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Nos. 13-15657, 13-15760

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAYA ARCE, *et al*., Plaintiffs-Appellants-Cross-Appellees,

v.

JOHN HUPPENTHAL, Superintendent of Public Instruction, *et al*.,

Defendants-Appellees-Cross-appellants.

Appeal From The United States District Court
For The District of Arizona, Tucson
The Honorable A. Wallace Tashima
No. 4:10-cv-00623-AWT

BRIEF FOR AMICI CURIAE 48 PUBLIC SCHOOL TEACHERS IN SUPPORT OF APPELLANTS' REQUEST FOR REVERSAL

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INTEREST OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29, amici certify that all parties have consented to the filing of this brief.

Amici are current and former public school teachers who teach or have taught in the states of Arizona, California, Hawaii, Nevada, Oregon, and Washington. As educators, amici are concerned with the actions taken by the State of Arizona with regard to the Mexican American Studies Program previously taught in the Tucson Unified School District. Specifically, amici believe that the ordered removal of seven books associated with the Mexican American Studies Program violates the First Amendment rights of students to receive the information and viewpoints they contain.

Amici certify that they sign this brief in their personal capacities only, and not as representatives of their schools, districts, unions, states, or any other entity.

FED. R. APP. P. 29(c)(5) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief. No person contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In January 2011, Respondent Huppenthal and the State of Arizona removed the Mexican American Studies ("MAS" or "the Program") curriculum from the Tucson Unified School District ("TUSD"), claiming that it violated an Arizona statute prohibiting courses that promoted the overthrow of the government, were designed primarily for one ethnic group, promoted resentment of a race or class of people, or advocated ethnic solidarity. Ariz. Rev. Stat. § 15-112.

Relevant to this brief, Superintendents of Public Instruction Horne and Huppenthal also ordered the removal of seven books, claiming that they violated the statute by inciting hatred or resentment of other races or classes of people and/or by advocating ethnic solidarity. *See, e.g.*, ER at 1162 ("TUSD shall provide evidence of the district's prompt collection of all MASD instructional materials from K-12 classrooms"); ER at 1165-66 (internal emails regarding books "that are specifically mentioned in the court order" and "that we can no longer use" "must be cleared from all classrooms, boxed up and sent to the Textbook Depository"). They justified their actions with Findings objecting to quotes from these books.[1]

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[1] Messrs. Huppenthal and Horne, along with the Administrative Law Judge who reviewed their Findings and actions, also took issue with quotes from curriculum materials. This Brief is concerned only with that aspect of the State's actions that resulted in the removal of these seven books.

Whether or not the statute is constitutional, ordering the removal of books based on isolated quotes does precisely what amici public school teachers devote their careers to preventing: it ignores context and argument, drawing shallow conclusions from fragments of text. Removing books based on isolated and purportedly offensive snippets or on generalizations, without considering the overall context of the work, violates students' First Amendment rights to receive information.

Such an approach also overlooks one of the most important functions of education: teaching students to read a text within its historical, cultural, and situational contexts and to analyze it accordingly. Absent the guidance of educators and an exposure to texts that, in whole or in part, appear to cut against the grain of mainstream culture, students face college—and life—with a diminished ability to think critically about the messages that they will necessarily be called on to confront and interpret as citizens, neighbors, employees, professionals, and civic leaders.

The approach taken also ignores that Arizona expressly instructs its teachers to contextualize all materials provided to their students. Rather than teach isolated snippets—like those identified by Messrs. Horne and Huppenthal—Arizona educators are instructed that any work must be critically analyzed and assessed in a variety of contexts.

To be sure, amici do not claim that a teacher has an unfettered right to put any book before a student. However, this Court does not allow states and school districts unlimited control over established curricula. And, the actions taken here violate this Court's proscriptions. This brief demonstrates how.

The brief examines the State's objections to these seven books and why they fail. Part I, *infra*. It will also demonstrate why the process followed by the State is counter to Arizona State standards for teaching. Part II, *infra*. Finally, this brief argues how the actions violate the limits that this Court has set to a State's power to remove books from a curriculum. Part III, *infra*.

ARGUMENT

I. THE BASIS FOR THE REMOVAL OF SEVEN BOOKS ASSOCIATED WITH THE MEXICAN AMERICAN STUDIES PROGRAM IS FLAWED.

The State of Arizona found that seven books used by the MAS violated the statute. The decisions were based either on generalizations about the book in question or on isolated quotes from the books that officials considered representative of what students were taught.

This Part analyzes the basis for the removal of the seven books at issue, showing that the basis of removal lacks a reasonable or rational basis.

A. *Pedagogy of the Oppressed*, Paulo Freire

1. Basis for the State's objection

The State objects to *The Pedagogy of the Oppressed* due to the book's

"communist" sources and because (the State believes) it teaches that Mexican Americans are oppressed.

As Mr. Horne stated, "Freire is a well-known Brazilian communist. The sources in the book, I've read the book, the sources are all Marx, Lenin, Engels." *See*, *e.g.*, HB 2281 legislative history, Horne testimony before the House Education Committee, 2/15/2010, at 1:28:30.

As for Mr. Huppenthal, he did not identify a quote from *Pedagogy* in his "Findings of Violation," but in a radio interview he stated that Freire "was talking about operating from a concept of the Mexican Americans being an oppressed group." ER at 2028.

2. State's objection was error

Elsewhere, Freire's value as a pedagogical source has been amply confirmed by the State itself. In 2005, the Paulo Freire Freedom School, a public charter school approved by the Arizona Board for Charter Schools, opened in Tucson; a second campus is due to open in August 2014. *See* http://www.elpueblointegral.org/#pffs.html. The School's description of its program of instruction notes its fidelity to the "mission of Paulo Freire" (navigate to "Curricular Emphasis" PDF from www.paulofreireschool.org), and in a 2005 *Tucson Citizen* article, its founders wrote that that "[i]n the tradition of the Brazilian educator Paulo Freire, we will encourage students to be critical thinkers,

to explore problems deeply, to ask questions like: Why are things the way they are and how could they be different?". *See* http://tucsoncitizen.com/morgue2/2005/04/04/154314-school-where-no-student-is-anonymous/. The bibliography of works that its founders identify as influential includes many works by Freire, including *Pedagogy*. *See* http://www.paulofreireschool.org/Bibliography.html. Amici are unaware of any efforts by the TUSD or the State to alter the philosophy or mission of the School.

As to the claim that Freire "was talking about operating from a concept of the Mexican Americans being an oppressed group," *Pedagogy of the Oppressed* does not discuss Mexican Americans. Also, it is true, as Mr. Horne observed, that *Pedagogy of the Oppressed* cites to Marx, Lenin, and Engels as sources. However, the book also quotes and discusses Erich Fromm, Jean Paul Sartre, Simone de Beauvoir, and G.W. Hegel, who are renowned for their own political and philosophical theories. Thus, the two essential bases for the removal of the book are not true.

In addition, Freire's book, which was originally translated into English 43 years ago and has sold over a million copies, advocates "critical pedagogy."[2]

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[2] *Pedagogy of the Oppressed* is also a standard in schools of education all over the country. *See, e.g.*, Steiner and Rozen, "Preparing Tomorrow's Teachers," in ed. Frederick M. Hess, A Qualified Teacher in Every Classroom?: Appraising Old Answers and New Ideas 129 (Harvard Educ. Press 2004) (*Pedagogy of the Oppressed* is often assigned in courses at 15 American graduate schools of

Freire advanced a method of teaching that treats students as generators of knowledge and participants in their own education, as opposed to the "banking model" of education that Freire (followed by many modern education scholars) entirely rejected. *See, e.g.*, *Pedagogy* at 72 ("This is the "banking" concept of education, in which the scope of action allowed to the students extends only as far as receiving, filing, and storing the deposits."). In contrast to seeing students as vessels to be filled by the teacher's knowledge, Freire's goal is the democratization of education, to be accomplished by encouraging critical thinking. Its best-known Freirean articulation is "education as the practice of freedom." *See, e.g.*, *Pedagogy* at 87.

In more prosaic terms, Freire's approach is intended to underscore the importance of "education as a force for strengthening the imagination and expanding democratic public life." Giroux, Lessons from Paulo Freire, The Chronicle of Higher Education B15-B16 (Oct. 17, 2010).

Such teachings can hardly be radical in our democratic society. Whether or not Freire regarded Mexican Americans as an "oppressed group," his point is that

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education); The 45th Anniversary of Paulo Freire's *Pedagogy of the Oppressed* (Askwith Forum, Harvard Graduate Sch. of Educ., May 1, 2013); American Educational Research Association, *Paulo Freire Special Interest Group*, http://www.aera.net/SIG159/PFCPESIG159/tabid/12214/Default.aspx.

critical pedagogy encourages *democracy* by advancing critical thinking.[3]

And to this point, in objecting to *Pedagogy of the Oppressed*, Mr. Horne not only failed to quote from or describe the book's content; he completely neglected to explain in what way the book violates the statute. He did not point to any part of the book that advocates overthrow of the government, fails to treat people as individuals, advocates ethnic solidarity, or fosters racial resentment.

B. *Message to Aztlán*, Rodolfo "Corky" Gonzales

1. Basis for the State's objection

Message to Aztlán is a selection of the speeches and writings of Chicano activist Rodolfo "Corky" Gonzales as edited by Antonio Equibel. Mr. Huppenthal objected to two quotes from the book.

The first is taken from a speech Gonzales gave at the Poor People's Campaign in Washington, D.C. in May 1968 that expressed certain "demands," including that Spanish be the first language and that lands be returned to Mexican Americans. In total the objected to quote is as follows:

> We demand that from kindergarten through college, Spanish be the first language and the textbooks be rewritten to emphasize the heritage and the

[3] Underscoring his devotion to expanding the scope of education, Freire was jailed and then exiled from his native Brazil after developing a highly successful literacy campaign. *See, e.g.*, Mariana Souto-Manning, *Freire, Teaching, and Learning*, at 16 (2010) ("After the military coup of April 1964, the Brazilian popular educator Paulo Freire was arrested, imprisoned, and eventually forced into exile. Government authorities were reacting to Freire's successes in mounting massive literacy campaigns among illiterate adults.").

> contributions of the Mexican American or Indio-Hispano in the building of the Southwest…We demand that not only the land which is our ancestral right, be given back to these pueblos, but also restitution for mineral, natural resources, grazing and timber used.

See ER at 1102.

The second is taken from Gonzales' October 1970 speech at Arizona State University, during which he derides the expansionism of the United States and criticizes George Washington. The specific quote is:

> The great white father is theirs, not ours; he belongs to that side of the Mississippi River. He was a cheater, and the new book on the bookkeeping system of George Washington proves that he gained 30 pounds while his soldiers were freezing at Valley Forge. … Then evaluate that this part of Mexico, Aztlan, was taken in an aggressive war of expansionism even worse than the war in Vietnam.

See id.[4]

2. State's objection was error

Corky Gonzales, widely considered one of the founders of the Chicano movement, gave this speech at the Poor People's Campaign, one year before he convened the first Chicano youth conference. He had immense influence over the burgeoning Chicano movement, and his poem "Yo Soy Joaquín [I Am Joaquin]"

[4] *Message to Aztlán* is provided as evidence of violation, but the book was used only as a reference, not a text, in MAS courses. *See* ER at 593-94 (TUSD Superintendent of Education Pedicone testified that this book is not on the MAS list, but rather on an African American literature list; he found only four copies in the district, three in high schools and one in a resource center).

became its anthem.[5]

Message to Aztlán is a compilation of writings by the leader of a historical movement highly relevant to MAS. Mo2013.reover, the editor's notes affirmatively provide the framing narrative for context. According to the editor, "in retrospect much of [Gonzalez's] work and thinking seems politically outmoded, rhetorically excessive, and even naïve . . . ." Editor's Note, *Message* at xvi. The editor also notes that Gonzales wrote at "one of the most turbulent times in [] history for Chicanos." *See Message* at xx; xxi ("We present Corky's writings with minimal editing, although some may think the language used is vulgar and offensive. We decided to present his own words without cleaning them up for the easily offended.").

Thus, Gonzales is a historical figure who made speeches and had views that reflected a viewpoint relevant to a specific point in time in our history. He is a key figure in the Chicano civil rights movement, and *Message to Aztlán* presents his unvarnished words as they were set down in the turbulent days of the Chicano civil rights movement's birth. The importance of these speeches and writings as documentary history of this period can hardly be overstated, as so many in the Chicano civil rights movement were poor and not literate in English, and hence left

[5] Jorge Mariscal, *The passing of a legend: Rodolfo 'Corky' Gonzales,* The Black Commentator (Apr. 21, 2005), *available at* http://www.blackcommentator.com/135/135_gonzales_pf.html.

no documentary trace. *See*, *e.g.*, Rodolfo Acuña, Foreword to *Message*, at xi.

Mr. Huppenthal apparently concludes, without evidence or even discussion, that teachers and students will bypass the framing narrative and ignore the historical nature of the speeches and other writings, uncritically adopting the perspective they express. Any school teacher will immediately identify this assumption as sheer nonsense; if it were accurate, whole reams of historical documents would be unteachable, from Malcolm X to Jefferson Davis. This cannot be a proper basis for removing a book.

C. *Critical Race Theory*, Richard Delgado and Jean Stefancic

1. Basis for the State's objection

Critical Race Theory: An Introduction is an overview of the body of thought by Seattle University School of Law professors Richard Delgado and Jean Stefancic. Mr. Horne objected to the book because MAS materials stated that "'unlike traditional civil rights, which embraces incrementalism and step-by-step progress, critical race theory <u>questions the very foundation of the liberal order</u>, including equality theory, legal reasoning, <u>Enlightenment rationalism</u>, and neutral principles of constitutional law.' (Emphasis added.)". *See* ER at 2191 (the material inside single quote marks is a quote from the book).

As to the work itself, Mr. Huppenthal objected to two quotes. He identified the first as taken from the Introduction: "Unique voice of color…minority status

brings with it a presumed competence to speak about their experiences with racism and the legal system." *See* ER at 1103. The second quote to which he objects is: "Minorities who achieve high socio-economic success still may suffer 'severe psychological impairment' due to racism despite their socio-economic success. (In other words, no matter if you're wealthy and economic opportunity has been made available to you, you will still blame race for your troubles and you may in fact be mentally ill.)-Ed." *See id*.

2. State's objection was error

The first quote to which Mr. Horne objects is actually not a quote from the objected-to book. The sentence does not contain the phrase "legal system." Rather, the second part of this quote reads "Minority status, in other words, brings with it a presumed competence to speak about race and racism." "Legal system" appears as part of the *next* sentence. In any case, the quote is from an introduction that provides a generalized definition of critical race theory; nowhere does Mr. Huppenthal provide a reason why it violates the statute at issue.

The second quote to which Mr. Huppenthal objects does not even appear in the targeted book. Indeed, it is not a quote at all; rather, the quote is paraphrased material from editors Richard Delgado and Jean Stefancic's book *Critical Race Theory: The Cutting Edge* (Temple UP 2d ed. 2000), at page 132 (not 137). The material objected to passage comes from Delgado's chapter "Words That Wound:

A Tort Action for Racial Insults, Epithets, and Name-Calling":[6]

> The achievement of high socioeconomic status does not diminish the psychological harms caused by prejudice. The effort to achieve success in business and managerial careers exacts a psychological toll even among exceptionally ambitious and upwardly mobile members of minority groups….As a result, the incidence of severe psychological impairment caused by the environmental stress of prejudice and discrimination is not lower among minority group members of high socioeconomic status.

Cutting Edge at 132.

We quote at length from this article for two reasons. First, Mr. Huppenthal presents his paraphrase as a direct quote, even placing the second part of the purportedly direct quote in parentheses closed by "-Ed." such that the parenthetical appears inserted by the book's editor. Second, even as paraphrase, the objection—especially the parenthetical—is simply inaccurate. Nowhere in this material does the author suggest that the student will, or should, "blame race" for her troubles, and the reference to "mental illness" is patronizing and distorted.[7]

In sum, it beggars belief that a State Superintendent of Public Instruction would cite an inaccurate paraphrase of a passage from a completely different book, passed off as a direct quote, as a reason for eliminating a book from the TUSD

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[6] Excerpted; full article originally published as Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982).

[7] Further, Mr. Huppenthal does not explain why a passage containing factual observations about psychological impairment in minority populations and speculating on its cause would incite resentment or hatred of "white people" or violate the statute in any other way.

curriculum.

D. *500 Años del Pueblo Chicano / 500 Years of Chicano History, in Pictures*, Elizabeth Martínez, Ed.

1. Basis for the State's objection

Mr. Huppenthal objected to a quote from the Introduction: "Since then Raza resistance has never died[—]and that is the message of this book. … We saw that the enemy wasn't simply the gringo but a system that dictated how U.S. society should be organized. Capitalismo, imperialism[o], socialism[o]…racism[o]." *500 Years* at iii. No specific explanation or commentary on this quote appears in the record.

2. State's objection was error

The problem with Mr. Huppenthal's analysis is that he elides entire portions of the text. The ellipses are contained in his quote because he leaves out entire passages that reflect the historical context of the statements made. And they reflect that the issue addressed is not so much race; it is poverty.

The first ellipsis in the quote drops out a full four paragraphs of text relating the history and diversification of the Chicano movement in the 1960s and 1970s. Those four paragraphs provide a historical perspective on the Chicano civil rights movement, but also relate its unification with other movements, including the African-American, Chicana (women's), Native American, and anti-war movements.

Placed in its proper context, the portion of the objected-to quote after the ellipsis does not promote racism or advocate ethnic solidarity. Rather, it proposes the precise opposite, including unity with whites. "We could see how this society is divided into classes, not just along color lines. Most Raza and other 'Third World' people were found in the poor and working classes, but also many Anglos. *Somehow we needed to unite everyone, like fingers forming a single fist*." *500 Years* at iii (emphasis added).

And when taken in context, Martinez describes a historical controversy about poverty. It is hardly remarkable or subversive. It is part and parcel of our continuing political dialog—indeed, it was a feature of our last presidential election. As the elided paragraphs demonstrate, Martinez's approach is far more complicated and rich than the portions Mr. Huppenthal picks for his objection. When the author addresses both sexes and several different races in her account, it is difficult to see how this text—even if it were not read as a text presenting a historical perspective requiring independent and critical analysis—would violate the statute.

E. *Rethinking Columbus: The Next 500 Years*, Bill Bigelow and Bob Peterson, Eds.

1. Basis for the State's objection

Mr. Huppenthal objected to a quote from an interview with Suzan Shown Harjo: "As Native American peoples in this red quarter of Mother Earth, we have

no reason to celebrate an invasion that caused the demise of so many of our people and is still causing destruction today. The Europeans stole our land and killed our people." *Rethinking* at 12. Mr. Huppenthal does not explain why he believes this passage violates the statute.

2. State's objection was error

Rethinking Columbus is a collection of writings that, according to its editors, "underscore contemporary resistance to the spirit of Columbus." *Rethinking* at 11. The editors "have tried to provide a forum for native people to tell some of their side of the encounter—through interviews, poetry, analysis, and stories. The point is not to present 'two sides,' but to tell parts of the story that have been mostly neglected." *Id*. The editors' "goal is not to idealize native people, demonize Europeans, or present a depressing litany of victimization." They add that "this knowledge must not be used to make white children feel guilty. There is nothing students can do to change history. And they should not feel responsible for what others did before they were born." *Id*.

Read in the context of this framing narrative, the Harjo interview is clearly one person—the president and director of an indigenous peoples' rights organization—relating her view of Columbus and his legacy. The editors' goal in presenting the interview is specifically *not* to create resentment or anger. Read in

context, this book cannot violate the statute.[8]

F. *Occupied America: A History of Chicanos*, Rodolfo A. Acuña

1. Basis of the State's objection

In his Findings, Mr. Horne highlights a quote from a speech by Jose Angel Gutierrez: "We are fed up. We are going to move to do away with the injustices to the Chicano and if the 'gringo' doesn't get out of our way, we will stampede over him." ER at 2189.

Mr. Horne further notes the textbook's comment that "Texans had never come to grips with the fact that Mexicans had won at the Alamo." In Mr. Horne's view "[i]t is certainly strange to find a textbook in an American public school taking the Mexican side of the battle at the Alamo." *Id*. This is the sole finding regarding this textbook made by either Mr. Horne or Mr. Huppenthal.

2. State's objection was error

The seventh edition of this book, the one obtained for examination by amici public school teachers, is 416 pages of very small print. References to and quotes from Mr. Gutierrez appear on eleven of those pages; Mr. Horne selected one page upon which to rest his objection to the entire textbook.

Otherwise, *Occupied America* is a textbook by a founder of the study of

[8] Arizona Department of Education Assistant Superintendent Habruluk testified that she agreed that in context, the author advocates telling students more than one side of the story so that they know they are getting the whole truth; Habruluk further testified that she agreed this was a good idea. ER at 579-80.

Chicano history that traces Mexican American history from its ancient Maya beginnings through colonization, conquest, and modern topics including immigration, the effects of World Wars I and II and the Depression on Mexican American communities, and the genesis and growth of the Mexican American Civil Rights Movement. Trained as an academic historian (Ph.D., Univ. of Southern California), Acuña's goal is to teach students to understand primary source documents in their proper context. *See* Preface at xv ("I kept in mind that history is the study of documents, and the job of the student is to make sense of them.").

Even if we were to focus solely on Mr. Gutierrez—who, as noted, occupies a total of 11 pages of a 416-page book—omitted from Mr. Horne's presentation of the book are the historical facts that gave rise to Mr. Gutierrez's comments. Mr. Gutierrez, who was 24 years old in 1969 when he spoke these words, was participating in a rally to protest the Texas governor's cancellation of a Volunteers in Service to America ("VISTA") program (cancelled because VISTA workers had participated in a protest against the police beatings of an Uvalde resident and his wife). *Occupied* at 306.

Further, the book provides the historical context for these comments. The text narrative notes that tensions were very high in Texas at that time; along with stating that Texas had never come to grips with the Mexican victory at the Alamo,

it explains further that "Texas also spawned national leaders of the Ku Klux Klan and the White Citizens Council." *Occupied* at 306.

As a document contemporaneous with a chaotic and even violent era in the history of the civil rights movement, Gutierrez's speech reflects the passions of its time and speaker. And again, placed in a historical context it cannot be considered any worse or different than anything uttered by the Confederate advocates of the Civil War or the speeches of Marcus Garvey. These are events that happened and there is a historical reason for them. This book is a means of "discover[ing] both the good and the bad in our history." *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1031 (9th Cir. 1998).

G. *Chicano! The History of the Mexican American Civil Rights Movement*, F. Arturo Rosales

1. State's objection

Neither Mr. Horne nor Mr. Huppenthal objected specifically to *Chicano!* in their Findings. However, Mr. Huppenthal made several objections to the book in a document released by his office on June 16, 2011. *See* ER at 1070-71.

Mr. Huppenthal specifically objects to three quotes. The quotes are taken from the Foreword and reference Anglo animosity to "mixed-race" northern Mexicans (pp. xxi-xxii); "racial animosity" against, and the "racialization" of, Mexicans (p. xxii); and the mission of the book, which is, in part, to document the "civil rights struggles waged by Mexican people in the U.S." (p. xxii). The

objection closes with a description of the book's chapters. *See id*.

2. State's objection was error

Mr. Huppenthal does not explain why these quotes violate the statute; we infer that he objected to the mention of racial animosity toward Mexican Americans.

Rosales' book is a history book. The book is heavily laden with quotes from primary source documents, making original statements available for students' analysis. For example, a sidebar accompanying the Foreword quotes from a nineteenth-century editorial in the Richmond *Whig*, "[W]e have far more to dread from the acquisition of a debased population who have been so summarily manufactured into American citizens than to hope from the extension of our territorial rights.", and a 1847 *New York Sun* editorial, "the [Mexican] race is perfectly accustomed to being conquered."

Many other sidebars throughout the book provide ample primary source material using many words to which Mr. Huppenthal would clearly object, and yet to eliminate them would be to erase history: "hatred and revenge," p. 6; "conquered," p. 7; "national bigotry," p. 7; "humiliated and insulted," p. 8, to name only a few from the first chapter. However, these words were used by nineteenth-century authors writing about their experiences as Mexicans. The quotes to which Mr. Huppenthal objected ignore these facts and fail to demonstrate why this book

violates the statute.

II. THERE IS NO BASIS FOR CONCLUDING THAT TEACHERS WILL NOT FOLLOW THE WIDELY ACCEPTED METHODS FOR TEACHING READING AND CRITICAL THINKING, INCLUDING THOSE IN USE BY THE ARIZONA DEPT. OF EDUCATION.

The State has expressed concern that students exposed to the books in question would consider them uncritically, adopting their "ideology" without further examination. *See, e.g.*, ER at 495. There appears to be no factual basis for this fear. Moreover, this concern runs counter to the State's own prescribed standards for teaching students how to read history, including primary source documents.[9]

Critical reading, identified by this Court as essential to effective citizenship and democracy, requires teachers and students to understand the context and perspective of documents and to subject their arguments and assumptions to careful questioning.[10] Arizona requires teachers to instruct students to take a step

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[9] *See, e.g.*, *Arizona Department of Education, Social Studies Standard Articulated by Grade Level: High School* (2006), http://www.azed.gov/wp-content/uploads/PDF/SSHighSchool.pdf ("SS Standards"); *Arizona's College and Career Ready Standards: English Arts and Literacy in History/Social Studies, Science, and Technical Subjects*, at 12 (Oct. 2013), http://www.azed.gov/azccrs/files/2013/10/accs-6-12-ela-content-literacy-standards-final10_28_2013.pdf ("ELA Standards").

[10] *See Monteiro*, 158 F.3d at 1031; *see also* Lisa Bosley, "Critical Reading Instruction in Composition Courses," 47 Literacy Research and Instruction 285, at 286 (2008) ("Critical reading involves a metacognitive aspect that engages the reader in conversation with the text: the reader talked to the book, asks questions,

back and examine many factors that influence the way the document presents information:

- Who is the *author*? What is his or her background?
- What is the author's *perspective* on this topic? How do you know?
- Who is the author's *audience*? How do you know? Why does it matter?
- What is the overall *argument* of the article (book, speech, etc.)?
- *When* was the work written, and how does its time period affect the message and its delivery?
- Is this a work of *fact*, *opinion*, or a *mix*? How do you know?
- What type of *language* does the author use: inflammatory? angry? detached? How does the choice of language affect the message, and how might it affect the message's reception?[11]

This interrogation process is critical reading in action, and the State has identified it as a necessary part of college and career readiness in Arizona. It is the process

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makes predictions, reads the silences, constructs new knowledge. Critical readers transform information for new purposes.") (internal citation omitted).

[11] *See generally* SS Standards, especially Strand 1: American History Concept 1, PO 3, 5, 6; ELA Standards, *e.g*. at viii ("[Students] work diligently to understand precisely what an author or speaker is saying, but they also question an author's or speaker's assumptions and premises and assess the veracity of claims and the soundness of reasoning."); at 13, no. 8 (students should "evaluate an author's premises, claims, and evidence by corroborating or challenging them with other information.").

of every engaged reader.

But, as the prior discussion shows, Messrs. Horne and Huppenthal removed the seven MAS books without considering that these Arizona teachers would, and were required to, provide context. Had they, it would have been apparent that, for example, Corky Gonzales was regarded by many outside his movement as controversial and even offensive, and that 24-year-old Jose Angel Gutierrez's speech was an oral (and angry) reaction to Texas' cancellation of VISTA. *See supra* at 9, 17. The critical reading process described above would naturally lead students to understand these works in context, to relate them to each other, and to compare their claims and arguments.

Neglect of this process is precisely the cause of the overbreadth problem so well-described by Appellants. Most primary source documents in history, and nearly all high-quality works of literature, will contain sections or statements that offend at least some of their readers or offer what many would consider inappropriate perspectives or arguments.

Any teacher can tell this Court that the controversial and even potentially offensive texts are those that generate the liveliest discussion and the best examples of critical reading on the part of students. While chilling teachers' choice of English and History texts would surely injure Arizona students' rights to receive information, further damage would ensue: teachers' efforts to teach critical

reading would be crippled even as, by the State's own report, the complexity level of what students are reading is declining. *See* www.corestandards.org/assets/Appendix_A.pdf. In addition to the constitutional injury to students, amici public school teachers ask this Court to consider the threat to the art of critical pedagogy and college readiness that the holding below embodies.

III. THE STATE OF ARIZONA EXCEEDED ITS DISCRETION TO REMOVE BOOKS FROM TUSD CLASSROOMS.

Amici do not dispute that schools may infringe students' First Amendment rights as long as "their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). However, neither the basis for the removal of the books at issue here nor the method of decision for removing the books can satisfy the standard.

A. The Basis for Removing the Books Is Not Sufficient.

A book cannot be removed simply on the basis that it might contain material that is somehow offensive. And as demonstrated above, this is the only apparent basis for the removal of the books at issue. No involved analysis was done of any book; rather, they were ordered removed based solely on snippets or generalized thoughts on what was considered offensive material.

While school districts certainly have the authority to monitor curriculum and the books taught, the removal of works from the curriculum due to their "alleged

violence" and "purported impact on the religious and family values of students" is not enough. *Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771, 773, 776 (8th Cir. 1982). "[S]chool districts do not have an absolute right to remove materials from the curriculum." *Id.* Nor is it enough that a book might create racial animus. *See Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1028-29 (9th Cir. 1998) ("Indeed, the Eighth Circuit has concluded that a school board's removal of material from the classroom curriculum solely on the basis of its message has a powerful symbolic effect on a student's or teacher's First Amendment rights … and is, therefore, unconstitutional.") (quoting *Pratt*, 670 F.2d at 773).

Monteiro presented this Court with the hard contradiction between the right of a student to be free of the racially hostile environment she alleged that *Huckleberry Finn* created and the right of the other students to receive the information and ideas in that novel. Ultimately, this Court decided that, even in a situation where the contents of a book seem racially discriminatory and hostile, the other students' paramount First Amendment rights won out. *See* 158 F.3d at 1027 n.5 (finding that the right to receive information is an "inherent corollary of the rights of free speech and press," and that students have the right to "receive a broad range of information so that they can freely form their own thoughts."). This Court thus decided that courts may not ban books on the basis of their content, "even

when the works are accused of being racist in whole or in part." *Id*. at 1028.[12]

Noting the impossibility of finding literary works that offend no one, this Court highlighted an important point: literature does not teach values, certainly not by embodying them in a particular character or line of narrative. If it "teaches" anything (as opposed to telling a story), literature teaches the truth of human experience, in its beauty and in its ugliness. The derivation of values and meaning is left to the mind of the reader; the derivation *process* is what teachers ultimately teach. *See*, *e.g.*, *Monteiro* at 1032 ("One of the roles of teachers is to guide students through the difficult process of becoming educated, to help them learn how to discriminate between good concepts and bad."). To foreclose this process by removing purportedly offensive books strikes at the heart of the freedoms of speech and thought, as this Court has recognized.

B. The State's Decision To Ban Books Associated with the Mexican American Studies Program Was Not Reasonably Related to a Legitimate State Interest.

Finally, Amici agree with the district court that reducing racism in schools is a legitimate pedagogical interest. *See* ER at 128. However, the methods employed by the State in arriving at its decision cannot be found sufficient to establish that

[12] Among the potentially injurious books that could have been caught in the net of a ruling in favor of the student in *Monteiro*, this Court listed works by Toni Morrison, Maya Angelou, William Shakespeare, and Tennessee Williams, noting that a nearly unlimited range of potential lawsuits based upon themes, characters, or "snippets of dialogue" would loom large, significantly chilling a district's willingness to assign a wide range of books. *Id*. at 1030.

the State's decision was "reasonably related" to a "legitimate pedagogical concern[].". *See Hazelwood*, 484 U.S. at 273. The fact is that two audits, completed before Messrs Horne and Huppenthal's atextual "analysis," concluded that the Program *was reducing* racism and was *increasing* student success. In other words, the Program was serving a legitimate pedagogical interest.

Mr. Huppenthal retained an auditor, Cambium Learning, Inc. *See* ER at 2201. That auditor concluded that MAS *reduced* racism, as "students from many different ethnicities are physically sitting in Mexican American Studies Department classes and are learning that different perspectives are valuable, that Americans come from many backgrounds, and that being an American means that all people are accepted." ER at 2262. After having obtained this result, Mr. Huppenthal decided to "review" the curriculum and books himself.

Moreover, two separate audits concluded that the courses had positive impacts on students. The curriculum audit that Mr. Huppenthal commissioned from Cambium Learning concluded that "student achievement has occurred and is closing the achievement gap." ER at 2267. While the audit certainly had suggestions for improving the MAS Program, it also found that "no observable evidence was present" to suggest that the statute was being violated in any observed TUSD classroom. *Id*.

The University of Arizona's College of Education also conducted an audit at the request of the Special Master for the TUSD desegregation case. *See* An Empirical Analysis of the Effects of Mexican American Studies Participation on Student Achievement within TUSD (June 20, 2012), at ER at 197. The audit reported that MAS students who initially failed at least one AIMS test were significantly more likely to ultimately pass all three than were non-MAS students for three of the four cohorts. *See* ER at 202. Further, MAS participation had a significant and positive impact on graduation rates; "[s]tudents who took MAS courses were between 51 percent more likely to graduate from high school than non-MAS students (2009) and 108 percent more likely to graduate (2008)." ER at 203. The auditors concluded that there was no evidence indicating that MAS participation worsened student achievement, and for the two factors noted above, MAS participation showed a positive effect. *See* ER at 204.

In light of these conclusions, it simply cannot be that taking quotes out of context and making generalizations about what a book might or might not advocate—based on a truncated view of source materials—satisfies the burden of establishing a "legitimate pedagogical concern," *Hazelwood*, 484 U.S. at 273, sufficient to overcome the First Amendment rights of students.

As noted, the speeches of Jefferson Davis would never pass muster, as he defended the rights of Southerners to have slaves and advocated the end of the

United States to protect those rights. By this measure, certain of the speeches of Abraham Lincoln—who freed the slaves, but thought that African Americans were an inferior race—would be banned. Yet, neither is—or should be—banned, because these documents are part of our historical experience. They reflect a time and place. They provide context to what has occurred and why. Presenting the perspectives of Jefferson Davis or Abraham Lincoln is no different than presenting those of someone like Corky Gonzalez, or those of any of the other primary source materials that were found to be so offensive here.

Moreover, as this Court warned in *Monteiro*, once the charge of bias suffices to remove or ban books from curricula, few literary works could be certain of survival. 158 F.3d at 1030. To name only three of the many books currently approved for use in the TUSD but clearly vulnerable to charges of incitement of resentment against a race or class of people: *The Absolutely True Diary of a Part-Time Indian*, by Sherman Alexie ("And what's more, our white dentist believed that Indians only felt half as much pain as white people did, so he only gave us half the Novocain. What a bastard, huh?"); *Beloved*, by Toni Morrison ("'Those white things have taken all I had or dreamed,' she said, 'and broke my heartstrings, too. There is no bad luck in the world but whitefolks.'"); and *The Sound and the Fury*, by William Faulkner ("'You going to do just what he want you to, nigger boy,' Dilsey said. 'You hear me.' 'Aint I always done it,' Luster said. 'Dont I always

does what he wants. Dont I, Benjy.'"). When the State inevitably broadens its focus beyond just the MAS Program, these books and innumerable others will be at risk of being warehoused upon nothing more than the State's whim.

While the goal of reducing racism is clearly a legitimate state interest, the means here employed to reach that goal—banning books for the "racism" allegedly demonstrated by quotes taken from the books—is neither reasonable nor rational. The First Amendment's answer to speech that citizens find objectionable is *more* speech—here, through discussion of the books—rather than a ban.

By their essential nature, literature and original historical documents present—they *embody*—all aspects of the human experience: joy, triumph, bitterness, grief, anger, loss, love. Literature does so by dramatizing human experience through characters who speak always and only for themselves. History does so by presenting contemporaneous documents within a narrative frame. Teaching history and literature enables students to read and think critically, but it also opens for them an infinite vista of the internal experience of other people. In the act of reading, students ideally learn to think hard and well, to compare different perspectives, and to develop and use their own judgment.

But students cannot avoid being touched and changed by their experience of literature and history. It is no more possible to experience tragedy without expressing grief, anger, and resentment than it is possible to experience fulfillment

without expressing joy and love. History's documents and literature's characters speak words imbued by the emotions they experience, "suffused by what [they] work[] in, 'like the dyer's hand.'" Adrienne Rich, Later Poems at 285 (2013). This is precisely how a curriculum like MAS promotes a view of persons as individuals. It is for students and teachers to absorb these words and place them into a context that increases their understanding of the events and experiences portrayed. The process is not without conflict; the marketplace of ideas is not peaceful, nor should it be.

CONCLUSION

For the foregoing reasons, amici public school teachers respectfully request that the grant of summary judgment in favor of defendants-appellees be reversed.

Dated: November 25, 2013

Respectfully submitted,

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APPENDIX

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This brief is filed on behalf of the following public school teachers. Amici certify that they sign this brief in their personal capacities only, and not as representatives of their schools, districts, unions, states, or any other entity.

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CERTIFICATE OF COMPLIANCE

Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,996 words as counted by the Microsoft Word word processing program used to generate the brief.

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