20120112

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 6, 2012
STATE OF NORTH DAKOTA

North Dakota State Board of Higher Education, Petitioner, vs. Al Jaeger, Secretary of State, in his official capacity, and Fighting Sioux Ballot Measures aka Committee for Understanding and Respect, Respondents, and North Dakota Legislative Assembly, Intervenor.	Supreme Court No. 20120112

RESPONSE OF
FIGHTING SIOUX BALLOT MEASURES AKA
COMMITTEE FOR UNDERSTANDING AND RESPECT'S RESPONSE
TO PETITIONER'S APPLICATION FOR WRIT OF INJUNCTION

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[¶1] **JURISDICTIONAL STATEMENT**

[¶2] The undersigned stipulates that this Court has original jurisdiction, but is precluded from making a determination for reasons contained herein.

[¶3] **STATEMENT OF THE ISSUES**

[¶4] 1. Whether Article I, §3, regarding the free exercise and enjoyment of religion precludes the State Board of Higher Education ("SBHE") to obtain a Writ of Injunction without joinder of the N.D. Sioux Tribes.

[¶5] 2. Whether the 1969 sacred Sioux ceremony giving the Fighting Sioux name to the University of North Dakota constitutes a religious function preventing civil interference.

[¶6] 3. Because the Secretary of State has not certified the Referral Petitions nor has there been an actual vote, whether the matter is ripe for Appellate Review.

[¶7] 4. Whether the actions by the majority of the State Legislature along with the State Board of Higher Education can be separated because the two entities acted in concert to promulgate SB 2370.

[¶8] 5. If SBHE and legislative actions can be separated so that constitutional authority can be chosen and decided by this Court, then the issue is whether or not retaining or retiring the Fighting Sioux name is an act to "organize or reorganize" under Article VIII, §6(6)(b) subject to statutory and constitutional limitations.

[¶9] 6. Because of the SBHE's failure to assert any constitutional rights following the enactment of N.D.C.C. §15-10-46 and the subsequent repeal of said statute pursuant to SB2370, whether the matter has now vested to the power reserved to the people pursuant to Article III, §1 to approve or reject legislative acts for which the SBHE was directly and influentially involved.

[¶10] **STATEMENT OF CASE**

[¶11] The matter before this Court involves more than choosing between the legislature and the State Board of Higher Education ("SBHE") and its powers to keep or retire the "Fighting Sioux" name from the University of North Dakota ("UND"). As set forth in Petitioner's Brief, this is a state wide issue. It is also a religious issue coming under the realm of Article 1, §3, which states in part:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state . . . ."

[¶12] Because of constitutional issues involving the traditional Sioux religion, the two North Dakota Sioux Tribes must be joined as Indispensable Parties under Rule 19 of the North Dakota Rules of Civil Procedure.[1] The Standing Rock Sioux Tribe ("SRST") and the Spirit Lake Sioux Tribe, by and through their Elders, gave the name "Fighting Sioux" to UND in 1969 in the context of a Sioux religious ceremony. Elders of Sioux Tribes assert that the name "Fighting Sioux" cannot be taken away. (Ex. 1, Affidavit of Wasicutawa (December 15, 2011)). Constitutional protections affirm the assertion precluding civil authorities from controlling in any manner or interfering in ecclesiastical matters. See, Bendewald v. Lay, 39 N.D. 272, 168 N.W. 693 (1918).

[¶13] As in previous litigation involving the "Fighting Sioux" name, the SBHE has again failed to include the N.D. Sioux Tribes in its attempt to exercise its jurisdiction over the State of North Dakota.

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[1] Two Sioux Tribes include the Spirit Lake Sioux Tribe and Standing Rock Sioux Tribe and not Sisseton Wahpeton Oyate Band of Indians who no longer use the name "Sioux."

[¶14] **STATEMENT OF FACTS**

[¶15] A 1969 traditional Sioux religious ceremony took place between the University of North Dakota and the N.D. Sioux Tribes. In 1969, SRST Tribal leaders carried out sovereign duties of the Tribe by traveling to UND to formally give the name "Fighting Sioux" to UND. These tribal leaders formally approved that UND use the name "Fighting Sioux." (Ex. 2, Art Raymond, "Fighting Sioux" Get Uncpapap ok, Grand Forks Herald, July 21, 1969; Ex. 3 Id., Bismarck Tribune, July 22, 1969). These SRST Tribal leaders included Tribal Chairman Aljoe Agard, Traditional and Spiritual Leader Edward Loon, Tribal Judge Bernard Standing Crow, and Traditional Leader Frank White Buffalo Man (grandson of Sitting Bull). (Ex. 4, Richard Cline, Starcher Becomes Chief At Sioux Indian Pow-Wow, Dakota Student, July 25, 1969 at 3; Ex. 5, Sioux Indian Pow-Wow Scheduled for Tonight, The Summer Student, July 18, 1969). In July, 1969, a Pow-wow, ceremonial rites, and dances were celebrated. (Ex. 6-10, photo reprint, 1969). Then UND President Dr. George W. Starcher was presented an Indian Headdress by Spirit Lake Tribal Elder.

[¶16] The 1969 ceremony is considered sacred by Tribal elders and part of Sioux history. A religious pipe ceremony was conducted in conjunction with the sacred giving of the "Fighting Sioux" name. Over 300 people filled the Prairie State Ballroom to observe the ceremony. The Sioux tribe gave President Starcher the Sioux name, "The Yankton Chief". (Ex. 11, photo reprint Id.). The leaders from Standing Rock Sioux also expressed their appreciation to UND for its efforts on behalf of the Tribe in the educational field and adopted President Starcher into the Sioux Tribe. Throughout

history treaties were rarely signed by the Sioux. Instead the sacred pipe was lit to seal a bond of the Sioux Word forever. Sioux elders smoked the Sacred Pipe, smoked and honored their Word and deed with UND. According to Sioux religion, the name "Fighting Sioux, cannot be taken away. To dismiss the sacred ceremony of 1969 is to dismiss the Sioux people, and to dismiss the tradition and ceremonies of the Sioux people. Because of the sacredness of the 1969 ceremony conducted by Standing Rock and Spirit Lake Tribal Elders, approval of UND's use of the "Fighting Sioux" name was long ago given, thereby meeting the terms of approval for the settlement agreement. The Sioux Tribes have entered into the free exercise and enjoyment of religious profession and worship as outlined in Article I, §3 of the North Dakota State Constitution. SBHE's actions as litigated in the past with the NCAA as well as the Application for a Writ of Injunction violate the Sioux Tribes' religious rights and cannot be taken away.

[¶17] Agents for the SBHE have referred to the Sioux name as "nothing more than a pile of dirty laundry." (Ex 12, Terri Finneman, N.D. University System Officials Claim Lawsuit is About Only the Fighting Sioux Nickname, GrandForksHerald.com (March 2, 2012), http://www.grandforksherald.com/event/article/id/231106).

[¶18] **ARGUMENT**

[¶19] I. Not Ripe for Review.

[¶20] The Petitions for the Referendum of Senate Bill 2370 have not yet been deemed sufficient or insufficient by the Secretary of State under N.D.C.C. §16.1-01-10. Even if the Secretary of State approves the Referendum Petition, there is no guarantee that the voters of North Dakota are going to vote in favor of the referendum. SB2370 may again

continue to be the law without any judicial intervention. Therefore, the Application for Writ of Injunction is speculative and not ripe for this Court to assert its jurisdiction. The SBHE has taken a "what if" scenario and brought it before the Court. The Supreme Court of North Dakota may only adjudicate actual controversies which requires an issue that is ripe for review. See, In re of L.D. M., 806 N.W. 2d 438, 2011 WL 555586, 2011 ND 208, Unpublished Disposition, N.D., November 15, 2011 (NO. 20110110); State v. Hammer, 787 N.W. 2d 716, 2010 WL 3222139, 2010 ND 152, N.D., August 17, 2010 (No. 20100025); Mertz v. 999 Quebec, Inc., 780 N.W. 2d 446, 2010 WL 1052555, 2010 ND 51, N.D., March 24, 2010 (No. 20090031).

[¶21] A. Activities Constitute Legislative Action by SBHE.

[¶22] It must be emphasized that the SBHE and its individual board members as well as administrators and faculty from UND were proactive in the legislative process, lobbying state Legislators, personally testifying, soliciting the testimony of others, including UND students and alumni, testifying strongly against N.D.C.C. §15-10-46, as well as its repeal through Senate Bill 2370. The SBHE as well as a majority of State Legislators have cooperated to pass SB2370. SBHE's efforts insured that SB2370 would be drafted, promulgated and signed by the governor to establish its supreme authority over the "Fighting Sioux" name and its retirement. Therefore, under the present facts, there is no need for this Court to choose between the constitutional powers of the SBHE and the Legislature, as they have acted in concert in accomplishing the repeal of N.D.C.C. §15-10-46.

[¶23] B. Burden of Proof Not Met to Warrant Action.

[¶24] The SBHE has not met the burden of proof to establish that a writ is necessary.

Rules of Appellate Procedure 21(a)(2)(D) require that the SBHE set forth a reason why a writ should be issued. SBHE alleges that the referral process has caused "significant harm" but fails to explain or elaborate in any measure what "significant harm" exists. SBHE relies on a criminal case of 1937 to take the position that the people's right of referral coexists with the legislative right. See, SBHE argument paragraph one, page 2, citing State v. Hogue, 271 N.W. 677, at 680 (N.D. 1937). The implication is that the people of North Dakota are prevented from any authority of curbing the power of the SBHE. As noted above, the SBHE was the root of the push to establish Senate Bill 2370 and repeal the "Fighting Sioux" name.

[¶25] SBHE argues that it has the authority to decide how UND's name and logo should be used in order to protect UND's financial viability but ignores any argument of the hundreds of thousands of dollars in revenue generated through the licensing of the "Fighting Sioux" logo. Also, the SBHE ignores any details of costs expended to scrub the name "Fighting Sioux" from UND's buildings. Because of these fiscal issues, some limitation upon the SBHE's assertion of absolute power must be considered.

[¶26] II. The North Dakota Sioux Tribes are Necessary Parties to this action.

[¶27] The Sioux Tribes, pursuant to North Dakota Rules of Civil Procedure, Rule 19 are an Indispensable Party. While this Court may not have subject matter jurisdiction over a federally recognized sovereign Tribe, the Tribes have a right to notice and an opportunity to submit to the jurisdiction of this Court for the limited purpose of establishing its religious rights in association with the gift to the University of North Dakota. Rule 19 of the N.D. Rules of Civil Procedure requires joinder or reasons for the Tribes not being joined. The religious ceremony that marked the origin of the "Fighting

Sioux" identity for UND's commercial sports activities makes the Tribes necessary to have a "seat at the table" in all matters regarding the "Fighting Sioux" identification for UND.[2]

[¶28] There is also a property right to the N.D. Sioux Tribes of the name "Fighting Sioux" because the trade usage of the "Sioux" name is identified by nationwide repeated use. N.D. Sioux Tribes are entitled to protection of that name and property right before an abrupt and secret retirement of its name by UND. The Spirit Lake Sioux Tribe specifically does not yield its name and its right to its name. Because of the property right associated with the name "Sioux" and the inherent good will and other economic advantages that come specifically to the Spirit Lake Sioux Tribe, the rights of all N.D. Sioux Tribes must be recognized by this Court.

[¶29] III. N.D.C.C.§15-10-46 is Presumed Constitutional.

[¶30] In Nord v. Guy, 141 N.W.2d 395 (N.D. 1966), this Court indicated every presumption is given to the constitutionality of legislative acts and that "every statute must be held to be constitutional, unless it is clearly violative of some constitutional provisions, and one who alleges a statute to be unconstitutional must be able to point to the constitutional provision that is contravened." (emphasis added). Citing, State ex rel. Kaufman v. Davis, 59 N.D. 191, 229 N.W. 105, Id. at 400. Because there is no bright line showing the contravention of any constitutional provisions, presumption continues that the law remains constitutional. "Every reasonable presumption is in favor of the constitutionality of a statute enacted by the legislature." See, Wilder v. Murphy, 218 N.W. at 157, citing State ex rel v. Taylor, 33 N.D. 76, 156 N.W. 561,

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[2]The Committee for Understanding and Respect has by Tribal Resolution been given authority to take any necessary legal means to protect and keep the name "Fighting Sioux."

L.R.A. 1918 B, 156 Ann. CAS. 918A, 583; O'Laughlin v. Carlson, 30 N.D. 213, 152 N.W. 675. The contrary will not be held unless its unconstitutionality clearly appears. Id. Citing, Buttfield v. Stranahan, 192 U.S. 470, 24 S.Ct. 349, 48 L.Ed. 525.

[¶31] SBHE cites a list of cases when an injunction or writ was granted by this court over Initiative Measures or Referrals. As noted by SBHE, however, there is no case on point addressing a direct conflict between SBHE's authority and a statute. Nor do the cases cited by SBHE involve: 1) intervention by the North Dakota Attorney General who approved specific referral language. (Ex. 12, Letter from Al Jaeger, N.D. Secretary of State, December 2, 2011), together with 2) Direct SBHE involvement in the underlying legislative process repealing a state statute.

[¶32] A. N.D.C.C. §15-10-46 Can Be Held Constitutional in Whole or in Part.

[¶33] N.D.C.C. §15-10-46, has one objective and that is to keep the name "Fighting Sioux" for the University of North Dakota, a state wide issue as admitted by SBHE. The remainder of N.D.C.C. §15-10-46 directing the SBHE to refrain or perform certain actions should not render the statute or the subsequent referral process void and prohibit the people from voting. "In construing statutes Court's seek not only to uphold their constitutionality but also endeavor to so construe them as to effectuate the legislative purpose which prompted their enactment even though the construction which is thus arrived at does not appear to be as natural as some other." State v. Borge, 283 N.W. 521, at 525, citing 11 Am. Jur., Constitutional Law, §97; Ledegar v. Bockoven, 77 Okl. 58, 185 P. 1097; Telman v. Telman, 84 S.C. 552, 66 S.E. 1049, 26 L.R.A., N.S., 781; Winters v. City of Duluth, 82 Minn. 127, 84 N.W. 788.

[¶34] State v. Borge went on to explain that the "Court, in construing a statute, must

give effect to the spirit and intent of the act so as to effectuate the object sought to be accomplished by the legislature, even though such construction may not seem warranted by the strict letter of its language." Id. at 527.Citing, Vermont Loan and Trust Co. v. Whithead, 2 N.D. 82, 49 N.W. 318; Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284; Boyle v. Northwestern Mutual Relief Ass'n., 95 Wis. 312, 70 N.W. 351; 26 Am. & Eng. Encyc. of L. 602.

[¶35] IV. Powers Reserved for the People.

[¶36] There is no mandatory and unequivocal grant of power to the SBHE over the people of North Dakota. In construing the statute as to effectuate its intent, it must be remembered that there are powers reserved to the people in Article III, as most recently amended in 1978. Art. III, §1 in its entirety reads as follows:

> While the legislative power of this state shall be vested in a legislative assembly, consisting of a Senate and a House of Representatives, the people reserve the power to propose and enact laws by the initiative, including the call for a constitutional convention; to approve or reject legislative acts, or parts thereof, by the referendum; to propose and adopt constitutional amendments by the initiative; and to recall certain elected officials. This article is self executing and all of its provisions are mandatory. Laws may be enacted to facilitate and safeguard, but not to hamper, restrict or impair these laws. (emphasis added).

[¶37] SBHE's reliance of Article VIII, §6(6)(b) was enacted before the powers reserved to the people as set forth in Article III, §1. Therefore, pursuant to State ex rel. Walker v. Link, 232 N.W. 2d 823 (N.D. 1975), the latest enactment of the Constitution prevails if conflicted, and the people's power supercede any powers reserved to the SBHE.

[¶38] A. Limitations of SBHE Power.

[¶39] Article VIII, §5 of the North Dakota Constitution leaves absolute and exclusive control of institutions of higher education to the State. Further limitation of the SBHE's

power is set forth in Article VIII, §6 (6)(b), wherein the SBHE:

> "Shall have full authority to organize or reorganize within constitutional and statutory limitations."

[¶40] SBHE's grammatical argument over the conjunctive, "and" together with the argument that such grammar actually gives the SBHE more power and more authority "to do each and everything necessary and proper for the efficient and economic administration of state educational institutions" is not accurate. The SBHE's attempts to retire the "Fighting Sioux" name could certainly be described as being a reorganization under an NCAA policy as well as an athletic conference, (i.e. the Big Sky). In the past, the Legislature has acted on other name changes. Bottineau State College was changed to Minot State University/Bottineau in 1996. In the last legislative session, that name was changed again to Dakota College at Bottineau by legislative action not the SBHE. (Ex.13, Dale Wetzel, N.D. Senate Back Bottineau College Name Change, Associate Press, (February 6, 2009),<t http://bismarcktribune.com/news/state-and-regional/article_ 51f9613-31e1-5715-98c9-c65d. . . .>

[¶41] **CONCLUSION**

[¶42] The issue before this Court is not about the authority of constitutional governmental entities of North Dakota nor is it about the authority of political subdivisions and entities that need protection from the people's right to vote. Instead, the issue before this Court is the people's right, as opposed to privilege, to have protection of religion as well as a system through referendum and initiation to protect itself from elected and appointed government officials who, whether by benevolence or malice, make decisions that detrimentally affect the citizens of North Dakota. This right of referral and initiation, by Divine Providence, will always be protected for the citizens

of North Dakota. Power to the government to restrict that right must remain severely limited. The presumption of the people's sovereignty is paramount second only to the sovereignty of the Creator. For these reasons, the matter must go forward on the ballot in June, 2012.

Dated this 6th day of March, 2011

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