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 capacity, WAYNE STENEHJEM, in his official capacity, NORTH DAKOTA BOARD OF HIGHER EDUCATION, THE UNIVERSITY OF NORTH DAKOTA, and the STATE OF NORTH DAKOTA Defendants.	)	Case No. 2:11-cv-00073-RRE -KKK

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Milberg LLP
Peter Safirstein
Carla F. Fredericks
One Pennsylvania Plaza
New York, New York 10119-0165
Telephone: (212) 594-5300
Facsimile: (212) 868-1229

Attorneys for Plaintiffs

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STATEMENT OF THE CASE

The State of North Dakota has already acknowledged in earlier court proceedings that under the current circumstances "The Fighting Sioux" name and logo by the University of North Dakota ("UND") must be changed. But rather than adhere to a court ordered final judgment the State has itself willingly entered into, the State (and its fellow co-defendants here) persist in ignoring legal precedent and further attack minority citizens of North Dakota and countenance continued racial abuse and hostility.

Plaintiffs are Native American students at UND who seek to change the hostile racial environment at their state and federally funded campus that continues to exist and is fostered by the Defendants' failure and refusal to take reasonable remedial action to end the use of Native American stereotypes. Plaintiffs filed a complaint on August 11, 2011. (Doc. 1). Thereafter, Defendants filed a motion to dismiss and a memorandum in support on September 2, 2011. (Doc. 10) ("Def. Mem. I"). Plaintiffs subsequently filed an amended complaint on September 26, 2011. (Doc. 12) ("Amended Complaint" or "Am. Compl.").

Plaintiffs' Amended Complaint principally added an additional claim and further factual allegations. Rather than fully address the Amended Complaint, which supersedes the original,[1] Defendants simply filed an abbreviated memorandum in support of their motion to dismiss the Amended Complaint on October 10, 2011. (Doc. 14) ("Def. Mem. II"). This subsequent

[1] "It is well-established that an amended complaint supercedes an original complaint and renders the original complaint without legal effect." *In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir. 2000).

memorandum incorporates arguments from Defendants' original memorandum while ignoring important differences in the Amended Complaint. Def. Mem. II at 1.[2]

Furthermore, Defendants' response violates this Court's Local Rules because the combined memorandums exceed the Defendants' allocated page limit.[3] More importantly, however, Defendants' arguments fail to sufficiently address the substance of Plaintiffs' claims. Thus, as described below, this Court should reject Defendants' motion to dismiss the Amended Complaint as a matter of law.

ARGUMENT

I. Plaintiffs' Claims Easily Satisfy Federal Pleading Standards.

Plaintiffs' allegations in their Amended Complaint are more than sufficient to satisfy the pleading standards discussed in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009). As the Eighth Circuit has stated, "*Twombly* and *Iqbal* did not abrogate the notice pleading standard of Rule 8(a)(2). Rather, those decisions confirmed that Rule 8(a)(2) is satisfied 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Hamilton v. Palm*, 621 F.3d 816, 817 (8th Cir. 2010) (quoting *Iqbal*, 129 S. Ct. at 1949). *See also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) ("[T]he complaint should be read as a whole, not parsed piece by piece to determine whether

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[2] For example, Defendants fail to clarify that Count I in the original complaint is now actually Count III in the Amended Complaint or that their *ex post facto* arguments are completely irrelevant to the Amended Complaint.

[3] D.N.D. Civ. L. R. 7.1(A)(1) prescribes that in a motion to dismiss or other dispositive motion "no more than twenty-five (25) pages may be argument"; however, Defendants' combined memorandums exceed this limit.

each allegation, in isolation, is plausible."). Indeed, the Eighth Circuit has held that in applying the pleading standard in *Iqbal* a court "need look no further than Rule 84 of the Federal Rules of Civil Procedure." *Hamilton*, 621 F.3d at 818. Rule 84 states that the sample forms attached to the rules "illustrate the simplicity and brevity that these rules contemplate." *See, e.g.*, Fed. R. Civ. P. App'x Form 11 (sample complaint for negligence).

Therefore, contrary to the Defendants' argument, Plaintiffs are not required to allege each and every factual allegation of their case as if they were appearing before a jury.[4] If this was the legal standard, the particularity requirements in Fed. R. Civ. P. 9(b) would be meaningless as would the rule's specific caution that "knowledge, and other conditions of a person's mind may be alleged generally." Plaintiffs are only required to plausibly allege the outlines of their claims in a manner that is sufficient to provide notice to the Defendants, and all factual allegations must be construed in favor of the Plaintiffs when deciding a Rule 12(b)(6) motion. *Northstar Indus., Inc. v. Merrill Lynch & Co.*, 576 F.3d 827, 832 (8th Cir. 2009).

II. Plaintiffs Have Plausibly Alleged a Title VI Claim.

A. Title VI Prohibits Racially Hostile Environments at Federally Funded Institutions.

Plaintiffs' claims in Count I are brought pursuant to 42 U.S.C. § 2000d ("Title VI"), which states:

> No person in the United States 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.

[4] *See, e.g.*, Def. Mem. II at 5 ("Absent, and fatal to Plaintiffs' Title VI claim, are any specific factual allegations that Defendants had actual knowledge of the alleged harassment.").

Title VI was enacted as part of the landmark Civil Rights Act of 1964, 78 Stat. 252, and was meant to combat racism at federally funded institutions that facilitated or tolerated racial discrimination. President John F. Kennedy exclaimed the importance of this legislation when he noted: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963).

Subsequent to the enactment of Title VI, the Supreme Court of the United States concluded that there could be "no doubt that Congress … understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination." *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979). It is now clear that all legal and equitable remedies are available for violations of Title VI. *See Rodgers v. Magnet Cove Public Schools*, 34 F.3d 642, 644 (8th Cir. 1994).

Federally funded schools violate Title VI when they encourage or tolerate an environment of racial hostility. Liability for a hostile environment can be based on student-on-student harassment that results from a school's deliberate indifference, and it can also be based on school-on-student harassment. Plaintiffs' Amended Complaint alleges both types of harassment.

Courts have previously held Title VI liability exists for tolerating student-on-student racial harassment. *See Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998) (holding a school "violates Title VI when (1) there is a racially hostile environment; (2) the district had notice of the problem; and (3) it 'failed to respond adequately to redress the racially hostile environment.'") (quoting *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11448, 11449 (March 10, 1994),

attached as Exhibit B to the Amended Complaint). *See also Bryant v. Indep. Sch. Dist. No.* 1-38, 334 F.3d 928, 933 (10th Cir. 2003) (holding a school can be liable under Title VI for being deliberately indifferent to a racially hostile educational environment).

In *Bryant*, for example, the court was asked to determine whether a school intentionally facilitated a racially hostile environment where "[c]aucasian males were allowed to wear T-shirts adorned with the confederate flag, swastikas, KKK symbols, and hangman nooses on their person and their vehicles" and the school failed to take reasonable and appropriate actions to reduce racial tensions. *Id*. at 932. The court held that Title VI imposes "a duty to provide a non-discriminatory educational environment" and an educational institution can be found civilly liable if administrators are deliberately indifferent to a known racial problem. *Id.* at 933. Moreover, "[w]hether a hostile educational environment exists is a question of fact," and "racist attacks need not be directed at the complainant in order to create a hostile educational environment." *Monteiro*, 158 F.3d at 1033.

Additionally, a school can be liable for its own offensive and harassing conduct. In *Jennings v. University of North Carolina*, 482 F.3d 686 (4th Cir. 2007) (en banc), a female soccer player successfully brought a claim against her university for sexual harassment pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which can be used to interpret Title VI.[5] In *Jennings*, the plaintiff alleged her soccer coach created a hostile

[5] *See Egerdahl v. Hibbing Community College*, 72 F.3d 615, 618 (8th Cir. 1995) (noting Title VI and Title IX are practically identical and should be interpreted similarly); *Bryant*, 334 F.3d at 934 ("the Court's analysis of what constitutes intentional sexual discrimination under Title IX directly informs our analysis of what constitutes intentional racial discrimination under Title VI (and vice versa)"); *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 286 (1998) (noting Title IX "was modeled after Title VI of the Civil Rights Act of 1964"). Likewise, the Eighth Circuit has also applied "Title VII [42 U.S.C. § 2000e *et seq*.] standards of institutional liability to [Title IX] hostile environment sexual harassment cases involving a teacher's

educational environment in conjunction with her teammates by making sexually offensive comments, even though she did not directly hear many of these comments and her coach claimed the comments were only intended as playful banter and were not meant to cause harassment. 482 F.3d at 691-94. Moreover, the plaintiff also alleged she contacted her university's highest ranking lawyer and told the lawyer her coach's comments were offensive to her and causing her emotional distress, but the lawyer simply ignored her complaints. *Id.* at 700. Based on these facts, the Fourth Circuit held "[t]his notice and the University's failure to take any action to remedy the situation would allow a rational jury to find deliberate indifference to ongoing discrimination." *Id.* at 701.

B. Defendants Were and Remain Deliberately Indifferent to the Harm Caused by Offensive Native Americans Stereotypes at UND.

The Eighth Circuit has expressly held that deliberate indifference is a form of intentional discrimination and that the "deliberate indifference standard, unlike some tests for intentional discrimination, 'does not require a showing of personal ill will or animosity toward the [minority] person,' but rather can be 'inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights.'" *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011) (quoting *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1228-29 (10th Cir. 2009)).

Here, Plaintiffs have unquestionably been harmed by the Defendants' pursuit of policies that they knew were likely to result in a violation of Plaintiffs' federally protected rights. In particular, Plaintiffs have alleged that the Defendants had actual knowledge of UND's hostile

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harassment of a student." *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996). As such, these standards may also be applicable to the interpretation of Title VI.

racial environment and knew that this problem was directly caused by a policy that encouraged and even required the use of Native American racial stereotypes. *See, e.g.*, Am. Compl. ¶ 42 ("Defendants knew about these problems from numerous press reports, complaints, and [third-party reports]").

The Amended Complaint details how the North Central Association of Colleges and Schools provided UND with a report in 2004 that clearly warned that the continued use of Native American racial stereotypes at UND was harmful and offensive to Native American students on campus. *Id.* This conclusion was further supported by a 2006 letter the NCAA provided that found that the use of Native American imagery in athletics created "an environment that is demeaning, insensitive, hostile or abusive to the Native American community." *Id.* at ¶ 43.[6] Moreover, these conclusions were also supported by the U.S. Commission on Civil Rights, the American Psychological Association, and by the findings of other groups and individual researchers. Am. Compl. ¶¶ 28-30.

Given this extensive research and evidence that demonstrated that the use of Native American stereotypes was responsible for causing severe, pervasive, and objectively offensive racial harassment, the Defendants' response was and continues to be unreasonable in light of the known circumstances that were communicated to the Defendants. Indeed, it is completely

[6] Defendants argue that as part of its Settlement Agreement, the NCAA was required to affirm that "as a general proposition, that the use of Native American names and imagery can create a hostile or abusive environment in collegiate athletics. However, the NCAA did not make any other findings about the environment on UND's campus." Def. Mem. II at 12. But whether the NCAA made any specific findings about UND does not undermine its general findings or the plausibility of Plaintiffs' specific allegations. At a minimum, Plaintiffs' hostile environment claims create a factual dispute about the UND campus environment that should not be determined as a matter of law.

unreasonable to continue a policy on campus that has been extensively linked to the racial harassment of Native American minorities.

Defendants act as if they are surprised to learn that individual students may have been harmed by their policies. But there is nothing surprising about the harm that Plaintiffs have suffered. Just as it would be unreasonable to expect other minority students to endure a campus environment where regular racial harassment was openly tolerated and sanctioned as part of a university's culture, it is also unreasonable to expect Native Americans to endure similar harassment at UND.

The situation at UND is not based on a hypothetical scenario; it is based on a clear and documented problem that has caused significant harm to Plaintiffs and other Native American minority students and deprived them of an equal educational experience and environment at UND.

The Amended Complaint describes in detail a racially hostile environment at UND that is directly caused by the Defendants' decision to use Native American stereotypes at campus athletic events. Am. Compl. ¶¶ 28-32. "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." *Id.* ¶ 32. It has also led to representations of Native Americans "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." *Id.* ¶ 33.

This type of open and notorious racial bigotry at UND athletic events simply has no place at a federally funded university in the 21st Century, especially when this bigotry is the direct result of a state university approved racial stereotype that offensively portrays Native Americans as warrior savages. *See Bryant*, 334 F.3d at 933 ("School administrators are not simply bystanders in the school. They are the leaders of the educational environment. They set the standard for behavior."). No matter how sincerely the Defendants may claim that the traditional status quo at UND is not meant to injure the rights of Native American students, this Court must look at the clear results of the Defendants' policies in addition to the sincerity of their assertions. *Cf. Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 492 (1954) (ending "separate but equal" policy because the Court was required to look at the racial *effect* of a particular educational policy).

But, unfortunately, even the supposed sincerity of the Defendants is questionable in this case. In particular, the NCAA clearly informed UND of the harm its racial stereotypes were causing Native American students, and, as part of its settlement agreement, UND indicated that it would use Native American imagery "only for so long as it may do so with the support of the Native American community." Am. Compl. Ex. A at 8. UND has never obtained this requisite support, Am. Compl. ¶ 23, and, to distract from this fact, the Defendants assert, without any empirical backing, that "many Native Americans feel the logo honors Native Americans." Def. Mem. II at 10 n.4. This factual assertion is not only inappropriate for a 12(b)(6) motion, it is erroneous. (As noted by a research report in the Sociology of Sport Journal,[7] "claims that Native

[7] Dana M. Williams, *Where's the Honor? Attitudes Toward the "Fighting Sioux" Nickname and Logo*, Sociology of Sport Journal 24 (Dec. 2007). (Dana M. Williams is a professor of sociology at the University of Akron, and the report is available at http://gozips.uakron.edu/~dw2/sociology_of_sport_journal.pdf (last accessed October 31, 2011)).

Americans find the UND nickname honorable were not supported by [survey] data." *Id.* at 450.)[8] Given the Defendants' actual knowledge of the harm they are causing and the lack of requisite support by Native Americans, the Defendants' stubborn insistence to continue their policies can persuasively be interpreted as an intentional and discriminatory decision.

III. Plaintiffs Have Adequately Alleged a Claim for Equitable Relief Under § 1983.

The Defendants' deliberate decision to continue using a name and logo that Native Americans consider racially offensive is also sufficient to allege a claim under Count II of Plaintiffs' Amended Complaint, which seeks equitable relief against the non-state Defendants pursuant to 42 U.S.C. § 1983. In *Hayut v. State University of New York*, 352 F.3d 733 (2d Cir. 2003), a female student sued her professor and university under § 1983 and Title IX because the defendants allegedly created and tolerated a hostile educational environment. The plaintiff alleged her professor repeatedly called her "Monica" during her political science classes because of her physical similarity to Monica Lewinsky and made several offensive sexual references about her that related to the Clinton/Lewinsky scandal. *Hayut*, 352 F.3d at 738. The Second Circuit held that the student's hostile environment allegations were sufficient to bring a claim under § 1983 because the state university professor's offensive remarks were made under color of law, caused the plaintiff to suffer an inequality, and were pervasive and severe enough to create a jury question. This was true even though the only damages the plaintiff alleged were

[8] This report was based on a survey of Native American students at UND, and it is obvious these particular students are in the best position to observe the harmful effects of UND's policies. The survey data indicated that there was "a clear consensus amongst the various tribal affiliations that the ["Fighting Sioux"] name is not respectful and should be changed." *Id.* at 447. In fact, "Native Americans were significantly more likely to want a nickname change …, as were students who have been at UND longer." *Id.* As the report noted, "Native Americans on the whole and 'Sioux' students specifically wanted the nickname changed." *Id.* at 449.

that she felt humiliated and experienced emotional distress. *Id.* at 748. (Additionally, the Second Circuit only dismissed the Title IX sexual harassment claims against the university because, unlike in the case here, the university had not had sufficient notice of the offensive remarks and the supposed hostile educational environment. *Id.* at 753.)

Similarly, in the *Jennings* case discussed above, the plaintiff also brought a Section 1983 claim against her soccer coach for engaging in offensive harassment. She also brought a claim against her university's lawyer for failing to take reasonable actions to stop the coach's harassment. *Jennings*, 482 F.3d at 701-02. In both situations, the Fourth Circuit allowed the plaintiff's Section 1983 claims to proceed for causing or tolerating a hostile environment. *Id.*

In the instant case, Plaintiffs seek equitable relief pursuant to Section 1983 in order to prevent further racial harassment at UND. This relief is not prohibited by the Eleventh Amendment because the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908) creates an "exception to the Eleventh Amendment, which permits suits against state officials for 'prospective injunctive relief to prevent a continuing violation of federal law.'" *Egerdahl*, 72 F.3d at 619 n.4 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Here, equitable relief is necessary to prevent Defendants Jack Dalrymple and Wayne Stenehjem from enforcing a UND policy that deprives the Plaintiffs of the equal protection of the law in violation of the Fourteenth Amendment. *See* Am. Compl. ¶ 2 (stating that the enforcement of North Dakota's "Fighting Sioux" legislation results in a violation of the Fourteenth Amendment).

Unlike other racial groups at UND, the Plaintiffs are subjected to offensive racial harassment that is the direct result of UND's decision to use a racial stereotype that portrays Native Americans as warrior savages. Native American students and organizations find this policy highly offensive and the American Psychological Association has "concluded that Native

American imagery in athletics has a profoundly negative impact on Native American students' self-image and overall psychological health." Am. Compl. ¶ 30. As such, this Court should grant Plaintiffs the equitable and declaratory relief they seek because they are being singled out and subjected to racial harassment in a manner that is constitutionally prohibited under the Equal Protection Clause of the Fourteenth Amendment. *See* Am. Compl. ¶¶ 60, 72.

IV. Defendants Have Violated the Terms of the NCAA Settlement Agreement.

Injunctive and declaratory relief is appropriate in this case not just because the Defendants' actions violate the Equal Protection Clause, but because they also violate the terms of the NCAA Settlement Agreement ("SA"). Am. Compl. Ex. A. This agreement was meant to settle all outstanding and potential claims between the NCAA and UND over its use of the "Fighting Sioux" name and logo.[9] As part of this agreement, UND indicated that it would use this name and logo "only for so long as it may do so with the support of the Native American community." SA ¶ 2(i); *see also id.* ¶ 2(a); Am. Compl. ¶ 20. Yet UND has never obtained the necessary authorization to continue using its offensive name and logo. *Id.* ¶ 23.

In fact, the State of North Dakota seeks to ignore the terms and spirit of the Settlement Agreement, and it has enacted specific legislation to prevent its implementation. *Id.* ¶ 45 (quoting N.D.C.C. § 15-10-46). This legislation even requires the attorney general, Wayne Stenehjem, to engage in explicit saber-rattling and to "consider filing a federal antitrust claim" against the NCAA in order to intimidate it and prevent it from enforcing the clear terms of the Settlement Agreement.

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[9] *See* SA at 2 ("Plaintiffs and Defendant desire to settle and extinguish all claims, rights of action, causes of action, and demands between themselves that they have or could have"); *id.* ¶ 1 ("Plaintiff hereby voluntarily settles, resolves and releases all claims asserted, or which could have been asserted, against any party or individual ….").

The threat of this antitrust litigation may deter the NCAA from enforcing its Settlement Agreement, which was clearly intended to benefit UND's Native American students. This is evident from both the settlement context detailed in the Amended Complaint, *see* Am. Compl. ¶ 43 (quoting NCAA letter to UND that advocates the end of Native American imagery), and the actual Settlement Agreement, which explicitly requires a public announcement about UND's supposed respect of Native Americans and a statement by the NCAA "that the time has come to retire Native American imagery in college sports." SA ¶ 2(i).

The NCAA only agreed to settle its dispute with UND when it was clear that the rights of UND Native American students would finally be protected. As a result, Native American students at UND have a right to stand in the shoes of the NCAA to enforce its rights. Indeed, the Supreme Court of North Dakota has previously cited the *Restatement (Second) of Contracts* § 302 (1981)[10] to interpret third-party beneficiary rights, *First Fed. Savings & Loan v. Compass Inves.*, 342 N.W.2d 214, 219 (N.D. 1983), and illustration 10[11] of § 302 demonstrates the type of rights Plaintiffs have in this case:

> A, the operator of a chicken processing and fertilizer plant, contracts with B, a municipality, to use B's sewage system. With the purpose of preventing harm to landowners downstream from its system, B obtains from A a promise to remove specified types of waste from its deposits into the system. C, a downstream landowner, is an intended beneficiary under Subsection (1)(b).

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[10] "§ 302. Intended and Incidental Beneficiaries (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intentions of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) **the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance**. (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary." (emphasis added).

[11] *See also Ratzlaff v. Franz Foods of Arkansas*, 468 S.W.2d 239 (Ark. 1971).

Thus, UND students are the intended beneficiaries of the NCAA's Settlement Agreement, which was designed to limit the "downstream" effects of UND's racially offensive imagery and protect the educational environment of the UND campus from degenerating into a cesspool of animosity and intolerance.

Consequently, because Native American students at UND were clearly designated as the intended beneficiaries of the NCAA Settlement Agreement, they have standing to enforce this agreement and to obtain a declaratory judgment that the Defendants are in breach of it. *See Int'l Primate Protection League v. Administrators of Tulane Educational Fund,* 500 U.S. 72, 77 (1991) ("standing is gauged by the specific common-law, statutory or constitutional claims that a party presents."). Moreover, as the Eighth Circuit has stated, "Article III generally requires injury to the plaintiff's personal legal interests, … but that does not mean that a plaintiff with Article III standing may only assert his own rights or redress his own injuries." *Braden,* 588 F.3d at 591-92 (citing *Vt. Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 771-72 (2000)).

Here, Plaintiffs' personal legal interests are harmed by the Defendants' continued failure to abide by the Settlement Agreement and by their continuing threat to bring an expensive antitrust lawsuit against the NCAA, which could deter the NCAA from enforcing its agreement. Accordingly, Plaintiffs have Article III standing to enforce the agreement because they allege an ongoing injury in fact that is fairly traceable to the Defendants' continued implementation of a racially harmful policy that might otherwise be remedied if this Court declares the Defendants have failed to comply with the terms of their agreement and that they have no right to bring an antitrust suit against the NCAA. *See Braden,* 588 F.3d at 591 (detailing Article III requirements).

V. Defendants' Conduct Violates the North Dakota Human Rights Act.

Plaintiffs' Count IV in the Amended Complaint (previously Count III in the Complaint) alleges a violation of the North Dakota Human Rights Act, N.D.C.C. § 14-02.4-01 *et seq*. This law clearly states: "It is the policy of this state to prohibit discrimination on the basis of race, color, religion, sex, national origin, …; to prevent and eliminate discrimination in … public accommodations, housing, state and local government services, and credit transactions; and to deter those who aid, abet, or induce discrimination or coerce others to discriminate." *Id.* § 14-02.4-01. Plaintiffs have alleged that they have received discriminatory treatment at UND in violation of N.D.C.C. § 14-02.4-14 and 15.

Defendants, however, do not even attempt to argue that their conduct is permitted by the statute. Instead, they move to dismiss solely on procedural grounds by arguing that "N.D.C.C. § 14-02.4-19(1) limits jurisdiction of claims under N.D.C.C. ch. 14-02.4 to the North Dakota Department of Labor or a state district court." Def. Mem. I at 13. But this is not a viable defense.

The Supreme Court ruled long ago that a statutory cause of action can be brought in another court system "even though the statute creating the cause of action provides that the action must be brought in local domestic courts." *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354, 361 (1914). Similarly, the Eight Circuit held: "State statutes, attempting to limit procedure to the state courts to enforce or secure rights created by the legislative authority of a state, have not been successful in accomplishing any such result. Such statutes cannot prevent the exercise of jurisdiction by the federal courts, where the facts exist which under the Constitution and the statutes of Congress give jurisdiction to such federal courts." *Texas Pipe Line Co. v. Ware*, 15 F.2d 171, 172 (8th Cir. 1926). *See also id.* at 175 ("'A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in

the state courts of the same locality.'") (quoting *Davis v. Gray*, 83 U.S. 203, 221 (1873)). Here, this Court has jurisdiction over both the parties and over Plaintiffs' state claims pursuant to 28 U.S.C. § 1367, and the Defendants have failed to articulate any sufficient justification for declining this jurisdiction.

VI. The North Dakota Legislature Has Improperly Interfered in UND Affairs.

Plaintiffs also seek a declaratory judgment that the North Dakota legislature has usurped the powers granted by North Dakota's Constitution to the North Dakota Board of Higher Education ("the Board"). Am. Compl. ¶ 73. The Board had previously agreed to retire UND's racially offensive name and logo pursuant to the NCAA Settlement Agreement and this would have occurred but for the enactment of N.D.C.C. § 15-10-46 by the North Dakota legislature. Am. Compl. ¶ 45. This legislation states, in part: "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." Because this legislation prohibited the Board from implementing a legitimate policy decision that was related to higher education at UND, it violated the North Dakota Constitution. Am. Compl. ¶ 46.

Defendants respond by arguing that Plaintiffs do not have constitutional standing because they "lack a personal stake in whether N.D.C.C. § 15-10-46 usurps the powers granted the Board by the North Dakota Constitution." Def. Mem. I at 18. But this is completely false. Were it not for this unconstitutional usurpation of power, UND's racially offensive name and imagery would have been retired and Plaintiffs would finally be treated as equals at UND. As noted by the Eight Circuit in *Braden*, Article III standing only requires allegations that the Plaintiffs (1) suffered an injury in fact, (2) that is fairly traceable to the challenged action, and (3) likely to be

redressed by a favorable decision. *Braden*, 588 F.3d at 591. Plaintiffs have satisfied these requirements.

There is also no discretionary reason under 28 U.S.C. § 1367(c) why this Court should decline to decide the legality of N.D.C.C. § 15-10-46. This legal issue is factually related to Plaintiffs' federal claims under Title VI and § 1983 and a ruling on this issue has the potential to quickly remedy Plaintiffs' ongoing harm that is caused by a racially hostile environment at UND. Furthermore, this Court will not be making needless decisions that involve novel and complex constitutional law questions as Defendants have claimed. Def. Mem. I at 19. The North Dakota Supreme Court has already clarified the law in this matter:

> Under N.D. Const. art. VIII, § 5, all North Dakota land grant universities and universities supported by a public tax shall remain under the absolute and exclusive control of the State. The Board is the constitutionally established entity for the control and administration of state educational institutions, including UND. N.D. Const. art. VIII, § 6(1)(a). *See also* N.D.C.C. §§ 15-10-11 and 15-10-17. The purpose of the settlement agreement was to end a lawsuit by the Board and UND against the NCAA regarding the NCAA's promulgation of the policy for displaying hostile and abusive racial or ethnic nicknames, logos, and imagery and the NCAA's application of that policy to 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 ex rel. N.D. State Bd. of Higher Educ., 781 N.W.2d 72, 76-77 (N.D. 2010) (emphasis added). Thus, as the Defendants concede, "[t]he North Dakota Supreme Court is the ultimate interpreter of the North Dakota Constitution," Def. Mem. I at 20, and it has already provided sufficient prior guidance on the legal issue now before this Court.

Finally, there are compelling reasons *not* to dismiss this case because the enactment of N.D.C.C. § 15-10-46 was based on a policy decision by the North Dakota Legislative Assembly with no justification other than to continue a UND tradition that is racially offensive and harmful

to a minority group that has historically already suffered numerous hardships. As the Supreme Court has noted, "'[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Romer v. Evans*, 517 U.S. 620, 634 (1996) (quoting *Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973)).

Although Defendants may assert they have no desire to harm Native Americans, their continued pursuit of a policy that Plaintiffs allege has directly harmed them is sufficient to create a factual question that is best left to a jury. *See Bryant*, 334 F.3d at 933 ("the question of intent in a hostile environment case is necessarily fact specific," and it cannot be determined as a matter of law. "It is for the trier of fact to determine if … administrators truly had notice of the 'shameful student-to-student conduct which, if proven, could be fairly characterized as racist and prejudicial.'").

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court deny the Defendants' Motion to Dismiss the Amended Complaint.

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Respectfully submitted,

Milberg LLP

By: /s/ Carla F. Fredericks

Peter Safirstein
Carla F. Fredericks
Nathaniel A. Tarnor
One Pennsylvania Plaza
New York, New York 10119-0165
Telephone: 212.594.5300
Facsimile: 212.868.1229

Attorneys for Plaintiffs, Amber Annis, Lisa Casarez, William Crawford, Franklin Sage, Sierra Davis, Robert Rainbow, Margaret Scott, and Janie Schroeder