No. 21-1421

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEMETRIUS MAREZ, *et al.*,
Plaintiffs-Appellants,

v.

JARED POLIS, Colorado Governor, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado
No. 21-cv-02941-RMR, The Honorable Regina M. Rodriguez

MOTION FOR INJUNCTION PENDING APPEAL UNDER CIRCUIT RULES 8.1 AND 27; RELIEF REQUESTED FORTHWITH

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CORPORATE DISCLOSURE STATEMENT

The undersigned attorneys for Plaintiff-Appellant, the Native American Guardian's Association, certifies that the Native American Guardian's Association is a non-profit corporation that it not publicly traded and has no parent corporation. There is no publicly held corporation that owns more than 10% of its stock.

Respectfully submitted this 10th day of December 2021.

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I. Appellants Move for Injunctive Relief Under Rule 8 and Rule 27.

In June 2021, the Colorado legislature enacted SB 21-116, a law eradicating Native American names and images from public schools throughout the state. The law purportedly targets offensive sports team mascots, but in fact haphazardly sweeps in even honorific uses of Native American names, images, and references to tribes. *See, e.g.*, Colo. Rev. Stats § 22-1-133(1)(a) (defining "mascots" to include "a name, symbol, or image that depicts or refers to an American Indian tribe, individual, custom, or tradition that is used as a mascot, nickname, logo, letterhead, or team name for the school."). It would literally prevent, for instance, a school from using an historically accurate and respectful image of Sitting Bull in its official letterhead, or, alternatively, from using former Colorado Senator Ben Nighthorse Campbell's name in its logo, without paying a fine of $25,000 per month.

The statute's formal deadline for schools to change their names, logos, and other images—all confusingly grouped as "mascots" under the statute—is June 1, 2022. But much of the action occurs before that date. For instance, the statute mandates that: "No later than thirty days after June 28, 2021, the [Colorado Commission of Indian Affairs (CCIA)] shall identify each public school in the state that is using an American Indian mascot and that does not meet the criteria for an exemption as outlined in subsection (2)(b) of this section. The commission shall post such information on its website." Colo. Rev. Stats § 22-1-133(4)(a). Once the CCIA

has identified all of the schools in violation of the statute, the CCIA must notify the schools, and, if a school "discontinues use of its American Indian mascot," it shall "notify … the commission." Colo. Rev. Stats § 22-1-133(4)(b)-(c).

Indeed, the CCIA has announced that even the statutory deadline of June 1, 2022, is actually illusory, since its last meeting before that date will be in May 2022. [EOR 070.] Unsurprisingly, schools have already begun the long process to invest time and money in changes to their names and imagery, anticipating needing to have the entire process completed by May 2022. At the CCIA's most recent meeting on December 9, 2021, it was noted that numerous schools have submitted documentation of their progress in changing their "mascots." [Erhardt Decl., Exhibit 1, ¶ 4-7; *see also* EOR 113 (detailing actions taken by the CCIA to date, including issuing a ruling that a school using "Thunderbirds" as a sports team name was in violation of SB 21-116).]

Nevertheless, without oral argument, the District Court denied Appellants' motion for preliminary injunction, because the statute's June 2022 deadline was too far away. [EOR 002 ("The Plaintiffs are thus requesting this Court to issue an 'emergency' order preliminarily enjoining action which is not being taken and which will not immediately be taken.").]

This cannot be right. Colorado's law is unconstitutional now. The injuries to Appellants are occurring now. They are ongoing, and grow worse with each school

that complies with an unconstitutional law. Thus, pursuant to 10th Cir. R. 8.1 and Fed R. App. P. 27, Appellants ask this Court to enter an injunction against SB 21-116, pending this appeal. If no injunction is entered, public schools in Colorado will simply go about undertaking the expensive and time-consuming process of changing their names and images. They will not change back, even if Appellants prevail. Any ultimate victory by Appellants in this matter would thus be completely empty.

Appellants do not specifically move for "Emergency" Relief presently, which would request relief in next 48 hours. However, Appellants do request relief forthwith, given that every day that passes poses the grave risk that additional schools will comply with Colorado's unconstitutional laws.

II. Appellants Have Properly Conferred Pursuant to Tenth Circuit Rule 27.1.

Appellants have conferred with Appellees regarding this motion and the relief requested herein. Appellees oppose. Additionally, Appellees have indicated that they believe that some, but not all, Appellees may invoke a defense of sovereign immunity.

III. Appellants Establish All of the Elements of Tenth Circuit Rule 8.1.

Appellants filed their Complaint in the District Court on November 2, 2021. [EOR 005.] Appellants moved for an emergency preliminary injunction on November 5, 2021. [EOR 043.] The District Court denied the motion on December 2, 2021, on the basis that the formal statutory deadline for schools to end their use

of a Native American mascot is not until June 1, 2022. [EOR 002.] The District Court also concluded that any harm that occurred was in fact monetary harm to schools who were out of compliance after June 1, 2022. [EOR 003 ("[T]he harm alleged would constitute harm to the schools, not to the Plaintiffs themselves. Finally, the alleged harm that could occur by the passage of this deadline is monetary harm that can be compensated through damages.")] Additionally, the District Court suggested that injunctive relief might never be appropriate under any circumstances. [EOR 003 ("Ultimately, where a challenge has been made to the enforcement of laws that were enacted pursuant to the democratic process, it should not be decided on an expedited and abbreviated process.")].

But the District Court erred, and pending this Court's review of the District Court's decision on the merits, it should enjoin the CCIA and the other Appellees from undertaking any action pursuant to SB 21-116.

A. The District Court and this Court Have Jurisdiction Over This Matter.

Tenth Circuit Rule 8.1 requires a movant to address the District Court's subject-matter jurisdiction, and the basis for the Court of Appeals' jurisdiction. Appellants alleged that the District Court possessed jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3) and (4), among other provisions. Appellants brought claims pursuant to 42 U.S.C. § 1983 regarding the First and Fourteenth Amendment, and a claim under Title VI of the Civil Rights Act of 1964,

42 U.S.C. § 2000d. No party before the District Court contested subject-matter jurisdiction, and the District Court did not question whether it had subject-matter jurisdiction over this dispute.

This Court has jurisdiction over this matter under 28 U.S.C. § 1292(a)(1), because the District Court issued an interlocutory order denying Appellants' motion for preliminary injunction.

B. Appellants Are Likely to Succeed on the Merits of their Appeal.

Appellants brought several claims before the District Court. The District Court addressed them only in a footnote: "While Plaintiffs' requested emergency relief is denied because the Plaintiffs have failed to establish irreparable harm, the Court notes that the remaining factors likely weigh in favor of the Defendants as well." [EOR 003, n. 2] That was the entirety of the District Court's analysis on the likelihood of success on the merits. However, for the reasons stated below, SB 21-116 violates the Fourteenth Amendment, the First Amendment, and Title VI of the Civil Rights Act.

1. Equal Protection: Direct Discrimination.

The Act singles out Native Americans for differential treatment, as (1) tribal entities; (2) a demographic group; and even (3) as individuals. It does not even define "individual" to cover only members of federally recognized tribes. It bars literally any school from using a Native American individual's name—other than a narrow

exception for letterhead—on school materials, including signs, uniforms, logos, and other imagery. The obvious result is that, if the law is enforced on its terms, no school in Colorado will ever be connected to a Native American tribe or individual.

"Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). As such, any government policy that classifies people by race is presumptively invalid and "inherently suspect." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("These ideas have long been central to this Court's understanding of equal protection, and holding 'benign' state and federal racial classifications to different standards does not square with them."). Moreover, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect." *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 309 (2013).

Indeed, even when the differential treatment has applied to a racial group as a whole, as opposed to individuals on the basis of their race, courts have applied the equal protection clause. *See Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) (reversing a district court ruling and holding that Arizona's law barring Mexican American Studies classes could violate the equal protection clause); *cf.* Dear

Colleague Letter, Joint DOJ/OCR Guidance on Segregated Proms (Sept. 20, 2004) (identifying the following school policies as Title VI violations: racially separate proms and dances, racially separate Homecoming Queens and Kings, racially separate awards for Most Popular Student or Most Friendly student).[1]

Colorado therefore has the burden of establishing that the Act satisfies strict scrutiny. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 741 (2007) ("Our cases clearly reject the argument that motives affect the strict scrutiny analysis."). In order to do so, Colorado must establish that it possesses a compelling state interest in implementing the Act, and that the Act is narrowly tailored toward achieving that goal. *Fisher*, 570 U.S. at 307-08 ("Any racial classification must meet strict scrutiny, for when government decisions touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."). Here, it can do neither.

First, Colorado's purported interest in opposing racial discrimination cannot satisfy strict scrutiny, because affirmatively engaging in differential treatment based on race, without more, is not a compelling interest. *Id.* at 748 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); *see also Regents of University of California v. Bakke*, 438 U.S. 265, 307 (1978)

[1] *See* https://www2.ed.gov/about/offices/list/ocr/letters/segprom-2004.html

(Opinion of Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."); *cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1733 (2017) (Kagan, J., concurring) ("As the Court states, a principled rationale for the difference in treatment *cannot* be based on the government's own assessment of offensiveness.") (emphasis added).

In the same vein, it is hardly obvious that the government's opinion on how to respond to purportedly offensive viewpoints is the correct one. In other contexts, groups have reappropriated negative concepts in order to achieve empowerment and deprive a word of its offensive meaning. *See Cf. Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J. concurring, with Ginsburg, J., Sotomayor, J., and Kagan, J.) ("[R]espondent endeavors to use The Slants to supplant a racial epithet, using new insights, musical talents, and wry humor to make it a badge of pride."); *id.* at 1767 ("[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."); *Walter v. Oregon Board of Education*, 301 Or. App. 516, 531 (Or. 2019) ("[T]he legislative record also includes testimony … that the use of positive and respectful Native American imagery in schools would combat racial stereotypes and discrimination against Native American students.").

Second, even if the government could establish a compelling interest, the Act is nowhere near narrowly tailored. The Act does not merely cover race-based caricatures, or historically inaccurate portrayals of individuals. It does not merely cover sports team names. Instead, it applies to all images, names, logos, and nearly all uses of letterhead. And of course, it does not cover all racial demographics. It leaves in place the ability of Colorado schools to even use offensive caricatures of Caucasians, African Americans, or Hispanics. It solely targets Native Americans. Such a feeble effort at tailoring should not be embraced by the Court.

2. Equal Protection: Political Process.

"It is beyond dispute, of course, that given racial or ethnic groups may not be . . . precluded from entering into the political process in a reliable and meaningful manner." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467 (1982). As Colorado's Supreme Court has recognized, the Fourteenth Amendment reaches political structures that distort governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation. *Evans v. Romer*, 854 P.2d 1270, 1280 (Colo. 1993), *aff'd sub nom on other grounds*, *Romer v. Evans*, 517 U.S. 620 (1996).

The U.S. Supreme Court appropriately narrowed *Seattle* in *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 305 (2014), noting that its holding was far too broad. *Id.* at 307 ("[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.").

Nevertheless, *Schuette* preserved *Seattle*'s core rationale, which applies to the instant case even more clearly than it applied to the action at issue in *Seattle*: "*Seattle* is best understood as a case in which the state action in question (the bar on busing enacted by the State's voters) had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in *Mulkey* and *Hunter*." *See id.* at 314 ("Those cases [like *Seattle*] were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race."); *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.").

Legislation like SB 21-116, which targets a specific race, poses a serious risk of causing injury on account of race, and is inherently suspect, without regard to discriminatory intent. *Seattle*, 458 U.S. at 485 ("We have not insisted on a particularized inquiry into motivation in all equal protection cases: 'A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.' And legislation of the kind

challenged in *Hunter* similarly falls into an inherently suspect category."); *see also Colorado Christian University v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) ("Even in the context of race, where the nondiscrimination norm is most vigilantly enforced, the Court has never required proof of discriminatory animus, hatred, or bigotry. The 'intent to discriminate' forbidden under the Equal Protection Clause is merely the intent to treat differently.").

Here, a member of any other racial demographic besides a Native American individual can request that a school use imagery or a name on its logo or letterhead. Individuals who are Scandinavian may directly lobby schools to refer to Vikings in their logos and images. Individuals who are Irish or have other European ancestry may similarly directly lobby for schools to refer to Celtics in their images. But the Act reserves for Native Americans alone the indistinct privilege of forcing them to seek an exemption from SB 21-116—at the Colorado State Legislature, and then with the Colorado Governor—before they are able to adequately advocate with public schools in the state. [EOR 151 (Plaintiffs "are free to petition and lobby the General Assembly to amend or repeal SB21-116."); *see id.* ("Or they may pursue an initiated statute or constitutional amendment that countermands SB 21-116 by reserving to local school boards the right to decide what names and mascots may be used by public schools.").] Such disfavor is unconstitutional. *See Seattle*, 458 U.S. at 470 ("[T]he political majority may generally restructure the political process to

place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process.").

Additionally, a distinction in the political process must be subject to strict scrutiny. *Id.* at 485 n.28 ("The State does not suggest that Initiative 350 furthers the kind of compelling interest necessary to overcome the strict scrutiny applied to explicit racial classifications."); *Evans*, 854 P.2d at 1282 ("[A]ny legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny."). For the reasons stated above, Colorado cannot satisfy either strict scrutiny factor.

3. First Amendment: Right to Petition

"The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives. To further this goal, the right to petition extends to all departments of the Government." *Santa Fe Alliance for Public Health and Safety v. City of Santa Fe, New Mexico*, 993 F.3d 802, 819 (10th Cir. 2021) (internal quotation marks, citations, and ellipses omitted).

Two Plaintiffs have already sought to petition public schools not to change their names, or at least to adopt a different name that honors Native Americans.

[EOR 081 and 109.] Appellant 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." [EOR 081.] 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." [EOR 083.] Similarly, Plaintiff Roubideaux petitioned that Yuma High School be named after his Lakota ancestor, Tall Bull, who was massacred at Summit Springs. [EOR 109.] 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] [EOR 113.]

To be clear, in contrast to the District Court's assumption that no injuries would occur until June 2022, Appellants are already being injured in a specific and concrete manner, by being denied the right to even be treated equally and fairly in the process of petitioning their local school boards—including on behalf of a familial relative, Tall Bull—to keep or change their names and imagery. The District Court

[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. As a practical matter, of course, no school will name itself after a Native American individual if it knows it may never use that individual's name in any school logo.

did not address either Appellant Marez or Appellant Roubideaux's current and ongoing injuries due to SB 22-116.

By failing to adequately announce the scope its coverage, the law undermines the right to petition in two ways: (1) it fails to apprise Plaintiffs of their ability to persuade public schools to adopt names honoring themselves, their relatives, or their tribes; and (2) it fails to apprise public schools of whether, if they are indeed persuaded by Plaintiffs, they can act accordingly, consistent with the Act.

Appellants 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. Admittedly, a majority opinion in *We the People Foundation, Inc. v. U.S.*, 485 F.3d 140, 144-45 (D.C. Cir. 2007), 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: Equal Protection and Hostile Environment Discrimination

Title VI of the Civil Rights Act of 1964 provides that no person "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Colorado does not contest that it is a recipient of federal funds, as are all public schools in the State of Colorado.

The parties agree that Title VI provides a private right of action for individuals who suffer direct race discrimination at the hands of a recipient of federal funds, applying the same standards as the Equal Protection Clause, analyzed above. *See Regents of the University of California Davis v. Bakke*, 438 U.S. 265, 287 (1978) (Title VI prohibits the same conduct that the equal protection clause prohibits).

Additionally, Title VI covers hostile environment claims. *See Bryant v. Independent School Dist. No. I-38*, 334 F.3d 928, 932 (10th Cir. 2003). Here, Colorado, and all public schools forced to change their name or refrain from adopting an honorific name related to Native Americans, (1) have knowledge of their conduct, and (2) are deliberately indifferent to their own harassing conduct. Additionally, erasure of Native American culture is (3) harassment that is so severe, pervasive and objectively offensive that it (4) deprives the Plaintiffs who are students or teachers of equal access to the educational benefits or opportunities provided by

the school. *See Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998) ("According to the Department of Education, a school district violates Title VI when (1) there is a racially hostile environment; (2) the district had notice of the problem; and (3) it failed to respond adequately to redress the racially hostile environment.").

Policies themselves can create a hostile environment. *Bryant*, 334 F.3d at 933 ("[W]e hold that Appellants have set forth facts which, if believed, would support a cause of action for intentional discrimination for facilitating and maintaining a racially hostile educational environment."); *see also Monteiro*, 158 F.3d at 1032 ("Nor do we preclude the prosecution of actions alleging that schools have pursued policies that serve to promote racist attitudes among their students, or have sought to indoctrinate their young charges with racist concepts.").

Imagine state laws ordering schools to paint over murals depicting African-Americans or Jews, out of acknowledged discriminatory motives, but with a compliance deadline of June 1, 2022. Or a state law mandating that no school may be named after a woman or LGBTQ+ individual, but with a similar deadline. Would no injunctive relief lie, even if schools were already beginning to destroy their walls and remove fixtures, because the compliance deadline hasn't passed? Doubtful. In the same way that these scenarios could establish a hostile environment for other groups immediately, so too does SB 21-116. [*See* Erhardt Decl. ¶ 6 (noting that

Campo School District apprised the CCIA that it would be painting over its murals depicting Native American warriors).]

Students and teachers in public schools, like the Plaintiffs in this case, will be forced to watch as schools take down banners, pennants, murals, and other materials related to Native Americans or Native American culture. This will have a concrete, negative effect on Plaintiffs who are forced to witness the elimination of their culture occur before their eyes, specifically because their cultural references alone are prohibited. Colorado and its officials obviously have notice of their own conduct, and have failed to respond by altering or reversing course in response to the knowledge that it creates a racially hostile environment.

Once again, the District Court ignored the current and ongoing injuries that two Appellants who are minors and who currently attend Yuma High School are suffering. Yuma has begun (but not concluded) the process of eradicating imagery related to Indians, and on December 9, 2021, the CCIA held a public meeting in which its members noted that Yuma High School had submitted formal documentation to come into compliance with SB 21-116. [Erhardt Decl., Exhibit 1, ¶ 7.]

C. Appellants' Harm Is Ongoing and Irreparable, Because a Constitutional Injury is *Per Se* Irreparable.

The parties engaged in significant debate before the District Court regarding the relevance of a November 30, 2021 deadline, by which schools were told that they

"must" notify the state of their intention to apply for grant funds. Colorado took the position that this deadline was non-statutory, and indeed, the State was correct that in some communications, schools were advised that they merely "should" notify the state of their intent to apply for grant funds.

But exactly for that reason, Appellants were absolutely clear that the issue was not outcome-determinative on the question of irreparable injury. [EOR 211 ("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.") (emphasis added).] Nevertheless, the District Court seemed to address solely the issue of the November 30 deadline. [EOR 003 ("The Plaintiffs argue that they will be harmed if the Court does not issue a preliminary injunction prior to November 30, 2021 because 'a transition to a new school name or logo is expensive, and it will be next to impossible to return to such a name if relief is granted after June 1, 2022.'").]

However, it remains black-letter law that when a plaintiff seeks to enjoin a violation of a constitutional right, *every other factor* of the standard for preliminary relief essentially collapses into the very factor that the District Court relegated to a footnote: the likelihood of success on the merits. "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." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 806 (10th Cir. 2019). The Tenth Circuit's rule is in good company. "[W]ell-settled law supports the constitutional-violation-as-irreparable-injury principle." *Free the Nipple-Fort Collins*, 916 F.3d at 806, *citing Elrod v. Burns*, 427 U.S. 347, 373–74, (1976); *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012); s*ee also, e.g.*, *Mills v. D.C.*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("It has long been established that the loss of constitutional freedoms, for even minimal period of time, unquestionably constitutes irreparable injury.") (citation omitted).

The District Court seemed to stop short, however, once it decided that it had no power to enjoin enforcement actions that would not occur until June 2022. But that is too narrow a view of the judicial power. As Appellants point out, the CCIA's implementation of SB 21-116 is presently ongoing, and causing constitutional injuries to Appellants, including Appellants who are students at schools in the process of changing their names, and Appellants who have asked local school districts to name their schools after respected Native American ancestors. These constitutional injuries are direct, concrete, and cannot be remediated with money damages. They are therefore *per se* irreparable.

D. Appellees are Not Harmed by an Injunction, and the Public Benefits.

Generally, the balance of harms and the public interest collapse into each other when the government is a defendant, because the government's supposed to represent the public interest. *Essien v. Barr*, 457 F.Supp.3d 1008, 1020 (D. Colo. 2020) (*citing Nken v. Holder*, 556 U.S. 418 (2009)). Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d at 1132 (quotation marks and citations omitted). Here, at a minimum, "issuance of a preliminary injunction would serve the public's 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). By contrast, Appellees will suffer no cognizable injury should they be barred from taking furth unconstitutional action.

Additionally, Appellees should not be able to argue that the eliminating offensiveness of some Native American mascots is in the public interest. Indeed, Appellants take the position that even offensive images can serve the purpose of catalyzing reappropriation or reclamation. *Cf. Matal*, 137 S. Ct. at 1751 ("'Slants' is a derogatory term for persons of Asian descent, and members of the band are Asian–Americans. But the band members believe that by taking that slur as the name of their group, they will help to "reclaim" the term and drain its denigrating force."). This factor therefore favors Appellants.

E. To the Extent this Court Chooses to Apply the Abuse-of-Discretion Standard, Appellants Meet that Standard.

To the extent this Court reviews the District Court's denial of a preliminary injunction for abuse of discretion, that standard is met. A district court abuses its discretion if its decision "rests on an erroneous legal conclusion or lacks a rational basis in the record." *Awad v. Ziriax*, 670 F.3d at 1125; *see also Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). A district court's legal conclusions are reviewed *de novo*, while factual findings are examined for clear error. *Id.* "[A]n error of law is a per se abuse of discretion." *Hayes v. SkyWest Airlines, Inc.*, 12 F.4th 1186, 1204 (10th Cir. 2021).

Here, the District Court relegated its analysis of the legal merits to a footnote, and incorrectly concluded that injury was too speculative, when in fact it is present and ongoing. To the extent that the District Court considered only the June 1, 2022 deadline to be of import, that was clear error, as the CCIA has (1) specifically identified certain schools which must come into compliance with SB 21-116; (2) received communications from these schools, many of whom are trying to come into compliance as soon as possible; and (3) may yet identify additional schools, including literally any Colorado school named after an individual with Native American ancestry where the school uses the individual's name in its logo. Additionally, the CCIA will have several meetings between now and May 2022, the final deadline for when schools who have been identified by the CCIA must change

their names, or suffer the consequences. Unless this Court intervenes, all of this unconstitutional conduct will come to pass.

Last, at a minimum, the District Court erred in concluding that injunctive relief is never appropriate with respect to enforcement of democratically enacted statutes. [EOR 003.]

CONCLUSION

For the foregoing reasons, this Court should grant an injunction pending appeal.

DATED this 10th day of December 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the requirements of Fed. R. App. P. 27(d) and Circuit Rules 27-1(1)(d) and 32-3(2) because it has 5199 words.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED this 10th day of December 2021.

/s/ William E. Trachman
William E. Trachman

CERTIFICATE OF ELECTRONIC FILING

In accordance with this Court's CM/ECF User's Manual and Local Rules, I hereby certify that the foregoing has been scanned for viruses with Sentinel One, updated December 10, 2021, and is free of viruses according to that program.

In addition, I certify that all required privacy redactions have been made and the electronic version of this document is an exact copy of the written document to be filed with the Clerk.

DATED this 10th day of December 2021.

/s/ William E. Trachman
William E. Trachman

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2021, the foregoing **MOTION FOR INJUNCTION PENDING APPEAL UNDER CIRCUIT RULES 8.1 AND 27; RELIEF REQUESTED FORTHWITH** appeal was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system and that a PDF copy of this motion will be emailed to opposing counsel immediately after it is filed.

/s/ William E. Trachman
William E. Trachman

No. 21-1421

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEMETRIUS MAREZ, *et al.*,
Plaintiffs-Appellants,

v.

JARED POLIS, Colorado Governor, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado
No. 21-cv-02941-RMR, The Honorable Regina M. Rodriguez

DECLARATION OF ERIN M. ERHARDT

I, Erin M. Erhardt, hereby declare, under penalty of perjury, as follows:

1. I am over the age of 21 and have personal knowledge about the matters set forth below.

2. I am an attorney of record in the captioned case, and an officer of the Court.

3. On December 9, 2021, I attended the SB 21-116 Discussion during the Colorado Commission of Indian Affairs (CCIA's) Second Quarterly Meeting via Zoom.

4. During the SB 21-116 Discussion, the commissioners noted three schools which had submitted documentation regarding proposed "mascot" changes in response to SB 21-116.

5. Avondale Elementary School proposed changing its sports team name from the "Apache Indians" to the "All-Stars." Avondale also announced that it has already changed its website to reflect the change in name.[1]

6. Schools in the Campo School District proposed keeping the name "Warriors" for their mascot, changing all imagery and references to the Trojan Warriors or another non-Native American group of warriors, and removing all Native American imagery and references, including any murals.

7. Yuma School District proposed changing its sports team name from "Indians" to "Tribe." Yuma submitted a definition of "tribe" to the CCIA, and stated that no Native American references or imagery would be used therewith.

8. After noting the schools' documentation, the commissioners held a vote on the current list of Schools with American Indian Mascots and/or

[1] *See* https://ave.district70.org/

Imagery.[2] The commission voted to ratify the list as presented. No schools were removed from the list.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 10, 2021
Lakewood, Colorado

/s/ Erin M. Erhardt
Erin M. Erhardt

[2] *See* https://ccia.colorado.gov/legislation

No. 21-1421

IN THE UNITED STATES COURT OF APPEALS
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DEMETRIUS MAREZ, *et al.*,
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On Appeal from the United States District Court for the District of Colorado
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EXCERPTS OF RECORD

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez

Civil Action No. 1:21-cv-02941-RMR

DEMETRIUS MAREZ et al.,

Plaintiffs,

v.

JARED POLIS, Colorado Governor, et al.,

Defendants.

ORDER

This matter is before the Court on Plaintiffs' Emergency Motion for Preliminary Injunction and Request for Expedited Hearing, ECF 4. For the reasons stated herein, Plaintiffs' Motion is **DENIED.**

"A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020) (quoting *United States ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Ent. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888 (10th Cir. 1989)).

> To obtain a preliminary injunction, the movant must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harms that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest.

Aposhian, 958 F.3d at 978 (quoting *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007)); *see also Heideman v. S. Salt Lake City*, 348 F.3d 1182,

1188 (10th Cir. 2003). "It is the movant's burden to establish that each of these four factors tips in his or her favor." *Heideman*, 348 F.3d at 1188–89.

In their motion, the Plaintiffs ask this Court to "issue a preliminary injunction barring Defendants from taking any actions to enforce [SB 21-116]." ECF 4 p. 2. However, in the very first sentence of their motion, the Plaintiffs admit that "the deadline to change Native American icons and imagery covered by SB 21-116" is June 1, 2022. *Id.* There is no indication in any of the Plaintiffs' briefing that the Defendants are currently enforcing SB 21-116 or that they intend to do so in the immediate future. The Plaintiffs are thus requesting this Court to issue an "emergency" order preliminarily enjoining action which is not being taken and which will not immediately be taken. The function and purpose of a "preliminary injunction" is to prevent irreparable injury *pending an ultimate determination of the action*. *See Marine Cooks & Stewards, AFL v. Panama S. S. Co.*, 268 F.2d 935, 935 (9th Cir. 1959). The Plaintiffs here have not established that they will suffer any immediate injury pending the ultimate determination of this action because the statute at issue will not be enforced for another six months.[1]

The November 30, 2021 deadline on which the Plaintiffs rely to support this "emergency" request is not tied to the relief requested. The Plaintiffs request that the Court enjoin the Defendants from *enforcing* SB 21-116. November 30, 2021 is simply the date by which schools need notify the Building Excellent Schools Today (BEST) of

[1] Indeed, the Plaintiffs acknowledge in their motion that "it is possible that the Defendants will agree to a case scheduling order that largely resolves the issues in the case prior to June 1, 2022." ECF 4 p. 20.

an intent to apply for funding to remove American Indian mascots. The November 30, 2021 deadline has no bearing whatsoever on the enforcement of the Act.

The Plaintiffs argue that they will be harmed if the Court does not issue a preliminary injunction prior to November 30, 2021 because "a transition to a new school name or logo is expensive, and [] it will be next to impossible to return to such a name if relief is granted after June 1, 2022." ECF 4 p. 19. Such speculative harm, however, cannot form the basis for a finding of irreparable injury. "Irreparable harm" means that the injury "must be both certain and great." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001). Further, the harm alleged would constitute harm to the *schools*, not to the Plaintiffs themselves. Finally, the alleged harm that could occur by the passage of this deadline is monetary harm that can be compensated through damages. "It is . . . well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm; such losses are compensable by monetary damages." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). The Plaintiffs have thus failed to establish irreparable injury absent a preliminary injunction, and their Motion must be denied.[2]

Ultimately, where a challenge has been made to the enforcement of laws that were enacted pursuant to the democratic process, it should not be decided on an expedited and abbreviated process. Here, there is no need to act on an emergency

[2] The Plaintiffs bear the burden of establishing that each preliminary injunction factor tips in their favor. While Plaintiffs' requested emergency relief is denied because the Plaintiffs have failed to establish irreparable harm, the Court notes that the remaining factors likely weigh in favor of the Defendants as well.

basis, and the public interest is thus best served by allowing the parties to proceed with the litigation.

For these reasons, the Court finds that the Plaintiffs have failed to establish entitlement to an emergency preliminary injunction. Plaintiffs' Motion, ECF 4, is **DENIED.**

DATED: December 1, 2021

BY THE COURT:

REGINA M. RODRIGUEZ
United States District Judge

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.

No. 1:21-cv-2941

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

John Doe, a minor, Jane Doe, a minor, Demetrius Marez, Chase Aubrey Roubideaux, Donald Wayne Smith, Jr. and the Native American Guardian's Association (together, the "Plaintiffs"), submit this complaint against Jared Polis, in his official capacity as Colorado Governor ("Governor Polis"), Dave Young, in his official capacity as Colorado State Treasurer ("Mr. Young"), Katy Anthes, in her official capacity as Colorado Commissioner of Education for the Colorado Department of Education ("Ms. Anthes"), Kathryn Redhorse, in her official capacity

as Executive Director of the Colorado Commission of Indian Affairs ("Ms. Redhorse"), Georgina Owen, in her official capacity as Title VII Coordinator for the Colorado Department of Education ("Ms. Owen"), and Phil Weiser, in his official capacity as Colorado Attorney General ("Mr. Weiser," and together with Governor Polis, Mr. Young, Ms. Anthes, Ms. Redhorse, and Ms. Owen, the "Defendants"), hereby allege, by their undersigned counsel, as follows:

1. Imagine a state law that barred schools from using the name or image of an African-American individual on its logos or letterhead. That would be the end of school names honoring Martin Luther King Jr., President Barack Obama, or Justices Thurgood Marshall and Clarence Thomas.

Dr. Martin Luther King Jr. Middle School, Germantown, Maryland.[1]

2. Or imagine a law banning school names and letterhead honoring Latin Americans like Cesar Chavez or Justice Sonya Sotomayor.

[1] https://s19499.pcdn.co/wp-content/uploads/2020/10/Martin-Luther-King-Jr.-Middle-School-featured.jpg (last visited October 28, 2021).

3. This is an action challenging the constitutionality of Colo. Rev. Stat. § 22-1-133 and Colo. Rev. Stat. § 22-1-137 ("SB 21-116" or the "Act"), and seeking prospective and injunctive relief against Defendants, and their respective officers, agents, officials, servants, employees, attorneys, and other representatives from interpreting, administering, implementing and enforcing or threatening to enforce SB 21-116 in violation of Plaintiffs' Fourteenth Amendment rights (Counts I & II). Plaintiffs also seek declaratory and injunctive relief in order to preserve their right to petition under the First Amendment, which is burdened by the vagaries of SB 21-116 (Count III), as well as under Title VI of the Civil Rights Act of 1964 for discrimination against Plaintiffs based on their race, color, or national origin (Count IV).

4. Plaintiffs oppose the use of American Indian mascot performers and caricatures that mock Native American heritage—such as Lamar High School's former mascot *Chief Ugh-Lee* or the Atlanta Braves' former Native American caricature *Chief Noc-A-Homa*—in sports and other public venues.

5. Nevertheless, culturally appropriate Native American names, logos, and imagery serve to honor Native Americans, and to help public schools neutralize offensive and stereotypical Native American caricatures and iconography, while teaching students and the general public about American Indian history.

6. SB 21-116 sweeps derisive, neutral, and honorific uses of Native American names and imagery together into the universal term "American Indian mascot." *See, e.g.*, Colo. Rev. Stat. § 22-1-133(1)(a) ("'American Indian mascot' means a name, symbol, or image that depicts or refers to an American Indian tribe, individual, custom, or tradition that is used as a mascot, nickname, logo, letterhead, or team name for the school.") (emphasis added).

7. Defining even honorific uses of Native American names or imagery as merely "mascots" is offensive to our sensibilities as a nation, which do not generally permit racial discrimination.

8. "[I]n a society in which [racial] lines are becoming more blurred, the attempt to define race-based categories also raises serious questions of its own. Government action that classifies individuals on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend." *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 308 (2014).

9. Erasing Native American names and images from the public square and from public discussions echoes a maneuver that Plaintiffs have previously seen used by the eradicators of Native American heritage. Colorado repeats the same mistake in its paternalistic assumption that it must protect Native Americans by erasing cultural references to them and to their heritage.

10. SB 21-116 unlawfully enacts state-sanctioned race discrimination against Plaintiffs.

11. Because the eradication of Native American names, iconography and images poses serious harm to the cultural identities and heritage of Native Americans, Plaintiffs regularly engage in efforts of "reappropriation," so as to render emotionally charged Native American names, logos, and imagery nondisparaging, and to educate others as to what it means to be a Native American in American culture. *Cf. Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J. concurring, with Ginsburg, J., Sotomayor, J., and Kagan, J.) ("[R]espondent endeavors to use The Slants to supplant a racial epithet, using new insights, musical talents, and wry humor to make it a badge of pride. Respondent's application was denied not because the Government thought his object was to

demean or offend but because the Government thought his trademark would have that effect on at least some Asian–Americans.").

12. "[T]he use of positive and respectful Native American imagery in schools would combat racial stereotypes and discrimination against Native American students." *See Walter v. Oregon Board of Education*, 301 Or. App. 516, 531 (Or. 2019) (rejecting equal protection challenge to state provisions which allowed Native American mascots to be used with the permission of a tribe; challenger contended that there was no way to assure uniformity within a tribe on the permissible use of its name).

13. Erasure of Native Americans from iconography hardly inures to the benefits of Native Americans. As an example, this popular meme circulated online after the Land O'Lakes Company eliminated an image of a Native American woman from its butter logo.

14. Reappropriation allows Native Americans to self-identify, and non-Native American allies to associate their identities with the messages that Plaintiffs seek to convey, in order to persuade others to join the cause of Plaintiffs. For example, Plaintiffs' attempts to honor their heritage by engaging in acts of Reappropriation include:

(a) using positive Native American names, logos, and imagery as a means of Native American empowerment;

(b) retaking, "taking back," or wresting ownership of "appropriated" Native American symbols in public schools (and, in particular, sporting and other public events) through messaging and language;

(c) educating non-Native Americans (particularly in public schools) about Native American race, color, and national origin; and

(d) reversing the "ripple effect" caused by eradication efforts designed to further silence and render invisible Native American voices in American culture.

15. Reappropriation has been used by members of historically marginalized groups seeking to reclaim names and images that were once directed at them as insults in order to turn them outward as badges of pride. *Cf. Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) ("'Slants' is a derogatory term for persons of Asian descent, and members of the band are Asian–Americans. But the band members believe that by taking that slur as the name of their group, they will help to "reclaim" the term and drain its denigrating force."); *see also* Mark Conrad, *Matal v. Tam—A Victory for the Slants, A Touchdown for the Redskins, But an Ambiguous Journey for the First Amendment and Trademark Law*, 36 CARDOZO ARTS & ENT. L.J. 83, 94 n. 55 (2017) (describing the numerous positive reclaimings of once-offensive words for women, gays, and racial groups).

16. For too long, non-Native Americans have used racial names, slurs, and American Indian mascot performers, stereotypes and caricatures to ridicule and debase Native Americans and their culture. Plaintiffs seek, through Reappropriation, to use images in a positive manner, in order to marginalize the racism that they and their ancestors have faced and continue to face in light of the efforts of the eradicators would erase Native American names, logos, and imagery from Colorado's public schools and, thereby, public view and debate. *Cf. Matal*, 137 S. Ct. at 1754 ("The group 'draws inspiration for its lyrics from childhood slurs and mocking nursery rhymes' and has given its albums names such as 'The Yellow Album' and 'Slanted Eyes, Slanted Hearts.'").

17. Accordingly, Plaintiffs bring this lawsuit seeking prospective and injunctive relief against Defendants, and their respective officers, agents, officials, servants, employees, attorneys, and other representatives from interpreting, administering, implementing and enforcing or threatening to enforce SB 21-116 in violation of Plaintiffs' Fourteenth Amendment rights. Plaintiffs also seek declaratory and injunctive relief which, if granted, will inure to the benefit of all Native Americans in Colorado actually injured by SB 21-116.

18. The plaintiffs are entitled to the requested injunction. Since the government cannot justify its discriminatory policy, the plaintiffs will win on the merits of their constitutional claim.

19. SB 21-116 includes a deadline of June 1, 2022, before all Colorado public schools must alter their names, logos, letterhead, and other imagery. If the law survives between now and then, it is highly unlikely that any school choosing to invest the time and money into changing its name will return, even if the law is ultimately struck down subsequently.

JURISDICTION AND VENUE

20. This Court has original, federal question jurisdiction over Plaintiff's federal claims by operation of 28 U.S.C. §§ 1331 and 28 U.S.C. § 1343(a)(3) and (4).

21. This Court has jurisdiction over this complaint under 42 U.S.C. § 1983 for deprivation of rights under the "color of state law."

22. This Court also has jurisdiction pursuant to 28 U.S.C. § 1367(a), which provides for supplemental jurisdiction over state law claims that are so related to the federal claims in this action such that they do not raise novel or complex issues of state law and do not substantially predominate over the federal claims. There are, further, no exceptional circumstances compelling declining state law claims.

23. Because this action is an actual controversy, this Court has authority to declare the rights of Plaintiffs and issue the requested declaratory relief under the Declaratory Judgment Act,

28 U.S.C. §§ 2201-2202, Rule 57 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."), and by its general legal and equitable powers.

24. This Court has authority to issue the requested temporary, preliminary, and permanent injunctive relief, pursuant to Fed. R. Civ. P. 65 and 28 U.S.C. § 1343(a)(3).

25. This Court is authorized to award the requested damages under 28 U.S.C. § 1343(a)(3).

26. Because Plaintiffs find it necessary to engage the services of private counsel to vindicate their rights under the law, Plaintiffs are entitled to, and this Court is authorized to award, attorneys' fees under 42 U.S.C. § 1988(b).

27. Venue is also proper in this district pursuant to 28 U.S.C. § 1391(b)(1)-(2) as a substantial part of the events giving rise to these claims occurred in this judicial district and because, upon information and belief, all Defendants reside within the District.

28. All of the acts of the Defendants, their officers, agents, employees, and servants, were executed and are continuing to be executed by Defendants under the "color of state law," 42 U.S.C. § 1983, and pretense of the policies, statutes, ordinances, regulations, customs, and usages of the State of Colorado.

PARTIES

29. Plaintiff John Doe, a minor, resides in Yuma, in the District of Colorado. He is of Cherokee and Chippewa heritage. He currently attends Yuma High School in Yuma, Colorado, which maintains imagery referring the "Yuma Indians." He participates in many school activities, as well as football and wrestling. He wants his school to continue to honor his culture and heritage, and would suffer a hostile environment if his culture were erased from his school.

30. Plaintiff Jane Doe, a minor, resides in Yuma, in the District of Colorado. She is of Cherokee heritage. She currently attends Yuma High School in Yuma, Colorado, which is known

as the "Yuma Indians." She too wants her school to continue to honor her culture and heritage, and would suffer a hostile environment if her culture were erased from her school.

31. Plaintiff Demetrius Marez resides in Lakewood, in the District of Colorado. He is 39% Diné (pronounced "de-NEH"). He served this country as a U.S. Marine and graduated from Lamar High School in 1993. Mr. Marez has urged Lamar High School to keep its current team name, the Savages, or in the alternative, petitioned the school to rename itself to Lamar High School Black Kettle. Neither would be legal under SB 21-116.

32. Plaintiff Chase Aubrey Roubideaux resides in Denver, in the District of Colorado. He is an enrolled Rosebud tribal member, with a blood degree of about 25%. He graduated from Yuma High School in 2010. Mr. Roubideaux has petitioned the Yuma School Board to keep the name of the Yuma Indians, or in the alternative, to rename the YHS Indians to the "Tall Bulls." Neither would be legal under SB 21-116.

33. Plaintiff Donald Wayne Smith, Jr. resides in Yuma, in the District of Colorado. He is the pastor of Yuma Christian Church and is of Cherokee heritage. Pastor Smith has previously taught in Colorado public schools, including in Yuma, which uses the term "Indian" in its imagery and iconography. Because of SB 21-116, he can no longer accept future teaching positions without being subject to a hostile environment.

34. Plaintiff the Native American Guardian's Association ("NAGA") is a section 501(c)(3) non-profit organization organized under the laws of the State of Virginia that focuses on increased education about Native Americans, especially in public educational institutions. NAGA seeks greater recognition of Native American heritage through sports and other high-profile public venues. NAGA has been partnering with public schools across the country to help those schools (a) eliminate stereotypical "mascot" caricatures and iconography, chants and cheers, and (b)

develop respectful and culturally appropriate Native American names, logos, iconography and imagery. NAGA maintains standing through associational standing, by and through its members.

35. Defendant Jared Polis is Colorado's Governor. Mr. Polis derives his authority from the State of Colorado and acts under the authority of the State of Colorado. Mr. Polis is charged with interpreting, administering, implementing and enforcing SB 21-116, including its imposition of a $25,000 fine "[f]or each month during which a public school uses an American Indian mascot after June 1, 2022." Mr. Polis is a "person" within the meaning of 42 U.S.C. § 1983, and all of the claims alleged in this case that Mr. Polis acted or failed to act in an official capacity have been taken "under color of state law" for purposes of federal civil rights law. 42 U.S.C. § 1983. Mr. Polis is sued in his official capacity only for declaratory and injunctive relief.

36. Defendant Dave Young is Colorado's State Treasurer. Mr. Young derives his authority from the State of Colorado and acts under the authority of the State of Colorado. Mr. Young is charged with interpreting, administering, implementing and enforcing SB 21-116, including its imposition of a $25,000 fine "[f]or each month during which a public school uses an American Indian mascot after June 1, 2022." Mr. Young is a "person" within the meaning of 42 U.S.C. § 1983, and all of the claims alleged in this case that Mr. Young acted or failed to act in an official capacity have been taken "under color of state law" for purposes of federal civil rights law. 42 U.S.C. § 1983. Mr. Young is sued in his official capacity only for declaratory and injunctive relief.

37. Katy Antes is Colorado's Commissioner of Education for the Colorado Department of Education. Ms. Antes derives her authority from the State of Colorado and acts under the authority of the State of Colorado. Ms. Antes is charged with interpreting, administering, implementing and enforcing SB 21-116 including its imposition of a $25,000 fine "[f]or each

month during which a public school uses an American Indian mascot after June 1, 2022." Ms. Antes is a "person" within the meaning of 42 U.S.C. § 1983, and all of the claims alleged in this case that Ms. Antes acted or failed to act in an official capacity have been taken "under color of state law" for purposes of federal civil rights law. 42 U.S.C. § 1983. Ms. Antes is sued in her official capacity only for declaratory and injunctive relief.

38. Phil Weiser is Colorado's Attorney General. Mr. Weiser derives his authority from the State of Colorado and acts under the authority of the State of Colorado. Mr. Weiser is charged with interpreting, administering, implementing and enforcing SB 21-116 including its imposition of a $25,000 fine for public schools "[f]or each month during which a public school uses an American Indian mascot after June 1, 2022." Mr. Weiser is a "person" within the meaning of 42 U.S.C. § 1983, and all of the claims alleged in this case that Mr. Weiser acted or failed to act in an official capacity have been taken "under color of state law" for purposes of federal civil rights law. 42 U.S.C. § 1983. Mr. Weiser is sued in his official capacity only for declaratory and injunctive relief.

39. Kathryn Redhorse is Executive Director of the Colorado Commission of Indian Affairs. Ms. Redhorse is charged with interpreting, administering, implementing and enforcing SB 21-116 including its imposition of a $25,000 fine for public schools "[f]or each month during which a public school uses an American Indian mascot after June 1, 2022." Ms. Redhorse is a "person" within the meaning of 42 U.S.C. § 1983, and all of the claims alleged in this case that Ms. Redhorse acted or failed to act in an official capacity have been taken "under color of state law" for purposes of federal civil rights law. 42 U.S.C. § 1983. Ms. Redhorse is sued in her official capacity only for declaratory and injunctive relief.

40. Georgina Owen is Title VII State Coordinator for the Colorado Department of Education. Ms. Owen is charged with interpreting, administering, implementing and enforcing SB 21-116 including its imposition of a $25,000 fine for public schools "[f]or each month during which a public school uses an American Indian mascot after June 1, 2022." Ms. Owen is a "person" within the meaning of 42 U.S.C. § 1983, and all of the claims alleged in this case that Ms. Owen acted or failed to act in an official capacity have been taken "under color of state law" for purposes of federal civil rights law. 42 U.S.C. § 1983. Ms. Owen is sued in her official capacity only for declaratory and injunctive relief.

41. Upon information and belief, all Defendants reside in the District of Colorado.

FACTS APPLICABLE TO ALL CAUSES OF ACTION

SENATE BILL 21-116

42. SB 21-116 is titled "Prohibition on use of American Indian Mascots."

43. The Act became effective on June 28, 2021.

44. The Act prohibits the use of American Indian mascots by public schools, including charter schools and public institutions of higher education (public school) as of June 1, 2022.

45. The Act imposes a fine of $25,000 per month for each month that a public school continues to use a "mascot" (as defined in SB 21-116) after June 1, 2022, payable to the state education fund.

46. The Act defined public schools to mean:

> a. An elementary, middle, junior high, high school, or district charter school of a school district that serves any of grades kindergarten through twelve; and
>
> b. An institute charter school that serves any of grades kindergarten through twelve.

Colo. Rev. Stat. § 22-1-133(1)(D)(I-II).

47. This lawsuit challenges the following provision of SB 21-116, which provides that the term "American Indian Mascot" means:

> a name, symbol, or image that depicts or refers to an American Indian tribe, individual, custom, or tradition that is used as a mascot, nickname, logo, letterhead, or team name for the school.

48. This provision is codified at Colo. Rev. Stat. § 22-1-133.

49. Moreover, SB 21-116 does not include any standards or criteria for Defendants or persons of common intelligence to determine the meaning, scope, and application of SB 21-116 and its prohibition against the use of mascots by public schools.

50. News reports initially estimated that 25 public schools in Colorado had team names, logos, and imagery that are directly impacted by SB 21-116.[2]

51. Subsequently, the Colorado Commission of Indian Affairs (CCIA) identified approximately 28 schools that it considered to violate the new law. *See* Legislation, Schools with American Indian Mascots and/or Imagery, at https://ccia.colorado.gov/legislation (last visited October 28, 2021).

52. As is apparent from the list issued by the CCIA, the CCIA has focused on school mascots as they are colloquially defined, rather than as broadly defined by the statute.

53. As a result, Colorado Commission of Indian Affairs is incorrect, and the number is likely larger, given the breadth of the statute. For instance, the following schools, among many others, may be in violation of Colo. Rev. Stat. § 22-1-133:

a. Cherokee Trail High School (Aurora)

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[2] *See* Sue McMillin, "25 Colorado schools still had Native American mascots. This week one finally decided to make a change," The Colorado Sun (March 17, 2021), https://coloradosun.com/2021/03/17/cheyenne-mountain-mascot-native-american-controversy/ (last visited October 26, 2021).

b. Cheyenne Mountain High School (Colorado Springs)[3]

c. Cheyenne Wells High School (Cheyenne Wells)

d. Kiowa High School (Kiowa)[4]

e. Yampa Valley High School (Steamboat Springs)

f. Schools in Pagosa Springs, Colorado that use the term "Pagosa" in their name, which is the Ute word for healing or boiling water.

g. Schools in Niwot, Colorado, that use the term "Niwot" in their name. Arapahoe Chief Niwot was a tribal leader in the Boulder, Colorado area.

54. Each of these schools potentially use a "name, symbol, or image that depicts or refers to an American Indian tribe, individual, custom, or tradition that is used as a mascot, nickname, logo, letterhead, or team name for the school." Colo. Rev. Stat. § 22-1-133(1)(b).

55. There is no evidence that the CCIA conducted an extensive review of every Colorado public school's logo or letterhead to see if it might refer to a Native American tribe (perhaps because it is in a city named after a tribe) or individual.

56. Additionally, the CCIA has opted to consider extrinsic evidence, such as the history of a name covered by SB 21-116, before deciding whether it is covered: "Eaton School District has begun the process of removing the American Indian imagery from their mascot, but retaining

[3] Although Cheyenne Mountain High School no longer uses the name "Indians" in its athletic team names, the name of the school continues to include the name of the Cheyenne people.

[4] Kiowa High School currently uses the name "Indians" in its athletics. And it is identified by the CCIA as a school on its list of illegal names. But removal of merely the name "Indians" would be insufficient to comply with SB 21-116, so long as the word "Kiowa" remained in the school's logo or letterhead.

the name 'Reds.' The district has a documented history of use of this name before the American Indian imagery was added in the 1960's."[5]

57. The terms of Colo. Rev. Stat. § 22-1-133 do not apply in certain cases where an agreement exists between a federally recognized Indian tribe and a public school. *See* Colo. Rev. Stat. § 22-1-133(2)(b).

58. But the CCIA has identified only two schools with such agreements: Arapahoe High School and Strasburg School District.[6] And it is hardly appropriate to condition the use of an honorific name regarding Native American ancestry on a school's ability to locate, negotiate, and contract with a tribe that may or may not represent the interests of the school's Native American constituents.

59. Delegating to individual tribes the right to approve of certain school names merely exploits those tribes as potential state-sponsored shields from criticism.

60. Nor are individual tribes the sole gatekeepers of whether something ought to be legal or not. The statute's constitutionality cannot rest on such an exception.

61. If SB 21-116 succeeds at erasing Native American names from public schools in Colorado, Native American students, teachers, and other staff who want their schools to reflect their heritage will be placed on a distinct and lesser playing field.

CAUSES OF ACTION

COUNT I
FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION OF THE LAWS
(42 U.S.C. § 1983)

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5 https://ccia.colorado.gov/legislation (last visited October 28, 2021).

6 *Id.*

62. Plaintiffs incorporate by reference, repeat and reallege each allegation set forth in the preceding paragraphs of this Complaint as if each such paragraph was set forth in its entirety herein.

63. Plaintiffs are Native Americans who subscribe to the idea of Reappropriation, and who have and will continue to petition school districts and educational entities to use Native American names as honorifics in order to reclaim their meaning and to teach non-Native American students in public schools about Native American history.

64. SB 21-116 discriminates against Native Americans on the basis of race, color, and national origin. For instance, Colorado public schools could use the name "Fighting Irish" or "Boston Celtics," or the name "Vikings" with a medieval Scandinavian warship logo, but may not generally use Native American iconography, or the use of the name "Fighting Sioux" or "Indian," with a culturally appropriate Native American logo, iconography or imagery.

65. SB 21-116, both on its face and as applied by Defendants, violates Plaintiffs' rights to equal protection of the laws as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

66. The Fourteenth Amendment to the U.S. Constitution protects Plaintiffs from disparate treatment on the basis of race, color, and national origin.

67. Plaintiffs' beliefs, practices, rituals, actions, and conduct related to Reappropriation with respect to Native American names, logos, and imagery, including in public schools, are avenues through which they educate others about their Native American race, ethnic heritage, traditions, religious beliefs, exercise and practices.

68. After SB 21-116, only individuals who are not Native American are able to use imagery and iconography adopted by school districts or other educational entities as avenues

through which they educate others about their race, ethnic heritage, traditions, religious beliefs, exercise and practices.

69. Plaintiffs seek to continue exercising their beliefs, practices, rituals, actions, and conduct related to Reappropriation, including teaching non-Native American students in Colorado's public schools about Native American history.

70. Plaintiffs are similarly situated in all relevant aspects to non-Native Americans.

71. SB 21-116 demeans and stigmatizes Native Americans based on their race, color, and national origin.

72. Ultimately, SB 21-116 denies Native Americans the opportunity to honor their heritage by provoking conversations and engaging with others about racial identity and racial stereotypes within and without the Native American community, helping others to understand the difference between appropriate and inappropriate use of Native American history and imagery.

73. SB 21-116 unlawfully discriminates against Plaintiffs, as members of a suspect class.

74. Both on its face and as applied, SB 21-116 expressly classifies based on race, color, and national origin by prohibiting any American Indian Tribe "name," "symbol," or "image."

75. "Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

76. SB 21-116's discrimination against Plaintiffs and their race, color, and national origin is presumptively unconstitutional and is subject to strict scrutiny.

77. Defendants were motivated by a discriminatory purpose against Native Americans. Native Americans will be disproportionately burdened by SB 21-116.

78. SB 21-116 does not satisfy strict scrutiny.

79. SB 21-116 does not further a compelling governmental interest of Colorado.

80. SB 21-116 is not narrowly tailored to further a compelling governmental interest of Colorado.

81. Colorado has no legitimate governmental interest in furthering race discrimination that harms Plaintiffs based on their race, color, and national origin.

82. The Colorado Legislature knew from debate within the General Assembly and witness testimony at hearings that SB 21-116 would harm Native Americans.

83. Nevertheless, the Colorado Legislature passed SB 21-116 in order to protect from offense, in part, non-Native American bystanders who are not the targets of racism and discrimination with regard to Native American names, logos, and imagery.

84. To the extent that legitimate state interests are at issue, the government can achieve those interests in a manner that does not violate Plaintiffs' civil rights or equal protection of the laws guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

85. Defendants are charged with interpreting, administering, implementing and enforcing SB 21-116, including its imposition of a $25,000 per month fine for public schools that continue to use a covered "mascot" (as defined in SB 21-116) after June 1, 2022.

86. Defendants' discrimination against Plaintiffs and their Native American race, color, and national origin when acting in their respective managerial roles is unlawful.

87. All actions taken by Defendants were done while acting under the color of state law, statute, regulation or custom of Colorado and had the effect of depriving Plaintiffs of rights secured by the U.S. Constitution, specifically the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

88. All actions taken by Defendants were done pursuant to official policies, practices, and customs.

89. As a direct and proximate result of SB 21-116, Plaintiffs have suffered and will suffer irreparable harm to their constitutional rights and their rights under Federal and State laws.

90. Plaintiffs have no adequate legal, administrative, or other remedy at law by which to prevent or minimize this harm.

91. An actual and immediate controversy exists between Plaintiffs and Defendants concerning the constitutionality of SB 21-116.

92. Absent injunctive and declaratory relief enjoining Defendants and their agents, officials, servants, employees and attorneys from implementing and administering SB 21-116, Plaintiffs have suffered and will continue to suffer great and irreparable harm.

93. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief.

94. Plaintiffs are entitled to a final judgment under 28 U.S.C. §§ 2201 and 2202 and the Fourteenth Amendment of the U.S. Constitution declaring that SB 21-116 violates Plaintiffs' rights under the Fourteenth Amendment of the U.S. Constitution without due process of law.

COUNT II
FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION:
POLITICAL PROCESS DISCRIMINATION BASED ON RACE
(42 U.S.C. § 1983)

95. Plaintiffs incorporate by reference, repeat and reallege each allegation set forth in the preceding paragraphs of this Complaint as if each such paragraph was set forth in its entirety herein.

96. Plaintiffs are entitled to a final judgment under 28 U.S.C. §§ 2201 and 2202 and the Fourteenth Amendment of the U.S. Constitution declaring that SB 21-116 violates Plaintiffs' rights under the Fourteenth Amendment of the U.S. Constitution.

97. "It is beyond dispute, of course, that given racial or ethnic groups may not be . . . precluded from entering into the political process in a reliable and meaningful manner." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467 (1982).

98. "[T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process." *Id.* at 470.

99. Such a structuring of the political process is "no more permissible than is denying members of a racial minority the vote, on an equal basis with others." *Id.* at 470 (internal brackets omitted).

100. Legislation of this nature is inherently suspect, without regard to discriminatory intent. *Id.* at 485 ("We have not insisted on a particularized inquiry into motivation in all equal protection cases: 'A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.' And legislation of the kind challenged in *Hunter* similarly falls into an inherently suspect category.").

101. The Court in *Seattle* noted that strict scrutiny applied to such legislation, just as it applied to other racial classifications. *Id.* at 485 n.28 ("The State does not suggest that Initiative 350 furthers the kind of compelling interest necessary to overcome the strict scrutiny applied to explicit racial classifications.").

102. The Court appropriately narrowed *Seattle* in *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 305 (2014), noting that in some ways, its holding was far too broad. *Id.* at 307 ("[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.").

103. Nevertheless, the *Schuette* Court preserved *Seattle*'s core rationale, which applies to the instant case even more clearly than it applied to the action at issue in *Seattle*: "*Seattle* is best understood as a case in which the state action in question (the bar on busing enacted by the State's voters) had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in *Mulkey* and *Hunter*." *See id.* at 314 ("Those cases [like *Seattle*] were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race.").

104. SB 21-116 generally relegates decision-making regarding a school name, logo, or imagery related to a Native American to the State of Colorado, as opposed to every other effort by individuals who are non-Native Americans to obtain name recognition.

105. Individuals who are not Native American may request, in the ordinary course, that a public school adopt a name honoring their heritage or history. There is no need to ask the State Legislature of Colorado to amend a bill like SB 21-116 before such a naming may occur. For

instance, an African-American individual may request that his school be named after Frederick Douglass without seeking amendment of state law.

106. On the other hand, for a "name, symbol, or image that depicts or refers to an American Indian Tribe, individual, custom, or tradition that is uses as a mascot, nickname, logo, letterhead, or team name for the school," one must lobby the Colorado State Legislature.

107. Defendants may not relegate to second-class status the unique interests of particular racial groups.

108. Colorado lacked appropriate legal authority under SB 21-116 to deprive Plaintiffs of their fundamental rights under Title VI.

109. Defendants are charged with interpreting, administering, implementing and enforcing SB 21-116 including $25,000 fine for public schools that continue to use a "mascot" (as defined in SB 21-116) after June 1, 2022.

110. Defendants cannot discriminate against Plaintiffs and their Native American race, color, or national origin when acting in their respective managerial roles.

111. All actions taken by Defendants were done while acting under the color of state law, statute, regulation or custom of Colorado and had the effect of depriving Plaintiffs of rights secured by the U.S. Constitution.

112. All actions taken by Defendants were done pursuant to official policies, practices, and customs.

113. Defendants knew or should have known that they were violating Plaintiffs' constitutional rights and their rights under federal and State laws and their fundamental rights under federal and State laws.

114. As a direct and proximate result of SB 21-116, Plaintiffs have suffered and will suffer irreparable harm to their constitutional rights and their rights under federal and State laws.

115. Plaintiffs have no adequate legal, administrative, or other remedy at law by which to prevent or minimize this harm.

116. An actual and immediate controversy exists between Plaintiffs and Defendants concerning the constitutionality of SB 21-116.

117. Absent injunctive and declaratory relief enjoining Defendants and their agents, officials, servants, employees and attorneys from implementing and administering SB 21-116, Plaintiffs have been and will continue to suffer great and irreparable harm.

118. Defendants have acted and are continuing to act "under color of state law" for purposes of federal civil rights law. 42 U.S.C. § 1983.

119. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief.

120. Plaintiffs are entitled to a final judgment under 28 U.S.C. §§ 2201 and 2202 and Title VI declaring that SB 21-116 violates Plaintiffs' rights under Title VI.

COUNT III
(FIRST AMENDMENT RIGHT TO PETITION: VAGUENESS)

(42 U.S.C. § 1983)

121. Plaintiffs incorporate by reference, repeat and reallege each allegation set forth in the preceding paragraphs of this Complaint as if each such paragraph was set forth in its entirety herein.

122. "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives. To further this goal, the right to petition extends to all departments of the Government." *Santa Fe Alliance for Public Health and Safety v.*

City of Santa Fe, New Mexico, 993 F.3d 802, 819 (10th Cir. 2021) (internal quotation marks, citations, and ellipses omitted).

123. SB 21-116 contains vague language because it prohibits the use in public schools of a "name, symbol, or image that depicts or refers to an American Indian Tribe, individual, custom, or tradition that is uses as a mascot, nickname, logo, letterhead, or team name for the school." Plaintiffs on occasion have or will engage in efforts to persuade school districts or other educational entities to name themselves in honor of Native Americans.

124. Despite the general prohibition on a much broader swath of names, only a handful of schools or districts have been identified by the CCIA as violating SB 21-116.

125. Indeed, even the CCIA is sending contrary messages, by suggesting that the team name "Reds" is acceptable, since the name pre-existed the use of the school's use of Native American imagery. One of the Plaintiffs has asked a school district—if it must replace the name "Indians"—to replace it with the honorific name "Tall Bulls." Does SB 21-116 cover such a name? How about just simply the Bulls? The fact that CCIA's various interpretations—which apparently consider extrinsic evidence—conflict with the plain text of the law demonstrate its ambiguity.

126. Plaintiffs have a Constitutional right to petition in a manner of their choosing, consistent with their beliefs, practices, rituals, actions, and conduct related to Reappropriation.

127. The Due Process Clause of the Fourteenth Amendment incorporates against the Defendants the right to petition.

128. The Due Process Clause's definition of "liberty" and fundamental fairness protects Plaintiffs' rights to publicly express and engage in their beliefs, practices, rituals, actions, and conduct related to Reappropriation in the political, civic, and economic life of the larger community.

129. SB 21-116, both on its face and as applied by Defendants, is so vague as to chill Plaintiffs' petition efforts, by discouraging them from petitioning that a school or education entity do something that may or may not be legal. Similarly, SB 21-116 will concomitantly chill any school's willingness to adopt a name of a Native American, given the vagueness of the law, and the high stakes of violating the law.

130. SB 21-116 is impermissibly vague because it fails to provide a reasonable opportunity to know what conduct is prohibited by law.

131. Because SB 21-116 infringes upon the rights of Plaintiffs that are constitutionally protected, it is unconstitutionally vague.

132. Persons of common intelligence must necessarily guess at the meaning, scope, and application of SB 21-116.

133. SB 21-116 seems to vest Defendants, CCIA, and their agents, officials, servants, employees and attorneys with unbridled discretion with regard to Native American "mascots."

134. SB 21-116 grants Defendants unbridled discretion by making it unlawful for public schools to have a Native American "name, symbol, or image that depicts or refers to an American Indian Tribe, individual, custom, or tradition that is used as a mascot, nickname, logo, letterhead, or team name for the school."

135. SB 21-116 does not define what constitutes a "name," "symbol," or "image."

136. Defendants are charged with interpreting, administering, implementing and enforcing SB 21-116, including its imposition of a monthly $25,000 fine for public schools that continue to use a "mascot" (as defined in SB 21-116) after June 1, 2022.

137. Accordingly, SB 21-116 is an unconstitutional violation of Plaintiffs' First Amendment right to petition rights under the U.S. Constitution.

138. As a direct and proximate result of SB 21-116, Plaintiffs have suffered and will suffer irreparable harm to their constitutional rights and their rights under federal and State laws.

139. Plaintiffs have no adequate legal, administrative, or other remedy at law by which to prevent or minimize this harm.

140. An actual and immediate controversy exists between Plaintiffs and Defendants concerning the constitutionality of SB 21-116.

141. Absent injunctive and declaratory relief enjoining Defendants and their agents, officials, servants, employees and attorneys from implementing and administering SB 21-116, Plaintiffs have suffered and will continue to suffer great and irreparable harm.

142. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief.

143. Plaintiffs are entitled to a final judgment declaring that SB 21-116 is void for vagueness by failing to provide persons of ordinary intelligence a reasonable opportunity to understand the breadth of the law.

COUNT IV
(TITLE VI OF THE CIVIL RIGHTS ACT)
(42 U.S.C. § 1983)

144. Plaintiffs incorporate by reference, repeat and reallege each allegation set forth in the preceding paragraphs of this Complaint as if each such paragraph was set forth in its entirety herein.

145. Title VI of the Civil Rights Act of 1964 provides that no person "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

146. Colorado and its public schools receive federal funds and financial assistance and are, accordingly, subject to Title VI's prohibitions. *See* 42 U.S.C. §2000d-4a.

147. Recipients of federal funds are barred from engaging in race discrimination.

148. Title VI provides a private right of action for individuals who suffer race discrimination at the hands of a recipient of federal funds. *See Regents of the University of California Davis v. Bakke*, 438 U.S. 265, 287 (1978) (Title VI prohibits the same conduct that the equal protection clause prohibits).

149. SB 21-116, both on its face and as applied by Defendants, violates Plaintiffs' rights as guaranteed by Title VI.

150. SB 21-116 denies Plaintiffs' their liberty, disparages their intimate personal choices and identity, and devalues their personhood.

151. Both on its face and as applied, SB 21-116 unlawfully discriminates against Plaintiffs "on the ground of race, color, or national origin." 42 U.S.C. § 2000d.

152. SB 21-116 targets Native Americans for disparate treatment on the basis of race, color, or national origin thereby violating Title VI.

153. SB 21-116 codifies into law Colorado's disparate treatment on the basis of race, color, or national origin and views the use of Native American names, logos, and imagery as offensive.

154. Title VI protects Plaintiffs from disparate treatment on the basis of race, color, or national origin.

155. Plaintiffs' beliefs, practices, rituals, actions, and conduct related to Native American names, logos, and imagery, including in public schools, are avenues through which they

educate others about their Native American race, ethnic heritage, traditions, religious beliefs, exercise and practices.

156. Plaintiffs' beliefs, practices, rituals, actions, and conduct related to their Native American race, color, or national origin are protected by Title VI.

157. Additionally, Title IV covers hostile environment claims. *See Bryant v. Independent School Dist. No. I-38*, 334 F.3d 928, 932 (10th Cir. 2003). Here, the State of Colorado, and all public schools forced to change their name or refrain from adopting an honorific name related to Native Americans, (1) have knowledge of their conduct, (2) are deliberately indifferent to their own harassing conduct. Additionally, erasure of Native American culture is (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprives the Plaintiffs who are students of equal access to the educational benefits or opportunities provided by the school.

158. Because each of the elements for a hostile environment claim are satisfied, Defendants are liable under Title VI of the Civil Rights Act.

159. Plaintiffs are similarly situated in all relevant aspects to non-Native Americans.

160. SB 21-116 demeans and stigmatizes Native Americans based on their race, color, or national origin.

161. SB 21-116 denies Native Americans the opportunity to engage in the most fundamental act of human dignity—to honor their heritage by provoking conversations and engaging with others about racial identity and racial stereotypes within and without the Native American community.

162. SB 21-116 primarily benefits non-Native American bystanders who are not the targets of racism and discrimination with regard to Native American names, logos, and imagery over Plaintiffs.

163. SB 21-116 primarily burdens Plaintiffs by prohibiting culturally and spiritually appropriate Native American names, logos, and imagery that honor Native Americans in favor of non-Native American bystanders who are not the targets of racism and discrimination with regard to Native American names, logos, and imagery over Plaintiffs.

164. Plaintiffs are members of a suspect class based on their race, color, or national origin.

165. SB 21-116 unlawfully discriminates against Plaintiffs, as members of a suspect class.

166. SB 21-116 unlawfully discriminates against Plaintiffs, not as underrepresented minorities, beneficiaries of racial preferences and members of a protected group, but as a State-sanctioned instrument primarily to confer benefits on non-Native American bystanders who are not the targets of racism and discrimination with regard to Native American names, logos, and imagery over Plaintiffs.

167. SB 21-116 unlawfully discriminates against Plaintiffs' beliefs, practices, rituals, actions, and conduct related to their Native American race, color, or national origin.

168. Both on its face and as applied, given its title "Prohibit American Indian Mascots," SB 21-116 expressly classifies based on race, color, or national origin.

169. Both on its face and as applied, SB 21-116 expressly classifies based on race, color, or national origin by prohibiting "American Indian mascots in Colorado."

170. Both on its face and as applied, SB 21-116 expressly classifies based on race, color, or national origin.

171. Both on its face and as applied, SB 21-116 expressly classifies based on race, color, or national origin by prohibiting any American Indian Tribe "name," "symbol," or "image."

172. SB 21-116's discrimination against Plaintiffs and their race, color, or national origin is presumptively unconstitutional and is subject to strict scrutiny.

173. Defendants' enforcement of SB 21-116 has a discriminatory effect against Native Americans.

174. Defendants were motivated by a discriminatory purpose against Native Americans. Native Americans will be disproportionately burdened by SB 21-116.

175. When the enforcement of laws, like SB 21-116, infringe on Plaintiffs' fundamental rights, courts presume discriminatory intent.

176. Plaintiffs' fundamental rights have been denied under Title VI.

177. The Colorado Legislature knew from debate within the General Assembly and witness testimony at hearings that SB 21-116 would harm Native Americans.

178. Nevertheless, the Colorado Legislature passed SB 21-116 in order to protect, in part, non-Native American bystanders who are not the targets of racism and discrimination with regard to Native American names, logos, and imagery over Plaintiffs.

179. Colorado lacked appropriate legal authority under SB 21-116 and the Colorado Constitution to deprive Plaintiffs of their fundamental rights under Title VI and Colorado's Constitution.

180. Defendants are charged with interpreting, administering, implementing and enforcing SB 21-116 including $25,000 fine for public schools that continue to use a "mascot" (as defined in SB 21-116) after June 1, 2022.

181. Defendants cannot discriminate against Plaintiffs and their Native American race, color, or national origin when acting in their respective managerial roles.

182. All actions taken by Defendants were done while acting under the color of state law, statute, regulation or custom of Colorado and had the effect of depriving Plaintiffs of rights secured by the U.S. Constitution, specifically Title VI.

183. All actions taken by Defendants were done pursuant to official policies, practices, and customs.

184. Defendants knew or should have known that they were violating Plaintiffs' constitutional rights and their rights under federal and State laws and their fundamental rights under federal and State laws.

185. As a direct and proximate result of SB 21-116, Plaintiffs have suffered and will suffer irreparable harm to their constitutional rights and their rights under federal and State laws.

186. Plaintiffs have no adequate legal, administrative, or other remedy at law by which to prevent or minimize this harm.

187. An actual and immediate controversy exists between Plaintiffs and Defendants concerning the constitutionality of SB 21-116.

188. Absent injunctive and declaratory relief enjoining Defendants and their agents, officials, servants, employees and attorneys from implementing and administering SB 21-116, Plaintiffs have been and will continue to suffer great and irreparable harm.

189. Defendants have acted and are continuing to act "under color of state law" for purposes of federal civil rights law. 42 U.S.C. § 1983.

190. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief.

191. Plaintiffs are entitled to a final judgment under 28 U.S.C. §§ 2201 and 2202 and Title VI declaring that SB 21-116 violates Plaintiffs' rights under Title VI.

COUNT V
(INJUNCTIVE RELIEF AGAINST STATE)

192. Plaintiffs incorporate by reference and reallege each allegation set forth in the preceding paragraphs of this Complaint as if each such allegation was set forth in its entirety herein.

193. Defendants have caused Plaintiffs to suffer irreparable harm for which money damages are unavailable and/or inadequate relief.

194. SB 21-116 codifies into law Colorado's disfavor of the Native American race and views the use of Native American names, logos, and imagery as offensive.

195. SB 21-116 codifies into law unconstitutional discrimination against Plaintiffs and their Native American race, color, and national origin, thereby denying Plaintiffs equal protection under the law.

196. Defendants' enforcement of SB 21-116 has a discriminatory effect against Native Americans.

197. Defendants were motivated by a discriminatory purpose against Native Americans.

198. Defendants knew or should have known that they were violating Plaintiffs' constitutional rights and their rights under federal and State laws and their rights under federal and State laws.

199. As a direct and proximate result of SB 21-116, Plaintiffs have suffered and will suffer irreparable harm to their constitutional rights and their rights under federal and State laws.

200. Plaintiffs have no adequate legal, administrative, or other remedy at law by which to prevent or minimize this harm.

201. Absent injunctive and declaratory relief enjoining Defendants and their agents, officials, servants, employees and attorneys from implementing and administering SB 21-116, Plaintiffs have been and will continue to suffer great and irreparable harm.

202. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief.

203. Under Fed. R. Civ. P. 57 and 65, Plaintiffs are entitled to injunctive relief against Defendants which would prohibit Defendants, their officers, agents, officials, servants, employees, attorneys, other representatives and those persons in active concert or participation with such persons from enforcing or threatening to enforce SB 21-116.

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, jointly and severally, as follows:

A. Issue a temporary restraining order, preliminary injunction, and permanent injunction enjoining Defendants and their officers, agents, officials, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction, from implementing and administering SB 21-116.

B. Enter a declaratory judgment under 28 U.S.C. §§ 2201 and 2202 declaring that SB 21-116's challenged provisions are unconstitutional, both on their face and as applied to Plaintiffs, and that SB 21-116:

1. violates Plaintiffs' rights under the Fourteenth Amendment of the U.S. Constitution without due process of law;

2. constitutes political process discrimination in violation of Plaintiffs' rights under the Fourteenth Amendment of the U.S. Constitution;

3. is void for vagueness under the First Amendment of the U.S. Constitution by failing to provide persons of ordinary intelligence a reasonable opportunity to understand what the law is; and

4. SB 21-116 violates Plaintiffs' rights under Title VI.

C. Adjudge, decree, and declare the rights and other legal relations of the parties to the subject matter here in controversy so that these declarations shall have the force and effect of a final judgment.

D. Award Plaintiffs nominal damages of $1.00.

E. Retain jurisdiction over this matter for the purpose of enforcing its orders.

F. Enter judgment awarding Plaintiffs reasonable attorneys' fees, costs, expenses, and other disbursement, pursuant to 28 U.S.C. § 1920 and 42 U.S.C. § 1988, and Federal Rules of Civil Procedure 23(e) and (h).

G. Enter the above-requested injunctive relief without condition of bond or other security being required of Plaintiffs.

H. Grant such other and further relief as the Court deems just, necessary, and proper to protect Plaintiffs.

Dated: November 2, 2021

/s/ *William E. Trachman*
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S

JS 44 (Rev. 04/21)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

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

(b) County of Residence of First Listed Plaintiff YUMA
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)* William E. Trachman, Joseph A. Bingham, Mountain States Legal Foundation, 2596 South Lewis Way, Lakewood, CO 80227 | 303.292-2021 wtrachman@mslegal.org, jbingham@mslegal.org AND Scott D. Cousins, Scott D. Jones, COUSINS LAW LLC | Brandywine Plaza West|1521 Concord Pike, Suite 301|Wilmington, Delaware 19803 | 302-824-7081 | scott.cousins@cousins-law.com

DEFENDANTS JARED POLIS, Colorado Governor; DAVE YOUNG, Colorado State Treasurer; KATY ANTHES, Commissioner of Education for the Colorado Dept of Education; PHIL WEISER, Colorado AG; 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.

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

Unknown

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☒ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

INTELLECTUAL PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
42 USC 1983, 42 USC 2000d

Brief description of cause: Equal Protection violation for discrimination on the basis of race

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE: November 2, 2021

SIGNATURE OF ATTORNEY OF RECORD: */s/ William E. Trachman*

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. Origin. Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

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-NYW

EMERGENCY MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR EXPEDITED HEARING

On or around November 1, 2021, Defendant Kathryn Redhorse communicated to certain Colorado school districts to remind them of the deadline to change Native American icons and imagery covered by SB 21-116 by June 1, 2022. *See* Jefferson Decl. (Exhibit 1 at Exhibit A, p. 6). However, the communication also apprised school districts that if they planned to seek grant funding for the changing of a name, a notice of intent must be submitted by November 30, 2021:

> To assist your public schools in making this change, SB 21-116 includes the Building Excellent Schools Today (BEST) grant program as a potential source of funding to "accomplish any structural changes that might be necessary" to remove American Indian mascots. Applications for the Fiscal Year 2023 grant round are due in February 2022. *All districts and charter schools must notify BEST of their intent to apply by November 30, 2021*.

Exhibit 1, at 6 (emphasis added). Given the imminent deadline of November 30, Plaintiffs file this emergency motion for preliminary injunction pursuant to Fed. R. Civ. P. 65(a). Plaintiffs request that the Court issue a preliminary injunction barring Defendants from taking any actions to enforce Colo. Rev. Stat. § 22-1-133 and/or Colo. Rev. Stat. § 22-1-137 (together, "SB 21-116" or the "Act").

More broadly, interim relief is needed because even if a school has no plan to apply for grant funds, they must nevertheless engage in a long process to erase their Native American names, images, and iconography before June 1, 2022. Indeed, as Ms. Redhorse represents in her letter, the true deadline for schools is actually May 2022:

> At a publicly noticed Quarterly Meeting, CCIA will vote on whether the changes made by the schools/school districts are sufficient to be removed from the list of non-compliant schools. *CCIA's Fourth Quarterly Meeting in May 2022 will be the last opportunity for schools/school districts to demonstrate compliance with the bill's requirements before the June 1, 2022 deadline*.

Exhibit 1, at 6 (emphasis added).

The Act imposes a $25,000 fine for each month that an affected school is deemed out of compliance with the Act. And because changing a school's name and letterhead involves significant time and expense, affected schools are already being forced to pursue compliance. *See* Marez Decl. (Exhibit 2), at ¶ 10.

If schools are forced to make further significant investment in changing their names and materials to comply with the unconstitutional Act, they are highly unlikely to invest at least as

much time and effort in returning to current names and materials after permanent relief is granted. *See* Draplin, *Native American group sues to stop Colorado's mascot ban*, The Center Square (Nov. 4, 2021) ("The mascot changes could cost the Montrose County School District between $500,000 to $750,000, Superintendent Carrie Stephenson previously said, according to the Montrose Mirror.").[1] Moreover, the Act imposes an ongoing violation of Plaintiffs' constitutional rights, which itself constitutes ongoing irreparable injury which cannot be compensated through money damages.

CONFERRAL

Under Colorado Local Rule 7.1, parties must confer prior to the filing of a motion. And the Attorney General's office is aware of this lawsuit. *See* Davison, *Colorado students, graduates, non-profit organization file lawsuit over ban on Native American school mascots* (Nov. 4, 2021) ("The Attorney General's Office stated they will defend the law, but will not comment any further.").[2] Counsel for Plaintiffs reached out the Attorney General's office by phone on November 5, and had a collegial phone call. However, given that there are several Defendants, the Attorney General's office has not been able to convey all of their positions to Plaintiffs. The Attorney General and the Treasurer do oppose this motion, as will officials from the Department of Education, and for the purpose of this motion for preliminary injunction, the Court is likely safe to assume that the other Defendants oppose as well.

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[1] *See* https://www.thecentersquare.com/colorado/native-american-group-sues-to-stop-colorado-s-mascot-ban/article_26122ffa-3da4-11ec-8e67-07dd84a7718f.html (last visited November 5, 2021).

[2] *See* https://www.koaa.com/news/covering-colorado/colorado-students-graduates-non-profit-organization-file-lawsuit-over-ban-on-native-american-school-mascots (last visited November 5, 2021).

FACTUAL BACKGROUND

1. SB 21-116 is titled "Prohibition on use of American Indian Mascots."

2. The Act became effective on June 28, 2021.

3. The Act provides that "[O]n or after June 1, 2022, a public school in the state is prohibited from using an American Indian mascot." Colo. Rev. Stat. § 22-1-133(2).

4. The Act generally prohibits any "use" of American Indian "mascots" by public schools, including charter schools and public institutions of higher education (public schools) as of June 1, 2022.

5. The Act imposes a fine of $25,000 per month for each month that a public school continues to use a "mascot" (as defined in SB 21-116) after June 1, 2022, payable to the state education fund.

6. The Act defines public schools to mean:

   a. An elementary, middle, junior high, high school, or district charter school of a school district that serves any of grades kindergarten through twelve; and

   b. An institute charter school that serves any of grades kindergarten through twelve.

Colo. Rev. Stat. § 22-1-133(1)(D)(I-II).

7. This lawsuit challenges the following provision of SB 21-116, which is exceedingly broadly worded, and provides that the term "American Indian Mascot" means:

> a name, symbol, or image that depicts or refers to an American Indian tribe, individual, custom, or tradition that is used as a mascot, nickname, logo, letterhead, or team name for the school.

8. The Act clearly contemplates that it applies to every "use" of even the name of an American Indian individual, because it carves out a narrow exception for letterhead: "[A] public school that is named after an American Indian tribe or American Indian individual may use the tribe's or individual's name, but not an image or symbol, on the public school's letterhead."

9. The Act's terms prevent a public school from using even the name of an American Indian individual's name on any material besides letterhead, which presumably includes uniforms, school signs, murals, and school walls. Further, the Act's terms prevent any use of an image or symbol of an American Indian individual, whether on letterhead, school banners, or materials in the school hallways.

10. The Colorado Commission of Indian Affairs (CCIA) has purported to identify approximately 28 schools that it considers implicated by the new law. *See* Legislation, Schools with American Indian Mascots and/or Imagery, at https://ccia.colorado.gov/legislation (last visited November 5, 2021).

11. As is apparent from the list issued by the CCIA, the CCIA has focused on school mascots as they are colloquially defined, rather than as broadly defined by the statute.

12. However, the Colorado Commission of Indian Affairs is incorrect, and the number of affected schools covered by the Act is likely much larger, given the breadth of the statute's language. For instance, the following schools, among many others, may be in violation of Colo. Rev. Stat. § 22-1-133:

a. Cherokee Trail High School (Aurora)

b. Cheyenne Mountain High School (Colorado Springs)[3]

c. Cheyenne Wells High School (Cheyenne Wells)

d. Kiowa High School (Kiowa)[4]

[3] Although Cheyenne Mountain High School no longer uses the name "Indians" in its athletic team names, the name of the school continues to include the name of the Cheyenne people.

[4] Kiowa High School currently uses the name "Indians" in its athletics. And it is identified by the CCIA as a school on its list of illegal names. But removal of merely the name "Indians" would be insufficient to comply with SB 21-116, so long as the word "Kiowa" remained in the school's logo or other imagery.

e. Yampa Valley High School (Steamboat Springs)

f. Schools in Pagosa Springs, Colorado that use the term "Pagosa" in their name, which is the Ute word for healing or boiling water.

g. Schools in Niwot, Colorado, that use the term "Niwot" in their name. Arapahoe Chief Niwot was a tribal leader in the Boulder, Colorado area.

13. Each of these schools potentially uses a "name, symbol, or image that depicts or refers to an American Indian tribe, individual, custom, or tradition that is used as a mascot, nickname, logo, letterhead, or team name for the school." Colo. Rev. Stat. § 22-1-133(1)(b).

14. As one example, it will cost the Arickaree School District around $50,000 to shift away from names or images referencing Native Americans. Jefferson Decl. (Exhibit 1), at ¶¶ 6-7.

15. Plaintiffs are American Indians who oppose the use of American Indian mascot performers and caricatures that mock Native American heritage—such as Lamar High School's former mascot *Chief Ugh-Lee* or the Atlanta Braves' former Native American caricature *Chief Noc-A-Homa*—in sports and other public venues.

16. Plaintiffs believe, however, that culturally appropriate Native American names, logos, and imagery serve to honor Native Americans, and to help public schools neutralize offensive and stereotypical Native American caricatures and iconography, while teaching students and the general public about American Indian history.

17. SB 21-116 sweeps derisive, neutral, and honorific uses of Native American names and imagery together into the universal term "American Indian mascot." *See, e.g.*, Colo. Rev. Stat. § 22-1-133(1)(a) ("'American Indian mascot' means a name, symbol, or image that depicts or refers to an American Indian tribe, individual, custom, or tradition that is used as a mascot, nickname, logo, letterhead, or team name for the school.").

18. Erasing Native American names and images from the public square and from public discussions echoes a maneuver that Plaintiffs have previously seen used by the eradicators of Native American heritage. Colorado repeats the same mistake in its paternalistic assumption that it must protect Native Americans by erasing cultural references to them and to their heritage.

19. Because the eradication of Native American names, iconography and images poses serious harm to the cultural identities and heritage of Native Americans, Plaintiffs regularly engage in efforts of "reappropriation," so as to render emotionally charged Native American names, logos, and imagery nondisparaging, and to educate others as to what it means to be a Native American in American culture.[5] Marez Decl. (Exhibit 2), at ¶¶ 13-15.

20. Plaintiff John Doe, a minor, resides in Yuma, in the District of Colorado. He is of Cherokee and Chippewa heritage. He currently attends Yuma High School in Yuma, Colorado, which maintains imagery referring the "Yuma Indians." He participates in many school activities, as well as football and wrestling. He wants his school to continue to honor his culture and heritage, and would suffer a hostile environment if his culture were erased from his school. John Doe Decl. (Exhibit 3), at ¶¶ 3; 12-18.

21. Plaintiff Jane Doe, a minor, resides in Yuma, in the District of Colorado. She is of Cherokee heritage. She currently attends Yuma High School in Yuma, Colorado, which is known as the "Yuma Indians." She too wants her school to continue to honor her culture and heritage,

[5] Plaintiffs choose to use self-referential Native American names, logos, and imagery for purposes of Reappropriation. Depending on the context and the speaker, however, Native American names and images can be either an act of self-identification (coupled with a claim of pride in group membership) or a slur intended to mock, heckle, or silence the actor or the speaker. *See* Marez Decl. (Exhibit 2), at ¶ 18. As such, because Plaintiffs are Native Americans, it is critical for them to reappropriate Native American culture for political and social expression—in particular what it means to them to be a Native American in American culture.

and would suffer a hostile environment if her culture were erased from her school. Jane Doe Decl. (Exhibit 4), at ¶¶ 11-13.

22. Plaintiff Demetrius Marez resides in Lakewood, in the District of Colorado. He is 39% Diné (pronounced "de-NEH"). He served this country as a U.S. Marine and graduated from Lamar High School in 1993. Mr. Marez has urged Lamar High School to keep its current team name, the Savages, or in the alternative, petitioned the school to rename itself to Lamar High School Black Kettle. Neither would be legal under SB 21-116 on the same terms as names referencing members of other racial demographics. Marez Decl. (Exhibit 2), at ¶¶ 6-9.

23. Plaintiff Chase Aubrey Roubideaux resides in Denver, in the District of Colorado. He is an enrolled Rosebud tribal member, with a blood degree of about 25%. He graduated from Yuma High School in 2010. Mr. Roubideaux has petitioned the Yuma School Board to keep the name of the Yuma Indians, or in the alternative, to rename the YHS Indians to the "Tall Bulls." Neither would be legal under SB 21-116 on the same terms as names referencing members of other racial demographics. Roubideaux Decl. (Exhibit 5), at ¶¶ 6-9.

24. Plaintiff Donald Wayne Smith, Jr. resides in Yuma, in the District of Colorado. He is the pastor of Yuma Christian Church and is of Cherokee heritage. Pastor Smith has previously taught in Colorado public schools, including in Yuma, which uses the term "Indian" in its imagery and iconography. Because of SB 21-116, he can no longer accept future teaching positions without being subject to a hostile environment. Smith Decl. (Exhibit 6), at ¶ 3; 13.

25. Plaintiff the Native American Guardian's Association ("NAGA") is a section 501(c)(3) non-profit organization organized under the laws of the State of Virginia that focuses on increased education about Native Americans, especially in public educational institutions. NAGA seeks greater recognition of Native American heritage through sports and other high-profile public

venues. NAGA has been partnering with public schools across the country to help those schools (a) eliminate stereotypical "mascot" caricatures and iconography, chants and cheers, and (b) develop respectful and culturally appropriate Native American names, logos, iconography and imagery. NAGA maintains standing through associational standing, by and through its members. Davidson Decl. (Exhibit 7), at ¶¶ 15-18.

STANDARD OF REVIEW

To obtain a preliminary injunction, a party must show (1) "a substantial likelihood" that it will "prevail on the merits"; (2) irreparable injury absent an injunction; (3) "proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party"; and (4) "that the injunction . . . would not be adverse to the public interest." *Lundgrin v. Clayton*, 619 F.2d 61, 63 (10th Cir. 1980) (citations omitted).

When, as here, the defendant is the government, elements (3) and (4)—the balance of harms and the public interest—merge into one inquiry. *Essien v. Barr*, 457 F.Supp.3d 1008, 1020 (D. Colo. 2020) (citing *Nken v. Holder*, 556 U.S. 418 (2009)). Additionally, where, as here, factors (2)-(4) are strongly in the moving party's favor, that party may satisfy the first factor merely by showing "a fair ground for litigation." *Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989) (citation omitted). In other words, a moving party favored by the irreparable injury and balance of harms inquires must show merely "that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Fed. Lands Legal Consortium v. United States*, 195 F.3d 1190, 1195 (10th Cir. 1999) (citation omitted).

ARGUMENT

a. Plaintiffs are Likely to Succeed on the Merits of their Claims.

"[T]o show a likelihood of success, the plaintiff must present a prima facie case, but need not prove he is entitled to summary judgment." *Daniels Health Scis., LLC v. Vascular Health Scis. LLC*, 710 F.3d 579, 582 (5th Cir. 2013); *accord Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 781 (10th Cir. 1964) (per curiam).

1. Equal Protection: Direct Discrimination.

The Act singles out Native Americans for differential treatment, as (1) tribal entities; (2) as a demographic group; and even (3) as individuals. It does not even define "individual" to cover only members of federally recognized tribe. It bars literally any school from using an American Indian individual's name—other than the narrow exception of letterhead—on school materials, including signs, uniforms, logos, and other imagery. The obvious consequence is that, if the law is enforced on its terms, no school in Colorado will ever be connected to a Native American tribe or individual.

"Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). As such, any government policy that classifies people by race are presumptively invalid and "inherently suspect." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("These ideas have long been central to this Court's understanding of equal protection, and holding 'benign' state and federal racial classifications to different standards does not square with them."). Moreover, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions

and hence constitutionally suspect." *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013) (*Fisher I*). Thus, "any official action that treats a person differently on account of race or ethnic origin is inherently suspect." *Id*.

Colorado therefore has the burden of establishing that the Act satisfies strict scrutiny. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 741 (2007) ("Our cases clearly reject the argument that motives affect the strict scrutiny analysis."). In order to do so, Colorado must establish that it possesses a compelling state interest in implementing the Act, and that the Act is narrowly tailored toward achieving that goal. *Fisher*, 570 U.S. at 307-08 ("Any racial classification must meet strict scrutiny, for when government decisions touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."). Here, Colorado can do neither.

First, Colorado's purported interest in opposing racial discrimination cannot itself satisfy strict scrutiny, because an act of discrimination, without more, does not further a compelling interest. *Id.* at 748 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); *see also Regents of University of California v. Bakke*, 438 U.S. 265, 307 (1978) (Opinion of Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."); *cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1733 (2017) (Kagan, J., concurring) ("As the Court states, a principled rationale for the difference in treatment *cannot* be based on the government's own assessment of offensiveness.") (emphasis added).

In the same vein, it is hardly obvious that the government's opinion on how to respond to purportedly offensive viewpoints is the correct one. In other contexts, groups have reappropriated

negative concepts in order to achieve empowerment and deprive a word of its offensive meaning. *See Cf. Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J. concurring, with Ginsburg, J., Sotomayor, J., and Kagan, J.) ("[R]espondent endeavors to use The Slants to supplant a racial epithet, using new insights, musical talents, and wry humor to make it a badge of pride. Respondent's application was denied not because the Government thought his object was to demean or offend but because the Government thought his trademark would have that effect on at least some Asian–Americans."); *id.* at 1767 ("[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."); *Walter v. Oregon Board of Education*, 301 Or. App. 516, 531 (Or. 2019) ("[T]he legislative record also includes testimony … that the use of positive and respectful Native American imagery in schools would combat racial stereotypes and discrimination against Native American students.").

Second, even if the government could establish a compelling interest, the Act is nowhere near narrowly tailored. The Act does not merely cover caricatures. It does not merely cover sports team names, or even what it purports to cover—"mascots." Instead, it applies to all images, names, logos, and nearly all uses of letterhead. And of course, it does not cover all racial demographics. It leaves in place the ability of Colorado schools to even use offensive caricatures of Caucasians, African Americans, or Hispanics. It solely targets Native Americans. Such a feeble effort at tailoring should not be embraced by the Court.

2. Equal Protection: Political Process.

"It is beyond dispute, of course, that given racial or ethnic groups may not be . . . precluded from entering into the political process in a reliable and meaningful manner." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467 (1982). As Colorado's Supreme Court has

recognized, the Fourteenth Amendment reaches political structures that distort governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation. *Evans v. Romer*, 854 P.2d 1270, 1280 (Colo. 1993), *aff'd sub nom on other grounds*, *Romer v. Evans*, 517 U.S. 620 (1996).

The U.S. Supreme Court appropriately narrowed *Seattle* in *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 305 (2014), noting that in some ways, its holding was far too broad. *Id.* at 307 ("[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.").

Nevertheless, the *Schuette* Court preserved *Seattle*'s core rationale, which applies to the instant case even more clearly than it applied to the action at issue in *Seattle*: "*Seattle* is best understood as a case in which the state action in question (the bar on busing enacted by the State's voters) had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in *Mulkey* and *Hunter*." *See id.* at 314 ("Those cases [like *Seattle*] were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race.").

Legislation like the Act which targets specific races is inherently suspect, without regard to discriminatory intent. 458 U.S. at 485 ("We have not insisted on a particularized inquiry into motivation in all equal protection cases: 'A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.' And legislation of the kind challenged in *Hunter* similarly falls into an inherently suspect category."); *see also Colorado Christian University v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) ("Even in the context of race, where the nondiscrimination norm is most vigilantly enforced,

the Court has never required proof of discriminatory animus, hatred, or bigotry. The 'intent to discriminate' forbidden under the Equal Protection Clause is merely the intent to treat differently.")

Here, a member of any other racial demographic besides a Native American individual or tribe can request that a school use imagery or a name on its logo or letterhead. Individuals who are Scandinavian may directly lobby schools to refer to Vikings in their logos and images. Individuals who are Irish or have other European ancestry may similarly directly lobby for schools to refer to Celtics in their images. But the Act reserves for Native Americans alone the indistinct privilege of forcing them to seek an exemption from SB 21-116—at the Colorado State Legislature, and then with the Colorado Governor—before they are able to adequately advocate with public schools in the state. This is inappropriate. *See Seattle*, 458 U.S. at 470 ("[T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process.")

Additionally, a distinction in the political process must be subject to strict scrutiny. *Id.* at 485 n.28 ("The State does not suggest that Initiative 350 furthers the kind of compelling interest necessary to overcome the strict scrutiny applied to explicit racial classifications."); *Evans*, 854 P.2d at 1282 ("[A]ny legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny.") For the reasons stated above, Colorado cannot satisfy an injury into either strict scrutiny factor.

3. First Amendment: Right to Petition

"The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives. To further this goal, the right to petition extends to all departments of the Government." *Santa Fe Alliance for Public Health and Safety v. City of Santa Fe, New Mexico*, 993 F.3d 802, 819 (10th Cir. 2021) (internal quotation marks, citations, and ellipses omitted).

Two Plaintiffs have already sought to petition public schools not to change their name, or at least to adopt a different name that honors Native Americans. Both have been rejected out of concern by the respective schools that the replacement names would still violate the Act. In these cases, the name Lamar High School Black Kettle and the Tall Bulls have been rejected, based on assumptions by school officials that both would violate the Act.

The Act creates significant ambiguity over its coverage:

- Notably, the Colorado Commission on Indian Affairs is instructed by the Act in the following manner: "No later than thirty days after June 28, 2021, the commission shall identify each public school in the state that is using an American Indian mascot and that does not meet the criteria for an exemption as outlined in subsection (2)(b) of this section." Colo. Rev. Stats. § 22-1-133(4)(a). But there are numerous Colorado schools named after, for instance, geographic locations that reference Native American names or tribes, which are not on the list.

- The Act does not define a Native American individual to mean someone who is an enrolled member of a federally recognized tribe. It seems to apply to literally any school name which refers to an individual who is part Native American. It is highly unlikely that the CCIA has poured over the genealogy records of every individual who has a school named after them in Colorado.

- Even the CCIA is sending mixed messages. It states that it will allow the "Reds" to continue as a school team name, once certain imagery is dropped. But it also identifies several schools using a "Warrior" name, despite the fact that a Warrior, standing alone, does not refer to a Native American tribe or individual.

By failing to adequately announce the true scope its coverage, the law undermines the right to petition in two ways: (1) it fails to apprise Plaintiffs of their ability to persuade public schools

to adopt names honoring themselves, their relatives, or their tribes; and (2) it fails to apprise public schools of whether, if they are indeed persuaded by Plaintiffs, they can act accordingly, consistent with the Act.[6]

Of course, it is true that the First Amendment does not guarantee the right of citizens to *succeed* at petitioning their government. *CSMN Investments, LLC v. Cordillera Metropolitan District*, 956 F.3d 1276, 1285 (10th Cir. 2020) ("The text of the First Amendment does not speak in terms of successful petitioning—it speaks simply of 'the right of the people to petition the Government for a redress of grievances.") (internal quotation marks and ellipses omitted). But the Constitution guarantee the fair ability to at least try by engaging in "personal expression" related to "seeking a redress of grievances." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388 (2011); *cf. We the People Foundation, Inc. v. U.S.*, 485 F.3d 140, 147 (D.C. Cir. 2007) (Brown, J., concurring) ("Based on the historical background of the Petition Clause, most scholars agree that the right to petition includes a right to some sort of *considered* response.") (emphasis added). Here, the Act fully undermines that ability. Even government entities don't truly understand the full scope of prohibited conduct under the Act.

4. Title VI: Equal Protection and Hostile Environment Discrimination

Title VI of the Civil Rights Act of 1964 provides that no person "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Colorado is a recipient of federal funds, as are all public schools in the State

[6] This absence of a clear standard creates a serious risk that the policy will be enforced in an arbitrary manner or will be used to target conduct based on the viewpoint of individual members of the CCIA. *Accord Coates v. City of Cincinnati*, 402 U.S. 611, 614-15 (1971).

of Colorado.[7] First, Title VI provides a private right of action for individuals who suffer direct race discrimination at the hands of a recipient of federal funds, applying the same standards as the Equal Protection Clause, analyzed above. *See Regents of the University of California Davis v. Bakke*, 438 U.S. 265, 287 (1978) (Title VI prohibits the same conduct that the equal protection clause prohibits); *see also* Dear Colleague Letter, *Joint DOJ/OCR Guidance on Segregated Proms* (Sept. 20, 2004) (identifying the following school policies as Title VI violations: racially separate proms and dances, racially separate Homecoming Queens and Kings, racially separate awards for Most Popular Student or Most Friendly student).[8]

Additionally, Title VI covers hostile environment claims. *See Bryant v. Independent School Dist. No. I-38*, 334 F.3d 928, 932 (10th Cir. 2003). Here, the State of Colorado, and all public schools forced to change their name or refrain from adopting an honorific name related to Native Americans, (1) have knowledge of their conduct, and (2) are deliberately indifferent to their own harassing conduct. Additionally, erasure of Native American culture is (3) harassment that is so severe, pervasive and objectively offensive that it (4) deprives the Plaintiffs who are students or teachers of equal access to the educational benefits or opportunities provided by the school. *See Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998) ("According to the Department of Education, a school district violates Title VI when (1) there is a racially hostile environment; (2) the district had notice of the problem; and (3) it failed to respond adequately to redress the racially hostile environment.").

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[7] *See* https://www.ed.gov/news/press-releases/department-education-announces-american-rescue-plan-funds-all-50-states-puerto-rico-and-district-columbia-help-schools-reopen (last visited November 5, 2021).

[8] *See* https://www2.ed.gov/about/offices/list/ocr/letters/segprom-2004.html (last visited November 5, 2021).

Policies themselves can create a hostile environment. *Bryant*, 334 F.3d at 933 ("[W]e hold that Appellants have set forth facts which, if believed, would support a cause of action for intentional discrimination for facilitating and maintaining a racially hostile educational environment."); *see also Monteiro*, 158 F.3d at 1032 ("Nor do we preclude the prosecution of actions alleging that schools have pursued policies that serve to promote racist attitudes among their students, or have sought to indoctrinate their young charges with racist concepts."). In the same way that a blanket policy against students studying the lives of prominent African Americans, or depicting honorific images of Hispanic Americans, could establish a hostile environment for other racial groups, so too does SB 21-116.

In the same vein, SB 21-116 also prevents Native American students and teachers, alone, from reappropriating or reclaiming even purportedly offensive names. *Cf. Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) ("'Slants' is a derogatory term for persons of Asian descent, and members of the band are Asian–Americans. But the band members believe that by taking that slur as the name of their group, they will help to "reclaim" the term and drain its denigrating force."); *see also* Mark Conrad, *Matal v. Tam—A Victory for the Slants, A Touchdown for the Redskins, But an Ambiguous Journey for the First Amendment and Trademark Law*, 36 CARDOZO ARTS & ENT. L.J. 83, 94 n. 55 (2017) (describing the numerous positive reclaimings of once-offensive words for women, gays, and racial groups). Plaintiffs alone are uniquely disadvantaged from engaging in appropriation by using their school's images, as amongst all racial demographics.

In this context, the State of Colorado has embarked on a sweeping mission to eradicate Native American imagery—broadly defined as "mascots," but incorporating all logos, images, and nearly all letterhead—from public schools. Students and teachers in public schools, like the Plaintiffs in this case, will be forced to watch as schools rip down all materials related to Native

Americans or Native American culture. This will have a concrete, negative effect on Plaintiffs who are forced to witness the elimination of their culture occur before their eyes. Colorado and its officials obviously have notice of their own conduct, and have failed to respond by altering or reversing the Act in response to the knowledge that it intends to create a racially hostile environment. *Cf. Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015) (reversing a district court's grant of summary judgment in favor of the State of Arizona, and noting that policies eliminating Mexican American Studies programs were subject to equal protection claims, due to potential race-based motivations).

b. Plaintiffs Will Suffer Irreparable Injury Absent Preliminary Relief.

When a "deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary." Wright & Miller, 11A Fed. Prac. & Proc. §2948.1 (3d Ed.); *see, e.g., Mills v. D.C.*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (citation omitted). The Supreme Court has long recognized that "a racial classification causes 'fundamental injury' to the 'individual rights of a person.'" *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (citation omitted). "[I]n an equal protection case of this variety," where "the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," the injury at issue "is the denial of equal treatment" itself. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 565, 666 (1993).

Additionally, all evidence points to the fact that a transition to a new school name or logo is expensive, and that it will be next to impossible to return to such a name even if relief is granted after June 1, 2022. Moreover, given the letter from Ms. Redhorse establishing November 30, 2021,

as the final date for giving notice regarding an application for grant funds, irreparable injury is imminent for Plaintiffs.

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

"[I]t 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. 2012) (quotation marks and citations omitted). Here, "issuance of a preliminary injunction would serve the public's 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). By contrast, Defendants will suffer no cognizable injury should they be barred from taking further unconstitutional action. Indeed, it is possible that Defendants will agree to a case scheduling order that largely resolves the issues in the case prior to June 1, 2022.

CONCLUSION

Once SB 21-116 is implemented, Plaintiffs will suffer irreparable and immeasurable harm which cannot be compensated through money damages. If its enforcement is not enjoined by this Court, SB 21-116 will strip Plaintiffs, as Native American, of their essential constitutional and civil rights by eradicating positive Native American names, logos, and imagery from Colorado public schools. Its implementation will also uniquely disadvantage Plaintiffs' ability to debate with others about the importance of respectful and culturally appropriate Native American logos, iconography and imagery, thereby further consigning Native Americans to historical oblivion. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize this harm. Plaintiffs meet the standards for issuing a preliminary injunction, against Defendants.

For the reasons stated above, Plaintiffs respectfully request the entry of a preliminary injunction, pending resolution of this case.

Dated: November 5, 2021

/s/ *William E. Trachman*
William E. Trachman, CO Bar #45684
Joseph A. Bingham*
Mountain States Legal Foundation
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EXHIBIT 1

(Declaration of Harold Jefferson)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(42

JOHN DOE, a minor; Jane DOE, a minor; DEMETRIUS MAREZ; CHASE AUBREY ROUBIDEAUX; DONALD WAYNE SMITH, JR.; and the NATIVE AMERICAN GUARDIAN'S ASSOICATION, Plaintiffs, v. JARED POLIS, Colorado Governor; DAVE YOUNG, Colorado State Treasurer; KATY ANTES, Commissioner of Education for the Colorado Department of Education; and 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-NYW

DECLARATION OF HAROLD JEFFERSON

I, Harold Jefferson, hereby declare, under penalty of perjury, as follows:

MY BACKGROUND

1. I am over the age of the 21 and have personal knowledge about the matters set forth below. I submit this Declaration in support of the above-captioned Complaint for Declaratory and Injunctive Relief (the "**Complaint**").

2. I am the Arickaree School District R-2 Board President.

3. Arickaree School District is located in Anton, Colorado in Washington County.

4. For over 60 years, Arickaree High School has used the name Indian with a Native American logo for its team name, logos, and imagery.

HOW SB 21-116 IMPACTS THE ARICKAREE SCHOOL DISTRICT

5. As of the date of this Declaration, it is my understanding that there are currently 25 public schools in Colorado which have team names, logos, and imagery that are directly impacted by SB 21-116.[1] It is also my understanding that none of these impacted schools have a Native American "mascot" related to their respective public schools.

6. The Arickaree School District has received an estimate by our sports apparel supplier of approximately $20,500 to replace the Indian name, logos, and imagery on the Arickaree High School uniforms.

7. In addition, by my estimate, it will cost approximately $30,000 for the Arickaree School District to come into compliance with SB 21-116 by June 1, 2022. Those compliance costs include the costs associated with removing and replacing the Indian name, logos, and imagery on the Arickaree High School gymnasium, front entrance, school buses and throughout the school.

COLORADO PUBLIC ARE RECIPIENTS OF FEDERAL FUNDS

8. Colorado public schools are recipients of federal funds.

9. It is my understanding, as recipients of federal funds, Colorado is subject to Title IV of the Higher Education Act of 1965.

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[1] *See* Sue McMillin, "25 Colorado schools still had Native American mascots. This week one finally decided to make a change," The Colorado Sun (March 17, 2021), https://coloradosun.com/2021/03/17/cheyenne-mountain-mascot-native-american-controversy/ (last visited October 26, 2021).

THERE ARE NO "MASCOTS" IN THE ARICKAREE SCHOOL DISTRICT

10. No school within the Arickaree School District has a Native American "mascot." Rather, the Arickaree High School is currently using a Native American name and related logo, and imagery, but not a "mascot."

LETTER FROM COLORADO COMMISSION OF INDIAN AFFAIRS

11. Recently Arickaree School District R-2 received a letter from the Colorado Commission of Indian Affairs (the "**CCIA Letter**"). Notwithstanding the deadlines for compliance set forth in SB 21-116, the CCIA Letter demanded that "All districts and charter schools must notify BEST of their intent to apply by *November 30, 2021*." (Emphasis added). A true and correct copy of the CCIA Letter is attached hereto as Exhibit A.

CONCLUSION

12. Accordingly, I respectfully request that the Court grant Plaintiffs' request for the issuance of a temporary restraining order.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2021
Anton, Colorado

/s/ Harold Jefferson
Harold Jefferson

Exhibit A

(Letter from Colorado Commission of Indian Affairs)

COLORADO COMMISSION OF INDIAN AFFAIRS

COLORADO
Department of Education

Colorado Commission of Indian Affairs
136 Capitol Drive
Denver, CO 80203

Colorado Department of Education
201 E Colfax Ave,
Denver, CO 80203

Arickaree School District R-2
12155 Co Rd NN
Anton, CO 80801

Dear Lisa Weigel,

On June 28, 2021, Governor Jared Polis signed into law Senate Bill 21-116 (SB 21-116), "Concerning the Prohibition of American Indian Mascots in Colorado." Beginning on and after June 1, 2022, the bill prohibits the use of American Indian mascots by public schools, which includes an elementary, middle, junior high, high school, district charter school of a school district, and institute charter school that serves any of grades kindergarten through twelve. The prohibition does not apply to:

- Any public school that has an agreement with a federally recognized Indian Tribe that complies with SB21-116; or
- Any public school that is operated by or with the approval of a federally recognized Indian Tribe and existing within the boundaries of such Tribe's reservation.

If a public school continues to use a prohibited American Indian mascot on or after June 1, 2022, SB 21-116 imposes a $25,000 monthly fine on the school district of the public school, or the State Charter School Institute in the case of an institute charter school, or public institution of higher education, of the public school. The fine is payable to the State Treasurer and will be credited to the state education fund.

According to our records, Arickaree School District RE-2 has 2 public schools that are out of compliance with SB 21-116, which are listed as follows:

Arickaree Undivided High School
Indians
1255 County Road Nn

Anton, CO 80801
(970) 383-2205

Arickaree Elementary School
Indians
12155 County Road Nn
(970) 383-2205

Schools looking to come into compliance with SB21-116 will need to submit supporting documentation to Colorado Commission of Indian Affairs (CCIA) staff indicating that the local school board will remove American Indian mascots, and share if a new mascot has been determined. Documentation should include, but is not limited to: a timeline from initiation to completion of changes, contractor receipts, school board meeting minutes, and any additional pertinent documentation. At a publicly noticed Quarterly Meeting, CCIA will vote on whether the changes made by the schools/school districts are sufficient to be removed from the list of non-compliant schools. CCIA's Fourth Quarterly Meeting in May 2022 will be the last opportunity for schools/school districts to demonstrate compliance with the bill's requirements before the June 1, 2022 deadline. Should compliance with SB 21-116 not be achieved by June 1, 2022, CCIA, in partnership with the Colorado Department of Education (CDE), will notify you of any remaining noncompliant public schools and the required monthly fine.

To assist your public schools in making this change, SB 21-116 includes the Building Excellent Schools Today (BEST) grant program as a potential source of funding to "accomplish any structural changes that might be necessary" to remove American Indian mascots. Applications for the Fiscal Year 2023 grant round are due in February 2022. All districts and charter schools must notify BEST of their intent to apply by November 30, 2021. Please visit the BEST website regularly for updated information or contact your Regional Program Manager for assistance with applying for a BEST grant.

Please reach out to Kathryn Redhorse, Colorado Commission of Indian Affairs, at kathryn.redhorse@state.co.us if you have any questions regarding a school's noncompliant status. Questions concerning the Department of Education can be directed to Georgina Owen, Colorado Department of Education, at owen_g@cde.state.co.us.

Sincerely,

Kathryn Redhorse
Executive Director, Colorado Commission of Indian Affairs
200 E. Colfax Ave.
Denver, CO 80203

Georgina Owen
ELD Specialist and Title VII State Coordinator Colorado Department of Education
201 E Colfax Ave,
Denver, CO 80203

EXHIBIT 2

(Declaration of Demetrius Marez)

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 ASSOICATION, Plaintiffs, v. JARED POLIS, Colorado Governor; DAVE YOUNG, Colorado State Treasurer; KATY ANTES, Commissioner of Education for the Colorado Department of Education; and 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-NYW

DECLARATION OF DEMETRIUS MAREZ

I, Demetrius Marez, hereby declare, under penalty of perjury, as follows:

MY BACKGROUND

1. I am over the age of the 18 and have personal knowledge about the matters set forth below. I submit this Declaration in support of the above-captioned Complaint for Declaratory and Injunctive Relief (the "Complaint").

2. I am one of the Plaintiffs in this matter.

3. I am a Colorado native and a Marine Veteran.

4. I am a resident of Lakewood, Colorado. I own a local handyman business and manage a condominium complex in Lakewood.

MY HERITAGE

5. I am 39% Diné (the Navajo People, or "The People of the Earth"). The Diné (pronounced "de-NEH") are included on the Department of the Interior's list of recognized Indian tribes, and have been included on every version of this list since approximately 1985. Most recently, the Tribe was included in the February 1, 2019, list published at 84 Fed. Reg. 1200 (Feb. 1, 2019).[1]

THE LAMAR "SAVAGE"

6. I graduated from Lamar High School in 1993.

7. My strong personal belief is that the Lamar High School name "Savage" is not offensive, dishonorable, derogatory or demeaning. In fact, it is quite the opposite. The Savage presents himself as a proud warrior with strength and integrity.

8. On September 7, 2021, I sent an email to letter to the Lamar School District School Board members (the "School Board Email"). I implored them to not change the name, logos, and imagery associated with the Lamar High School Savages. Alternatively, I requested that, if they were compelled to change the name and iconography related to the LHS Savages as a result of SB 21-116, the Board rename the LHS Savages to the LHS "Black Kettle." Black Kettle was a

[1] The Federally Recognized Indian Tribe List Act of 1994 (the "List Act") requires the Secretary of the Interior to publish an annual list of "all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *See* 25 U.S.C. §§ 5130, 5131.

prominent Chief of the Southern Cheyenne during the Colorado War and Sand Creek Massacre. A true and correct copy of the School Board Email is attached hereto as Exhibit 1 to this Declaration.

9. The next day, September 8, 2021, School Board member Lanie Mireles responded to my School Board Email (the "School Board Response"), writing:

> Key language taken from the bill includes: "American Indian Mascot means a name, symbol, or image that depicts or refers to an American Indian tribe, individual, custom, or tradition that is used as a mascot, nickname, logo, letterhead, or team name of the school." *I believe your suggestion would fit within this definition thereby making the school subject to the fines/fees if we adopted this suggestion*. Other board members can chime in with their thoughts.

(emphasis added). A true and correct copy of the School Board Response is attached as Exhibit 2 to this Declaration.

10. About July 23, 2021, the Lamar School District School Board has announced that if SB 21-116 is not "overturned by January 15, 2022, the Board of Education will appoint a committee of stakeholders, alumni, and students to solicit recommendations for a mascot change" in order to "allow sufficient time to implement the changes by the June 1, 2022 deadline."[2] A true and correct copy of the School Board press release is attached as Exhibit 3 to this Declaration.

REAPPROPRIATION

11. I was a Lamar High School Savage letterman in both wrestling and track. I wore my colors, and represented our school with pride and integrity like so many others.

[2] The press release is also assessable here: https://sites.google.com/lamarschools.org/district/home/sb21-116 (last visited November 5, 2021).

12. Representing our school outside of Lamar, I never heard a derogatory comment about our Savage name or Native Americans in general. Being Diné, I would have been sensitive to any derogatory remarks or gestures.

13. Because the eradication of Native American names, iconography and images poses serious and irreparable harm to the cultural identities and heritage of Native Americans, I regularly engage in efforts of "reappropriation" as a form of expressive speech in order to communicate political, cultural and social messages so as to render emotionally charged words and images nondisparaging, to mitigate the stigma of racism and discrimination that I have faced as a member of an underrepresented minority group and a member of a protected group, and to educate others as to what it means to be a Native American in American culture.

14. Reappropriation allows me to self-identify to non-Native American allies in order to help them associate their identities with the messages that I seek to convey in order to persuade others to join me in my cause.

15. I view my efforts of Reappropriation as an important form of speech. It allows me to communicate political, cultural, and social messages so as to render emotionally charged words and images nondisparaging, to mitigate the stigma of racism and discrimination that I have faced as a member of an underrepresented minority group and a member of a protected group, and to educate others as to what it means to be a Native American in American culture.

16. In addition, Reappropriation allows me to self-identify with the messages that I seek to convey to allies and to the groups that might associate with my efforts in order to persuade others to join the cause of Plaintiffs.

17. I know that some claim that Native American names, logos, and imagery invite racist conduct during sporting events. Instead of "blaming the victim," I view such situations as

opportunities for Reappropriation where students and fans to learn more about Native American heritage, not as an opportunity to eradicate appropriated symbols in public schools in order to avoid *the potential* of non-Native American fans behaving poorly at a public-school sporting events.

18. Through Reappropriation, I use these slurs and images in a positive manner in order to marginalize the racism that fellow Native Americans and our ancestors have faced and continue to face. I seek to fight bigotry by seizing the bigots' own names, symbols, or images that are banned by SB 21-116.

SB 21-116

19. SB 21-116 would ban the name, symbol and imagery of the Lamar High School Savages in Lamar, Colorado while leaving non-Native American names, symbols, and imagery in other public schools unchanged.

20. Outside of Colorado, there are many team names that honor Native Americans: Braves, Indians, Warriors, Blackhawks, Chiefs, Chippewas, Seminoles, Utes, and Fighting Sioux.

21. While some seek to characterize this battle as a fight over "race-based mascots," SB 21-116 only bans "American Indian mascots in Colorado," thereby leaving as unregulated the imagery and names such as "Fighting Irish" or "Boston Celtics" with a leprechaun mascot, or the "Vikings" with a Norseman's head. Recently, Notre Dame defended its "Fight Irish" leprechaun image and turned the nickname around:

> Because Notre Dame was largely populated by ethnic Catholics – mostly Irish, but also Germans, Italians and Poles – the university was a natural target for ethnic slurs, it said. At one football game in 1899, Northwestern students chanted "Kill the fighting Irish," Notre Dame said. . . . "Soon, Notre Dame supporters took it up,

turning what once was an epithet into an 'in-your-face' expression of triumph," the university said.[3]

22. SB 21-116 discriminates against Native Americans under the pretext of "helping" them as underrepresented minorities and beneficiaries of racial preferences, while protecting non-Native American bystanders (clearly not a protected group) who are offended by Native American names, logos, and imagery.

HOW SB 21-116 IMPACTS ME

23. SB 21-116 discriminates against me based on my Native American race, color, or national origin.

24. By banning names and images that Colorado deems disparaging, SB 21-116 denies Native Americans the opportunity to engage in the most fundamental act of human dignity—to honor their heritage by provoking conversations and engaging with others about racial identity and racial stereotypes within and without the Native American community.

CONCLUSION

25. I am participating in this Complaint for the reasons set forth above.

26. Accordingly, I respectfully request that the Court grant Plaintiffs' request for the issuance of a temporary preliminary injunction.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2021
Lakewood, Colorado

/s/ Demetrius Marez
Demetrius Marez

[3] *See* Dana Hunsinger Benbow, Notre Dame defends leprechaun mascot, ranked college football's 4th-most offensive in study, Indianapolis Star (August 26, 2021), https://www.indystar.com/story/sports/college/2021/08/23/notre-dame-defends-fighting-irish-leprechaun-mascot-ranked-offensive/8249420002/ last visited November 5, 2021).

EXHIBIT A

(September 7, 2021 Email to Lamar School Board)

From: Demetrius Marez <demetriusmarez@yahoo.com>
To: lanie.mireles@lamarschools.org <lanie.mireles@lamarschools.org>; nancy.winsor@lamarschools.org <nancy.winsor@lamarschools.org>; conniejacobsen@lamarschools.org <conniejacobsen@lamarschools.org>; chris.wilkinson@lamarschools.org <chris.wilkinson@lamarschools.org>; roddunn@lamarschools.org <roddunn@lamarschools.org>; shannon.obryan@lamarschools.org <shannon.obryan@lamarschools.org>; jake.chamberlain@lamarschools.org <jake.chamberlain@lamarschools.org>
Sent: Tuesday, September 7, 2021, 07:50:18 PM MDT
Subject: Lamar High School Savage Name and Iconography

September 7th, 2021

Lamar School District Board of Education

Ms. Lanie Meyers-Mireles, President
lanie.mireles@lamarschools.org

Ms. Nancy Winsor, Vise President
Nancy.winsor@lamarschools.org

Ms. Connie Jacobson, Secretary
connie.jacobsen@lamarschools.org

Mr. Chris Wilkinson, Treasure
Chris.wilkinson@lamarschools.org

Mr. Rod Dunn, Director
rod.dunn@lamarschools.org

Mr. Shannon O'Bryan, Director
Shannon.obryan@lamarschools.org

Mr. Jake Chamberlain, Director
jake.chamberlain@lamarschools.org

Re: Lamar High School Savage Name and Iconography

Dear Board Members

My name is Demetrius Marez. I am an interested former community resident of the Lamar School District, which includes Lamar High School ("LHS"). I am of Indian heritage, 39% Dine ("the Navajo People of the Earth"). I graduated from Lamar High School in 1993. I am a small business owner and a taxpayer in Colorado.

Considering your press release from July 23, 2021, I understand that the Lamar School District Board of Education (the" Board") is considering changing the name and iconography related to the LHS "Savage" in light of the enactment of SB 21-116, the "Prohibit American Indian Mascots" Act. As you know, the Act prohibits the "use of American Indian mascots by public schools, "including LHS as of June 1, 2022. I am also aware of the consequences of $25,000 per month fine for not changing. I do understand that it will cost the school board $250,000 to $500,000 to change everything as well.

The Lamar High School name "SAVAGES" is not offensive, dishonorable, derogatory or demeaning to me. In fact, it is quite the opposite. The Savage presents himself as a proud warrior with strength and integrity. Accordingly, to correlate the word "SAVAGE" Just as a Native term or word is ridiculous, and I request that the Board not change the name and iconography related to the LHS Savage. To the extent, however, that the Board feels compelled to change the name and iconography related to the LHS Savage, I request that the Board consider renaming the LHS Savages to "Lamar High School Black Kettle." Black Kettle was a prominent Chief/leader of the Southern Cheyenne during the Colorado War and the Sand Creek Massacre.

I look forward to your reply at your earliest convenience.

Sincerely,

Demetrius Marez

10115 W. 25th Ave. #5

Lakewood CO, 80215

Demetriusmarez@yahoo.com

EXHIBIT B

(September 8, 2021 Lamar School Board Response)

From: "Lanie Mireles" <lanie.mireles@lamarschools.org>
To: "Demetrius Marez" <demetriusmarez@yahoo.com>
Cc: "nancy.winsor@lamarschools.org" <nancy.winsor@lamarschools.org>, "conniejacobsen@lamarschools.org" <conniejacobsen@lamarschools.org>, "chris.wilkinson@lamarschools.org" <chris.wilkinson@lamarschools.org>, "roddunn@lamarschools.org" <roddunn@lamarschools.org>, "shannon.obryan@lamarschools.org" <shannon.obryan@lamarschools.org>, "jake.chamberlain@lamarschools.org" <jake.chamberlain@lamarschools.org>
Sent: Wed, Sep 8, 2021 at 8:00 AM
Subject: Re: Lamar High School Savage Name and Iconography

Demetrius,
Thank you for your email and suggestion. We appreciate hearing from invested stakeholders. We are all very aware of your advocacy on this issue through written correspondence, testimony, etc. Again, thank you for all of your work.

Key language taken from the bill includes:
"American Indian Mascot means a name, symbol, or image that depicts or refers to an American Indian tribe, individual, custom, or tradition that is used as a mascot, nickname, logo, letterhead, or team name of the school." I believe your suggestion would fit within this definition thereby making the school subject to the fines/fees if we adopted this suggestion. Other board members can chime in with their thoughts.

Thank you again for your ongoing advocacy and support. The district continues to evaluate options and seek consultation and guidance on this topic. Please don't hesitate to maintain contact with us and continue to share additional thoughts and suggestions.

Warm regards,
Lanie

On Tue, Sep 7, 2021 at 7:50 PM Demetrius Marez <demetriusmarez@yahoo.com> wrote:

EXHIBIT C

(Lamar School Board Press Release)

The Lamar School District Board of Education held a community forum on July 15th to provide information related to SB21-116 which prohibits the use of Native American mascots by Colorado schools beginning June 1, 2022.

The Board of Education notified the public of the following:

- The Board never voted to change or replace the mascot. SB21-116 was introduced as legislation on February 23, 2021 by Representative McLauchlan and was subsequently approved in the House and Senate. Governor Polis signed the bill into law on June 28, 2021.
- The Board does not believe the Lamar High School, nor the community of Lamar, represents or uses the mascot in a negative or derogatory manner.
- This bill will impose a fine of $25,000 per month for districts failing to comply with the law beginning June 1, 2022.
- The high school will maintain the current mascot/logo and associated imagery through May 31, 2022.
- The Board recognizes that NAGA and Noble Savages are raising funds to file an injunction and lawsuit in an effort to overturn the law.
- The Board does not believe it would be financially prudent to contribute any district funds towards covering legal fees associated with filing an injunction or a lawsuit, as there is no guarantee of the timeframe or costs associated with reaching a settlement or court decision. District funds must be prioritized for the education of the students, as well as recruitment and retention of quality staff.
- Should the law NOT be overturned by January 15, 2022, the Board of Education will appoint a committee of stakeholders, alumni, and students to solicit recommendations for a mascot change. A new mascot will be selected by March 1, 2022. It is necessary for the Board to begin taking these steps in early 2022 to allow sufficient time to implement the changes by the June 1, 2022 deadline.
- If the law is overturned prior to May 31, 2022, Lamar High School will remain the “Lamar Savages” with no changes to the logo.

Approximately 125 community members attended the forum, with approximately two dozen people speaking offering feedback. Following the public comment period, a poll was taken asking the community members to choose one of the following:

- Keep the “Savages” name and adopt a new logo that does not include any Native American imagery.
- Change both the name and logo for the high school.

Ninety-three individuals voted to maintain “Savages” and adopt a new logo; 6 voted to replace both; and 26 individuals provided a written-in response of “keep both”. It has been widely discussed that the Board should have included an option to “keep both”, however if the law is overturned, Lamar High School will experience no changes to the current mascot. If the law remains in place or a lawsuit has not been settled, the district will have no choice but to make the necessary changes to avoid substantial

fines, or the risk of substantial fines. Again, it is the duty of the Board of Education to remember always that the greatest concern must be the educational welfare of the students attending the school and to be fiscally responsible and make decisions that leave the district in a sound financial position.

In an effort to be proactive, the Board is seeking feedback from the Colorado Commission of Indian Affairs to ensure that the district will be in compliance with the law, should "Savages" be maintained without the Native American imagery. The Board of Education will continue to work through this process and as new information becomes available, it will be shared with the community. The Board recognizes this to be a passionate topic for the community and wants to provide ample information and opportunity for the community to be engaged in this process.

EXHIBIT 3

(Declaration of John Doe, a Minor)

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 ASSOICATION, Plaintiffs, v. JARED POLIS, Colorado Governor; DAVE YOUNG, Colorado State Treasurer; KATY ANTES, Commissioner of Education for the Colorado Department of Education; and 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-NYW

DECLARATION OF JOHN DOE, A MINOR

I, John Doe, a minor, hereby declare, under penalty of perjury, as follows:

MY BACKGROUND

1. I am under the age of the 18 and have personal knowledge about all of the matters set forth below. I submit this Declaration in support of the above-captioned Complaint for Declaratory and Injunctive Relief (the "Complaint").

2. I am one of the Plaintiffs in this matter. Because I am a minor, I am using the pseudonym "John Doe" for my name in this declaration.

3. I live in Yuma, Colorado. I am a student at Yuma High School in Yuma, Colorado, which is known as the "Yuma Indians," and where I participate in many school activities, as well as football and wrestling. I am proud to wear our Native jerseys.

MY HERITAGE

4. I have always known I was part Indian, and I believe I inherited those roots from both parents, as my mom and my dad both had Indian ancestors. Although my grandmother had been adopted, nearly a decade ago she discovered her Native roots and went to Oklahoma to meet her biological family, which is both Cherokee and Chippewa.

5. My father always knew he also had Indian ancestors, and I always was proud of that fact.

6. My mother grew up near an Oregon reservation and attended high school with the children from the reservation. Her school had a "white buffalo" mascot.

7. When I entered fifth grade, my family moved into a new school district where I attended a Native themed school. Because of my Native heritage, I realized I took more pride in my school. I was happy to share my heritage with everyone who would listen. I thought it was cool that my family was Indian, and my school was Indian!

8. My coaches have taught me and my teammates to be proud of our Native team and to always show respect to our opponents, to their team, their town, their field. We would never hurt their property. I have never heard any ridicule about our Native team or about my Native heritage. In fact, other students are also proud of my roots. At school, we like to do Native chants together.

9. My community is proud of its Native history, from thousands of years ago to today; from the Yuma Points and Yuma the Indian; from Native students attending our school; we have very strong school spirit, and strong community support.

10. While we have Cherokee and Chippewa roots, my family does not have any tribal affiliation, but we feel our town and our school are what "tribe pride" are all about.

11. I am proud to be an Indian, Redskin, Native American, Warrior, or whatever. None of these titles are demeaning to me. I am pleased when anyone calls me by any of those titles. My Native identity has strengthened my self-esteem, just as my Native school has added to my identity.

HOW SB 21-116 IMPACTS ME

12. SB 21-116 discriminates against me based on my Native American race, color, or national origin.

13. I participate in many school activities, as well as football and wrestling. These activities often honor my culture and heritage.

14. Because I was afraid that Yuma High School's current name and logo would be banned on school athletic wear as a result of SB 21-116, on October 6, 202,1 my mother purchased "DSG Men's Cold Weather Compression Tights" for $41.26 to replace my Yuma Indian compression shorts that I wear while playing football for Yuma High School.

15. I want our lawmakers to know I am just as proud of my personal heritage as I am my school's Native name and local history. I am proud to share that history with all of Colorado and tell of our "Yuma Spear Points" and the grave of our namesake, "Yuma The Indian."

16. This law attacks something which has been in place 86 years, and which everyone in our town respects and is proud of, whether Indian or not. If our Indian history and culture is erased, this will not only hurt our students, teachers, and school, but it will also hurt our town. We will feel like we have let down "Yuma the Indian" who is buried here. We would have let down

the farmers (later an esteemed paleontologist, Dr. Harold V. Andersen, a Yuma graduate) who found the famous, ancient spear points in our county, spoke at our school, and led to the change from Cornhuskers to Indians in 1935. This law has made everyone very upset and sad. No one who I know believes our proud theme should be erased by people who do not even live here and may possibly have never even been here!

17. I object to SB 21-116's regulation and suppression, which treats me differently solely based on my race and the race of my ancestors.

18. Because of SB 21-116, I cannot reappropriate my heritage through my use of positive Native American names, logos, and imagery, as anyone from any other race is free to do.

CONCLUSION

19. As a teenager living in Colorado, I am fighting this un-American law, in order to protect my Native family, my Native school, my Native-themed town, and my Native-themed county. Our identity is positive and honorable and should never be erased. I believe my opinion should be heard, and my legal rights should be properly protected.

20. Accordingly, I respectfully request that the Court grant Plaintiffs' request for the issuance of a temporary restraining order.

DECLARATION OF MINOR

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2021
Yuma, Colorado

/s/ John Doe
John Doe, a minor

DECLARATION OF PARENT

Pursuant to 28 U.S.C. § 1746(2), I, Lyndsey Blach, hereby declare under penalty of perjury that:

1. I am over the age of 18 and competent to testify.

2. I am the mother of John Doe, the minor Plaintiff identified in the foregoing declaration of John Doe, a Minor (the "**John Doe Declaration**").

3. The factual allegations and statements set forth in the John Doe Declaration are true and correct.

Executed on November 5, 2021
Yuma, Colorado

/s/ Lyndsey Blach
Lyndsey Blach

EXHIBIT A

(Dick's Sporting Goods Receipt)

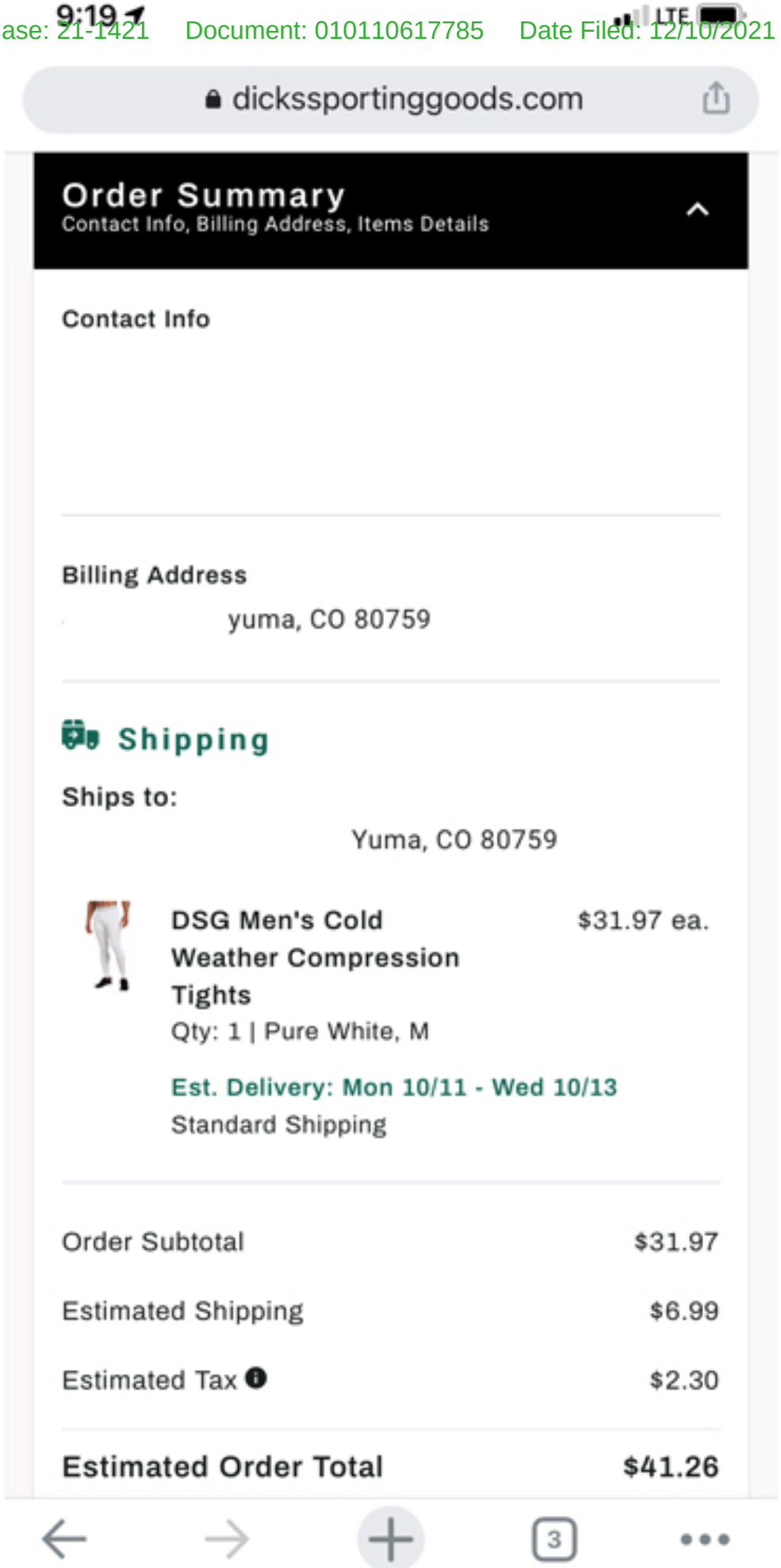
9:19
LTE
dickssportinggoods.com
Order Summary
Contact Info, Billing Address, Items Details
Contact Info
Billing Address
yuma, CO 80759
Shipping
Ships to:
Yuma, CO 80759
DSG Men's Cold Weather Compression Tights
$31.97 ea.
Qty: 1 | Pure White, M
Est. Delivery: Mon 10/11 - Wed 10/13
Standard Shipping
Order Subtotal
$31.97
Estimated Shipping
$6.99
Estimated Tax
$2.30
Estimated Order Total
$41.26
3

EXHIBIT 4

(Declaration of Jane Doe, a Minor)

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 ASSOICATION, Plaintiffs, v. JARED POLIS, Colorado Governor; DAVE YOUNG, Colorado State Treasurer; KATY ANTES, Commissioner of Education for the Colorado Department of Education; and 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-NYW

DECLARATION OF JANE DOE I, A MINOR

I, Jane Doe, a minor, hereby declare, under penalty of perjury, as follows:

MY BACKGROUND

1. I am under the age of the 18 and have personal knowledge about all of the matters set forth below. I submit this Declaration in support of the above-captioned Complaint for Declaratory and Injunctive Relief (the "Complaint").

2. I am one of the Plaintiffs in this matter. Because I am a minor, I am using the pseudonym "Jane Doe" for my name in this declaration.

3. I am a student at Yuma High School in Yuma, Colorado, which is known as the "Yuma Indians."

4. I was born and raised in Colorado. My parents and I moved to Yuma when I was a toddler. My schooling began at Little Indians Preschool in Yuma. I was only four years old, but I remember the black sign out front says, "Little Indians." I also remember when we all sat in a circle on a Little Indians carpet for story time and singing.

5. Tribe Pride is important to me. It is seen everywhere at YHS and in Yuma, ever since we became the Yuma Indians in 1935. On my cell phone I put a photo from my student handbook, to help me remember the school song. This photo includes three "YHS MOTTO-VALUES: Tribe Pride. Tradition. Excellence." A triangle around our school's icon lists four kinds of Tribe Pride, which are "self, others, learning, and property." I would say that our school strongly focuses on learning respect.

6. My girlfriends and I all cried together when we first heard about Colorado's plan to take away the Indian theme from our schools. We even agreed that we would chain ourselves to a school fence, if we could stop anyone from erasing our Indians from our school!

MY HERITAGE

7. Today, as a Yuma Indian with Indian blood, I am part of my culture, and my culture is part of me!

8. My parents told me of my Indian heritage, which comes from both my parents, but from different tribes. I don't have a tribal enrollment, but I am a mixture of both my parents, who

are Indian, White, and Hispanic. My mother calls me her "Indian Princess" because of my strong Native features, dark skin, and long, black hair.

9. My mother told me she gave me Cherokee blood and my father also has Native blood, but I am okay with being Indian, Redskin, Native or whatever. In our town everyone is proud to be Native of any type. I have never seen anyone discriminate someone for being a Yuma Indian or any other type of Indian. This is what we look up to!

10. Besides jerseys, I also wear my Yuma Indians shirts to represent my "tribe pride." I am proud to be part of our school tribe, just as I'm proud to be part Indian from both my parents. In Yuma, both adults and students wear Yuma Indians shirts. My mother wears Yuma Indian shirts; my father and my uncle wear Yuma Indian hats. An Indian is never a bad symbol or a bad thing!

HOW SB 21-116 IMPACTS ME

11. SB 21-116 discriminates against me based on my Native American race, color, or national origin.

12. With the enactment of SB 21-116, I will lose opportunities to mentor non-Native Americans about my Native American ethnic heritage.

13. By banning Yuma Indians in our school, this law impairs my ability to celebrate my personal Native heritage, from honoring my parents who are from two different tribes, from honoring my town's history, from honoring Yuma (the Indian who is buried here in 1860's), from honoring tribes who lived and traveled here a century or more ago, from honoring the history of the paleo Indians who were here thousands of years ago, from wearing my Yuma Indians jersey, and from raising my future children to continue the "tribe pride" which I have enjoyed almost all my life, while in our Little Indians Preschool, Morris Elementary, Yuma Middle School, and Yuma

High School. In my view SB 21-116 treats me differently from every other racial demographic in the State of Colorado.

CONCLUSION

14. I am participating in this Complaint for the reasons set forth above.

15. Accordingly, I respectfully request that the Court grant Plaintiffs' request for the issuance of a preliminary injunction.

DECLARATION OF MINOR

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2021
Yuma, Colorado

/s/ Jane Doe
Jane Doe, a minor

DECLARATION OF PARENT

Pursuant to 28 U.S.C. § 1746(2), I, Michelle Serrano, hereby declare under penalty of perjury that:

1. I am over the age of 18 and competent to testify.

2. I am the mother of Jane Doe, the minor Plaintiff identified in the foregoing declaration of Jane Doe, a Minor (the "**Jane Doe Declaration**").

3. The factual allegations and statements set forth in the Jane Doe Declaration are true and correct.

Executed on November 5, 2021
Yuma, Colorado

/s/ Michelle Serrano
Michelle Serrano

EXHIBIT 5

(Declaration of Chase Aubrey Roubideaux)

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 ASSOICATION, Plaintiffs, v. JARED POLIS, Colorado Governor; DAVE YOUNG, Colorado State Treasurer; KATY ANTES, Commissioner of Education for the Colorado Department of Education; and 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-NYW

DECLARATION OF CHASE AUBREY ROUBIDEAUX

I, Chase Aubrey Roubideaux, hereby declare, under penalty of perjury, as follows:

MY BACKGROUND

1. I am over the age of the 21 and have personal knowledge about the matters set forth below. I submit this Declaration in support of the above-captioned Complaint for Declaratory and Injunctive Relief (the "Complaint").

2. I am one of the Plaintiffs in this matter.

3. I graduated from Yuma High School, Yuma, Colorado in 2010.

4. Yuma High School has been known as the Yuma Indians since 1935. In fact, from 1993 to 2010, I lived across the street from the campus, in direct view of the sign above the stadium press box on the football field. In 2002, I helped my father paint and hang the school's first sign.

5. As a Yuma student in grade school. I won a national PBS Contest called "Dear Mr. President." I wrote a letter to the U.S. President about the Native diabetes problem, which is so prevalent. My Native father and I went to the Oval Office to visit the President, together with seven other winners; the President told me of legislation and budgeting toward improving the Native health crisis. I gave gifts to the President, including a Yuma Indians baseball cap and a framed arrowhead, which my father found in Yuma County.

6. In high school, I continued to share my heritage. My best friend was new to Yuma, and believed he had Native heritage. We were both proud to be Yuma Indians. We enjoyed participating in all school functions, including all sports, Homecoming and Wigwam, where there were many foods to buy, and we had so much community support in raising activity funds.

7. As a Yuma Indian, I believed I was a part of a very long legacy: now 86 years!, and I wanted to leave my positive mark as well. My parents gave me an Indian name of Star Boy.

8. On September 5, 2021, I sent a letter to the Yuma School District-1 School Board (the "School Board") members and certain administrators (the "School Board Letter"). I implored them to not change the name, logos, and imagery associated with the Yuma High School Indians. Alternatively, I requested that, if they were compelled to change the name and iconography related to the YHS Indians as a result of SB 21-116, the Board rename the YHS Indians to the YHS "Tall Bulls." Tall Bull was a prominent Chief of the Southern Cheyenne during the Colorado War

following Sand Creek Massacre. He fought at the Battle of Beecher Island, where I have attended reenactments many times. Tall Bull is a Lakota ancestor of mine, but he and many in his band were massacred at Summit Springs, just about 45 miles northwest of Yuma. A true and correct copy of the School Board Letter is attached hereto as Exhibit 1.

9. While the School Board never responded to the School Board Letter, on or about September 23, 2021, *The Yuma Pioneer* published an article that reported that on September 20, 2021, at a regularly scheduled Board meeting, the School Board "eliminated" my suggestion of "Tall Bulls," "because it refers to a Native American chief killed in the 1880s."[1] A true and correct copy of *The Yuma Pioneer* article is attached hereto as Exhibit 2. *The Yuma Pioneer* also reported that Superintendent Diana Chrisman disclosed that the "cost to change the mascot is definitely nearing $400,000 to the district." *Id.*

MY HERITAGE

10. I received my Sioux heritage from my father, who is a member of Rosebud Sioux Tribe. My father grew up there in extreme poverty. I am also an enrolled Rosebud tribal member; my blood degree is about 25%.

11. The Rosebud Sioux Tribe of the Rosebud Indian Reservation is a federally recognized Indian Tribe. The Tribe is included on the Department of the Interior's list of recognized Indian tribes, and has been included on every version of this list since approximately 1985. Most recently, the Tribe was included in the February 1, 2019, list published at 84 Fed. Reg. 1200 (Feb. 1, 2019).[2]

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[1] *See* https://www.yumapioneer.com/yuma-mascot-list-trimmed-to-15/ (last visited November 5, 2021).

[2] The Federally Recognized Indian Tribe List Act of 1994 (the "**List Act**") requires the Secretary of the Interior to publish an annual list of "all Indian tribes which the Secretary

I AM "NOT YOUR MASCOT"

12. I agree with most Americans that no person or nation of people should be a "mascot."

13. That is why I personally opposed a decade's old and long deceased practice of using American Indian mascot performers, caricatures and cartoonish minstrels (and related racial stereotypes, names and slurs) to mock and ridicule Native Americans and their heritage—such as Lamar High School's former mascot *Chief Ugh-Lee* or the Atlanta Braves' former Native American caricature *Chief Noc-A-Homa*—in sports and other public venues. Indeed, these Native American impersonators were removed long ago because of their negative impact on Native Americans.

14. Instead, I believe that culturally appropriate Native American names, logos, and imagery are important to honor Native Americans, and to help public schools neutralize offensive and stereotypical Native American caricatures and iconography while teaching students and the general public about American Indian history.

15. As of the date of this Declaration, it is my understanding that there are currently numerous public schools in Colorado which have team names, logos, and imagery that are directly impacted by SB 21-116.[3] At least four of these public schools are located in Yuma, including the "Little Indians Preschool," "Morris Elementary," "Yuma Middle School," and "Yuma High

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recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *See* 25 U.S.C. §§ 5130, 5131.

[3] *See* Sue McMillin, "25 Colorado schools still had Native American mascots. This week one finally decided to make a change," The Colorado Sun (March 17, 2021), https://coloradosun.com/2021/03/17/cheyenne-mountain-mascot-native-american-controversy/ (last visited November 5, 2021).

School." It is also my understanding that none of these impacted schools has a Native American "mascot" related to their respective public schools.

16. As such, by using the term "mascot," supporters of SB 21-116 have conflated the use of American Indian mascot performers (something that I oppose) with culturally appropriate Native American names, logos, and imagery (something that I seek to protect in order to honor my Native Americans heritage).

NATIVE AMERICANS ARE NOT OFFENDED BY TEAM NAMES

17. It is a demeaning stereotype to suggest that Native Americans are monolithic in their views on Native American names and imagery in public schools. Use of Native American names and imagery is one of personal opinion.

18. While many non-Native Americans claim to be standing up to the discrimination against Native Americans, they are, instead, "bystanders" who are not the target of SB 21-116, and whose only harm is one of being offended by Native American names, logos, and imagery

19. Until now, I have been afraid to state my opposition to SB 21-116 simply to avoid confrontation with others. Now, I have decided to take a stand.

HOW SB 21-116 IMPACTS ME

20. In my view, SB 21-116 restricts what I do or do not hold dear, namely my "tribe pride" for Yuma Indians. This law restricts what signs I can post on the Yuma High School football field.

21. It is my view that the goal of many of the proponents of SB 21-116 and similar laws across the country is the complete eradication of positive Native American names, logos, and imagery from mainstream American culture.

CONCLUSION

22. In writing this declaration, I am reminded of the wise words of Justice Clarence Thomas, who accurately states why I am involved in this fight against SB 21-116: "Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J. concurring in result). I am participating in this Complaint for the reasons set forth above.

23. Accordingly, I respectfully request that the Court grant Plaintiffs' request for the issuance of a temporary restraining order.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2021
Denver, Colorado

/s/ Chase Aubrey Roubideaux
Chase Aubrey Roubideaux

EXHIBIT A

(September 5, 2021 Letter to School Board)

September 5, 2021

VIA ELECTRONIC MAIL
TO: Yuma Board of Education
ysd1board@yumaschools.net
Dan Ross, Pres.
Duane Brown, VP
Kim Langley, Sec./Treas.
Lindsey Galles, Dir.
Thomas Holtorf, Dir.
ALSO: Dianna Chrisman, Supt.
Brady Nighswonger, YHS Principal

VIA HAND DELIVERY:
TO: YSD-1Office: 418 S. Main, Yuma, CO 80759

RE: YHS Name and Symbols

Dear Board Members and Administrators:

My name is Chase Aubrey Roubideaux, and I graduated from Yuma High School in 2010. I grew up next door to YHS almost all my life, and I am one hundred percent Yuma Indian. I am an enrolled member of Rosebud Sioux Tribe, and my blood degree is 17/64ths (about 27% Lakota). Last, I am also a Colorado taxpayer.

I understand that the Yuma Board of Education is considering changing the name and iconography related to the YHS "Indians" following the enactment of SB 21-116, the "Prohibit American Indian Mascots" Act, which I strongly opposed.

First, I petition the Board NEVER change the name and iconography related to the YHS Indians. It is our school and town name since 1935! Our Town and County themselves were named for "Yuma The Indian" in 1887 and 1889, respectively, both well over 130 years! Yuma The Indian is still buried here.

Alternatively, if the Board is compelled to change the name and iconography related to the YHS Indians, I request that the Board rename the YHS Indians to the **YHS "Tall Bulls."** Tall Bull was a prominent Chief of the Southern Cheyenne during the Colorado War following Sand Creek Massacre. He fought at the Battle of Beecher Island, where I have attended reenactments many times. Tall Bull is a Lakota ancestor of mine, but he and many in his band were massacred at Summit Springs, just about 45 miles northwest of Yuma.

I look forward to hearing back from you at your earliest convenience.

Sincerely,

Chase Aubrey Roubideaux
chase.roubideaux@gmail.com
1451 – 24th Street
Apt #158
Denver, CO 80205
PH: 970-597-0286

EXHIBIT B

(September 23, 2021 *Yuma Pioneer* article)

The Yuma Pioneer
Every Thursday Since 1886

Yuma mascot list trimmed to 15

By: yumapioneer / On: September 23, 2021 / In: Local News

There are now 15.

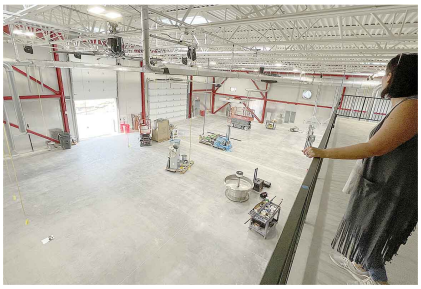
The Yuma School District-1 Board of Education trimmed the list of submissions for a new mascot during its regular monthly meeting, Monday night at the district office located on the southern edge of downtown Yuma.

Yuma-1 needs to eliminate “Indians” which has been around

NEWS

Yuma mascot list trimmed to 15

ON: SEPTEMBER 23, 2021 /
IN: LOCAL NEWS



Yuma-1 Board hears project update

ON: SEPTEMBER 23, 2021 /
IN: LOCAL NEWS

since the mid-1930s for a new mascot, and incorporate a new one during the current school year. That is because Senate Bill 21-116 was passed by the Colorado Legislature during this year's session, dictating that all public schools with Native American mascots must have them removed by June 1, 2022.

Four of the five board members participated in Monday's meeting, Dan Ross, Lindsey Galles, and Duane Brown in person, and Kim Langley remotely. Board member Thomas Holtorf was absent.

Yuma-1 has been accepting submissions for a new mascot for the past several weeks, leading up to the September board meeting. There were 36 community submissions, representing 22 options, by the September 15 deadline.

The board then narrowed down the possible new mascots Monday night to 15 — basically eliminating those that now way would be accepted for various reasons.

Following are the remaining 15:

• Pioneers.
• Tribe.
• Aggies.
• Lightning.
• Bison.
• Yetis.
• UFOs.
• Ring Necks.
• Renegades.
• Flyers.
• Thunder.
• Huntsmen.
• Railroaders.
• Phoenix.
• Balers.

Yuma-1 again will have submission forms available for the

public to comment on which choices they like the best. There was talk about having some kind of social media poll, or a Survey Monkey poll, but it was noted the explanations given behind each original submission was very thoughtful, and it would be preferable to have that again instead of just clicking on a poll.

October 8 is the deadline for community feedback on the remaining 15. The board will have a work session on October 11 to gain more input in person from the public. The board then will have more discussion on the topic at its October meeting.

The timeline calls for the board to select the new mascot at the November meeting. The district then will work with companies for a new logo, which will be selected in time for the fall sports uniforms to be ordered in a timely fashion.

The Pioneers and the Tribe each had the most among the 36 public submissions, each receiving seven.

"What I appreciated is they provided the rationale," Superintendent Dianna Chrisman said of all the submissions. "I think all of them had a connection to Yuma or Yuma's history."

Several suggestions were eliminated Monday night, for various reasons. Yuma was the Cornhuskers for about 15 years before switching to Indians in the mid-1930s. Someone suggested returning to Cornhuskers, but there was concern about the University of Nebraska having copyright privileges. The suggestion of "Tall Bulls" was eliminated because it refers to a Native American chief killed in the 1880s. "Arrows" was thrown out because of its Native American connection. Others tossed out on the first cut included Red Renegades, Thunderbirds, Hawks, and Red Hawks.

Board member Duane Brown expressed concerns about Tribe because of its connection to Native Americans. Ross said the term goes back to Biblical times and is used all over the world, so he felt it would be acceptable. Galles said there is a lot of ways to define Tribe. Brown said he agreed, but had concerns it would not be accepted.

Board members did talk about how those behind the state

legislation, with passions running high, creates a wide-ranging gray area that they could find unacceptable. Some suggestions were eliminated because board members noted they did not want Yuma's new mascot to be one that is used by several different schools.

It also was discussed how imagery was more important than the mascot word itself. It was brought up that Lamar still was going to keep "Savages" but would eliminate its imagery, and that Eaton has stuck with "Reds" but just got rid of its Native American caricature imagery.

Chrisman said during the discussion that the cost to change the mascot is definitely nearing $400,000 to the district, so the community needs to be committed to the mascot change, whichever one is chosen.

The state legislation dictates school districts such as Yuma must make the change, and eliminate all imagery by June 1. Ross asked Chrisman how likely the district will be able to meet that deadline, and if it would have to pay the monthly fine of $25,000 if it did not.

Chrisman said the district probably can get most of it done by June 1, but the gym floors probably would not be done until summer vacation. She said Yuma-1 is working with other impacted districts and the Rural School Alliance to be allowed some leeway. She said the public would not be in the gyms during the summer anyway and they could not be done until then unless they are taken away as classroom space.

"I think as long as we have the good-faith effort…I think we'll be okay," Chrisman said, adding that at this point there is no guarantee.

Previous Post: **Yuma-1 Board hears project update**

LINKS

Community

CAPA
Old Threshers
ReadyNortheast
Yuma Chamber of Commerce
Yuma County Economic Development

Government

City of Yuma
Food Inspections
NECO Health Dept
Republican River Water Cons. Dist.
Yuma County Government
Yuma County Office of Emergency Management

News

Pioneer Historical Archives
Yuma County History Website

Schools

Arickaree School District
Liberty School
Lone Star School District
Otis School District
Yuma School District

Sports

CHSAANow
Colorado Preps
CSU Rams
CU Buffs Athletics
Max Preps

EXHIBIT 6

(Declaration of Donald Wayne Smith, Jr.)

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 ASSOICATION, Plaintiffs, v. JARED POLIS, Colorado Governor; DAVE YOUNG, Colorado State Treasurer; KATY ANTES, Commissioner of Education for the Colorado Department of Education; and 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-NYW

DECLARATION OF DONALD WAYNE SMITH, JR.

I, Donald Wayne Smith, Jr. hereby declare, under penalty of perjury, as follows:

MY BACKGROUND

1. I am over the age of the 21 and have personal knowledge about the matters set forth below. I submit this Declaration in support of the above-captioned Complaint for Declaratory and Injunctive Relief (the "Complaint").

2. I am one of the Plaintiffs in this matter. In 2005, I moved my family to Yuma, Colorado, where I became pastor of Yuma Christian Church aka Yuma Church of Christ in Yuma. We own our home and pay taxes in Yuma County.

3. In addition to being a pastor, I offer pastoral counseling to those in crisis in our community, including children. I have substitute taught for Yuma public schools. I have also taught courses at Morgan Community College.

4. To the best of my knowledge and belief, my grandmother was a full blood Cherokee. I am proud of my Cherokee heritage. I have presented Native programs at Yuma Public Schools, adult meetings, and many other venues. I often play my Native flute and tell Native American folk tales. The purpose of the stories, especially for students, is to teach a positive message, such as kindness, communication, and good listening skills.

5. In Yuma, many adult citizens consider themselves to be "Yuma Indians" as well as the students. I have attended many local sports and other events in Yuma Schools, where over half of students are minorities, and I have witnessed "tribe pride" and never seen a derogatory incident, either by locals or opposing teams. It seems to me that most citizens know of the history of "Yuma the Indian," the man for whom the schools, town, and county are named, as well as the "Yuma Points" the ancient spear points that were discovered here.

MY HERITAGE

6. As a Native American, I seek to maintain the rich cultural history and traditions of Native America in the public. In fact, I am thankful to bring Native programs into Yuma culture and in Yuma classrooms. This should include all public schools, which I believe should be "centers of excellence" in teaching and sharing the quickly disappearing history of Native Americans.

7. I received my Cherokee heritage from my grandmother, a member of Cherokee.

8. My heritage is often the subject of conversation, particularly since moving to Yuma. The school students where I presented programs are impressed by that. When I discuss my ancestry, I am proud to say I am Cherokee from my grandmother, my Mom's Mom. My opinion is that my heritage is enriched by living here with a town of Yuma Indians; it is a positive experience for me and the other Natives I know.

HOW SB 21-116 IMPACTS ME

9. SB 21-116 discriminates against Native Americans under the pretext of "helping" them as underrepresented minorities and beneficiaries of racial preferences while protecting non-Native American bystanders who are offended by Native American names, logos, and imagery.

10. While SB 21-116 seeks to protect against an "unsafe learning environment" caused by "a name, symbol, or image that depicts or refers to an American Indian Tribe, individual, custom, or tradition that is used as a mascot, nickname, logo, letterhead, or team name for the school," what better State institution could there be for teaching non-Native American students about the proud history of Native Americans than Colorado's public school system? To be sure, what better place to teach students about the harmful stereotyping of Native Americans, and other underrepresented minorities and members of a protected group than in the educational environment of a Colorado public school?

11. Conversely, there could be no worse forum for suppressing the proud history of Native Americans than in Colorado's public schools, institutions of education and learning.

12. With the enactment of SB 21-116, I will lose opportunities to mentor non-Native Americans about Native American ethnic heritage.

13. Additionally, to substitute teach again, I would have to be willing to endure a hostile environment that erases my Native American heritage and culture.

14. By banning names and images that Colorado deems disparaging, SB 21-116 denies Native Americans the opportunity to engage in the most fundamental act of human dignity—to honor their heritage by provoking conversations and engaging with others about racial identity and racial stereotypes within and without the Native American community.

CONCLUSION

15. In writing this declaration, I am reminded of President Biden's words on October 8, 2021, in his "A Proclamation on Indigenous Peoples' Day, 2021," where he wrote:

> Our country was conceived on *a promise of equality and opportunity for all people* — a promise that, despite the extraordinary progress we have made through the years, we have never fully lived up to. That is especially true when it comes to upholding the rights and dignity of the Indigenous people who were here long before colonization of the Americas began."

(Emphasis added).

16. I am participating in this Complaint for the reasons set forth above.

17. Accordingly, I respectfully request that the Court grant Plaintiffs' request for the issuance of a preliminary injunction.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2021
Yuma, Colorado

/s/ Donald Wayne Smith, Jr.
Donald Wayne Smith, Jr.

EXHIBIT 7

(Declaration of Eunice Davidson of NAGA)

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 ASSOICATION, Plaintiffs, v. JARED POLIS, Colorado Governor; DAVE YOUNG, Colorado State Treasurer; KATY ANTES, Commissioner of Education for the Colorado Department of Education; and 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-NYW

DECLARATION OF EUNICE DAVIDSON

I, Eunice Davidson, hereby declare, under penalty of perjury, as follows:

MY BACKGROUND

1. I am over the age of the 21 and have personal knowledge about the matters set forth below. I submit this Declaration in support of the above-captioned Complaint for Declaratory and Injunctive Relief (the "Complaint").

2. As the age of six, I, along with my four brothers, were placed in a foster home on the Spirit Lake Reservation with an Indian family on their small farm.

3. I was part of the last classes taught at the old Fort Totten Indian Boarding School in 1959, which began in the 1890s when the military left. I graduated in 2014 from Cankdeska Cikana Community College on the Spirit Lake Reservation with a Degree in Liberal Arts, and Dakota Studies. I attended Black Hills State University in Spearfish, South Dakota and received my Bachelor of Arts in General Studies with an emphasis in Education, Humanities, and Social Science.

4. I attended IAP Career College where I received my certification as a genealogist.

5. I currently live in North Dakota.

6. I am a founding member, past President, and current Vice President of Native American Guardian's Association ("NAGA"). The Board of Directors of NAGA are all American Indians from the Four Corners of the United States with an advisory committee containing some non-Indians with knowledge related to local issues.

7. NAGA is a section 501(c)(3) non-profit organization organized under the laws of the State of Virginia that focuses on increased education about Native Americans, especially in public educational institutions. NAGA's motto is "educate not eradicate."

8. I am authorized to make this Declaration on behalf of NAGA.

MY HERITAGE

9. I am enrolled with the Spirit Lake Tribe in Fort Totten, ND. I am a full-blood Dakota Sioux. I reside in Devils Lake, North Dakota along with my husband David Davidson of 53 years.

10. The Spirit Lake Tribe is included on the Department of the Interior's list of Federally recognized Indian tribes and has been included on every version of this list since approximately 1985. Most recently, the Tribe was included in the February 1, 2019, list published at 84 Fed. Reg. 1200 (Feb. 1, 2019).[1]

11. Other racial demographics, such as African Americans and Latinos, benefit from multiple platforms to keep their culture and identity visible and relevant in mainstream American society.

12. But for the American Indian, we are fighting for our very survival. If left to fulfil their desire, the American Indian will vanish from the face of the earth never to be remembered or acknowledged.

WHY I FIGHT

13. In 1968, along with four other women from my Reservation and the Tribal Chairman Lewis Goodhouse, my grandmother Alvina Alberts helped bring awareness to the forced removal of Indian children from their families.

14. While many non-American Indians claim to be standing up to the discrimination against American Indians, they are, instead, "bystanders" who are not the target of SB 21-116 and whose only harm is one of being offended by American Indian names, logos, and imagery. As I have found in my daily life, eradication favors the views of non-American Indian bystanders.

[1] The Federally Recognized Indian Tribe List Act of 1994 (the "List Act") requires the Secretary of the Interior to publish an annual list of "all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *See* 25 U.S.C. §§ 5130, 5131.

HOW SB 21-116 IMPACTS NAGA

15. NAGA maintains hundreds of members, including Coloradans, who are affected by the passage of SB 21-116. These members are having their own equal protection rights violated, in addition to their First Amendment right to petition, and their Title VI rights.

16. NAGA members from Colorado individually will suffer due to SB 21-116.

17. Over the last eleven months, I and other NAGA representatives have been involved in communications with administrators of Lamar High School in Lamar and Lamar School District School Board members about NAGA's Partner School Program, similar to the program we have completed for other schools across the country. Those communications ceased following the enactment of SB 21-116, in my view as a result of the anticipated implementation of SB 21-116.

18. It is my view that if SB 21-116 is not enjoined from becoming effective, NAGA's efforts to educate Colorado's public-school students about Native American culture will come to a complete halt.

HOW SB 21-116 IMPACTS ME

19. On May 20, 2021, I testified before the Colorado House Education Committee against the enactment of SB 21-116.

20. SB 21-116 discriminates against me based on my American Indian race, color, or national origin.

21. I object to SB 21-116's regulation and suppression, which denies me an equal right to reappropriate my heritage through my use of positive American Indian names, logos, and imagery.

CONCLUSION

22. I am not ashamed for my ancestors or myself. I will fight to my dying day to stop this attempted removal and genocide of my people.

23. Accordingly, I respectfully request that the Court grant Plaintiffs' request for the issuance of a preliminary injunction.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2021
Devils Lake, North Dakota

/s/ Eunice Davidson

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-NYW

[PROPOSED] ORDER

This matter coming before the Court on the above-captioned Plaintiffs' Complaint and Plaintiffs' Emergency Motion for a Preliminary Injunction (the "Motion"), as well as the Declarations of Harold Jefferson, John Doe, Jane Doe, Demetrius Marez, Chase Aubrey Roubideaux, Donald Wayne Smith, Jr., and Eunice Davidson, together with any responses to the Motion, and having heard the arguments of counsel at the hearing on [_____], 2021, the Court finds and concludes as follows:

A. This Court has original federal question jurisdiction over Plaintiffs' federal claims by operation of 28 U.S.C. §§ 1331 and 28 U.S.C. § 1343(a)(3) and (4). Venue is also proper in this district pursuant to 28 U.S.C. § 1391(b)(1)-(2) as a substantial part of the events giving rise to these claims occurred in this judicial district and because, upon information and belief, all Defendants reside within the District.

B. The Court concludes that Plaintiffs have demonstrated that a preliminary injunction is warranted in order to enjoin Defendants, and their respective officers, agents, officials, servants, employees, attorneys, and other representatives from interpreting, administering, implementing and enforcing or threatening to enforce SB 21-116.

C. Plaintiffs have met the required showing with respect to their likelihood of success on the merits, irreparable injury absent the requested injunction, the balance of harms to the parties, and the public interest.

IT IS HEREBY ORDERED this _____ day of _____, 2021, that:

1. The Motion is GRANTED.

2. Pending further Order of the Court, Defendants, and their respective officers, agents, officials, servants, employees, attorneys, and other representatives from interpreting, administering, implementing and enforcing or threatening to enforce SB 21-116.

4. Pursuant to Federal Rule of Civil Procedure 65(c), the Court finds that security in the amount of $0 is appropriate; Plaintiffs are therefore excused from posting a bond in connection with this order.

6. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Order.

Dated: _____, 2021

_____
District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-02941-NYW

JOHN DOE, a minor,
JANE DOE, a minor,
DEMETRIUS MAREZ,
CHASE AUBREY ROUBIDEAUX,
DONALD WAYNE SMITH, JR., and
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,

Defendants.

MINUTE ORDER

Entered by Magistrate Judge Nina Y. Wang

This civil action was filed on November 2, 2021 and directly assigned to the undersigned Magistrate Judge pursuant to D.C.COLO.LCivR 40.1. [Doc. 1; Doc. 2]. On November 5, 2021, Plaintiffs filed a motion for injunctive relief in the form of a preliminary injunction. *See* [Doc. 4]. The court thus concludes that this matter should be directly assigned to a District Judge pursuant to D.C.COLO.LCivR 40.1(c)(2)(a), which provides that civil actions "in which a motion for injunctive relief is filed" shall not be directly assigned to a Magistrate Judge.

Accordingly, **IT IS ORDERED** that:

(1) The Clerk of the Court is **DIRECTED to REDRAW** this action to a District Judge for further proceedings.

DATED: November 8, 2021

From: COD_ENotice@cod.uscourts.gov
To: COD_ENotice@cod.uscourts.gov
Subject: Activity in Case 1:21-cv-02941-RMR Marez et al v. Polis et al
Date: Monday, November 8, 2021 8:07:25 AM

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court - District of Colorado

District of Colorado

Notice of Electronic Filing

The following transaction was entered on 11/8/2021 at 8:07 AM MST and filed on 11/8/2021
Case Name: Marez et al v. Polis et al
Case Number: 1:21-cv-02941-RMR
Filer:
Document Number: 6(No document attached)

Docket Text:
CASE REASSIGNED. Pursuant to [5] Minute Order this case is randomly reassigned to Judge Regina M Rodriguez. All future pleadings should be designated as 21-cv-02941-RMR. (Text Only Entry). (alave,)

1:21-cv-02941-RMR Notice has been electronically mailed to:

William Edward Trachman wtrachman@mslegal.org, meri@mslegal.org

1:21-cv-02941-RMR Notice has been mailed by the filer to:

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; and 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.

No. 1:21-cv-2941-RMR

(1) STIPULATED SCHEDULING PROPOSAL REGARDING BRIEFING ON PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION [ECF NO. 4]

(2) PLAINTIFFS' OPPOSED REQUEST TO SET A HEARING DATE

STIPULATED SCHEDULING PROPOSAL

John Doe, a minor, Jane Doe, a minor, Demetrius Marez, Chase Aubrey Roubideaux, Donald Wayne Smith, Jr. and the Native American Guardian's Association (together, the "Plaintiffs"), on the one hand, and Jared Polis, in his official capacity as Colorado Governor, Dave Young, in his official capacity as Colorado State Treasurer, Katy Anthes, in her official capacity as Colorado Commissioner of Education for the Colorado Department of Education, Phil Weiser,

in his official capacity as Colorado Attorney General, and Georgina Owen, in her official capacity as Title VII State Coordinator for the Colorado Department of Education (together, the "Defendants"), on the other hand, by and through their respective undersigned counsel, hereby agree regarding a briefing schedule on Plaintiffs' Emergency Motion for Preliminary Injunction and Request for Expedited Hearing (ECF No. 4, the "Motion"), as set forth below:

1. **Response Deadline**: November 23, 2021 shall be the deadline by which the Defendants shall file its response to the Motion.

2. **Reply Deadline**: November 26, 2021 shall be the deadline by which the Plaintiffs shall file any reply in support of the Motion.

POTENTIAL ORAL ARGUMENT ON MOTION

3. **Preliminary Injunction Hearing**: The parties agree at this time that there is no need for an evidentiary hearing.

Plaintiffs' Request: Plaintiffs respectfully request oral argument on the Motion the week of November 29, 2021. Subject to the Court's availability, Plaintiffs request oral argument on November 29 itself, given the November 30 date for institutions to provide notification that they will seek grant funds to support a change from their Native American imagery.

Defendants' Opposition: Defendants respectfully oppose Plaintiffs' request for an expedited oral argument. Defendants' position is that the November 30 date does not justify accelerating a decision on the Motion. First, the date applies only to public schools, none of which are plaintiffs in this action. Second, even if the interests of nonparties were relevant, the November 30 deadline is not binding on any public school—rather, it is merely a deadline to file a notice that a school intends to apply for grant funds in February, and it neither binds schools who file the notice to apply in February nor bars schools who do not file a notice from applying in February. If

the Court concludes upon reading the parties' briefing that oral argument would assist it in resolving the Motion, Defendants agree to the scheduling of such argument at the Court's convenience.

Dated: November 12, 2021

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From: COD_ENotice@cod.uscourts.gov
To: COD_ENotice@cod.uscourts.gov
Subject: Activity in Case 1:21-cv-02941-RMR Marez et al v. Polis et al Order
Date: Friday, November 12, 2021 3:36:06 PM

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U.S. District Court - District of Colorado

District of Colorado

Notice of Electronic Filing

The following transaction was entered on 11/12/2021 at 3:35 PM MST and filed on 11/12/2021
Case Name: Marez et al v. Polis et al
Case Number: 1:21-cv-02941-RMR
Filer:
Document Number: 16(No document attached)

Docket Text:
ORDER granting in part [9] Stipulated Scheduling Proposal. The Court GRANTS the parties' stipulated proposed briefing schedule as follows: Defendants shall file any Response to Plaintiffs' pending [4] Motion for Preliminary Injunction by Tuesday, 11/23/2021. Plaintiffs shall file any Reply to Defendants' Response by Friday, 11/26/2021.The Court TAKES UNDER ADVISEMENT Plaintiffs' opposed request for an expedited oral argument. The Court is currently scheduled for trial the week of 11/29/2021. The Court will determine the need and timing of a hearing once it has had an opportunity to review the briefing. SO ORDERED by Judge Regina M Rodriguez on 11/12/2021. Text Only Entry (rmrja)

1:21-cv-02941-RMR Notice has been electronically mailed to:

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1:21-cv-02941-RMR Notice has been mailed by the filer to:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:21-cv-02941-RMR

JOHN DOE, a minor, et al.,

Plaintiffs,

v.

JARED POLIS, in his official capacity as Colorado Governor, et al.,

Defendants.

DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION [DOC. 4]

INTRODUCTION

Senate Bill 21-116 ("SB21-116" or the "Act") prohibits most uses of American Indian mascots by public schools. Because Colorado undoubtedly may control the speech of its subordinate political subdivisions—including school districts and the boards that oversee them—Plaintiffs advance novel claims in an effort to enjoin the law. But SB21-116 in no way regulates private speech and therefore the government speech doctrine forecloses Plaintiffs' First and Fourteenth Amendment claims. Indeed, no court has ever held that a statute that classifies certain school mascots for differential treatment violates the Equal Protection Clause; that the First Amendment entitles individuals to a "considered response" when they request an American Indian mascot; or that a statute can create a hostile environment in every public school across a state. Plaintiffs' claims are simply implausible.

Plaintiffs' requested injunction fails for two reasons. *First*, because SB21-116 causes no injury to Plaintiffs, and may never cause any such injury, Plaintiffs lack standing to pursue those

claims. *Second*, even if they possess standing, Plaintiffs cannot meet the required elements for a preliminary injunction. In particular, their novel legal claims are highly unlikely to succeed on the merits. At base, Plaintiffs object to the wisdom of the policy determination made by SB21-116. But that objection is properly made to the Colorado General Assembly, not the courts.

Defendants respectfully request that the Court deny the preliminary injunction.[1]

BACKGROUND

A. Background to the passage of SB21-116

Colorado's public education system has a long history of engaging in or condoning harmful practices towards American Indians. "In the early twentieth century, American Indian boarding schools across Colorado forced American Indian children to relinquish their tribal identities and give up inherited customs so that they would better assimilate into the majority white culture." Ex. 1 (SB 21-116), § 1(c). Around the same time, schools for non-American Indian students began adopting American Indian mascots, which often invoked racist imagery or stereotypes, such as "Eaton high school's large-nosed caricatures" and "Lamar high school's 'Chief-Ugh-Lee' mascot." *Id.* § 1(d)-(f).

In 2015, Governor John Hickenlooper created a commission to study the continued use of American Indian imagery in Colorado schools. *Id.* § 1(h). The commission's 2016 report concluded, among other things, that Colorado schools should eliminate American Indian mascots

[1] By filing this joint response, none of the Defendants agree to waive their Eleventh Amendment sovereign immunity or consent to be sued in this Court. Many of the named Defendants do not have the requisite "connection with the enforcement of the act" and so cannot be sued in their official capacities. *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013) (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)). Defendants will address this issue more fully in a motion to dismiss if it is not sooner resolved through conferrals with Plaintiffs.

unless a federally recognized tribe approves the school's use of the imagery. *See* Ex. 2 at 7. A "few Colorado schools" subsequently "voluntarily abandoned their American Indian mascots, but change, for the most part, has not come easily." Ex. 1, § 1(j).

The Colorado General Assembly heard about five hours of testimony concerning SB21-116, much of which concerned the history of discrimination against American Indians in Colorado and nationwide and the harmful present-day effects of American Indian mascots.[2] Representatives of 16 American Indian bands and tribal nations testified about the historic harms their ancestors and families have endured, their individual negative experiences with mascots and stereotyping, and the lack of tribal sovereignty and representation in the decision to use American Indian mascots and imagery. Much of this testimony is reflected in the legislative declaration of the Act, which finds that the use of "derogatory American Indian mascots" has "serious negative impacts" on American Indian students' "mental health and [promotes] bullying of American Indian students." Ex. 1, § 1(a).

B. SB21-116

On June 28, 2021, Governor Polis signed SB21-116 into law. Ex. 1. The Act generally bars public schools in Colorado from using an "American Indian mascot," which is defined as "a name, symbol, or image that depicts or refers to an American Indian tribe, individual, custom, or tradition that is used as a mascot, nickname, logo, letterhead, or team name for the school." § 22-1-133(1)(a), C.R.S. (2021). This prohibition is subject to four exceptions:

[2] *See Hearing on S.B. 21-116 Before the S. Educ. Comm.*, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. Apr. 1, 2021) at 1:58:53 PM, https://tinyurl.com/rsk76m5y; *Hearing on S.B. 21-116 Before the H. Educ. Comm.*, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. May 20, 2021) at 4:39:50 PM, https://tinyurl.com/7w9v76x3.

- A "public school that is named after an American Indian tribe or American Indian individual may use the tribe's or individual's name, but not an image or symbol, on the public school's letterhead." § 22-1-133(2)(a).
- If a public school has a pre-existing agreement with a federally recognized tribe permitting the use of a name, symbol, or image, the public school can honor that agreement. § 22-1-133(2)(b)(I).
- A public school may enter into an agreement with a federally recognized tribe permitting the use of a name, symbol, or image. § 22-1-133(2)(b)(III).
- A public school located on a reservation operated by, or with the consent of, a federally recognized tribe is exempt from the Act. § 22-1-133(2)(b)(II).

Schools subject to the Act have until June 1, 2022 to stop using a prohibited American Indian mascot or else must pay a $25,000 per month fine. § 22-1-133(3). As required by § 22-1-133(4)(a), the Colorado Commission of Indian Affairs has identified those public schools that must come into compliance before the deadline. *See* Colo. Comm'n of Indian Affairs, *Legislation* (Nov. 18, 2021), https://ccia.colorado.gov/legislation. The Commission also identified two schools that may continue to use an American Indian mascot consistent with preexisting agreements with tribes. *See id.*

ARGUMENT

I. Plaintiffs lack standing and their claims are unripe.

To establish standing, a plaintiff must show: (1) injury in fact, which is the "invasion of a legally protected interest" that is (a) "concrete and particularized," and (b) "actual or imminent, not conjectural or hypothetical"; (2) causation between the injury and defendant's conduct; and

(3) a likelihood that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted). Plaintiffs bear the burden of proof on all three elements. *Id*. at 561.

Plaintiffs also must show a case is ripe to establish subject matter jurisdiction. *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1498-99 (10th Cir. 1995). The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.* at 1499 (quotations omitted). An issue is unfit for judicial review if "the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* (quotations omitted).

A. Plaintiffs fail to establish any particularized injury to a legally protected interest.

Plaintiffs argue that SB21-116 injures them because it removes their schools' ability to use American Indian mascots to honor, celebrate, and reappropriate their heritage. *See, e.g.*, Doc. 4-2, ¶ 24; Doc. 4-3, ¶ 18; Doc. 4-4, ¶ 13; Doc. 4-5, ¶ 20; Doc. 4-6, ¶¶ 12-13. But Plaintiffs' sincere preference for their affiliated public schools to maintain an American Indian mascot does not constitute a "legally protected interest." *Lujan*, 504 U.S. at 560. Colorado law vests local school boards with the authority to select school names and mascots and does not guarantee any individual a right to choose the name or mascot of a school. *See* § 22-32-103(1) ("Each school district shall be governed by a board of education . . . [that] shall possess all powers delegated to a board of education or to a school district by law, and shall perform all duties required by law."); § 22-32-109(1)(b) ("[E]ach board of education" has the duty "[t]o adopt policies and prescribe rules and regulations necessary and proper for the efficient administration of the affairs of the district[.]"). And the Complaint [Doc. 1] does not allege that any Plaintiff participated in

their schools' selection of an American Indian mascot, only that schools may abandon American Indian mascots without first obtaining their approval or agreement.

Even if SB21-116 deprives Plaintiffs of their sincerely held desire for their affiliated public schools to maintain an American Indian mascot, such deprivation does not constitute a "particularized" injury. *Lujan*, 504 U.S. at 560. A public school could never satisfy the individual preference of every student in selecting a single mascot and, according to Plaintiffs' theory, any disappointed student or alumnus would have standing to challenge the school board's decision. Federal courts have rejected this theory. *See McMahon v. Fenves*, 946 F.3d 266, 271 (5th Cir. 2020) (plaintiffs lacked standing because their deeply held preference for city's retention of Confederate monuments was not a particularized injury). Like the plaintiffs in *McMahon*, Plaintiffs here "confuse having particular reasons for caring about [American Indian mascots] with having a particularized injury." *Id*. Plaintiffs thus lack standing because they seek only to "'vindicate their own value preferences,'" not to redress an injury particular to them. *Id*. (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)).[3]

B. Plaintiffs' alleged injuries are too speculative to establish standing or ripeness.

Even if Plaintiffs could show an invasion of their legally protected interests, their alleged injuries are too speculative to establish standing or ripeness. Plaintiffs allege they will be harmed if Lamar High School and schools in the Yuma school district—which they attend, attended, or substitute taught at—change their mascots. To date, none of these schools have changed their

[3] The organizational Plaintiff, the Native American Guardian's Association, also lacks standing because the Complaint [Doc. 1] fails to establish the standing of "at least one identified member" of the organization. *Summers v. Earth Island Inst*., 555 U.S. 488, 498 (2009).

mascots. Nor is there any guarantee that they will. Schools are not prohibited from using an American Indian mascot until June 1, 2022—more than six months from now. § 22-1-133(2)(a). Before June 1, 2022, local school boards could reach agreements with federally recognized Indian tribes, thus exempting the schools from this prohibition. § 22-1-133(2)(b)(III).

True, Yuma has begun to consider new mascots. Doc. 4-5, pp. 11-15. And Lamar plans to choose a new mascot by March 1, 2022. Doc. 4-2, pp. 14-15. But neither action prevents the local school board from reaching an agreement with a tribe that preserves the current mascot. Because Plaintiffs' alleged injuries "rest on speculation about the decisions" of school board members, who are "independent actors," Plaintiffs have failed to demonstrate standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). Similarly, because the schools may not actually change their mascots, Plaintiffs' alleged injury "may not occur at all" and this case is unripe. *See Gonzales*, 64 F.3d at 1499.

II. Plaintiffs are not entitled to a preliminary injunction because they cannot satisfy the required elements.

Courts "must presume that a state statute is constitutional." *Eaton v. Jarvis Prods. Corp.*, 965 F.2d 922, 929 (10th Cir. 1992). Plaintiffs must not only overcome this presumption, but to obtain the "extraordinary remedy" of a preliminary injunction, they also must show their "right to relief [is] clear and unequivocal." *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009) (quotations omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, . . . and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Nken v. Holder*,

556 U.S. 418, 435 (2009) (the balance of equities and public interest factors "merge when the Government is the opposing party.").

A. Plaintiffs are unlikely to succeed on the merits of their claims.

1. The government speech doctrine forecloses any First Amendment challenge to SB21-116.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Indeed, "[a] government entity has the right . . . to select the views that it wants to express[.]" *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)). As a result, "government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) (holding that state-issued specialty license plates convey a government message and therefore constitute government speech). This "freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech." *Id.* (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).

As explained in Section I.A., local school boards select public school names and mascots, not individual students, teachers, or special interest organizations. *See* § 22-32-103(1); § 22-32-109(1)(a) & (b). However, such boards are not unfettered because their powers are limited to only those "delegated . . . by law," their duties are limited to only those "required by law," and their discretion must be exercised "[]consistent with law." § 22-32-109(1)(a) & (b). Put another way, "[a] school board administers a school district. A school district is a subordinate division of the government and exercising authority to effectuate the state's education purposes. As such,

school districts and the boards which run them are considered to be political subdivisions of the state." *Bagby v. Sch. Dist. No. 1*, 528 P.2d 1299, 1302 (Colo. 1974) (internal citations omitted).

States have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). Because SB21-116 only regulates the speech of local school boards, which are subordinate to the State of Colorado, it does not violate the First Amendment. *See* § 22-1-133(2)(a) ("A public school in the state is prohibited from using an American Indian mascot.").

2. Plaintiffs are not likely to succeed on their Equal Protection claim.

a. Plaintiffs have not stated a claim that is cognizable under the Equal Protection Clause.

"[P]rivate citizens 'have no personal interest in government speech on which to base an equal protection claim.'" *Fields v. Speaker of Pa. House of Reps.*, 936 F.3d 142, 160 (3d Cir. 2019) (quoting *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 970 (9th Cir. 2011)). The Third, Fourth, Fifth, Sixth, and Ninth Circuits have all rejected Equal Protection claims against government speech. *See Fields*, 936 F.3d at 160 (collecting cases). And no federal court of appeals has held that government speech by itself violates the Equal Protection Clause.[4] To the contrary, "the gravamen of an equal protection claim is differential governmental treatment, not differential governmental messaging." *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017) (rejecting Equal Protection challenge to Mississippi's display of the confederate battle emblem

[4] The "First and D.C. Circuits," and a Supreme Court concurring opinion, "have suggested (without deciding and without explanation) that the Equal Protection Clause might apply to government speech," but no court of appeals has so held. *Fields*, 936 F.3d at 160-61; *see also Summum*, 555 U.S. at 482 (Stevens, J., concurring).

on the state flag). Because SB 21-116 regulates only government speech and government speech does not support an Equal Protection claim, Plaintiffs cannot succeed on that claim.

Even if a claim could hypothetically exist that government speech violates the Equal Protection Clause, Plaintiffs' claim fails for two additional reasons. *First*, Plaintiffs object that SB21-116 classifies citizens based on race, Doc. 4 at 10, but the Act makes no such classification. Rather, SB21-116 classifies mascots, but does not create different classifications of persons and apportion government benefits differently to different groups, as required to state an Equal Protection claim. *See Moore*, 853 F.3d at 250. *Second*, Plaintiffs have suffered no equal protection injury here. Plaintiffs claim their injury is from "the government erect[ing] a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." Doc. 4 at 19 (quoting *Ne. Fla. Chapter of Ass'd Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)). But here, there is no cognizable government benefit. To the extent their claimed injury is a public school's inability to choose an American Indian mascot, that affects the school, not the Plaintiffs. And to the extent their claimed injury is an inability to ask a public school to adopt such a mascot, that duplicates their second claim and is addressed below.

b. Even if Plaintiffs had suffered any injury, they are not likely to succeed on the merits of their Equal Protection claim.

Because Plaintiffs' claim is not cognizable under the Equal Protection Clause, the Court need not go any further to deny a preliminary injunction. *See Walter v. Or. Bd. of Educ.*, 457 P.3d 288, 297 (Or. Ct. App. 2019) (denying claim that partial ban of American Indian mascots violated Equal Protection Clause without applying strict scrutiny). But even if Plaintiffs' claim were cognizable, it would still likely fail—SB21-116 would satisfy strict scrutiny because it is

narrowly tailored to serve a compelling governmental interest. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1164 (10th Cir. 2000).

"A state's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 321 F.3d 950, 958 (10th Cir. 2003) (quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996)). "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). SB21-116 details some of that racist history in its legislative declaration, such as "Eaton high school's large-nosed caricatures" and "Lamar high school's 'Chief Ugh-Lee' mascot." Ex. 1, § 1(f). The bill also details some effects of schools continuing to use these mascots, including that they "create[] an unsafe learning environment for American Indian students," negatively impact their mental health, promote bullying, and "teach non-American Indian children inaccurate information about American Indian culture and teach them that it is acceptable to participate in culturally abusive and prejudicial behaviors." *Id.* § 1(a), (b). The Act also relies on the findings of a detailed report by a commission to study American Indian representations in public schools as further evidence of the history and present effects of these mascots. *See* Ex. 2. These findings support the existence of a compelling state interest in remedying the past discrimination created by using American Indian mascots.

Finally, SB21-116 is narrowly tailored to remedying the negative effects from using American Indian mascots. Plaintiffs argue that it is not narrowly tailored because "it does not cover all racial demographics" and allows "Colorado schools to even use offensive caricatures"

of other races. Doc. 4 at 12. Setting aside the bizarre theory of injury this argument implies—that Plaintiffs are harmed because schools cannot use offensive caricatures of American Indians—this fundamentally misunderstands the narrow tailoring inquiry. Eliminating mascots tied to other races (to the extent those exist, which Plaintiffs have not shown) would not be narrowly tailored to remedying the effects of past discrimination against American Indians by the use of school mascots. *See Adarand Constructors*, 228 F.3d at 1183 (narrow tailoring requires examining whether programs are over- or under-inclusive). Additionally, the Act is flexible, another relevant inquiry in narrow tailoring. *See id.* at 1180. The Act does not absolutely bar using all American Indian mascots and imagery, as it continues to allow the use of such mascots and imagery if sanctioned by a federally-recognized tribe. *See* § 22-1-133(2)(b).

3. SB21-116 does not violate Plaintiffs' political process rights.

Plaintiffs are highly unlikely to succeed on the merits of their Fourteenth Amendment political process claim. Before 2014, state laws designed to preclude racial or ethnic groups "from entering into the political process in a reliable and meaningful manner" could be challenged through an Equal Protection political process claim and were subject to strict scrutiny. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982) (sustaining challenge to voter-initiated statute prohibiting public school boards from mandating student busing, but only if the mandate was for the specific purpose of achieving racial desegregation). In 2014, the Supreme Court gutted the reach of *Seattle*-based political process claims, with a majority of justices denying such a challenge to a voter-initiated constitutional amendment prohibiting the use of race-based preferences in the admissions process for Michigan public universities in *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 305-307 (2014).

The *Schuette* Court explained *Seattle* as holding that "where a government policy 'inures primarily to the benefit of the minority' and 'minorities . . . consider' the policy to be 'in their interest,' then any state action that 'places effective decisionmaking authority over' that policy 'at a different level of government' must be reviewed under strict scrutiny." 572 U.S. at 307 (plurality op.) (quoting 458 U.S. at 472, 474). It then expressly "rejected" the Sixth Circuit's "broad reading of *Seattle*" under which "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[.]" *Id.* (quoting 458 U.S. at 472, 474). In doing so, the Supreme Court noted that "*Seattle* must be understood" based on its facts—namely, that "neither the State nor the United States 'challenged the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation,'" yet the "state initiative . . . 'was carefully tailored to interfere only with desegregative busing.'" *Id.* at 306 (quoting 458 U.S. at 472 n.15, 471). In stark contrast here, Colorado 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 interests, and even Plaintiffs "oppose the use of American Indian mascot performers and caricatures that mock Native American heritage[.]" Doc. 1, ¶ 4.

The Supreme Court reasoned that "[t]here would be no apparent limiting standards defining what public policies should be included in what *Seattle* called policies that 'inur[e] primarily to the benefit of the minority' and that 'minorities . . . consider' to be 'in their interest.'" *Schuette*, 572 U.S. at 309 (quoting 458 U.S. at 472, 474). And absent such standards, "[t]hose who seek to represent the interests of particular racial groups could attempt to advance those aims by demanding an equal protection ruling that any number of matters be foreclosed

from voter review or participation." *Id*. Notably, the *Schuette* Court specifically found that, under the broad reading of *Seattle* urged by Plaintiffs here, "even the naming of public schools" is a "subject[] that some organizations could insist should be . . . beyond the power of a legislature to decide when enacting limits on the power of local authorities or other governmental entities to address certain subjects." *Id.* SB21-116 is the exact same type of legislative limitation on local school boards' power to name public schools or select their mascots that the *Schuette* Court shielded from a *Seattle*-based political process claim.

Even the facts from *Schuette* are closely analogous to those presented here. There, Michigan voters removed from the boards of trustees that oversee state universities the power to determine whether to employ race-based preferences in the admissions process. *Id.* at 298-301. Here, the Colorado General Assembly removed from local school boards some of their powers over the choice of a school name or mascot. In both cases, a group of organizational and individual plaintiffs challenged the new legislation as violating their Equal Protection political process rights. *Id.* at 299-300. In rejecting the claim, the *Schuette* Court found that "[b]y approving Proposal 2 . . . , the Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power," and concluded that *Seattle* and its underlying precedents do *not* "stand for the conclusion that Michigan's voters must be disempowered from acting." *Id.* at 311, 313-314. The Court therefore held:

> This case is not about how the debate about racial preferences should be resolved. It is about *who* may resolve it. There is no authority in the Constitution of the United State or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.

Id. at 314 (emphasis added) (citing *Sailors v. Bd. of Ed. of Cnty. of Kent*, 387 U.S. 105, 109 (1967)).

The same reasoning applies with equal force to SB21-116. Here, the General Assembly has made the policy determination about what names and mascots may be used by public schools. *Accord Seattle*, 458 U.S. at 487 ("[W]e do not undervalue the magnitude of the State's interest in its system of education. Washington could have reserved to state officials the right to make all decisions in the areas of education and student assignment."). Post-*Schuette*, the mere shift in who makes this determination from local officials to state officials does not violate Plaintiffs' political process rights.

Finally, no provision of SB21-116 forestalls Plaintiffs' use of the political process to change its espoused policy determination with which they disagree. They are free to petition and lobby the General Assembly to amend or repeal SB21-116. Plaintiffs may also be able to appeal to tribal governments to enter into agreements with individual schools to continue using American Indian mascots. 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. *See*, *e.g.*, COLO. CONST. art. IX, § 16 ("Neither the general assembly nor the state board of education shall have power to prescribe textbooks to be used in the public schools.").

4. Plaintiffs cannot succeed on their First Amendment right to petition claim.

Because SB21-116 does not restrict Plaintiffs' First Amendment right to petition, they cannot demonstrate a likelihood of success on this claim. Plaintiffs allege SB21-116 infringes the right to petition because school districts or educational entities are confused by the law and thus, may decide not to adopt Plaintiffs' suggestions. Doc 1, ¶¶ 123-129. Plaintiffs further allege that

because the law is unclear, they will be discouraged from petitioning, and thus, their speech will be "chilled." *See id.* ¶ 129. Plaintiffs fail to allege a First Amendment violation.

In relevant part, the First Amendment states: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const., amend. I. "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives[.]" *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011). To further this goal, "the right to petition extends to all departments of the Government" and includes the "right of access to the courts." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

But the First Amendment does not "speak in terms of successful petitioning—it speaks simply of 'the right of the people . . . to petition the Government for a redress of grievances.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002) (quoting U.S. Const. amend. I). Although Plaintiffs allege SB21-116 will discourage petitioning of school districts—due to confusion over what the law permits—they fail to show that SB21-116 precludes any individual from, or penalizes any individual for, petitioning. Nor could Plaintiffs identify any such provision in SB21-116, as none exists. Recently, the Tenth Circuit held the same failure fatal to a plaintiff's right to petition claim. *See Santa Fe All. for Pub. Health & Safety v. City of Santa Fe*, 993 F.3d 802, 818-19 (10th Cir. 2021) (affirming dismissal of petition claim where law did not preclude or penalize plaintiff's petitioning the city on health effects of radio-frequency emissions although law barred the city from adopting plaintiff's desired policy).

As Plaintiffs concede, the First Amendment "does not guarantee the right of citizens to *succeed* at petitioning their government." Doc. 4 at 16 (citing *CSMN Investments, LLC v.*

Cordillera Metro. District, 956 F.3d 1276, 1285 (10th Cir. 2020)). But Plaintiffs urge the court to adopt a ruling that "the right to petition includes some sort of *considered* response," quoting Judge Rogers' concurrence in *We the People Foundation, Inc. v. United States*, 485 F.3d 140, 147 (D.C. Cir. 2007). *See* Doc. 4 at 16 (cited as "Brown, J., concurring"). The Court cannot entertain this argument because it directly contravenes Supreme Court precedent. As the majority opinion in *We the People* holds, "the Supreme Court [has] flatly stated that the First Amendment . . . does not provide a right to a response to or official consideration of a petition. *Id*. at 143–44 (Kavanaugh, J.) (citing *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984); *Smith v. Ark. State Highway Employees*, 441 U.S. 463, 465 (1979)).[5] Plaintiffs have not shown a likelihood of success on their right to petition claim.

5. Plaintiffs are not likely to succeed on the merits of their Title VI claim.

Plaintiffs next claim that SB21-116 violates their rights under Title VI of the Civil Rights Act of 1964 because banning American Indian mascots creates a hostile environment in all public schools.[6] This claim fails because, first, hostile environment claims apply to actions by specific schools, not generally applicable state laws that Plaintiffs disagree with; and second, even if they did, Plaintiffs cannot establish the elements of a hostile environment claim.

[5] Plaintiffs' reliance on Judge Rogers' *We the People* concurrence misses the mark because she expressly conceded that "we have no occasion to resolve the merits of appellants' historical argument [that the right to petition includes the right to a response], given the binding Supreme Court precedent in [*Smith* and *Knight*]." 485 F.3d at 145 (Rogers, J., concurring).

[6] To the extent Plaintiffs also allege a violation of Title VI based on direct racial discrimination, Plaintiffs acknowledge that the same analysis applies as to their Equal Protection claim, which is addressed above. *See* Doc. 4 at 17.

a. Hostile environment claims arise only from conduct within a specific school, not from state laws that apply to all schools.

Plaintiffs' use of a hostile environment claim under Title VI to enjoin a statute that applies statewide is misguided. Education-related hostile environment claims involve actions within specific schools that must be corrected by the school itself, such as student-to-student sexual harassment, *see Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.,* 526 U.S. 629 (1999), and race-based student bullying, *see Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 934 (10th Cir. 2003). In these types of cases, once notified, the school must take remedial action to stop the behavior causing the hostile environment. And only if it fails to do so can the school be considered deliberately indifferent. *Bryant*, 334 F.3d at 934. A hostile environment claim therefore cannot be premised on a statute that applies to all public schools statewide. And even if it could, no Defendant can remedy the hostile environment that allegedly exists statewide because the prohibition in SB21-116 is aimed directly at public schools, *see* § 22-1-133(2)(a), and therefore, the power to repeal or countermand it lies only with the General Assembly or the electorate.

b. Plaintiffs cannot establish any of the hostile environment factors required to state a claim.

Even if a Title VI hostile environment claim could be used to challenge a statute that applies to all schools statewide, Plaintiffs are not likely to succeed here. To succeed, a plaintiff must show "the district (1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school." *Bryant*, 334 F.3d at 934 (emphasis omitted). None of the required elements are present here.

First, Plaintiffs argue that "Colorado and its officials obviously have notice of their own conduct," Doc. 4 at 19, but the knowledge required is knowledge of harassment. Plaintiffs have not shown any Defendant has notice of alleged harassment as a result of SB21-116. To the contrary, the testimony before the General Assembly detailed students feeling harassed by the use of American Indian mascots. *Second*, deliberate indifference requires a defendant's failure to correct the actions giving rise to a hostile environment. *Bryant,* 334 F.3d at 933. But because Plaintiffs have not shown any harassment, they cannot show that any Defendant has been or is being deliberately indifferent to it. *Third*, Plaintiffs argue that "erasure of Native American culture is [] harassment that is . . . severe, pervasive, and objectively offensive," Doc. 4 at 17, but SB21-116 has no impact on the continued operation of § 22-32-145, which governs "Native American language and culture instruction" and authorizes school boards to "adopt a policy to grant general education or world language credit for the successful completion of Native American language course work for languages of federally recognized tribes." And *fourth*, Plaintiffs assert that the Act deprives them of certain educational benefits or opportunities, but provide no evidence or authority in support of that conclusory assertion. Doc. 4 at 17.

B. Plaintiffs will suffer no irreparable injury if the injunction is denied.

Plaintiffs also cannot establish that they will suffer irreparable injury, as required for a preliminary injunction, for three reasons. *First*, as argued above, Plaintiffs are not suffering any injury-in-fact from SB21-116, let alone one that is irreparable. *Second*, at least as to the constitutional claims, this element collapses into the likelihood of success element, so Plaintiffs are not suffering an irreparable injury because they are not likely to establish a constitutional violation. *Free the Nipple v. City of Ft. Collins*, 916 F.3d 792, 806 (10th Cir. 2019). And *third*, to

the extent Plaintiffs are using the November 30 date to signal interest in applying for grant funds as an irreparable injury, *see* Doc. 4 at 19-20, that deadline affects only public schools, none of which are Plaintiffs. The deadline creates neither an exigency nor the risk of irreparable injury to Plaintiffs—it is for administrative convenience only and does not legally bind schools or alter the February 2022 deadline for schools to submit grant applications. *See* Ex. 3.

C. The public interest favors denying the requested injunction.

Finally, the Court should deny the requested injunction because the public interest is best served by respecting the will of Colorado's voters as expressed through their duly elected representatives' enactment of SB21-116. Indeed, the Colorado General Assembly is best positioned to determine the public interest. *See, e.g.*, *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) ("our democratically elected representatives are in a better position than this Court to determine the public interest") (quotations, alterations omitted). Plaintiffs argue that "it is hardly obvious that the government's opinion on how to respond to purportedly offensive viewpoints is the correct one." Doc. 4 at 11. But the correct approach to a matter of public policy should be determined by the political branches that are responsive and accountable to the people.

CONCLUSION

Plaintiffs' motion for a preliminary injunction should be denied. They have suffered no injury in fact from SB21-116—and may never suffer any injury from it—and so they lack standing and this Court lacks jurisdiction. Even if they had standing, they are highly unlikely to succeed on the merits of their novel legal claims and do not meet the other elements necessary for injunctive relief.

Respectfully submitted this 23rd day of November, 2021.

PHILIP J. WEISER
Attorney General

/s/ *LeeAnn Morrill*
/s/ *Michael T. Kotlarczyk*
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Counsel to Commissioner Anthes and Coordinator Owen

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2021, I served a true and complete copy of the foregoing **DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION [DOC. 4]** upon all parties herein by e-filing with the CM/ECF system maintained by the court, addressed as follows:

Erin Marie Erhardt
William Edward Trachman
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, CO 80227
eerhardt@mslegal.org
wtrachman@mslegal.org
Attorneys for Plaintiffs

s/ Xan Serocki
XAN SEROCKI

Exhibit 1

SENATE BILL 21-116

BY SENATOR(S) Danielson, Bridges, Buckner, Coleman, Fields, Ginal, Gonzales, Hansen, Jaquez Lewis, Kolker, Lee, Moreno, Pettersen, Story, Winter;
also REPRESENTATIVE(S) Benavidez and McLachlan, Amabile, Bacon, Bernett, Bird, Boesenecker, Caraveo, Cutter, Duran, Esgar, Exum, Froelich, Gonzales-Gutierrez, Herod, Hooton, Jackson, Jodeh, Kipp, Lontine, McCluskie, McCormick, Michaelson Jenet, Mullica, Ortiz, Ricks, Sirota, Titone, Valdez A., Weissman, Young, Garnett.

CONCERNING THE PROHIBITION OF AMERICAN INDIAN MASCOTS IN COLORADO.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. (1) The general assembly finds and declares that:

(a) The presence and use of derogatory American Indian mascots across Colorado creates an unsafe learning environment for American Indian students by having serious negative impacts on those students' mental health and by promoting bullying of American Indian students;

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

(b) American Indian mascots teach non-American Indian children inaccurate information about American Indian culture and teach them that it is acceptable to participate in culturally abusive and prejudicial behaviors;

(c) In the early twentieth century, American Indian boarding schools across Colorado forced American Indian children to relinquish their tribal identities and give up inherited customs so that they would better assimilate into the majority white culture;

(d) Young American Indian children were coerced into leaving their families, giving up their culture and language, and changing their appearances to pass for a white person. At the same time, non-American Indian students in many communities in Colorado were dressing up in war bonnets at pep rallies that they called "pow-wows".

(e) In 1925, the same year that La Veta high school became the "R*dsk*ns", a Loveland yearbook stated that the school decided to adopt the "Indian" moniker to depict "bravery, loyalty, patriotism, and dauntless pride". Several years later, Cheyenne Mountain high school would also claim that its "Indian" mascot's purpose was to "preserve the legacy of the Cheyenne and Ute tribes, which were fading in the area".

(f) Despite continued claims that such mascots honored American Indian peoples, the majority of such mascots in Colorado regularly employed racist stereotypes, from Eaton high school's large-nosed caricatures to Lamar high school's "Chief Ugh-Lee" mascot;

(g) By the time of the civil rights movement in the 1960s, the first wave of American Indian activists began calling for an end to American Indian mascots. By the end of the 1990s, only three Colorado schools had listened. Although organizations like the National Commission on Civil Rights, the NAACP, the National Congress of American Indians, and the American Psychological Association published statements condemning American Indian mascots, few Colorado schools would take heed, even into the early 2000s.

(h) In 2015, Colorado Governor John Hickenlooper signed an executive order to establish the commission to study American Indian representations in public schools;

(i) The commission, comprised of American Indian leaders from across the state, visited the Colorado schools that wanted to be a part of this conversation. There were only four: Strasburg, Loveland, Eaton, and Lamar. After visiting each of these communities, the commission's recommendation was to completely eliminate American Indian imagery and nomenclature in schools in Colorado.

U) Since that time, a few Colorado schools have voluntarily abandoned their American Indian mascots, but change, for the most part, has not come easily; and

(k) Currently, public sentiment is moving in favor of abandoning these discriminatory mascots. Many national athletic teams have abandoned them, and similar changes are happening at the college level and on down to the local level. In 2019, Maine successfully paved the way with legislation for an American Indian mascot ban at the state level.

(2) Therefore, the general assembly declares that passing legislation to retire all American Indian mascots in the state will provide another step toward justice and healing to the descendants of the survivors of the Sand Creek Massacre, most notably the Cheyenne and Arapaho tribes, as well as other American Indians in Colorado who have been harmed or offended by these discriminatory mascots.

SECTION 2. In Colorado Revised Statutes, **add** 22-1-133 as follows:

22-1-133. Prohibition on use of American Indian mascots - exemptions - definitions. (1) As USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "AMERICAN INDIAN MASCOT" MEANS A NAME, SYMBOL, OR IMAGE THAT DEPICTS OR REFERS TO AN AMERICAN INDIAN TRIBE, INDNIDUAL, CUSTOM, OR TRADITION THAT IS USED AS A MASCOT, NICKNAME, LOGO, LETTERHEAD, OR TEAM NAME FOR THE SCHOOL.

(b) "COMMISSION" MEANS THE COLORADO COMMISSION OF INDIAN AFFAIRS, ESTABLISHED PURSUANT TO SECTION 24-44-102.

(c) "INSTITUTE CHARTER SCHOOL" MEANS A CHARTER SCHOOL

AUTHORIZED BY THE STATE CHARTER SCHOOL INSTITUTE PURSUANT TO PART 5 OF ARTICLE 30.5 OF THIS TITLE 22.

(d) "PUBLIC SCHOOL" MEANS:

(I) AN ELEMENTARY, MIDDLE, JUNIOR HIGH, HIGH SCHOOL, OR DISTRICT CHARTER SCHOOL OF A SCHOOL DISTRICT THAT SERVES ANY OF GRADES KINDERGARTEN THROUGH TWELVE; AND

(II) AN INSTITUTE CHARTER SCHOOL THAT SERVES ANY OF GRADES KINDERGARTEN THROUGH TWELVE.

(2) (a) EXCEPT AS PROVIDED FOR IN SUBSECTION (2)(b) OF THIS SECTION, ON OR AFTER JUNE 1, 2022, A PUBLIC SCHOOL IN THE STATE IS PROHIBITED FROM USING AN AMERICAN INDIAN MASCOT. NOTWITHSTANDING THE DEFINITION OF THE TERM "AMERICAN INDIAN MASCOT" IN SUBSECTION (1) OF THIS SECTION, A PUBLIC SCHOOL THAT IS NAMED AFTER AN AMERICAN INDIAN TRIBE OR AMERICAN INDIAN INDIVIDUAL MAY USE THE TRIBE'S OR INDIVIDUAL'S NAME, BUT NOT AN IMAGE OR SYMBOL, ON THE PUBLIC SCHOOL'S LETTERHEAD. ANY PUBLIC SCHOOL THAT IS USING SUCH AN AMERICAN INDIAN MASCOT AS OF JUNE 1, 2022, SHALL IMMEDIATELY CEASE USE OF SUCH AMERICAN INDIAN MASCOT.

(b) THE PROHIBITION SET FORTH IN SUBSECTION (2)(a) OF THIS SECTION DOES NOT APPLY TO:

(I) ANY AGREEMENT THAT EXISTS PRIOR TO JUNE 30, 2021, BETWEEN A FEDERALLY RECOGNIZED INDIAN TRIBE AND A PUBLIC SCHOOL. A PUBLIC SCHOOL THAT IS A PARTY TO SUCH AN AGREEMENT IS HELD TO A HIGH STANDARD AND EXPECTED TO HONOR THE AGREEMENT. THE FEDERALLY RECOGNIZED INDIAN TRIBE HAS THE RIGHT AND ABILITY TO REVOKE ANY SUCH AGREEMENT AT ANY TIME AT ITS DISCRETION. IF AN AGREEMENT ENTERED INTO PURSUANT TO THIS SUBSECTION (2)(b)(I) BETWEEN A FEDERALLY RECOGNIZED INDIAN TRIBE AND A PUBLIC SCHOOL IS TERMINATED BY EITHER PARTY, THE PUBLIC SCHOOL HAS ONE YEAR FROM THE DATE OF TERMINATION TO DISCONTINUE ITS USE OF ITS AMERICAN INDIAN MASCOT BEFORE THE PENALTIES SET FORTH IN SUBSECTION (3) OF THIS SECTION APPLY.

(II) ANY PUBLIC SCHOOL THAT IS OPERATED BY A FEDERALLY

RECOGNIZED INDIAN TRIBE OR WITH THE APPROVAL OF A FEDERALLY RECOGNIZEDINDIANTRIBEANDEXISTINGWITHINTHEBOUNDARIESOFSUCH TRIBE'S RESERVATION.

(III) (A) THE ABILITY OF ANY FEDERALLY RECOGNIZED INDIAN TRIBE TO CREATE AND MAINTAIN A RELATIONSHIP OR AGREEMENT WITH A PUBLIC SCHOOL THAT FOSTERS GOODWILL, EMPHASIZES EDUCATION AND SUPPORTS A CURRICULUM THAT TEACHES AMERICAN INDIAN HISTORY, AND ENCOURAGES A POSITIVE CULTURAL EXCHANGE. SUCH RELATIONSHIPS AND AGREEMENTS MAY INCLUDE IMPORTANT HISTORICAL FIGURES, NAMES, IMAGERY, TRIBAL NAMES, AND MORE.

(B) ANY SUCH AGREEMENT ENTERED INTO PURSUANT TO THIS SECTION BETWEEN A PUBLIC SCHOOL AND A FEDERALLY RECOGNIZED INDIAN TRIBE MAY ALLOW ANY AMERICAN INDIAN MASCOT THAT IS CULTURALLY AFFILIATED WITH THAT FEDERALLY RECOGNIZED INDIAN TRIBE AS DETERMINED AT THE DISCRETION OF THE TRIBE'S GOVERNING BODY. IF AN AGREEMENT ENTERED INTO PURSUANT TO THIS SUBSECTION (2)(b)(III) BETWEEN A FEDERALLY RECOGNIZED INDIAN TRIBE AND A PUBLIC SCHOOL ISTERMINATEDBYEITHERPARTY, THEPUBLICSCHOOLHASONEYEARFROM THE DATE OF TERMINATION TO DISCONTINUE ITS USE OF ITS AMERICAN INDIAN MASCOT BEFORE THE PENALTIES SET FORTH IN SUBSECTION (3) OF THIS SECTION APPLY.

(C) FOR THEPURPOSESOFTHISSECTION,A "FEDERALLY RECOGNIZED INDIAN TRIBE" IS ONE OF THE FORTY-EIGHT CONTEMPORARY TRIBES WITH TIES TO COLORADO, DEVELOPED BY HISTORY COLORADO IN PARTNERSHIP WITH THE COLORADO COMMISSION OF INDIAN AFFAIRS. THIS LIST MAY CHANGE OVER TIME BUT IS THE OFFICIAL LIST TO BE USED FOR THE PURPOSES OF THIS SECTION.

(3) FOR EACH MONTH DURING WHICH A PUBLIC SCHOOL USES AN AMERICAN INDIAN MASCOT AFTER JUNE 1, 2022, THE SCHOOL DISTRICT OF THE PUBLIC SCHOOL, OR IN THE CASE OF AN INSTITUTE CHARTER SCHOOL, THE STATE CHARTER SCHOOL INSTITUTE, SHALL PAY A FINE OF TWENTY-FIVE THOUSAND DOLLARS TO THE STATE TREASURER, WHO SHALL CREDIT THE MONEY RECEIVED TO THE STATE EDUCATION FUND CREATED IN SECTION 17 (4) OF ARTICLE IX OF THE STATE CONSTITUTION.

(4) (a) NOLATERTHAN30DAYSAFTER THEEFFECTIVEDATEOFTHIS

SECTION, THE COMMISSION SHALL IDENTIFY EACH PUBLIC SCHOOL IN THE STATE THAT IS USING AN AMERICAN INDIAN MASCOT AND THAT DOES NOT MEET THE CRITERIA FOR AN EXEMPTION AS OUTLINED IN SUBSECTION (2)(b) OF THIS SECTION. THE COMMISSION SHALL POST SUCH INFORMATION ON ITS WEBSITE.

(b) IN ADDITION TO POSTING ON ITS WEBSITE THE INFORMATION CONCERNING PUBLIC SCHOOLS THAT ARE USING AN AMERICAN INDIAN MASCOT, THE COMMISSION, IN COORDINATION WITH THE DEPARTMENT OF EDUCATION, SHALL NOTIFY THE SCHOOL DISTRICT OF A PUBLIC SCHOOL IDENTIFIED BY THE COMMISSION PURSUANT TO SUBSECTION (4)(a) OF THIS SECTION OF THE REQUIREMENTS RELATED TO THE USE OF AMERICAN INDIAN MASCOTS, AS SET FORTH IN SUBSECTION (2) OF THIS SECTION, AS WELL AS THE PENALTY FOR CONTINUED USED OF SUCH MASCOTS AS OUTLINED IN SUBSECTION (3) OF THIS SECTION. THE COMMISSION, IN COORDINATION WITH THE DEPARTMENT OF EDUCATION, SHALL ALSO PROVIDE THE SAME NOTIFICATION TO THE CHARTER SCHOOL INSTITUTE IF ANY INSTITUTE SCHOOLSAREIDENTIFIEDPURSUANTTOSUBSECTION (4)(a) OFTHIS SECTION.

(c) WHEN A PUBLIC SCHOOL IDENTIFIED PURSUANT TO SUBSECTION (4)(a) OF THIS SECTION DISCONTINUES ITS USE OF ITS AMERICAN INDIAN MASCOT PRIOR TO JUNE 1, 2022, THE PUBLIC SCHOOL SHALL NOTIFY ITS SCHOOL DISTRICT, OR, IN THE CASE OF AN INSTITUTE CHARTER SCHOOL, ITS AUTHORIZER, THE COMMISSION, AND THE DEPARTMENT OF EDUCATION OF SUCH DISCONTINUATION.

(5) A PUBLIC SCHOOL THAT IS IDENTIFIED TO BE IN VIOLATION OF SUBSECTION (2) OF THIS SECTION FOR USING AN AMERICAN INDIAN MASCOT MAY APPLYTOTHEDEPARTMENTOFEDUCATIONFORAGRANTTHROUGHTHE "BUILDING EXCELLENT SCHOOLS TODAY ACT", ARTICLE 43.7 OF TITLE 22, TO ACCOMPLISH ANY STRUCTURAL CHANGES THAT MIGHT BE NECESSARY TO COME INTO COMPLIANCE WITH THIS SECTION. THE TIME REQUIRED FOR MAKING AN APPLICATION OR FOR THE AWARDING OF SUCH GRANT DOES NOT IMPACT THE TIME REQUIREMENT SET FORTH IN SUBSECTION (2)(a) OF THIS SECTION.

SECTION 3. In Colorado Revised Statutes, 22-43.7-109, **add** (5)(c.3) as follows:

22-43.7-109. Financial assistance for public school capital

construction - application requirements - evaluation criteria - local match requirements - technology grants - career and technical education capital construction grants - rules - definition. (5) The board, taking into consideration the financial assistance priority assessment conducted pursuant to section 22-43.7-108, shall prioritize applications that describe public school facility capital construction projects deemed eligible for financial assistance based on the following criteria, in descending order of importance:

(c.3) PROJECTS THAT ASSIST PUBLIC SCHOOLS TO REPLACE PROHIBITED AMERICAN INDIAN MASCOTS AS REQUIRED BY SECTION 22-1-133 (2).

SECTION 4. In Colorado Revised Statutes, **add** 23-1-137 as follows:

23-1-137. Prohibition on use of American Indian mascots - exemptions - definitions. (1) As USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "AMERICAN INDIAN MASCOT" MEANS A NAME, SYMBOL, OR IMAGE THAT DEPICTS OR REFERS TO AN AMERICAN INDIAN TRIBE, INDIVIDUAL, CUSTOM, OR TRADITION THAT IS USED AS A MASCOT, NICKNAME, LOGO, LETTERHEAD, OR TEAM NAME FOR THE SCHOOL.

(b) "PUBLIC INSTITUTION OF HIGHER EDUCATION" MEANS A PUBLIC COLLEGE, UNIVERSITY, COMMUNITY COLLEGE, AREA VOCATIONAL SCHOOL, EDUCATIONAL CENTER, OR JUNIOR COLLEGE THAT IS SUPPORTED IN WHOLE OR IN PART BY GENERAL FUND MONEY.

(2) (a) EXCEPT AS PROVIDED FOR IN SUBSECTION (2)(b) OF THIS SECTION, ON OR AFTER JUNE 1, 2022, A PUBLIC INSTITUTION OF HIGHER EDUCATION IN THE STATE IS PROHIBITED FROM USING AN AMERICAN INDIAN MASCOT. ANY PUBLIC INSTITUTION OF HIGHER EDUCATION THAT IS USING SUCH AN AMERICAN INDIAN MASCOT AS OF JUNE 1, 2022, MUST IMMEDIATELY CEASE USE OF SUCH AMERICAN INDIAN MASCOT.

(b) THE PROHIBITION SET FORTH IN SUBSECTION (2)(a) OF THIS SECTION DOES NOT APPLY TO:

(I) ANY AGREEMENT THAT EXISTS PRIOR TO JUNE 30, 2021, BETWEEN A FEDERALLY RECOGNIZED INDIAN TRIBE AND A PUBLIC INSTITUTION OF HIGHER EDUCATION. A PUBLIC INSTITUTION OF HIGHER EDUCATION THAT IS A PARTY TO SUCH AN AGREEMENT IS HELD TO A HIGH STANDARD AND EXPECTED TO HONOR THE AGREEMENT. THE FEDERALLY RECOGNIZED INDIAN TRIBE HAS THE RIGHT AND ABILITY TO REVOKE ANY SUCH AGREEMENT AT ANY TIME AT ITS DISCRETION.

(II) ANY PUBLIC INSTITUTION OF HIGHER EDUCATION THAT IS OPERATED BY A FEDERALLY RECOGNIZED INDIAN TRIBE OR WITH THE APPROVAL OF A FEDERALLY RECOGNIZED INDIAN TRIBE AND EXISTING WITHIN THE BOUNDARIES OF SUCH TRIBE'S RESERVATION.

(3) FOR EACH MONTH DURING WHICH A PUBLIC INSTITUTION OF HIGHER EDUCATION USES AN AMERICAN INDIAN MASCOT AFTER JUNE 1, 2022, THE PUBLIC INSTITUTION OF HIGHER EDUCATION SHALL PAY A FINE OF TWENTY-FIVE THOUSAND DOLLARS TO THE STATE TREASURER, WHO SHALL CREDIT THE MONEY RECEIVED TO THE STATE EDUCATION FUND CREATED IN SECTION 17 (4) OF ARTICLE IX OF THE STATE CONSTITUTION.

Exhibit 1

SECTION 5. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, or safety.

Leroy M. Garcia
PRESIDENT OF
THE SENATE

Alec Garnett
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

Robin Jones
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

APPROVED Ju\lUJ2-'6 /2aZJ CA+3!.,_ 0f\'0
(Date and Time)

Jared S. Polis
GOVERNOR OF THE STATE OF COLORADO

Exhibit 2

Governor's Commission to Study American Indian Representations in Public Schools

Report 2016

UTE MOUNTAIN UTE TRIBE
P.O. Box 248
Towaoc, Colorado 81334-0248
(970) 565-3751

Friday April 15th, 2016

Dear Commission to Study American Indian Representations in Public Schools,

The Ute Mountain Ute Tribe would like to thank Governor Hickenlooper for creating this Commission and to thank you all for your months of hard work to raise awareness and create productive dialogue around the issue of American Indian mascots. As this is a topic that affects our youth and future leaders, as well as the way that American Indian history and culture is perceived by the larger public, it is critical that honest and thoughtful conversation be facilitated in the State of Colorado. It was an honor for the Ute Mountain Ute Tribe to participate in the Commission and we value involvement in this process as a means of continuing to strengthen our government-to-government relationships.

Through participation in this Commission, our tribe was able to see the lack of education and awareness around American Indian history and culture in Colorado's public schools. A better understanding of the various American Indian nations that have contributed to Colorado's history, as well as a specific understanding of the relationship between Colorado and the Ute peoples, is critical to the education of Colorado citizens.

The use of American Indian mascots creates an opportunity for schools and tribes to engage in meaningful relationships with one another. Schools like Strasburg High School are positive examples of a way in which the use of a mascot can be the catalyst for fostering a respectful, educational, and unique partnership that also acknowledges the sovereignty of American Indian nations.

Our tribe has consistently and continuously offered to share Ute culture and history with schools who are interested in expanding their American Indian educational engagement. We look forward to working with local communities and schools to continue to address the issue of American Indian mascots in a way that benefits everyone and look forward to the creative recommendations that will be produced from this Commission.

Respectfully,

Manuel Heart

Manuel Heart
Chairman

SOUTHERN UTE INDIAN TRIBE

April 13, 2016

Dear Commission to Study American Indian Representations in Public Schools,

The Southern Ute Indian Tribe would like to thank Governor Hickenlooper for creating this Commission and to thank you all for your months of hard work to raise awareness and create productive dialogue around the issue of American Indian mascots. As this is a topic that affects our youth and future leaders, as well as the way that American Indian history and culture is perceived by the larger public, it is critical that honest and thoughtful conversation be facilitated in the State of Colorado. It was an honor for the Southern Ute Indian Tribe to participate in the Commission and we value involvement in this process as a means of continuing to strengthen our government-to-government relationships.

Through participation in this Commission, our tribe was able to see the lack of education and awareness around American Indian history and culture in Colorado's public schools. We believe it is incumbent upon our Tribe, the State of Colorado, and Colorado public schools to recognize the role of American Indians in Colorado's history and to ensure that this history is taught comprehensively and accurately. A better understanding of the various American Indian nations that have contributed to Colorado's history, as well as a specific understanding of the relationship between Colorado and the Ute people, is critical to the education of Colorado citizens.

American Indian mascots that portray American Indians as caricatures, trivialize symbols of American Indian culture, and lack any sincere connection to the people they purport to represent, can be harmful and offensive. Nonetheless, the use of American Indian mascots creates an opportunity for schools and tribes to engage in meaningful relationships with one another. Schools like Strasburg High School are positive examples of a way in which the use of a mascot can be the catalyst for fostering a respectful, educational, and unique partnership that also acknowledges the sovereignty of American Indian nations.

The Southern Ute Indian Tribe has consistently and continuously offered to share Ute culture and history with schools who are interested in expanding their American Indian educational engagement. This Commission provided a platform for us to share Ute culture and history and to engage in meaningful dialogue with Colorado public schools on a difficult subject. Moreover, the Colorado Commission on Indian Affairs has been a great resource in addressing issues that our Tribe faces and in facilitating dialogue between our Tribe and the State of Colorado to address these issues. We would like to see the Colorado Commission on Indian Affairs continue the work of this Commission in some form. We look forward to working with local communities and schools to continue to address the issue of American Indian mascots in a way that benefits everyone and look forward to the creative recommendations that will be produced from this Commission.

Respectfully,

Clement J. Frost

Clement J. Frost, Chairman
Southern Ute Indian Tribe

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EXECUTIVE SUMMARY

On October 5, 2015, Governor Hickenlooper issued an Executive Order establishing the Commission to Study American Indian Representations in Public Schools. [1]This Commission was charged to "facilitate discussion around the use of American Indian imagery and names used by institutions of public education and develop recommendations for the Governor and General Assembly regarding the use of such imagery and names." The Commission members included leaders from the American Indian community, educators, students, and representatives from civil and governmental organizations.

The need for this Commission has grown out of the debate over the "use of imagery and names that are offensive and degrading to American Indians in institutions of public education." These images can serve to dishonor the rich history of American Indians in Colorado. While these images "may be steeped in local traditions and important to community identity, they may also reinforce negative stereotypes about American Indians" and portray an inaccurate and inauthentic view of American Indians today.

The Commission was given the unique task of visiting communities and schools in various places in Colorado which currently use American Indian mascots and depictions. Through open dialogue and personal experiences, the Commission was able to visit four communities, explore the traditions behind the use of mascots, and hear firsthand from community members. Commission members provided information about the harmful effects of American Indian mascots and offered personal testimonies on the highly negative impact mascots can have on young people and adults. Community members were able to openly express themselves on the ongoing struggle for local traditions vs. the desire to treat American Indians respectfully and honor their history and culture. The Commission visited four communities with American Indian mascots. The first visit was to Strasburg, CO (Indians), followed by visits to Loveland, CO (Indians), Lamar, CO (Savages), and Eaton, CO (Reds). In each of these communities, a rich discussion was held with community members. While a simple solution cannot be derived from the many varying opinions, this Commission developed recommendations to Colorado communities, state agencies and organizations, educational institutions, and the Governor. This report is the result of the many hours spent in these communities along with discussions among the Commission members and other leaders, including many in the American Indian community. The Commission has established several guiding principles that preface the recommendations of this report to the Governor.

First, the Commission recommends that communities eliminate American Indian mascots, particularly those that are clearly derogatory, offensive, or misrepresent American Indian people or tribes. The Commission recommends that every school and community with American Indian mascots review the use of these depictions in one or more facilitated public forums that allow for the sharing of perspectives, including input from American Indians. The use of these mascots must be reevaluated with a strong consideration of the negative impact they have on American Indians and on all cultures. American Indians must be treated with respect and their history and culture must be honored.

Furthermore, schools and communities that choose to retain American Indian representations should form a partnership with individual federally recognized American Indian tribes to promote transitioning to respectful relations. The Commission respects the inherent sovereignty of American Indian nations, including tribes' authority to enter into relationships with public schools in both Native and non-Native student settings, regarding the use of American Indian mascots, representations and practices. Through these relationships, respectful use of mascots and depictions can be developed and can foster the use of authentic educational experiences with regard to American Indian history, traditions, and culture.

Lastly, the Commission recognizes local control of public schools by elected boards of education as provided by longstanding Colorado law along with the primacy of elected boards to address the appropriate use of American Indian mascots and representations. We have identified several examples of individual schools and districts that have decided to use respectful and authentic American Indian mascots in partnership with federally recognized tribes and organizations.

In closing, the Governor's Commission to Study American Indian Representations in Public Schools was created to explore the use of potentially harmful mascots and depictions in our schools and communities. We recognize the value of local traditions and the pride that exists in the communities we visited. However, the consensus of the Commission members is that portraying American Indians

1 Appendix A

in a stereotypical way or misrepresenting their culture is harmful not only to American Indians, but to all people. Treating American Indians and all cultures respectfully ultimately supersedes local traditions. Our goal is for each community with American mascots to reevaluate their use and their purpose in an honest and productive way. Clearly, if mascots are derogatory or offensive, they should be changed or eliminated. Schools and communities that have respectful and authentic mascots should explore the origin of their mascot and use their identity to further educate all community members on the history and culture of American Indians that once populated our surroundings and those that continue to call Colorado home. Furthermore, all schools with American Indian mascots should enter into partnerships with American Indian tribes or local organizations and through these partnerships, a bridge to understanding and authentic education can take place that benefits people of all backgrounds and cultures.

ACKNOWLEDGEMENTS

A report of this nature requires the support of many organizations and individuals to make it happen. We would first like to acknowledge the support of Governor John Hickenlooper and Lieutenant Governor Joseph A. Garcia. Without their support, this report and Commission's work would not have been possible. This report is the result of extensive collaboration among a number of tribal, public, and private entities who have contributed their time and talents over the last six months. The representatives and organizations that were part of the Governor's Commission to Study American Indian Representations in Public Schools are:

- Darius Lee Smith, Co-Chair, Director of Denver Anti-Discrimination Office, Denver, CO
- Jeffrey Paul Rasp, Co-Chair, Principal at Strasburg High School, Strasburg, CO
- Walter C. Cooper, Superintendent of Cheyenne Mountain School District, Colorado Springs, CO
- Deirdre Jeannette White Jones, Eaton High School, Eaton, CO
- Tamra Pearson d'Estree, PhD, Director of the Conflict Resolution Institute's Center for Research and Practice, University of Denver, Denver, CO
- Lucinda Long-Webb, Native American Education Durango 9-R and CEA/DEA Member, Durango, CO
- Amy J. Young, Tribal Councilwoman of the Southern Ute Indian Tribe, Ignacio, CO
- Juanita A. Plentyholes, Vice-Chairwoman of the Ute Mountain Ute Tribe, Towaoc, CO
- Lucille A. Echohawk, Colorado Commission of Indian Affairs, Arvada, CO
- Elicia M. Goodsoldier, Denver American Indian Commission, Firestone, CO
- Matthew Lee Campbell, Native American Rights Fund, Boulder, CO
- Georgina Owen, Colorado Department of Education, Denver, CO
- Lindsey Nicole Nichols of Strasburg, CO
- Holly Arnold Kinney of Denver, CO
- Anpa'O Dorothy Locke of Denver, CO
- Troy A. Eid of Morrison, CO served as facilitator

Gillian Weaver, AmeriCorps VISTA for the Colorado Commission of Indian Affairs, Antonio Mendez, Deputy Chief of Staff for Lt. Governor Joseph A. Garcia, and Ernest House, Jr., Executive Director of the Colorado Commission of Indian Affairs assisted in the coordination, planning, and drafting of this Commission and its report and we appreciate their efforts. Finally, this report would not have been completed without the information provided by and invitation to visit the communities of Strasburg, CO; Loveland, CO; Lamar, CO; and Eaton, CO; and the many other students, community members, and organizations that participated in this report. We would like to thank each of them for their time and efforts to make this report a success. For questions or further information regarding this report, please contact:

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ONE PAGE OVERVIEW

The goal of the Commission to Study American Indian Representations in Public Schools was to facilitate discussion around the use of American Indian imagery and names and to develop recommendations regarding the use of such imagery and names through community meetings. The communities visited were: Strasburg, CO (Indians) on November 30, 2016; Loveland, CO (Indians) on January 14, 2016; Lamar, CO (Savages) on February 25, 2016; Eaton, CO (Reds) on March 10, 2016.

After five months of community meetings and discussion, the Commission has established four guiding principles which structure the overall recommendations. These recommendations are intended to provide specific action items that can be taken on by local communities, state agencies and organizations, and educational institutions. (full recommendations on page 21)

Summary of recommendations:

A. The Commission recommends the elimination of American Indian mascots, imagery, and names, particularly those that are clearly derogatory and offensive, and strongly recommends that communities review their depictions in facilitated public forums.

- **Organizations involved in regulating, monitoring, and administering student activities and/or competitive events should engage in this dialogue.** We recommend that they establish new, or update existing, policy to prohibit member schools from displaying hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery, and likewise prohibit hostile and abusive behavior of any kind. While the Colorado High School Activities Association (CHSAA) was not involved in any of the Commission's community meetings, the Commission has seen similar organizations in other states play a key role in this discussion.
- The **Colorado Commission of Indian Affairs (CCIA)** should develop an inventory of experts and resources to assist communities in evaluating their American Indian representations.
- Development a list of recommended specific criteria and/or best practices for schools that decide to maintain their American Indian mascot.

B. The Commission recognizes and respects Tribal sovereignty and strongly recommends schools to enter into formal relationships with federally recognized tribes to retain their American Indian imagery.

- **School Districts** that choose to retain American Indian mascots should make informed decisions regarding the impact of mascots on students and the community and be strongly encouraged to develop partnerships with American Indian tribes or organizations.
- Tribal partnerships for schools should be heavily encouraged.

C. The Commission recognizes and respects local control by elected boards of education and an active involvement of local communities, students, and citizens around the topic of American Indian mascots.

- Information regarding the harmful effects of American Indian mascots should be shared with every public school district in the state.
- Student identity should be strengthened through an increased attention to the academic, cultural, and social emotional environment of school districts.
- School districts should reexamine their anti-bullying/anti-discrimination policies.
- Legislative penalties and unfunded mandates on schools should be avoided.
- **Local communities and school districts** should engage in a community based, inclusive, and participatory process for discussing the American Indian mascot.

D. Work collaboratively to promote and support American Indian history, culture, and contributions in our public schools and districts.

- The Governor should extend this Commission's work through the creation of an **Advisory Committee under the Colorado Commission of Indian Affairs.**
- The **Colorado Department of Education and all school districts** should include American Indian history and educational opportunities and supports for American Indian students within its state educational plan under the Every Student Succeeds Act (ESSA).
- **The Colorado Commission of Indian Affairs** should provide sample curriculum plans, American Indian sources, and other resources to schools to help implement American Indian education in all public schools that focuses on appreciation of American Indian culture and history.
- **History Colorado Center** should archive and maintain the work of the Commission and those schools that choose to transition in order to disseminate it as a resource for other communities, states, etc.

BACKGROUND AND HISTORY

Debate on the National Level

The debate over the use of American Indian mascots in the national sphere goes back for over sixty years. [2]Since the 1970's, over 2/3rds of American Indian mascots have been retired at K-12 schools across the country,[3] including Colorado's own Arvada High School.[4] In 1989, Charlene Teters, a Native American graduate student attending the University of Illinois at Urbana-Champaign, initiated efforts to eliminate that school's "Chief Illiniwek" mascot.[5] Her efforts were made known to the greater public through Jay Rosenstein's documentary "In Whose Honor," which aired on PBS Nationally.[6] Mr. Rosenstein's film highlights Charlene Teters' efforts to eliminate the "Chief Illiniwek,"

In 2001, after conducting extensive field hearings across the United States, the United States Commission on Civil Rights (CCR) issued a statement demanding an end to the use of American Indian images and team names by non-American Indian public schools. The CCR's accompanying public statement, entitled, "The U.S. Commission on Civil Rights Condemns the Use of American Indian Images and Nicknames as Sports Symbols," concludes:

> The stereotyping of any racial, ethnic, religious or other groups, when promoted by our public educational institutions, teaches all students that stereotyping of minority groups is acceptable – a dangerous lesson in a diverse society. Schools have a responsibility to educate their students; they should not use their influence to perpetuate misrepresentations of any culture or people.[7]

The CCR condemned the use of all American Indian representations by non-Native public schools, calling them "disrespectful and insensitive."

The Commission to Study American Indian Representations in Public Schools concluded that these concerns should prompt public schools in Colorado to reconsider the use of American Indians as mascots. As will be discussed at length below, a growing body of evidence indicates that using any ethnic or racial group, including American Indians, as mascots potentially harms young people.[8] American Indian and Alaska Native youth are particularly at risk. As a result of historical trauma and other factors, Native children experience Post-Traumatic Stress Disorder at approximately the same reported rate – more than one in four – as returning military veterans from Afghanistan and Iraq[9]. Medical and scientific research strongly suggests that even seemingly benign or superficially positive representations of American Indians can be dehumanizing and desensitizing to an already vulnerable group of young people.

Consequently, several major professional organizations have called for the elimination of all American Indian mascots from public schools. For instance, the American Psychological Association a decade ago called for the "immediate retirement of all American Indian mascots, symbols, images, and personalities by schools, colleges, universities, athletic teams, and organizations." The American Counseling and American Sociological Association likewise called for the elimination of American Indian and Alaska Native names, mascots, and logos in 2011 and 2007, respectively.

2 Phillips, *supra* note 7, at 14.

3 *Suzan S. Harjo, Et Al., v. Pro-Football, Inc.,* 09-326, available at http://www.ncai.org/attachments/LegalBriefing_TByaxkdqYwYRDohDiQUvSVlcVeXOGzqntVkEXTaEnFailZrpGfN_Amici-NCAI-et-al-10-16-09.pdf.

4 The school is now known as the Arvada Bulldogs. http://www.changethemascot.org/history-of-progress/.

5 Interview: Charlene Teters on Native American Symbols as Mascots in The NEA Higher Education Journal. Available online http://www.nea.org/assets/img/PubThoughtAndAction/TAA_00Sum_11.pdf

6 In Whose Honor? Film Description http://www.pbs.org/pov/inwhosehonor/film-description/

7 The CRC's public statement and recommendations are available at www.usccr.gov/press/archives/2001/041601.htm

8 See, e.g., MISSING THE POINT: THE REAL IMPACT OF NATIVE AMERICAN MASCOTS AND TEAM NAMES ON NATIVE AMERICAN AND ALASKA NATIVE YOUTH, Center for American Progress (July 22, 2014), available at www.americanprogress.org/issues/race/report/2014/07/22/94214/missing-the-point/.

9 See A ROADMAP FOR MAKING INDIAN COUNTRY SAFER: REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES, Indian Law and Order Commission (Nov. 2013), available at www.aisc.ucla.edu/iloc/report/.

The use of American Indian mascots by institutions of higher education was severely limited in August of 2005, when the National Collegiate Athletic Association (NCAA) contacted 18 member schools with unacceptable "hostile or abusive" American Indian mascots and encouraged them to change them or risk participating in future championship competition.

> "Colleges and universities may adopt any mascot that they wish, as that is an institutional matter," said Walter Harrison, chair of the Executive Committee and president at the University of Hartford. "But as a national association, we believe that mascots, nicknames or images deemed hostile or abusive in terms of race, ethnicity or national origin should not be visible at the championship events that we control.[10] "

From the 18 schools called out in the NCAA decision, several chose to pursue the development of respectful relationships with sovereign tribes, notably the Utah Utes, who have a Memorandum of Understanding (MOU) with the Ute Indian Tribe of the Uintah and Ouray reservation and the University of Florida Seminoles, who have a MOU with the Seminole Tribe of Florida. These relationships support mutual respect and understanding, promote specific tribal histories and culture, and advocate for increased higher educational opportunities for American Indian students.

Additionally, policy changes in some states and localities have triggered more schools to retire their mascots. For example, in 2009 the Wisconsin State legislature passed a law allowing citizens to initiate mascot changes if the school mascots are deemed discriminatory.[11] In 2012, the Oregon State Board of Education prohibited all Native American team names and mascots in their schools.[12] Likewise, the Michigan Board of Education passed a resolution calling on schools to retire American Indian mascots in 2003.[13] Both the Los Angeles Consolidated School District and the Houston Independent School District have moved to end the use of offensive mascots, requiring many schools to change their team names.[14] Most recently, California adopted the California Racial Mascots Act in 2015, prohibiting all public schools from using the term Redskins for school or athletic team names, mascots, or nicknames.

The available scientific and medical evidence makes it all the more important for those public schools with American Indian mascots to reevaluate their use and – if the decision is made to retain such representations, including in partnership with individual federally recognized Indian tribes or American Indian organizations – to do so in a thoughtful and deliberative manner designed to promote and institutionalize the positive educational development and awareness of all students. Those schools choosing to retain American Indian mascots must keep clear educational goals in mind, and should expect to be held to a higher standard.

Debate in Colorado

As the debate has continued on the national level for the past four decades, it has simultaneously affected Colorado communities and school districts. During the 90's, three schools in the Denver metro area voluntarily eliminated or modified their American Indian mascots. In 1993, Arvada High School eliminated their mascot of "Redskins" and moved towards the use of "Reds" with an image of a bulldog.

Also in 1993, Arapahoe High School, under the direction of Principal Ron Booth, contacted the Northern Arapaho Tribe to begin conversations about the school's mascot and their use of that image. An artist from the Northern Arapaho Tribe redesigned the logo to be a culturally specific rendering of an Arapaho warrior and the tribe advised the school on ways to use the mascot image more respectfully, such as the removal of the image from the gym floor and the placement of the image over the "heart" on school sponsored apparel. The tribe and the school also entered into a respectful and formal relationship, which resulted in cultural exchanges and visits that occur on an annual basis.

10 NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events. http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/NCAA%2BExecutive%2BCommittee%2BIssues%2BGuidelines%2Bfor%2BUse%2Bof%2BNative%2BAmerican%2BMascots%2Bat%2BChampionship%2BEvents.html

11 *Id.* at 8.

12 *Id.*

13 *Id.*

14 Phillips, *supra* note 7, at 16.

In 1996, Montbello High School eliminated the use of an American Indian figure to represent their "warriors" mascot and replaced it with an image of a futuristic warrior. In 2015, there were approximately 30 schools in Colorado with American Indian mascots at all levels of public education.[15]

Two legislative bills, related to the use of American Indian mascots in institutions of public education, have been introduced in the General Assembly over the last five years and both failed to pass. In 2010, Senate Bill 10-107, "Concerning the Use of American Indian Mascots by Public High Schools" was introduced, which would have required each public high school of a school district and each charter high school that uses an American Indian mascot to cease using the mascot, obtain approval for the continued use of the mascot, or select another mascot from the Colorado Commission of Indian Affairs. In 2015, House Bill 15-1165, "Concerning the Use of American Indian Mascots of Institutions of Public Education" was introduced, which would have established a subcommittee to evaluate and approve or reject the use of American Indian mascots by public schools and public institutions of higher education within the state. Neither of these legislative bills passed. Concerns about preserving local traditions and costs to school districts (particularly in rural communities) played a role in the legislative outcome.

Given the local debate, Strasburg High School, the "Indians," decided in 2015 to pursue a thoughtful and critical reexamination of their mascot. School officials and students reached out to the Northern Arapaho Tribe, as they were one of the former inhabitants of the area that made up Strasburg, in order to begin conversations about the image of the mascot. Tribal representatives visited the school and made comments about the usage of the image, but also agreed to develop a formal relationship with the school. In early 2016, Principal Jeff Rasp and Senior Lindsey Nichols traveled to the Wind River Reservation in Wyoming to present a formal resolution acknowledging the partnership and the support of respectful relations, increased American Indian education, and cultural exchanges to the tribal business council.

In keeping with tribal sovereignty, the Commission respects the right of these and all other tribal governments to decide for themselves how such relationships might be pursued and sustained, particularly when the public school involved may not include many or any students who are actually members of that tribe. The examples of Arapahoe and Strasburg High Schools show some of the positive ways tribes are working collaboratively and respectfully with public educators to determine which American Indian representations are most appropriate, and whether and when they might be used, in order to serve legitimate pedagogical goals of improving mutual respect and understanding. These schools can serve as models of positive benefits that can flow when American Indian representations are deliberately used as a springboard for strengthening educational opportunities for students to learn about Native people, history, and cultures.

Colorado Law of Local Control

In contrast to many other states, the public school system in Colorado grew out of an intentional commitment to local control[16]. Instead of establishing a centralized, state-administered system, Colorado's constitutional framers "… made the choice to place control 'as near the people as possible' by creating a representative government in miniature to govern instruction."[17] This choice sets our state apart. Just six states in the nation have a constitutional provision for local public school governance.

The Commission respects the primacy of elected boards of education as ensured by Colorado law, including the ability to address the appropriate use of American Indian mascots and representations in sports and other settings. These are fundamentally local policy decisions that elected school board members should make and administrators and educators carry out with input from all impacted citizens. These decisions should be made with knowledge of both the local and national history as well as the potential harms to all students.

15 See appendix D.

16 For a good overview of local control of public secondary education in Colorado, see the Colorado Association of School Boards, "Boards of Education: Local Control of Instruction," available at www.casb.org/Page/228.

17 Owens v. Congress of Parents, Teachers and Students, 92 P. 3d 933, 939 (Colorado Supreme Court, 2004).

Tribal Sovereignty

This Commission recognizes that the legal status of Native nations in the United States is unique both domestically and internationally.[18] Tribal sovereignty – or, in the words of the United States Supreme Court, the right of American Indians living on federally recognized reservations to "make their own laws and be ruled by them"[19] – is recognized in thousands of treaties, statutes, executive orders and court decisions. Tribal sovereignty secures for tribes a government-to-government relationship with the federal government, imposes limits on the power of Colorado and other states over Native people and lands, and protects Native nations' right to self-governance.

Of the 567 Indian tribes and nations currently recognized by the federal government, two tribes – the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe – are headquartered within the boundaries of the State of Colorado. Additionally, at least 46 other tribes have cultural and historical ties to our state. The Commission was privileged to include elected officials from the Southern Ute and Ute Mountain Ute Tribes as well as officials of several other tribes connected to Colorado.

During the course of the Commission's fieldwork, we were mindful that several federally recognized tribes have entered into voluntary agreements with public schools in Colorado related to the representations of American Indians. In some instances – such as Arapahoe High School and the Northern Arapaho Tribe of the Wind River Indian Reservation in Wyoming – the mascot is specifically identified with that tribe's own citizens. We respect each tribe's sovereign right to make its own decision regarding American Indian representations.

Effects of Mascots on Students

The dispute over the use of American Indian mascots is rooted in an extensive history of abuse, discrimination, and conquest. American Indian mascots became popular during a time in our country when racism and cultural oppression were the norm.[20] Many present day Indian-based team names were once widely used as derogatory terms to describe American Indian characters. Beginning in the early 20th century, sports clubs ranging from the professional level to local schools began appropriating American Indian imagery to represent their teams.[21] This imagery was often based on stereotypical and false historical narratives of violence, ferociousness, and savagery and such renderings still exist today.[22]

Not only are American Indian mascots extremely offensive, but they also cause real, documented harm to the mental health of American Indian and Alaska Native ("American Indian") students. American Indian youth already face some of the harshest realities in the nation. For example, the poverty rate for American Indians under age 18 was 36.5% in 2012, as compared to 22.2% for the overall population.[23] Further, American Indian youth are more likely to suffer from addiction and substance abuse issues than the general population. A disproportionate 18.3% of American Indian eighth graders reported binge drinking, versus 7.1% nationally.[24] These modern challenges, combined with a history of cultural oppression and trauma, result in feelings of

18 A succinct overview introduction to tribal sovereignty in the United States may be found in Robert T. Anderson, Bethany Berger, Sarah Krakoff and Philip P. Frickey, AMERICAN INDIAN LAW: CASES AND COMMENTARY (3d Ed. 2008)

19 Williams v. Lee, 389 U.S. 217, 220 (1959).

20] National Congress of American Indians, *Ending the Legacy of Racism in Sports & the Era of Harmful "Indian" Sports Mascots,* 2 (2013), http://www.ncai.org/attachments/policypaper_mijapmouwdbjqftjayzqwlqldrwzvsyfakbwthpmatcoroyolpn_ncai_harmful_mascots_report_ending_the_legacy_of_racism_10_2013.pdf.

21 Id.

22 J. Gordon Hylton, *Before the Redskins Were the Redskins: The Use of Native American Team Names In the Formative Era of American Sports, 1857-1933,* 86 N.D. L. Rev. 879, 891 (2010).

23 Bureau of the Census, *Selected Population Profile in the United States: 2010-2012 American Community Survey 3-Year Estimates,* http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/12_3YR/S0201/0100000US/popgroup~001|006.

24 Colorado State University, College of Natural Sciences, Comparing Rates of Substance Use Among AI Students to National Rates: 2009-2012, available at http://triethniccenter.colostate.edu/ai_epi1.htm.

hopelessness for many Native youth.[25] As such, suicide is the second leading cause of death for American Indians ages 15 to 34, at a rate 2.5 times higher than the national average[26].

American Indians are the only group of human beings in the United States who are made the subject of mascots at all levels of education. Several prominent professional, civil rights, and religious organizations have long objected to the use of American Indian mascots. These prominent organizations include The American Psychological Association (2005), American Sociological Association (2007) and American Counseling Association (2001). These organizations have all passed resolutions recommending the end of all American Indian mascots in sports due to the damaging effects on both the American Indian and non-Native population. According to the American Psychological Association, numerous studies have demonstrated that the use of American Indian mascots: (1) undermines the educational experiences of members of all communities; (2) establishes an unwelcome and hostile learning environment for American Indian students; (3) has a negative impact on the self-esteem of American Indian children; (4) undermines the ability of American Indian nations to portray accurate and respectful images of their culture; and (5) may represent a violation of the civil rights of American Indian people[27].

Emerging mental health research, investigating and reporting the negative psychological effects of these mascots, reaches the same conclusion. Research shows that the mascots establish an unwelcome and hostile learning environment for American Indian students.[28] The research also revealed that the presence of American Indian mascots directly resulted in lower self-esteem and mental health issues for American Indian adolescents and young adults.[29] Equally important, recent studies also show that these mascots undermine the educational experience of all students, particularly those who have little to no contact with American Indian people.

Racial stereotypes, positive or negative, can play an important role in shaping adolescent consciousness. As a consequence, inauthentic behavior displayed in schools with American Indian mascots, by making an absurd misrepresentation of American Indian cultural identity, causes many young Native people to feel shame about who they are. Studies partly attribute feelings of inferiority to negative characterizations that are materialized in racist school mascots.[30] Native youth are faced with these undesirable images, showing them the constrained ways in which others view them.[31] This further limits the ways in which Native youth may view themselves.[32] As American Indian youth continue to struggle to find their sense of identity, they are presented with caricature versions of themselves, and this in turn affects how Native youth view their place in society.[33] All this occurs in the context of a population that already has been proven to experience serious psychological distress 1.5 times more than the general population. The most significant mental health concerns among American Indians, cited by the American Psychological Association, are the high prevalence of depression, substance use, suicide, and anxiety (including PTSD).

These concerns arise as American Indian students often face ridicule and harassment in the classroom and at sporting events.[34] Such hostile environments result in lower academic achievement and success rates across the

25 Victoria Phillips, Erik Stegman, *Missing the Point: The Real Impact of Native Mascots and Team Names on American Indian and Alaska Native Youth, Center for American Progress,* 7 (July 2014).

26 *Suicide Facts at a Glance,* http://www.cdc.gov/violenceprevention/pdf/Suicide-DataSheet-a.pdf.

27 American Psychological Association, *APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations* (2005), http://www.apa.org/pi/oema/resources/indian-mascots.aspx.

28 Victoria Phillips, Erik Stegman, Missing the Point: *The Real Impact of Native Mascots and Team Names on American Indian and Alaska Native Youth, Center for American Progress,* 7 (July 2014).

29 Id.

30 Id.

31 American Psychological Association, *APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations* (2005), http://www.apa.org/pi/oema/resources/indian-mascots.aspx.

32 Id.

33 Id.

34 Phillips, *supra* note 7, at 4.

board.[34] The federal government recognizes that schools should work toward eliminating hostile learning environments, as they lead to serious challenges to students' success.[36]

Studies also show that the continued use of American Indian mascots is harmful to all students, not just American Indian students.[37] Schools take on the role of educating and influencing students. By using American Indian mascots, schools are teaching students that stereotyping minority groups is an acceptable practice, further legitimizing discrimination against American Indians.[38] These images perpetuate misrepresentations portraying American Indians as a "culture of people frozen in time.[39]" Non-Indian students with little contact with Indigenous peoples come to rely on these stereotypes to inform their own understanding of American Indians' place in society, often times leading to discriminatory behavior.[40]

Such practices also lead to cultural intolerance and higher rates of hate crimes against American Indians.41 For example, in 2014 Native students in California reported being taunted with names like "wagon burners," "savages," and "dirty Indians.[42]" Two students at the same high school were forced to transfer schools after finding notes on their lockers reading "White Pride Bitch" and "Watch Your Redskinned Back.[43]" There have also been recent examples of schools with American Indian mascots performing "Indian" dances or chants at pep rallies or other events, where students are dressed in fake feathers and mock war paint. This cultural intolerance embodies the negative impacts described by the American Psychological Association.

As shown above, the causal connection is clearly evident, and the mascots and concomitant behavior that goes along with them only exacerbate an already severe, unfair, and unjust burden and problem.

35 Id. at 5.

36 Id.

37 American Psychological Association, APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations (2005), http://www.apa.org/pi/oema/resources/indian-mascots.aspx.

38 Id.

39 Id.

40 Id.

41 U.S. Department of Justice Office of Justice Programs, Bureau of Justice Statistics, American Indians and Crime, (1999), available at http://www.bjs.gov/content/pub/pdf/aic.pdf.

42 Alysa Landry, Racial Bullying Persists in Northern California (Apr. 17, 2014), http://indiancountrytodaymedianetwork.com/2014/04/17/racial-bullying-persists-northern-california-154494.

43 Id.

COMMUNITY SUMMARIES

The Commission to Study American Indian Representations in Public Schools and staff collaborated with local school boards, educational organizations, and community leaders to plan and execute the community meetings. The Commission agreed to only visit schools and communities that they were invited to and these communities listed below showed great hospitality and interest. From initial invitation, purpose of Commission, and creating a respectful and successful dialogue; staff and Commissioners worked to make sure all viewpoints were heard in a facilitated public forum.

In these meetings, the Commission asked to hear comments from students, school staff, and community members regarding their American Indian mascot, logo, and/or school traditions, in order to better understand the particular feelings, local histories, and challenges associated with the mascot. The communities visited were:

COMMUNITY	MASCOT	LOCATION	DATE
Strasburg	Indians	Strasburg High School	November 30, 2015
Loveland	Indians	Loveland High School	January 14, 2016
Lamar	Savages	Lamar Community College	February 25, 2016
Eaton	Reds	Eaton High School	March 10, 2016

STRASBURG, CO

Meeting Date: November 30th, 5:30PM-8:30PM

Location: Strasburg High School, 56729 Colorado Ave., Strasburg, CO 80136

Number of Community Members Attended: 30

Media Present: ABC7 The Denver Channel, The I-70 Scout/Eastern Colorado News

Demographics

As of the census of 2000, there were 1,402 people, 503 households, and 393 families residing in the town. The racial makeup of the town was 95.44% White, 1.28% African American, 0.57% American Indian/Alaska Native, 0.21% Asian, 0.07% Pacific Islander, 0.71% from other races, and 1.71% from two or more races.

The first meeting of the Commission was held at Strasburg High School, at the invitation of Commission members Principal Jeff Rasp and senior Lindsey Nichols. During the meeting, Jeff Rasp and Lindsey Nichols provided an overview of their ongoing goal to develop a formal relationship with the Northern Arapaho Tribe, a project which was spurred by a deeper investigation of the meaning, implications, and history of the school's "Indians" mascot.

Highlights from Strasburg Meeting:

- **A Strasburg student** contributed to the conversation by saying that in his opinion, the local community has embraced the mascot as more of a symbol than as a representation of a culture and that to remedy that, they need more education. It is clear that the community embraces the name "Indians" and the various American Indian names used for streets throughout the community, but no one knows anything about these particular cultures.
- **A staff member of Strasburg High School** commented on the emotional impact that the mascot has on alumni and students, who they believe carry the name with pride. The name "Indians" is deeply tied to their identity. She also shared with the group that according to a local historian, the town of Strasburg was originally called "Comanche Crossing," but it changed to Strasburg with the development of the railroad.
- **A school board member** noted that the main issue underlying this conversation is education and the lack of education, or ignorance, regarding this topic. He commented that not everyone will be agree, but that the community of Strasburg never intended to be derogatory or disrespectful to American Indians. That being said, he would like the school to remove the mascot image from the gym floor, because based on conversations he had during the small group break out, this is disrespectful.

LOVELAND, CO

Meeting Date: January 14th, 2016 5:30 PM-8:30PM

Location: Loveland High School, 920 W. 29th St., Loveland, CO 80538

Number of Community Members Attended: 40

Media Present: Loveland Herald-Reporter

Demographics

As of the census of 2000, there were 50,608 people, 19,741 households, and 14,035 families residing in the city. The racial makeup of the city was 92.85% White, 0.37% Black, 0.69% American Indian/Alaska Native, 0.83% Asian, 0.03% Pacific Islander, 3.21% from other races, and 2.02% from two or more races.

Photo credit: Loveland Reporter-Herald

The second meeting of the Commission was held at Loveland High School, at the invitation of Superintendent Stan Scheer. During the meeting, Principal Todd Ball and former teacher Danny Heyrmann provided an overview of how Loveland and tried to seek tribal input on their mascot and the challenges of that process.

Highlights from Loveland Meeting:

- **A faculty member** of Loveland High School commented that she chose to work for Loveland due to its rich sense of history and traditions. She works with the student council to improve the student climate and these students would like to honor their tradition as respectfully as possible. They are interested in learning more about this and educating the student body as well, perhaps through the form of a school assembly. The student council would definitely be willing to increase awareness of this issue to their peers.
- **A student representative from the student council** stated that he is very proud to be a Loveland "Indian" as his school is very important to him, but this meeting has been an eye opening experience. He was not aware of how much he didn't know and of how many people are willing to educate people more on the topics being discussed here. He would love to learn more about how the entire community can be educated on what was discussed tonight.
- **An alumnus of Loveland High School** remarked on how interesting this meeting and conversation had been for her. She was born and raised in this area and in her youth looked forward to becoming a "Loveland Indian." For her, strength is a big part of the image she had of the mascot, but was very impressed with the opportunity to get more information for actual people and as opposed to reading information through a third party. With real people, there is a tangible connection which is a great blessing for the community. She remembers when in the past there was more of a connection to American Indian culture, through annual powwows in the downtown area. During these visits, there was an opportunity for Loveland residents to meet American Indian people and learn more about their dances and dress. This type of cross cultural education is exciting and the community of Loveland should have access to it in their youth, they should not have to wait as long as she did for this conversation. She also thanked the Commission members that spoke their native language tonight, as this alone was a unique way to show the diversity of indigenous culture.
- **Another student** agreed with her peer that she is also proud to be an "Indian," but it needs to be represented in a positive way. She also wasn't very aware of this issue and knows many students are not as well.

LAMAR, CO

Meeting Date: February 25th, 5:00PM-8:00PM

Location: Lamar High School,
1900 S. 11th St., Lamar, CO 81052

Number of Community Members Attended: 100

Media Present: The Prowers Journal

Demographics

As of the census of 2000, there were 8,869 people, 3,324 households, and 2,247 families residing in the city The racial makeup of the city was 76.24% White, 0.38% African American, 1.48% American Indian/Alaska Native, 0.47% Asian, 0.05% Pacific Islander, 18.81% from other races, and 2.57% from two or more races.

The third meeting of the Commission was held at Lamar Community College and discussed the Lamar High School "Savages" mascot. The meeting was opened by representatives of the Lamar Board of Education.

Highlights from Lamar Meeting:

- **A community member** stated that he appreciated the Commission coming to visit and doing their own research of the community. Initially, this visit put him on the defensive, but after hearing several Commissioners speak, that is not how he feels now. He had several questions: first, if the major concern is being respectful of American Indian culture, does the community really communicate disrespect and/or did the Commission come across anything intentionally harmful or malicious? Second, he would like to understand where the feeling of disrespect comes from: is it a misunderstanding of the name savages or the logo, or, is it the connection between the name savages and the image of an American Indian?

- **A Lamar High School alumnus and former faculty** announced to the Commission that they are "in Indian Country now" and that it was "Savage Country." She attended and taught in the Lamar education system. She is also active in the alumni community and just finished organizing a reunion that was attended by over 350 people. When they sat together at this reunion, singing songs together, praying together, they were "savages." She asked the Commission if they didn't think they were proud to be Savages. They are as proud as everyone sitting in the chairs [the Commission]. This is Savage Country to them, their ambulances and fire trucks carry the logo. Anyone who would have anything to say against the savages will hear about it. They are proud people here. If the Commission should get mad at anyone, they should get mad at the media, they are the ones responsible for pushing those stereotypical and offensive images. How is Lamar supposed to learn about tribal history if they cut Colorado History from the curriculum? You need to work on the media and standards of education before solving the mascot question.

- **A different community member** spoke on her experience in Lamar and with the mascot as a transplant to this area. To those who can't understand why the Savage name is offensive, to others outside the community, it is embarrassing to be associated with such a name. The term is a slur and is especially offensive when used in connection with American Indians; it means someone is less than human, beast like. Continued use of the mascot makes the town look ignorant.

- **Another community member** commented that everyone's feelings get hurt way too easily, including himself. When he first heard about this meeting, his feelings were hurt, but now he doesn't feel that way. He graduated high school here as well as his children. When the governor visited Lamar a few months back, he asked him if he was going to change their mascot. In no way would he want to demean a child and he has nothing but respect for American Indians. If it weren't for the Navajo, everyone in America would be speaking Japanese today. He has friends who are Navajo, and to hear them speak their language is beautiful. He has respect for all Indian nations and he doesn't care what creed or race a person is, if you are a good human, you are a good human. He hopes the Commission feels the same way about the people of Lamar and see how much they care for this community. He ended his comments by saying that he feels a lot better after hearing the stories of the Commissioners and learning different things.

- **A junior at Lamar High School** commented that the mascot has been used by generations upon generations of community members. The school does provide a Colorado History curriculum where they learn about some of the heritage of Lamar. He asked the commission, whether any tribe was ever called the savages, and if not, what tribe would that offend then? He also asked if the artwork represented American Indians negatively or if anything other pride was for that name was felt at the school. The title of this year's yearbook is called "Pride in the Tribe," which demonstrates how the students feel about this moniker.

EATON, CO

Meeting Date: March 10th, 5:00PM-8:00PM

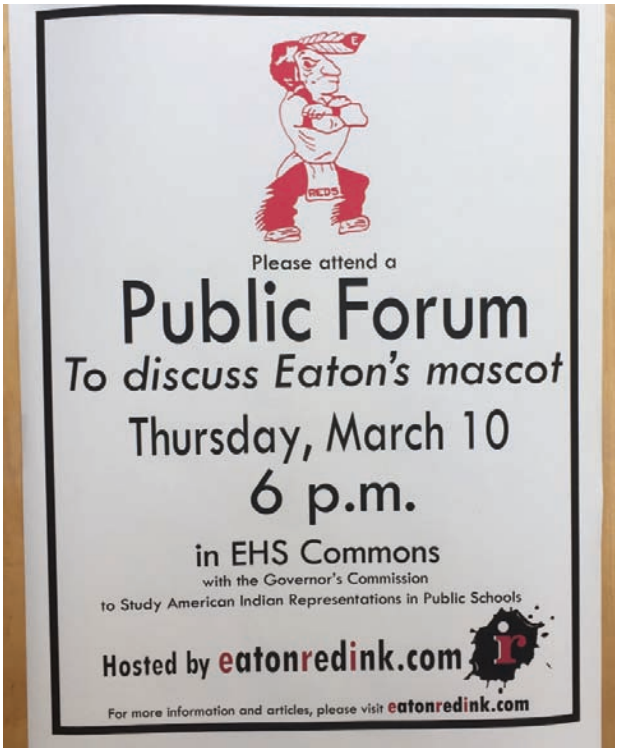
Location: Eaton High School, 1900 S. 11th St., Lamar, CO 81052

Number of Community Members Attended: 125

Media Present: The Herald Voice, ABC 7, The Denver Channel, The Greeley Tribune, Colorado Public Radio

Demographics

As of the census of 2000, there were 2,690 people, 1,033 households, and 765 families residing in the town. The racial makeup of the town was 91.12% White, 0.04% African American, 0.52% American Indian/Alaska Native, 0.78% Asian, 5.76% from other races, and 1.78% from two or more races.



Highlights from Eaton Meeting:

- **An alumnus of Eaton High School** remarked on her particular experience. She was an actively involved student and was always proud of her school and athletic teams. It wasn't until she went to college that she became more aware of the context and complicated nature of American Indian mascots. Now examining he mascot, she does not see authentic American Indian culture and she thinks that people who would have a different opinion of the image if they were exposed to American Indian culture. If they were doing this to any other ethnic group, it would be considered racist.

- **A community member**, not an alumni of Eaton High School, grew up in Nebraska, where there is more American Indian culture, and has lived here for 50 years. It was interesting for him to listen to the kids at this meeting and what they have to say, but he thinks that their negative associations of American Indian mascots is a product of the media. When he was younger, he would play cowboys and Indians and always wanted to be the Indian because they were brave, fast, and courageous, I don't see a killer. He would encourage the youth to make their own opinions and not be influenced by Hollywood.

- **A student athlete at Eaton** commented on the sports traditions associated with the mascot. Every week, the best player gets to wear a tomahawk on their helmet and there is a lot of usage of warrior names and ideas. Everyone is very protective of the mascot, but his eyes have been opened and he realizes that it isn't his bloodline or his heritage. It belongs to someone else. The school can embrace the warrior spirit without being American Indians. He sees a division in the younger and older generations over this issue, but it directly affects the current students, not the alumni.

- **A community member and father of Eaton High School Alumni** said that he had empathy of what he had heard tonight, but to comment on why people like to dress up as Indians, it is because "we are a tribal bunch" He was a part of the 13th bomb squadron in 1945 and their mascot was the "Devil's Own Grim Reapers." 60 years later, this mascot still belongs to him, though it might offend some people. He also shared his experiences as a youth soccer coach and his success in inspiring athletes by having them think of their warrior spirit. He ended his comments with a plea to not take the mascot away and a suggestion that any changes should be made with a community vote.

RECOMMENDATIONS OF THE COMMISSION TO STUDY AMERICAN INDIAN REPRESENTATIONS IN PUBLIC SCHOOLS TO COLORADO COMMUNITIES, STATE AGENCIES AND ORGANIZATIONS, AND EDUCATIONAL INSTITUTIONS

After five months of community meetings and discussion, the Commission has established four guiding principles which structure their overall recommendations. These recommendations are intended to provide specific action items that can be taken on by local communities, state agencies and organizations, and educational institutions. As citizens of Colorado, we should all be invested in and responsible for the education and well-being of our students, so similarly there are ways that respectful and meaningful discussion of the mascot issue can be held at the individual, local, and state levels. Furthermore, every local community is unique and has its own distinctive challenges, history, traditions, and identity that must be taken into account, so recommendations regarding mascots should be flexible, responsive, and supportive of these needs.

The Commission to Study American Indian Representations in Public Schools makes the following recommendations:

A. The Commission recommends the elimination of American Indian mascots, imagery, and names, particularly those that are clearly derogatory and offensive, and strongly recommends that communities review their depictions in facilitated public forums.

The Commission recommends that every school and community with American Indian mascots review the use of these depictions in a facilitated public forum that allows for the sharing of perspectives, including input from American Indians. The use of these mascots must be reevaluated with a strong consideration of the negative impact they have on American Indians and on all cultures and students. Mascots or images should be eliminated, particularly those that are derogatory and offensive.

In support of this recommendation, the Commission recommends:

- **Organizations involved in regulating, monitoring, and administering student activities and/or competitive events should engage in this dialogue**. We recommend that they establish new, or update existing, policy to prohibit member schools from displaying hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery, and likewise prohibit hostile and abusive behavior of any kind. While the Colorado High School Activities Association (CHSAA) was not involved in any of the Commission's community meetings, the Commission has seen similar organizations in other states play a key role in this discussion.
- The **Colorado Commission of Indian Affairs (CCIA)** to develop an inventory of experts and resources that can assist school districts and student organizations with either eliminating or reviewing their mascot.
- **A special Advisory Committee by the Colorado Commission of Indian Affairs** to develop a list of recommended specific criteria and/or best practices for schools that decide to maintain their American Indian mascot.

B. The Commission recognizes and respects Tribal sovereignty and strongly recommends schools to enter into formal relationships with federally recognized tribes to retain their American Indian imagery.

Schools that choose to retain an American Indian mascot are encouraged to form a partnership with individual federally recognized tribes to promote transitioning to respectful relations. The Commission respects the inherent sovereignty of American Indian nations, including tribes' authority to enter into relationships with public schools in both Native and non-Native student settings, regarding the use of American Indian mascots, representations and practices. Through these relationships, respectful use of mascots and depictions can be developed and can foster the use of authentic educational experiences with regard to American Indian history, traditions, and culture.

In support of this recommendation, the Commission recommends:

- That **school districts** that choose to retain American Indian mascots should make informed decisions regarding the impact of mascots on students and the community and be strongly encouraged to develop partnerships with American Indian tribes or organizations.
- Tribal partnerships for schools that want to develop long term relationships with sovereign governments and Native citizens to inform how and when mascots are used, provide contemporary cultural education, and establish mutually beneficial partnerships, should be heavily supported.

C. The Commission recognizes and respects local control by elected boards of education and an active involvement of local communities, students, and citizens around the topic of American Indian mascots.

As the Commission respects the primacy of elected boards of education as ensured by Colorado law, including the ability to address the appropriate use of American Indian mascots and representations in sports and other settings, it strongly advises communities to take this topic on at the local policy level and support systems that ensure culturally sensitive, inclusive, and respectful learning environments for the benefit of all their students.

In support of this recommendation, the Commission recommends:

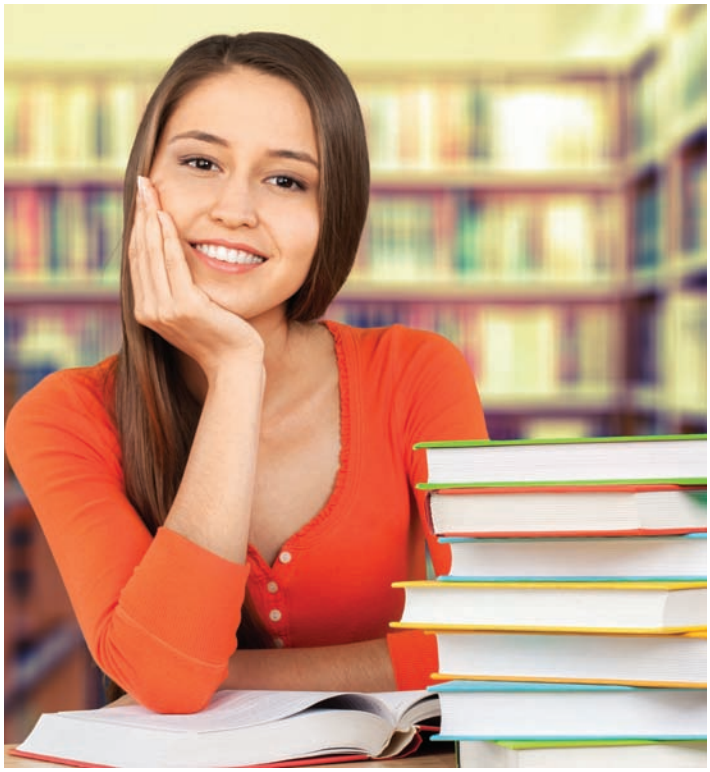
- Information regarding the harmful effects of American Indian mascots should be shared with every public school district in the state.
- Student identity to be strengthened through an increased attention to the academic, cultural, and social emotional environment of school districts, particularly in regards to American Indian students.
- School districts to reexamine their anti-bullying/anti-discrimination policies, especially with regard to American Indian students.
- That legislative penalties and unfunded mandates for schools with American Indian mascots be avoided.
- **Local communities and school districts** to engage in a community based, inclusive, and participatory process for discussing the American Indian mascot. To support these conversations there should be incentives and aid provided to help in facilitating public meetings, gathering school information, inviting speakers and experts, consultations, etc.

D. Work collaboratively to promote and support American Indian history, culture, and contributions in our public schools and districts.

One of the most important aspects of the debate over continued use of American Indian mascots is a lack of educational awareness of American Indian culture and history in public schools and a lack of resources for developing and increasing this awareness. In order to advocate for American Indian cultures and history in local communities, resources need to be available to inform school districts of the rich and diverse American Indian heritage in Colorado.

In support of this recommendation, the Commission recommends:

- An extension of this Commission's work through the creation of an **Advisory Committee under the Colorado Commission of Indian Affairs** to assist with community conversations, the development of set of criteria and transition process for public schools that use American Indian mascots or imagery, and to help identify financial support to assist in the transition process.
- The **Colorado Department of Education and all school districts** should include American Indian history and educational opportunities and supports for American Indian students within its state educational plan under the Every Student Succeeds Act (ESSA).
- **The Colorado Commission of Indian Affairs** to provide sample curriculum plans, American Indian sources, and other resources to schools to help implement American Indian education in all public schools that focuses on appreciation of American Indian culture.
- **History Colorado Center** to archive and maintain work of the Commission and those schools that choose to transition in order to disseminate it as a resource for other communities, states, etc.



LOOKING FORWARD

American Indians have long challenged the use of stereotypical American Indian images by sports, entertainment, and educational institutions. Many contend that the use of such imagery is as demeaning as the *Amos & Andy, Frito Bandito,* and *Aunt Jemima* racial caricatures of a not so distant segregated past. Proponents for Indian mascots assert that using these images honors Native peoples and promote native culture in highly visible forums.

While there is no denying that western colonization set in motion the demise of the traditional American Indian way of life, there remains profound resistance to letting go of Indian mascots or acknowledging the current impact these mascots and images have on Indian identity and cross-cultural relationships. For American Indian children, who are collectively denied positive media and educational models to counter these images, the ramifications on self-identity are very real and documented. While they are the inheritors of strong and vibrant tribal communities, Indian children share a legacy of poverty created by relocation and reservation systems. Too often rendered invisible by mainstream society, Indian youth experience the dismissal of their progression into the future as they are continually romanticized into the past. Often regarded as fierce warriors or noble savages the American Indian is expected to look, act, speak, and think in a manner predetermined by mainstream viewpoints, regardless of whether these perceptions are historically or currently accurate.

In defining culture there is an inherent sense of entitlement to write one's own record of history. To acknowledge the use of Indian mascots as hurtful or insulting would require a reexamination of the accepted views of "new world discovery" and western expansion. Also, honest conversations would need to take place about the associated, economic benefit for professional sports organizations and educational institutions.

These perspectives, among others, contribute to an inevitable conflict between those who support the continued use of cartoonish Indian mascots, those who find such images offensive and demeaning, and those that have documented real and actual harms that are caused by mascots to all students. Unlike the past, when mainstream viewpoints dictated cultural identification, Indians today are expressing themselves through both contemporary and traditional mediums by insisting on their human right of self-determination. By educating all children to more accurately and positively reflect the contributions of all people, the use of American Indian mascots will no longer be an accepted reality, but an issue relegated to the footnotes of American history.

"Defiant to your Gods", Denver Art Museum,
Artist Gregg Deal

APPENDIX A

STATE OF COLORADO

OFFICE OF THE GOVERNOR
136 State Capitol
Denver, Colorado 80203
Phone (303) 866-2471
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John W. Hickenlooper
Governor

B 2015 006

EXECUTIVE ORDER

Creating the Commission to Study American Indian Representations in Public Schools

Pursuant to the authority vested in the Office of the Governor of the State of Colorado, and in particular, pursuant to Article IV, Section 2, of the Colorado Constitution, I, John W. Hickenlooper, Governor of the State of Colorado, hereby issue this Executive Order creating a Commission to Study American Indian Representations in Public Schools.

I. Background, Need and Purpose

American Indians have resided in Colorado for centuries. Within the boundaries of the present State of Colorado, numerous indigenous nations hunted, gathered, and lived in every part of the state. The early settlement of Colorado resulted in displacement of American Indians from their land, as well as the loss of language, culture, and lives. The offensive use of tribal names and American Indian imagery became more apparent in early media publications as these wars, massacres, and displacements occurred. The use of imagery and names that are offensive and degrading to American Indians in institutions of public education dishonors the ongoing legacy of American Indians in the State of Colorado. The use of these images and names may be steeped in local traditions and important to community identity, but they may also reinforce negative stereotypes about American Indians and limit public knowledge about actual indigenous culture and heritage.

Two legislative bills, related to the use of American Indian mascots in institutions of public education, have been introduced in the General Assembly over the last five years and both failed to pass. In 2010, Senator Suzanne Williams sponsored Senate Bill 10-107, "Concerning

the Use of American Indian Mascots by Public High Schools." The bill would have required each public high school of a school district, and each charter high school, that uses an American Indian mascot to cease using the mascot, obtain approval for the continued use of the mascot, or select another mascot from the Colorado Commission of Indian Affairs. In 2015, Representative Joe Salazar sponsored House Bill 15-1165, "Concerning the Use of American Indian Mascots of Institutions of Public Education." The bill would have established a subcommittee to evaluate and approve or reject the use of American Indian mascots by public schools and public institutions of higher education within the State. Neither of these legislative bills passed. Concerns about preserving local traditions and costs to school districts (particularly in rural communities) played a role in the legislative outcome.

Some school districts in Colorado have found constructive and collaborative ways to migrate away from offensive ethnic caricatures and mascots without disrupting school traditions or incurring costs that detract from student learning. In some cases, these districts have even found ways to use the debate over offensive mascots as an opportunity to educate students about our common history and bring diverse communities together.

It is in that spirit, we believe a more open and ongoing discussion and study is needed to identify how affected communities can respect the culture of American Indians while maintaining community traditions. One of the goals of this Commission is to host public discussions among constituents who feel strongly connected with these names and images without the threat of revoking state funding or issuing penalties.

II. Mission and Scope

The Commission shall facilitate discussion around the use of American Indian imagery and names used by institutions of public education and develop recommendations for the Governor and the General Assembly regarding the future use of such imagery and names. Through dialogue between representatives from federally recognized tribes, Colorado's American Indians, institutions of public education, state agencies, and community stakeholders, the Commission will explore the manner in which images and names are perceived in relationship to individual, historical, and cultural perspectives. The Commission will also reach out to affected communities to gather more information about the community response to the usage of American Indian imagery and evaluate potential impacts to both rural and urban communities. Representatives from American Indian tribes and urban populations will guide discussion on the offensive nature of some images and names, the effects of these images and names on members of their communities, and opportunities for cooperation. The Commission will create a list of recommendations for the State of Colorado to address the issue of American Indian imagery and names in institutions of public education in a way that serves all affected communities.

III. Membership

The Commission shall consist of no more than fifteen (15) members and shall be appointed by the Governor. The Governor shall appoint the Chair and Co-chair of the Commission. Efforts will be made to ensure representation from all areas of the state. The members of the Commission shall be as follows:

i. Chair;
ii. Co-Chair;
iii. Four representatives from statewide education organizations;
iv. One representative of the Southern Ute Tribe;
v. One representative of the Ute Mountain Ute Tribe;
vi. One representative from the Colorado Commission of Indian Affairs;
vii. One representative from the Denver American Indian Commission;
viii. One representative from the Native American Rights Fund;
ix. The Executive Director of the Colorado Department of Education or his or her designee;
x. Three members of the public.

IV. Duration

This Executive Order shall continue in existence until April 4, 2016, or until such time as it is either terminated or extended beyond that date by further Executive Order of the Governor.

GIVEN under my hand and the Executive Seal of the State of Colorado, this fifth day of October, 2015.

John W. Hickenlooper
Governor

APPENDIX B:

The following is a list of relevant resources regarding American Indian mascots and representations.

Rules and Resolutions:

APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations (2005)

Minneapolis Commission on Civil Rights Resolution in opposition to the use of offensive Native American team names and logos within the City of Minneapolis

NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events (2005)

Oregon State Board of Education Resolution Regarding Use of Native American Mascots (2015)

Oregon State Board of Education Rule Banning Use of Native American Mascots (2015)

Statement of U.S. Commission on Civil Rights on the Use of Native American Images and Nicknames as Sports Symbols

Washington State Board of Education Native American Mascot Resolution (2012)

Studies on how American Indian mascots have serious social effects on American Indian communities:

Justin W. Anglea, Sokiente W. Dagogo-Jack,Mark R. Forehandb, and Andrew W. Perkins (2016)

Activating Stereotypes with Brand Imagery: The Role of Viewer Political Identity

Chaney, Burke and Burkley (2011)

Do American Indian Mascot = American Indian People? Examining Implicit Bias Towards American Indian People and American Indian Mascots

Kim-Prieto, Okazaki, Goldstein and Kirschner (2009)

Effect of Exposure to an American Indian Mascot on the Tendency to Stereotype a Different Minority Group

Steinfeldt, Foltz, Kaladow, Carlson, Pagano, Benton and Steinfeldt (2010)

Racism in the Electronic Age: Role of Online Forums in Expressing Racial Attitudes About American Indians

Freng and Willis-Esqueda (2011)

A question of honor: Chief Wahoo and American Indian stereotype activation among a university based sample

Stephanie A. Fryberg, Hazel Rose Markus and Daphna Oyserman

Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots

LaRocque, McDonald, Weatherly and Ferraro (2011)

Indian sports nicknames/logos: affective difference between American Indian and non-Indian college students

National Congress of American Indians (2013)

Ending the Legacy of Racism in Sports & the Era of Harmful "Indian" Sports Mascots

Erik Stegman and Victoria Phillips (2014)

Missing the Point: The Real Impact of Native Mascots and Team Names on American Indian and Alaska Native Youth

Government Reports:

Native American Mascots: Report to the Oregon State Board of Education (2012)

White House Initiative on American Indian and Alaska Native Education U.S. Department of Education School Environment Listening Sessions (2015)

Legislation:

California Racial Mascots Act (2015)

Colorado Senate Bill 10-107: Concerning the Use of American Indian Mascots by Public High Schools

Colorado House Bill 1165: Concerning the Use of American Indian Mascots by Public Institutions of Education (2015)

New York State Senate Resolution 5966 Condemning the Promotion and Marketing of Dictionary-Defined Racial Slurs as Mascots (2014)

U.S. House of Representatives Bill 3487 – Respect for Native Americans in Professional Sports Act of 2015

For even more resources, please visit ChangeTheMascot.org, which has many resources related to American Indian mascots, specifically the Washington Redskins Football team.

APPENDIX C: American Indian Tribes with a Historic Connection to the State of Colorado

Apache Tribe of Oklahoma
Cheyenne & Arapaho Tribes of Oklahoma
Cheyenne River Sioux Tribe
Comanche Nation of Oklahoma
Crow Creek Sioux Tribe
Crow Tribe
Eastern Shoshone Tribe (Wind River Reservation)
Fort Sill Apache Tribe
The Hopi Tribe
Jicarilla Apache Nation
Kewa Pueblo (formerly the Pueblo of Santo Domingo)
Kiowa Tribe of Oklahoma
Mescalero Apache Tribe
Navajo Nation
Northern Arapaho Tribe
Oglala Sioux Tribe
Ohkay Owingeh (Pueblo of San Juan)
Osage Nation
Paiute Indian Tribe of Utah
Pawnee Nation of Oklahoma
Pueblo of Acoma
Pueblo de Cochiti
Pueblo of Isleta
Pueblo of Jemez
Pueblo of Laguna
Pueblo of Nambe
Pueblo of Picuris
Pueblo of Pojoaque
Pueblo of San Felipe
Pueblo of San Ildefonso
Pueblo of Sandia
Pueblo of Santa Ana
Pueblo of Santa Clara
Pueblo of Taos
Pueblo of Tesuque
Pueblo of Zia
Rosebud Sioux Tribe
San Juan Southern Paiute Tribe
Shoshone-Bannock Tribes
Southern Ute Indian Tribe
Standing Rock Sioux Tribe
Three Affiliated Tribes
Ute Indian Tribe (Uintah & Ouray Reservation)
Ute Indian Tribe (Uintah & Ouray Reservation)
Wichita & Affiliated Tribes
Ysleta del Sur Pueblo
Zuni Tribe of the Zuni Reservation

APPENDIX D: Colorado Schools with Indian Mascots/Names/Logos

-Elementary School-
Avondale Elementary School—Avondale, CO (Apache Indians)
Eaton Elementary School—Eaton, CO (Little Braves)
Frederick Elementary School—Frederick, CO (Warriors)
Galeton Elementary School—Galeton, CO (Indians)
Kiowa Public School—Kiowa, CO (Indians)
Morris Primary School—Yuma, CO (Indians)
Mountain Valley School—Saguache, CO (Indians)
Sanford Elementary School— Sanford, CO (Indians)
Strasburg Elementary School—Strasburg, CO (Indians)

-Middle School-
Bill Reed Middle School—Loveland, CO (Warriors) Previously the Indians
Centennial Middle School—Mostrose, CO (Braves)
Eaton Middle School—Eaton, CO (Reds)
West Middle School—Colorado Springs, CO (Warriors)
Yuma Middle School—Yuma, CO (Indians)

-High School-
Arapahoe High School—Arapahoe, CO (Warriors)
Arickaree School—Anton, CO (Indians)
Campo School—Campo, CO (Warriors)
Central High School—Grand Junction, CO (Warriors)
Cheyenne Mountain High School—Colorado Springs, CO (Indians)
Eaton High School—Eaton, CO (Reds)
Fredrick High School—Fredrick, CO (Warriors)
Lamar High School—Lamar, CO (Savages)
Loveland High School—Loveland, CO (Indians)
Montrose High School—Montrose, CO (Indians)
Yuma High School—Yuma, CO (Indians)

-Junior and High School-
Frederick Junior Senior High School—Frederick, CO (Warriors)
La Veta Junior Senior High School—La Veta, CO (Redskins)
Mountain Valley School—Saguache, CO (Indians)

-K-12
Weldon Valley School—Weldona, CO (Warriors)

-Preschool
Little Indians Preschool—Yuma, CO (Little Indians)

Southern Ute Indian Tribe

Sunshine Cloud Smith Youth Advisory Council

December 29, 2015

Dear Governor Hickenlooper, Southern Ute Tribal Council, and Colorado Commission of Indian Affairs,

The use of disrespectful mascots saddens the Sunshine Cloud Smith Youth Advisory Council of the Southern Ute Indian Tribe because people are being told wrong information which attributes the lack of Native American cultural awareness. The Sunshine Cloud Smith Youth Advisory Council believes having people portray Native Americans culture in a negative way is disrespectful. This is important to address this issue because there are some people who are not aware of the effects it has on Native American communities. Our culture and tradition are very important to us and the use of questionable mascots do not support our values as a people. The Sunshine Cloud Smith Youth Advisory Council supports Governors Hickenlooper efforts of addressing the issue by appointing a commission to research the use of Native American mascots. We look forward to the next steps the State of Colorado, Governor Hickenlooper, and this commission will do for all Indian Country by seeing an example.

Sincerely,

Issac Suina, Chairman

Larenz Wilbourn, Vice-Chairman

Lakota TwoCrow, Secretary

Cameron Weaver, Councilman

Elijah Weaver, Councilman

Randy Herrera, Councilman

P. O. Box 737 ♦ Ignacio, CO 81137 ♦ Phone: 970-563-0237 ♦ Fax: 970-563-0382

**RESOLUTION OF THE
STRASBURG SCHOOL DISTRICT AND THE NORTHERN ARAPAHO BUSINESS COUNCIL, WIND RIVER RESERVATION, ETHETE, WYOMING**

Resolution No. NABC-2016-____

WHEREAS, the Strasburg School District Board of Education is the duly elected governing body of the Strasburg School District; and

WHEREAS, the Strasburg School District has been approached by the Northern Arapaho Business Council from the Wind River Reservation in Ethete, Wyoming, with the intention to establish an ongoing partnership with the Tribe so that their use of a school mascot named the "Indians" is depicted in a respectful and authentic manner; and

WHEREAS, the Strasburg School District acknowledges that the Arapaho and Cheyenne were the original peoples in the area where their school is now located; and

WHEREAS, the Strasburg School District hopes to honor the tribes and people who once lived in the area and integrate American Indian history and culture into the school's curriculum and community; and

WHEREAS, the Strasburg School District has agreed to use an authentic depiction of their mascot designed by a Northern Arapaho Tribal member, Eugene Ridgley;

NOW, THEREFORE, BE IT RESOLVED, that the Northern Arapaho Business Council supports the efforts and goals of the Strasburg School District of wanting to explore and learn about the Northern Arapaho culture, historical events (such as Sand Creek Massacre), prevalent issues facing Natives today, respectful use of an Indian mascot, and creating a relationship/partnership with the Tribe

BE IT FINALLY RESOLVED that the Strasburg Board of Education is authorized and directed to sign this resolution.

CERTIFICATION

The undersigned, as members of the Strasburg Board of Education, hereby certifies that the foregoing resolution was adopted by a vote of 4 (_) in favor, 0 (_) against, and that the foregoing resolution has not been rescinded or amended in any way.

Done at Strasburg, Colorado, this 13th day of April, 2016.

_____, Superintendent, Strasburg School District

_____, President, Strasburg School District School Board of Education

_____, School Board Member

_____, School Board Member

_____, School Board Member

_____, School Board Member

_____, Principal, Strasburg High School, Co-Chair of Governor's Commission to Study American Indian Representations in Public Schools

_____, Student at Strasburg High School, President of National Honor Society, Member of Governor's Commission to Study American Indian Representations in Public Schools

Exhibit 2

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:21-cv-02941-RMR

JOHN DOE, a minor, et al.,

Plaintiffs,

v.

JARED POLIS, in his official capacity as Colorado Governor, et al.,

Defendants.

DECLARATION OF JENNIFER OKES

I, Jennifer Okes, declare as follows:

1. I am the Chief Operating Officer at the Colorado Department of Education (CDE). I have worked at CDE for eight years.

2. In this position, I oversee the Division of School Finance and Operations, which includes the following Units: Budget, Accounting, Contracts and Purchasing, Human Resources, Capital Construction, School District Operations; and School Nutrition.

3. Part of Capital Construction includes the Building Excellent Schools Today (BEST) grant program, which provides an annual amount of funding in the form of competitive grants to school districts, charter schools, institute charter schools, boards of cooperative educational services, and the Colorado School for the Deaf and the Blind. BEST funds can be used for the construction of new schools as well as general construction and renovation of existing school facility systems and structures.

Exhibit 3

4. The Public School Capital Construction Assistance Board makes recommendations to the State Board of Education about the appropriate prioritization and allocation of financial assistance for capital construction projects.

5. SB 21-116 instructed the Public School Capital Construction Assistance Board to add the following to its list of priorities: applications for capital construction projects that assist public schools to replace prohibited American Indian mascots.

6. Grant applications for Fiscal Year 2022/23 are due in February 2022.

7. All districts and charter schools are asked to notify BEST of their intent to apply by November 30, 2021. However, this "deadline" is not included in the statute or regulations of the BEST program and is not binding on any district or charter school. The November 30, 2021 date is solely for administrative convenience. Specifically, early notice allows BEST to gauge the amount of grant applications coming, start working with potential applicants, and to set priorities for building assessments.

8. If a district or charter school does not provide notice by November 30, 2021, it may still submit a grant application by February 2022, and the Public School Capital Construction Assistance Board will still consider that application.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 19, 2021

Jennifer Okes

Jennifer Okes

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

/s/ *William E. Trachman*
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— and —

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* *Admission Papers to Be Filed*

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:

LeeAnn Morrill
First Assistant Attorney General
Michael T. Kotlarczyk
Assistant Attorney General
Public Officials Unit
leeann.morrill@coag.gov
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Counsel to Governor Polis, Treasurer Young
Attorney General Weiser, and Executive Director Redhorse

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Counsel for Commissioner Anthes and Coordinator Owen

/s/ William E. Trachman
William E. Trachman

EXHIBIT 1

(Supplemental Declaration of Eunice Davidson of NAGA)

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; and 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.	No. 1:21-cv-2941-RMR

SUPPLEMENTAL DECLARATION OF EUNICE DAVIDSON

I, Eunice Davidson, hereby declare, under penalty of perjury, as follows:

INTRODUCTION

1. I have personal knowledge about the matters set forth below. Unless otherwise defined, definitions used herein correspond to definitions contained in my Declaration dated

November 5, 2021 filed in this case in support of the above-captioned Complaint for Declaratory and Injunctive Relief. [ECF No. 4-7]

2. I am authorized to make this Declaration (the "Supplemental Declaration") on behalf of NAGA.

AT LEAST ONE MEMBER OF NAGA IN A COLORADO RESIDENT

3. Plaintiff Demetrius Marez is a member of NAGA and has been since August 9, 2021. He is a resident of Lakewood, Colorado. Plaintiffs intend to seek leave to amend the Complaint to reflect this fact.

I AM "NOT YOUR MASCOT"

4. In Defendants' Opposition to Motion for Preliminary Injunction [Dkt No. 20] (the "Opposition"), Defendants repeatedly use the term "mascot," claiming that SB 21-116 protects against, among other things, "'an unsafe learning environment for American Indian students. . . .'" *See* Opp. at p. 11 (quoting SB 21-116). Moreover, Defendants have deliberately conflated the use of American Indian mascot performers (something that I oppose) with culturally appropriate Indian names, logos, and imagery (something that I seek to protect in order to honor my Indian heritage). *See* Opp. at p. 12 (claiming that Plaintiffs are setting forth a "bizarre theory of injury" that they are "harmed because schools cannot use offensive caricatures of American Indians.").

5. I agree with Colorado and most Americans that no person or nation of people should be a "mascot." That is why I personally opposed a decade's old and long deceased practice of using American Indian mascot performers, caricatures, and cartoonish minstrels (and related racial stereotypes, names and slurs) to mock and ridicule Indians and their heritage—such as Lamar High School's former mascot *Chief Ugh-Lee* or the Atlanta Braves' former Indian

caricature *Chief Noc-A-Homa*—in sports and other public venues. Indeed, these Indian impersonators were removed long ago because of their negative impact on Indians.

6. Instead, I believe that culturally appropriate Indian names, logos, and imagery are important to honor Indians, and help public schools neutralize offensive and stereotypical Indian caricatures and iconography while teaching students and the general public about American Indian history.

NAGA REJECTS "BYSTANDER" OBJECTIONS TO AMERICAN INDIAN IMAGERY

7. In its Opposition, Defendants also claim that SB 21-116 is designed to remedy Colorado's past history of "teach[ing] non-American Indian children inaccurate information about American Indian culture and teach them that it is acceptable to participate in culturally abusive and prejudicial behaviors." *See* Opp. at p. 11 (quoting SB 21-116).

8. As I testified in my First Declaration, while many non-American Indians claim to be standing up to the discrimination against American Indians, many are, instead, "bystanders" who are not the target of SB 21-116 and whose only harm is one of being offended by American Indian names, logos, and imagery. ECF No. 4-7, at ¶ 14.

9. Here, Colorado made no finding that non-American Indian students were a "protected person or group" that had been harmed by discrimination as a result of the "use of American Indian mascots (mascots) by public schools." To the contrary, SB 21-116 discriminates against American Indians (clearly a protected group) under the pretext of "helping" them as underrepresented minorities and beneficiaries of racial preferences while protecting non-American Indian bystanders (clearly not a protected group) who are offended by American Indian names, logos, and imagery. Simply put, these are non-targeted bystander claims—claims of racism and discrimination alleged by non-American Indians (who are not the target of the discrimination) that

are based, not on discrimination suffered by the witness, but on the racism and discrimination that the bystander perceives to have been suffered by targeted American Indians who, in fact, are actually harmed by SB 21-116.

10. As bystanders, those who support the eradication of American Indian names, logos, and imagery from public view and debate are not harmed by the implementation interpretation, administration, or enforcement of SB 21-116 because they are not the objects of the discrimination complained of in the Complaint. In short, because they cannot show actual harm, these bystanders are not aggrieved by SB 21-116.

11. Let me be clear—many of the supporters of SB 21-116 are not the victims of historical American Indian oppression and are not "oppressed." To be sure, being offended is not the same as being a member of an underrepresented minority or otherwise protected group whose family has struggled to be protected from discrimination and made equal before the law.

CONCLUSION

12. Accordingly, I respectfully request that the Court grant Plaintiffs' request for the issuance of a preliminary injunction.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 26, 2021
Devils Lake, North Dakota

/s/ Eunice Davidson
Eunice Davidson

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U.S. District Court - District of Colorado

District of Colorado

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Case Name: Marez et al v. Polis et al
Case Number: 1:21-cv-02941-RMR
Filer:
Document Number: 22(No document attached)

Docket Text:
ORDER denying Plaintiffs' request for an expedited oral argument. Pursuant to the Court's [16] November 12, 2021 Order, the Court has reviewed the parties' briefings and DENIES Plaintiffs' request for an expedited oral argument. Upon review of the briefings, the Court finds that oral argument on Plaintiffs' [4] Emergency Motion for Preliminary Injunction and Request for Expedited Hearing is unnecessary. The Court will issue its ruling on the briefings. SO ORDERED by Judge Regina M Rodriguez on 11/29/2021. Text Only Entry (rmrja)

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