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.

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/s/ *William E. Trachman*
William E. Trachman, CO Bar #45684
Joseph A. Bingham*
Mountain States Legal Foundation
2596 S. Lewis Way
Lakewood, Colorado 80227
Telephone: (303) 292-2021
Facsimile: (303) 292-1980
Email: wtrachman@mslegal.org
* *Admission Papers to Be Filed*

— and —

Scott D. Cousins*
Scott D. Jones*
COUSINS LAW LLC
Brandywine Plaza West
1521 Concord Pike, Suite 301
Wilmington, Delaware 19803
Telephone: (302) 824-7081
Facsimile: (302) 292-1980
Email: scott.cousins@cousins-law.com
* *Admission Papers to Be Filed*