UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIVE AMERICAN GUARDIAN'S ASSOCIATION, et. al.

Plaintiffs,

v.

NEW YORK STATE BOARD OF REGENTS, et. al.

Defendants.

Case No.: 2:25-cv-03008

PLAINTIFFS' CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs Native American Guardian's Association ("NAGA") and David Finkenbinder (collectively, "Plaintiffs") hereby submit this Consolidated Memorandum as (i) an Opposition to the Rule 12(b)(6) Motion to Dismiss of Defendant NEW YORK STATE BOARD OF REGENTS, individually and collectively (hereinafter "Defendants") (DE 23-1) and (ii) a Reply in Support of its Motion for Preliminary Injunction.

PRELIMINARY STATEMENT

For centuries, Native Americans have endured disrespect at the hands of public officials, who ignore native voices while passing laws ostensibly designed to "protect" the Native tribes. In earlier centuries, these "progressive" laws sought to ban native languages while forcing Native children to attend boarding schools and become "assimilated." In later years, those very same Puritan ideals seek to ban Native names, images and likenesses from use by scholastic or professional sports teams – again, in the name of "progress."

Today, in New York State, regulation 8 NYCRR § 123 ("Part 123" or "the Native Name Ban") expressly states (i) "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," Part 123.2; (ii) "prohibit[s] school officers and employees when located on school property or at a school function from utilizing or promoting any Indigenous name, logo, or mascot," Part 123.5.; and (iii) prohibits contracts with Indigenous organizations by limiting recognition to pre-May 3, 2023 agreements with specified in-state New York tribes and by banning "any money, consideration, or thing of value pursuant to any such agreement." Part 123.4(b).

Those provisions directly injure Plaintiffs by (i) suppressing their Native expression and association with New York schools and (ii) nullifying their contracting ability through a race-

based, content-based prohibition that uniquely targets Native names and imagery while allowing all others. These injuries are concrete and redressable by declaratory and injunctive relief.

Banning a broad and undefined pallet of names and images[1] based on their association with America's Native tribes, is not "progress.' It's pure and simple racism. At a minimum, such laws rely **both** on outdated racial stereotypes – Native Americans must be "protected" from their own images – and on a race-based classification, subject to a "strict scrutiny" analysis under the Fourteenth Amendment of the United States Constitution. Without any asserted public policy (other than the obsolete concept of "good discrimination"[2]) and lacking a narrowly tailored approach, the Native Name Ban violates both the Fourteenth and the First Amendments.

Defendants' motion to dismiss should be denied and Plaintiff's Motion for a Preliminary Injunction restraining the Defendants from enforcing Part 123 should be granted.

LEGAL STANDARD

Plaintiffs have standing on the grounds that Part 123: (i) violates the Equal Protection Clause of the Fourteenth Amendment (Compl. (DE 1) ¶¶ 126-129), as well as 42 U.S.C. § 1981 (*id.*) and Article I, § 11 of the New York Constitution (*id.* ¶¶ 128-138); (ii) represents an overbroad ban on public speech in violation of the First Amendment (*id.* ¶¶ 139-150) and Article I, § 8 of the New York Constitution (*id.* ¶¶ 140-150); (iii) is unconstitutionally vague in violation of the Fourteenth Amendment's Due Process clause (*id.* ¶¶ 152-157); (iv) violates Title VI of the Civil Rights Act of

[1] In their pleadings, the Defendants continually (and disingenuously) refer to the Ordinance as a "Mascot Ban," even though they have not identified any such "mascot" affiliated with the School District in this case – or in any other pending case. Indeed, the banning of the name "Chiefs" is a pure and simple **NATIVE NAME BAN, whether** it's applied to the Massapequa School District or the Kansas City football franchise.

[2] *See, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023).

1964 (*id.* ¶¶ 170-174); and (v) violates the dormant Commerce Clause (*id.* ¶¶ 159-168) and Indian Commerce Clause, (*id.* ¶¶ 4, 46).

Legal Standard for Standing

To establish standing, Plaintiffs "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). Plaintiffs must also demonstrate a "causal connection between the injury and the conduct complained of." *Id.* The injury must be "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To satisfy standing at the pleading stage, "'general factual allegations of injury resulting from the defendant's conduct may suffice,' because the Court 'presume[s] that general allegations embrace those specific facts that are necessary to support the claim.'" *Do No Harm v. Pfizer Inc*., 126 F.4th 109, 119 (2d Cir. 2024) (citation omitted).

An organization can 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)).

Also, "an association may have standing to sue as the representative of its members, '[e]ven in the absence of injury to itself.'" *Do No Harm v. Pfizer Inc.*, 126 F.4th 109, 117-118 (citing *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). "To establish associational standing, an association must show: (1) 'its members would otherwise have standing to sue in their own right'; (2) 'the interests it seeks to protect are germane to the organization's purpose'; and (3) 'neither the claim asserted nor the relief requested requires the participation of

individual members in the lawsuit.'"[3] *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).

"A breach of contract has long been recognized as providing a basis for suit in American courts." *Marsh & McLennan Agency LLC v. Williams*, 2025 U.S. Dist. LEXIS 82626, *19-20 (S.D.N.Y. Apr. 30, 2025) (citing *Eletson Holdings*, 731 F. Supp. 3d at 571 ((("For two centuries, courts have recognized that a party who suffers only nominal damages from a material breach may still seek relief in court against the breaching party." (citing *Marzetti v. Williams*, 109 Eng. Rep. 842, 846 (K.B. 1830))).

Legal Standard for Motion to Dismiss

To survive dismissal under Rule 12(b)(6), a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[A]ll allegations contained in the complaint are assumed to be true," except for legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO ASSERT ALL NINE CAUSES OF ACTION.

A. Direct Contractual Harm Establishes Standing for All Plaintiffs

Plaintiffs have suffered direct and concrete injury because Part 123 *de facto* nullified the Agreement ("MSD-NAGA Agreement") between the Massapequa School District ("Massapequa"

[3] Defendants make the false representation that "associational standing is not available for claims asserted under 42 U.S.C. § 1983." Def. Mot. at 6 (citing *Nat'l Rifle Assoc. of Am. v. Hochul*, No. 20-3187, 2021 WL 5313713, at *2 (2d Cir. 2021)). However, *Nat'l Rifle Association* stands for no such proposition. Rather, the Second Circuit merely stated "that 'organizations suing under Section 1983 must, without relying on their members' injuries, assert that their own injuries are sufficient to satisfy Article III's standing requirements.'" *NRA of Am. v. Hochul*, 2021 U.S. App. LEXIS 33909, *3-4 (citing *N.Y. State Citizens' Coal. for Child. v. Poole*, 922 F.3d 69, 74-75 (2d Cir. 2019) (citing *Aguayo v. Richardson*, 473 F.2d 1090, 1099-1100 (2d Cir. 1973))).

or the "District") and the Plaintiff Native American Guardian's Association. Compl. ¶ 13. The Agreement, valid and supported by consideration, required the District's continued use of Native name, imagery and likeness ("NIL") in connection with its educational and athletic programming, e.g. continuing the traditions of "the Massapequa Chiefs." Compl. ¶¶ 14-16. Thus it falls within NAGA's core 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." Compl. ¶ 7. Per its allegations, NAGA "is committed to advancing cultural integrity, community service, and the protection of Native American heritage and identity in public life." Compl. ¶ 11.

By its plain language, Part 123 renders the MSD-NAGA Agreement unenforceable, which constitutes a paradigmatic Article III injury. *Fleisher v. Phoenix Life Ins. Co.*, No. 11 Civ. 8405 (CM), 2013 U.S. Dist. LEXIS 99959, 2013 WL 12224042, at *7 (S.D.N.Y. July 12, 2013) ("Invading a legally protected interest by breaching the terms of a contract is an injury-in-fact for purposes of standing." (citing *Lujan*, 504 U.S. at 560)); *Eletson Holdings, Inc. v. Levona Holdings Ltd.*, No. 23 Civ. 7331 (LJL), 731 F. Supp. 3d 531, 569 (S.D.N.Y. 2024) (holding that the invasion of a contractual right constitutes a concrete injury sufficient for standing, even absent pecuniary loss); *Marsh & McLennan Agency LLC v. Williams*, 2025 U.S. Dist. LEXIS 82626, *18-19 (S.D.N.Y. Apr. 30, 2025) ((stating "several courts have followed this approach, holding that a bare breach of contract—one without an attendant monetary injury—is sufficient to confer Article III standing upon the party asserting the breach.") (citations omitted).

Plaintiffs' loss of contractual rights is plainly traceable to Defendants' promulgation and enforcement of Part 123, and redressable by the injunctive and declaratory relief sought.

NAGA also has standing as an organization for a second reason: Part 123 renders NAGA unable to advance its core mission in New York State, which is the preservation and recognition of Native American imagery and history ("the interests [NAGA] seeks to protect in this case—the preservation of Native American images and identity—are germane to its mission and organizational purpose," which is "to promote the respectful use of Native American names and imagery in public discourse" nationwide. Compl. ¶¶ 7,9.

NAGA enters into agreements, such as the MSD-NAGA Agreement, with schools to secure the ongoing (and positive) use of Native American names, imagery, and logos. Compl. ¶¶ 7-12. Part 123 eliminates NAGA's ability to engage in such agreements with any public school district in New York State. *See* Part 123.4(b). That is a redressable injury.

Mr. Finkenbinder, a NAGA Board Member and thus a party to the contract, suffers the same harm due to Part 123's invalidation of the Agreement. Compl. ¶ 9 (stating that Mr. Finkenbinder is a NAGA Board Member); Compl. ¶¶ 13-16 (acknowledging that NAGA Board is a party to the MSD-NAGA Agreement); Compl., Exh. A. ("This AGREEMENT by and between the BOARD OF EDUCATION . . . the NATIVE AMERICAN GUARDIAN'S ASSOCIATION . . . and the BOARD OF DIRECTORS of NAGA.").

B. **NAGA Has Associational Standing to Bring Claims for its Members.**

NAGA's members include enrolled tribal citizens, descendants, and Native community leaders. Compl. ¶¶ 8-12. Plaintiff Finkenbinder—an enrolled member of the Crow Creek Sioux Tribe living in New York —is individually excluded from forums of expression and targeted by a regulation that *prohibits* recognition of his Native identity in public schools *that he subsidizes as a taxpayer*. Compl. ¶¶ 18-19. These injuries are concrete and particularized, satisfying Article III. The presence of Mr. Finkenbinder alone suffices to establish member standing, notwithstanding

all other Native residents who are impacted by the Native Name Ban. *Do No Harm v. Pfizer Inc.*, 126 F.4th 109, 117-118.

C. **Individual Harm Establishes Standing for Mr. Finkenbinder**

As a statewide law, Part 123 also excludes Mr. Finkenbinder, as an individual, from school-sponsored events by forbidding the display of Native names, logos, or imagery, except as approved classroom discussion topics. *See* Part 123. This prohibition constitutes a concrete exclusion from cultural activities, based on specific, state-imposed restrictions that bar his Native expression by banning his cultural regalia, or even wearing a "Chiefs" or "Black Hawks" jersey, on public school property, while allowing another person to wear a pirate costume, a kimono, or any cultural wear– as long as it's not Native-based.

Mr. Finkenbinder also has standing as a New York State taxpayer. In his affidavit, plaintiff Mr. Finkenbinder, a citizen of New York, expressed his objection to Part 123 that "[it] only targets Native Names and Images but leaves alone nicknames and logos like Patriots, Yankees, Vikings." He asserted, "I have a right to see my history and culture celebrated just like any of these other groups." Exhibit A The doctrine recognizes "a remedy for taxpayers to challenge important governmental actions …when the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action." *Airey v. State of New York*, 230 N.Y.S.3d 531, 543 (2025) (citing *Matter of Colella v Bd. of Assessors of County of Nassau*, 95 NY2d 401, 410, 741 N.E.2d 113, 718 N.Y.S.2d 268 [2000]). Without such standing, Part 123's racist policy would be "insulated from judicial review,"[4] since school districts and board members have already been denied standing in the *Massapequa* matter. *Airey*, 230 N.Y.S.3d at 543–44.

[4] Moreover, "[b]ecause the NYSED will not provide any funding to support its mandate, school districts are also forced to redistribute their own educational funds to finance this unfunded

As a Native American tribal member and New York taxpayer, Mr. Finkenbinder "falls within the 'zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted." *Colella v. Board of Assessors*, 95 N.Y.2d 401, 409-410 (2000) (citing *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773; *Rudder v Pataki*, 93 NY2d 273, 280; *Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587). He has adequately alleged "'proof of special harm different in kind and degree from the community in general'." *New York State Assn. of Small City School Dists., Inc. v. State of New York*, 42 A.D.3d 648, 651 (2007). Part 123 uniquely injures him as a Native American in ways not shared by the general public.

D. Defendants' Standing Arguments Are Legally and Factually Baseless

First, Defendants rely on *Marez v. Redhorse*, No. 1:21-cv-02941 (D. Colo. May 5, 2022), an unpublished opinion, which involved a challenge to a Colorado statute in which plaintiffs alleged only a general "desire to use Native American imagery at schools." *Id.* The court found no concrete injury because the plaintiffs had no contractual rights, no agreements with school districts, and no Title VI finding supporting their claims.[5] Here, Plaintiffs allege direct and particularized harms: (1) the Massapequa–NAGA Agreement, a negotiated contract, was nullified by Part 123; (2) Plaintiffs are expressly barred from entering into similar agreements by Part 123; and (3) the U.S. Department of Education's OCR has already found that Part 123 violates Title VI.

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mandate of banning Native imagery." Compl. ¶ 96. This allegation links his taxpayer status to the unlawful redirection of public funds.

[5] Notably, the *Marez* opinion, which was not appealed, occurred before the U.S. Supreme Court sounded the death knell of "good discrimination" in the *Fair Admissions* case. *See supra*. Such "progressive" laws will not survive Supreme Court review based on that standard recently articulated.

Second, Defendants' misleadingly assert that "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." Def. Mot. at 7. That theory, if accepted, would permit any state to evade judicial review simply by phrasing its regulations as restrictions on "school districts" rather than on individuals. In other words, a state could bar "school districts" from admitting students of a particular race and no excluded individual could raise a challenge. That is not, and never has been, the law. Here, Part 123 singles out Native Americans for a race-based "Native Name Ban," nullifies the MSD-NAGA Agreement, and excludes Plaintiffs and others from recognition. Those are injuries-in-fact that confer standing.

Third, Defendants' statement that the regulation only applies to "interscholastic sports teams" ignores the regulation's own text, Defs.' Mot. at 7, which states: "**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**." Part 123.2. There is no limitation to "interscholastic sports teams" and those words appear nowhere in its prohibition section. *Id.* In other words, a School may not permit *any display* of Native imagery on its premises, except for classroom instruction. That is classic overbreadth.

Fourth, Defendants contend that "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." Def. Mot. at 8. As detailed in Vice-President Frank Black Cloud's affidavit, NAGA's mission is "is to teach American school children about Native history and traditions, because they build respect in both Native culture and the overall history of the United States of America, which represents a synthesis of many different culture." "The agreement was entered with the express purpose of keeping Native image alive and not letting

it be canceled." Exhibit B. Part 123 nullifies the MSD–NAGA Agreement (expressly designed to promote education about Native American history (Compl. ¶¶ 13-17, Exh. 5)), bars Plaintiffs from entering into similar agreements (Compl. ¶¶ 163-167), and stigmatizes Native expression in school settings. Compl. ¶¶ 130-132.

Fifth, Defendants claim that Plaintiffs' theory of harm rests on "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." Def. Mot. at 8. Plaintiffs do not allege this, nor is it relevant to the standing inquiry. Plaintiffs need only show Part 123 inflicts a concrete and particularized injury, which it does: by banning words and images based on Native association. Defendants' theory of "acts of racial discrimination are OK if they are limited to sports" has no constitutional basis.

Sixth, Defendants incorrectly (and irrelevantly) argue that there is no injury because "the District conducts educational programming and instruction concerning Native American history and culture," and therefore any discontinuation of such programming would be the District's choice, not due to Part 123. Def. Mot. at 9. But this misrepresents the actual terms of the Agreement and the nature of Plaintiffs' injury. The Agreement makes clear that the interest of NAGA—consistent with its mission—is the continued use of the "Chiefs" name and logo by the District. Compl. ¶ 13-16. Exh. 5. That provision was not incidental; it was the essence of the bargain. Part 123, by its plain terms, prohibits that use. Part 123.2. Thus, the injury here is not speculative, nor tied to discretionary choices by the District.

Seventh, Defendants wrongly assert that the Agreement is not legally cognizable because NAGA does not "own" the image or likeness of Sachem Tackapausha. Def. Mot. at 10. The Agreement does not purport to transfer trademarked intellectual property rights; rather, it secures

NAGA's express authorization and continuing participation in the District's use of the "Chiefs" name and logo. The essence of the bargain—and the benefit conferred on NAGA—is the District's continued use of Native symbols in partnership with NAGA. There is no requirement that a Native organization hold intellectual property rights to contract on matters of cultural representation. Defendants simply invented this standard.[6]

Eighth, Defendants' argument that Plaintiffs "lack standing to assert any First Amendment claim" because this is merely a "pre-enforcement" challenge misstates both the facts and the law. Def. Mot. at 11. Part 123 has *already* been used to suppress expressive speech. Multiple New York school districts, including Connetquot School District and Wyandanch School District, have already eliminated Native symbols under threat of sanctions from the State. Plaintiffs are not speculating about hypothetical future enforcement; that is already happening.

Ninth, Defendants erroneously claim that Plaintiffs cannot raise a First Amendment claim because Part 123 "does not apply to [Plaintiffs]." Def. Mot. at 11. Under that theory, the State can suppress public speech, leaving a group without a voice – and that group has no right of redress. The First Amendment is not so easily ignored. By its plain terms, Part 123 prohibits school districts from using Native names and imagery or entering into agreements with Indigenous organizations to promote positive images. Part 123.4(b). That is a State-sponsored ban on expressive speech, which violates the First Amendment. *Cruz v. FEC*, 542 F. Supp. 3d 1, 9 (2021)("Even indirect regulations of speech may run afoul of the First Amendment, because they can 'abridg[e] the freedom of speech.'"); *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222

[6] The Defendants' reliance on *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147, 1166 (D.N. Mexico 2013), is thus misplaced because Plaintiffs here do not allege trademark ownership.

(1967) ("The First Amendment would ... be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints.").

Tenth, Defendants' claim that Plaintiffs lack standing to raise a due process-based vagueness challenge because "Part 123 does not apply to Plaintiffs" also fails. Defs.' Mot. at 11-12. Part 123 has already been enforced—voiding the MSD–NAGA Agreement and compelling districts like Connetquot to eliminate Native symbols. Undefined terms like "Indigenous imagery" (Compl. ¶¶ 50-51, 153-155) beg for clarification. (Does this implicate images of Buffaloes? Wild Horses? Hatchets?). Plaintiffs are of Native American descent; they have every right to protest this extraordinary, yet abstract, effort to ban images related to their heritage.

Eleventh, Defendants' argument that Plaintiffs lack standing under Title VI misstates both the statute and the Complaint. Def. Mot. at 12. Public school districts indisputably receive federal funds, and Part 123 governs the programs and activities they operate. Part 123 expressly and uniquely excludes Native peoples from representation in those programs. Every other racial or ethnic group remains free to be depicted in school names and imagery; only Native names and imagery are categorically prohibited. That exclusion – falsely titled a "mascot ban" -- is precisely the kind of race-based discrimination Title VI forbids.

II. PLAINTIFFS HAVE PLAUSIBLY STATED A CLAIM UNDER EACH CAUSE OF ACTION

A. Plaintiffs Have Plausibly Stated Claims Under the Equal Protection Clause, 42 U.S.C. § 1981, and Article I, § 11 of the New York Constitution.

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

a. Plaintiffs' Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution Claim

The "'core purpose' of the Equal Protection Clause [is] 'do[ing] away with all governmentally imposed discrimination based on race.'" *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 206 (citing *Palmore* v. *Sidoti*, 466 U. S. 429, 432 (1984); *Loving*, 388 U. S., at 10; *see also Washington* v. *Davis*, 426 U. S. 229, 239 (1976). In that respect, the Equal Protection Clause "demands that racial classifications . . . be subjected to the 'most rigid scrutiny.'" *Fisher v. Univ. of Tex.*, 570 U.S. 297, 310 (2013) (citing *Loving* v. *Virginia*, 388 U.S. 1 (1967)).

As recently stated by the United States Supreme Court, "[a]ny exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as 'strict scrutiny.'" *Students for Fair Admissions*, 600 U.S. at 206-207 (citing *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 227 (1995)). The court first analyzes "whether the racial classification is used to 'further compelling governmental interests.'" *Id.* (citing *Grutter v. Bollinger*, 539 U. S. 306, 326 (2003)). And second, the court inquires "whether the government's use of race is 'narrowly tailored'—meaning 'necessary'—to achieve that interest." *Id.* (citing *Fisher v. University of Tex. at Austin*, 570 U. S. 297, 311-312 (2013) (Fisher I)). Indeed, "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of

the statute." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (citing *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 272 (1979)).

On its face, Part 123 is a racial classification subject to the "most rigid scrutiny." By its plain text, Part 123 intentionally discriminates against Native people by prohibiting only Native names, logos, and imagery, while permitting identical expression, symbolism, and cultural references by non-Indigenous groups. *See* Part 123.2; Compl. ¶¶ 1, 3, 10-11, 38-39, 42, 46, 88, 121, 130. Part 123 also categorically bans NIL contracts between school districts and Indigenous groups, while permitting such agreements with all other racial or ethnic group. Part 123.4; Compl. ¶¶ 17, 92. "Compared with others similarly situated," *Higgins v. United States,* No. 02 CV 499 (ARR),, 92 A.F.T.R.2d (RIA) 2003-5108 at 3 (E.D.N.Y. May 27, 2003). Plaintiffs are clearly "selectively treated" by Part 123 based on race. *Id.*

Although Plaintiffs need not do so—because Part 123 is already subject to strict scrutiny as a facial classification—they have further shown that "the discrimination was intentional" because "Part 123, by its design and implementation, targets Native-associated expression and enforces a blanket prohibition that extends to names, traditions, and imagery that may reflect pride, history, and tribal affiliation." Compl. ¶ 39; 130, 132, 149, 166. In that respect, Part 123's history makes clear, dating back to Commissioner Mills' April 2001 memorandum, Native American names, symbols, and "mascots" [sic] were being singled out as the intentional target of this discrimination. Compl. ¶¶ 98, 101.

Defendants' contention that Part 123 "does not apply to [Plaintiffs]", Def. Mot. at 13—again—misconstrues the nature of Plaintiffs' injury. States cannot evade constitutional review by stating that race-based prohibitions apply to "schools" only. By singling out Native expression, Part 123 deprives Plaintiffs of equal protection under the U.S. Constitution, notwithstanding the

paternalistic justifications put forward. Indeed, Defendants concede that Part 123 "prevents the ***appropriation*** of such names, symbols and imagery for use as mascots [sic] to represent interscholastic sports teams." Def. Mot. at 13 (emphasis added).

But Part 123 does define or use "appropriation" which is an academic term without legal meaning; instead, it ***prohibits*** the "use" and "display" of Native names and imagery in schools, i.e. the Native Name Ban.. By not quoting the text of their own ordinance, Defendants attempt to minimize the breadth of the prohibition by reframing it as a "mascot" prohibition. Meanwhile, despite the Native Name Ban, schools remain free to adopt other ethnic or group names or historic images such as Padres, Saxons, Mountaineers, Yankees, or Patriots, and then use them in tandem with school events and activities. Compl. ¶ 171.

That is racial discrimination on its face.

b. Strict Scrutiny Applies to Plaintiffs' Equal Protection Claim

Because Part 123 enacts an express racial classification, it "must survive a daunting two-step examination known in our cases as 'strict scrutiny.'" *Students for Fair Admissions*, 600 U.S. at 206-207 (citing *Adarand Constructors*, 515 U. S. at 227). It does not.

First, Defendants' express racial classification does not "'further compelling governmental interests.'" *Id.* (citing *Grutter v. Bollinger*, 539 U. S. 306, 326 (2003)). Defendants invoke general interests in "providing a safe and supportive learning environment" and preventing stereotyping. Def. Mot. at 2-3. The proffered state interest—protecting children from cultural insensitivity, Def. Mot. at 2-3—is the classic "good discrimination" objective, which has been wholly rejected by Supreme Court authority. *See Parents Involved in Community Schools v. Seattle School District,* 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.")

Defendants cite "numerous research studies," Def. Mot. at 14, but those studies ignore far more comprehensive studies showing that Natives have little or no issue with Native names and symbols being used by American sports teams[7] -- are neither tied to the actual practices of the New York school districts nor demonstrate that a *wholesale ban* in Indigenous names or imagery is helpful. In contrast, NAGA founder Eunice Davidson, an enrolled member of the Sioux nation, gives cogent testimony that paternalistic regulations are far more offensive to Native Americans. Regardless, Plaintiffs' MSD-NAGA Agreement expressly incorporates educational programming around Native American history and culture, advancing the State's alleged goals.

Second, Defendants' use of race is not "narrowly tailored." *Id.* (citing *Fisher I*, 570 U. S. at 311-312). Part 123's across-the-board prohibition on *all* Indigenous expression and contracting is fatally overbroad. Less restrictive alternatives exist, including district-by-district review for negative portrayals or derisive uses. The blunt instrument of a Native Name Ban is, by definition, a violation of the "narrowly tailored" requirement.

Defendants' admission that "[t]he adoption of Part 123 effectively codifies" the *Cambridge* Decision underscores the false premise behind the Native Name Ban. Def. Mot. at 3. That case did not impose a statewide ban on Native American imagery, names, and symbols; rather, it prevented a school board from arbitrarily changing its logo back to an "Indian." The *Cambridge* Decision never held that "public schools are prohibited from utilizing Indigenous mascots [sic]." Defs.' Mot. at 3. Indeed, such a decision would violate the First and Fourteen Amendments. *See infra*. Rather the decision simply reflects the ability of a community to make its own decision on these matters; not be ruled by state fiat.

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[7] Public opinion polls, such as those conducted by the Annenberg Public Policy Center and Harris Poll, have shown that 80%–90% of American Indians supported the continued use of Native names and imagery. Exhibit C.

Faced with the overbreadth issues, Defendants' claims that Part 123 only "prohibits the use of Indigenous names and images by public school districts to represent their ***sports teams***." Defs.' Mot. at 14 (emphasis added). Actually, the regulation applies to school hallways, fields, gymnasiums, walls, and beyond. Defendants' misrepresentation is rebutted by Part 123's text and the NYSED's official background guidance on the regulation.[8]

Finally, Defendants' position rests on a premise the Supreme Court repeatedly disavows: that members of a racial group "think alike" and in this case uniformly oppose (and must be protected from exposure to) Native names, imagery, and logos. That is racial stereotyping, not constitutional tailoring. *Students for Fair Admissions*, 600 U.S. at 220 (citing *Schuette* v. *BAMN*, 572 U. S. 291, 308 (2014) (plurality opinion) ("In cautioning against 'impermissible racial stereotypes,' this Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike . . . .'" (quoting *Shaw* v. *Reno*, 509 U. S. 630, 647 (1993)))).

c. Plaintiffs' Claim Under Article I, § 11 of the New York Constitution

Article I, § 11 provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." N.Y. Const. art. I, § 11. New York courts analyze Article I, § 11 equal-protection claims coextensively with the

[8] "the ***center section of the field*** containing the prohibited team, logo, or imagery could be replaced," "[s]mall sections of ***terrazzo tile***s can be removed and replaced rather than entire ***floors***, and images can be painted over rather than replacing ***walls***," and "Building Aid is available for this work." *NYSED Part 123 FAQ* (May 2023), https://www.nysed.gov/sites/default/files/programs/indigenous-education/indigenous-mascot-regulation-background-and-faq.pdf, at p.6.

federal Equal Protection Clause. *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 53 (2d Cir. 2007). Thus Part 123 violates Article I, § 11 for the same reasons stated infra.

2. Plaintiffs' Claim Under 42 U.S.C. § 1981- Right to Contract

"To state a [Section] 1981 claim, 'a plaintiff must allege facts in support of the following elements: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., make and enforce contracts, sue and be sued, give evidence, etc.).'" *Alameda v. Ass'n of Soc. Work Bds.*, 2024 U.S. Dist. LEXIS 175886, *13-14 (citing *Ahmad v. S.R.*, No. 18-CV-3416, 2018 U.S. Dist. LEXIS 248881, 2018 WL 11472415, at *3 (S.D.N.Y. July 16, 2018) (quoting *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993)).

Plaintiffs satisfy all these elements. First, Plaintiffs plead they are racial minorities: American Indians. Compl. ¶¶ 8, 10-12, 18-19. Second, Plaintiffs plead that Defendants discriminate through Part 123 by (i) prohibiting Native cultural expression and (ii) eliminating Plaintiffs' right to contract *solely due to Plaintiffs' race*. Compl. ¶ 17. And third, Plaintiffs plead that the discrimination involves the right to make and enforce contracts. Compl. ¶ 17.

Plaintiffs have also pled "purposeful discrimination" because "but-for" Plaintiffs' race and ethnicity as Native Americans, they could contract with public school districts in New York for NIL depictions. *See* Part 123.4; Compl. ¶¶ 17, 92; *Comcast Corp. v. Nat'l Assoc. of African American-Owned Media*, 589 U.S. 327, 333, 140 S. Ct. 1009, 206 L. Ed. 2d 356 (2020) ("[Section] 1981 follows the general rule. [A] plaintiff bears the burden of showing that race was a but-for cause of its injury[, a]nd . . . the burden itself remains constant."). Plaintiffs allege purposeful discrimination as Part 123's "design and implementation, targets Native-associated

expression and enforces a blanket prohibition that extends to names, traditions, and imagery that may reflect pride, history, and tribal affiliation." Compl. ¶ 39; *see also* 130, 132, 149, 166.

No such restriction would apply had the MSD-NAGA Agreement been with a non-Indigenous party. This is a clear violation of Section 1981. The Supreme Court has stated:

> Such a contractual relationship need not already exist, because § 1981 protects the would-be contractor along with those who already have made contracts. We made this clear in *Runyon* v. *McCrary,* 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976), which subjected defendants to liability under § 1981 when, for racially motivated reasons, they prevented individuals who "*sought to enter* into contractual relationships" from doing so, ... We have never retreated from what should be obvious from reading the text of the statute: Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship.
>
> *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006) (emphasis added).

Part 123 violates this principle because it (1) prevents the formation of new contracts between NAGA and school districts, and (2) nullifies or impairs existing contractual relationships by outlawing consideration. *See Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir. 2004) ("To form a valid contract under New York law, there must be an offer, acceptance, consideration, mutual assent and intent to be bound." (quotation marks omitted)). In effect, no contractual agreement involving Indigenous groups may survive under this Part 123 regime**.** Ironically, Defendants' argument that the MSD–NAGA Agreement is an "illegal contract" constitutes an admission that ***Part 123 bars the Agreement***.[9] Def. Mot. at 16.

[9] Notably when the MSD-NAGA Agreement was executed—on May 15, 2025—there was no prohibition on contracts between Native Americans and the District, as Part 123 did not go into effect until June 30, 2025. Compl. ¶ 52. The contract was valid at formation and only invalidated by Part 123. *See* Compl. ¶¶ 13-17; Exh. A.

Defendants' reliance on *Spirit Lake Tribe v. Nat'l Collegiate Athletic Ass'n,* 715 F.3d 1089 (8th Cir. 2013), which upheld a policy adopted by a **private association**—the National Collegiate Athletic Association. **In other words, there was no state action**. The Eighth Circuit found no discriminatory intent because the private actor policy relied on tribal approval for the use of Native imagery (again, this "good discrimination" decision, which was not appealed, was pre-*Fair Admissions*). By contrast, the State of New York enacted a binding state regulation that requires school districts to follow the Native Ban. Part 123.4(b). Further, *Spirit Lake* did not involve a valid contract, making it inapposite here. Def. Mot. at 17 n.3.

Plaintiffs have plausibly alleged a Section 1981 violation.

B. Plaintiffs Have Plausibly Stated Claims That Part 123 Violates Their Rights Under the First Amendment and Article I, § 8 of the New York Constitution.

By challenging Part 123, a law that literally "bans" names and images because of their expressive character, Plaintiffs state an obvious claim under the First Amendment and Article I, § 8 of the New York Constitution. Def. Mot. at 11 and 18. Part 123 is not viewpoint neutral. It prohibits the use of certain terms and imagery ("Warriors," "Chiefs," "Thunderbirds") based solely on cultural and racial associations - a content-based restriction

Faced with an obviously unconstitutional law, Defenders focus on standing. Def. Mot. at 7. However, Part 123 not only bans certain school logos and images but prohibits agreements between school districts and tribal entities under § 123.4(b). Plaintiffs thus suffer concrete injuries to their rights of speech and association. As such, Part 123 violates protected, non-disruptive expression, a right which also survives on school property. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 89 S.Ct. 733 (1969). This makes the regulation actionable under the First Amendment and New York's constitution.

Defendants' argument that Part 123 is under the "government speech" doctrine as a defense should be rejected. Def. Mot. at 34. The government speech doctrine allows the state to express its own viewpoints without triggering First Amendment concerns only when the expression is clearly attributable to the government – not the actions of individuals. *See Walker v. Texas Div., Sons of Confederate Veteran*s, 576 U.S. 200, 207-08 (2015). Here, § 123.4(b) reaches beyond school-controlled expression and regulates private agreements between school districts and Indigenous groups. It also "bans" expressive speech on a school-wide basis and not just through the names of school teams.

In *Shurtleff v. City of Boston*, 596 U.S. 243 (2022), the Supreme Court rejected the idea that speech occurring in a government-affiliated context automatically becomes "government speech." In that case, the Court emphasized that when a government creates a forum for public expression, it "may not exclude speech based on religious viewpoint; doing so constitutes impermissible viewpoint discrimination." *Id.* at 258 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001)). In this case, the display of Native imagery at a public school, whether for a sports team or a random jersey, does not transform the expression into government speech—and even if it did, the government would still have the requirement to adopt "viewpoint-neutral" restrictions. As *Shurtleff* demonstrates, facilitating speech is not the same as adopting it, and state regulations suppressing speech due to its content or viewpoint—especially on cultural or religious grounds—are subject to strict First Amendment scrutiny.

A State-sponsored ban on Native-related imagery and names—even those used respectfully—is overbroad and suppresses more speech than necessary to achieve the State's interest.

C. Plaintiffs Have Plausibly Stated Claims That Part 123 Violates Their Rights Under the Fourteenth Amendment's Due Process Clause.

Part 123 violates both procedural and substantive due process protections under the Fourteenth Amendment. The regulation is impermissibly vague, resulting in arbitrary enforcement and the unjust denial of public education based on protected cultural expression.

Procedural due process requires that laws be drafted with sufficient clarity so that individuals can understand what is prohibited and that they provide objective standards to guide enforcement, thereby preventing arbitrary or discriminatory application. In *Grayned v. City of Rockford*, the Supreme Court explained: "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned*, 408 U.S. 104, 108 (1972). The regulation at issue here—Part 123—contains no definitions for terms such as "Indigenous name" or "Indigenous imagery." This lack of clarity leaves students, parents, and administrators uncertain about what is prohibited.

Even more troubling, Part 123 delegates enforcement to hundreds of individual school boards across the state, each left to interpret the regulation without clear guidance or uniform standards. This vagueness will create inconsistent application and disparate treatment of similarly situated schools, each driven by the fear of being sanctioned by the State Education Department.

Defendants' reliance on *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), and *United States v. Salerno*, 481 U.S. 739 (1987), is misplaced. Def. Mot. at 19. Plaintiffs do not claim that every application of Part 123 violates due process. Rather, they challenge the regulation's core vagueness, which leads to enforcement patterns that violate protected expression and due process. *See Kolender v. Lawson*, 461 U.S. 352 (1983) (statute stricken for encouraging arbitrary enforcement).

The doctrine of substantive due process also protects individuals from arbitrary and irrational government conduct—particularly when it infringes on fundamental rights. *County of*

Sacramento v. Lewis, 523 U.S. 833, 846–47 (1998); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); *Reno v. Flores*, 507 U.S. 292, 301-302 (1993).

Here, Part 123 penalizes non-complying public schools through forced removal of elected school board members or withholding of state education funding. Under the "unconstitutional conditions" doctrine, the government may not condition the receipt of a public benefit on the forfeiture of a constitutional right. As the Supreme Court held in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), even where no entitlement to a benefit exists, "there are some reasons upon which the government may not rely," and it "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech."

In sum, school districts are forced to accept an unconstitutional law, without any idea of how it will be enforced. That is a violation of substantive due process.

D. Plaintiffs Have Plausibly Stated a Claim That Part 123 Violates the Dormant Commerce Clause.

The Dormant Commerce Clause prohibits states from enacting regulations that discriminate against or unduly burden interstate commerce. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). Plaintiffs allege that Part 123.4(b) violates this principle by restricting NIL agreements to in-state tribes only. Part 123.4(b) reads that Part 123 "shall not apply where a written agreement exists prior to the effective date of this part between a federally recognized tribal nation ***within the State of New York*** or a ***New York State recognized tribal nation*** and a public school " Part 123.4(b). This geographic limitation categorically excludes federally recognized tribes outside New York, even though they are entitled to engage in commercial (NIL) activity across state lines. Compl. ¶¶ 163-168.

This restriction directly injures NAGA, an intertribal organization composed of members from federally recognized tribes across the United States. Compl. ¶¶ 165-166. By barring them

from entering agreements with New York school districts, the State has insulated in-state tribes from out-of-state competition. *Id.* Favoring in-state entities over out-of-state competitors is precisely the type of local preference the Dormant Commerce Clause forbids. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992).

Defendants' assert that no competitive market exists for Indigenous NIL. Def. Mot. at 21. Yet there is a well-established, nationwide market for the licensing and endorsement of Indigenous NIL rights, including some of the most popular sports teams in the world (the Atlanta Braves, the Kansas City Chiefs, the Florida State Seminoles). Schools enter such agreements to honor Native American identifiers, tribes and organizations and receive formal or informal authorization for such uses. In return, they promote cultural awareness of Native American history and culture; this is how the American economy should work.

The MSD–NAGA Agreement itself is proof of the NIL market: it represents a bargained-for contract involving consideration and educational obligations. Compl. ¶¶ 14-16. Part 123.4(b) itself further identifies and supports the existence of such a market by explicitly providing an exception for school districts and tribal nations to contract before Part 123's effective date. This is evidence of a competitive market.

Defendants contend that Part 123 is "demonstrably justified by a valid factor unrelated to economic protectionism," citing its goal of fostering an anti-discriminatory student environment (Regents: "we must ban Native symbols to show we are 'anti-discriminatory'"). Def. Mot. at 22. Even assuming that bizarre theory, Part 123 arbitrarily distinguishes between in-state and out-of-state tribes. If Indigenous names and imagery are inherently harmful, than why should the state of a permitting tribe even matter? Allowing only New York-based or New York-recognized tribes to contract with schools, while barring out-of-state tribes, serves no legitimate local interest. The

burden—categorically stripping all non-New York tribes of their contractual rights—is "clearly excessive in relation to the putative local benefit." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

Plaintiffs have plausibly alleged a Dormant Commerce Clause violation.

E. Plaintiffs Have Plausibly Stated a Claim That Part 123 Violates Title VI.

The relevant text of 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.

Plaintiffs allege that: (i) New York public school districts (and NYSED) receive federal funds, Compl. ¶ 45; (ii) Part 123 governs federally funded educational programs in school districts and in the Massapequa School District, Compl. ¶ 46; and (iii) Part 123 intentionally singles out Native names and imagery for categorical exclusion from these programs. Compl. ¶¶ 172-174. The harm is clearly identified through Part 123, i.e. invalidating the MSD-NAGA Agreement, which expressly provided Plaintiffs the right to participate in the District's federally funded programs in the form of the "Chiefs" name and logo being used by the District and NAGA providing educational programming under the Agreement. Compl. ¶¶ 14-17, Exh. A. Those allegations readily clear the plausibility bar at this stage.

Part 123 violates Title VI in two ways. First, it expressly discriminates on the basis of race and national origin by excluding Native names, imagery, and symbols for prohibition in school programs, while permitting identical uses for all other groups. Compl. ¶¶ 172-174. A school may honor "Pilgrims" or "Fighting Irish" with no restriction, but it may not honor Native heritage. Compl. ¶ 171. This is intentional discrimination on its face. Second, Part 123.4(b) imposes a race-based bar on contracting. It prohibits any new contracts with Indigenous groups and nullifies

consideration in existing agreements unless narrowly tied to certain in-state tribes before the regulation's effective date. Part 123.4(b). The MSD–NAGA Agreement was voided for no reason other than the fact that it involved Indigenous NIL. If Massapequa had entered the identical agreement with a non-Indigenous group, Part 123 would not apply. That discrimination alone establishes a Title VI violation.

Defendants incorrectly assert that the Plaintiffs cannot sue under Title VI because they are not "intended beneficiaries" of a federally-funded program. Def. Mot. at 23. However, the Title VI "intended beneficiary" rule is not limited to schoolchildren. Def. Mot. at 23. Title VI is "designed to prevent recipients of federal grants from administering such grants in a discriminatory fashion," and it gives a private party the right to sue "only if they are either the intended beneficiaries of the federal program or the discrimination that the plaintiffs are suffering will negatively impact upon those intended beneficiaries." *Coalition of Bedford-Stuyvesant Block Asso. v. Cuomo*, 651 F. Supp. 1202, 1208 (1987).

Even accepting Defendants' premise that schoolchildren are the intended beneficiaries (Def. Mot. 23), Plaintiffs still have a private right of action. Plaintiffs allege that Part 123's race-based prohibition on *Plaintiffs'* own Native American names, logos, and imagery in federally-funded programs "will negatively impact" *Indigenous children,* by marking them as "victims" or "not real Americans." Compl. ¶¶ 173-174 ("Part 123 discourages Indigenous students from celebrating or expressing their heritage and sends a message that Indigenous identity is unwelcome in public schools."). NAGA also alleged that it "brings this action on behalf of itself and its members, who include ***Native American students***, parents, educators, and community leaders directly impacted by the enforcement of Part 123 in the State of New York." Compl. ¶ 8. That is sufficient for Plaintiffs to have a private right of action under *Coalition.*

Defendants must concede that Native Americans are the regulation's intended beneficiaries: "[i]n adopting Part 123, NYSED relied on studies that unanimously showed that the use of Native American mascots [sic] imposes either direct negative effects ***on Native Americans.***" Def. Mot. 24 (emphasis added). The text of the regulation provides the best evidence that Native Americans are the intended beneficiaries of the federally-funded programs subject to Part 123. If Native Americans are the intended beneficiaries, Plaintiffs—a Native American individual and NAGA—fall squarely within that category and may sue under Title VI.

In fact, NAGA submitted an OCR complaint to the U.S. Department of Education alleging Title VI violations with respect to Part 123. Compl. ¶¶ 121-124. The Department issued a formal Title VI finding on May 30, 2025, that "OCR determined that the Board has violated Title VI of the Civil Rights Act (1964) by banning the use of Native American … logos by school districts in the state of New York." *U.S. Dep't of Educ., Secretary McMahon Visits Massapequa High School* (May 30, 2025), https://www.ed.gov/about/news/press-release/secretary-mcmahon-visits-massapequa-high-school-announces-finding-school-mascot-probe.

The finding made clear that the intended beneficiaries of the federally-funded programs subject to Part 123 were "Native American tribes." *Id.* Indeed, one of the enforcement actions by the Department included a requirement that the Regents send "letters of apology to Indigenous tribes, acknowledging that the Board violated Title VI by discriminating against Native Americans and, through its implementation of the statewide policy, silenced the voices of Native Americans and attempted to erase Native American history." *Id.*

Thus, Plaintiffs have standing and adequately pled a Title VI claim.

F. Plaintiffs Have Stated a Claim Under the Indian Commerce Clause.

The Supreme Court has long interpreted the Indian Commerce Clause as vesting the federal

government with exclusive and plenary power over tribal affairs and economic relations between Indian tribes and the states. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) ("The Indian Commerce Clause within the U.S. Constitution provides vests the federal government with exclusive authority over relations with Indian tribes."). By restricting the validity of cultural agreements to only those made with federally or state-recognized tribes located in New York—and only if executed prior to May 3, 2023—Part 123 unlawfully impedes the ability of federally recognized tribes and intertribal organizations, including Plaintiffs, to engage in commerce and cooperative agreements with public institutions across state lines. Part 123.4.

Defendants contend that Plaintiffs cannot succeed on an Indian Commerce Clause because "they plead no such claim in the Complaint, and because any such claim would fail." Def. Mot. at 33. However, Plaintiffs pled this claim: "The declaratory judgment action presents a facial and as-applied challenge to the constitutionality of Part 123 . . . for violation of the Commerce Clause under Article I, Section 8 of the United States Constitution (both Dormant and **Indian Commerce Clauses**)." Compl., ¶ 4 (emphasis added). Under Count IV in the Complaint, Plaintiffs also pled: "Article I, Section 8 of the U.S. Constitution grants the exclusive right of the United States Congress to 'regulate Commerce with foreign Nations, and among the several States, and with the **Indian Tribes**.'" Compl., at ¶ 159 (emphasis added). Further, "[t]he last part of this provision, 'the **Indian Commerce Clause**,' has been interpreted to mean that only the Federal government can regulate **Indian tribes** or their economic activities." Compl. ¶ 159 (emphasis added). The Complaint extensively details the discrimination against Native Americans in violation of the Indian Commerce Clause. Compl. ¶¶ 3, 8, 10, 17, 19, 38, 39, 42, 46, 48, 51, 53, 88, 89, 91-92, 130, 132. Thus, the Plaintiffs have satisfied their burden of pleading the elements of a claim under the Indian Commerce Clause.

Specifically, Part 123 violates the Indian Commerce Clause in three distinct ways. First, Part 123 prohibits all post-May 3, 2023 agreements between school districts and tribal nations, regardless of federal recognition or educational purpose. Part 123.4(b). Second, it renders unlawful any agreement that involves "consideration," thereby nullifying basic elements of contract law essential to tribal commerce and cultural licensing arrangements. *Id.* And third, it effectively regulates and restricts tribal commerce and identity—such as NIL—that is deeply intertwined with tribal lands, sovereignty, and intertribal cooperation across state borders. *Id.*

The NIL rights of Indigenous peoples—including cultural symbols and identity expressions—are both cultural and commercial interests protected under the Indian Commerce Clause. By selectively banning the commercial use of these rights by out-of-state or non-New York–recognized tribal entities, Part 123 intrudes into a federally controlled field.

Defendants acknowledge that evaluating a state regulation under the Indian Commerce Clause requires balancing the interests of tribes, the federal government, and the state. Def. Mot. at 33. Defendants concede that "[a] tribe's interest peaks when a regulation threatens a venture in which the tribe has invested significant resources." Def. Mot. at 33 (citing *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 113 (2d Cir. 2014)). This case falls squarely within that framework. NAGA is composed of members from numerous tribal nations and has a core mission "to promote the respectful use of Native America names and imagery in public discourse" across the country. Compl. ¶ 7. It has been in operation for over seven years, is officially registered as a non-profit organization, initiated this litigation and other litigation across the country to protect Native American imagery, engaged with Massapequa School District to form the MSD-NAGA Agreement, and has been officially recognized by the U.S. Department of the

Interior Bureau of Indian Affairs. Compl. ¶¶ 13-17, Exh. A. The federal government also has a strong, independent interest in enforcing federal civil rights laws, including Title VI and § 1981.

By contrast, the State's purported interest—"providing a safe and discrimination-free environment for all school children," Def. Mot. at 34 —lacks any evidentiary support and is entirely subjective. Like the defendants Students for Fair Admission, the State seeks to justify its race-based policy through a non-existent exception for "good discrimination" – paternalistic and justified by carefully crafted "research." But that exception no longer exists.

Finally, Defendants' assertion that Part 123 regulates only "off-reservation activity" misrepresents and oversimplifies the law. Courts have repeatedly held that cases like this one require "a 'particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.'" *HCI Distrib., Inc. v. Peterson*, 110 F.4th 1062, 1066 (8th Cir. 2024) (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980)). It is improper to adopt Defendants' reductive view, label the MSD-NAGA Agreement as "off-reservation," and evade the nuanced, fact-specific analysis required under the Indian Commerce Clause. *Id.*

Plaintiffs have adequately pled a claim under the Indian Commerce Clause.

III. PLAINTIFFS SATISFY EVERY REQUIREMENT FOR A PRELIMINARY INJUNCTION

Plaintiffs satisfy all requirements for preliminary injunctive relief: (1) irreparable harm, (2) likelihood of success on the merits, and (3) a preliminary injunction is in the public interest.

Defendants are incorrect in asserting that Plaintiffs "must show a clear or substantial likelihood of success." Def. Mot. 25. Defendants' own authority makes clear that this "heightened standard" only applies when "Plaintiffs seek to enjoin enforcement of and, ultimately, void a statute that was already in effect ***at the time that the Complaint was filed***." *Pankos Diner Corp. v.*

Nassau County Legislature, 321 F. Supp. 2d 520, 523-524 (2003) (emphasis added); *Flores v. Town of Islip*, 382 F. Supp. 3d 197, 205 (2019)(same); *Consumer Directed Pers. Assistance Ass'n of N.Y. State v. Zucker*, 2018 U.S. Dist. LEXIS 123988, *6 ("the Court concludes that this heightened standard is appropriate because Plaintiffs are seeking to enjoin enforcement of and, ultimately, void a statute that was in effect ***at the time they filed their complaint***.") (emphasis added). Here, Plaintiffs filed their Complaint on May 29, 2025, (DE 1), at which point the regulation had not yet become effective. Indeed, even Defendants concede this point: "Plaintiffs seek to disrupt the *status quo* by challenging a valid State regulation that became **fully enforceable as of June 30, 2025**." Def. Mot. 25 (emphasis added). Accordingly, because the regulation was not effective at the time Plaintiffs filed their Complaint, the "heightened standard" does not apply.

Even under a heightened standard, however, Plaintiffs have shown a substantial likelihood of success. Pls.' Mem. (DE 21-1) at 13-22, and *supra*, Point I-II.

A. Plaintiffs have demonstrated irreparable harm.

Plaintiffs have demonstrated that enforcement of Part 123 causes them irreparable harm, Pls.' Mem. at 8-13. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Pls.' Mem. at 9 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 179–80 (5th Cir. 2009). As detailed in Plaintiffs' motion, Pls.' Mem. at 8-13, Plaintiffs have been deprived of their rights to contract, i.e. under the MSD-NAGA Agreement, and to freedom of speech and expression.

Defendants open with the misleading assertion that Plaintiffs were "delay[ed] in filing their motion," thereby defeating irreparable harm. Def. Mot. at 26. Part 123 took effect on June 30, 2025. Def. Mot. 25. The MSD–NAGA Agreement was invalidated on that date by operation of the regulation. Plaintiffs moved for a preliminary injunction on July 7, 2025—seven days later. DE 16. The Court then ordered letter briefing on July 8, 2025 (DE 17), invited supplementation on

July 28, 2025, and Plaintiffs filed an amended motion on August 8, 2025, all consistent with the Court's schedule. Plaintiffs acted promptly and in good faith. Additionally, the Massapequa School District sought an extension of the enforcement deadline—expressly citing the MSD–NAGA Agreement. That request was denied on June 20, 2025, and the District could submit a further request up to June 30, 2025. Until the regulation took effect on June 30 (and the Agreement was thereby nullified), a preliminary injunction would have been premature. Plaintiffs promptly filed their motion for preliminary injunction.

Defendants contend there is no irreparable harm from the termination of the MSD–NAGA Agreement because Plaintiffs do not "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." Def. Mot. 29. That argument is legally irrelevant and factually wrong. Nothing in Section 1981—or in Part 123—conditions the right "to make and enforce contracts" on a plaintiff's ownership of intellectual-property rights. Parties routinely contract for permissions, endorsements, and NIL uses without owning the underlying marks. The MSD–NAGA Agreement does not transfer IP; it obligates the District to continue using the "Chiefs" name and logo in collaboration with NAGA.

In fact, Defendants' own regulation confirms that ownership is not required in agreements between tribes and school districts for Indigenous NIL. Part 123.4(b) exempts pre–May 3, 2023 agreements "between a federally recognized tribal nation within the State of New York or a New York State recognized tribal nation and a public school permitting the use of an Indigenous name, mascot, or logo that is culturally affiliated with such tribe." Part 123.4(b). The text says nothing about required tribal ownership of the name or imagery.

Nor does Defendants' focus on "Sachem Tackapausha" help them. The MSD–NAGA Agreement requires continued use of the "Chiefs" name and logo; it does not mention Tackapausha at all. Def. Mot. 30; Compl., Exh. A. Likewise, Defendants cite no authority imposing a geographic or "Long Island–affiliation" prerequisite before Native individuals or organizations may enter NIL or similar agreements with a school—because there is none.

Defendants next argue the Agreement is infirm because it was executed "two years after Part 123 was adopted." Def. Mot. 30. But that timing argument is baseless. No statute or regulation prohibited districts from entering NIL agreements with Native American persons or groups at any particular time before June 30, 2025, and no law prohibited the Massapequa School District from contracting on May 15, 2025.

Defendants also label the Agreement "illegal," asserting that "Plaintiffs have no rights under any contractual provision that violates Part 123." Def. Mot. 30. That contention simply assumes Part 123, the Native Name Ban, is constitutional. Defendants' position thus underscores—not defeats—the controversy. That is precisely the legal question for the Court to decide on a developed record.

Defendants' reliance on the Agreement's "thirty-days' notice" and "severance" provisions (Def. Mot. 29) is equally as baseless. Such clauses in a private contract do not convert an unconstitutional regulation into a constitutional one, nor do they cure the State's interference with Section 1981 rights "to make and enforce contracts," including the right to enjoy "all benefits, privileges, terms, and conditions of the contractual relationship." Section 1981(b). Part 123 directly invalidates the Agreement because it removes the right of Plaintiffs to obtain its bargained-for-performance in the Agreement (the District's continued use of the "Chiefs" name and logo),

while also stripping away the right to receive monetary value for extending NIL rights. No contract clause avoids the injury.

For the reasons stated above, Plaintiffs have demonstrated irreparable harm.

B. Plaintiffs have demonstrated that they are likely to succeed on the merits of their claims.

Plaintiffs have established standing and a strong likelihood of success on every claim. *See supra* Points I–II; *see* Pls.' Mem. at 13-22. To the extent the Court applies the "heightened standard," Plaintiffs have also shown a clear or substantial likelihood of success for the reasons set forth in their memorandum. *Id.* Plaintiffs incorporate by reference their merits showing in the preliminary-injunction memorandum and the analyses set out in Points I and II. This section addresses Defendants' principal errors of law and fact.

First, Plaintiffs have standing to assert a First Amendment overbreadth claim and are likely to prevail. Pls.' Mem. 14. Defendants' reliance on *Farrell v. Burke*, 449 F.3d 470, 499 (2d Cir. 2006), is misplaced. *Farrell* addressed a narrow challenge to parole conditions and emphasized that the plaintiff failed to show a personal stake in broad facial relief. Here, Plaintiffs have shown particularized injuries because Part 123 broadly limits their ability to use Indigenous- names and imagery in educational and cultural context, and prevent them – as Native American individuals and sovereign tribal members – from entering into cultural consultation agreements with government-funded schools, and imposes penalties—including loss of funding—if they fail to comply. Further, Plaintiffs have direct stake in how state education policy is shaped and enforced—particularly when it targets Native identity and expressive traditions under the guise of regulation. Part 123 intrudes upon Plaintiffs' rights as individuals to participate in and preserve Native cultural representation in public life, which is protected under the First Amendment and Equal Protection Clause. Unlike *Farrell*, where the alleged restriction was personal and limited,

Part 123 applies across entire school districts and imposes a statewide prohibition with penalties – including the loss of funding – for speech that is not obscene or disruptive, but rather culturally expressive. Plaintiffs' speech is therefore not incidental to a state-imposed condition, but central to their constitutional identity and civic participation.

Moreover, Defendants' invocation of government-speech principles does not defeat standing or overbreadth review. The Supreme Court in *Shurtleff* rejected the argument that all speech in a school or public setting is automatically governmental. When regulations extend to prohibit private agreements and tribally supported expression, they implicate a range of private speech interests that fall outside the scope of government speech doctrine. Plaintiffs are therefore proper parties to bring this overbreadth claim because they face a credible threat of enforcement, satisfying the requirements of Article III standing. Second, Defendants argue that the "public record leading up to the adoption of Part 123 demonstrates the anti-discriminatory" intent of the regulation, and that this somehow defeats Plaintiffs' Section 1981 claim. Def. Mot. 32. Again, the State claims "good discrimination" is necessary to achieve state goals.

But Section 1981 protects the right "to make and enforce contracts" free from racial discrimination, regardless of State motives. The plain text of Part 123 targets and excludes Native people from the right to contract with school districts for their Indigenous NIL. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006) ("We have never retreated from what should be obvious from reading the text of the statute: Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship.").

Third, Defendants contend Plaintiffs "belatedly" invented a market for Indigenous NIL. Def. Mot. 32. Not so. The Complaint and Plaintiffs' PI memorandum allege—and document—that

school districts contract with Indigenous persons and organizations for permission to use Indigenous NIL, and that Plaintiffs did so here through the MSD–NAGA Agreement. *See* Compl. ¶¶ 7, 17, 163-167, Exh. A; Pls.' Mem. at 21. Both Plaintiffs' Complaint and Defendants' own memorandum likewise acknowledge that Part 123 regulates—and now prohibits—precisely these NIL agreements by carving out only pre–May 3, 2023 agreements and forbidding "any money, consideration, or thing of value" under such agreements. *See* Compl. ¶¶ 91-93; Def. Mot. 2; Part 123.4(b). A regulation that exempts and then bans compensated agreements necessarily presupposes a market for Indigenous NIL. Defendants then cite *Spirit Lake Tribe* in their memorandum, which further demonstrates the existence of a nationwide Indigenous NIL market. Def. Mot. 17-18.

Nor does *Sweigert v. Goodman*, No. 118-cv-08653, 2020 WL 8261572, at *4 (S.D.N.Y. Dec. 28, 2020), aid Defendants. *Sweigert* simply holds that a movant must come forward with proof at the preliminary-injunction stage, not mere allegations. Plaintiffs have done exactly that: the executed MSD–NAGA Agreement, the text of Part 123, the supporting affidavits of NAGA's history and mission and Defendants' own admissions establish proof of the existence of, and State interference with, the Indigenous NIL market, as well as the harmful nature of the Native Ban. Accordingly, Defendants' "belated" argument fails.

Fourth, Defendants argue that Plaintiffs "failed to plead" an Indian Commerce Clause claim. Def. Mot. 33. Not so. The Complaint expressly pleads that Part 123 violates the Indian Commerce Clause. Compl. ¶ 4 ("The declaratory judgment action presents a facial and as-applied challenge to the constitutionality of Part 123 . . . for violation of the . . . Indian Commerce Clauses)."; Compl. at ¶ 159 ("Article I, Section 8 of the U.S. Constitution grants the exclusive right of the United States Congress to 'regulate Commerce with foreign Nations, and among the

several States, and with the Indian Tribes.'") Compl. ¶ 159 ("'the Indian Commerce Clause,' has been interpreted to mean that only the Federal government can regulate Indian tribes or their economic activities.") The Complaint then extensively details how the regulation discriminates against, and burdens, commerce with Indians. Compl. ¶¶ 3, 8, 10, 17, 19, 38, 39, 42, 46, 48, 51, 53, 88, 89, 91-92, 130, 132; *see also* Pls.' Mem. at 19-20.

Defendants concede that "a tribe's interest peaks when a regulation threatens a venture in which the tribe has invested significant resources." Def. Mot. 33. Their follow-on assertion—that "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," Def. Mot. 34 —is wrong. In their Complaint, Plaintiffs attached the executed MSD–NAGA Agreement and pled that their organization's core mission—since 2017—has been "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." Compl. ¶¶ 7, 10. This record demonstrates Plaintiffs' substantial investment of time and resources, and their action here to vindicate their mission and the MSD–NAGA Agreement further underscores that investment. Part 123 itself acknowledges (and then extinguishes) this tribal activity by forbidding "any money, consideration, or thing of value" under such agreements, while carving out only pre–May 3, 2023 deals with specified in-state tribes. Part 123.4(b). A prohibition that targets compensated agreements with tribes is a direct burden on tribal commerce.

Nor does Defendants' "off-reservation activity" label save the regulation. Def. Mot. 33-34. The Supreme Court has made clear that "[a]bsent ***express federal law to the contrary***, Indians going beyond reservation boundaries have generally been held subject to ***nondiscriminatory state law*** otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S.

145, 148–49 (1973). Plaintiffs allege here—and the regulation makes plain—that Part 123 discriminates against Native Americans, barring contracts involving Indigenous people, while permitting similar arrangements with non-Indigenous people. Because Part 123 is not a neutral, generally applicable law, *Mescalero* confirms its invalidity under the Indian Commerce Clause. This is precisely the discriminatory regulation that violates "express federal law to the contrary." *Id.* Furthermore, the Supreme Court stated in *Mescalero* that "even on reservations, state laws may be applied ***unless*** such application would interfere with reservation self-government or ***would impair a right granted or reserved by federal law***." *Mescalero*, 411 U.S. at 148 (emphasis added). Part 123 impairs both the right to contract and equal protection, which reaches tribal reservations.

C. Plaintiffs have demonstrated that the balance of hardships weigh in their favor and that a preliminary injunction is in the public interest.

The balance of hardships and the public interest favor injunctive relief. Plaintiffs—a Native American organization and an individual—are burdened by a regulation that strips them—and all Native Americans—of the right to contract and right to express their Indigenous heritage in public-school fora, like sports team, school buildings, school hallways, and other areas of core educational community gathering. By contrast, Defendants suffer no cognizable harm from preserving the *status quo* and complying with constitutional limits pending adjudication. Plaintiffs respectfully direct the Court to their full public interest and balance of hardships analysis in Pls.' Mem. 22-25,[10] and respond to Defendants' errors in fact and law in this section.

[10] To the extent the Court applies the "serious questions on the merits" standard, Plaintiffs have raised at least five serious questions on the merits. Pls.' Mem. at 22-23. Defendants respond to only one, effectively conceding the remainder present serious questions warranting relief. On the point they do contest, Defendants argue that Plaintiffs' reliance on the U.S. Department of Education Office for Civil Rights' formal finding that Part 123 violates Title VI cannot establish a "serious question." Def. Mot. 35. That misunderstands the standard and misstates Plaintiffs' position. Plaintiffs do not contend the OCR finding is binding; rather, it is strong evidence from the federal agency charged with enforcing Title VI. The serious-questions pathway does not

First, Defendants' assertion that "the balance of hardships has already been held to favor Defendants" in the *Massapequa* case is misleading and legally baseless. Def. Mot. 36. That case involved a school district and a board member acting in official capacities; this case involves a private Native American organization and an individual whose injuries include suppression of protected expression and the State's nullification of a private contract. The parties, claims, and record are different (including the MSD–NAGA Agreement and the OCR non-compliance finding), so the prior balancing has no bearing here.

Second, Defendants again misstate the *Cambridge* rulings. The *Cambridge* Decision involved a case-specific, discretionary determination that did not involve Part 123—the regulation was not even promulgated at that time. And on appeal, the Third Department dismissed the case as moot and never evaluated the constitutionality of Part 123. *Cambridge Cent. Sch. Dist. v. New York State Educ Dep't,* 22 A.D.3d 1068, 1070-71 (3d Dep't 2023). Thus, Defendants' reliance on *Cambridge* provides no support in this case.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss in its entirety, grant Plaintiffs' motion for preliminary injunction, and grant such other and further relief as the Court deems just and proper.

require a binding mandate from a federal agency. The very existence of a formal OCR noncompliance determination underscores that this case presents serious questions the Court should resolve on the merits.

Dated: September 4, 2025

Respectfully submitted,

NATIVE AMERICAN GUARDIAN'S ASSOCIATION

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CERTIFICATION

Pursuant to Local Rule 7.1, I hereby certify that this letter brief complies with the word limit, containing a total of 12,066 words.

/s/ J. Chapman Petersen
J. Chapman Petersen

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September 2025, a true and accurate copy of the foregoing Plaintiffs' Motion for Preliminary Injunction was served via ECF on all counsel of Record.

By: *__/s/ J. Chapman Petersen__*
J. Chapman Petersen