UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIVE AMERICAN GUARDIAN'S ASSOCIATION, David Finkenbinder – Wanblee Ohitika (Brave Eagle),

Plaintiffs,

-against-

NEW YORK STATE BOARD OF REGENTS, LESTER W. YOUNG, JR, in his official capacity as Chancellor of the New York State Board of Regents, JUDITH CHIN, in her official capacity as Vice Chancellor of the New York State Board of Regents, ROGER TILLES, in his official capacity as a member of the New York State Board of Regents, CHRISTINE D. CEA, in her official capacity as a member of the New York State Board of Regents, WADE S. NORWOOD, in his official capacity as a member of the New York State Board of Regents, SUSAN W. MITTLER, in her official capacity as a member of the New York State Board of Regents, FRANCES G. WILLS, in her official capacity as a member of the New York State Board of Regents, ARAMINA VEGA FERRER, in her official capacity as a member of the New York State Board of Regents, SHINO TANIKAWA, in her official capacity as a member of the New York State Board of Regents, ROGER P. CATANIA, in his official capacity as a member of the New York State Board of Regents, ADRIAN I. HALE, in his official capacity as a member of the New York State Board of Regents, HASONI L. PRATTS, in her official capacity as a member of the New York State Board of Regents, PATRICK A. MANNION, in his official capacity as a member of the New York State Board of Regents, SEEMA RIVERA, in her official capacity as a member of the New York State Board of Regents, BRIAN KRIST, in his official capacity as a member of the New York State Board of Regents, KEITH B. WILEY, in his official capacity as a member of the New York State Board of Regents, and FELICIA THOMAS-WILLIAMS, in her official capacity as a member of the New York State Board of Regents,[1]

Defendants.

No. 25-03008 (SJB-LGD)

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND
IN OPPOSTION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the names of the Regents, all sued in their official capacity only, who are no longer serving have been removed and replaced with the current Regents. *See* https://www.regents.nysed.gov/members.

LETITIA JAMES
Attorney General
State of New York
Attorney for Defendants

Helena Lynch
Assistant Attorney General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

United States Constitution **Page**

Federal Statutes **Page**

Federal Rules of Civil Procedure **Page**

New York Constitution **Page**

New York State Statutes **Page**

New York State Regulations **Page**

Other State Statutes **Page**

Other Authorities **Page**

Defendants respectfully submit this memorandum of law (1) in support of their motion, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Complaint, and (2) in opposition to Plaintiffs' motion for a preliminary injunction.

PRELIMINARY STATEMENT

Plaintiffs, the Native American Guardian's Association (the "Association") and David Finkenbinder – Wanblee Ohitika (Brave Eagle), belatedly, and without basis, challenge Part 123 of the Regulations of the Commissioner of Education, N.Y. Comp. Codes R. & Regs. tit. 8 ("8 NYCRR") §§ 123.1-123.5 ("Part 123"), which was adopted on May 3, 2023 and became fully enforceable as of June 30, 2025. Part 123 applies solely to New York State public school districts, and prohibits them from using Indigenous names, logos, or mascots to represent their respective schools, while allowing use of such names and images for classroom instruction. Despite Plaintiffs' misreading of Part 123, the actual effect of Part 123 is solely to place restrictions on interscholastic sports teams' names, logos, and mascots. *See* Declaration of David Frank ¶ 16. There is no "Native Ban."

Defendants adopted Part 123 to further the "state interest in providing a safe and supportive learning environment for every child." 2023 NY REG TEXT 631927 ("Notice of Adoption," Exhibit 1 to Declaration of Helena Lynch ("Lynch Decl.")) at 2. In adopting Part 123, The New York State Education Department ("NYSED") cited an overview of academic studies that addressed the use of Native American mascots. *Every* study reviewed concluded either that the use of Native American mascots had negative effects on Native Americans or activated, reflected, or reinforced stereotyping and prejudice among non-Native persons. *Id*. at 2-3. In sum, Part 123's purpose is *anti*-discriminatory, and Plaintiffs' disagreement with New York State's approach falls far short of identifying any constitutional or statutory violation.

In their Complaint dated May 29, 2025, Docket Entry ("DE") 1, Plaintiffs assert various constitutional and statutory challenges to Part 123. On July 7, 2025, Plaintiffs also moved for a preliminary injunction against the continued enforcement of Part 123. *See* DE 16; DE 21-1 (revised memorandum of law). For the reasons set forth below, all claims asserted in the Complaint should be dismissed for lack of standing and for failure to state a claim, *infra*, Point I, and Plaintiffs' motion for a preliminary injunction should be denied for failure to satisfy any of the essential requirements, *infra*, Point II.

CHALLENGED REGULATION: TEXT AND UNDERLYING POLICY

Part 123 provides that, with one exception, "no public school in the State of New York may utilize or display an Indigenous name, logo, or mascot other than for purposes of classroom instruction." 8 NYCRR § 123.2. A single exception was created so as not to interfere with certain already-existing agreements between a school district and a recognized tribal nation. *Id*. § 123.4(b).

Boards of education were required to fully comply with Part 123 by the end of the 2024-2025 school year. *Id*. § 123.3(a). Public school districts are also required to "prohibit school officers and employees [except those who are members of a tribal nation] when located on school property or at a school function from utilizing or promoting any Indigenous name, logo, or mascot." *Id*. § 123.5.

The Notice of Adoption sets forth the anti-discriminatory State interest underlying Part 123, first set forth in a 2001 memo issued by then-Commissioner Mills, which concluded that "the use of Native American symbols or depictions as mascots can become a barrier to building a safe and nurturing school community and improving academic achievement for all students." Notice of Adoption at 2. Commissioner Mills recognized the "state interest in providing a safe and

supportive learning environment for every child." *Id*. NYSED also cited to academic studies which unanimously show the harmful effects on school children of the use of Indigenous mascots. *Id*.

NYSED's policy has been supported from the beginning by New York State's local Indigenous communities, and tribal leaders took an active role in advising the State on implementation of Part 123. Declaration of Harry B. Wallace ¶¶ 4, 22-25; Declaration of Germain L. Smith ¶¶ 3, 11-13.

The adoption of Part 123 effectively codifies a June 2022 Albany Supreme Court decision, *Cambridge Central School District v. N.Y. State Education Dep't*, Index No. 902161-22 (Sup. Ct. Albany Cnty.) (Decision/Order/Judgment, June 21, 2022) (the "*Cambridge* Decision," Exhibit 2 to Lynch Decl.), that upheld a determination by the Commissioner of Education in *Appeal of McMillan*, Decision No. 18,058 (Exhibit 3 to Lynch Decl."). In *Appeal of McMillan*, the Commissioner determined that the decision by the Board of Education of the Cambridge Central School District to continue to use its "Indians" team name and logo was arbitrary and capricious and an abuse of discretion. *Appeal of McMillan* at 6. The Commissioner also stated that the continued use of Native American mascots could violate the Dignity for All Students Act (the "Dignity Act"), *id.* at 6-7, which prohibits "the creation of a hostile environment by conduct or by threats, intimidation or abuse, . . . that . . .reasonably causes or would reasonably be expected to cause . . . emotional harm to a student," Education Law § 11(7).

The *Cambridge* Decision, as NYSED noted, "establishes that public schools are prohibited from utilizing Indigenous mascots." Notice of Adoption at 3. In the *Cambridge* Decision, the only State court decision to examine the use of Indigenous names and imagery to represent public schools' sports teams, Albany Supreme Court held that the Commissioner was correct in determining that the continued use by the Cambridge school district of the "Indians" name and

logo was an abuse of discretion in light of the twenty years that had passed since the 2001 directive issued by then-Commissioner Mills and the evidence of the harms caused by the use of such names and imagery. *Cambridge* Decision at 3-4, 7-8.

ALLEGATIONS IN COMPLAINT

As alleged in the Complaint, Plaintiff the Association is a "non-profit organization currently registered with the Internal Revenue Service (IRS) as a 501(c)(3) corporation." Compl. (DE 1) ¶ 7. The Association is "incorporated and headquartered in North Dakota." *Id*. It was "founded in 2017 with a mission to increase the public awareness and education about Native American history and culture in public institutions, and to promote the respectful use of Native America names and imagery in public discourse." *Id*.

Plaintiff Finkenbinder is a member of the board of the Association and an enrolled member of the Crow Creek Sioux Tribe in South Dakota. Compl. ¶ 18. He has been residing in West Coxsackie, New York since 2013. *Id*.

According to the Complaint, before the European settlement of Long Island, the area of Massapequa was occupied by an Algonquin-speaking group known as the Lenape, which consisted of thirteen tribes, and Sachem Tackapausha was the leader of the Massapequas, one of the thirteen tribes. *Id*. ¶¶ 63, 64. Around 1925, Massapequa schools began using the "Chiefs" name and a logo that purports to be an image of "Sachem Tackapausha himself." *Id*. ¶¶ 68, 70.

On May 15, 2025, the Association entered into a memorandum of agreement (the "Agreement") with Massapequa Union Free School District (the "District") purporting to require the District to continue to use the "Chiefs" team name. Compl. ¶¶ 13-14. What the Agreement actually states is:

> So long as the District continues its current educational programming and instruction concerning Native American history and culture as outlined in the

> attached Exhibit A and the obligations outlined in this Agreement, NAGA and the Board of Directors of NAGA fully permit, consent to, support, and authorize the District in its continued use of the District's Indigenous [name, image, and likeness] for all school-related purposes, including but not limited to educational uses, athletic uses, community uses, and in any new programs hereafter developed.

Compl. ¶ 16; Agreement, DE 1-1, ¶ 1.

ARGUMENT

POINT I: ALL CLAIMS ASSERTED IN THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF STANDING AND FOR FAILURE TO STATE A CLAIM

Plaintiffs assert five causes of action, alleging that Part 123: (1) discriminates in violation of the Fourteenth Amendment's Equal Protection Clause; 42 U.S.C. § 1981; and Article I, § 11 of the New York Constitution, Compl. ¶¶ 126-138; (2) deprives Plaintiffs of free speech rights in violation of the First Amendment and Article I, § 8 of the New York Constitution, *id*. ¶¶ 140-150; (3) is unconstitutionally vague in violation of the Fourteenth Amendment's Due Process clause, *id*. ¶¶ 152-157; (4) violates the dormant Commerce Clause, *id*. ¶¶ 159-168; and (5) violates Title VI of the Civil Rights Act of 1964, *id*. ¶¶ 170-174. Plaintiffs seek declaratory and injunctive relief. Compl. ¶ 175.

Requirements for standing:

To have standing to assert a claim, a "plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff must also show a "causal connection between the injury and the conduct complained of." *Id*. And the plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. at 561 (internal quotations and citation omitted); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) ("The plaintiff must have (1)

suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.").

An organization may plead that "it suffered an injury 'in its own right,' including an impairment of its ability to fulfill its mission (called 'organizational' standing)." *Hunter v. Cortland Hous. Auth.*, No. 5:23-cv-1540, 2024 WL 2078590, at *5 (N.D.N.Y. May 9, 2024) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 & n.19 (1982)). Or, an organization may assert associational standing, by "su[ing] on behalf of its members, in which case it must show, inter alia, that some particular member of the organization would have had standing to bring the suit individually." *New York C.L. Union v. New York City Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012). However, associational standing is not available for claims asserted under 42 U.S.C. § 1983. *Nat'l Rifle Assoc. of Am. v. Hochul*, No. 20-3187, 2021 WL 5313713, at *2 (2d Cir. 2021).

The question of standing "is especially significant when federal courts sit in judgment over duly enacted state laws, given [courts'] concern about 'the proper—and properly limited—role of the courts in a democratic society.'" *Schutz v. Thorne*, 415 F.3d 1128, 1132-33 (10th Cir. 2005). (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

Standards on motion to dismiss for failure to state a claim:

To survive a motion to dismiss, a "complaint must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Massapequa Union Free Sch. Dist. v. New York State Bd. of Regents*, No. 23-cv-7052, 2025 WL 929710, at *5 (E.D.N.Y. Mar. 27, 2025) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Although all allegations contained in the complaint are assumed to be true, this tenet is inapplicable to legal conclusions.'" *Id.* (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action,

supported by mere conclusory statements, do not suffice.'" *Roe v. St. John's Univ.*, 91 F.4th 643, 651 (2d Cir. 2024) (quoting *Iqbal*, 556 U.S. at 678, 129)

A. Plaintiffs lack standing to assert any of their claims.

Part 123 applies only to New York State public school districts, and it simply restricts the names, logos, and mascots that those schools may use for their interscholastic sports teams. Frank Decl. ¶ 16. Plaintiffs are a North Dakota-based non-profit organization and a New York resident who is an enrolled member of the South Dakota Crow Creek Sioux Tribe. Plaintiffs fail to explain how Part 123, which does not apply to them, harms them in any legally recognized way.

Plaintiffs lack standing to assert any of their claims because they do not allege, as they must, a concrete and particularized injury in fact that is actual and imminent. As an initial matter, Plaintiffs' claimed injuries are based on a misreading of Part 123. For example, Plaintiffs assert that Part 123:

- "categorically prohibits the use of Native American names, imagery, and symbols," Compl. ¶ 38;
- "enforces a blanket prohibition that extends to [Native American] names, traditions, and imagery," *id.* ¶ 39; and
- "prohibit[s] the display, use, or recognition of [Native Americans'] cultural symbols, names, and imagery in public schools," *id.* ¶ 130.

These statements are misleading. Plaintiffs also misquote Part 123. They assert that § 123.2 "mandates that public school districts 'eliminate the use of all Indigenous names, logos, or mascots.'" Compl. ¶ 143 (incorrectly quoting 8 NYCRR § 123.2). What Section 123.2 actually states is: "Except as provided in section 123.4 of this Part, no public school in the State of New York may utilize or display an Indigenous name, logo, or mascot *other than for purposes of classroom instruction*." 8 NYCRR § 123.2 (emphasis added). Plaintiffs consistently misrepresent Part 123 by ignoring that Part 123 does *not* place any restrictions on the use of Indigenous names and imagery for educational purposes. 8 NYCRR § 123.2. Only once do Plaintiffs acknowledge

that Part 123 does not apply to classroom instruction. *See* Compl. ¶ 88. Otherwise, in framing their allegations, Plaintiffs consistently ignore that no restrictions are placed upon display or discussion of Indigenous names and imagery for educational purposes. Accordingly, Plaintiffs allegations are asserted against a regulation that does not exist.

In any event. Plaintiffs fail to assert any concrete, particularized injury. The Association asserts it is suffering an injury in fact because Part 123 impedes the Association's mission of "advancing cultural integrity community service, and the protection of Native American heritage and identity in public life." Compl. ¶ 11. Plaintiff Finkenbinder asserts he is "impacted by Part 123 . . . which excludes him (and others sharing his heritage) from having their history and ancestry recognized through names, logos and images, such as those traditionally associated with public schools." Compl. ¶ 19. Plaintiffs further allege that their "beliefs, practices, rituals, actions, and conduct with respect to Native American names, logos, and imagery, including those images featured in New York public schools, are avenues through which they educate others about their Native American ethnic heritage, traditions, religious beliefs, exercise and practices." Compl. ¶ 129.

However, Plaintiffs do not allege any facts to show how Part 123 prevents the Association from advancing cultural integrity, protecting Native American heritage, or educating others about Native American heritage. And Plaintiffs fail to allege a single fact to show how Part 123 prevents Plaintiff Finkenbinder from having his history or ancestry recognized. Plaintiffs' claims of harm would require acceptance of the plainly erroneous premise that New York State public schools' interscholastic sports teams' mascots are the only forum for presentation or discussion of Native American history and culture.

Plaintiffs also fail to show that Part 123 is the cause of any of their claimed injuries. The Agreement itself acknowledges that the District conducts "educational programming and instruction concerning Native American history and culture." Agreement ¶ 1. This provision in the Agreement makes clear that nothing in Part 123 prevents school districts from conducting educational programming on Native American history and culture and that, Part 123 notwithstanding, it is the school districts' choice how to conduct such educational programming. Therefore, to the extent any New York State public school district discontinued its educational programming on Native American history and culture, or conducted its programming in a way that did not align with the Association's mission, such programming decisions would not be caused by Part 123 in any way.

Lack of standing permeates all of Plaintiffs' causes of action. A district court in Colorado has already ruled that the Association did not have standing to assert an equal protection challenge to a Colorado law restricting Native American mascots. In *Marez v. Redhorse*, the Association was found to lack standing to assert its claims, including an equal protection claim, challenging Colorado's Senate Bill 21-116, which prohibits the use of Native American mascots in Colorado's public schools. Order dated May 5, 2022, No. 1:21-cv-02941 (D. Co.), (Ex. 4 to Lynch Decl.). The Court explained: "While the Plaintiffs here may have a desire to use Native American imagery at schools, that is simply not sufficient to impart them with standing to bring the instant suit." *Id*. at 14. The court further explained that the Supreme Court has identified examples of legally protected interests under the Equal Protection Clause, which include such matters as admission to undergraduate, medical, or law school programs, as well as appointment to a board of education, but "[h]aving a school mascot representing one's culture and heritage is not among these 'legally

protected interest[s].'" *Id.* at 15-6 (quoting *Lujan*, 504 U.S. at 560).[2] Just as in *Marez*, Plaintiffs here do not allege any facts that could show that they have a legally protected interest in having New York State public school districts use Indigenous names or imagery to represent their sports teams. The same lack of standing applies to Plaintiffs' claims under Article I, § 11 of the New York Constitution, New York's Equal Protection Clause. *See Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 53 (2d Cir. 2007) ("[T]he Equal Protection Clauses of the federal and New York Constitutions are coextensive.").

Plaintiffs also lack standing to assert their 2 U.S.C. § 1981 claim because they cannot show any legally cognizable injury based on the invalidity of the parts of the Agreement that violate Part 123. "The requirements for the formation of a contract are: (1) at least two parties with legal capacity to contract, (2) mutual assent to the terms of the contract, and (3) consideration." *Beautiful Jewellers Priv. Ltd. v. Tiffany & Co.*, No. 06 Civ. 3085, 2010 WL 2720007, at *2 (S.D.N.Y. June 28, 2010), *aff'd*, 438 F. App'x 20 (2d Cir. 2011).

But Plaintiffs fail to show that the Agreement is a valid contract. Plaintiffs fail to allege that the Association, a North Dakota-based 501(c)(3) corporation, has any legal right to contract the image and likeness of Sachem Tackapausha, who led a Long Island tribe. Compl. ¶¶ 64–65. The Agreement states only that the Association "support[s] the artistry of native identifiers," not that the Association owns or has any claim to these identifiers. *See* Agreement at 1. This lack of specificity stands in contrast to cases where courts have recognized a tribe's claim to a name,

[2] In addition to Colorado and New York, the following states have similar restrictions in place on the use of Native American mascots: Maine (Maine Stat. 20-A Section 12 (2019)); California (Cal. Ed. Code Section 221.3); Connecticut (Connecticut Public Act No. 21-2); Minnesota (Minnesota Statutes 2024 Section 121A.041); Nevada (Nevada NRS 388.045); Ohio (Ohio HCR No. 25); Oregon (OAR 581-021-0047); Vermont (16 V.S.A. § 568); and Washington (Rev. C. Wash. Section 28A.320.296).

image, or likeness. *See, e.g.*, *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147, 1166 (D. N. Mexico 2013) (holding that Navajo Nation, which had over 80 alleged Navajo trademarks, stated plausible Lanham Act trademark infringement claim).

Plaintiffs equally lack standing to assert any First Amendment claim. To establish standing to bring a pre-enforcement First-Amendment claim, a plaintiff must demonstrate "an actual and well-founded fear that the law will be enforced against it." *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013). Plaintiffs cannot demonstrate any such fear because Part 123 does not apply to them. This is not a case in which there is an unresolved question as to whether the state law applies, such as in *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000), where the state represented that it interpreted a statute so as not to apply to the plaintiff, but the possibility existed that the state could change its interpretation, *id*. at 383. Here, there is no possible interpretation of Part 123 that could make it applicable to Plaintiffs. *See* 8 NYCRR § 123.2 (providing that except for § 124(b), "no public school in the State of New York may utilize or display an Indigenous name, logo, or mascot other than for purposes of classroom instruction"); *id*. § 123.3(a) (directing "[b]oards of education" to take steps toward compliance); *id*. § 123.5 (directing "public schools" to "prohibit school officers and employees when located on school property or at a school function from utilizing or promoting any Indigenous name, logo, or mascot."). To the extent Plaintiffs seek to stretch the meaning of § 123.4(b) to argue that it applies to them, nothing about § 124(b) has any effect on Plaintiffs' free speech.

And Plaintiffs similarly lack standing to assert their due process-based vagueness challenge, whether facial or as applied, because, again, Part 123 does not apply to Plaintiffs. Therefore, no circumstances exist under which Part 123 could be enforced against Plaintiffs.

Plaintiffs also lack standing to assert their Title VI claim. Title VI 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." 42 U.S.C. § 2000d. But Plaintiffs do not allege, nor could they, that they have been excluded from any program, denied a benefit, or suffered discrimination based on their race, color, or national origin due to the adoption of Part 123, which merely restricts the types of names and imagery that public school districts in New York State may use to represent their interscholastic sports teams.

Accordingly, the Complaint should be dismissed in its entirety for lack of standing.

B. Plaintiffs fail to state a plausible claim on any of the causes of action they assert.

1. Plaintiffs fail to state a claim that Part 123 violates their rights under the Equal Protection Clause, 42 U.S.C. § 1981, or Article I, § 11 of the New York Constitution.

a. Fourteenth Amendment Equal Protection Clause and Article I, § 11 of the New York Constitution.

"An equal protection claim has two essential elements: '(1) the [plaintiff], compared with others similarly situated, was selectively treated; and (2) . . . such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" *Higgins v. United States*, No. 02-cv-499, 2003 WL 21693717, at *3 (E.D.N.Y. May 27, 2003) (quoting *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir. 2000) (additional internal quotation marks omitted). "[A] plaintiff pursuing a claimed . . . denial of equal protection under § 1983 must show that the discrimination was intentional." *Patterson v. County of Oneida*, 375 F.3d 206, 225-26 (2d Cir. 2004). The plaintiff must prove "'that the decisionmakers . . . acted with discriminatory purpose.'" *Knight v. Conn. Dep't of Public Health*, 275 F.3d 156, 166 (2d Cir. 2001) (quoting *McCleskey v.*

Kemp, 481 U.S. 279, 292 (1987))). The identical standards apply to New York State's Equal Protection Clause, Article I, § 11 of the New York Constitution. *See Town of Southold,* 477 F.3d at 53; *Singh v. Joshi*, 201 F. Supp. 3d 245, 248 (E.D.N.Y. 2016) ("[T]he Court's resolution of the federal equal-protection claim disposes of plaintiffs' parallel claim under the New York Constitution."); *Brown v. State*, 89 N.Y.2d 172, 190 (1996).

Plaintiffs cannot show they were treated differently from any similarly situated group or individual as a result of Part 123 because Part 123 does not apply to them, requires nothing of them, and deprives them of no legally protected interest. Part 123 is not a "Native Ban," as Plaintiffs mischaracterize it, *see* Compl. ¶¶ 4, 134, 153, 157, and it is not a race-based classification that excludes Plaintiffs. Part 123 does not prohibit "the use of Native American names, symbols, and imagery." Compl. ¶ 132. It merely prevents the appropriation of such names, symbols and imagery for use as mascots to represent interscholastic sports teams. The cases cited by Plaintiffs, *see* Compl. ¶¶ 41, 42, do not support their claims. Those cased involved the plaintiffs' access to educational programs or economic opportunities. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 230 (2023) (undergraduate admissions); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, U.S. 701, 747 (2007) (elementary school admissions); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (law school admissions); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (awarding of public construction contracts). Plaintiffs do not allege they are being denied access to educational or economic opportunities. Plaintiffs' desire to have New York State public schools use Native American names and imagery for their interscholastic sports teams is not an interest protected by the Equal Protection Clause. *See Marez*, Order at 15-16. For this reason, the question of which level of scrutiny applies is irrelevant.

Nevertheless, Part 123 would survive strict scrutiny because it is narrowly tailored to achieve the compelling interest of protecting children from the proven harms of using Indigenous-themed mascots. Plaintiffs' arguments to the contrary are, again, based on a misreading of Part 123. Plaintiffs allege that Part 123 is not narrowly tailored because it "prohibit[s] the display, use, or recognition of [Native Americans'] cultural symbols, names, and imagery in public schools." Compl. ¶ 130. This is simply not true. Part 123 prohibits the use of Indigenous names and images by public school districts to represent their sports teams. Part 123 does not prohibit the use, display, or discussion of Native American names and images by New York State public school districts in an educational context. *See* 8 NYCRR § 123.2. The restriction on sports teams' names and logos is a narrow restriction that addresses a very specific but very serious problem: that the use of such images as mascots to represent sports teams has a detrimental effect on both Native American and non-Native American students. *See* Notice of Adoption at 2-3; *see also* Cambridge decision at 3-4, 7-8. Plaintiffs' conclusory assertion that the rationale behind Part 123 "lacks a quantitative analysis," Compl. ¶ 133, is incorrect. Defendants relied on numerous research studies that unanimously demonstrated the detrimental effects of using Native American mascots. *See* Notice of Adoption at 3.

Plaintiffs' equal protection claim fails for the additional reason that, even if Plaintiffs had plausibly pled unequal treatment in the context of a protected interest, they do not plausibly plead, as they must, that any Defendant had discriminatory intent or purpose. The intent behind Part 123 is anti-discriminatory. Part 123 furthers the State interest in "providing a safe and supportive learning environment for every child." Notice of Adoption at 2. In adopting Part 123, NYSED relied on studies that unanimously showed that the use of Native American mascots imposes either direct negative effects on Native Americans or the fostering of harmful stereotypes among non-

Native persons. *Id*. at 3. NYSED also relied on the New York Association of School Psychologist's determination that the continued use of Indigenous mascots negatively affects all students. *Id*. Defendants also relied upon the overwhelming majority of Indigenous tribes, as well as educational professionals, who support ending the use of Indigenous names and imagery for sports teams. *See, e.g*. *Cambridge* Decision at 3-4, 7-8.

To the extent Plaintiffs suggest that Defendants engaged in intentional discrimination, their allegations are not plausible because they are aimed at a regulation that does not exist. One salient example is in paragraph 130, where Plaintiffs allege that Part 123 "explicitly targets" Native Americans, but then incorrectly assert that Part 123 imposes a blanket prohibition on "the display, use, or recognition of" Native American "cultural symbols, names and imagery in public schools." Compl. ¶ 130. Part 123 expressly allows the use of Indigenous names and imagery in a classroom setting. 8 NYCRR § 123.2. And Part 123 "targets" mascots, not Indigenous students. In addition, the Agreement acknowledges that the District continues to present educational programming on Native American culture and history. Agreement (DE 1-1) ¶ 1. Falsely representing the scope of Part 123 does not transform it into an exercise in intentional discrimination.

Because Plaintiffs allege no facts whatsoever to support an inference that Defendants intended to "inhibit or punish the exercise of [their] constitutional rights," or that Defendants maliciously or in bad faith intended to injure Plaintiffs, see *Higgins*, 2003 WL 21693717, at *3, Plaintiffs fail to state a claim of a violation of the federal or state Equal Protection Clause.

b. 42 U.S.C. § 1981.

42 U.S.C. § 1981 prohibits discrimination with respect to the enjoyment of benefits, privileges, terms, and conditions of a contractual relationship. *See Patterson,* 375 F.3d at 224. To establish a violation of § 1981, a plaintiff must show that (1) the plaintiff is a member of a racial

minority; (2) the defendant intended to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in § 1981. *Hill v. City of New York*, 136 F. Supp. 3d 304, 329–30 (E.D.N.Y. 2015), *order amended and supplemented*, No. 13-cv-6147, 2019 WL 1900503 (E.D.N.Y. Apr. 29, 2019).

Plaintiffs fail to state a claim of a violation of 42 U.S.C. § 1981. Plaintiffs are not prohibited from contracting with New York State public school districts. However, under New York law any contractual provision that violates Part 123, a valid regulation, is an illegal contract. Courts will enforce an illegal contract only in limited circumstances not present here, where: "(1) the statutory violation is *malum prohibitum*; (2) the statute that renders the contract illegal does not specifically require that all contrary contracts be rendered null and void; and (3) the penalty imposed by voiding the contract is 'wholly out of proportion to the requirements of public policy.'" *Schlessinger v. Valspar Corp*., 686 F.3d 81, 85 (2d Cir.), *certified question accepted*, 19 N.Y.3d 992 (2012), *certified question answered*, 21 N.Y.3d 166 (2013) (quoting *Benjamin v. Koeppel*, 85 N.Y.2d 549, 553 (1995)).

Here, the long public record of the harms caused by the use of Indigenous names and imagery in ways prohibited by Part 123 establishes that the conduct prohibited by Part 123 is *malum in se*, *i.e*., inherently wrong, not merely *malum prohibitum*. *See* Notice of Adoption at 2-3; *Cambridge* Decision at 3-4, 7-8. A contract designed to allow a school district to use Indigenous names and imagery in violation of Part 123 would also violate public policy. *See id*. Accordingly, any agreement between a school district and any individual or entity, Indigenous or non-Indigenous, would, consistent with established law, be unenforceable insofar as it purports to violate Part 123, a valid regulation. *See Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 357

(1908) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them.").

In addition, Plaintiffs fail to plead, as they must, purposeful discrimination. It is well established that 42 U.S.C. § 1981 "can be violated only by purposeful discrimination." *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982); *see also Albert v. Carovano*, 851 F.2d 561, 571 (2d Cir. 1988). Plaintiffs allege no facts that could support an inference that Part 123's purpose was to inflict harm on Indigenous persons or nations. And the public record of Part 123 shows just the opposite: the purpose of Part 123 is to *prevent* harms to both Indigenous and non-Indigenous school children.

In *Spirit Lake Tribe of Indians ex rel. Comm. of Understanding & Respect v. Nat'l Collegiate Athletic Ass'n*, 715 F.3d 1089 (8th Cir. 2013), the Eighth Circuit held that the plaintiffs failed to show discriminatory intent on the part of the National Collegiate Athletic Association ("NCAA") based on its prohibition on the display of Native American mascots, nicknames, and images at championship events, including the University of North Dakota's use of the "Fighting Sioux" nickname and imagery. *Id*. at 1092. The NCAA's stated motivation was to eliminate "hostile and abusive" mascots and imagery, but it agreed to allow continued use of the name if both the Spirit Lake and Standing Rock tribes approved. *Id*. The Standing Rock Tribe did not approve, which prevented certain mascots, nicknames, and imagery from being displayed at NCAA championships games. *Id*. In response to a claim that this constituted discrimination, the Eighth Circuit held that "[t]here is no evidence that the NCAA enacted the policy in order to eradicate Sioux culture," as alleged. *Id*. at 1093. The same reasoning applies here.[3] As expressly

[3] Although *Spirit Lake* involved a 42 U.S.C. § 1981 claim, the court ruled that there was no enforceable contract. 715 F.3d at 1093.

provided for in Part 123 and acknowledged in the Agreement, school districts in New York may continue to present educational programming on Native American history and culture. 8 NYCRR § 123.2; Agreement ¶ 1.

Plaintiffs fail to state a claim of a violation of 42 U.S.C. § 1981.

2. Plaintiffs fail to state a claim that Part 123 violates their rights under the First Amendment and Article I, § 8 of the N.Y. Constitution.

Plaintiffs fail to state a claim of a violation of the First Amendment or of Article I, § 8 of the New York Constitution for the same reason they lack standing to assert such claims: because Part 123 does not apply to Plaintiffs, it does not infringe on their rights to free speech. Plaintiffs' citation to *Texas v. Johnson*, 491 U.S. 397 (1989), *see* Compl. ¶¶ 49, 140, is inapposite because the "bedrock principle underlying the First Amendment" that the government "may not prohibit the expression of an idea," *id*. at 414, has no relevance where the complaining party is not prohibited from expressing an idea.

Also irrelevant is the level of scrutiny to be applied in examining Part 123. Plaintiffs' argument that Part "targets" certain speech, *see* Compl. ¶ 141 (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015)), is irrelevant because Part 123 does not target any speech by Plaintiffs. However, as stated above, *see supra*, Point I(B)(2), Part 123 would survive strict scrutiny because it is narrowly tailored to further the compelling government interest of providing a discrimination-free environment for New York's public school children.

3. Plaintiffs fail to state a claim that Part 123 violates their rights under the Fourteenth Amendment's Due Process Clause.

Plaintiffs assert that Part 123 violates procedural and substantive due process because it is vague and promotes arbitrary enforcement. Compl. ¶ 50. Plaintiffs also allege that Part 123 "burdens protected rights" and "den[ies] children a right to a publicly-funded education." Compl.

¶¶ 53, 153. Plaintiffs fail to state a claim under any of these theories. Plaintiffs do not specify whether they assert a facial or an as-applied vagueness challenge.

Plaintiffs fail to state a facial or as-applied vagueness claim for the same reason that they lack standing to do so. Because Part 123 does not apply to Plaintiffs, no circumstances exist under which Part 123 could be enforced against them. As for a facial challenge, if Plaintiffs could assert such a claim, it would fail. To state a facial challenge, Plaintiffs must plead and prove that "no set of circumstances exists under which [Part 123] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Plaintiffs "must demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 497 (1982). However, Plaintiffs expressly recognize that the District's name and logo violate Part 123. Compl. ¶¶ 17, 53, 67-70. This recognition refutes any claim that Part 123 is "impermissibly vague in all of its applications." *Village of Hoffman,* 455 U.S. at 497.

Even if Plaintiffs could assert an as-applied vagueness challenge, it, too, would fail. The vagueness doctrine requires "that laws be crafted with sufficient clarity to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited" and be written in a manner that does not permit arbitrary or discriminatory enforcement. *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010) (citation omitted). The Supreme Court has recognized that " we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). A statute or regulation is not required to specify every prohibited act in order to satisfy the requirement of adequate notice. *Williams v. Korines*, 966 F.3d 133, 140 (2d Cir. 2020).

In the related case *Massapequa Union Free School District v. New York State Board of Regents*, the Court rejected both a facial and an as-applied vagueness challenge to Part 123, first

holding that the plaintiffs had "not plausibly alleged that they had insufficient notice that" the Indigenous names, symbols, and images associated with their sports teams "were covered by Part 123." No. 23-cv-7052, 2025 WL 929710, at *14 (E.D.N.Y. Mar. 27, 2025). The Court noted that "the Second Circuit has upheld laws with less precise definitions in the First Amendment context." *Id*. at *13.

The Court also ruled that the plaintiffs failed to plausibly allege that Part 123 encourages arbitrary enforcement. The *Massapequa* plaintiffs argued that Part 123 encourages arbitrary enforcement because it requires school districts themselves to determine if their team names and imagery had to be retired. *Id*. at *14. Plaintiffs herein make the same allegation. Compl. ¶ 155. ¶ The Court rejected this argument, holding that "Part 123's definition of prohibited Indigenous cultural reference provides clear standards through which schools can determine whether their names, logos, and mascots are prohibited Indigenous cultural references." *Id*. at *15.

Plaintiffs herein further allege that, "[b]y denying children a right to a publicly-funded education because they attend a school that uses the moniker 'Chiefs,' the actions by the Board of Regents violate substantive due process under the Fourteenth Amendment of the United States Constitution." Compl. ¶ 17. Plaintiffs fail to explain what basis they have for asserting a substantive due process claim on behalf of New York State public school students. In any event, such a claim would fail. *See Aristy-Farer v. State*, 143 A.D.3d 101, 119 (1st Dep't 2016), *aff'd as modified*, 29 N.Y.3d 501 (2017) (rejecting substantive due process challenge to restrictions on funding for school districts that fail to comply with mandatory performance review standards).

Plaintiffs fail to state a claim of a due process violation under any theory they assert.

4. Plaintiffs fail to state a claim that Part 123 violates the dormant Commerce Clause.

Plaintiffs fail to state a claim that Part 123 violates the dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3, because they fail to allege discrimination against interstate commerce.

The dormant Commerce Clause prohibits state regulation "that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (internal quotation marks and alteration omitted)). To state a claim for "discrimination in violation of the Commerce Clause, a plaintiff must identify an in-state commercial interest that is favored, directly or indirectly, by the challenged statutes at the expense of out-of-state competitors." *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 95 (2d Cir. 2009) (internal quotation marks and alteration omitted). "Both an in-state interest and an out-of-state competitor are necessary because laws that draw distinctions between entities that are not competitors do not discriminate for purposes of the dormant Commerce Clause." *Id*. (internal quotation marks omitted).

Courts examining dormant Commerce Clause claims first ask "whether the challenged law [1] discriminates against interstate commerce, or [2] regulates evenhandedly with only incidental effects on interstate commerce." *New York Pet Welfare Ass'n, Inc. v. City of New York*, 850 F.3d 79, 89 (2d Cir. 2017) (internal quotation marks omitted). Plaintiffs' dormant Commerce Clause claim, which is premised solely on 8 NYCRR § 123.4(b), *see* Compl. ¶ 163, fails to allege that section 123.4(b) either discriminates against or has an incidental effect on interstate commerce.

Plaintiffs do not plausibly allege discrimination against interstate commerce because they do not identify either a competitive in-state market or a competitive out-of-state market for Indigenous names and imagery. *See Selevan*, 584 F.3d at 95. A law that affects no competitive market does not "discriminate" for purposes of the dormant Commerce Clause, because "in the

absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference." *Gen. Motors Corp*., 519 U.S. at 300.

Even if Plaintiffs could show that section 123.4(b) discriminates against out-of-state commerce, they still fail to allege a dormant Commerce Clause violation. A purportedly discriminatory law will not violate the dormant Commerce Clause "if the state shows [the law is] 'demonstrably justified by a valid factor unrelated to economic protectionism.'" *New York Pet Welfare Ass'n*, 850 F.3d at 89 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)). Part 123 is "demonstrably justified" by its valid anti-discriminatory purpose. *See* Notice of Adoption at 2-3; *Cambridge* Decision at 3-4, 7-8. This State interest has nothing to do with economic protectionism.

Nor do Plaintiffs plead a dormant Commerce Clause claim if they allege that Part 123 has an incidental effect on interstate commerce. Courts "will uphold a nondiscriminatory law unless the challenger shows that 'the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *New York Pet Welfare*, 850 F.3d at 90 (quoting *Pike v. Brice Church*, 397 U.S. 137, 142 (1970)). Plaintiffs come nowhere near plausibly alleging that any burden imposed upon a non-existent competitive market is "clearly excessive" in relation to the proven benefits of Part 123.

Plaintiffs' dormant Commerce Clause claim should be dismissed for failure to state a claim.

5. Plaintiffs fail to state a claim that Part 123 violates Title VI.

Plaintiffs fail to state a plausible claim of a violation of Title VI. Initially, any Title VI claim against the individual Defendants would have to be dismissed because "Title VI does not permit a claim against an individual in his official capacity." *D.C. by Conley v. Copiague Union Free Sch. Dist*., No. 16-cv-4546, 2017 WL 3017189, at *10 (E.D.N.Y. July 11, 2017).

In addition to lacking Article III standing, *see supra*, Point I(A), Plaintiffs lack statutory standing to assert a Title VI claim. "To have [statutory] standing to bring a Title VI claim, the plaintiff must 'allege that: (1) [the defendant] received federal financial assistance, (2) [the plaintiff] was an intended beneficiary of the program or activity receiving the assistance, and (3) [the defendant] discriminated against [the plaintiff] on the basis of race, color, or national origin in connection with the program or activity.'" *Rodriguez v. Boursiquot*, No. 09 Civ. 0802, 2010 WL 985187, at *4 (S.D.N.Y. Mar. 17, 2010) (quoting *Commodari v., Long Island Univ.*, 89 F. Supp. 2d 353, 378 (E.D.N.Y. 2000)). Plaintiffs cannot show that they were intended beneficiaries of Title VI because the intended beneficiaries of Title VI in this context are school children, not non-profit organizations or individual New York State residents. *Id.; see also Schuler v. Bd. of Educ. of Cent. Islip Union Free School Dist.*, No. 96-cv-4702, 2000 WL 134346, at *10 (E.D.N.Y. Feb. 1, 2000).

Plaintiff's Title VI claim also fails on the merits. Title VI 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." 42 U.S.C. § 2000d. To state a claim under Title VI, a plaintiff must plausibly allege that (1) "the defendant discriminated against [it] on the basis of [national origin]," (2) the "discrimination was intentional," and (3) "the discrimination was a substantial or motivating factor for the defendant's actions." *Tolbert v. Queens College*, 242 F.3d 58, 69 (2d Cir. 2001) (internal citations and quotation marks omitted).

A plaintiff must allege "the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of racially discriminatory intent." *Yzaguirre v. KIPP NYC Pub. Charter Sch.*, No. 24 Civ. 1500, 2025 WL 795732, at *12 (S.D.N.Y. Feb. 7,

2025), *report and recommendation adopted sub nom. Yzaguirre v. Levin*, No. 24-cv-1500, 2025 WL 804771 (S.D.N.Y. Mar. 13, 2025) (internal quotation marks omitted). Plaintiffs allege neither intentional discrimination nor circumstances giving rise to a plausible inference of discriminatory intent.

Plaintiffs do not allege that they have been excluded from participation in, denied the benefits of, or subjected to discrimination under any program receiving federal assistance. Part 123 merely restricts the types of names and images that New York public schools may use to represent interscholastic sports teams. Part 123 does not "discourage[] Indigenous students from celebrating or expressing their heritage," nor does it "send[] a message that Indigenous identity is unwelcome in public schools." Compl. ¶ 173. The express language of Part 123 allows for discussion of Indigenous history and culture, including Indigenous names and imagery, in an educational setting. *See* 8 NYCRR § 123.2. The Agreement acknowledges that Part 123 has no effect on educational programming on Indigenous history and culture. Agreement ¶ 1.

Plaintiffs also fail to plead "circumstances giving rise to a plausible inference of racially discriminatory intent." The intent behind Part 123 is to create a discrimination-free environment in public schools and to promote the State interest in "providing a safe and supportive learning environment for every child." Notice of Adoption at 2. In adopting Part 123, NYSED relied on studies that unanimously showed that the use of Native American mascots imposes either direct negative effects on Native Americans or the fostering of harmful stereotypes among non-Native persons. *Id*. at 3. NYSED also relied on the New York Association of School Psychologist's determination that the continued use of Indigenous mascots negatively affects all students. *Id*.

Defendants also relied upon the overwhelming majority of Indigenous tribes and organizations, as well as educational professionals, who support ending the use of Indigenous

names and imagery for sports teams. *See, e.g. Cambridge* Decision at 3-4, 7-8. And Part 123 is narrowly tailored to achieve the compelling government interest of protecting children from the proven harms of using Indigenous-themed mascots.

Plaintiffs' Title VI claim should be dismissed for failure to state a claim.

POINT II. PLAINTIFFS FAIL TO SATISFY ANY OF THE ESSENTIAL REQUIREMENTS FOR A PRELIMINARY INJUNCTION

In general, a party seeking a preliminary injunction must show "(1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest.'" *Consumer Directed Pers. Assistance Ass'n of New York State, Inc. v. Zucker*, No. 18-cv-746, 2018 WL 3579860, at *2 (N.D.N.Y. July 25, 2018) (quoting *North Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc*., 883 F.3d 32, 37 (2d Cir. 2018)). "However, 'where a preliminary injunction is sought against government action taken in the public interest pursuant to a statutory or regulatory scheme, the less demanding 'fair ground for litigation' standard is inapplicable, and therefore a 'likelihood of success' must be shown.'" *Pankos Diner Corp. v. Nassau Cnty. Legislature*, 321 F. Supp. 2d 520, 523 (E.D.N.Y. 2003) (quoting *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 149 (2d Cir.1999)).

In addition, because Plaintiffs seek to disrupt the *status quo* by challenging a valid State regulation that became fully enforceable as of June 30, 2025, they must show a clear or substantial likelihood of success. *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (injunction against application of regulatory scheme "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion"); *Pankos Diner*, 321 F. Supp. 2d at 523-24 (because the plaintiffs sought to enjoin

enforcement of a state law that was already in effect, "[a] heightened standard requiring a showing of a 'clear' or 'substantial' showing of likelihood of success").

A. Plaintiffs fail to demonstrate irreparable harm.

Much like Plaintiffs cannot show any concrete, particularized injury to provide them with standing to assert their claims, *see supra*, Point (I)(A), Plaintiffs cannot demonstrate that enforcement of Part 123 against New York State public school districts would cause them irreparable harm.

To demonstrate irreparable harm, a plaintiff must demonstrate "an injury that is neither remote nor speculative, but actual and imminent." *Grand River Enter. Six Nations, Ltd.,* 481 F.3d at 66 (internal quotation marks omitted). Because Plaintiffs fail to demonstrate irreparable harm, their motion fails at the outset.

Plaintiffs' delay in filing their motion defeats their claim of irreparable harm at the outset. "Delay in seeking injunctive relief may, standing alone, preclude the granting of preliminary injunctive relief, because the failure to act sooner undercuts the sense of urgency upon which the availability of the remedy is predicated." *Hodnett v. Medalist Partners Opportunity Master Fund II-a, L.P.*, No. 1:21-cv-00038, 2021 WL 535485, at *6 (S.D.N.Y. Feb. 12, 2021) (internal quotation marks omitted). "[C]ourts in [the Second] Circuit 'typically decline to grant preliminary injunctions in the face of unexplained delays of more than two months.'" *Monowise Ltd. Corp. v. Ozy Media, Inc.*, No. 17-cv-8028, 2018 WL 2089342, at *2 (S.D.N.Y. May 3, 2018); *see Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137, 144 (2d Cir. 2005) (noting delay of ten weeks has been found to defeat irreparable harm).

Plaintiffs assert that they show irreparable harm based on their allegations that Part 123 will (1) impair their constitutional rights; (2) suppress their cultural or expressive identity; and (3)

disrupt the Agreement. Pls.' Mem. at 14. However, Plaintiffs cannot show irreparable harm under any of these theories.

As for the purported deprivation of Plaintiffs' constitutional rights, courts have been clear that "the mere allegation of a constitutional infringement in and of itself does not constitute irreparable harm." *Pinckney v. Bd. of Educ. of Westbury Union Free Sch. Dist.*, 920 F. Supp. 393, 400 (E.D.N.Y. 1996); *see also Blakeman v. James*, No. 2:24-cv-1655, 2024 WL 3201671, at *18 (E.D.N.Y. Apr. 4, 2024) ("[A] bare assertion of a constitutional injury . . . is insufficient to automatically trigger a finding of irreparable harm."). Rather, where "Plaintiffs allege violations of their constitutional rights as the irreparable injury suffered, they must show a likelihood of success on the merits of their constitutional claims to meet the irreparable injury prong to merit a preliminary injunction." *Goldstein v. Hochul*, 680 F. Supp. 3d 370, 389 (S.D.N.Y. 2023). Thus, to demonstrate irreparable harm, Plaintiffs must first show they are likely to succeed on the merits of their constitutional claims. *See Turley v. Giuliani*, 86 F. Supp. 2d 291, 295 (S.D.N.Y. 2000) ("Because the violation of a constitutional right is the irreparable harm asserted here, the two prongs of the preliminary injunction threshold merge into one: in order to show irreparable injury, plaintiff must show a likelihood of success on the merits.").

Plaintiffs show no likelihood of succeeding on the constitutional claims. As set forth above, Plaintiffs lack standing to assert their constitutional claims, *see supra*, Point I(A), and they fail to state a plausible claim of any constitutional violation, *see supra*, Point I(B)(1)-(4). In their motion, just like in the Complaint, Plaintiffs premise their alleged constitutional harms on a misreading of Part 123. Plaintiffs consistently argue that Part 123 imposes a categorical ban on the use of Indigenous names and imagery. *See* Pls.' Mem. at 14, 16, 17. But Part 123 merely restricts the use of Indigenous names and imagery to represent interscholastic sports teams. 8 NYCRR § 123.2;

Frank Decl. ¶ 16. Part 123 does not restrict the display or discussion of Indigenous names, imagery, history, or culture in a classroom setting. *Id*. § 123.2; Frank Decl. ¶¶ 17, 18; *see* Agreement ¶ 1.

Plaintiffs also fail to allege that the restriction on use of Indigenous mascots restricts their own expression. They merely state in conclusory terms that Part 123 "suppresses Plaintiffs' constitutionally protected cultural expression and prevents them from exercising their right to self-representation and expression in public institutions." Pls.' Mem. at 9. Plaintiffs further vaguely assert that Part 123 "stigmatizes Indigenous identity" and "marginalizes the very voices that [it] purports to protect." *Id*. These are not concrete, particularized injuries. They are, instead, imprecise expressions of disapproval of a fictitious version of Part 123. The declarations by individual members of the Association do not demonstrate concrete harms. Eunice Davidson asserts that Part 123 "unfairly targets one culture, one race of people to be erased, extinguished." Davidson Decl. (DE 21-2) ¶ 13. But, again, Part 123 does no such thing. Public school districts in New York State may choose to present Native American culture and history and they may partner with Native American groups to present such programming. Frank Decl. ¶¶ 17, 18; Agreement ¶ 1. The declaration of Frank Black Cloud does not assert any injury, although it appears to be missing a page. *See generally* Black Cloud Decl. (DE 21-3). To the extent Mr. Black Cloud asserts that Part 123 "cancel[s]" Native culture, that assertion, too, is belied by the Agreement that his declaration describes. *See* Agreement ¶ 1. Plaintiff Finkenbinder asserts that Part 123 censors his viewpoint and cancels Native names and logos, Finkenbinder Decl. ¶¶ 6-7, but these are not particularized injuries. Part 123 imposes no restriction on educational programming on Native American culture and history. Frank Decl. ¶¶ 17, 18; Agreement ¶ 1. And Part 123 does not "censor" Mr. Finkenbinder, who is free to express his viewpoint.

Plaintiffs also fail to demonstrate irreparable harm based on the Agreement, which purports to permit the District to continue to use the "Chiefs" name and associated logo. Plaintiffs assert that "Indigenous symbols are unique assets that money damages cannot account for," Pls.' Mem. at 11, but nowhere do Plaintiffs allege, much less demonstrate, that the "Chiefs" name and the logo, which purportedly is an image of Sachem Tackapausha, are assets that belong to them and for which they can contract. The Agreement merely makes the unsupported and implausible assertion that "such symbols are culturally affiliated" with the Association and its members. Agreement at 1. The Association claims no affiliation with Long Island tribes, whose heritage includes Sachem Tackapausha. And the Long Island tribes disclaim any such affiliation. Wallace Decl. ¶¶ 20; Smith Decl. ¶¶ 16-18.

In any event, Plaintiffs fail to show irreparable harm if the provision of the Agreement that violates Part 123 is held to be unenforceable. The Agreement is terminable by either party on thirty days' notice, Agreement ¶ 3, and the Agreement has a severance clause so that even though the provision that violates Part 123 is unenforceable, the remainder of the contract remains in effect (including the District's presentation of educational programs on Native American history and culture) unless either party opts to cancel the Agreement, *id*. ¶ 5. In addition, the Agreement provides that, should the District opt not to continue using the name and logo, Plaintiffs will simply withdraw their purported consent, and will have no cause of action against the school district. *Id*. ¶ 1. Most saliently, the Agreement acknowledges that is up to school districts how to present their educational programming on Native American history and culture, and nothing about Part 123 has any effect on such educational programming. *Id*. Plaintiffs fail to demonstrate that the unenforceability of the parts of the Agreement that violate Part 123 will cause them any harm whatsoever, much less irreparable harm. Plaintiffs' argument that money damages are insufficient,

see Pls.' Mem. at 10-13, is irrelevant because Plaintiffs show no harm of any kind related to the Agreement.

Plaintiffs also ignore that they entered into the Agreement more than two years after Part 123 was adopted. Plaintiffs' decision to enter into a contract containing provisions that violate a valid state law undermines any claim to irreparable harm. Plaintiffs' reliance on *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), is misplaced. *See* Pls.' Mem. at 19. *Domino's Pizza* holds that § 1981 may be applied to an existing or prospective contractual relationship "so long as the plaintiff has or would have rights under the existing or proposed contractual relationship." 546 U.S. at 476. Plaintiffs have no rights under any contractual provision that violates Part 123, an existing, valid State law. *See Hudson Cnty. Water Co.*, 209 U.S. at 357 ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them.").

Moreover, the Association has no affiliation with the recognized Indigenous Nations located on Long Island—the Shinnecock Nation and the Unkechaug Nation. The Shinnecock and the Unkechaug, whose history is rooted on Long Island, and who are the only nations with any cultural ties to Sachem Tackapausha and the only nations who could consent to the use of his image, have never consented to the use by the District of the "Chiefs" name or the logo. Wallace Decl. ¶ 19; Smith Decl. ¶ 15. The local Indigenous Nations explain that Massapequa's logo is not a representation of Sachem Tackapausha. Wallace Decl. ¶¶ 11-14; Smith Decl. ¶¶ 15. Instead, it is a made-up caricature. The headdress depicted in the logo is more typical of that worn by the people of the Plains Indians. Wallace Decl. ¶ 13; Smith Decl. ¶ 15. And the headdress seemingly contains a random number of feathers, which is not historically or culturally accurate because each feather has significance. Wallace Decl. ¶ 17.

Accordingly, Plaintiffs fail to show how they would be harmed under the Agreement by the retirement of the District's sports logo and nickname.

B. Plaintiffs fail to show they are likely to succeed on the merits of any of their claims.

Defendants have shown that Plaintiffs lack standing to assert any of their causes of action and that they fail to state a plausible claim. *See supra*, Point I. Plaintiffs, therefore, necessarily cannot show likelihood of success on the merits. Plaintiffs' repetition of their conclusory allegations, *see* Pls.' Mem. at 13-16, does not remedy their pleading failures.

To minimize repetitiveness, Defendants respectfully refer the Court to Point I, and address herein only arguments or issues that are new or unique to the preliminary injunction motion. As for the First Amendment claims, to the extent Plaintiffs belatedly seek to assert a First Amendment overbreadth claim, *see* Pls.' Mem. at 14, they cannot succeed on that claim because they lack standing to assert it. *See Farrell v. Burke*, 449 F.3d 470, 499 (2d Cir. 2006).

Plaintiffs assert for the first time that Defendants violate the Fifth Amendment Due Process Clause. *See* Pls.' Mem. at 14-15. Plaintiffs cannot succeed on any such claim because they fail to assert such a claim in the Complaint, and any such claim would fail because the Fifth Amendment Due Process Clause does not apply to state officials. *See Maxineau v. City of New York*, No. 11-cv-02657, 2013 WL 3093912, at *5 (E.D.N.Y. June 18, 2013) (holding plaintiff "asserted no cognizable wrong under the Fifth Amendment's due process clause" because "all of his complaints are directed at officials operating with state authority"); *Cassidy v. Scoppetta*, 365 F. Supp. 2d 283, 286 (E.D.N.Y. 2005) ("The Fifth Amendment governs the conduct of the federal government and federal employees, and does not regulate the activities of state officials or state actors." (internal quotation marks omitted)).

With respect to Plaintiffs' equal protection claims (both state and federal) and their 42 U.S.C. § 1981 claim, the public record leading up to the adoption of Part 123 demonstrates the anti-discriminatory purpose of the regulation. *See* Notice of Adoption at 2-3; *Cambridge* Decision at 3-4, 7-8; Haudenosaunee Statement on Mascots, Ex. 5 to Lynch Decl.; Band of Mohican Indians Tribal Council Offices Resolution, Ex. 6 to Lynch Decl.; The Five Civilized Tribes Intertribal Council Mascot Resolution, Ex. 7 to Lynch Decl.; Letter from Woape Foundation to Cambridge Board (Dec. 10, 2020), Ex. 8 to Lynch Decl.; Statement to Cambridge Board by National Congress of American Indians (July 7, 2021), Ex. 9 to Lynch Decl.; National Indian Education Association Resolution 09-05, Ex. 10 to Lynch Decl.; Statement of U.S. Commission on Civil Rights on the Use of Native American Images and Nicknames as Sports Symbols (2001), Ex. 11 to Lynch Decl.;[4] Official Statement on NY Board of Regents Mascot Ban by Shinnecock Nation (Apr. 19, 2023), Ex. 12 to Lynch Decl.

In support of their dormant Commerce Clause claim, Plaintiffs belatedly assert that there is an "active, nationwide market for the licensing and endorsement of Indigenous name, image, and likeness (NIL) rights, particularly in the context of public education . . . ." Pls.' Mem. at 21. However, Plaintiffs provide no support for this assertion. For purposes of Plaintiffs' motion, their unsupported allegations need not be accepted as true. *Sweigert v. Goodman*, No. 118-cv-08653, 2020 WL 8261572, at *4 (S.D.N.Y. Dec. 28, 2020) ("[I]n order to obtain a preliminary injunction, Plaintiff may not merely rely upon his pleading allegations. He must come forth with proof."); *Incantalupo v. Lawrence Union Free Sch. Dist. No. 15*, 652 F. Supp. 2d 314, 317 (E.D.N.Y. 2009),

[4] Exhibits 5 through 11 are part of the certified record in *Cambridge Cent. Sch. Dist. v. New York State Educ. Dep't,* 222 A.D.3d 1068, 1070-71 (3d Dep't 2023), which affirmed the *Cambridge* Decision.

aff'd, 380 F. App'x 59 (2d Cir. 2010) (the plaintiffs' "allegations are not accepted as true for purposes of [their] preliminary injunction motion").

Finally, Plaintiffs cannot succeed on an Indian Commerce Clause, U.S. Const, art, I, § 8, cl. 3, claim, *see* Pls.' Mem. at 19-20, because they plead no such claim in the Complaint, and because any such claim would fail. In examining an Indian Commerce Clause challenge to a state regulation, courts in the Second Circuit consider "the location of the targeted conduct and the citizenship of the participants in that activity." *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs*., 769 F.3d 105, 113 (2d Cir. 2014). Once a state law "reaches across a reservation's borders," courts weigh the interests of the tribe, the federal government, and the State." *Id*. A State's interest becomes stronger "if 'the conduct of non-Indians' is in question." *Id*. (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144(1980)). In addition to the location and the citizenship of those affected by a state law, "a court must still understand 'what' a regulation targets to weigh interests appropriately." *Id*. A tribe's interest peaks when a regulation threatens a venture in which the tribe has invested significant resources." *Id*. "In contrast, a tribe has no legitimate interest in selling an opportunity to evade state law." *Id*. at 114.

In *Otoe-Missouria Tribe*, the Second Circuit affirmed the district court's conclusion that plaintiffs, tribes that operate payday lending sites, failed to show they were likely to succeed on their challenge to New York State's anti-usury laws. 769 F.3d at 112-118. The Second Circuit agreed that the plaintiffs failed to show that the payday loan agreements were on-reservation activity. *Id*. at 116-117.

Here, the Agreement does not involve conduct occurring on tribal lands. Part 123 applies solely to New York State public school districts. *See generally* Part 123. Thus, the location and

citizenships inquiries show that any contract purportedly allowing use of Indigenous names and imagery by a New York State school district would be an off-reservation activity.

An examination of competing interests also eliminates any possibility that Part 123 violates the Indian Commerce Clause. Plaintiffs make only a conclusory argument that Indigenous names and imagery are "inherently commercial and cultural interests." Pls.' Mem. at 20. Plaintiffs do not contend that any Indigenous nation has "invested significant resources" in developing agreements with school districts for use of Indigenous names and imagery. To the contrary, the majority of Tribes and others representing tribal interests have stated that the use of such names and imagery would be harmful to their interests. *See, e.g.*, *Cambridge* Decision at 3-4, 7-8; Exs. 5-10, 12; Wallace Decl. ¶¶ 18, 21-27; Smith Decl. ¶¶ 11, 13-15.

Plaintiffs say nothing about the State interest in providing a safe and discrimination-free environment for all school children, or the interest in protecting both Indigenous and non-Indigenous students from the harms of Indigenous mascots. *See* Notice of Adoption at 2-3. These interests are no less strong than the State's interest in reducing exploitative payday loans at issue in *Otoe-Missouria Tribe*, which the court described as a "paradigmatic example of governmental action taken in the public interest." 769 F.3d at 110 (internal quotation marks omitted).

Plaintiffs fail to show likelihood of success on the merits of any of their claims.

C. Plaintiffs fail to show that the equities weigh in their favor.

Plaintiffs, a South Dakota-based not-for-profit organization and a single New York State resident who do not have standing to assert their claims, are not entitled to a preliminary injunction for the additional, independent reason that they fail to show that the equities weigh in their favor.

First, Plaintiffs fail to show that they "raise serious questions on the merits." Pls.' Mem. at 22. As an initial matter, the "serious questions" standard does not apply in this matter, which

involves "government action taken in the public interest pursuant to a statutory or regulatory scheme." *See Pankos Diner Corp.*, 321 F. Supp. 2d at 523. But if that standard did apply, Plaintiffs fail to satisfy it. Plaintiffs cite to the purported finding by the U.S. Department of Education's Office of Civil Rights ("OCR") that Part 123 violates Title VI, and the referral by OCR to the U.S. Department of Justice ("DOJ"). Pls.' Mem. at 23. But the OCR's finding does not raise serious questions on the merits. First, that finding has no binding effect on this matter. *See Pearl River Union Free School Dist. v. Duncan*, 56 F. Supp. 3d 339, 366-82 (S.D.N.Y. 2014) (holding that OCR findings letters are not final agency actions and noting that agency findings may not even be admissible at trial because they "vary greatly in quality and factual detail"). Second, the OCR expressly acknowledged the anti-discriminatory purpose of Part 123: "The Board [of Regents] intended this prohibition to help create a safe and supportive learning environment for all students and eliminate direct negative effects on Native Americans or the reinforced stereotyping and prejudice among non-Native persons." Letter from Randolph Wills, Deputy Assistant Secretary for Enforcement, to Lester Young, Jr. and Dr. Betty A. Rosa (May 30, 2025), Ex. 13 to Lynch Decl. Finally, OCR's referral to the DOJ belies any claim to serious questions on the merits because the DOJ has taken no action in the three months that have passed since the matter was referred to it.

In arguing that the balance of the hardships tips in their favor, Plaintiffs again misrepresent Part 123. *See* Pls.' Mem. at 22. Part 123 does not "eliminate the imagery and symbols of one specific racial and national origin group." *Id*. It also a distortion of Part 123 to contend that it restricts contracting authority. Part 123 merely carved out an exception so as not to interfere with any already-existing agreements allowing the use of names and imagery associated with a

particular tribe. 8 NYCRR § 124.3(b). Where a party knowingly contracts in violation of an existing, valid state law and the state's public policy, the party cannot claim hardship.

Plaintiffs, as part of their continual misrepresentation of Part 123, assert that Part 123, if not enjoined, "would mandate the wholesale removal of Native American names, imagery, and logos from public educational institutions." Pls.' Mem. at 24. Plaintiffs know this is not true. Public school districts in the State are free to present educational programming on Native American history and culture. 8 NYCRR § 123.2; Agreement ¶ 1; Frank Decl. ¶¶ 17, 18. There is no "statewide erasure of Indigenous culture, history, and pride." Pls.' Mem. at 24. Plaintiffs' motion is based upon a fiction.

Moreover, the balance of hardships has already been held to favor Defendants. The *Massapequa* Court held that "the balance of hardships tips decidedly in Defendants' favor" because the plaintiffs' claimed injuries did "not outweigh the public interest in furthering a discrimination- and harassment-free learning environment in all of New York's public schools." *Massapequa*, 2025 WL 929710, at * 35. Here, Plaintiffs' asserted injuries—which are asserted against a fictitious version of Part 123—weigh even lighter against the State's interest.

It is notable that Albany Supreme Court, the only State court to thoroughly examine the use of Indigenous names and imagery by school sports teams, held that the Commissioner was correct in determining that the Cambridge school district's use of the "Indians" name and logo was an abuse of discretion in light of SED's longstanding policy that such images undermine the State's interest in providing a safe and supportive learning environment for public school children. *Cambridge* Decision at 3-4, 7-8. In affirming the *Cambridge* Decision, the Appellate Division ruled that Cambridge's claim that it had the right to retain the Indians name and logo was "no longer tenable" after the adoption of Part 123. *Cambridge Cent. Sch. Dist. v. New York State Educ.*

Dep't, 222 A.D.3d 1068, 1070-71 (3d Dep't 2023). It is also notable that Indigenous nations have overwhelmingly opposed the use of Indigenous imagery as mascots, and the two recognized Nations on Long Island have expressly supported Part 123. *See* Ex. 5-10, 12; Wallace Decl. ¶¶ 21-27; Smith Decl. ¶¶ 11-15.

Critically, the results of Part 123 thus far tip the balance even further in favor of Defendants. Public school students reported feeling fear, anxiety, shame, and worthlessness when competing against teams that used Indigenous mascots, but Indigenous students have reported that since Part 123 took effect, the negative treatment they previously experienced has not occurred. Frank Decl. ¶ 21.

The State interest in providing a safe and discrimination-free learning environment for all public school students far outweighs Plaintiffs' interest in seeing the District use Plaintiffs' preferred team name and logo.

CONCLUSION

Defendants respectfully request that the Court grant their motion and dismiss, in their entirety and with prejudice, all claims asserted in the Complaint, and deny Plaintiffs' motion for a preliminary injunction, in its entirety and with prejudice, and grant such other and further relief that the Court deems just and equitable.

Dated: Mineola, New York
August 21, 2025

LETITIA JAMES
Attorney General of the State of New York
Attorney for Defendants
By: /s/ Helena Lynch
Helena Lynch, Assistant Attorney General
200 Old Country Road, Ste. 240 Mineola, New York 11501
(516) 248-3312 | Helena.Lynch@ag.ny.gov

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned, an attorney duly admitted to practice before this Court, hereby certifies that the foregoing Memorandum of Law in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Memorandum of Law") complies with Rule 7.1(c) of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, which acknowledges that a court may grant leave for an enlargement of the 8,750 word-count limit set forth therein. By Docket Order dated August 19, 2025, the Court granted leave for an enlargement, of up to 12,000 words, of the word-count limit for the foregoing Memorandum of Law. The Memorandum of Law contains 11,966 words, as counted by the word processing system used to prepare it. This word count excludes the caption, tables, signature block, and this Certificate, but includes all headings and footnotes (including the footnote to the caption).

Dated: Mineola, New York
August 21, 2025

Helena Lynch

Helena Lynch
Tel.: (516) 248-3312
Helena.lynch@ag.ny.gov