IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JOHN DOE, a minor; JANE DOE, a minor; DEMETRIUS MAREZ; CHASE AUBREY ROUBIDEAUX; DONALD WAYNE SMITH, JR.; and the NATIVE AMERICAN GUARDIAN'S ASSOCIATION,

Plaintiffs,

v.

JARED POLIS, Colorado Governor; DAVE YOUNG, Colorado State Treasurer; KATY ANTHES, Commissioner of Education for the Colorado Department of Education; PHIL WEISER, Colorado Attorney General; KATHRYN REDHORSE, Executive Director of the Colorado Commission of Indian Affairs; and GEORGINA OWEN, Title VII State Coordinator for the Colorado Department of Education, in their official capacities,

Defendants.

Case No.: 1:21-cv-02941-RMR

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION, AND RENEWED REQUEST FOR ORAL ARGUMENT, TO THE EXTENT IT WOULD AID THE COURT

Give Colorado credit for embracing the full scope of its radical argument: under its theory, no court could ever review an equal protection challenge to a state law—in Colorado or otherwise—barring public schools from honoring African-Americans, Hispanics, or even LGBTQ+ individuals or women. Colorado could, in a targeted way that was explicitly based on invidious racial considerations, even prohibit local schools from celebrating National Native American Heritage month, presently ongoing now. Moreover, under the government's standing arguments, no one could be "injured" if a state law barred schools from being named after African-Americans, or having imagery associated with important historical figures like Martin Luther King Jr. But that can't be right. *See Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) ("Even if § 15–112 is not facially discriminatory, however, the statute and/or its subsequent enforcement against the [Mexican American Studies] program would still be unconstitutional if its enactment or the manner in which it was enforced were motivated by a discriminatory purpose.").

Unsurprisingly, the parties disagree over whether prohibiting Native American names and imagery in schools is discriminatory, since a subset of that conduct is offensive to Native Americans. But identifying offensive speech and declaring it off-limits is precisely an area where the government is weakest. *Cf. Matal v. Tam*, 137 S.Ct. 1744, 1769 (2017) (Kennedy, J., concurring, with Kagan, J., Sotomayor, J., and Ginsburg, J.) ("[T]he dissonance between the trademark's potential to teach and the Government's insistence on its own, opposite, and negative interpretation confirms the constitutional vice of the statute."). It is also where the state runs into extreme danger. *Id.* at 1769 ("A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all.").

But in any event, this court should reject Colorado's arguments based on the purported offensiveness of images and icons covered by SB 21-116 (the Act). To be clear, the Act isn't

carefully drawn to ban all race-based caricatures, historically inaccurate portrayals of cultures, or racially hostile environments based on a school's images. That would be one thing. Instead, however, the Act singles out a specific race for differential treatment, puts Plaintiffs in a distinct and disadvantageous political process as compared to individuals of other races, confuses both the Plaintiffs and the schools that they attempt to petition, and forces several plaintiffs to watch as their culture's names and imagery are stripped from their schools. This Court should therefore grant a preliminary injunction while it decides the merits of the claims at issue in the case.

ARGUMENT

1. Equal Protection: The Act Directly Discriminates Against Plaintiffs.

Defendants misconstrue Plaintiffs' claims as free speech claims, or as claims asserting some vague right to "equal time" in government messaging. But Plaintiffs simply ask that they, their ancestors, and their members not be singled out for differential treatment based on race, with respect to what public schools can do. Whether or not mascots, nicknames, logos, letterhead, and team names are government "speech" is irrelevant to the question of whether SB 21-116 treats Native Americans differently under the law.[1]

Defendants rely on *Moore*, which rejected an equal protection challenge to a state's flag. *Moore v. Bryant*, 853 F.3d 245 (5th Cir. 2017). But that case truly was about the government's speech, which did not facially differentiate among various racial demographics. The plaintiff also relied merely on his stigmatic injury, which the court unsurprisingly rejected as insufficient to establish standing. The court distinguished, however, cases where, like here, actual discriminatory

[1] Indeed, even on Colorado's own terms, as the amount of conduct that courts construe as speech is expanding, a holding that immunizes all public school speech from equal protection challenges poses serious dangers. *See Janus v. American Federation of State, County, and Mun. Employees, Council*, 138 S. Ct. 2448, 2502 (Kagan, J., dissenting) ("Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech.").

treatment occurred. *Id.* at 251 ("[I]n cases where the Government engages in discriminatory speech, that speech likely will be coupled with discriminatory treatment.").

Defendants next claim that there is no constitutional injury to not having one's race associated with a mascot. But they neglect to acknowledge the immense breadth of the statute, which covers not merely sports "mascots" under the ordinary meaning of that term, but all names, symbols, or images that depict or refer to an American Indian tribe, individual, custom, or tradition, on a school's logo or letterhead. To be clear, Plaintiffs are members of the only racial demographic barred from having themselves, their ancestors, or their tribes honored by Colorado public schools on an equal basis. And it is hardly foreign to suggest that race discrimination in the school setting can trigger cognizable injuries. *Cf. Dear Colleague Letter*, Joint DOJ/OCR Guidance on Segregated Proms (Sept. 20, 2004) (identifying as Title VI violations racially separate awards for "Most Popular Student, Most Friendly, or other superlatives").

Defendants next contend that the Act satisfies strict scrutiny, citing a compelling interest in remedying the effects of discrimination against Native Americans. They also argue that the Act is narrowly tailored because (1) it applies only to Native American names and culture and (2) the Act contains an exception for schools that enter an agreement with tribes. But this is wrong on both accounts: first, because there is no compelling interest in erasing Native American tribes and individuals from all school logos and letterhead; and second, because the Act sweeps in conduct that is not only honorific and respectful, but also because it uniquely denies Native Americans the opportunity to reappropriate terms as part of a movement to undermine their offensiveness.

Defendants' arguments on narrow-tailoring are especially troubling. They contend that the Act is narrowly tailored because past discrimination against a group *requires* new differential treatment. But the law is the opposite: before Colorado can engage in race discrimination, it must

establish the *unavailability* of similarly-effective race-neutral alternatives. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237-38 (1995). Defendants do not even *gesture* at carrying this burden, or point to why equal treatment would have interfered with the objective of remedying discrimination against Native Americans. Indeed, not only does "[n]arrow tailoring require[] serious, good faith consideration of workable race-neutral alternatives," *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007), but Defendants bear the burden of demonstrating the *actual absence* of any "workable race-neutral alternatives." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013). Colorado argues that a race-neutral alternative is unnecessary, because Native American mascots are the real problem; but unless Colorado places some value on other schools *having* racial caricatures of non-Native races, their position provides even *less* support for Colorado's race-conscious ban.

Nor does it establish narrow tailoring that the Act contains an exception for schools that enter agreements with certain tribes. The exception is hardly meaningful; Colorado cannot escape an equal protection challenge by delegating unilateral power to other entities, with their own interests, players, decision-making processes, and internal changes in leadership. Nor is it appropriate, in a general sense, to force tribal governments to act as gatekeepers for myriad Colorado public schools—many of which the CCIA has still failed to identify—any time a school refers to a Native American individual or tribe in its logo or letterhead.

2. Equal Protection: The Act Violates the Political Process Doctrine.

Defendants supercharge this claim by noting that Plaintiffs "are free to petition and lobby the General Assembly to amend or repeal SB21-116." Opp. at 15; *see id.* ("Or they may pursue an initiated statute or constitutional amendment that countermands SB21-116 by reserving to local school boards the right to decide what names and mascots may be used by public schools."). No

other racial demographic is subjected to such a daunting political landscape. And it is exactly because Plaintiffs have no other choice but to seek statewide changes or exemptions to the Act that their claim is likely to succeed.

The parties agree that *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014), is the controlling authority on this question. *Schuette* drastically cut back on the reach of *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) (*Seattle*), but left intact a doctrine that Plaintiffs fall squarely into: when the government uniquely and intentionally places a specific racial demographic at a disadvantage that no other demographic suffers, it violates the Equal Protection Clause. *Id.* at 305 ("*Seattle* is best understood as a case in which the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race."). By contrast, *Schuette* rejected a "broad" reading of *Seattle*, which had previously embraced the idea that any vague notion of "racial focus" was sufficient to establish an equal protection violation. *See id.* ("[A]ccording to the *broad* reading of *Seattle*, any state action with a 'racial focus' that makes it more difficult for certain racial minorities than for other groups to achieve legislation that is in their interest is subject to strict scrutiny. . . . *[T]hat* reading must be rejected.") (emphasis added); *see also id.* at 392 (Sotomayor, J., dissenting) ("The Constitution does not protect racial minorities from political defeat. But neither does it give the majority free rein to erect selective barriers against racial minorities.").

Defendants focus on *dicta* from the plurality opinion wherein the Court recognized that a "broad" reading of *Seattle*—wherein anything having a "racial focus" might be vulnerable to constitutional challenge—would lead to absurd results, like whether the name of a school might not "inure[] primarily to the benefit of the minority." 572 U.S. at 309. But not only do Plaintiffs not rely on a broad reading of *Seattle*, but the Act actually presents the flipside of the *Schuette*

dicta: here, the state is actively *engaging* in race discrimination against a particular race by forcing schools to change logos and letterhead.

Moreover, Defendants' efforts to distinguish *Schuette* fail. Colorado suggests that it can discriminate against Native Americans now because it has never "conceded and does not concede that the use of American Indian mascots by public schools is a proper policy for achieving American Indian interest." But this is non-responsive. The question is not whether the *use* of American Indian mascots achieves American Indian interests; it is whether, under *Schuette*, a *ban* on depicting Native American tribes or individuals—including in honorific ways—"ha[s] the serious risk, if not purpose, of causing specific injuries on account of race." Because it undoubtedly does, it is therefore prohibited. *Cf. Romer v. Evans*, 517 U.S. 620, 633 (1996) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

3. First Amendment: The Act Violates Plaintiffs' Right to Petition.

Colorado does not dispute the fact that the Act applies to myriad public schools that have not been identified by CCIA, because they depict or refer to a Native American individual or tribe in their logo or letterhead. Nor does Colorado push back on the idea that the CCIA has failed to evaluate the genealogy records of every individual who has a school in Colorado named after them, to determine whether that individual may have Native American ancestry, and to determine whether an image of that individual may unlawfully appear on a school's logos or letterhead.

Furthermore, there is no question that Plaintiffs' injuries are concrete. Plaintiff Marez, for instance, specifically petitioned Lamar High School to change its name to Lamar Black Kettle. He noted: "Black Kettle was a prominent Chief/leader of the Southern Cheyenne during the Colorado War and the Sand Creek Massacre." [ECF No. 4-2, at 10] He received the blunt reply that: "I

believe your suggestion would fit within this definition thereby making the school subject to the fines/fees if we adopted this suggestion." [*Id.* at 12] Similarly, Plaintiff Roubideaux petitioned that Yuma High School be named after his Lakota ancestor, Tall Bull, who was massacred at Summit Springs. [ECF No. 4-5, at 2-3]. Media reports establish that "[t]he suggestion of 'Tall Bulls' was eliminated because it refers to a Native American chief killed in the 1880s."[2] [*Id.* at 13]

Plaintiffs are not arguing that they have a right to *succeed* at petitioning. Rather, they contend that Colorado drafted a statute so poorly that public schools and school districts cannot discern its meaning. Defendants rely on the majority opinion in *We the People Foundation, Inc. v. U.S.*, 485 F.3d 140, 144-45 (D.C. Cir. 2007), which admittedly held that "Executive and Legislative responses to and consideration of petitions are entrusted to the discretion of those Branches." Here, however, it is hardly appropriate to rely on the discretion of Colorado schools—which are neither the "Executive or Legislative" branches—when they truly can't determine the fair meaning of a law. What good does it do to for citizens to express "ideas, hopes and concerns" to public officials, when those officials don't know whether they are legally permitted to be persuaded? This Court should not permit such vagaries when it comes to constitutional rights.

4. Title VI: The Act Creates a Racially Hostile Environment.

Colorado does not dispute that it receives federal funds and is therefore subject to Title VI. And Plaintiffs John Doe and Jane Doe both articulate how their injuries are immediate and concrete. [ECF Nos. 4-4 and 4-5] Schools are in the process of changing names now to avoid fines next year, and Colorado has done nothing. Colorado's argument that there may be other forms of

[2] It appears that both responses were legally inaccurate, since the Act may technically allow a school to be named after a Native American individual or tribe, so long as there is no reference to that tribe or individual on the school's logo, or in the school's team name or nickname. There is an exception that applies to the name of the individual—but not an image or symbol—which is limited exclusively to letterhead (but not logos). As a practical matter, of course, no school would name itself after a Native American individual if it knew it could never use that individual's name in any school logo.

general education credit or world education credit available to Native American students is hardly responsive to the idea that the Does will see their school's buildings, hallways, and materials stripped of the names and depictions of tribes and individuals on any logo or letterhead—however broadly a school sees defines those term—as schools feebly try to comply with an ambiguous law.

Defendants seem to contend that a state law can't give rise to a hostile environment claim under Title VI. But this is factually inaccurate. *See, e.g.*, 34 C.F.R. § 100.13(i) ("The term recipient means any State, political subdivision of any State, or instrumentality of any State or political subdivision …"). Colorado also does not push back on Plaintiffs' authorities that formal policies can create hostile environments; it would be odd to rule out such a possibility. And Title VI contains no textual support for Colorado's argument that a state policy can't create a hostile environment in a local school. In any event, the Plaintiffs' evidence and the authorities in the Motion establish that the Act will create a hostile environment at the Does' specific school, caused by a recipient of federal funds—the State of Colorado—and its ongoing deliberate indifference.

5. Plaintiffs Will Suffer Irreparable Injury Absent Preliminary Relief.

Colorado is trying to have it both ways, by ordering schools to start the process of changing their names by November 30, while representing to this Court that there's nothing binding about that deadline. *See, e.g.*, ECF No. 4, at 1-2 ("All districts and charter schools must notify BEST of their intent to apply by November 30, 2021.") (emphasis added). The website now uses the word "should" instead of "must" in some places—although it has left the word "must" in its online calendar—but the language hardly offers assurances that the November 30 deadline is no big deal:

> **Please Note: ALL** potential FY22-23 applicants should notify BEST of intent to apply by completing a **Grant Manager registration** prior to November 30th. If you cannot complete the form by that date, please email **BESTschools@cde.state.co.us** to request information on how to apply this grant round.

See BEST Grant Program website (bold and capital letters in original).[3] To be sure, schools have received the message, loud and clear. *See, e.g.*, Winfrey, *MCSD objects to state demands to change Johnson Elem. Mascot*, Montrose Press (Nov. 13, 2021) ("If the state does not accept the challenge to change the Johnson Elementary mascot, Jenkins said that MCSD will move forward with swapping the Thunderbird for a new one to avoid paying the $25,000 monthly fine outlined in the law.")[4]; Meek, *New state law says schools can't use American Indian insignias*, Center Post Dispatch (Sept. 3, 2021) ("The district is actively seeking input from all community members to create a mascot that will represent the schools in the future without violating the new law.")[5]; Bounds, *Frederick High asks for new mascot suggestions Boulder Daily Camera* (Aug. 25, 2021).[6]

But Plaintiffs do not rely exclusively on the November 30 deadline, or the fact that every day that passes creates greater pressure for schools to begin the process of changing their names. Constitutional violations, in and of themselves, inherently constitute irreparable injury. Therefore, if the Court finds in favor of Plaintiffs on *any* of their constitutional claims, Plaintiffs will suffer irreparable injury. *See also, e.g., Free the Nipple v. City of Ft. Collins*, 916 F.3d 792, 806 (10th Cir. 2019) ("What makes an injury 'irreparable' is the inadequacy of, and the difficulty of calculating, a monetary remedy after a full trial. Any deprivation of any constitutional right fits that bill.").

Defendants separately assert that Plaintiffs have no legally protected interest at issue. They argue that because Plaintiffs cannot show that they would *succeed* in persuading their schools to

[3] http://www.cde.state.co.us/capitalconstruction/best (last visited, Nov. 26, 2021); *but see* https://www.cde.state.co.us/capitalconstruction/best-timeline ("**No later than November 30:** All Districts and Charter Schools must notify BEST of intent to apply.") (original emphasis)

[4] https://www.montrosepress.com/news/mcsd-objects-to-state-demands-to-change-johnson-elem-mascot/article_17149dc6-4448-11ec-b0f2-274cb25ea297.html

[5] https://centerpostdispatch.com/article/mountain-valley-school-district-asks-for-input-to-choose-new-mascot

[6] https://sports.yahoo.com/frederick-high-asks-mascot-suggestions-140800490.html

retain Native American names or imagery—or because the schools may opt to go ahead and subject themselves to exorbitant fines—they cannot challenge the disadvantage at which the Act puts them. (Imagine a state making the same argument after barring schools from being named after prominent African-Americans.) In any event, however, the law is precisely to the contrary: "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand Constructors,* 515 U.S. at 229–30. Moreover, when the government discriminates based on race, the injury is "that a discriminatory classification prevents the plaintiff from competing on an equal footing." *Id.* at 221; *see also Arce*, 793 F.3d at 977 (elimination of Mexican American Studies program posed triable equal protection issue).[7]

6. The Balance of Harms and the Public Interest Strongly Favor Plaintiffs.

Defendants ask this Court to defer to the legislature over whether the race discrimination here serves the public interest. But "it is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 20120). And the public has a particular "interest in maintaining a system of laws free of unconstitutional racial classifications." *O'Donnell Const. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992).

CONCLUSION

Plaintiffs oppose the erasure of Native Americans names and images from schools. They therefore request the entry of a preliminary injunction, pending resolution of this case. To the extent it would aid the Court, Counsel is prepared to attend in-person or remote oral argument on the Motion as soon as possible, consistent with the Court's schedule.

[7] Defendants claim in a footnote that NAGA lacks standing because the Complaint fails to establish the standing of an identified member. As set forth more fully in the Davidson Supplemental Declaration, Plaintiff Marez is a member of NAGA and has been since August 9, 2021. *See* Davidson Supplemental Decl., Ex. 1, ¶ 3.

Dated: November 26, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2021, I served a true and complete copy of the foregoing **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION, AND RENEWED REQUEST FOR ORAL ARGUMENT, TO THE EXTENT IT WOULD AID THE COURT** upon all parties herein by e-filing with the CM/ECF system maintained by the court, addressed as follows:

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