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

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