

No. 15-1874

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PRO-FOOTBALL, INC.,

Plaintiff-Appellant,

v.

AMANDA BLACKHORSE, MARCUS BRIGGS-CLOUD, PHILLIP GOVER,
JILLIAN PAPPAN AND COURTNEY TSOTIGH

Defendants-Appellees.

On Appeal from the United States District Court
United States District Court for the Eastern District of Virginia at Alexandria
1:14-cv-01043-GBL-IDD

**SECOND CORRECTED BRIEF OF THE NAVAJO NATION AS *AMICUS
CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES**

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Statement Pursuant to Fed. R. App. P. 29(a), (c)(5)

All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution that was intended to fund this brief's preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1(b)(1), *amici* Navajo Nation states that it is not a publicly held corporation, does not issue stock, and does not have a parent corporation.

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INTRODUCTION

Amicus Navajo Nation (the “Nation”) files this brief in support of Appellees, and joins them to urge this Court to affirm the cancellation of Appellant Pro-Football, Inc.’s trademark.

The Nation agrees with the positions asserted in the briefs filed by Amanda Blackhorse, an enrolled citizen of the Navajo Nation, and the other individual Appellees, as well as the United States. The Nation files this separate brief because Pro-Football, Inc. and its amici suggest that the Nation and its individual tribal members do not find the Washington football team name disparaging. *See* Appellant’s Opening Brief [Dkt. 29], at 60; Brief of Amici Don Bettyloun, et al., [Dkt. 37], at 13. In fact, the Nation’s view is quite the opposite. Peter McDonald is a named amicus supporting Pro-Football, Inc., but he is but one among over 300,000 enrolled Navajo citizens. He speaks on his own behalf, and his view is not reflective of the Nation or of its citizens in general. Brief of Bettyloun, et al., at 1. The Nation’s elected and appointed and traditional leaders speak for the Navajo people, and their strong, unified opposition to the team name due to its disparaging nature and the harm it threatens to the health and well-being of the Nation’s individual tribal members, is the true reflection of the Navajo Nation’s view with respect to the team name.

Pursuant to the stipulation of the parties consenting to all amicus briefs conforming to Federal Rule of Appellate Procedure 29, Appellant's Response to Motion for Leave to File Brief of *Amicus Curiae* Professor Russ VerSteeg, [Dkt. 42], at 1, this brief is properly filed.

INTEREST OF AMICUS NAVAJO NATION

The Navajo Nation is the largest Indian nation by land holdings, and, by some measures, the number of enrolled citizens. It has over 300,000 enrolled citizens and over 17 million acres of largely contiguous land in New Mexico, Arizona, and Utah. The Nation is larger than ten of the states and is roughly the size of West Virginia and twice the size of Massachusetts. The Nation is a sovereign with two ratified treaties with the United States, entered into in 1850 and 1868.

The Nation has a three-branch government made up of Executive, Legislative, and Judicial Branches. The Nation's President and Council Delegates are elected by the Nation's membership through a democratic vote. The Navajo Nation Council (the "Council") has twenty-four Delegates representing a total of one hundred and ten Chapters (local government units on the Nation).

The Council created the Navajo Nation Human Rights Commission (the "Commission") in 2006. The Commission is a body within the Legislative Branch empowered to investigate human rights violations against the Navajo people. *See* 2

N.N.C. § 920. It incorporates Navajo, federal, and international legal principles to combat discrimination against Navajo people. *Id.*

The Nation expresses its views here as the official Navajo Nation government and as *parens patriae* for its members.

ARGUMENT

I. A “SUBSTANTIAL COMPOSITE” OF THE NATION FINDS THE WASHINGTON TEAM NAME DISPARAGING.

A trademark can be canceled if a “substantial composite” of the relevant group may find it disparaging. *In re Geller*, 751 F.3d 1355, 1360-61 (Fed. Cir. 2014); *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 2010 WL 766488, at *3-4 (Trademark Tr. & App. Bd. 2010). A “substantial composite” need not be a majority of the disparaged group, and a trademark may be disparaging even if some within that group find it to be positive. *See In re Boulevard Entm’t*, 334 F.3d 1336, 1340 (Fed. Cir. 2003) (substantial composite is “not necessarily a majority”); *In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071, 2008 WL 5065114, at *6-8 (Trademark Tr. & App. Bd. 2008) (affirming finding of disparagement even though some members of Jewish community do not find term offensive). Further, the view of public officials expressed through resolutions is appropriate evidence on the views of a “substantial composite” of the disparaged population. *See Pro-Football, Inc., v. Harjo*, 50 U.S.P.Q.2d 1705, 1999 WL 375907, at *46 (Trademark Tr. & App. Bd. 1999), *rv’d*, 284 F.Supp. 2d 96 (D.D.C. 2003), *rmn’d*, 415 F.3d 44 (D.C. Cir. 2005) (accepting

National Congress of American Indians resolution as evidence of the views of Native Americans on disparaging effect of “Redskins”).

A. Formal action by the Nation’s elected, appointed, and traditional leaders unequivocally shows a “substantial composite” of Navajos consider Washington football team name disparaging.

1. The Nation’s Legislative and Executive leadership view the team name as disparaging and harmful to the health and well-being of the Navajo people and the Council has made an official public policy statement to that end.

The Nation’s elected legislative body has formally stated for the Nation that the term “Redskins,” as used by Pro-Football, Inc., “constitutes a disparaging epithet.” Resolution No. NABIAP-22-14, ¶ 2. On April 10, 2014, the Naabik’íyáti Committee of the Navajo Nation Council, a “committee of the whole” made up of all Council Delegates (elected by and representative of all voting-eligible Navajo people), with the power to state the policy of the Navajo Nation on important public policy matters,¹ unanimously passed a resolution clearly stating the official view of the Nation that:

The Navajo Nation . . . opposes the use of the terms “redskin” and “redskins,” and other disparaging epithets and references to Native Americans in professional sports franchises.

Id., ¶ 10. This view was based on the findings that the use of those disparaging terms “has a negative psychological effect on Native Americans, such as promoting low self-esteem and self-image in Native youth who are already disadvantaged by social

¹ 2 N.N.C. § 701; *see* 2 N.N.C. § 701(A)(6), (8).

ills beyond their control” and “perpetuates racism, stereotyping, ignorance and misrepresentation of indigenous peoples.” *Id.*, ¶¶ 4-5.

This official policy position of the Nation reflects the Nation’s concern for the mental health of its people, especially its youth. According to the *Navajo Nation Mortality Report, 2006-2009*, assembled by the Navajo Nation Department of Health, suicide was identified as the seventh leading cause of mortality on the Navajo Nation. In that same period, Navajo citizens in New Mexico and Arizona were committing an average of 30 suicides per year. This data excludes the mortality rate for Utah Navajo citizens. Suicide is a major public health and public policy issue on the Nation. After a spike in suicides late this past summer and fall, where five young people (i.e., individuals from the age group of middle school to thirty-one years of age) and eleven people total took their lives, the Nation declared a public emergency to combat suicide among Navajo youth and conducted a series of events in schools and communities on the Nation to raise awareness and prevent suicides. The Nation’s concern for the mental well-being of its people as well as the ongoing threat of suicide and other high risk actions reflective of low self-esteem and low self-worth is well placed.

The Nation’s concern for the connection between mental health and the continued use of disparaging team names in professional sports is supported by the work of the American Psychological Association, which has identified the continued

use of Indian mascots as having a negative effect on Native youth self-esteem and as causing hostile learning environments in schools. American Psychological Association (the “APA”) Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations, at 1, available at: <https://www.apa.org/about/policy/mascots.pdf> (accessed February 9, 2016). The APA consulted numerous studies and other sources to reach its conclusions. See *id.*

The Naabik’íyáti Committee’s Resolution ends by authorizing the Nation’s leaders, including the President, the Speaker of the Council, and the Nation’s Washington, D.C. office “to oppose the use of the terms ‘redskin’ and ‘redskins.’” *Id.*, ¶ 13. The current President and Vice-President of the Navajo Nation were Council Delegates when the Resolution passed, and they both voted in favor of it. Press Release of the Navajo Nation Washington Office, *Navajo President Russell Begaye and Vice President Jonathan Nez Applaud Court Ruling Cancelling Washington DC’s Football Team Trademark Registrations* (July 9, 2015).² When Ms. Blackhorse prevailed in the district court in this case in July, the President and Vice-President “hailed” the federal judge’s ruling and congratulated Ms. Blackhorse for her perseverance and leadership. *Id.* The President regarded the ruling as “a

² Available at <http://nnwo.org/content/navajo-president-russell-begaye-and-vice-president-jonathan-nez-applaud-court-ruling> (visited February 11, 2016).

victory for all of Indian Country.” *Id.* The views of the Nation’s elected leadership could not be clearer.

2. The appointed leaders of the Navajo Nation Human Rights Commission view the team name as disparaging and in violation of the human rights of the Navajo people and of the Navajo Nation.

On March 7, 2014, the five Commissioners of the Navajo Nation Human Rights Commission, appointed by the Speaker and confirmed by a Council committee, unanimously passed a resolution urging Council to pass a resolution “in opposition to the use of disparaging references to Native Peoples in professional sports franchises [such] as ‘redskin,’ ‘redskins.’” Resolution No. NNHRCMAR-41-14. The Commissioners represent a cross-section of the Nation’s members, and are required by statute to include “persons with reputable and established backgrounds in the fields of education, business, law enforcement and social services.” 2 N.N.C. § 922(A). The Commissioners’ recommendation was based in part on a finding made in 2012 by the United Nations Special Rapporteur on Indigenous Peoples that “[w]ithin the United States stereotypes persist that tend to render Native Americans relics of the past, perpetuated by the use of Indian names by professional and other high-profile sports teams.” *Id.*, § 5. The Commission noted that “[t]hroughout his mission, the Special Rapporteur heard complaints from indigenous representatives about such stereotypes, and about how they obscure understanding of the reality of Native Americans today and instead help to keep alive racially discriminatory

attitudes.” *Id.* As evidenced by the unanimous passage by the Naabik’íyáti Committee of the Navajo Nation Council of Resolution No. NABIAP-22-14, the full Council heeded the Commission’s advice, and shared the Commission’s concern with respect to the Washington football team’s name.

3. The Nation’s traditional leaders also find the team name disparaging.

In a resolution passed on November 17, 2013, the Diné Medicine Men’s Association (the “Association”), a non-profit organization that consists of a substantial number of the Nation’s traditional healers and leaders, also expressed its views in opposition to the team name on the basis that the team name perpetuates “racist stereotypes and cultural appropriation” and has a “psychological and physical disrupt[ive]” nature. Resolution, Resolved Clause 1. The Association urged President Obama and Navajo Executive and Legislative leaders to take steps to eliminate use of the “racial slur” by the team. *Id.*, § 2; *Id.*, Whereas Clause 4.

The unmistakable statements of the Nation’s elected, appointed, and traditional leaders demonstrate that a “substantial composite” of Navajos find the Washington football team name to be disparaging. Combined, the three entities represent the views of numerous and diverse cross-sections of Navajo people.

B. Pro-Football, Inc. and Amici's sparse and isolated examples of Navajo support for the team name does nothing to countervail the overwhelming view of the Navajo Nation and the Navajo people that the team name is disparaging.

Pro-Football and its amici wrongly suggest that the Navajo people do not object to the Redskins team name. They support this position through statements by one Navajo citizen, and through reference to one school on the Navajo Nation. The Nation has over 300,000 citizens, and over one hundred thirty schools on the Nation. That one of our tribal citizens espouses the view that the team name is not only not disparaging but is in fact an honorific title is not at all reflective of the views of the Navajo Nation or the Navajo people, particularly where the elected leadership of the Navajo people, and our appointed and traditional leadership, take such a strong view that the name is indeed disparaging and is furthermore harmful to our people and should be dropped from professional sports use altogether. With respect to Red Mesa School, which uses "Redskins" as its sports mascot, that school is an Arizona state public school. It is not created or sanctioned by the Navajo Nation government, and in fact the Red Mesa School District has directly challenged in federal court the Nation's sovereign authority over its activities on Navajo trust land in an effort to exempt itself from Navajo Nation law. *See Red Mesa Unified School Dist. v. Yellowhair*, 2010 WL 3855183 at *1 (D. Ariz. Sept. 28, 2010).

The isolated examples relied upon by Pro-Football and its amici do nothing to establish the general views of the Navajo Nation or the Navajo people. Mr.

McDonald states his views as a single Navajo citizen, not in any official governmental capacity, and without any evidence that any other Navajo people share his views.³ Further, even if the Red Mesa School's mascot is supported by Navajos in that community, Red Mesa is but one community among over 300,000 Navajo people. Tellingly, though there are over one hundred thirty schools on the Nation, Pro-Football and Amici only identify that one school that uses "Redskins."

Regardless, individual Navajos like Mr. McDonald or a single community of Navajos, such as residents of the Red Mesa area, are free to disagree with the Nation's official position, and may believe that the term is not disparaging. That does not mean there is not a "substantial composite" of Navajos and other Native Americans that find the term offensive. Mr. McDonald and the Red Mesa School cannot negate the official statements of the Nation's government and medicine men that Pro-Football's trademark is disparaging.

CONCLUSION

The negative effect of mascots created and used commercially by professional sports teams on Native American self-esteem is well-documented. The Navajo Nation has firmly expressed the views of a substantial composite of its members that

³ Though Mr. McDonald identifies himself as President of the Navajo Code Talkers Association, Brief of Amici Don Bettyloun, et al., [Dkt. 37], at 1, he provides nothing to show that association endorses his views.

Pro-Football Inc.'s trademark is disparaging. Based on this, Amicus Navajo Nation urges the Court to affirm the decision of the District court that the "Redskins" trademark may disparage Native Americans under Section 2(a) of the Lanham Act and must be canceled.

Dated: February 22nd, 2016

Respectfully submitted,

By: /s/ Mark A. Griffin

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,136 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). I relied on the word count of Microsoft Word 2013 in preparing this certificate.

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because the brief—in both its text and its footnotes—has been prepared in 14-point Times New Roman font.

DATED: February 22nd, 2016.

/s/ Mark A. Griffin

Mark A. Griffin

CERTIFICATE OF SERVICE

I hereby certify that on February 22nd, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit through the CM/ECF system. I further certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: February 22nd, 2016.

/s/ Mark A. Griffin

Mark A. Griffin