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Native American Mascots' Last Stand - Legal Difficulties in Eliminating Public University Use of Native American Mascots

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I. DESPITE GROWING OPPOSITION, PUBLIC UNIVERSITIES STILL HAVE NATIVE AMERICAN TEAM NAMES AND MASCOTS

The 2006 “Federal Express” Orange Bowl featured the Nittany Lions of Pennsylvania State University (“PSU”) and the Seminoles of Florida State University (“FSU”). Many FSU fans donned “war paint” and enthusiastically waved their arms as though swinging a tomahawk throughout the game. Ironically, the teams played the nationally televised game five months after the National Collegiate Athletic Association’s (“NCAA”) decision banning team mascots deemed “hostile or abusive” to Native Americans from NCAA Tournaments. Prominent public universities originally listed in violation of the ban included athletic powerhouses: University of Illinois Fighting Illini, Florida State University Semi-

A. Purpose of Comment

This Comment addresses the genesis of Native American mascots and, more importantly, the legal difficulties in eliminating public university use of Native American team names and mascots. Part I of this Comment introduces the controversy. In particular, this Comment focuses on the continuing problem of public university use of Native American mascots. Part II provides background concerning past, pending, and potential legal challenges to Native American mascots at the amateur level. Part III analyzes these legal challenges, explaining why each is unlikely to succeed. Part IV predicts the continued usage of Native American team names and mascots.


10. For a further discussion of the controversy, see infra notes 39-45 and accompanying text.

11. For a further discussion of the background concerning past, pending, and potential legal challenges, see infra notes 46-84 and accompanying text.

12. For a further discussion of why legal challenges to Native American mascots will not succeed, see infra notes 85-166 and accompanying text.

13. For a further discussion of the future of Native American team names, see infra notes 167-77 and accompanying text.
B. Public Universities and State Officials Refuse to Eliminate Native American Team Names and Mascots

Currently, eighteen NCAA schools, including a number of public universities, retain Native American team names.14 Despite growing discontent with Native American mascots and team names, university presidents and powerful officials continue to lobby to keep such names.15 Thus far, their lobbying has proven successful.16 Following repeated legal threats, the NCAA reversed its previous finding that the name "Seminole" is "hostile and abusive" to Native Americans.17 Soon after, the NCAA permitted the

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14. See NCAA Press Release, supra note 3, ¶ 16 (listing schools retaining Native American mascots, including Alcorn State University Braves, Central Michigan University Chippewas, Catawba College Indians, Florida State University Seminoles, Midwestern State University Indians, University of Utah Utes, Indiana University-Pennsylvania Indians, Carthage College Redmen, Bradley University Braves, University of Illinois-Champaign Illini, University of Louisiana-Monroe Indians, McMurry University Indians, Mississippi College Choctaws, Newberry College Indians, University of North Dakota Fighting Sioux, and Southeastern Oklahoma State University Savages).

15. See Brenden S. Crowley, Resolving the Chief Illiniwek Debate: Navigating the Gray Area Between Courts of Law and the Court of Public Opinion, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 28, 35 (2004) ("[I]n the late 1990s, the Illinois legislature became involved in the debate [over offensiveness of Native American mascots]. In 1996, former governor Jim Edgar signed a bill introduced by University alumnus Rick Winkel in which the Illinois General Assembly declared that Chief Illiniwek may remain the symbol of the University.").


17. See Kallestad, supra note 16, ¶¶ 1-5 (noting NCAA permitting Seminole name because of tribal support and fierce opposition by public officials including Florida State’s President and Florida Governor Jeb Bush).
University of Utah to retain its "Utes" team name. The NCAA also exempted CMU Chippewas from the ban.

In opposing the NCAA's original ruling, FSU's President pointed to Florida's Seminole Tribe's support for the team name. Nevertheless, some Seminole tribes continue to oppose the school's use of the Seminole mascot. Similarly, the University of Utah


   The University of Utah scored a double victory Friday: A few hours before the [Ute]'s opening-game win against Arizona, the NCAA gave the university permission to retain its nickname — the Utes. The university had sent a seven-page appeal to the NCAA on Wednesday, asking that it be removed from a list of 18 schools subject to restrictions because they have American Indian nicknames, mascots or images. Besides Utah, the NCAA approved the removal of the Central Michigan University Chippe was from the list. U. President Michael Young was pleased with the NCAA's prompt response to his school's appeal. "We are very pleased that the NCAA has recognized our close and mutually respectful relationship with the Ute Tribe and accordingly has removed the University of Utah from their list of schools that use Native American names or imagery inappropriately," Young said. "We appreciate their prompt attention to our appeal."

Id.


   The NCAA gave Central Michigan permission to continue using its Chippewas nickname Friday. . . . "The NCAA Executive Committee continues to believe the stereotyping of Native Americans is wrong," the organization said in a statement. "In its review of the particular circumstances regarding Central Michigan University. . . . the NCAA staff review committee noted the relationship between the universities and the Saginaw Chippewa Indian Tribe of Michigan . . . as a significant factor."

Id.


   The Seminole Nation of Oklahoma opposes the use of Florida State University's use of "Seminoles" as a nickname and mascot, council member David Narcomey said. Narcomey said the Seminole Nation's council plans to pass a resolution opposing the mascot. He criticized the Seminole Tribe of Florida for supporting the name. "As far as the complexity of the mascot issue and the harm it brings, they don't seem to have an understanding that should be there," Narcomey told USA Today. "Their understanding is just that of the average non-Indian person." The NCAA's Minority Interests and Opportunities Committee is considering tribal views at is [sic] looks at the Indian imagery used by over 30 schools. But an outright ban is not an option, said the committee's chairman.

Id.
pointed to the support of local tribal officials. CMU also received tribal support. The public universities’ continued use of the Native American mascot forces opponents to consider their options and their likelihood of success.

C. NCAA, Native American, and University Student and Faculty Efforts to Eliminate Native American Team Names and Mascots

Despite state officials’ reluctance to change Native American team names, the NCAA, Native American tribal leaders, university faculty, and students combine to provide powerful opposition towards offensive Native American team names and mascots. Their movement enjoys tremendous success. "[D]uring the past 30 years, more than ‘600 colleges, universities and high schools have changed or eliminated their use of Native American mascots.’" Despite acquiescing to FSU, Utah, and CMU’s lobbying, the NCAA appears firmly opposed to offensive names through enforcing tournament bans on hostile or abusive Native American team names and mascots. Similarly, tribal leaders, particularly the Lakotas, rally in opposition to North Dakota’s use of Fighting Sioux. The Inter-Tribal Council of the Five Civilized Tribes (Choctaw, Chickasaw, Creek, Cherokee, and Seminole Nations) oppose the use of offensive Native American mascots, and in particular, Southeastern Oklahoma State University’s “Savages” team

22. See Sorenson, supra note 18, ¶ 6 (stating “[i]n its appeal, Utah included two letters in support of the university, from Maxine Natchees, chairwoman of the Uintah and Ouray Tribal Business Committee, and one from Craig Thompson, commissioner of the Mountain West Conference”).
23. See NCAA Approves CMU’s Mascot, supra note 19, ¶ 3 (detailing Chippewa support of mascot).
24. See NCAA Press Release, supra note 3 (detailing ban by NCAA of Native American Mascots in NCAA Tournaments); see also Colleges Grapple with Indian Mascot Names, supra note 16 (describing University of North Dakota’s ongoing struggle with use of Fighting Sioux mascot); Protestors of Indian Mascot Meet with Chancellor, Apr. 16, 2004, http://cbs2chicago.com/topstories/local_story_107130019.html (describing student protests of University of Illinois’s use of Native American mascot).
26. Id. ¶ 4 (quoting New York state education department review) (highlighting effects of student led efforts and voluntary changes made by institutions).
27. See Marot, supra note 9, ¶¶ 1-3 (describing NCAA ban eliminating offensive team names from NCAA tournaments).
28. See Colleges Grapple with Indian Mascot Names, supra note 16, ¶¶ 1-10 (noting difficult issues surrounding Native American team names).
Additionally, University of Illinois faculty and students continue to protest Illinois's use of Fighting Illini and the Chief Illiniwek mascot. The bill

D. Controversy Extends to U.S. Public High Schools

The controversies and difficulties surrounding the elimination of Native American team names is also an important issue on the high school level. In California, where approximately 184 high schools retain Native American team names (including six Redskin teams), the California legislature passed the Racial Mascots Act, banning the use of certain Native American team names. The bill


30. See Protestors of Indian Mascot Meet with Chancellor, supra note 24, ¶ 1-7 (noting continuing opposition to school's mascot). The article reports:

The University of Illinois chancellor met with 40 protestors ... one day after they took over the main administration building to demand the school get rid of its Chief Illiniwek mascot and associated Indian-head symbol. ... In an advisory referendum held as part of the campus' student government election ... more than two-thirds of the 13,000 students who voted said they favored keeping the Chief.

Id.; see also Crowley, supra note 15, at 33 (describing background to debate). The author notes:

Public disapproval of Chief Illiniwek seems to have first appeared on the University of Illinois campus in 1975, when Citizens for the American Indian Movement ("AIM") protested that the mascot degraded Indians and exhibited the ignorance of the white race. ...

[By 2000, the Peoria Tribe [the last remnants of the Illini Tribe] ... passed a resolution requesting that the University of Illinois end its use of Chief Illiniwek. Crowley, supra note 15, at 33 (footnotes omitted). See generally Crue v. Aiken, 370 F.3d 668 (7th Cir. 2004) (describing Illinois faculty and staff's litigation for right to contact incoming athletes and inform them of University's alleged use of offensive mascot).


The Legislature finds and declares all of the following:
(a) The use of racially derogatory or discriminatory school or athletic team names, mascots, or nicknames in California public schools is anti-
proved popular in the California House and Senate. Nevertheless, California Governor Arnold Schwarzenegger vetoed the bill. In New York, the State Board of Education voted to eliminate all Native American team names. A similar controversy erupted theoretical to the California school mission of providing an equal education to all:

(b) Certain athletic team names, mascots, and nicknames that have been and remain in use by other teams, including school teams, in other parts of the nation are discriminatory in singling out the Native American/American Indian community for the derision to which mascots or nicknames are often subjected;

(c) Many individuals and organizations interested and experienced in human relations, including the United States Commission on Civil Rights, have concluded that the use of Native American images and names in school sports is a barrier to equality and understanding, and that all residents of the United States would benefit from the discontinuance of their use;

(d) No individual or school has a cognizable interest in retaining a racially derogatory or discriminatory school or athletic team name, mascot, or nickname.

Id.

33. See Calif. Close to Banning ‘Redskins’ Mascot, supra note 31, ¶¶ 1-2, (describing California’s attempt to ban “Redskin” team name). The article noted:

In addressing an issue that professional sports teams such as the Washington Redskins have faced and resisted in recent years, the California State Assembly passed a bill Thursday that would require the state’s middle and high schools to drop “Redskins” as their mascots if the bill becomes law. The Assembly passed the bill 43-20 after a lengthy, passionate debate about Native American-related mascot names that are common throughout California and the nation.

Id.

34. See Jim Wasserman, Schwarzenegger Vetoes Bill to Ban ‘Redskins’ as Name for Teams, SFGate.com, ¶¶ 1-2, Sept. 21, 2004, http://www.sfgate.com/cgi-bin/article.cgi?file=/News/archive/2004/09/21/state2036EDTO127.DTL (reporting California Governor’s veto of anti-mascot bill). Addressing the controversy, the author writes that:

The Redskins of Chowchilla Union High School will be able to keep their name, as Gov. Arnold Schwarzenegger Tuesday vetoed a bill that would have prohibited Chowchilla and four other high schools from using the name considered by some American Indians to be racial slur. In a message accompanying his veto, Schwarzenegger said local school districts should make their own choices and that the bill “takes more focus away from getting kids to learn at the highest levels.”

Id.

35. See Gaffney, supra note 25, ¶¶ 8-16 (describing New York state’s effort in eliminating Native American team names). The author describes the background to New York’s ban on Native American team names as follows:

In February 2001, Richard P. Mills, state commissioner of education, issued a memo to superintendents and boards of education mandating the mascot change. “I ask the superintendents and presidents of the school boards to lead their communities to a new understanding of this matter,” wrote Mills. “I ask boards to end the use of Native American mascots as soon as practical.” Mills’ comments were the result of an investigation into the issue that began in 1998.
amongst Texas high schools. In New Jersey, students walked out of class following the superintendent’s announcement that Parsippany High School would be changing its mascot from Redskins to Red Hawks. The Vermont Board of Education has also explored eliminating Native American mascots and team names.

II. HISTORY OF RACIAL DISCRIMINATION, EMERGENCE OF NATIVE AMERICAN TEAM NAMES, AND LEGAL BATTLES

Since Christopher Columbus’s arrival in North America in 1492, Native Americans have faced unwavering oppression and discrimination at the hands of “Europeans and their [American] descendants.” As conflicts over land and resources developed between indigenous tribes and European explorers and settlers, hostilities arose. Discrimination against Native Americans roots itself in the long, often violent, struggle between the two cultures. As a result, Americans tend to associate Native Americans with violence and savagery. This stereotype is perpetuated through the use of


Two Central Texas school districts intend to keep their Indian mascots despite requests of an American Indian activist group that has prompted some changes. . . . Jonathon Hook, president of San Antonio’s American Indian Resource Center [stated] ‘the next step would be to pursue legal options.’

Id.

37. See Paul Riede, More Than a Mascot, ¶ 4, Sept. 2001, http://www.findarticles.com/p/articles/mi_m0JSD/is_8_58/ai_78177352 (describing strong opposition by students and parents to changing team name).

38. See Reed, supra note 31, ¶ 1 (describing efforts in Vermont to eliminate Native American team names).

39. Dee Brown, Bury My Heart at Wounded Knee 2 (Henry Holt & Co. 1970) (describing history of discrimination against Native Americans). The author writes:

It began with Christopher Columbus who gave the people the name Indios. . . .

. . .

Columbus being a righteous European was convinced that the people should be “made to work, sow and do all that is necessary and to adopt our ways.” Over the next four centuries (1492-1890) several million Europeans and their descendents undertook to enforce their ways upon the people of the New World.

Id. at 1-2.

40. See id. at 2 (describing confrontations between Native Americans and settlers from time of Columbus’s arrival in 1492 to close of nineteenth century).

41. See id. at 1-4 (detailing nearly three centuries of conflict between Native Americans and settlers).

Native American mascots and team names with violent connotations.\textsuperscript{43} Names such as “Braves,” “Fighting Sioux,” “Fighting Illini,” and “Savages” perpetuate this negative connotation between American Indians and violence.\textsuperscript{44} Furthermore, names such as Redskins display blatant insensitivity and racism towards Native Americans.\textsuperscript{45}

A. Past Legal Challenges to the Use of Native American Team Names and Mascots

Past legal challenges aimed at eliminating the use of Native American team names and mascots include trademark, Title VI, and legislative challenges.\textsuperscript{46} Other proposals are public accommo-

\textsuperscript{43} See Kristine A. Brown, Comment, \textit{Native American Team Names and Mascots: Disparaging and Insensitive or Just a Part of the Game}, 9 SportS Law. J. 115, 117-19 (2002) (describing association of Native American mascots and team names with violence and savagery). The author notes that “there is the ‘Old West’ view that Native Americans are savage warriors, waiting to scalp anyone at a moment’s notice.” Id. at 117. The author also points out that in 1988 “[t]he Michigan State Civil Rights Commission...recognized that ‘one of the most pervasive examples of the way in which we have misunderstood and misrepresented Indian peoples lies in the use of athletic team symbols and names.’” Id.

\textsuperscript{44} See id. at 117-19 (demonstrating how team names reflect misconceptions of Native American people and history).

\textsuperscript{45} See id. at 118 (explaining continuing insensitivity towards Native Americans). The author explains:

The [Michigan Civil Rights] Commission noted that the proliferation of negative imagery of Native Americans “indicated that there is a generally low level of sensitivity to Indian images which exist in this society, and a generally high level of racism towards Native American people.” Id. (footnotes omitted).

dations, free speech based grassroots protests, and intentional infliction of emotional distress ("IIED") challenges.47

i. Trademark Challenge: Pro-Football, Inc. v. Harjo

One legal tactic aimed at challenging Native American team names is the trademark challenge.48 In Pro-Football, Inc. v. Harjo, currently pending in the United States District Court for the District of Columbia, the plaintiffs allege the National Football League's ("NFL") Washington "Redskins" trademark is disparaging.49 The plaintiffs want the court to rescind the team's trademark registration pursuant to Section 2(a) of the Lanham Act.50 The plaintiffs contend that the NFL violated the Lanham Act because the "Redskins" team name disparages Native Americans and brings them into disrepute.51 The plaintiffs argued that the Trademark Trial and Appeal Board ("TTAB") should rescind the NFL's "Red-

47. See Rosner, supra note 46, at 267 (explaining potential public accommodations challenges to Native American mascots); see also Crue, 370 F.3d at 674-75 (describing grassroots protests against University of Illinois's Chief Illiniwek mascot); Goldstein, supra note 46, at 700-04 (proposing intentional infliction of emotional distress challenges); A Public Accommodations Challenge, supra note 46, at 904 (addressing public accommodations challenges).

48. See, e.g., Harjo, 415 F.3d at 48-50 (detailing trademark challenge to NFL's use of Redskin mascot).

49. See id. (detailing facts of case).

50. See id. at 46 (providing background to case). The court states:

In 1992, seven Native Americans petitioned the Trademark Trial and Appeal Board ("TTAB") to cancel the registrations of six trademarks used by the Washington Redskins football team. After the TTAB granted their petition, the team's owner, Pro-Football, Inc., brought suit seeking reversal of the TTAB's decision. The district court granted summary judgment to Pro-Football on two alternate grounds, holding that the TTAB should have found the Native Americans' petition barred by laches and that in any event the TTAB's cancellation decision was unsupported by substantial evidence. The Native Americans now appeal. . . .

The Lanham Trademark Act provides protection to trademark owners. . . . [T]rademark owners must register their marks with the Patent and Trademark Office. Not all marks, however, can be registered. Under 15 U.S.C. § 1052, the PTO must deny registration to certain types of marks, including those which, in subsection (a)'s language, "may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."

Id. (citations omitted).

51. Rosner, supra note 46, at 269 (citing 15 U.S.C. § 1052 (2000)) (explaining past and potential legal approaches). The author states that the Lanham Act: [P]rovides that no trademark shall be denied registration on account of its nature "unless it consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage . . . national symbols or bring [groups] into contempt or disrepute."
skins” trademark registration because the name disparages Native Americans.52 The TTAB agreed and ruled that the “Redskins” trademark was “no longer entitled to Federal Protection under the Lanham Act.”53

Pro-Football, Inc. appealed the TTAB decision.54 On appeal, the U.S. District Court for the District of Columbia declared summary judgment for Pro-Football, Inc.55 In reaching its decision, the district court found no substantial evidence supporting the Board’s finding of disparagement.56 On July 15, 2005, the United States Court of Appeals for the District of Columbia reversed the district court’s ruling and remanded the case for review of the plaintiff’s prejudice claims.57 Many opponents of Native American team names hope potential financial losses from repeal of trademark protection will not only affect professional teams, but also public universities.58

ii. Title VI of the Civil Rights Act

Title VI of the Civil Rights Act of 1964 is another approach to challenging Native American team names and mascots.59 Under Ti-
tle VI, no program or activity receiving federal funding may discriminate "on the ground of race, color, or national origin." Therefore, it is argued, public universities receiving federal government funding violate Title VI when they use offensive Native American team names and mascots. Proponents of this legal theory argue that a potential loss of federal funds will encourage universities to drop offensive Native American team names. Both state and federal suits have addressed this claim.

color, or national origin in any program or activity that receives federal financial assistance. Under Title VI, schools are prohibited from creating, encouraging, tolerating, or leaving uncorrected a racially hostile environment in any of its academic, extracurricular, or athletic programs, no matter where they are conducted. Title VI applies to all school-sponsored activities and facilities.

Id. (footnotes omitted).


61. See Rosner, supra note 46, at 267 (discussing application of Title VI to Native American team names). The author explains that “[u]nder guidelines adopted in 1994, the Department of Education may withhold federal funds from an institution whose mascot creates a hostile environment for its Native American students until the school remedies the situation by changing its mascot.” Id.

62. See id. (explaining applicability of statute to current issue).


[T]he OCR addressed related issues in two separate school districts. In the Quincy, Massachusetts, Public School District, a school logo was reasonably viewed by many as a caricature of a Native American. No student had complained of racially discriminatory conduct. The OCR concluded that the one reported incident of racially derogatory comments was not severe, persistent or pervasive conduct. The second case involved the University of Illinois' use of Chief Illiniwek as its mascot, the use of an Indian logo and the university's nickname, "Fighting Illini." In addition to allegations that the use of the symbols contributed to a racially hostile environment, the OCR received numerous allegations of racial harassment. After investigation, the OCR found that many allegations were not substantiated, and that the incidents were isolated, spread over a six-year period and involved different individuals. Based on all the circumstances, the OCR concluded that the allegations of which the university had notice were not sufficiently severe, pervasive or persistent to rise to the level of a racially hostile environment.

Here, the department concluded that based upon the totality of the circumstances, it could not find a severe, persistent and pervasive pattern of racially hostile acts directed at the appellant's children, "of which the district had actual or constructive notice," which rose to the level of a racially hostile environment.

Id. (citations omitted).
iii. Legislation

California sought to eliminate offensive Native American team names and mascots through its proposed Racial Mascots bill. Specifically, the bill sought to ban the name “Redskins” and other offensive team names. The State House and Senate voted to pass the bill; California’s Governor Arnold Schwarzenegger, however, vetoed it. If passed, the bill’s constitutionality would have been questionable, especially under the First Amendment.

B. Potential Legal Claims Against Native American Team Names and Mascots

There are a number of potential legal claims against teams with Native American mascots. These claims include suits for intentional infliction of emotional distress, public accommodations challenges, and free speech/grassroots protests.

i. Intentional Infliction of Emotional Distress (“IIED”)

A possible avenue for eliminating Native American team names is through IIED challenges. To succeed on an IIED claim, the plaintiff must prove three elements that are often difficult to meet: “(1) [T]he conduct must be truly extreme and outrageous; (2) the actor must either intend that his conduct inflict severe emotional distress, or know that there is at least a high probability that...”

65. See id. (detailing content of bill).
66. See Wasserman, supra note 34, ¶ 1-5 (describing Governor’s veto of bill in effort to maintain local control of mascots).
67. See Brock, supra note 46, at 73 (addressing potential constitutional challenges to legislation under free speech argument). The author states, “[i]f the bill were constitutional [under the First Amendment], other states may be able to emulate California’s bill to force educational institutions to eliminate other racial mascots.” Id.
68. See Crue v. Aiken, 370 F.3d 668, 674-75 (7th Cir. 2004) (describing grassroots protests against University of Illinois mascot); Goldstein, supra note 46, at 710-12 (describing potential legal challenges); Rosner, supra note 46, at 700 (summarizing approaches used to challenge Native American mascots, including public accommodations challenges).
69. See Goldstein, supra note 46, at 700 (explaining IIED challenge). The author explains another ground for battling Native American team names, stating: After many other attempts to eliminate Native American mascots, both within and outside the courts, IIED may be another possibility for a remedy. The harm and pain caused by racial harassment is becoming an important issue in the legal community. A growing number of academics are calling for a change in the law of IIED to include a remedy for "words that wound.”
Id. (footnotes omitted).
this conduct will cause emotional distress; [and] (3) the conduct must in fact cause severe emotional distress.\textsuperscript{70} Proponents of this legal theory argue that Native American team names and mascots meet the IIED requirements because the names cause serious emotional harm to Native Americans.\textsuperscript{71} Advocates of IIED challenges also believe the threat of financial suits will encourage teams to eliminate Native American team names.\textsuperscript{72}

ii. Public Accommodations Challenges

Another possible avenue for eliminating Native American team names and mascots is through public accommodations challenges.\textsuperscript{73} Title II of the Civil Rights Act of 1964 guarantees "all persons shall be entitled to ... full and equal enjoyment ... of any places of public accommodation ... without discrimination or segregation on the ground of race, color, religion, or national origin."\textsuperscript{74} Arguably, some Native American fans are uncomfortable attending certain sporting events featuring Native American team names or mascots.\textsuperscript{75} For example, some Native American families cannot enjoy a Major League Baseball game featuring the Cleveland Indians or Atlanta Braves because of the mascots.\textsuperscript{76} Litigants believe that successful public accommodations challenges will legally force teams to drop Native American names and mascots.\textsuperscript{77}

\textsuperscript{70} Goldstein, \textit{supra} note 46, at 700 (quoting Harriston v. Chi. Trib. Co., 992 F.2d 697, 702 (7th Cir. 1993)).

\textsuperscript{71} See \textit{id.} at 689 (describing possible grounds for IIED challenge).

\textsuperscript{72} See \textit{id.} (noting one argument in favor of challenge).

\textsuperscript{73} See \textit{A Public Accommodations Challenge, supra} note 46, at 906 (noting potential of such challenges). "This Note offers a new legal approach and proposes using the federal accommodations law, Title II of the Civil Rights Act of 1964, to challenge professional sports teams' use of Indian nicknames and mascots." \textit{Id.} (footnotes omitted).

\textsuperscript{74} 42 U.S.C. § 2000(a) (2000).

\textsuperscript{75} See \textit{A Public Accommodations Challenge, supra} note 46, at 910 (arguing grounds for public accommodations challenge). The article continues:

The use of Indian team names and mascots denies American Indians the full and equal enjoyment of a place of public accommodation. Although Indians are not physically barred or denied service, the manner in which they are served is nonetheless discriminatory because team names and mascots cause harm and lead to exclusion by maintaining an intimidating environment. This race-based abuse prevents Indians from attending sporting events, thereby violating Title II.

\textit{Id.}

\textsuperscript{76} See \textit{id.} (describing situations where public accommodations challenges may be appropriately raised).

\textsuperscript{77} See \textit{id.} (proposing opposition to Native American team names through public accommodations challenges).
iii. Free Speech and Grassroots Protests

Grassroots protests also serve as potential challenges to Native American team names. Nevertheless, there is some question as to what extent a public university may legally limit protests. The Illinois Court of Appeals for the Seventh Circuit confronted that issue in Crue v. Aiken. In Crue, faculty and students of the University of Illinois protested the school’s Chief Illiniwek mascot through various means. Although the University permitted these activities, it did not allow faculty and students to personally contact incoming athletes. The faculty and students argued the prohibition violated their First Amendment rights. Supporters of grassroots protests believe this is an effective legal means to call attention to and eliminate Native American team names and mascots.

78. See Crue v. Aiken, 370 F.3d 668, 674 (7th Cir. 2004) (noting grassroots protests against University of Illinois “Chief Illiniwek” mascot). The court remarked that:

The first sounds of protest over Chief Illiniwek in 1975 have grown to a crescendo. Many people today find him to be offensive, including the Peoria Tribe of Indians of Oklahoma, known collectively as the Illiniwek or Illinois Nations, who just a few years ago formally voted to ask the university to stop using him as a mascot. And that takes us to today’s suit where a loose group of faculty members and a graduate teaching assistant at the university escalated the debate a little further. The group, whom we will simply call “plaintiffs,” claim that the chief creates a hostile environment for Native American students and that he promotes dissemination of inaccurate information in an educational setting.

Id. (footnote omitted).

79. See id. (describing efforts by University of Illinois to block efforts to inform incoming athletes of Illini name background).

80. See id. at 673-74 (involving grassroots protests against University of Illinois mascot).

81. See id. at 674 (describing efforts by University faculty and students, including “public speeches, letter writing, meetings with student groups, and by submitting newspaper articles for publication”).

82. See id. at 674-75 (explaining university’s fear of violating NCAA rules as one reason for prohibiting protester contact). The court noted:

As a member of the National Collegiate Athletic Association (NCAA) and the Big Ten Athletic Conference, there are a number of rules with which all persons associated with the University must comply. For example, the NCAA regulates the timing, nature and frequency of contacts between any University employee and prospective athletes. . . . The University faces potentially serious sanctions for violation of NCAA or Big Ten rules.

Id. (citations omitted).

83. See Crue, 370 F.3d at 670 (“This case, raising First Amendment issues involving the University of Illinois, concerns ‘Chief Illiniwek,’ who, depending on one’s point of view, is either a mascot or a symbol of the university.”).

84. See id. at 674 (examining reasoning behind grassroots challenges).
III. INHERENT WEAKNESSES OF PAST, PENDING, AND POTENTIAL LEGAL CHALLENGES TO NATIVE AMERICAN MASCOTS

Fed up with the continued use of Native American team names and mascots by public universities, Native Americans, and others, have spearheaded diverse legal challenges. Unfortunately, analyzing past, pending, and potential legal challenges reveals their weaknesses.

A. Trademark Challenge: No Financial Incentive for Public Universities to Change Athletic Team Names

Challenging federal trademark protection of Native American team names remains an uncertain means of eliminating offensive mascots. Trademark challengers hope potential financial losses stemming from trademark recession will encourage teams to drop offensive team names. The U.S. District Court for the District of Columbia is currently deciding whether the NFL team name "Redskins" is disparaging and, consequently, should no longer enjoy federal trademark protection. The plaintiffs' success may lead to other plaintiffs challenging numerous public university trademarks.

Overall, trademark challenges are unlikely to succeed in eliminating Native American team names because rescinding the NFL's "Redskins" trademark will have little effect on the majority of public universities. Trademark protection allows professional clubs and

85. For a further discussion of legal challenges, see supra notes 39-84 and accompanying text.

86. For a further discussion of the weaknesses of legal challenges, see infra notes 87-177 and accompanying text.

87. For a further discussion of the difficulties of a trademark challenge, see infra notes 88-96 and accompanying text.

88. See Rosner, supra note 46, at 272 (explaining financial consequences of trademark challenges).

89. See id. at 271-72 (citing Pro-Football, Inc. v. Harjo, 415 F.3d 44 (D.D.C. Cir. 2005)).

90. See id. at 272-73 (detailing potential for additional suits).

91. See id. (contrasting potential effects of loss of trademark protection on professional sports leagues and public universities). The author describes the significant financial impact on universities, stating:

The denial of federal trademark protection has more significant financial implications for post-secondary institutions and professional sports leagues than it does for an individual professional sports team [or state institution]. A loss of federal trademark protection would allow anyone to sell products containing the unprotected logo, symbol, or mascot without sharing the profits with the league. Thus, the league has a tremendous financial incentive to ensure that all of its marks are protected by federal trademark law.

Id. at 272 (footnotes omitted).
public universities to earn money from items sold with their "logo, symbol, or mascot." Loss of trademark protection would detrimentally impact large universities like FSU that earn a substantial percentage of their revenue from merchandise sales. The loss of trademark protection at smaller schools, like the Savages of Southeastern Oklahoma State or the Braves of Alcorn State University, would not result in the same financial disincentive to change their mascots because such schools do not earn a large amount of money from merchandise sales. The general lack of financial incentive demonstrates an inherent weakness in trademark challenges against public universities. In summary, big schools earning significant amounts of money from merchandise sales may be forced to change names, but not small schools. Even if challengers succeed in proving names are sufficiently disparaging, smaller universities would likely suffer insufficient financial harm to change names.

B. Title VI of the Civil Rights Act

Title VI of the Civil Rights Act of 1964 serves as another approach to challenging Native American team names and mascots. Public universities "are prohibited from creating, encouraging, tolerating, or leaving uncorrected a racially hostile environment in any of its academic, extracurricular, or athletic programs...."

Any school that creates such an environment is at risk of being de-
nied future federal funds. Therefore, arguably all state universities should eliminate Native American team names and mascots in order to ensure future federal funding.

To violate Title VI, the Office of Civil Rights ("OCR") must determine "that a racially hostile environment existed, that the school had actual or constructive notice of this racially hostile environment, and that the school failed to adequately correct this racially hostile environment." It is the OCR's responsibility to determine if state universities have violated each of these elements.

Although it appears a sound method for eliminating Native American team names and mascots, OCR has rejected such assertions twice. The OCR found that the University of Illinois's use of Illini and Quincy (MA) High School's use of Indians were not sufficiently pervasive to violate Title VI. The Wisconsin Court of Appeals rejected similar arguments in *Munson v. Superintendent of...*

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99. *See id.* (discussing consequences of Title VI violation). The author notes:

The United States Department of Education's Office for Civil Rights ("OCR") may investigate whether an institution's use of Native Americans mascots and imagery creates a hostile educational environment in violation of Title VI. Under guidelines adopted in 1994, the Department of Education may withhold federal funds from an institution whose mascot creates a hostile environment for its Native American students until the school remedies the situation by changing its mascot. Under these regulations, an institution is in violation of Title VI if it has created or is responsible for a racially hostile environment that is sufficiently severe, pervasive, or persistent that it interferes with or limits a student's ability to participate in or benefit from the services, activities, or privileges that it provides. A school cannot cause, encourage, accept, tolerate, or fail to remedy a racially hostile environment of which it has either actual or constructive notice.

*Id.* (footnotes omitted).

100. *See id.* (explaining potential consequences of Title VI violation).

101. *Id.* at 267-68 (citing *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11, 448 (Mar. 10, 1994) (to be codified at 34 C.F.R. § 100)).

102. *See id.* at 268 (describing OCR's role in finding Title VI violations).


104. *See Rosner*, *supra* note 46, at 269 (explaining past difficulties of proving Title VI violation).

OCR's investigation of the University of Illinois's use of the Chief Illiniwek mascot [found that the university] did not create a racially hostile environment because the incidents involving the mascot were isolated rather than pervasive. A second investigation of a high school in Quincy, Massachusetts using the nickname 'Indians' yielded a similar result.

*Id.* (footnote omitted).
Public Instruction. Also, public accommodation challenges do not affect professional sports clubs because they do not receive public funding. These federal and state precedents illustrate the weaknesses, at all levels of sports, of Title VI challenges.

C. Legislation: Violates First Amendment Rights

Following passage by both the California State House and Senate, Governor Arnold Schwarzenegger vetoed the Racial Mascots Act ("the Act") in an effort to maintain local school districts control over mascots. No court has addressed whether states can, consistent with the Constitution, prohibit public schools from using certain mascots.

The California legislature sought an outright ban on the use of the name "Redskins." The original bill also aimed to ban many other Indian team names. Many hope this type of legislation will serve as a template for future efforts to ban Native American team names. Nevertheless, such a measure will certainly face a Consti-
tutional challenge. Specifically, a "Racial Mascots" statute will face First Amendment scrutiny.

Assuming a statute bans public university use of offensive team names, the vast majority of names are protected under the First Amendment. First Amendment protection is a difficult barrier to overcome. Challengers will argue that a school’s team name is commercial speech, which receives less protection. This is true for private, profit generating sports franchises like the Washington Redskins, but "the ability of public schools to make commercial speech is questionable, because they are non-profit organizations under the control and supervision of the state." Therefore, strict scrutiny should apply in these cases.

Under Brandenburg v. Ohio, the government may limit speech if it likely results in intentional, serious, and imminent harm. Challenges to team names fail the Brandenburg’s imminency requirement. In fact, many public schools have used Native American team names and mascots for decades without ever

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113. See id. at 72-73 (speculating on constitutional challenges to bill).
114. See Brock, supra note 46, at 72-73 (explaining Act would likely face First Amendment challenge).
115. See U.S. Const. amend. I ("Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.").
116. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (outlining strict scrutiny test). "[The state may not] forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Id.
117. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 500 (1996) (offering argument for commercial speech, which receives less protection).
118. Brock, supra note 46, at 74 (stating that, "[i]t is undisputed that team names, symbols, and logos qualify as commercial speech, as they provide consumers with information about the identity and quality of sports teams" (quoting Scott R. Rosner, Legal Approaches to the Use of Native American Logos and Symbols in Sports, 1 Va. Sports & Ent. L.J. 258, 259 (2002))).
119. See id. at 84 (noting strict scrutiny is applied in non-commercial free speech); Brandenburg, 395 U.S. at 447 (establishing First Amendment speech protection).
121. See id. at 447 (describing current protection of First Amendment speech).
122. See id. (requiring imminent harm for valid government restriction on speech).
causing serious harm.\textsuperscript{123} Therefore, even if a legislature bans a name like "Redskins," such a ban would fail strict scrutiny.\textsuperscript{124}

D. Intentional Infliction of Emotional Distress: Fails Extreme and Outrageous Elements

Close analysis demonstrates an IIED challenge's inherent weaknesses.\textsuperscript{125} Under Restatement (Second) of Torts Section 46, an IIED plaintiff must prove the following elements: "(1) the conduct must be truly extreme and outrageous; (2) the actor must either intend that his conduct inflict severe emotional distress, or know that there is a high probability that this conduct will cause emotional distress; [and] (3) the conduct must in fact cause severe emotional distress."\textsuperscript{126}

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\textsuperscript{123} See Tom D'Angelo, Oklahoma Seminoles Back FSU on Mascot, PalmBeachPost.com, ¶ 16, Aug. 11, 2005, http://www.freerepublic.com/focus/f-news/1462328/posts (reporting "[i]n a self-evaluation FSU gave to NCAA regarding its use of the Seminole nickname and symbols, the school highlighted the history of its only nickname since 1947"); see also Crue v. Aiken, 370 F.3d 668, 672 (7th Cir. 2004) (noting University of Illinois adopted name Illini in 1926).

\textsuperscript{124} See Brandenburg, 395 U.S. at 447 (stating strict scrutiny test requires immediate and serious harm).

\textsuperscript{125} See Goldstein, supra note 46, at 690 (explaining difficulties of IIED challenges). "The current understanding of the law makes it very difficult to succeed in a claim for IIED against the use of a Native American mascot . . . . For policy reasons, IIED must lower the bar in its standard of 'extreme and outrageous' conduct to include racist imagery and harassment." \textit{Id.}

\textsuperscript{126} \textit{Id.} at 700 (quoting Harriston v. Chi. Trib. Co., 992 F.2d 697, 702 (7th Cir. 1993)).
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Arguably, the use of Native American Mascots and team names is outrageous. "Redskins" results in particular harm. Nevertheless, it is difficult to argue that the name is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." This is a very strict standard and "racial and sexual epithets or insults alone are not conclusive of extreme and outrageous conduct . . . ."

In Vance v. Southern Bell Telephone & Telegraph Co., the court noted racial insults alone do not result in IIED. Still, the existence of racial insults are certainly important factors. These mascots arguably "mock a race, religion, and culture." It would be difficult to prove a reasonable person would find that Braves, Warriors, or Indians violate the strict requirements of IIED, and making this task even more difficult is the reality that "the face of a reasona-

127. See id. at 703-05 (arguing use of Native American mascots and teams' names constitutes "extreme and outrageous conduct"). The author explains:

Other factors that the courts have examined to determine outrageous conduct are: financial harm and degree of inconvenience to the plaintiff; publicity of the insults; threats; physical contact; repetitiveness of the insults; awareness on the part of the defendant of the susceptibility of the plaintiff; power position held by the defendant over the plaintiff; and community standards of offensiveness and the specific context of the situation. . . .

[Under this comment] there are several factors that make Native American mascots "outrageous." First, these mascots mock a race, religion, and culture. Second, the frequency of being subjected to this insult is quite high. Third, this is not just a private "indignity" among a small number of people. Fourth, these mascots may be a violation of current public policy. Fifth, several Native Americans who live in campuses where there are mascots have incurred financial harm and huge inconvenience. Sixth, the universities and professional teams have been aware of Native Americans' protests of these mascots. Seventh, Native Americans are "susceptible" to the kind of images put forth by these mascots. Eighth, changing community standards have shown that more and more people oppose these mascots. Ninth, there is a significant power disparity between those insulted by the mascots and those teams and schools who maintain the mascots.

Id. (footnotes omitted).

128. See Rosner, supra note 46, at 270 (noting TTAB survey finding 46.2 percent of respondents believing "Redskins" name offensive).

129. Goldstein, supra note 46, at 701 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. D (1964)).

130. Id. at 702 (footnotes omitted).

131. 983 F.2d 1573 (11th Cir. 1993).

132. See id. at 1575 n.7 (finding racial insults were not extreme or outrageous for IIED claim).

133. See Goldstein, supra note 46, at 702 (footnotes omitted) (arguing such insults are important factor in determining existence of IIED).

134. Id. at 704.
ble person appears to be white; [therefore] the reasonable person may not find these mascots outrageous until white people find them outrageous." 135 IIED claims generally fail, largely due to the outrageousness element. 136

Second, public universities must intend or know that the team name causes severe emotional distress. 137 Clearly, universities are aware of the many protests. 138 It will be difficult for a university to eliminate a locally popular team name in order to cater to those perceived as overly sensitive or politically correct. 139

While there is some evidence that Native American teams names result in severe emotional distress, such evidence remains rare. 140 For example, one Native American suffered symptoms of extreme emotional distress due to the University of Illinois’ mascot. 141 Nevertheless, her reaction does not necessarily represent

135. Id. at 709. The author explains:

[T]he reasonable person standard is not exactly articulated, but it certainly does not take into account the possibility that a reasonable person may be a non-white person. It is safe to say that this so-called reasonable person looks very much like a white person. Furthermore, the concept of community standards goes along with the reasonable person standard. Are the Washington “Redskins” outrageous to the Native American community? It certainly appears that a greater percentage of Native Americans consider the mascot outrageous than white people. Nonetheless, white people are the majority and are the standard-bearers for “community standards.”

Id. at 708-09 (footnotes omitted).

136. See id. at 690 (noting “[t]he current understanding of the law makes it very difficult to succeed in a claim for IIED against the use of a Native American mascot”).

137. See RESTATEMENT (SECOND) OF TORTS § 46 (noting elements of IIED).

138. See Goldstein, supra note 46, at 707 (stating that “universities and professional teams have been aware of Native American’s protests of these mascots”).


140. See id. at 707 (explaining Native Americans’ hardships). The author notes that:

[S]everal Native Americans who live on the campuses where there are Native American mascots have incurred financial harm and huge inconvenience. Charlene Teters, and several other students, staff, and faculty, have felt forced to pick up and leave Champaign, Illinois because of the pressures experienced as a result of the mascot.

Id.

141. See id. at 709 (detailing mascots harm on Native American). “Charlene Teters [a Native American] experienced both psychological and tangible displays of emotional distress. . . . Chief Illiniwek was the reason she felt forced to move away from Champaign, Illinois [home of the University of Illinois].” Id. (footnote omitted).
that of all Native Americans.\textsuperscript{142} Her plight is an anomaly in a community that generally supports the team name.\textsuperscript{143}

E. Public Accommodations Challenges: Fear of "Slippery Slope" and First Amendment Challenges

Some have proposed public accommodations challenges to eliminate Native American team names and mascots.\textsuperscript{144} These people argue that the racial team names discourage Native Americans from attending and enjoying games.\textsuperscript{145} Sports arenas and stadiums are among those places that may not discriminate in accordance with Title II.\textsuperscript{146}

Demonstrating a nexus between the sports team and the place of public accommodation - the arena - is the first step towards proving a violation of Title II.\textsuperscript{147} Arguably, the sports team cannot operate without using a sports facility.\textsuperscript{148} In fact, "[a] stadium and team are mutually interdependent."\textsuperscript{149}

Next, a party must demonstrate that the use of Native American team names denies American Indians full and equal enjoyment of the public accommodations.\textsuperscript{150} Proponents claim "[r]acial in-

\textsuperscript{142}. See id. at 710 (explaining not all Native Americans oppose use of Native American mascots).


\textsuperscript{144}. See A Public Accommodations Challenge, supra note 46, at 906 (stating "[t]his Note offers a new legal approach and proposes using the federal public accommodations law, Title II of the Civil Rights Act of 1964, to challenge professional sports teams' use of Indian nicknames and mascots").

\textsuperscript{145}. See id. (noting basis of public accommodations argument). It is argued that "Indian team names and mascots deter a substantial number of American Indians from patronizing places of public accommodation, and therefore cause a denial of the full and equal enjoyment of those facilities." Id.

\textsuperscript{146}. See id. at 908 (explaining "Title II prohibits discrimination or segregation by 'any motion picture house, theatre, concert hall, sports arena, stadium or other place of exhibition or entertainment'" (emphasis added)).

\textsuperscript{147}. See id. (arguing nexus exists between team and stadium). The author demonstrates this nexus by explaining:

The nexus between a sports team and its home stadium or arena is so close and so complete that if the stadium cannot bar an individual or a class, neither can the sports team that uses the stadium — however that barrier is created. Congressional intent to eliminate discrimination in sports arenas and stadiums is clearly expressed in the statutory text. This intent should not be subverted by permitting a sports team to discriminate in a stadium.

\textsuperscript{148}. See id. at 908 (describing "nexus" between teams and stadium).

\textsuperscript{149}. A Public Accommodations Challenge, supra note 46, at 910.

\textsuperscript{150}. See id. (arguing "[a]lthough Indians are not physically barred or denied service, the manner in which they are served is nonetheless discriminatory because
results are documented to cause psychological and physical harms." 151 Also, a Michigan Civil Rights Commission study shows team names like "Redskins" result in "racial stereotyping" and harm to Native Americans, as well as leading to the harassment of Native American youth. 152

The final step in proving a Title II claim "hinges on establishing as a factual matter that Indian team names and mascots effectively exclude American Indians [from sporting events] and thus deny the full and equal enjoyment of a place of public accommodation." 153 It is proposed that the "collective response" of Native Americans to the use of mascots demonstrates this problem. 154 Proponents point to Native Americans repeated protests of the use of Native American team names, including large protests at premier sporting events. 155

Despite strong arguments that public accommodations challenges can eliminate Native American team names and mascots, such challenges are not likely to succeed. 156 First, courts fear a "slippery slope" in which anything potentially offensive is barred

team names and mascots cause harm and lead to exclusion by maintaining an intimidating environment. This race-based abuse prevents Indians from attending sporting events, thereby violating Title II). 151. Id. at 911.

152. See id. (citing MICHIGAN DEP'T OF CIVIL RIGHTS, MICHIGAN CIVIL RIGHTS COMMISSION REPORT ON USE OF NICKNAMES, LOGOS AND MASCOTS DEPICTING NATIVE AMERICAN PEOPLE IN MICHIGAN EDUCATION INSTITUTIONS 21 (1988)) (detailing potential harmful effects of Native American mascots).

153. Id. at 914.

154. See A Public Accommodations Challenge, supra note 46, at 915 (noting public efforts by Native Americans protesting offensive team names).

155. See id. at 915 (describing protest efforts by Native Americans opposed to certain team names). The author argues that:

[T]he best evidence of the deterrent effect of Indian mascots and nicknames is the collective response of American Indians. Over five hundred Indian Nations have voiced their unified opposition through such representative organizations as the National Congress of American Indians (NCAI), the National Indian Education Association, the Great Lakes Inter-Tribal Council, and the Oneida Tribe of Indians of Wisconsin. The number of protestors at sporting events also illustrates the deterrent effect: police reported five hundred protestors at the 1991 World Series in which the Atlanta Braves participated, and three thousand protestors at the 1992 Super Bowl in which the Washington Redskins participated. Anecdotal evidence reveals specific instances of discriminatory impact. In a litigation setting, parties challenging a certain team name or mascot could produce more location-specific evidence of exclusion in violation of Title II.

Id. (footnotes omitted).

156. See id. at 915-16 (stating "a public accommodations challenge may raise slippery slope concerns that soon every team will be challenged by hypersensitive plaintiffs who are offended by a team name or mascot").
under public accommodations. For example, some visitors to a museum will be offended by certain art, some Norwegian football fans will be insulted by the NFL’s Minnesota Vikings, and some Irish basketball fans will protest the Boston Celtics or Notre Dame’s Fighting Irish nickname.

The First Amendment may also serve as a bar to Title II challenges. Public universities are non-profit entities and, therefore, receive the highest First Amendment protection. The fear of the “slippery slope” combined with First Amendment protection are strong defenses for state universities defending public accommodations challenges.

F. Grassroots Protests

Challenges to Native American team names and mascots also include grassroots protests. As previously stated, Crue v. Aiken addressed the legal limits of the University of Illinois’s faculty and student efforts combating the name “Illiniwek.” Students and faculty contacted potential student athletes in an effort to inform them of the Illinois mascot. In Crue, the court dismissed the suit

157. See id. (describing concerns of hypersensitive plaintiffs raising weak public accommodations challenges).

158. See id. at 916 (noting similarities between Native American team names and other team names). The author argues, however, that Native American teams names are different:

[A] broader historical context is critical to distinguishing Indian team names from others that also refer to national origin (like the Boston Celtics or the Minnesota Vikings) or religion (like the New Orleans Saints or the California Angels). Unlike American Indians, Celtics, Vikings, Saints, and Angels “have not been widely disrespected and abused in this country.”

Id. (footnotes omitted).

159. See Brock, supra note 46, at 74-77 (noting potential constitutional weakness of Title II challenges).

160. See id. at 74 (noting difficulty of state institution conducting commercial speech). For a further discussion on First Amendment and strict scrutiny, see supra notes 115-24 and accompanying text.

161. See A Public Accommodations Challenge, supra note 46, at 915-16 (noting public accommodations challenges’ potential flaws and defenses).

162. See Crue v. Aiken, 370 F.3d 668, 679-80 (7th Cir. 2004) (describing University of Illinois faculty and student efforts notifying incoming athletes of university’s use of allegedly offensive “Illini” team name).

163. For a further discussion of Crue, see supra notes 78-84 and accompanying text.

164. See Crue, 370 F.3d at 670-75 (describing efforts taken by students in opposition to Illini mascot).
as moot. Consequently, these protests have not accomplished their ultimate goal of eliminating the University of Illinois mascot.

IV. PREDICTING THE FUTURE OF NATIVE AMERICAN TEAM NAMES AT PUBLIC INSTITUTIONS — ARE WE LIKELY STUCK WITH OFFENSIVE MASCOTS?

Past, present, and potential challenges to Native American mascots include trademark, Title VI, legislative, IIED, public accommodations, and grassroots based challenges. Despite the diversity of these challenges to Native American mascots, it appears that none of them will successfully eliminate all Native American team names. First, even if successful, trademark challenges are unlikely to pose a sufficient financial threat to the majority of public universities using Native American team names. Second, courts have roundly dismissed Title VI funding challenges. Third, legislation banning team names likely violates the First Amendment. Fourth, the majority of Native Americans team names are not sufficiently extreme and outrageous to warrant IIED claims. Fifth, the fear of an “overly sensitive person standard” prevents courts from upholding public accommodations challenges. Finally, grassroots protests have proven ineffective in eliminating Native American team names and mascots.

165. See id. at 677 (finding “[a]s a preliminary matter, we will mention the claim that this action must be dismissed as moot because the offending e-mail has been retracted and Chancellor Aiken has resigned”).

166. See Crowley, supra note 15, at 35-36 (demonstrating grassroots protests’ lack of success).

167. For further discussion of past, present, and potential legal challenges, see supra notes 46-84 and accompanying text.

168. For a further discussion of the weaknesses of legal challenges, see supra and infra notes 85-177 and accompanying text.

169. For a further discussion concerning the weaknesses of trademark challenges, see supra notes 87-96 and accompanying text.

170. For a further discussion explaining the weaknesses of Title VI challenges, see supra notes 97-107 and accompanying text.

171. For a further discussion explaining the weaknesses of legislative bans on Native American team names, see supra notes 108-24 and the accompanying text.

172. For a further discussion of the weaknesses of IIED challenges, see supra notes 125-43 and accompanying text.

173. For a further discussion describing the weaknesses of public accommodation challenges, see supra notes 144-61 and accompanying text.

174. For a further discussion explaining the weaknesses of grassroots protests, see supra notes 162-66 and accompanying text.
The above indicates that challenges to Native American team names are unlikely to succeed. The reality is that each of these challenges fail because the "reasonable person" does not find Native American team names or mascots offensive. Therefore, Native American team names will remain until the beliefs and views of the average, "reasonable" American changes.

Brian R. Moushegian

175. For a further discussion on the overall weaknesses of legal challenges, see supra and infra notes 85-177 and accompanying text.

176. See Goldstein, supra note 46, at 708-09 (explaining that current reasonable person standard is bias against minorities such as Native Americans).

177. See id. (demonstrating weaknesses of legal challenges).