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, Plaintiff, 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

PLAINTIFF'S COMBINED (1) REPLY TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND (2) RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

The parties do not dispute the facts. Summary judgment is therefore appropriate to determine that Colorado enacted an unconstitutional law with the goal of "completely eliminat[ing] American Indian imagery and nomenclature in schools in Colorado." ECF 20-1, at 2 (Legislative Declaration (h)). Defendant spends much of its brief recounting the findings of the 2016 report of the Commission to Study American Indian Representation in Public Schools, and certain testimony before the General Assembly. But those materials are unresponsive to the fact that the law that Colorado actually enacted—SB 21-116—is wildly overinclusive, intentionally underenforced, inscrutably vague, and casts its net exclusively based on race. Good intentions cannot save such a law.

After several rounds of briefing, it is obvious that the parties fundamentally disagree on whether Plaintiffs have standing to lodge their claim that they have been injured based on their race. Defendant continues to press the argument that no one has a right to a school mascot or sports team name that represents their race, particularly given the "government speech" doctrine in the context of free speech claims. Plaintiffs, by contrast, continue to respond that they have never alleged such an injury. Rather, Plaintiffs are denied an equal opportunity to have themselves, their ancestors, or their tribes be represented, depicted, and honored by public schools throughout Colorado, due solely to their race. The Constitution does not permit facially discriminatory laws motivated by race to evade strict scrutiny.

Plaintiffs are therefore not addressing the wrong branch of government, as Defendant asserts. Indeed, as Plaintiffs' claim for political process discrimination establishes, Defendant's response precisely implicates that constitutional theory as interpreted by *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014). Where, as here, a legislative body enacts a racially-discriminatory law, it is the province of the judiciary to articulate what the law is.

Secondarily, with respect to Plaintiffs' claim that their right to petition has been denied, Defendant relies primarily on the idea that such a right is basically empty, and essentially contends that being able to simply fire off one's opinion into the ether is sufficient to satisfy the right. This is hardly consistent with the Tenth Circuit case law on point, which establishes that the right is not meaningless. Indeed, Defendant's assertion that the schools properly interpreted SB 21-116 is directly contrary to the CCIA's own interpretation of the law, as it has read into the law a geographic exception for logos containing the names of American Indian tribes and individuals, which would apply to both "Black Kettle" and "Tall Bull." In short, even the CCIA can't keep the scope of SB 21-116 straight.

Last, with respect to Title VI, it is entirely appropriate for this Court to recognize that recipients of federal funds may not engage in race discrimination, whether through written policies or through the intentional creation of a hostile environment for the Plaintiffs. It is the same language from Title VI that covers both theories of intentional discrimination, and Defendant's argument that this would be the first case on record to embrace what is clearly allowed by federal statute is not grounds for rejecting a viable theory.

DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

Plaintiffs do not specifically dispute the contents of Defendant's Statement of Undisputed Facts. Instead, Defendant describes much of the legislative testimony given when SB 21-116 was debated by Colorado's General Assembly. ECF 49, at 2-3. To the extent that the "undisputed facts" at issue are simply the fact that the testimony occurred, Plaintiffs do not dispute them, but they have minimal bearing on the constitutionality of SB 21-116.

Defendant's Statement also cites to a 2016 study of American Indian representation in public schools, which the General Assembly cited in Section 1 of SB 21-116. *See* ECF 49-1.

Plaintiffs do not dispute the existence of the study, which is not relevant to the constitutionality of SB 21-116. Plaintiffs note, however, that the study specifically recommends *against* unfunded mandates and legislative penalties, the exact mechanism SB 21-116 enshrined into law. ECF 49-1, at 22.

LEGAL STANDARD

"[S]ummary judgment 'should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Hartnett v. Papa John's Pizza USA, Inc.*, 828 F. Supp. 2d 1278, 1283–84 (D.N.M. 2011), quoting Fed. R. Civ. P. 56(c)(2). The rule is the same when both parties cross-move for summary judgment. *Denver Newspaper Guild, Local 74 v. Denver Pub. Co.*, 714 F.Supp. 448 (D. Colo. 1989) ("Rule 56(c) applies with equal force when the parties have filed cross motions for summary judgment.").

Here, the parties have not only cross-moved, but also agree on the material facts. The Court's role is generally limited, therefore, to applying the substantive law to those facts. *See Wilson v. Federated Service Ins. Co.*, 173 F.3d 865, *1 (10th Cir. 1999) (Table) ("The parties agree on the facts and therefore, our review is limited to examining the district court's application of the substantive law."); *Julicher v. I.R.S.*, No. CIV. A. 92-7369, 1995 WL 386613 (E.D. Pa., June 29, 1995) ("Therefore, if the parties agree on the facts, and especially if they stipulate to them, summary judgment is appropriate.").

ARGUMENT

I. Plaintiffs have standing to challenge SB 21-116.

a. Plaintiffs have suffered injury in fact to a legally protect interest.

Plaintiffs make up a diverse group of American Indian students, community members, a teacher who teaches in one of the affected schools, and an interest group that represents its members. Defendant does not deny that Plaintiffs have identified a race-based classification (nor could Defendant, since the discrimination is explicit on the face of SB 21-116), but nevertheless contends that none of these Plaintiffs have established any injury. But Tenth Circuit and Supreme Court case law establish that racial discrimination itself is a cognizable injury. *See American Humanist Association, Inc. v. Douglas County School District RE-1*, 859 F.3d 1243, 1248 (10th Cir. 2017) ("We find no support in our jurisprudence for the proposition that an injury must meet some threshold of pervasiveness to satisfy Article III. As the Supreme Court has explained, 'an identifiable trifle is enough for standing to fight out a question of principle.'"); *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 593 (10th Cir. 1996) ("Plaintiffs claiming discrimination in the denial of a benefit need not show they would have obtained the benefit in the absence of the discrimination to establish standing; it is enough to show the discrimination deprived them of the ability to compete for the benefit on an equal footing."); *see also Arce v. Douglas*, 793 F.3d 968, 973 (9th Cir. 2015) ("The children of the Tucson Unified School District ('TUSD'), a majority of whom are of Mexican or other Hispanic descent, have a natural interest in knowing more about their cultural heritage and that of their community—or so the school board of Tucson decided, inaugurating a Mexican American Studies ('MAS') program in the Tucson public schools.").

Defendant misreads *Arce* as a First Amendment case. While the plaintiffs in *Arce* separately pursued a First Amendment claim and a Fourteenth Amendment vagueness claim grounded on due process, the Ninth Circuit's decision in *Arce* did not rely on the First Amendment to establish standing. Instead, it noted the direct injury to students that occurred when the state

legislature engaged in race-based discrimination. *Id.* at 981 ("[A]pplying the five *Arlington Heights* factors to the evidence of record—taken, as it must be for these purposes, most favorably to plaintiffs—there is sufficient evidence to raise a genuine issue of material fact as to whether the enactment and/or enforcement of § 15–112 here challenged was motivated, at least in part, by an intent to discriminate against MAS students on the basis of their race or national origin."). Indeed, in a partial dissent, Judge Clifton recognized how broadly the majority in *Arce* framed its decision. *Id.* at 990 ("In doing so, however, the majority opinion conflates antipathy toward Tucson's Mexican American Studies program ('MAS') with animus toward Mexican Americans more generally."). Judge Clifton's point, however, did not carry the day.

Defendant also fails to respond to the Supreme Court's political process cases, where a plaintiff challenging state action was able to establish an inability to act locally due to their race. Plaintiffs explain below why Defendant is wrong to argue that *Schuette* entirely abolished the political process doctrine by limiting *Seattle School District* to its facts. But Defendant does not even dispute the pre-*Schuette* cases cited by Plaintiff on the issue of standing. *Compare* ECF 47, at 20, *with* ECF 49, at 7-8. Plaintiffs who can establish that a locality was forced to discriminate due to an unconstitutional state law are "injured" for the purpose of Article III.

b. Plaintiffs' injuries are not speculative.

Plaintiffs' injuries are not speculative. SB 21-116 is fully in effect in Colorado. Schools are responding to it, and the CCIA itself has no doubt that every school is coming into compliance with the law. Indeed, Defendant's argument suggests that the case will only be ripe once it is moot, and all Colorado public schools have already whitewashed their names, icons, and images. For now, however, there remain a handful of schools who have not yet erased their American Indian imagery, although the CCIA is actively taking materials and presentations from those schools and

is voting on whether to remove schools from its list. That includes Yuma School District, where media reports indicate that the school has already changed its sports team name. *See* Sue McMillin, *12 Colorado schools still face monthly $25K fines under new law banning American Indian mascots*, The Colorado Sun (Mar. 11, 2022) ("The [Yuma School District] board reportedly voted last month to eliminate the Indian mascot, but did not opt for a new one, according to a Denver Post article.");[1] *see also* Nick Coltrain, *Instead of replacing Native American school mascot, this Colorado town is going without one*, Denver Post (Mar. 8, 2022) ("Yuma public schools' sports teams will be known as just that — not the Aggies, not the Yetis, not the Pioneers, just Yuma — for the foreseeable future after dropping the 'Indians' mascot this year.");[2] *accord Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (permitting pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent.).

Incredibly, Defendant claims that Plaintiffs' injury is speculative because "whether the Plaintiffs' schools will change their mascots is still unknown, as Plaintiffs' schools remain on the list of schools using American Indian mascots." ECF 49, at 8. This ignores the fact that Plaintiffs' schools, Yuma and Lamar, have both taken numerous overt steps to remove American Indian imagery from their grounds, have submitted materials or presentations to the CCIA on proposed alternative mascots, and have sought feedback from the CCIA on those proposed alternative mascots. As an ex-officio member of the CCIA who has presided over multiple recent sessions on SB 21-116 compliance, Defendant is well aware of the steps these schools have taken to date to change their mascots. Defendant acknowledged under oath that there is no doubt whatsoever that these schools are engaged in the process of changing their American Indian names and imagery,

[1] https://coloradosun.com/2022/03/11/american-indian-mascots-colorado-schools/.
[2] https://www.denverpost.com/2022/03/08/yuma-colorado-no-native-american-mascot/.

including historic artistic references to American Indians within the school. ECF 47-1, at 14. The fact that Plaintiffs' schools remain listed is solely a function of the CCIA's approval process, not an indication that these schools will retain their current American Indian mascots.

II. SB 21-116 violates Plaintiffs' rights to equal protection under the law.

a. The government speech doctrine is inapplicable.

Defendant seeks to prevent Constitutional scrutiny of SB 21-116 by hiding behind the government speech doctrine. However, the government speech doctrine is a function of the Free Speech Clause of the First Amendment. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."). It does not protect government speech from all Constitutional scrutiny. *See Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 970 (9th Cir. 2011) ("The same cannot be said for the Establishment Clause, however. That Clause *does* apply to government speech."); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 482 (2009) (Stevens, J., concurring) ("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."); *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, n.9 (1st Cir. 2009) (The Establishment Clause is another restraint on government speech, *id.*, and the Equal Protection Clause may be as well.").

In the instant case, Plaintiffs have not brought a claim under the Free Speech Clause of the First Amendment which would trigger the government speech doctrine. Rather, Plaintiffs have brought claims under, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment. Colorado has denied Plaintiffs an equal opportunity to have themselves, their ancestors, and their tribes be represented, depicted, and honored by public schools throughout Colorado, due solely to

their race. That is differential government treatment, in the same way that a state government may not prohibit localities from honoring African-Americans, or naming neighborhoods after Jewish individuals. It is an even stronger showing of injury than in *Arce*, where students and parents had challenge a facially neutral law motivated by race-conscious legislators. Indeed, a precedent that state laws can demand that localities discriminate would sweep broadly and dangerously.

b. Plaintiffs have stated a valid equal protection claim.

Defendant contends that Plaintiffs' equal protection claim must fail because Plaintiffs "have not identified a government benefit they are denied on account of their race." ECF 49, at 11. Defendant ignores that the injury in fact in an equal protection case "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. V. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993). In other words, Plaintiffs are injured simply by "the inability to compete on an equal footing" because "a discriminatory policy prevents [them] from doing so on an equal basis." *Id.* Defendant argues that Plaintiffs are not entitled to a mascot of their choosing, ECF 49, at 14, but that argument misses the point: "A plaintiff need not show that he or she would necessarily have received the benefit but for the operation of the policy; rather, the injury is the imposition of the barrier itself." *Day v. Bond*, 500 F.3d 1127, 1133 (10th Cir. 2007) (internal citations omitted).

Defendant asserts that *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015), which allowed an Equal Protection claim to go forward against statutes that led to the elimination of a Mexican American Studies program, is distinguishable because it turns on a right not implicated here—the First Amendment right of students to 'receive information and ideas.'" ECF 49, at 10. But the *Arce* court considered the plaintiff's Equal Protection and First Amendment claims separately, and

reversed the district court's grant of summary judgment in favor of the defendant on the Equal Protection claim before engaging in any discussion of the First Amendment. 793 F.3d at 981.

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

There can be no doubt that SB 21-116 contains a racial classification on its face. The statute was enacted to engage in a racial classification, such that logos and letterhead can essentially never feature American Indian individuals, absent a tribal compact. As such, the law is subject to strict scrutiny; it must be "narrowly tailored to serve a compelling government interest." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 714 (2007). SB 21-116 is neither.

Moreover, the motivation behind SB 21-116 does not insulate it from strict scrutiny. *Id.* at 741 ("Our cases clearly reject the argument that motives affect the strict scrutiny analysis."). The Supreme Court has repeatedly held that "*all* racial classifications, imposed by whatever federal, state, or local governmental actor, *must* be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 US. 200, 227 (1995) (emphasis added); *see also Johnson v. California* 543 U.S. 499, 505 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"). Indeed, "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). "Racial classifications are suspect, and that means that simple legislative assurances of good intent cannot suffice." *Id.* Put simply, "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

Defendant claims that the government has a compelling interest in figuring out which schools use letterhead, logos, sports team names, and other imagery—all of which falls under the

counter-intuitive header of a "mascot"—as part of a remedial effort to make up for discrimination in the past. ECF 49, at 12 (citing *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 321 F.3d 950, 958 (10th Cir. 2003). Recently, however, the Supreme Court has pushed back on that rationale. *Parents Involved*, 551 U.S. at 748 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

Defendant has never explained how the state has a compelling interest in preventing a school from honoring an American Indian tribe or individual by using an historically accurate and respectful likeness, or a name on a logo. It also may not put the name on its website, or athletic uniforms, or school signage. It is commonly accepted that school namesakes constitute honorifics. For instance, Dr. Martin Luther King, Jr. Early College is free to continue using its namesake's name and likeness in its logo, and on its website without fear of incurring a $25,000 per month fine. *See* ECF 47-1, at 38-42. However, if tomorrow, a genealogist determines that Martin Luther King Jr. had even 1% American Indian Ancestry, the school could be in violation of SB 21-116, and subject to fines, based on new information regarding race. ECF 47-1, at 16 (When asked if an individual who had one percent American Indian ancestry would be covered by SB 21-116, Defendant responded, "You know, I think that opens up just that conversation of how one self identifies as versus that 1 percent. Whether it's in their blood quantum, or is it how one self identifies? And . . . it would be presented to the commissioners and the commissioners would vote.").

Nor is SB 21-116 narrowly tailored to achieve its goal of eliminating discriminatory mascots. Rather, it is both over- and under-inclusive. It is over-inclusive because, by its own terms, SB 21-116 eliminates *all* American Indian "mascots" from Colorado public schools, with very limited exceptions. C.R.S. § 22-1-133(2). It prevents the consideration of images honoring specific

American Indian figures, even at the request of a figure's direct lineal descendants. ECF 47, at 32. It prevents the use of a mythical creature only tangentially associated with American Indians: the Thunderbirds of Johnson Elementary School currently remain on the CCIA's list of non-compliant schools.[3] It may even prevent Yuma schools from utilizing the mascot "tribe"—with no associated American Indian imagery—because CCIA Commissioners subjectively associate the word "tribe" with American Indians, despite the fact that "tribe" is used in myriad unrelated contexts. Even if the Court accepts every finding described by Defendant regarding the 2016 Commission report, the statute sweeps significantly broader than needed to remedy those findings.

Moreover, SB 21-116 includes an overly broad definition of "mascot": "American Indian Mascot" is defined as any "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 schools." C.R.S. § 22-1-133(1)(a). The law specifically contemplates that this definition covers the names of schools themselves, as it provides a narrow exception for the use of such school names on the school's letterhead: "Notwithstanding the definition of the term 'American Indian Mascot' in subsection (1) of this section, a public school that is named after an American Indian tribe or American Indian individual may use the tribe's or individual's name, but not an image or symbol, on the public school's letterhead." C.R.S. § 22-1-133(2)(a).

In her deposition, Defendant explained that the CCIA has unilaterally read an exception into the law for the names of schools, based on legislative intent. ECF 47-1, at 27-28. In crafting its list of non-compliant schools, the CCIA also excepted schools, like Ouray and Niwot, named after their geographic location. *Id.* It also excepted schools like Pawnee High School, which shares its name with a tribe unrelated to the name of its geographic location, because its sports team name

[3] https://ccia.colorado.gov/legislation.

is the Cougars.[4] These exceptions are purely extra-textual; they are not contained within the letter of SB 21-116. The CCIA's enforcement thus ignores the black letter of the law, relies on extra-legislative guidance,[5] and is subject to the whims of the Commissioners.

On the other hand, SB 21-116 is under-inclusive because it does not prevent the use of *any* mascots—even discriminatory or derogatory mascots—representing other races or ethnic groups. There is no law in Colorado preventing schools from becoming, for instance, the "Vikings," the "Fighting Irish," or the "Celtics." Instead, SB 21-116 singles out a single minority group, American Indians, for differential treatment. Defendant has announced no public interest in continuing to discriminate in such a way.

There are also myriad Colorado schools covered by SB 21-116 that the CCIA has failed to address. Most noticeably, the La Veta High School Redskins are specifically called out in the Legislative Declaration, Section 1 of SB 21-116, but are not included on the CCIA's list of non-compliant schools, despite the fact that La Veta High School continues to have a painting of an American Indian man in a headdress and the word "Redskin" in its basketball gymnasium. ECF 47-1, at 13. Eaton schools, which were named by the CCIA on its website but never actually included on the list of non-compliant schools, have never had to submit assurances that their old yearbooks or jerseys—which used the term "Reds" as a sports team name—have been destroyed or given to a third party. And as mentioned above, various Colorado schools, such as Niwot High

[4] The Pawnee Tribe of Oklahoma is one of the forty-eight contemporary tribes with ties to Colorado. https://ccia.colorado.gov/sites/ccia/files/documents/CO%20Tribal%20contact%20list%201550%20September2021.docx.pdf. Pawnee High School is located in Grover, Colorado. ECF 47-1, at 27.

[5] https://ccia.colorado.gov/sites/ccia/files/documents/Guidance%20for%20Commissioners%20to%20Consider%20on%20SB21-116%20Compliance.pdf.

School and Ouray High School, are named after American Indian tribes or individuals, and use those names in their logos. *See* further discussion infra, Part IV.

There are a few exceptions to SB 21-116's prohibition on American Indian mascots that are written into the law. For instance, a school may enter into an agreement with a federally recognized American Indian tribe allowing them to use an otherwise prohibited mascot. C.R.S. § 22-1-133(2)(b)(III). However, acceptance of an agreement between a tribe and a school is also apparently subject to the whims of the CCIA. Since Plaintiffs' last filing, Kiowa Elementary, Middle, and High Schools have purportedly reached an agreement with the Kiowa Tribe of Oklahoma to keep their "Indians" mascots.[6] At its March 10, 2022, meeting, the CCIA noted the Kiowa agreement, but declined to remove Kiowa from its list. *Id.* Put simply, a law that cannot even be consistently enforced cannot be considered to satisfy strict scrutiny analysis.

III. SB 21-116 violates Plaintiffs' rights to equal protection in the political process.

Bizarrely, Defendant claims that the reading of *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) (*Seattle*) adopted by *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014), is foreclosed by … *Schuette*. ECF 49, at 15. In short, Defendant argues that "'Seattle must be understood' on its facts," rather than the way that the *Schuette* court directed us to understand it. *Id*. With all due respect, this is incoherent. The Supreme Court must be taken at its word, and its word limited *Seattle* not to "its facts," as Defendant would argue, but to "case[s] in which the state action in question . . . ha[s] the serious risk, if not the purpose, of causing specific injuries on account of race[.]" *Schuette*, 572 U.S. at 305. Other courts have affirmed the continued existence of the political process doctrine under *Schuette*: in *Lewis v. Governor of Alabama*, the

[6] McMillin, *12 Colorado schools still face monthly $25K fines under new law banning American Indian mascots*, The Colorado Sun (Mar. 11, 2022), https://coloradosun.com/2022/03/11/american-indian-mascots-colorado-schools/.

11th Circuit rejected a political process challenge to an allegedly racialized (but facially neutral) minimum wage law under *Schuette*, but recognized "the Supreme Court's limited application of the political-process doctrine to laws explicitly addressing racial harms." 896 F.3d 1282, 1298 (11th Cir. 2018), *rev'd en banc on other grounds*.

Defendant cannot escape this argument by citing *dicta* regarding the naming of schools, which referenced the old test involving the purported "racial focus" of a law. Plaintiffs do not contest a general power that state legislatures have to regulate school names. Nor do Plaintiffs contend that school name choices should be beyond the reach of voters. But the *dicta* in *Schuette* related to a "broad" reading of the political process doctrine that would have swept in conduct that merely had a "racial focus." That has never been Plaintiff's theory of this case.

Plaintiffs do not rely on a "broad" reading of *Seattle.* Rather, Plaintiffs argue that the state legislature may not single out a particular race and place it at a systematic disadvantage in the political process. ECF 47, at 30. That principle, adopted by the Supreme Court in *Seattle* and reaffirmed in *Schuette*, applies in *every* context, including school naming policies. The Constitution does not take school names out of the hands of voters; it does take racial discrimination out of the hands of voters. SB 21-116 actually flips the *Schuette dicta* on its head: here, Colorado is actively *engaging* in race discrimination against a particular race by forcing schools to change mascots, logos, and letterhead.

Defendant similarly tries to flip *Schuette* on its head in an attempt to distinguish *Schuette.* The *Schuette* Court noted that, in *Seattle*, "neither the State nor the United States 'challenged the propriety of race-conscious student assignments for the purposes of integration.'" 572 U.S. at 306 (quoting *Seattle*, 458 U.S. at 372, n. 15). Defendant contrasts *Schuette* with the instant case, stating "Colorado has never conceded and does not concede that the use of American Indian mascots by

public schools is a proper policy for achieving American Indian interests." ECF 49, at 15. This attempted contrast misreads the issue. The question is not whether the *use* of American Indian mascots achieves American Indian interests – rather, the question is whether, under *Schuette*, a *ban* on American Indian mascots (even as honorifics) "ha[s] the serious risk, if not purpose, of causing specific injuries on account of race." *Schuette*, 572 U.S. at 305.

The Plaintiffs allegations in this regard go unchallenged. Besides relying on inapposite *dicta* and contrasts, Defendant has no response to Plaintiffs' political process claim. There is none. Colorado imposed a system of explicit racial discrimination on the school naming process. The Equal Protection clause forbids this.

Indeed, Defendant's arguments feed directly into the cause of action. Defendant notes—accurately—that Plaintiffs may "appeal to a tribal government to allow the use they desire. Or they can seek to change state law[.]" ECF 49, at 15. But this response entirely concedes Plaintiffs' claims. No other racial group is required to request permission from third parties as part of its effort to seek representation; Colorado has imposed this disadvantage explicitly and exclusively on American Indians, explicitly and exclusively on the basis of their race. Under Defendant's theory, any state law that singles out a racial minority, placing that minority at a disadvantage in the political process without actually stripping that minority of the franchise, would be permissible if "they can seek repeal of the racially-discriminatory state law." *See* ECF 49, at 15. That wasn't enough in *Seattle* as understood by *Schuette*, and it wasn't enough elsewhere, either. *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."); *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37-38 (1928) ("Discriminations of an unusual character especially suggest

careful consideration to determine whether they are obnoxious to the constitutional provision."). Nor is it enough here.

IV. SB 21-116 violates Plaintiffs' right to petition.

To be clear, the text of SB 21-116 sweeps in myriad schools, which have never been named by the Colorado Commission on Indian Affairs, based on their logos:

- The logo for Niwot High School, which refers to Arapahoe Chief Niwot. Exhibit 1 (Deposition Exhibit 24)
- The logo for Ouray High School, which refers to Ute Chief Ouray. Exhibit 2 (Deposition Exhibit 22)
- The logo for Pawnee High School, which refers to the Pawnee Tribe of Oklahoma. ECF 47-1, at 29-32 (Deposition Exhibit 28)
- The logo for Pagosa Springs High School and other Pagosa schools, which include the word "pagosa," the Ute word for healing or boiling water. Exhibit 3 (Deposition Exhibit 29)
- The logo for the American Indian Academy of Denver, which refers to American Indians. ECF 47-1, at 38-42 (Deposition Exhibit 32)

The best that Defendant can muster is that these schools' names are not covered by SB 21-116, because the statute contains an exception for the names of schools. That is beside the point, since Defendant acknowledges that there is no similar exception for logos. And the CCIA continues to incoherently apply its standards, including some schools using the "Thunderbirds" for their imagery on its list of schools, while leaving other schools using the same terminology off of its list. *See* Anna Lynn Winfrey, *Two other schools in Colorado have a Thunderbird mascot.*

Why was Johnson Elementary School the only one the state said needs to change?, Montrose Press (updated Mar. 15, 2022).[7]

There can also be no doubt that schools themselves are confused regarding the application of the law. When two Plaintiffs sought to either preserve local school sports team names or name the schools after American Indians, the schools rejected those efforts. Of course, Lamar High School could never have known, based on the text of SB 21-116, that using the term "Black Kettle" would not be viewed by the CCIA as covered by the statute, since there is a geographic location using that name, the Black Kettle National Grasslands.[8] Nor could the Yuma School District have read the text of SB 21-116 to discover that using a logo with Tall Bull would pass muster as well, because there is a geographic location known as the Tall Bull Memorial Grounds.[9]

Put simply, SB 21-116 interferes with Plaintiffs' First Amendment right to petition because it is impossibly vague, both on its face and as applied. ECF 47, at 33. And even where the text is clear, the CCIA has repeatedly reached conclusions and issued guidance directly contrary to the language of SB 21-116. ECF 47, at 31-32. Many additional irregularities were discovered only as part of this litigation. Any rational school district considering a petition to name a school after an American Indian individual will be deterred by the massive fine imposed by SB 21-116 even if the proposal is permissible, because the CCIA gives every indication that it does not believe itself to be bound by that text.

Defendant argues that "the right to petition doesn't require the government to 'apprise' anyone of anything." ECF 49, at 16. But this Court should not bless the idea that a law may prohibit

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[7] https://www.montrosepress.com/news/two-other-schools-in-colorado-have-a-thunderbird-mascot-why-was-johnson-elementary-school-the/article_ef9a08c0-5fb4-11ec-b706-9303d403dbb0.html.

[8] https://www.nps.gov/waba/planyourvisit/black-kettle-national-grassland.htm

[9] https://mountainparksfoundation.org/parks/daniels-park/

conduct merely in the vaguest of generalities, only to see the agency charged with interpreting those generalities both expand and contract their scope. Defendant concedes that petitioning is protected conduct. ECF 49, at 16. When the petitioned officials literally cannot ascertain the legality of the action petitioned for, the right to petition is rendered meaningless.

Generally, it is accepted that laws ought to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). For SB 21-116, that is simply not the case. Not only are ordinary people confused by what is and is not acceptable under the law, it appears that even the CCIA Commissioners tasked with enforcing SB 21-116 are similarly unsure.

V. SB 21-116 creates a hostile environment under Title VI of the Civil Rights Act of 1964.

Make no mistake—the harm done to the Plaintiffs who are students and teachers at Colorado schools occurs at the local level, at the behest of the state legislature. Defendant acknowledges that schools must be wary of displaying any American Indian cultural icons or imagery, lest they be found in violation of SB 21-116. Murals, memorials, old jerseys, old yearbooks, and other artwork must all be systematically eliminated and washed away, according to Defendant's own admission. ECF 47-5, at 3 (In response to RFA No. 3, Defendant admitted, subject to objection, that "the term 'logo' includes logos featured on school signs, walls, marquees, banners, murals, pennants, trophies, historical awards, historical jerseys, and yearbooks.").

Worse, schools have the incentive to aggressively eliminate names and imagery not even covered by the statute, given that the CCIA has issued guidance that far exceeds the scope of the plain text of the statute. For instance, the CCIA's guidance expands the already over-broad statutory definition of "mascot" to further include *any* name, symbol, image, or word that is or ever was associated "with the 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 [CCIA]."[10]

On the merits, Plaintiffs' claim succeeds as a matter of law, because Defendant does not dispute the facts underlying each of the Plaintiffs' elements. 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.

Plaintiffs' contend that they are students and a teacher who have to witness their schools rid themselves of American Indian imagery, at the pain of massive monthly fines, so as to satisfy the whims of unpredictable CCIA Commissioners. There is no serious dispute that Defendant has knowledge of SB 21-116 and has not addressed its consequences. These are the first two elements.

The key questions for the Court to resolve are elements (3) and (4). With respect to (3), Plaintiffs argue that their schools have been compelled to eliminate not just sports team names, but student memorials, old yearbooks, old jerseys, memorabilia in trophy cases, and other displays, solely because those materials connect to their American Indian ancestry. Defendant herself has acknowledged that school murals without any reference to a sports team name have been destroyed—and must be eliminated—in order for schools to come into compliance with SB 21-116. ECF 47-1, at 24. By contrast, murals of non-American Indians may continue to be displayed on school walls, and old yearbooks featuring other logos are not contraband within the school. Again, Plaintiffs' factual claims in this litigation that the discrimination at issue "disparages their intimate personal choices and identity, and devalues their personhood" are uncontested, and suffice

[10]https://ccia.colorado.gov/sites/ccia/files/documents/Guidance%20for%20Commissioners%20to%20Consider%20on%20SB21-116%20Compliance.pdf

to establish that this harassment was severe, pervasive, and objectively offensive. And it would be surprising for the Court to conclude that despite the discrimination, Plaintiffs have not suffered a loss of equal educational benefits of opportunities. *Cf. M.C. v. Hollis Independent School District No. 66 of Harmon County, Oklahoma*, No. CIV-15-343-C, 2016 WL 51274, *2 (W.D. Okla., Jan. 4, 2016) (an allegation that a student was "deprived of a safe and harassment-free educational environment" stated a Title IX claim).

All that is left of Defendant's defense is the strange argument that a state official, named in their individual capacity as a representative, maintains a blanket exemption from Title VI that immunizes state-level policies from creating hostile environments at local levels. Such an exception is ungrounded in the text of Title VI and counter-intuitive as a policy matter. A state law requiring schools to use a curriculum that systematically harassed and belittled students based on race would be immune from challenge, under Defendant's theory. Moreover, states could force schools to ignore other civil rights laws protecting students from disability and sex discrimination. There is no textual basis for the court to simply announce a rule that a recipient of federal funds—named through their representative as matter of sovereign immunity jurisprudence—is never subject to a hostile environment claim.[11]

CONCLUSION

For the reasons articulated in Plaintiffs' prior brief and in this brief, the Court should deny Defendant's Motion to Dismiss and its Cross-Motion for Summary Judgment, and grant Plaintiffs' Motion for Summary Judgment.

[11] Notably, the parties have stipulated that to the extent that Plaintiffs are entitled to relief, they are entitled to all such relief by naming Ms. Redhorse. ECF 35, at ¶ 2.

DATED this 1st day of April 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April 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*
William E. Trachman

EXHIBIT 1

Niwot wrestling pic

(Redhorse Deposition Exhibit 24)

EXHIBIT
24

EXHIBIT 2

Ouray Basketball (FB page)

(Redhorse Deposition Exhibit 22)

EXHIBIT
22

Ouray Basketball
February 4, 2016 ·

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Author
Ouray Basketball
As always, a HUGE thank you to Christina Danley for taking such wonderful photos and sharing them with us !

Like Reply 6y 1

Angela Reed Herrington
My nephew rocks!

Like Reply 6y

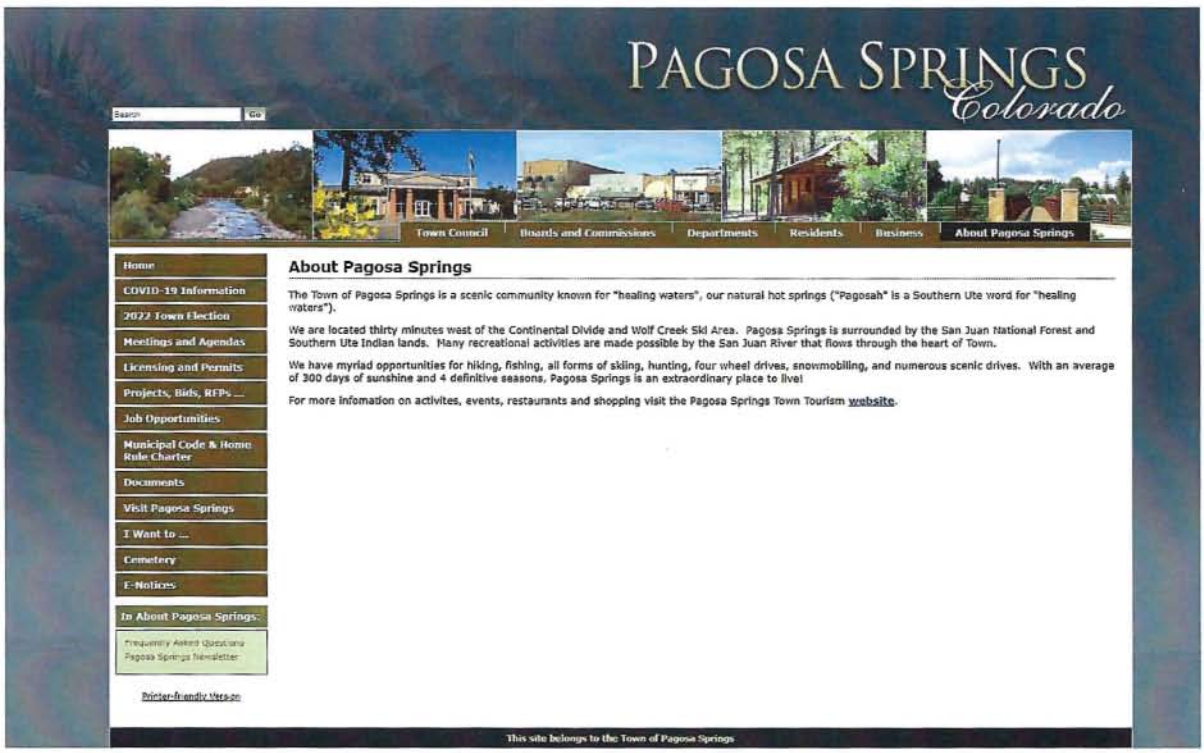
Write a comment...

EXHIBIT 3

Pagosa Springs

(Redhorse Deposition Exhibit 29)

EXHIBIT
29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About Pagosa Springs
The Town of Pagosa Springs is a scenic community known for "healing waters", our natural hot springs ("Pagosah" is a Southern Ute word for "healing waters").
We are located thirty minutes west of the Continental Divide and Wolf Creek Ski Area. Pagosa Springs is surrounded by the San Juan National Forest and Southern Ute Indian lands. Many recreational activities are made possible by the San Juan River that flows through the heart of Town.
We have myriad opportunities for hiking, fishing, all forms of skiing, hunting, four wheel drives, snowmobiling, and numerous scenic drives. With an average of 300 days of sunshine and 4 definitive seasons, Pagosa Springs is an extraordinary place to live!
For more infomation on activites, events, restaurants and shopping visit the Pagosa Springs Town Tourism website.
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