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. KATHRYN REDHORSE, Executive Director of the Colorado Commission of Indian Affairs, in her official capacity, *Defendant*,	Case No. 1:21-cv-02941-RMR-NYW

PLAINTIFFS' COMBINED (1) RESPONSE TO DEFENDANTS' MOTION TO DISMISS; AND
(2) MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2015, Governor Hickenlooper "signed an executive order to establish the commission to study American Indian representations in public schools." [ECF 20-1, at 2 (Legislative Declaration (h)).] SB 21-116 purports to rely on the Commission's conclusion: "[T]he commission's recommendation was to completely eliminate American Indian imagery and nomenclature in schools in Colorado." [*Id.* at 3 (Legislative Declaration (i) (emphasis added).]

The Colorado legislature "therefore" enacted legislation to "retire all American Indian mascots in the state." [*Id.* at 3 (Legislative Declaration (2).] Consistent with the goal of eliminating all American Indian imagery and nomenclature in public schools, the term "mascot" is defined so broadly as to even include honorific references to individuals with American Indian Ancestry:

> "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.

Colo. Rev. Stat. § 22-1-133(1)(a); Colo. Rev. Stat. § 23-1-137(1)(a).

Although SB 21-116 applies to what are commonly referred to as "mascots" or sports team names, it also applies to a host of other school materials. Indeed, the Colorado Commission of Indian Affairs—which is given authority to identify schools covered by the statute, and to remove those schools from its list—has taken testimony that schools are eliminating historical murals of American Indians. Ex. 1, Deposition of Defendant Kathryn Redhorse (Feb. 22, 2022), 174:5-10 ("Q. Do you agree that, at either the January 12th session or a prior session, Campo schools presented evidence that they were painting over murals on their school walls of American Indians? A. Yes. They submitted documents prior to the special session."). And the CCIA acknowledges that SB 21-116 would even cover an historically accurate image of Sitting Bull on a school letterhead. *See* Ex. 1, 235:15-18 ("Q. A school that put a historically accurate image of Sitting Bull

on its letterhead, that school would be covered by SB21-116, yes? A. That language is specific, yes, in this bill.").

Therefore, SB 21-116 categorizes schools based on the racial characteristics of their names, images, logos, and letterhead. Moreover, although SB 21-116 assigns the Colorado Commission of Indian Affairs (CCIA) the task of identifying non-compliant schools before the statutory deadline of June 1, 2022, the statute has no sunset provision, meaning that Colorado schools may never again use American Indian names and images on equal terms as other racial groups. Defendant identifies exceptions to SB 21-116, such as that schools can enter tribal agreements. But such agreements are subject to the parochial interests of each individual tribe, and none have been entered into since the enactment of SB 21-116.

Separately, SB 21-116 is hopelessly inscrutable, to the point that the CCIA has read into the statute an extra-textual geographical exception. Additionally, in deposition testimony, Ms. Redhorse took the position that logos that depict and refer to American Indian names in their logos—including even the American Indian Academy of Denver—are not covered by SB 21-116, because of legislative intent. As a result, schools cannot hope to divine what the CCIA will think if they consider using American Indian names or imagery. Petitioners like Plaintiffs will be met with confusion time and again when they seek to have schools honor their relatives or themselves.

Plaintiffs are directly injured by SB 21-116's discriminatory treatment and vague language. Plaintiffs include American Indian students and a teacher who attend and teach at schools identified by CCIA. Plaintiffs also include community members who petitioned their local schools, and a membership group representing Native Americans. They are all harmed by Defendant's unequal treatment of their racial group, their relatives, and themselves. Additionally, the Plaintiff community members sought to petition their local school districts to keep their names—or at least

change them to respectful American Indian names, including a direct ancestor—and were informed that their petitions would trigger coverage of SB 21-116.

Defendant seeks to confuse this matter by making it about government speech and future deadlines. But the Court should be wary of the precedent it sets for analogous contexts. A law banning portraits of African-Americans from City Hall by a date certain, for instance, presents exactly the same issues; similarly, a law banning schools from including LGBTQ+ individuals in the curricular materials, or prohibiting schools from maintaining murals celebrating Hispanic American culture, by a specific date in the future, would also be valid under the government's arguments.

Time is of the essence. Since the February 3 scheduling order was entered, the CCIA has announced a new hard deadline for schools to submit all documentation by April 29, 2022. Ex. 1, 165:20-166:1 ("I noticed that a number of contacts happened on February 11th. It looks like one with each of the school districts. Do you remember what that contact was? A. That is the date that we shared the timeline and the confirmed dates of the quarterly meetings in March and May with the schools."). Plaintiffs therefore ask for a forthwith decision on summary judgment.

STATEMENT OF UNDISPUTED FACTS

1. On June 28, 2021, Colorado enacted SB 21-116, "Prohibition on the use of American Indian Mascots." [ECF No. 43, at 3.]

2. SB 21-116 contains a series of Legislative Declarations, including one that purports to characterize a 2016 Commission Report studying American Indian representations in schools: "[T]he commission's recommendation was to completely eliminate American Indian imagery and nomenclature in schools in Colorado." [ECF 20-1, at 2.]

3. SB 21-116 contains an exception for schools entering tribal agreements that cover American Indian imagery, but the exception is subject to the complete discretion of tribes. Ex. 1, 175:1-11 ("Q. … The only thing I'll ask you on this topic is there's nothing from preventing the southern Ute tribe from declining to enter into an agreement, regardless of how eloquent or culturally appropriate a tribute to the tribe is, correct? MR. KOTLARCZYK: Object to the form. A. As previously stated, the southern Ute Indian tribe—or the Southern Ute Tribal Council in here have the authority to enter or decline, or not even respond to schools to create an agreement. That is under their jurisdiction, and their authority.") (emphasis added)

4. No tribal agreements have been entered into between schools and tribes since the enactment of SB 21-116, and the CCIA's website lists no such agreements. [ECF 20, at 4 (referring to two "preexisting" agreements that preceded the enactment of SB 21-116.]

5. The statute does not merely cover "mascots," in the ordinary sense of sports team names or other icons used by the school. It defines "mascot" to include "a mascot, nickname, logo, letterhead, or team name for the school." Colo. Rev. Stat. § 22-1-133(1)(a); Colo. Rev. Stat. § 23-1-137(1)(a).

6. The statute's use of the phrase "a … letterhead" simply refers to a school's use of letterhead. Ex. 1, 40:15-20 ("Q. … Now, the locution of a letterhead has always bothered me. Does a 'letterhead' just mean, 'on letterhead'? MR. KOTLARCZYK: Object to form. A. That's how we understand it. We did not write the bill.").

7. Consistent with the fact that SB 21-116 covers more than merely "mascots" in the traditional sense of the term, SB 21-116 specifically contemplates an exception for the name of an American Indian tribe or individual on a public school's letterhead. *See, e.g.*, Colo. Rev. Stats. 133-1-133(2)(a) ("Notwithstanding the definition of the term 'American Indian mascot' in

subsection (1) of this section, a public school that is named after an American Indian tribe or American Indian individual may use the tribes or individual's name, but not an image or symbol, on the public school's letterhead."); Colo. Rev. Stats. 23-1-137(2)(a).

8. The text of the statute does not contain any exceptions for logos containing the name of an American Indian tribe or individual. Nor does it contain exceptions for team names that depict or refer to an American Indian tribe, individual, custom, or tradition. Ex. 1, 42:3-23 ("Q. Do you agree with me that only applies to letterhead? A. Yes. Q. Doesn't apply to logos, for instance? A. It does not name logos. Q. And it doesn't apply to geographic places? A. It does not. Q. And it doesn't say anything about nicknames, for instance? A. No. Q. Or team names, sports team names? A. It does not.") (emphasis added).

9. Under SB 21-116, a logo is, at a minimum, an image that a school uses that is associated either with its name or with its mascot. Ex. 1, 135:7-10 ("Q. Do you have a working definition of the term "logo"? A. An image used that is associated with their—the school's name or mascot.") (emphasis added).

10. Plaintiffs requested that Defendant admit that the text of SB 21-116 covers public schools that have the name of an American Indian tribe, custom, or individual in them, including geographic locations named after such tribes, customs, or individuals. In response, Defendant denied the request, subject to objections, and stated: "Request 2 was denied because the Commission does not treat geographic terms containing names of American Indian persons, tribes, customs, or traditions as falling within the scope of SB 21-116." *See* Ex. 2, Defendant's Response to Plaintiffs' First Set of Interrogatories, at 1-2.

11. As CCIA reads the statute, even if a logo contains the name of an American Indian tribe, individual, custom, or tradition, the school using that logo is not covered by SB 21-116 if

the logo contains the name of the school. Ex. 1, 144:19-24 ("Q. Do you disagree with me that a mascot for a school can include the name of an American Indian tribe? A. As a mascot, not as the name of the school. Q. Where are you getting that last part from? A. That the language of the bill is a prohibition of American Indian mascots.").

12. The CCIA relies on its perception of legislative intent and/or stakeholder preferences to determine whether certain schools are covered by SB 21-116. Ex. 1, 193:23-194:11 ("Q. … Is [there] a different reason why Pawnee is not subject to the statute? A. Because their mascot here indicates that they are known as the Coyotes for Pawnee High School. I'm really looking at the intent of the law, having observed stakeholder conversations, is that the stakeholders wanted to ensure that this focused on—the Senate Bill 21-116 focused on mascots, and not school names, or their geographic locations in which the schools reside.") (emphasis added).

13. As the CCIA reads the statute, for example, the statute's definition of "mascot" (which includes any "logo") does not include the logo of the American Indian Academy of Denver, which contains the phrase "American Indian." Ex. 1, 198:1-14 ("Q. … This is a charter school in Denver. … It's called the American Indian Academy of Denver. … So there you have a logo that clearly mentions American Indian in it. Why isn't this school on the CCIA list? … A. That's the name of their school, American Indian Academy of Denver, and that is what is on their logo and imagery, American Indian Academy of Denver.") (emphasis added).

14. As of January 19, 2022, the CCIA had identified 26 schools with American Indian mascots and/or imagery. [ECF No. 43, at 3.]

15. The CCIA has had communications with each school on its list, and no school has indicated that it does not intend to come into compliance. Ex. 1, 125:7-10 ("Q. Has any school indicated that they plan to just pay the fine and continue to use their current mascot? A. No.").

16. Only one school is actively attempting to obtain a tribal agreement (others attempted, but abandoned the effort after receiving no response). Ex. 1, 125:11-17 ("Q. Has any school, besides [Kiowa], indicated that they planned to try to enter into a tribal agreement? A. There were other schools that had tried and reached out to other tribes, but with no response from those tribes. And I don't believe—after receiving no response, I don't believe they're further trying to enter into an agreement.") (emphasis added).

17. Because Yuma High School's sports team name is the Indians, its murals and other imagery will also need to be covered or otherwise removed in order for the CCIA to vote that the school has come into compliance with SB 21-116. Ex. 1, 174:11-14 ("Q. How can you tell whether a mural is of an American Indian individual? A. We're looking at those murals to be associate [sic] with their current mascot.").

18. Plaintiff Marez petitioned the Lamar School Board to either keep its name, logos, and imagery associated with "Savages," or at least change to "Lamar High School Black Kettle." Marez explained that "Black Kettle was a prominent Chief/leader of the Southern Cheyenne during the Colorado War and the Sand Creek Massacre." In response, Marez received an e-mail from a School Board member stating that "I believe your suggestion would fit within [the SB 21-116] definition thereby making the school subject to the fines/fees if we adopted this suggestion." [ECF No. 4-2, at 2-3.]

19. Plaintiff Roubideaux petitioned the Yuma School Board to either keep its name, logos, and imagery associated with the "Indians," or change its name to the "Yuma High School Tall Bulls," after his Lakota ancestor. The School Board never responded to Roubideaux's letter, but on or about September 23, 2021, *The Yuma Pioneer* published an article reporting that the

School Board "eliminated" Roubideaux's suggestion "because it refers to a Native American chief killed in the 1880s." [ECF No. 4-5, at 3-4.]

20. Plaintiff John Doe is a student at Yuma High School in Yuma, Colorado, which is known as the Yuma "Indians." Doe connects his personal Native American heritage with his self-esteem, and objects to having his history and culture erased. He alleges that the erasure of his culture will have negative consequences for his learning environment. [ECF No. 4-3, at 2-4.]

21. On October 6, 2021, John Doe's mother purchased DSG tights to replace his Yuma Indian compression shorts that he wears while playing football for Yuma High School. [ECF No. 4-3, at 3.]

22. The CCIA held a public meeting on January 12, 2022, to hear evidence from several schools, including Yuma and Lamar schools, regarding submissions related to name changes. [ECF No. 43, at 3.]

23. The CCIA is not aware of Yuma attempting to enter into a tribal agreement to preserve its current name, imagery, or other covered materials. Ex. 1, 171:6-11. The CCIA has no indication that Yuma is not going to continue to engage the process outlined by the CCIA, including working with the CCIA to develop multiple alternatives to its current names and imagery. Ex. 1, 171:21-172-3.

24. Plaintiff John Doe filed a declaration in this matter recounting the educational opportunities he is deprived of due to SB 21-116 [ECF 4-3.]

25. Plaintiff Jane Doe filed a declaration in this matter recounting the educational opportunities he is deprived of due to SB 21-116 [ECF 4-4.]

26. Plaintiff Donald Wayne Smith, Jr. filed a declaration in this matter recounting the educational opportunities he is deprived of due to SB 21-116 [ECF 4-6.]

27. An additional meeting of the CCIA is scheduled to take place in March 2022. [ECF No. 43, at 3.]

28. Additional schools will be on the agenda for March 2022 as possible additions to the list of non-compliant schools, including at least two schools that use "Thunderbirds." Ex. 1, 49:13-19 ("Q. Do you have any plans, as you sit here today, to add schools to the list? A. We have plans to put on the agenda for the next quarterly meeting two schools to add to the list. Q. … Which are those schools? A. Hinkley High School [with] Aurora Public Schools, and Sangre de Cristo School.").

29. CCIA staff rely on guidance issued by the Commissioners of the CCIA to determine whether to propose additions to the list of schools covered by SB 21-116. Ex. 3, Guidance for Commissioners to Consider on SB21-116 Compliance; *see also* Ex. 1, 54:16-22 ("Q. I think what you're saying is that the guidance that is attributed to the commissioners in order for them to consider whether a school ought to come off the list is also being considered by the staff as to whether schools ought to go onto the list, at least for an agenda item. A. Yes.").

30. This guidance uses words that are not in the statute. For instance:

a. SB 21-116 covers "a name, symbol, or image." CCIA's guidance adds the term "word" such that it also covers "words" that are not names, symbols, or images. Ex. 3 (referring to "the changed name/symbol/image/word").

b. SB 21-116 covers a name, symbol, or image that "depicts or refers to" certain American Indian monikers. CCIA's guidance uses the phrase "is/was associated with." *Id.*

c. SB 21-116 refers to an American Indian tribe, individual, custom, or tradition. CCIA's guidance uses the phrase "American Indian/Alaska

> Native community or with Tribal Nations, either in the generalized historical context of the name/symbol/image/word and/or currently as of the date of the signing of the bill and subsequent identification by the Colorado Commission of Indian Affairs."

31. In discovery, Plaintiffs asked Defendant to admit that the guidance document contains factors for the Commissioners to consider that are outside of SB 21-116. Defendant denied "that the guidance provided … is not fairly included in SB 21-116." However, Defendant admitted "that some language … is not included in SB 21-116." Ex. 5, Defendant's Response to Plaintiff's First Set of Requests for Admissions, at 3.

32. The CCIA is scheduled to meet in May 2022. This meeting is currently the last regularly scheduled meeting prior to SB 21-116's June 1, 2022 compliance deadline. [ECF No. 43, at 3.]

33. Schools face a "hard deadline" of April 29 to submit materials associated with their efforts to be deemed compliant before the statutory cutoff of June 1, 2022. Ex. 1, 162:8-13 ("A. [April 29] is a hard deadline in order for us to compile all the information for the commissioners to review, and give them enough time to review all of the documents to see if they have any questions."); *see* Ex. 4, at 1 ("Documents must be sent to CCIA staff by April 29, 2022, for the May 19, 2022 Quarterly meeting.").

34. Schools that have American Indian names or imagery could potentially have an obligation to paint over historical murals of American Indians, subject to the viewpoint of the CCIA Commissioners. Ex. 1, 30:4-12 ("Q. But it sounds like you're saying [it's] possible that an image of an American Indian woman would have to be destroyed or painted over in order for the school to come into compliance with 21-116. MR. KOTLARCZYK: Object to form. A. I'm

looking at the language of Senate Bill 21- 116. It's the 'cease use of Native mascots,' you know, and it—so I guess, yes, it could be, but it's—it is up to the commissioners.").

35. In response to discovery, Defendant admitted, subject to objections, that under SB 21-116, the definition of logo includes "logos featured on school signs, walls, marquees, banners, murals, pennants, trophies, historical awards, historical jerseys, and yearbooks." Ex. 5, at 2.

36. The CCIA has advised schools to consult their own legal counsels to determine whether their American Indian imagery may subject them to liability under SB 21-116, because the Commissioners have not provided guidance on numerous questions related to art, yearbooks, social media, media content such as student shows, etc. Ex. 1, 23:3-23:12 ("Q. Well, why would it be up to the commissioners to determine whether the display of this yearbook or other art would be covered by SB21-116? A. It's part of the process to get off the list of noncompliance for schools on—for Senate Bill 21- 116. The commissioners are the ones to vote them off. For those schools who have asked that particular question, I have asked them to go back to their legal counsel to see—seek advice from what their legal team.") (emphasis added).

37. The CCIA did not conduct site inspections prior to announcing its list, and schools that are not on its list appear to have imagery that is covered by SB 21-116. Ex. 1, 58:16-59:13 ("Q. So this is an exhibit that I took off of La Veta's Facebook page this morning. This is their basketball YouTube channel. You saw that La Veta was mentioned in the legislative declarations of the statute that we just went through. And this is, I think, what their basketball court looks like. This is from a February 15th YouTube video. … Q. You can see on the left-hand side of the basketball court what looks like an American Indian image that says, 'Pride & Poise.' And then on the right-hand side of the image, it says, 'Redskin.' So La Veta's not on your list; is that right? Is that correct? A. I believe it is not. Q. Even though they were named in the statute, correct? A.

Yes. Q. And you didn't do any site inspections before that 30-day period was up, right? A. No, we did not.").

38. Even for schools mentioned by the legislative declarations in SB 21-116, site inspections were not conducted if schools began transitioning away from American Indian mascots prior to enactment. Ex. 1, 33:18-34:3 ("Q. Did anyone ask Eaton, are your historical jerseys on display at the school? A. No. Q. Did Eaton have to submit any minutes of school board meetings to assure the CCIA that trophy cases don't contain old memorabilia with the old mascot? A. Not if they were not on the list. Q. Why wasn't any of that done? A. Because they were not on the list of noncompliant schools, and they changed their mascot prior to the bill package.").

39. Prior to a January 12, 2022 special session, Campo School District presented evidence to the CCIA that it has successfully destroyed its murals of American Indian warriors. Ex. 1, 174:6-10 ("Q. Campo schools presented evidence that they were painting over murals on their school walls of American Indians? A. Yes. They submitted documents prior to the special session.").

40. Murals of individuals of other races are not covered by SB 21-116. Ex. 1, at 174:15-19 ("Q. Are murals of individuals of other races prohibited by statute? A. By Senate Bill 21-1116? Q. Yeah. A. No.").

41. The Martin Luther King Jr. Early College in Denver maintains a logo for the school that depicts or refers to an African-American individual. Ex. 1, 221:20-222:4 ("So do you see a name that depicts or refers to an African-American individual on this logo? A. Yes, I see the name of the school as Dr. Martin Luther King, Jr. Early College. Q. Let me ask my question again, do you see the name of an African-American individual on this logo for the school? A Yes.").

42. The Chavez-Huerta School in Colorado uses a United Farm Workers Flag as a logo for the school, which depicts or refers to a Mexican-American individual. Ex. 1, 223:24-224:16 ("I'll represent to you that there is a K through 12 preparatory academy called the Chavez-Huerta school, that—it is a combination of a couple of different schools. One of which is the Cesar Chavez Academy. And I'll represent to you that this is their 2021-2022 student handbook that I downloaded online. And that we use the example of the United Farm Workers flag in the middle left here in our complaint as an image that is often associated with Cesar Chavez. So those are all facts that I'm representing, I'm not asking you to testify to those facts. What I am asking you to testify to is that, do you agree with me that the United Farm Workers flag is symbol or image, that depicts or refers to a Mexican American individual, that is used as a logo for the school? A Yes. But again we weren't looking at school names or school—we we're looking at mascots.").

43. In response to discovery, Defendant admitted, subject to objections, that SB 21-116 has a definition of "American Indian Individual" that covers individuals who are not members of state or federally recognized tribes. Ex. 5, at 1-2.

44. Although Ms. Redhorse conceded in her deposition testimony that SB 21-116 applies to images of American Indians on school letterhead, Ms. Redhorse also acknowledged that the CCIA did not conduct any genealogy research on school namesakes in Colorado. *E.g.* Ex. 1, 66:17-24 ("Q. Why didn't you conduct any genealogy research as to whether schools that are named after people might be named after American Indians and thus have those persons' names on their logos, for instance? A. Because we looked at the definition of a "mascot" not being the name of the school. That would be the name of their mascot.").

45. The Court previously stated in its Order denying Plaintiffs' motion for preliminary injunction: "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." [ECF No. 24, at 3 n. 2.] This Court is in the best position to know what it meant in this footnote, but a footnote in an interim order generally does not express a final view on the legal merits of their claims, given the potential benefit of fuller briefing and additional factual development.

I. Plaintiffs Establish a Concrete Injury with Respect to Article III.

Defendant conflates the standing inquiry as it relates to all four of Plaintiffs' causes of action. This is an error because the legal injuries alleged are distinct. Moreover, Defendant's misunderstands that this action is merely about traditional sports team "mascots"—when the coverage of SB 21-116 relates to essentially every name and image published by Colorado schools. Most importantly, Defendant mischaracterizes Plaintiffs' alleged injury as about "mascot preference," as opposed to providing a race-neutral playing field for names and images.

a. With respect to Claims 1 and 2, All Plaintiffs are Injured by SB 21-116's Discrimination on the Basis of Race.

The CCIA has identified schools based on specific racial characteristics of their names, images, and logos. Such outright race-conscious differential treatment—specifically in the context of state mandates covering schools—has been deemed unconstitutional. *See Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) ("Even if § 15–112 is not facially discriminatory, however, the statute and/or its subsequent enforcement against the [Mexican American Studies] program would still be unconstitutional if its enactment or the manner in which it was enforced were motivated by a discriminatory purpose.").

Plaintiffs seek to vindicate this constitutional interest, and include individuals such as students and a teacher who are immediately affected by SB 21-116's racial classifications. *See also Gonzalez v. Douglas*, 269 F. Supp. 3d 948, 950 (D. Ariz. 2017) (after remand in *Arce v.*

Douglas, the District Court found an equal protection violation in "an action brought by students and their parents" against Arizona's effort "to eliminate Tucson Unified School District's Mexican–American Studies program"); *Brown v. Board of Ed. of Topeka*, 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").

Plaintiffs also include all of the individuals and NAGA itself, who have alleged that they are injured by the political process set in place by SB 21-116. Defendant disputes the merits of that claim, but none of its standing arguments are responsive to the fact that Plaintiffs specifically allege that SB 21-116 "ha[s] the serious risk, if not purpose, of causing specific injuries on account of race." *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 305 (2014); *Reitman v. Mulkey*, 387 U.S. 369, 372 (1969) (plaintiffs were individuals prevented from seeking local action due to state law).

b. With respect to Claim 3, Plaintiffs Marez and Roubideaux, and NAGA Possess Standing.

Defendant does not dispute that two Plaintiffs specifically sought to petition their local school districts to keep their names, or in the alternative, change their names to honor other American Indians, including Mr. Roubideaux's relative, Chief Tall Bull. Nor does Defendant dispute Plaintiffs' statement in the Amended Complaint that NAGA "has been partnering with public schools across the country to help those schools (a) eliminate stereotypical "mascot" caricatures and iconography, chants, and cheers; (b) develop respectful and culturally appropriate Native American names, logos, iconography, and imagery." [ECF No. 39, at 10.] In the same vein, "NAGA seeks greater recognition of Native American heritage through sports and other high-profile venues." [*Id.*]

None of Defendant's arguments related to standing address the right to petition under the First Amendment. Again, Defendant simply disputes the merits of that claim, as discussed below.

But it cannot dispute that two plaintiffs adequately allege an injury and continue to be injured due to their failed efforts at petitioning. In short, the question of whether they will prevail on their claim is distinct from the underlying standing inquiry.

c. With Respect to Claim 4, Plaintiffs Doe, Doe, and Smith Possess Standing.

Plaintiffs include three individuals who are closely connected to Yuma High School. These are two minor students and one individual who substitute teaches at the school. The parties do not dispute that these individuals allege that they will be injured by the removal—not just of the sports team name the Indians—but by Yuma High School being compelled to eliminate their beliefs, practices, rituals, actions, and other cultural symbols stripped from the hallways and walls of their school. Undisputed Fact No. 17. Defendant asserts certain defenses to Plaintiffs' hostile environment claims, which are discussed below. But none of its arguments on standing dispute the underlying theory of injury in this matter, which is that it is injurious to suffer a hostile environment.

d. NAGA Possesses Association Standing.

Defendant contends that Plaintiff Native American Guardian's Association (NAGA) does not possess standing because it must have a particularized injury, consistent with "the reasons discussed above" in its earlier argumentation. [Mot. at 6.] It is not clear why Defendant seeks to distinguish NAGA from the other Plaintiffs, given that it seems to rely merely on in its prior argumentation. To be clear, Defendant concedes that NAGA has identified one of its members who alleges harm in the case. The dispute is merely whether the allegation suffices to establish Article III standing.

e. Plaintiffs' Injuries are Ripe.

Defendant continues to misconceive of this case as one where the injury only occurs once a school has already changed its name or imagery. Instead, however, Plaintiffs' injuries are

concrete and ongoing. Their injury is not failure to get the "mascot of their choice." Their injury is the state's racial discrimination. They ask for an even playing field, untainted by racial considerations or ambiguous text, in decisions regarding the use of American Indian names and images. The injury is not simply the unfair *outcome* that may or may not result, but "that a discriminatory classification prevents the plaintiff from competing on an equal footing." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 221 (1995).

Indeed, Plaintiffs' injuries are riper than many other cases involving future injury, given that schools are already in the process of changing their name, and because the CCIA has already begun to apply SB 21-116. Even on Defendant's own terms, the CCIA has no doubt that each of the schools that it has listed are engaged in the process of changing their names and imagery, with the possible exception of one school district that is holding out hope of entering into a tribal agreement. With respect to Yuma High School specifically, the CCIA acknowledges that Yuma is engaged in the process and not pursuing a tribal agreement, or preparing to pay a monthly fine. Undisputed Fact No. 23.

II. Defendant May Not Rely on a Government Speech Exception to the Equal Protection Clause or the Right to Petition Under the First Amendment.

Defendant seeks to dismiss this lawsuit by arguing that SB 21-116 regulates government speech, and thus is exempt from the constitution's proscription of racial discrimination or the right to petition. But the government speech defense applies to free speech causes of action, not to other constitutional claims. *See Green v. Haskell County Board of Com'rs*, 568 F.3d 784, 802 (10th Cir. 2009) (analyzing whether government speech violated the Establishment Clause).

Defendant separately refers to *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), but does not mention Justice Stevens' concurrence in that case, despite the fact that the Tenth Circuit seemed to affirmatively adopt it in *Green*. *See* 568 F.3d 784, 797 n.8 ("For even if the Free Speech

Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.") (quoting Stevens, J., in *Summum*, 555 U.S. at 482) (emphasis added).

Regardless, Plaintiffs have never brought a free speech claim or sought "equal time" in the "marketplace of ideas" among all school mascots. Nor have they suggested that schools *must* use American Indian names or imagery in the abstract, or that they are entitled to preserve a fixed number of American Indian mascots. Defendant's cases regarding government speech are inapposite because Plaintiffs do not seek to engage in government speech, or force the government to engage in certain speech. Plaintiffs simply argue that the government's speech in this case violates other constitutional doctrines. *Accord Arce*, 793 F.3d at 977 (elimination of Mexican American Studies program posed triable equal protection issue, if racial animus were shown).

Indeed, Defendant's case, *Moore v. Bryant*, 853 F.3d 245 (5th Cir. 2017), recognized that speech and conduct were different. There, the Fifth Circuit rejected a challenge to a state government's use of the Confederate flag, but distinguished cases where actual discriminatory treatment occurred. *Id.* at 251 ("[I]n cases where the Government engages in discriminatory speech, that speech likely will be coupled with discriminatory treatment."). In short, a law banning portraits of African-Americans in City Hall should not be rescued by the government speech doctrine. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005) ("We have held that *all* racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny.") (internal quotation marks, brackets, and ellipses omitted) (emphasis in original); *accord Lawrence v. Texas*, 539 U.S. 558, 600 (2003) (Scalia, J., dissenting) ("A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race.") (*citing Washington v. Davis*, 426 U.S. 229, 241-242 (1976)); *accord*

Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio, 364 F.Supp.3d 253, 280 (S.D.N.Y. 2019) ("All racial classifications trigger strict scrutiny.").

Here, Plaintiffs firmly dispute the idea that Colorado has merely engaged in speech. Colorado has engaged in discriminatory treatment. It has identified schools solely by using race as its criteria, and barred all schools from referring to American Indian tribes and individuals in their names and images. It has placed the Plaintiffs on an uneven playing field when advocating for honoring American Indians, and it has enacted a vague statute that no school district could hope to parse even with extensive guidance and legal counsel. Whether the state's expressive speech is technically involved at some level is wholly irrelevant. And Plaintiffs have never—in contrast to the plaintiffs in Defendant's cases—demanded any particular government speech.

Defendant cites to a Third Circuit case for the proposition that government speech can never trigger an equal protection claim. But that case simply rehashes the same idea—the government is free to espouse a certain belief without being forced to provide a microphone to a party that has a competing viewpoint. *See Fields v. Speaker of Pennsylvania House of Representatives*, 936 F.3d 142 (3d. Cir. 2019) ("The nontheists argue that the House's theists-only guest chaplain policy violates their equal-protection rights."). Fortunately, Plaintiffs rely on no such theory for their claims. Instead, Plaintiffs' claims resonate in the same theory underlying the *Arce* case, and in guidance issued by the U.S. Department of Education. *See* Dear Colleague Letter, Joint DOJ/OCR Guidance on Segregated Proms (Sept. 20, 2004) (racially separate awards for Homecoming Queens and Kings and for Most Popular Student or Most Friendly student violate Title VI).[1] Colorado may contend that a law banning Mexican American Studies is simply

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

restricting government speech. Or that a school using racial classifications to annually designate the friendliest or most popular students is simply government speech. Yet both are discriminatory.

III. Plaintiffs' Claims Succeed as a Matter of Law.

a. Equal Protection: Direct Discrimination

The Act singles out American Indians 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. Undisputed Fact No. 43. It bars literally any school from using an American Indian 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 an American Indian 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*, 133 S. Ct. 2411, 2419 (2013) (*Fisher I*).

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*, 793 F.3d at 977 (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).

Defendant maintains that SB 21-116 is well-intentioned. There is no such defense that avoids strict scrutiny. *See 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 the Act furthers a compelling state interest, and that the Act is narrowly tailored toward achieving that interest. *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) (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. It permits schools to honor General George Custer freely because he is Caucasian, while forcing schools who want to honor Sitting Bull—the American Indian Chief who helped defeat Custer—to enter into tribal agreements. And Plaintiffs contend that the law treats differently schools named after African-American or Mexican-American individuals. Of course, if tomorrow, it is determined that either Cesar Chavez or Martin Luther King Jr. had even 1% American Indian ancestry, SB 21-116 coverage may be triggered. Undisputed Fact No. 43, 44.

SB 21-116 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 American Indians. Such a feeble effort at tailoring should not be embraced by the Court.

Nor is CCIA's enforcement of the law consistent with narrowly tailoring, even on its own terms. The CCIA has conducted no site visits to determine whether imagery and icons remain at schools, even for those that until recently had sports team names that referred to American Indians. La Veta High School, which is named in SB 21-116's legislative declarations, continues to have a painting of an American Indian man in a headdress, and the word "Redskin" in its basketball gymnasium. Undisputed Fact No. 35.

b. Equal Protection: Political Process

The District Court must follow Supreme Court precedent until it is unambiguously overturned. *See Bosse v. Oklahoma*, 137 S.Ct. 1 (2016) ("It is this Court's prerogative alone to overrule one of its precedents.") (internal brackets and quotation marks omitted).

"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*'s plurality preserved *Seattle*'s core rationale, which firmly applies to the instant case: "*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.").

The plurality's holding is in line with other precedents. *See, e.g., 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."). And the Supreme Court's declination to overturn *Seattle* has been recognized by other lower courts. *See Lewis v. Governor of Alabama*, 896 F.3d 1282, 1298 (11th Cir. 2018), *rev'd en banc on other grounds* (rejecting political process challenge to allegedly "racialized" minimum wage law under *Schuette*, but still recognizing in *dicta* "the Supreme Court's limited application of the political-process doctrine to laws explicitly addressing racial harms."). Moreover, there is no basis for the Court to infer that the Supreme Court meant to go further and abandon the political process doctrine altogether.

Defendant focuses on *Schuette*'s recognition that a "broad" reading of *Seattle*—wherein state action with a "racial focus" might be vulnerable to constitutional challenge—would lead to absurd results, like whether the name of a school might not "inure[] primarily to the benefit of the minority." 572 U.S. at 309. But Plaintiffs do not rely on a broad reading of *Seattle*. Instead, the question is whether, under *Schuette*, a ban on depicting American Indian tribes or individuals—

including in honorific ways—"ha[s] the serious risk, if not purpose, of causing specific injuries on account of race." Because it does, it is therefore subject to strict scrutiny.

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 an American Indian 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 or Norsemen 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 American Indians 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. [Mot. at 12. (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 reserves to local school boards the exclusive power to name schools and choose mascots.").]

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.

c. First Amendment: Right to Petition

No ordinary reader of SB 21-116 could ever reach the same conclusions that the CCIA has reached.

- SB 21-116 covers logos with American Indian names or tribes referenced in them. The CCIA asserts otherwise, if the school's name itself includes the reference.
- SB 21-116 covers team names with American Indian names or tribes referenced in them. The CCIA asserts otherwise, if the school's name itself includes the reference.
- The CCIA asserts that "the Commission does not treat geographic terms containing the names of American Indian persons, tribes, customs, or traditions as falling within the scope of 21-116."
- The CCIA has issued guidance which includes considerations not contained in the statute, such as "words" that are not names, symbols, or images.
- The CCIA has issued guidance which includes considerations not contained in the statute, such as whether a moniker is merely "associated with" with the "American Indian/Alaska Native community or with Tribal Nations."

- The CCIA asks whether the "general public" associates a moniker with the American Indian/Alaska Native community or Tribal Nations.

The result of these confusing glosses on SB 21-116 is that public schools will never be able to appropriately respond to good-faith requests from Plaintiffs. Even a receptive school will be forced to consider the severe consequences of paying an enormous monthly fine rather than engaging the process of discussing honoring an American Indian as part of its school name or imagery.

"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). SB 21-116 functionally cuts off the right to petition by making it impossible for schools to receive such petitions and understand how to respond to them.

Two Plaintiffs have already sought to petition public schools not to change their names, or at least to adopt a different name that honors American Indians. Undisputed Fact Nos. 18 and 19. Plaintiff Marez, for instance, specifically petitioned Lamar High School to change its name to Lamar Black Kettle. He noted: "Black Kettle was a prominent Chief/leader of the Southern Cheyenne during the Colorado War and the Sand Creek Massacre." Undisputed Fact No. 18. He received the blunt reply that: "I believe your suggestion would fit within this definition thereby making the school subject to the fines/fees if we adopted this suggestion." *Id.* Similarly, Plaintiff Roubideaux petitioned that Yuma High School be named after his Lakota ancestor, Tall Bull, who was massacred at Summit Springs. Undisputed Fact No. 19. Media reports establish that "[t]he suggestion of 'Tall Bulls' was eliminated because it refers to a Native American chief killed in the 1880s." *Id.* Neither response is supported by the text of the law, and yet both indicate the chilling effect of SB 21-116.

To be clear, Plaintiffs 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. By failing to 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.

Plaintiffs are not arguing that they have a right to *succeed* at petitioning. Rather, they contend that Colorado drafted a statute so poorly—and which is being interpreted and enforced in unpredictable ways—that public schools 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 inappropriate 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.

d. Title VI.

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. Defendant does not contest that Colorado receives federal funds, or that all public schools receive federal funds. Defendant also concedes that under Title VI, Plaintiffs direct

claim is co-extensive with its equal protection claim. [ECF 20, at 17 n.6.] Defendant contends, however, that a state law can't give rise to a hostile environment claim under Title VI. But this is factually inaccurate. *See, e.g.*, 34 C.F.R. § 100.13(i) ("The term recipient means any State, political subdivision of any State, or instrumentality of any State or political subdivision …") (emphasis added); *Bryant v. Independent School Dist.*, 334 F.3d 928, 931 (10th Cir. 2003) ("Title VI protects the right to be free from discrimination under a program that receives federal funding.").

Here, Defendant satisfies the elements of a hostile environment claim under Title VI. The elements are whether the Defendant: (1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school. *Id.* at 934 (internal citation omitted and emphasis supplied). Nothing in *Bryant* inherently precludes a state law from triggering each of the elements.

Moreover, 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 v. Tempe Union High School District*, 158 F.3d 1022, 1032 (9th Cir. 1998) ("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. Or a state law mandating that no school may be named after a woman or LGBTQ+ individual. Or a law requiring schools to shun certain undocumented immigrants based on their race. In the same way that these scenarios could establish

a hostile environment against the state, so too does SB 21-116. A much more radical conclusion would be that a state may claim absolute immunity from Title VI merely because its own state law is novel or unusual.

Plaintiffs properly contend in the Amended Complaint that they are denied "the opportunity to engage in the most fundamental act of human dignity—to honor their heritage by provoking conversations and engaging with others about racial identities and racial stereotypes within and without the Native American community." [ECF No. 39, at 28.]. The Does and Plaintiff Smith will be forced to watch as Yuma takes down banners, historical jerseys, pennants, murals, and other materials solely because of their relation to American Indians or American Indian culture. SB 21-116 "disparages their intimate personal choices and identity, and devalues their personhood." [*Id.* at 26.]

This will have a concrete 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. Defendant contends that Plaintiffs have not identified how these items constitute an "educational benefit." But Plaintiffs' declarations stand uncontested in the case, and clearly demonstrate how forcing the erasure of culture solely based on race does serious damage to these students and to Mr. Smith. Undisputed Facts 25, 26, 27. Defendant obviously has notice SB 21-116's effect on schools, and has not responded by altering or reversing course in response to the knowledge that it creates a racially hostile environment.

CONCLUSION

Because the complete elimination of American Indian imagery and nomenclature in schools in Colorado is inappropriate and unlawful, Plaintiffs respectfully request that the Court deny Defendant's Motion to Dismiss, and grant Plaintiffs' Motion for Summary Judgment.

DATED this 28th day of February 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February 2022, I electronically filed the foregoing using this Court's CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and service will be accomplished by this Court's CM/ECF system.

/s/ *William E. Trachman*
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