THE LITIGATOR

MOUNTAIN STATES LEGAL FOUNDATION VOL. 1, 2022

NEW CASE SPOTLIGHT: MAREZ v. REDHORSE

SWEEPING BAN ON AMERICAN INDIAN ICONS DRAWS CONSTITUTIONAL CHALLENGE

In 2021, Colorado lawmakers banned public schools in the state from using Native American "mascots" – as they define that term – by June 1, 2022. Schools that don't comply with the law by that date face a $25,000 per month fine.

There is no question that, historically, some Native American "mascots" have been based on ugly or offensive caricatures. However, Colorado's "mascot ban" goes further, banning not just offensive caricatures of Native Americans but *all* Native American-related names and imagery, even those that are respectful and culturally appropriate. There are few exceptions to the law: for instance, schools may use a Native American "mascot" if they enter into an agreement with a recognized Native American tribe which signs off on such use.

That, of course, is easier said than done. Only two Colorado schools currently have applicable agreements with tribes. At least one other school has sought such an agreement from a tribe and been denied – despite working with that tribe just a few years ago to design respectful and historically grounded imagery for its Indian mascot.

Our plaintiffs, the Native American Guardian's Association and several individuals of Native American heritage who don't want to see that heritage erased from Colorado schools, have challenged the law's constitutionality on equal protection grounds, as the law applies to all Native American "mascots" but does not ban schools from using names and imagery – even potentially offensive names and imagery – related to any other group. Moreover, banning all Native American "mascots" precludes plaintiffs and others like them from reappropriating those names and images, rendering them nondisparaging and education others on Native American culture.

Both the District of Colorado and the Tenth Circuit have denied our requests for an injunction, which would stay enforcement of the mascot ban until a ruling is made on the ban's constitutionality. The state, of course, knows that most schools can't afford not to comply, given the risk of fines they face once the deadline passes. Some school officials have indicated that impacted schools will be unlikely to reverse ground even if the law eventually is found unconstitutional – meaning the state can "win" simply by letting time pass.

Despite denying our request for injunction, the District Court recognizes that the June 1 deadline for compliance is fast approaching. Recently, the Court issued a briefing schedule to be completed by April 15, 2022.

Erin Erhardt *is an associate attorney at Mountain States Legal Foundation.*

Key Facts

Case: *Marez v. Redhorse*

Court: U.S. District Court for the District of Colorado

Who's working the Case?

William E. Trachman, *General Counsel*

Joseph Bingham, *Senior Attorney*

Erin M. Erhardt, *Associate Attorney*

Biden and Harris Are Getting Desperate

We're fighting—and succeeding—in halting their unconstitutional agenda

Cristen Wohlgemuth

When Joe Biden and Kamala Harris took office in 2021, we knew the mission of defending limited, constitutional government in the courts was more crucial than perhaps at any time in our nation's history. After all, Biden, Harris, and their allies on the far-left of the progressive spectrum also controlled both houses of Congress. No constitutionally minded legislation was going to make it past their desks.

Nevertheless, if you believed Biden's rhetoric at the time, you would have expected him to do his best to heal the deep divisions in this country. "My whole soul is in this," he said at his inauguration, "bringing America together, uniting our people, and uniting our nation."

It took just weeks for the true colors of the Biden-Harris Administration to show. Since then, the Administration's primary political tactic has been to divide our country along racial lines.

Biden's COVID-19 relief package, for example, passed shortly after he took office, included aid for American farmers and ranchers who serve our nation's critical food supply chain and who had been hard hit by pandemic lockdowns. However, white farmers and ranchers were specifically excluded—not even eligible to apply.

It was a brazenly unconstitutional bill, and an offense to the bedrock principles America has stood for since the Declaration. Our legal team sprang into action, quickly filing multiple lawsuits on behalf of ranchers and farmers who suffered this discrimination—in not one but three different states. I'm proud to say that, thanks to our supporters, we were able to win an injunction to stop the racist program in its tracks.

We also took aim at the Department of Education's attempt to strong-arm local school districts into teaching poisonous Critical Race Theory, which teaches students to define themselves primarily by race and offers them a twisted narrative about our nation's history.

We filed comments with the Department of Education and were pleased to see the Biden-Harris Administration back down from its attempt to tie federal funding to the teaching of this corrupt ideology. We also continue to litigate against the FAA's race-based hiring program, which prioritized racial politics over public safety.

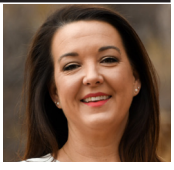
At Mountain States Legal Foundation, we proudly defend the Constitution's guarantee of equal treatment under the law for all Americans. We believe individuals should be judged "not by the color of their skin, but by the content of their character." Joe Biden and Kamala Harris seem to have forgotten those famous words.

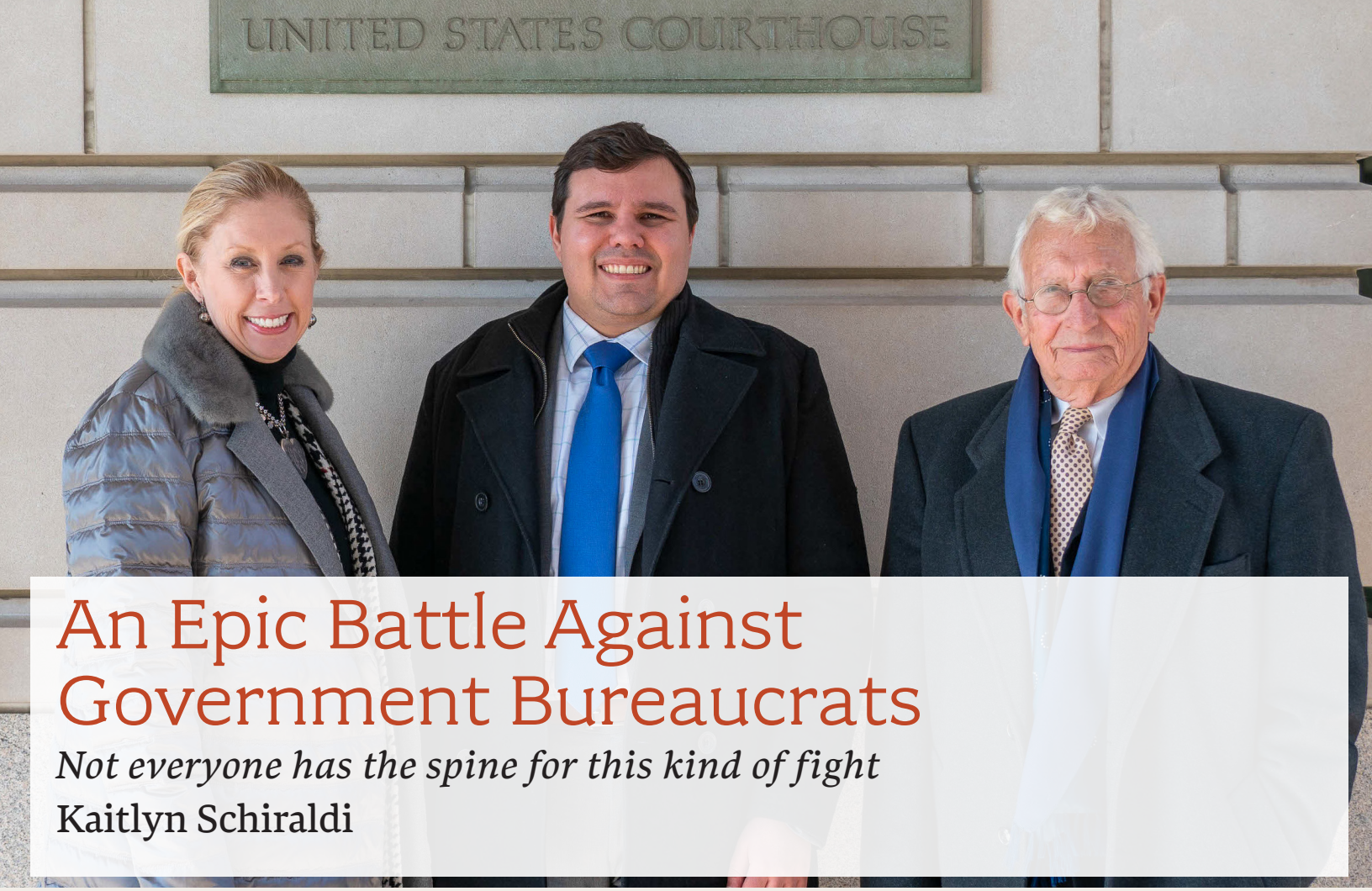
After being frustrated repeatedly in 2021, you can tell Biden is growing desperate. He began 2022 with a speech that was far different from the one he gave at his inauguration a year before. He used the phrase "Jim Crow 2.0" to describe common sense laws designed to prevent voter fraud, even invoking the image of the Civil War in a shameless attempt to demonize Americans who disagree with him. It was, quite frankly, beneath the Office of the President.

We're pleased that we played a significant role in stopping the Biden-Harris agenda so far.

Whether it's equal protection under the law, property rights, the right to keep and bear arms—or any other constitutionally protected right—these battles inspire us to get up each day and fight to win. We are not about to slow down. And we hope you'll join us in this fight.

Cristen Wohlgemuth *is the President of Mountain States Legal Foundation.*





An Epic Battle Against Government Bureaucrats

Not everyone has the spine for this kind of fight

Kaitlyn Schiraldi

Would you spend nearly four decades fighting a federal government with unlimited resources, patience, and power at its disposal? Or would you grow tired and give in, as so many Americans do when confronted with such a daunting task?

Well, not everyone has the spine or the endurance for that type of fight, but our client, the late-Sidney M. Longwell did. Mr. Longwell never extracted a single drop of oil on a lease he purchased in Montana nearly four decades ago due to arbitrary agency decision making.

Sadly, while waiting for a favorable decision, Mr. Longwell passed away. We continue to defend Mr. Longwell against the impulsiveness of agencies acting absent authority.

The lease at issue was located on land in the Badger-Two Medicine area, which is wedged between Glacier National Park, the Lewis and Clark National Forest, and the Blackfeet Indian Reservation in Montana. After validly purchasing his lease from the Bureau of Land Management in 1982, Mr. Longwell dutifully complied with the "alphabet soup" of federal regulations (NEPA, NHPA, AIRFA, etc.). Somehow, he managed to run the entire gauntlet. Ultimately, the Bureau of Land Management and the Forest Service approved the application to drill for oil and gas in 1985.

But then, a surge of enraged members of the local community, environmentalists, and the Blackfeet Tribe voiced their opinion that drilling should not take place on the "sacred" Badger-Two Medicine area.

The Forest Service and Bureau of Land Management, apparently bowing to the pressure from activists and politicians, suddenly suspended Mr. Longwell's lease year, after year, after year until the agencies finally cancelled the lease over thirty years after its initial purchase.

A mini-documentary called Our Last Refuge explores this case, and the Badger-Two Medicine area. In the film, a former Forest Service employee claimed, "the least we could do – the very least – just begin to atone for what we've stripped from the Blackfeet and other indigenous cultures – the least we can do is protect those sacred lands." But Mr. Longwell himself had nothing to atone for. And his sacrifice went completely uncompensated. Indeed, the weight of the tragic history of how settlers treated the Blackfeet Tribe continued to rest on Mr. Longwell's innocent shoulders. That is, until he passed away in 2020.

Mr. Longwell got caught in the middle of a tug-of-war between righting the wrongs of every atrocity done to the Blackfeet Tribe of Montana, and achieving economic prosperity for the reservation through oil and gas drilling. Many commentators cheaply categorized Mr. Longwell as the bad guy – a businessman who wanted to spoil the sacred wilderness of Montana that belonged to the Blackfeet. It's easy to see photographs of the seemingly untouched, pristine beauty of the Badger-Two Medicine area, and feel that the court and agencies got it right; that suspension and cancellation of the lease to drill for oil was the right choice after all that the Blackfeet have been through. Arguments that tug on heartstrings are guaranteed winners these days. But just barely under the surface lie some peculiar facts.

One of the main pressure points, among many, is that Mr. Longwell and a handful of other lease owners, were going to be drilling on sacred land. This sacred land is referred to as the "ceded strip," better known as the Badger-Two Medicine area. The history of the land would suggest it's not so sacred.

The land is called the "ceded strip" because in 1896, the Blackfeet granted, i.e., ceded, that area to the United States government for mining purposes. When the outrage occurred after the issuance of Mr. Longwell's lease in the 1980s, oil wells already existed on the ceded strip. The first well was drilled in 1901, and between 1954 and 2013 there have been at least 19 wells drilled on the Blackfeet Reservation within 7 miles of the Badger-Two Medicine Area. Curiously, in 1983 through a Tribal Resolution, the Blackfeet expressed interest in working with Forest Oil Corporation to "acquire any and all rights to the surface and minerals within the Ceded Strip" – meaning that it was very sacred land when outsiders wanted to drill, but a prosperous business decision when initiated by the Blackfeet.

This "sacred" land is also surrounded by modern disturbances. The proposed drill site is three miles from a highway, three miles from a railroad, and two miles from existing pipelines.

In 1985, when the Bureau of Land Management initially approved the drilling permit, it noted compliance with the American Indian Religious Freedom Act, since no religious sites were found where the drilling was to take place. Additionally, in Forest Service documents, it was noted that a few Blackfeet believed that "religious practices in that area have only been initiated within the past few years as a form of opposition to oil and gas exploration."

Above: Members of the Blackfeet tribe were FOR drilling in the "sacred" Badger-Two Medicine Area before they were against it. Opposite: Kelly Longwell, Sidney's daughter, at the courthouse in Washington, D.C. with MSLF attorney David McDonald

Nevertheless, Mr. Longwell's permit to drill was suspended for over 30 years, before ultimately being cancelled in 2016.

If emotional arguments continue to win in court, precedent will bend with the wind. Lease holders near reservations should be leery of newfound religious sites that cease production and render their leases a nullity. That categorization seems extreme, yet it is Mr. Longwell's story. What's being done here is clearly not about thwarting any drilling in the Badger-Two Medicine area.

This is a power move by a long-downtrodden tribe in hopes of regaining its strength. If decisions are continually made to make up for the cruelty of the past, we further divide as a people, and add salt to the wounds that so badly want to heal.

My firm, Mountain States Legal Foundation, and I continue to fight for Mr. Longwell's right to drill after decades of excessive delay.

Kaitlyn Schiraldi *is an associate attorney with Mountain States Legal Foundation.*

CELEBRATING 45 YEARS

45 years of protecting and restoring liberty through pro-bono litigation

Mountain States Legal Foundation is celebrating 45 years of defending freedom. MSLF has always believed in the importance of equal protection. Education, jobs, and other opportunities should be based on the merit of the individual. Quota systems based on skin color, ethnic background, and gender are discriminatory and do not provide for equal treatment under the law. Here are our top 5 equal protection cases throughout our 45 years of success.

Wygant v. Jackson Board of Education (1986)

In Jackson, Michigan, the local Board of Education fired caucasian teachers and retained "minority personell" under its Collective Bargaining Agreement. It didn't matter that our clients had more seniority. Their race got them fired. MSLF represented the teachers who were terminated, and argued that they were fired in violation of the Equal Protection Clause. In a fractured opinion, the Supreme Court agreed that the district engaged in racial discrimination.

City of Richmond v. J.A. Croson Co. (1989)

After MSLF's victory in *Wygant*, but before the Supreme Court would reach its ultimate decision in *Adarand*, we filed an amicus brief in the case of *City of Richmond v. J.A. Croson*. In this case, the Court continued to struggle with whether it ought to treat affirmative action programs—which are purportedly based on good intentions to benefit certain people—differently than other forms of race discrimination. MSLF's brief was premised upon the idea that regardless of intentions, affirmative action programs must be strictly limited. The Court agreed with MSLF's arguments, and struck down the program.

Adarand Constructors, Inc. v. Peña (1995)

In 1995, in *Adarand Constructors, Inc. v. Peña*, MSLF represented a tiny "mom and pop" company from Colorado Springs, Colorado, that challenged a federal program that used race to award highway projects. In a 5-4 ruling by Justice O'Connor, the Court struck down two earlier rulings that permitted Congress to make decisions based on race, and then ruled that Congress itself is subject to "strict scrutiny" of its race-based decisions.

Holman v. Vilsack (2021-present)

As part of the American Rescue Plan Act of 2021 signed by President Biden, Congress created a COVID-19 debt relief program for non-white farmers. Under the program, the Department of Agriculture would automatically forgive federal farm loans at 120 percent of the loan value, unless the farmer is white. Discriminating on the basis of race is illegal and unconstitutional. The U.S. Supreme Court has declared that the way to stop race-based discrimination is to stop discriminating on the basis of race. The federal government's use of government-sponsored race discrimination as a tool to end "systemic racism" is patently unconstitutional.That's why MSLF and our friends at Southeastern Legal Foundation filed a lawsuit in federal court on behalf of Rob Holman, a fourth-generation Tennessee farmer who is excluded from the program solely because of his skin color. The program was halted in 2021, and the case is ongoing.

Brigida v. FAA (2015-present)

The Obama administration dropped a skill-based system for selecting and hiring air traffic controllers and replaced it with a new system designed to favor applicants on the basis of their race. It makes no sense. Worse yet, it is illegal and unconstitutional. The FAA purged its system of thousands of previously-qualified, ready-to-hire applicants simply because they did not fit the right biographical profile. The government endangered public safety and owes restitution for this grave injustice. See Page 8 for a *major* update on this case.

Pssst... Do you want to be a frequent freedom fighter? Join our brand new society! Details on the next page ->

MOUNTAIN STATES LEGAL FOUNDATION

FREE COUNTRY. FREE PEOPLE.

America Needs Your Help. Act Now and Help Stop Liberals!

- Right now, we are engaged in multiple ongoing lawsuits to stop the Biden-Harris agenda. We are locked in a war to save our rights, as protected by the Constitution, for us and for future generations.

- Our Freedom Club members are committed to liberty, justice, and freedom. These key supporters make an annual contribution to MSLF of $1,000 or more. Join today!

- We are issuing a special challenge. **We are looking for 45 NEW supporters who are willing to become monthly givers by March 31.** Please consider becoming a monthly donor today.

YOUR GIFT PAYS LEGAL COSTS FOR CLIENTS LIKE THESE

Zachary Fort

The governor of New Mexico reversed a gun store shutdown order after we filed a lawsuit on his behalf.

Leisl Carpenter

She was excluded from Biden's debt relief program because of her race. But the Constitution requires all Americans to be treated equally.

BECOME A MEMBER OF THE 5 STONES SOCIETY

defending your freedom against Goliath-like government

By becoming a **5 Stones Member**, you're making a *monthly* donation, at any amount, to Mountain States Legal Foundation.

Benefits of joining:

- A monthly recurring donation allows you to spread the financial impact of your giving across the entire year, allowing a gradual effect on your budget.
- Your guaranteed donation will help us plan for cases we might otherwise have to refuse.
- By donating monthly, you will receive a quarterly special communication from MSLF leadership.

The first 20 new members, with a minimum monthly gift of $50.00 or more, will receive an exclusive commissioned print, valued at $450, that embodies the American Spirit from a professional photographer and longtime supporter of MSLF. Sign up NOW!

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UPDATE: Major Milestone for Brigida v. FAA

Mountain States Legal Foundation just took a major step toward holding the Federal Aviation Administration accountable for Obama-era hiring practices that were designed to exclude better-qualified air traffic control candidates, in favor of less-qualified candidates, all due to the color of their skin.

Federal judge Dabney Friedrich of the Federal District Court in the District of Columbia today approved class action certification for MSLF clients Andrew Brigida and Matthew Douglas-Cook and other aspiring air traffic controllers who scored highly on qualification tests but lost out on their dream jobs due to the FAA's effort to skew the hiring process along racial lines.

That allows MSLF to represent approximately 1,000 qualified applicants who were passed over for an air traffic controller position as part of the FAA's effort to prioritize racial characteristics over qualifications.

The plaintiffs were elated by the ruling. "Today was a really great feeling," Brigida said when the ruling was announced. "It was a shock finally hearing the judge grant our motion to move the case along, and a long time coming. Not many

cases of this type even get to this point of the lawsuit. I know there is still a lot of work ahead to be done, but I feel that today was a huge hurdle to jump over, and probably one of the bigger ones."

"We're extraordinarily pleased with the Court's order granting class certification," added MSLF Attorney David C. McDonald. "The FAA has been trying to insert false conflicts into our class for years now, but the judge saw through their attempts to divide us. Now that our class has been approved, we can move into the merits phase of the case, where we expect to prove the FAA engaged in illegal race discrimination against our class. We're excited to begin this new stage of the litigation and expect to see much more success on behalf of the class moving forward."

To support MSLF's fight to defend your constitutional rights, visit mslegal.org.