a federal forum, he seeks dismissal (and not merely remand) of the federal claims against him. But he asks the court to somehow retain jurisdiction over Plaintiffs' state law claims against him and to dismiss them because the Plaintiffs allegedly failed to exhaust their administrative remedies.[2]

It would be surprising if Evers could manage such a procedural sleight-of-hand. But he can't. By removing this case to federal court, Evers has consented to federal jurisdiction, waiving any sovereign immunity defense he might otherwise have had against claims under 42 U.S.C. §1983. Even if that were not so, Plaintiffs' claims for declaratory and injunctive relief against Evers may proceed under the *Ex Parte Young* exception to sovereign immunity. As for Plaintiffs' state law claims, if this Court dismisses the federal claims against Evers, it should remand the state law claims to state court. If the Court considers Evers' motion to dismiss the state law claims, Plaintiffs exhausted their administrative remedies and requested a valid judicial remedy. Evers should not be dismissed from this lawsuit.

[1] Contrary to Evers' claim, this case was not "removed to this Court pursuant to a motion by the [Friess Lake School] District." (*See* Dkt #20 at 3.)

[2] Evers also argues that the Plaintiffs cannot proceed against him in his individual capacity. The Plaintiffs do not intend to proceed against Evers in his individual capacity.

ARGUMENT

I) PLAINTIFFS' CONSTITUTIONAL CLAIMS AGAINST EVERS UNDER 42 U.S.C. §1983 MAY PROCEED.

The Eleventh Amendment to the United States Constitution reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Plaintiffs agree with many of Defendant Evers' general statements about the Eleventh Amendment. But there are two major exceptions to that rule against federal jurisdiction over state defendants that are applicable here: (1) when a State waives its immunity; and (2) when a plaintiff seeks declaratory or injunctive relief against a state official's unconstitutional act (the *Ex Parte Young* doctrine).

A) By Removing this Case to Federal Court, Evers Consented to Suit and Waived Eleventh Amendment Immunity.

In *Lapides v. Board of Regents*, 535 U.S. 613 (2002), the Supreme Court unanimously held that removal of a case by a state from state court to a federal court waives the state's Eleventh Amendment immunity. The Court explained that it would be "anomalous or inconsistent" for a State "to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand" and then turn around and "claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand." *Id.* at 619. The motive of the state in removing the case is irrelevant. *Id.* at 621.

The Supreme Court's holding in *Lapides* applied only to the plaintiffs' state law claims, *id.* at 617, but following *Lapides*, circuit courts have concluded that its logic applies to federal claims as well. *See, e.g., Lombardo v. Penn. Dep't of Public Welfare*, 540 F.3d 190, 198 (3d Cir. 2008) (holding that a state department and official's "removal of federal-law claims to federal

court effected a waiver of immunity from suit in federal court"); *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004) ("We conclude that the rule in *Lapides* applies to federal claims."); *Ku v. Tenn.*, 322 F.3d 431, 433-35 (6th Cir. 2003) (although not a removal case, concluding that extensive litigation of a federal claim waived an Eleventh Amendment defense under *Lapides*); *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1204-06 (10th Cir. 2003) (concluding that removal waived sovereign immunity against a federal claim). The Seventh Circuit has not yet decided this issue. *See Hester v. Indiana Dep't of Health*, 726 F.3d 942 (7th Cir. 2013) (acknowledging the issue but not deciding it, due to the failure of the plaintiff's claims on other grounds). While some circuits have distinguished between immunity from suit and immunity from damages,[3] *see id.* at 949-50, none have found that removal of federal claims does not waive immunity from suit.

As noted in those circuit court decisions, the logic of *Lapides* applies equally as well to the waiver of immunity from federal law claims as state law claims. In *Lapides*, the Court announced a "'general principle' that immunity is waived where a State voluntarily invokes a federal court's jurisdiction." *Lombardo v. Penn. Dep't of Public Welfare*, 540 F.3d 190, 196 (3d Cir. 2008), quoting *Lapides*, 533 U.S. at 620. The *Lapides* Court drew on more than a century of Supreme Court cases standing for the principle that the voluntary invocation of federal court authority waives Eleventh Amendment immunity. *Lapides*, 535 U.S. at 619. "Nothing in the reasoning of Lapides supports limiting the waiver to . . . state law claims only." *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004). "Allowing a State to waive immunity to remove a case to

[3] The question of liability for damages is not relevant to this Motion, as the Plaintiffs seek a declaration and an injunction against Evers but not damages. The Plaintiffs seek damages from only Friess Lake. (*See* Pl. Summary Judgment Br. at 27.)

federal court, then 'unwaive' it to assert that the federal court could not act, would create a new definition of chutzpah." *Id.* at 566.

Of course, it is possible that a state might remove a case making multiple federal claims against it and then promptly dismiss *only* those barred by the Eleventh Amendment. Consent could not be implied in such a case because the state could be said to be seeking a federal forum only for those non-barred federal claims. *See, e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). But that is not what is happening here; Evers is saying that are *no* federal claims that can be brought against him because of the jurisdictional bar of the Eleventh Amendment. If that is so, then there is no subject matter jurisdiction over this case and all of the claims against it would have to be dismissed for want of such jurisdiction. *Id*. at 514 ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety.").

So if Evers is right that the Eleventh Amendment bars Plaintiffs' claim for declaratory and injunctive relief (although as noted below he is not), the matter was improvidently removed and ought to be remanded. Whether the matter can proceed there is a matter of Wisconsin law regarding sovereign immunity and will be decided by the state courts.[4] But that is not what Evers wants. He asks this Court to say that no federal claims can be brought against him in federal court, but yet retain a federal forum for his state law claims. In other words, he has attempted to invoke a federal jurisdiction that he now says does not exist to bootstrap himself into a federal forum for state law claims. As we explain below, that cannot work. But it certainly involves consent to federal jurisdiction which Evers cannot seek when he wants it and deny when he doesn't.

[4] As noted below, the Eleventh Amendment does not bar Plaintiffs' claim in federal or state courts. If Plaintiffs are wrong, Congress has no general authority to abrogate a state's sovereign immunity in state courts. *Alden v. Maine*, 527 U.S. 706 (1999). But whether there is such immunity is a matter of state law. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

B) The *Ex Parte Young* Exception for Declaratory and Injunctive Relief Applies.

Even if Evers has not waived his Eleventh Amendment immunity, the Plaintiffs may still bring their declaratory and injunctive claims against him under the longstanding *Ex Parte Young* exception. *See Ex Parte Young*, 209 U.S. 123 (1908). *Ex Parte Young* allows plaintiffs to bring declaratory and injunctive claims against state officials whose actions allegedly violate the Constitution or other federal law, because such actions lack the official authority that normally cloaks officials with the same immunity States themselves enjoy. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 (1989), citing *Ex Parte Young*, 209 U.S. 123. Damage awards are not available, but a "federal court may award an injunction that governs the official's future conduct." *Id.*, citing *Edelman v. Jordan*, 415 U.S. 651 (1974).

Here, the claim against Evers is for a declaration and an injunction to prevent an ongoing violation of the Constitution consisting of the application of a religious test regarding the approved attendance areas for private schools. He has concluded, based on a review of the school's website, that St. Augustine is "Catholic" in the same way that the Archdiocesan schools are "Catholic," such that they should be considered affiliated even though they are legally and even ecclesiastically independent.[5] This is an unconstitutional religious test specifically foreclosed by binding Wisconsin Supreme Court precedent. *See* Pl. Br. in Support of Summary Judgment at 3 (Dkt #23).

The religious test approved and adopted by Evers in this case will have continuing effects in at least four ways. First, it means that St. Augustine has no approved attendance area within Friess Lake. That means that none of its students who live in Friess Lake will ever be entitled to

[5] Evers' argument that he did not do this reduces, remarkably, to the claim that it was "easy" and required no ongoing monitoring of St. Augustine. In other words, a superficial religious test is OK. This ignores the clear direction of the Wisconsin Supreme Court as to what may and may not be considered as well as the evidence that St. Augustine is religiously as well as legally distinct.

transportation because one of the criteria for eligibility is that the student lives in St. Augustine's attendance area. *See* Wis. Stat. §121.54(2)(b)1. Second, St. Augustine is entitled to apply annually for an attendance area. *See* §121.54(2)(b)3. That means that this dispute will recur with respect to St. Augustine on an annual basis, and unless Evers is enjoined in this case, Evers will continue to deny St. Augustine its permitted attendance area. Third, it is clear from Evers' written decision in this case that the policy that he has created of applying a religious test to §121.51 is intended to be applied state-wide to all parochial schools in the state. Fourth, the Forros continue to be denied transportation for their children and, consequently, either the Forros or St. Augustine must provide it.

Evers' claim that there can be no declaratory relief issued against him amounts to a claim that, because the act denying the Plaintiffs their constitutional rights has been completed, there is no federal forum to address its continuing effect. It's as if a state university board of regents who had upheld the admissions office denial of admission to a Plaintiff on the basis of race could not be sued for declaratory and injunctive relief because the rejection letter was already in the mail.

Evers argues that he cannot be sued because he acted in a "quasi-judicial" role, *i.e.*, that he merely approved a decision that Friess Lake had already made. There is indeed a body of law that says state officials performing a judicial function may not be sued for damages under section 1983. But Evers makes no effort to show why those cases are applicable to his exercise of his ultimate *executive* responsibility for administration for the statute and, in any event, Plaintiffs' claim against him is for injunctive and declaratory relief. In fact, he cites no cases to support the notion that the mere fact that he was reviewing a decision first made by someone else gives him absolute immunity from any form of relief. To the contrary, he concedes that he would have to

comply with any federal decision barring him from doing what he did here. (Dkt #20 at 9.) In other words, declaratory and injunctive relief can lie against him as they can against any state official who violates the United States Constitution. It can lie against him to provide relief for the Forros. And it can lie against him to halt his unconstitutional application of §121.51.

As explained in detail in the Plaintiffs' Brief in Support of their Motion for Summary Judgment, before filing suit (Dkt #23 at 21-24), the Plaintiffs pointed out his constitutional error, but Evers did not take that opportunity to correct his mistake. He still insisted that he could determine who and what is "Catholic," ignoring the fact that St. Augustine has no institutional ties to the Archdiocese of Milwaukee or its schools, including St. Gabriel. As a result, the Plaintiffs have been denied transportation required by state law. If Plaintiffs are correct that this violated their constitutional rights, it is a paradigmatic case for declaratory and injunctive relief.

And it makes no practical sense to dismiss Evers from this lawsuit. He has adopted an unconstitutional interpretation of a statute that he intends to keep implementing. He has the statutory power to resolve transportation disputes, and must be specifically enjoined from doing so in an unconstitutional way. In this same manner, the U.S. Supreme Court allowed Minnesota's Attorney General to be enjoined from enforcing a statute in violation of the Fourteenth Amendment. *See Ex Parte Young*, 209 U.S. at 168 (enjoining Minnesota's attorney general from enforcing a statute in violation of the Fourteenth Amendment). This Court has the authority to enjoin Evers from enforcing state statutes in an unconstitutional way.

II) IF THIS COURT DISMISSES THE FEDERAL CLAIMS AGAINST EVERS, IT SHOULD REMAND THE STATE CLAIMS TO STATE COURT.

In addition to asking this Court to dismiss the federal claims against him on Eleventh Amendment grounds, Evers has asked this Court to dismiss the state claims against him on an alleged failure to exhaust administrative remedies. But the state claims could only be heard by

this Court due to supplemental jurisdiction. 28 U.S.C. §1367. If this Court dismisses the federal claims, it should remand the state claims back to the state court whence they came.

Supplemental jurisdiction began its life as a common law doctrine. As reflected in the seminal case of *Mine Workers v. Gibbs*, 383 U.S. 715 (1966), federal courts with federal-question subject matter jurisdiction over a claim could also hear state law claims (under what was then called "pendent jurisdiction,") if the federal and state law claims "'derive from a common nucleus of operative fact' and comprise 'but one constitutional 'case.'"" *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 539 (2002), citing *Gibbs*, 383 U.S. at 725. But if there was no substantial federal claim – if, as Evers argues here, there is no federal claim at all – then the state law claims should be dismissed. *Gibbs*, 383 U.S. at 792 ("Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed.").

In 1990, Congress codified a version of that doctrine in 28 U.S.C. §1367, providing in relevant part that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

Prior to 1990, the Supreme Court had already ruled that the Eleventh Amendment barred pendent jurisdiction over state law claims against a non-consenting defendant. *Raygor*, 383 U.S. at 540-41, citing *Pennhurst*, 465 U.S. at 118, 20. In *Raygor*, the Supreme Court concluded that the same rule applied to supplemental jurisdiction under §1367. *Id.* at 541-42. Because Congress did not expressly abrogate sovereign immunity as a defense in §1367, the Eleventh Amendment bars supplemental claims against non-consenting defendants.

And if this Court concludes that Evers has not waived his Eleventh Amendment immunity, then Evers is a non-consenting defendant. *See Raygor*, 534 U.S. at 536 (describing the Regents of the University of Minnesota, who had successfully raised the Eleventh Amendment as a defense to federal jurisdiction, as non-consenting defendants). Therefore, if this Court dismisses the Plaintiffs' federal claims against Evers on Eleventh Amendment grounds, then it must remand the state claims to federal court, as it no longer has jurisdiction over them.

Even if *Raygor* did not apply, then this Court should still exercise its discretion under 28 U.S.C. § 1367(c)(3) and decline to exercise supplemental jurisdiction over the remaining state law claims if the court dismisses the federal claims. Considerations of comity and deference to state courts on matters of state law so dictate. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349-50 (1988) (citing the "values of judicial economy, convenience, fairness, and comity"); *Gibbs*, 383 U.S. at 726-27 ("[I]f the federal claims are dismissed before trial . . . , the state claims should be dismissed as well."). This case was originally brought in state court, and should be returned there if this Court concludes that the federal claims against Evers cannot continue.

III) PLAINTIFFS' STATE LAW CLAIMS AGAINST EVERS SHOULD NOT BE DISMISSED.

Finally, Evers asks this Court to dismiss the Plaintiffs' state law claims, alleging that the Plaintiffs failed to exhaust their administrative remedies because they did not petition for judicial review of the decision. That argument fails for two reasons. First, the Plaintiffs have already exhausted all their administrative remedies; the judicial review Evers claims the Plaintiffs have not sought is a judicial remedy. Second, the Plaintiffs have requested a valid form of judicial remedy.

A) Plaintiffs Exhausted Their Administrative Remedies.

"The general doctrine [is] that judicial relief will be denied until the parties have exhausted their administrative remedies; the parties must complete the administrative proceedings before they come to court." *Nodell Investment Corp. v. City of Glendale*, 78 Wis. 2d 416, 424, 254 N.W.2d 310, 315 (1977). "The rule of exhaustion of administrative remedies is a doctrine of judicial restraint which the legislature and the courts have evolved in drawing the boundary line between administrative and judicial spheres of activity." *Id.* (emphasis added). In *Nodell*, an investment company was forbidden from coming to court because they failed to use an available administrative appeal to a local zoning board of appeals. *Id.* at 417. Thus, a plaintiff may not "skip" available administrative remedies and go right to court. If those remedies are available, a plaintiff must use them before going to court.

In this case, that is exactly what the Plaintiffs did. They obtained an unfavorable determination from the Friess Lake School District on their request for a specific attendance area. They followed the statutory procedure for an administrative appeal of that determination to the Superintendent under Wis. Stat. §121.51. That administrative appeal also concluded unfavorably for them. The statutes provide no further avenues for administrative relief. So having exhausted their administrative remedies, they filed this suit.

Evers' position is nonsensical. He talks about administrative exhaustion, but the Plaintiffs have used up all administrative remedies available to them. The only option left was to seek judicial review. Evers is arguing that before the Plaintiffs can go to court, they have to go to court. That makes no sense, and is not consistent with the holding of *Nodell*. He is complaining that the Plaintiffs are using the wrong judicial remedy, but that is not a question of administrative exhaustion. The Plaintiffs have exhausted their administrative remedies.

B) The Plaintiffs Have Requested a Valid Form of Judicial Remedy.

In reality, Evers is arguing that the Plaintiffs are seeking the wrong judicial remedy, but Evers cites no case law to support *that* proposition and it is wrong as a matter of law. Evers' argument is the Plaintiffs were required to seek judicial review under Wis. Stat. §227.52 (Evers' Br. at 12) and no other form of action is permissible. But that argument should be rejected for three reasons: (1) there is nothing in §121.51 that requires a dispute under that section to proceed under chapter 227 of the Wisconsin Statutes; (2) Evers, himself, did not treat this dispute as being covered by chapter 227; and (3) barring all else, this case can be converted to 227 review.

1. *A dispute under §121.51 is not covered by chapter 227.*

First, nothing in §121.51 supports or suggests that disputes thereunder are covered by Chapter 227 of the Wisconsin Statutes. As a starting matter, Wis. Stat. §806.04 provides that where a person's rights are affected by a statute that declaratory judgment relief is available to determine their rights. Alternatively, common law certiorari is also available where there is no express statutory method of review. *Ottman v. Town of Primrose*, 2011 WI 18, ¶35, 332 Wis. 2d 3, 796 N.W.2d 411. Here, there is no express statutory method of review. Thus, either method is available to the Plaintiffs herein and the Plaintiffs have alleged both (with their request for certiorari relief being in the alternative).

Second, there have been two cases litigated under §121.51 – *Vanko v. Kahl*, 52 Wis. 2d 206, 215, 188 N.W.2d 460 (1971), and *Holy Trinity Community School v. Kahl*, 82 Wis. 2d 139, 262 N.W.2d 210 (1978). Neither was litigated as an appeal under chapter 227. *Vanko* was an original action for declaratory judgment in the Wisconsin Supreme Court, 52 Wis. 2d at 206, 210, and *Holy Trinity Community School* was an action for common law certiorari review, 82

Wis. 2d at 143. Neither case even mentions Chapter 227 nor discusses the level of deference owed the Superintendent's decision, a common feature of 227 cases. *See, e.g., Masri v. LIRC*, 2014 WI 81, ¶¶22-29, 356 Wis. 2d 405, 850 N.W.2d 298 (considering whether to apply great weight, due weight, or no deference to LIRC's decision). *Vanko* and *Holy Trinity* establish that there are a number of ways to litigate a dispute under §121.51 and both declaratory judgment and certiorari review are among them.

In *State ex rel. City of La Crosse v. Rothwell*, 25 Wis. 2d 228, 130 N.W.2d 806 (1964), the Wisconsin Supreme Court considered a case quite similar to this one. In 1962, the State Legislature changed the rules for drawing high school district boundaries, and provided that disputes over those boundaries could be appealed to the Superintendent. *Id.* at 231-32, citing §40.035(3) (1961-62). Two disputes over boundaries were brought to the Superintendent for appeal and neither of them was brought under chapter 227 judicial review. Rather they were brought for review by certiorari to a circuit court. *Id.* at 232. This case presents a similar boundary dispute – the Superintendent's determination that St. Augustine could not have an overlapping attendance zone with St. Gabriel.

2. Evers did not treat this dispute as one covered by chapter 227.

In his brief, Evers argues that this case should have been brought as a judicial review of an "administrative decision" under § 227.52. One would have thought that if he truly believed that, he would have treated the dispute as an administrative decision under §§ 227.40, *et. seq*., but he did not. There was no hearing under § 227.42, the Division of Hearings and Appeals was not involved per § 227.43, no notice was sent complying with § 227.48, etc. Having not treated this case as one covered by Chapter 227 himself, Evers is hard-pressed to argue that Chapter 227 is the exclusive remedy here.

3. Barring all else, this case can be converted to 227 review.

Even if this Court concludes that neither declaratory judgment nor common law certiorari review is available, it can proceed to treat this case as a claim for judicial review under §227.52. The Wisconsin Court of Appeals took a similar approach in *Tomaszewski v. Giera*, 2003 WI App 65, 260 Wis. 2d 569, 659 N.W.2d 882. In that case, the court of appeals reviewed the differences between 227 review and certiorari review, concluded that the circuit court had proceeded under the wrong standard of review, and remanded "to the trial court to construe Tomaszewski's complaint as a common law writ of certiorari and to review the fence viewers' determination accordingly." *Id.*, ¶¶18-20. Such a change would be minor and would have no practical effect on the case. As stated in *Stacy v. Ashland County Dep't of Public Welfare*, 39 Wis. 2d 595, 159 N.W.2d 630 (1968), section 227.52 judicial review and certiorari review are nearly identical:

> Specifically the scope of the review on certiorari was held to include: (1) Whether the board kept within its jurisdiction, (2) whether it proceeded on a correct theory of law, (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment, and (4) whether the evidence was such that it might reasonably make the order or determination in question. This scope of the review is substantially the same as that provided in sec. 227.20,[6] stats., for review under that chapter.

39 Wis. 2d at 600; *see also State ex rel. Harris v. Annuity & Pension Bd.*, 87 Wis. 2d 626, 275 N.W.2d 668 (1979) ("The sufficiency of evidence on review by common law certiorari is identical to the substantial evidence test used for the review of administrative determinations under ch. 227.").

[6] In 1968, §227.15 provided for judicial review of administrative decisions and §227.20 delineated the scope of that review. *See* Wis. Stat. ch. 227 (1967-68). In 1985, those sections were renumbered without substantive change to §227.52 *et seq*. *See* 1985 Wis. Act 182, §§ 35, 41.

Finally, the entire issue is unnecessary if the Court rules for the Plaintiffs on their §1983 claim, because the entire case may be resolved on those grounds. And a 42 U.S.C. §1983 claim is not subject to administrative exhaustion requirements, nor does a plaintiff have to use available state judicial remedies before bringing such a claim. *See Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on 42 U.S.C. §1983 . . . we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.").

The Plaintiffs exhausted their administrative remedies before the Superintendent. If this Court rules that a declaratory judgment action is unavailable, the Plaintiffs' state claims can proceed under common law certiorari review or be converted to §227.52 review.

CONCLUSION

For the foregoing reasons, Evers' Motion to Dismiss should be denied. Evers waived Eleventh Amendment immunity by removing this case to federal court, and even if he did not, the Plaintiffs can obtain declaratory and injunctive relief against him under the *Ex Parte Young* exception. If this Court dismisses the Plaintiffs' federal claims, it should remand the state law claims to state court. If this Court retains jurisdiction over the state law claims, it should not dismiss those claims.

Submitted this 20th day of December, 2016.

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