

**UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA**

AMBER ANNIS, LISA CASAREZ, WILLIAM
CRAWFORD, SIERRA DAVIS, ROBERT
RAINBOW, MARGARET SCOTT, FRANKLIN
SAGE, and JANIE SCHROEDER

Plaintiffs,

v.

JACK DALRYMPLE., in his official and
individual capacities, WAYNE STENEHJEM, in
his official capacity, NORTH DAKOTA BOARD
OF HIGHER EDUCATION, THE UNIVERSITY
OF NORTH DAKOTA, and the STATE OF
NORTH DAKOTA

Defendants.

**COMPLAINT AND JURY TRIAL
DEMAND**

Cause No.

COMPLAINT

Plaintiffs Amber Annis, Lisa Casarez, William Crawford, Sierra Davis, Robert Rainbow, Margaret Scott, and Janie Schroeder, bring this action to prevent the further use of the “Fighting Sioux” imagery and logo by the University of North Dakota which has had and continues to have a discriminatory and profoundly negative impact on Plaintiffs. This action arises from the actions of Defendants Jack Dalrymple, in his individual and official capacity as Governor of the State of North Dakota, Wayne Stenehjem, in his official capacity as the Attorney General of the State of North Dakota, the State of North Dakota, the North Dakota Board of Higher Education, and the University of North Dakota (“UND”), in connection with the North Dakota legislature’s recent passage of Chapter 15-10-46 of the North Dakota Century Code, which mandates the use of the “Fighting Sioux” nickname and logo for intercollegiate athletic teams sponsored by the University of North Dakota, in violation of a Court order issued by North Dakota courts, 42 U.S.C. §§ 1983 and 1988, the Fourteenth Amendments to the United States Constitution, and the laws and Constitution of the State of North Dakota.

Plaintiffs allege the following upon personal knowledge as to their own acts, and upon information and belief based on the investigation conducted by Plaintiffs' counsel as to all other matters.

INTRODUCTION

1. This is an action for declaratory and injunctive relief brought pursuant to 42 U.S.C. §§ 1983 and 1988, the Fourteenth Amendment to the United States Constitution, and under the laws and Constitution of the State of North Dakota, arising from the North Dakota legislature's recent passage of Chapter 15-10-46 of the North Dakota Century Code (hereinafter, the "Legislation").

2. The Legislation mandates that the University of North Dakota's sports teams retain the disparaging, regressive and controversial nickname "Fighting Sioux." This Legislation was passed despite the fact that: 1) the North Dakota Constitution vests the power to make such decisions exclusively with the State Board of Higher Education, not the legislature; 2) the Legislation is in direct contravention of a court ordered settlement issued by a court of the State of North Dakota which resolved litigation on precisely this issue between the NCAA and UND, and which was explicitly found to be a "final judgment" by the North Dakota Supreme Court; 3) the Legislation violates the 14th Amendment rights of Plaintiffs in that the name and logo are disparaging and harmful to Native Americans, and their use has created overt and implicit hostility towards Native Americans on, *inter alia*, University of North Dakota campuses, resulting in Native Americans receiving a markedly different and inferior educational experience in this State-owned institution; and 4) for the same reasons the Legislation violates North Dakota's Human Rights Act.

JURISDICTION AND VENUE

3. This Court has original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 over Plaintiffs' cause of action arising under the Constitution of the United States and 42 U.S.C. §

1983 and pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. This Court has supplemental jurisdiction over Plaintiffs' causes of action arising under North Dakota state law pursuant to 28 U.S.C. § 1367.

4. Venue lies in the United States District Court for the District of North Dakota because Plaintiffs are students at a university located in this State and also reside in this State, and Defendants are officers or entities located in this State, who conduct substantial business within North Dakota. Venue is also proper in this District because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in North Dakota. 28 U.S.C. § 1391(b)(2).

PARTIES

5. Plaintiff Amber Annis, a student at the University of North Dakota, is a member of the Cheyenne River Sioux Tribe and resides in Grand Forks, North Dakota. As a Native American student at UND, Plaintiff Annis's interests have been affected by the passage of the Legislation, and UND's use of the "Fighting Sioux" imagery and logo in athletics has had, and continues to have, a profoundly negative impact on her self-image and overall psychological health, as well as deprives her of an equal educational experience and environment at UND.

6. Plaintiff Lisa Casarez, a student at the University of North Dakota, is a member of the Three Affiliated Tribes and resides in Grand Forks, North Dakota. As a Native American student at UND, Plaintiff Casarez's interests have been affected by the passage of the Legislation, and UND's use of the "Fighting Sioux" imagery and logo in athletics has had, and continues to have, a profoundly negative impact on her self-image and overall psychological health, as well as deprives her of an equal educational experience and environment at UND.

7. Plaintiff William Crawford, a student at the University of North Dakota, is a member of the Sisseton-Wahpeton Oyate and resides in Grand Forks, North Dakota. As a Native American student at UND, Plaintiff Crawford's interests have been affected by the passage of the Legislation, and UND's use of the "Fighting Sioux" imagery and logo in athletics has had,

and continues to have, a profoundly negative impact on his self-image and overall psychological health, as well as deprives him of an equal educational experience and environment at UND.

8. Plaintiff Franklin Sage, a student at the University of North Dakota, is a member of the Navajo Nation residing in Grand Forks, North Dakota. As a Native American student at UND, Plaintiff Sage's interests have been affected by the passage of the Legislation, and UND's use of the "Fighting Sioux" imagery and logo in athletics has had, and continues to have, a profoundly negative impact on his self-image and overall psychological health, as well as deprives him of an equal educational experience and environment at UND.

9. Plaintiff Sierra Davis, a student at the University of North Dakota, is a member of the Three Affiliated Tribes and resides in Grand Forks, North Dakota. As a Native American student at UND, Plaintiff Davis's interests have been affected by the passage of the Legislation, and UND's use of the "Fighting Sioux" imagery and logo in athletics has had, and continues to have, a profoundly negative impact on her self-image and overall psychological health, as well as deprives her of an equal educational experience and environment at UND.

10. Plaintiff Robert Rainbow, a student at the University of North Dakota, is a member of the Turtle Mountain Band of Chippewa and resides in Grand Forks, North Dakota. As a Native American student at UND, Plaintiff Rainbow's interests have been affected by the passage of the Legislation, and UND's use of the "Fighting Sioux" imagery and logo in athletics has had, and continues to have, a profoundly negative impact on his self-image and overall psychological health, as well as deprives him of an equal educational experience and environment at UND.

11. Plaintiff Margaret Scott, a student at the University of North Dakota, is a member of the Spokane Tribe and resides in Grand Forks, North Dakota. As a Native American student at UND, Plaintiff Scott's interests have been affected by the passage of the Legislation, and UND's use of the "Fighting Sioux" imagery and logo in athletics has had, and continues to have, a

profoundly negative impact on her self-image and overall psychological health, as well as deprives her of an equal educational experience and environment at UND.

12. Plaintiff Janie Schroeder, a student at the University of North Dakota, is a member of the Turtle Mountain Band of Chippewa and resides in Grand Forks, North Dakota. As a Native American student at UND, Plaintiff Schroeder's interests have been affected by the passage of the Legislation, and UND's use of the "Fighting Sioux" imagery and logo in athletics has had, and continues to have, a profoundly negative impact on her self-image and overall psychological health, as well as deprives her of an equal educational experience and environment at UND.

13. The Plaintiffs named in Paragraphs 5 through 12 are collectively referred to herein as the "Plaintiffs."

14. Defendant Jack Dalrymple is the Governor of North Dakota and signed the Legislation at issue in this complaint. He is sued in his individual and official capacities.

15. Defendant Wayne Stenehjem is the Attorney General of the State of North Dakota, and is sued in his official capacity.

16. The State of North Dakota, first settled by Native Americans, gained statehood in 1889, and is a "State" as that term is used in the United States Constitution.

17. Defendant North Dakota Board of Higher Education (the "Board") is a body created by Article VIII, Section 6 of the North Dakota Constitution, and is tasked with "full authority over the institutions under its control" including *inter alia*, the University of North Dakota.

18. Defendant the University of North Dakota ("UND") is a state-funded institution of higher learning, and a member of the National Collegiate Athletic Association ("NCAA"). Through the NCAA, UND intercollegiate athletic associations participate in a variety of sports

against other schools, under the nickname “Fighting Sioux,” which is used with an associated logo.

BACKGROUND

A. The Prior Litigation

19. The debate over the “Fighting Sioux” nickname is decades old; the present controversy began six years ago, when the NCAA adopted a policy that prohibited the use or display of Native American nicknames or logos during championship events. The policy also urged member schools to boycott regular season games against schools using such nicknames or logos. The NCAA’s policy was adopted after extensive studies showed that such nicknames and logos are disruptive to the learning environment and are harmful to Native Americans. *See, e.g.*, ¶¶ 28 - 30.

20. UND and the Board sued the NCAA over this policy in 2006. The parties settled in 2007, agreeing that UND could continue to use the nickname and logo until November 30, 2010 (“the NCAA Settlement”). Thereafter, pursuant to the terms of the NCAA Settlement, UND’s use of the nickname and logo after November 30, 2010, was to be contingent on the “clear and affirmative support” of both the Spirit Lake Tribe and the Standing Rock Sioux Tribe -- if UND could not secure the approval of both tribes by that date, then it would have until August 15, 2011 to complete the transition to adopt a new nickname and logo.

21. Also as part of the settlement agreement, the State and Board gave up the right to sue the NCAA regarding the nickname and logo, including under Federal antitrust grounds.

22. By April of 2009, UND had secured the approval of the Spirit Lake Tribe. However, the Standing Rock Sioux Tribe had not yet voted to approve or disapprove the use of the nickname and logo. In May of 2009, the Board resolved to retire the Fighting Sioux nickname and logo on October 1, 2009 (such retirement to be completed by August 1, 2010),

unless UND could secure approval of both Tribes for a period of not less than 30 years (the “May 2009 Board Resolution”).

23. The Spirit Lake Tribe granted UND perpetual use of the nickname and logo, beginning October 1, 2009. However, the Standing Rock Sioux Tribe had still, as of that date, not voted either to approve or disapprove the use of the nickname and logo. Accordingly, pursuant to the May 2009 Board Resolution, the nickname and logo were to be retired by August 1, 2010.

24. Before UND could effectuate the retirement of the Fighting Sioux nickname and logo, eight members of the Spirit Lake Tribe sued the Board in North Dakota State Court, alleging that the Board’s retirement of the nickname and logo approximately one year before it was so required by the NCAA Settlement was a violation of the NCAA Settlement.

25. In determining whether the members of the Spirit Lake Tribe had standing (a decision the Court ultimately declined to reach), the North Dakota Supreme Court explicitly held that, because the NCAA Settlement was incorporated by reference into the Order dismissing the underlying litigation, it was not merely a contract but a judgment: “When a settlement agreement is merged into a judgment, [] the agreement is interpreted and enforced as a final judgment and not as a separate contract.” *Davidson v. State*, 2010 ND 68, P13 (N.D. 2010)

26. Thus, the NCAA Settlement is not merely a contract between two private parties - - it is a final judgment already ordered by a Court of the State of North Dakota, and recognized as such by the North Dakota Supreme Court. As described above, that judgment explicitly mandates that if UND cannot secure approval from both Tribes by November 30, 2010 -- something it has plainly failed to do -- it must begin the transition process to a new nickname and logo.

27. Further, the North Dakota Supreme Court explicitly noted that “[t]he Board is the constitutionally established entity for the control and administration of state educational

institutions, including UND. . .The plain language of the settlement agreement does not restrict the Board's constitutional and statutory authority to change UND's nickname and logo, and we agree with the district court that nothing in the plain language of the settlement agreement limits the Board's constitutional and statutory authority, or requires the Board or UND to continue using the nickname and logo throughout the approval period." *Davidson v. State*, 2010 ND 68, P17 (N.D. 2010)

B. The Harmful Effects of Disparaging Native American Nicknames and Logos in General, and Plaintiffs' Experiences in Particular

28. The harm caused to Native Americans in particular by the use of Native American logos and imagery is well-documented. Indeed, on April 13, 2011, the United States Commission on Civil Rights (the "Commission") released a statement calling the use of Native American nicknames and images in sports "disrespectful," "offensive" and "particularly inappropriate" and calling for the elimination of such practices. Dozens of respected organizations representing Native American interests have joined in that call, including the Association on American Indian Affairs, the National Indian Education Association, and the National Congress of American Indians.

29. The Commission's conclusion has also been verified by numerous studies. For example, in 2002, Dr. Stephanie Fryberg, of the University of Arizona, conducted a study on the psychological impact of such logos or mascots on Native Americans. She concluded that exposure to such logos: 1) lowers the self-esteem of Native American students; 2) reduces Native American students' belief that their community has the power or resources to solve problems; and 3) reduces the number of achievement-related future goals that Native American students see for themselves.

30. Dr. Fryberg's findings were further buttressed by a thoroughly researched and vehement resolution passed by the American Psychological Association, which concluded that Native American imagery in athletics has a profoundly negative impact on Native American students' self-image and overall psychological health.

31. It goes without saying that such effects are contrary to the stated education purpose of UND and are particularly reprehensible in that they are promulgated by a state-funded organization dedicated to the education and advancement of students.

32. These effects are not a general phenomena -- they undisputably occur in Grand Forks, North Dakota, and at other venues where UND sports are played. UND's opponents, for example, routinely chant demeaning phrases such as "Sioux Suck" and "F*ing Sioux" at sporting events, and several Native Americans have reported that they were subjected to racist chants at sporting events, or racial comments directed at them personally.

33. Nor is it only opposing fans that contribute to this problem. A Native American attending a sporting event at UND can look forward to seeing a representation of his or her ethnicity engaged in any of the following: being trodden, skated, or spit upon by athletes on both sides; being sat on by fans; being used as a container to serve beer, whiskey, or other alcoholic beverages; or a representation of a Native American sodomizing or being sodomized by a buffalo or other animal.

34. While the psychological harm caused by Native American imagery and logos is significant in and of itself, it is not the only form of damage. The nickname and logo have also detrimentally impacted Native Americans' learning environment. The legislature heard testimony from Native Americans, including some of the Plaintiffs here, that they feel "singled out" in the classroom due to the nickname and logo; that their social, recreational, and academic experiences are diminished due to the nickname and logo; that they have been subjected to discriminatory treatment due to the logo; and that those of them who oppose the logo have been subjected to retaliatory actions.

35. Native American students at UND -- including Plaintiffs -- have also, at least partially because of the controversy surrounding the "Fighting Sioux" nickname and logo, been subjected to overt hostility. This includes incidents such as the vandalism of a tipi erected

outside the student union by a Native American group, the vandalism of the American Indian Student Services building, the chanting of racist slurs at Native Americans, and the posting of racist notes on public bulletin boards which leave no doubt that the nickname and logo contribute to the problem. Such notes include the following:

- IF THE NAME HAS TO GO SO SHOULD YOUR **FUNDING**;
- If You Get Rid Of The “Fighting Sioux” Then We Get Rid Of Your FREE Schooling!;
- Wish I Could Go To School 4 free;
- Go back to the res, or work @ the Casino, PRAIRE [sic] NIGGA;
- Drink 'Em Lots O' Fire Water; and
- You Lost the War, Sorry.

36. The popular social networking site Facebook has seen groups arise for the purpose of expressing anti-Native American sentiment as a reaction to concerns over the logo. Two such groups are “If you are against the Sioux logo you deserve to die of AIDS” and “If you are against the Sioux logo you can F*ck yourself and die.” The racism expressed in these social media sites evidences yet further discrimination at the University of North Dakota against Plaintiffs related to the nickname and logo.

37. In addition, the harm to Native Americans has at times turned physical. In 2000, during the first week that the current logo was unveiled, one Native American student was “egged” and called a “dirty Indian.” The children of Native Americans who have openly opposed the logo have been harassed at school, and other family members have been subjected to harassing phone calls.

38. By way of example only, Plaintiff Crawford attended a UND hockey game during his freshman year of 2007. While present, Plaintiff Crawford was singled out and pointed at by white fans while clips purporting to depict Sioux culture were played on the scoreboard.

Plaintiff Crawford also witnessed fans engaged in the “Tomahawk Chop” and was subjected to chants of “Sioux Suck” and “F*ing Sioux” by opposing fans. Additionally, Plaintiff Crawford felt he could not even engage in cheering for UND because all of the cheers were done in a “chanting” fashion, mimicking (and thereby trivializing) Native American culture and religious rituals. Plaintiff Crawford has, understandably, not attended any further UND sporting events, despite his strong desire to do so. Plaintiff Crawford’s last semester at UND will commence shortly.

39. Similarly, Plaintiff Sage has experienced disparate treatment at UND during classroom discussions regarding the logo, as students have made comments such as “I thought you Indians liked to be honored.” On one occasion, two young boys “war whooped” at Plaintiff Sage as he was studying at a picnic table. Plaintiff Sage’s experiences grew dramatically worse after he joined BRIDGES, a student organization dedicated to increasing diversity, and which has opposed the nickname and logo. Since then, Plaintiff Sage has been subjected to obscene and racially motivated taunts, including: “Go home you f*ing Indians,” “You get free education,” “F*ck NCAA,” “Get a job,” and “Find something else to whine about.” (Unsurprisingly, these taunts were typically delivered from moving vehicles).

40. These are specific examples representing countless similar incidents. These examples make clear that the “Fighting Sioux” nickname and logo has fostered an environment in which Native Americans receive a materially different -- and substantially inferior -- educational experience than do members of other ethnic groups. The behavior described above, and similar behavior, has impacted Plaintiffs’ and other Native Americans’ abilities to study, to engage in discussions in and out of the classroom, to participate in important social events such as attending sports games and related activities, and, in general, to learn.

41. It is beyond peradventure that the behavior described above has no place in modern society. More to the point, it certainly has no place in a state-funded educational institution. To

the contrary, it has fostered an environment in which Native American students' access to educational and recreational facilities and experiences is plainly not equal to the access enjoyed by other ethnic or national groups.

42. In short, the use of the nickname and logo has not only damaged Native Americans' perception of themselves, it has also impeded their ability to enjoy equal access to State sponsored services and facilities; any endorsement or encouragement of the nickname and logo, tacit or otherwise, by the State is a clear violation of the 14th Amendment and the North Dakota Human Rights Act.

C. The Passage of the Legislation

43. Despite all of the above facts, on or about July 13, 2011, the North Dakota Legislature passed, and Defendant Dalrymple signed into law, the Legislation, which became effective August 1, 2011. The Legislation reads, in relevant part:

The intercollegiate athletic teams sponsored by the university of North Dakota shall be known as the university of North Dakota fighting Sioux. Neither the university of North Dakota nor the state board of higher education may take any action to discontinue the use of the fighting Sioux nickname or the fighting Sioux logo in use on January 1, 2011. Any actions taken by the state board of higher education and the university of North Dakota before August 1, 2011, to discontinue the use of the fighting Sioux nickname and logo are preempted by this section. If the national collegiate athletic association takes any action to penalize the university of North Dakota for using the fighting Sioux nickname or logo, the attorney general shall consider filing a federal antitrust claim against that association.

N.D. Cent. Code, § 15-10-46

44. The Legislation -- which was passed despite the Board's recommendation to the contrary -- constitutes an impermissible attempt by the Legislature to usurp the authority of both the Courts of the State of North Dakota and the powers granted to the Board under the State of North Dakota's Constitution.

45. The legislation is also an *ex post facto* law, in that it seeks to punish the NCAA for acts which were legally undertaken by that entity in the past, namely, the adoption of the NCAA's

policy regarding Native American imagery, nicknames, and mascots. As the text makes clear, the Legislation threatens to sue the NCAA unless it rescinds this policy as to UND.

46. Finally, the Legislation constitutes a violation of the 14th Amendment rights of Plaintiffs and thus is a violation of 42 U.S.C. §1983.

COUNT I

Application for Enforcement of Judgment Pursuant to 28 U.S.C. §1738 As To Defendants UND, State of North Dakota, and the Board

47. Plaintiffs re-allege and incorporate by reference all prior paragraphs.

48. 28 U.S.C. § 1738 provides that:

Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

49. The NCAA Settlement agreement is a judicial proceeding. Specifically, it is a final judgment entered by a Court with proper jurisdiction, and binding on the Board, the State of North Dakota, and UND. The time for any appeals from that judgment has expired.

50. Plaintiffs are third party beneficiaries to the final judgment.

51. Plaintiffs seek an order compelling these Defendants to comply with the NCAA Settlement agreement by retiring the Fighting Sioux nickname and logo.

COUNT II

Violation of 42 U.S.C. §1983 Against All Defendants Except the State of North Dakota

52. Plaintiffs re-allege and incorporate by reference all prior paragraphs.

53. 42 U.S.C. §1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

54. Plaintiffs have been or soon will be deprived of their constitutional rights under color of law. Each Plaintiff has received a markedly different and inferior educational experience than his or her non-Native American counterparts, has refrained from attending sporting events, and has endured the other indignities described above, due to the continued use of the "Fighting Sioux" nickname and logo.

55. The above indignities have always been carried out by a State owned institution, but are now, because of the Legislation, further taken "under color of law" as that term is used in 42 U.S.C. § 1983.

56. Plaintiffs seek an order permanently enjoining Defendants from executing or enforcing the Legislation.

COUNT III

Violation of the North Dakota Human Rights Act Against All Defendants

57. Plaintiffs re-allege and incorporate by reference all prior Paragraphs.

58. UND provides "public services" and "public accommodations" as those terms are used in North Dakota's Human Rights Act, N.D. Cent. Code, § 14-02.4-01 *et seq.*

59. Such services and accommodations include but are not limited to education, dormitories, and access to sporting and other recreational events.

60. Plaintiffs have received adverse treatment and/or unequal access, or been constructively denied access, to such services and accommodations by reason of their national origin, in violation of N.D. Cent. Code, § 14-02.4-14 and 15.

61. Plaintiffs seek a permanent injunction barring any Defendant from executing or enforcing the Legislation.

COUNT IV

Declaratory Judgment and Injunctive Relief

62. Plaintiffs re-allege and incorporate by reference all prior paragraphs.

63. As set forth above, the Legislation is violative of the 14th Amendment rights of Plaintiffs.

64. As set forth above, the Legislation constitutes an improper attempt to usurp the powers granted by the North Dakota Constitution to the Board.

65. As set forth above, the Legislation is an *ex post facto* law in violation of the United States Constitution.

66. Plaintiffs seek a judgment declaring the Legislation null and void, and enjoining all Defendants from attempting to execute or enforce the Legislation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests this Court:

- A. Enter judgment in favor of Plaintiffs and against Defendants;
- B. Enter an order declaring the Legislation void and unenforceable, and enjoining Defendants from attempting to enforce the legislation;
- C. Issue an order directing the Board and UND to retire the "Fighting Sioux" nickname and logo;
- D. Award Plaintiffs' counsel reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and any other applicable provisions of law; and
- E. Grant to Plaintiffs such other and further relief as may be just and proper under the circumstances, including but not limited to appropriate injunctive relief.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all issues so triable.

DATED: August 10, 2011

Respectfully submitted,

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