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Plaintiffs-Appellants/Cross-Appellees'Response and Reply Brief

Robert S. Chang
Seattle University School of Law

Lorraine Bannai
Seattle University School of Law

Charlotte Garden
Seattle University School of Law

Fred T. Korematsu Center for Law and Equality

Ronald A. Peterson Law Clinic

Attorneys for Appellants

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAYA ARCE, et al.,
Plaintiffs-Appellants-Cross-Appellees,
v.
JOHN HUPPENTHAL, et al.
Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court for the District of Arizona at Tucson
No. 4:10-CV-00623-AWT • Honorable A. Wallace Tashima

PLAINTIFFS-APPELLANTS/CROSS-APPELLEES' RESPONSE AND REPLY BRIEF

Richard M. Martinez
Law Office of Richard M. Martinez
300 South Convent Avenue
Tucson, Arizona 85701
(520) 327-4797 Tel.; (520) 320-9090 Facsimile
richard@richardmartinezlaw.com

Anjana Malhotra
SUNY Buffalo Law School
518 O'Brian Hall, North Campus
Buffalo, NY 14260-1100
(716) 645-3696 Tel.; (716) 645-6199 Facsimile
anjanam@buffalo.edu

Erwin Chemerinsky
University of California, Irvine
School of Law
401 E. Peltason
Irvine, California 92697-8000
(949) 824-7722 Tel.
echemerinsky@law.uci.edu

Lorraine Bannai
Robert S. Chang
Charlotte Garden
Fred T. Korematsu Center for Law
and Equality
Ronald A. Peterson Law Clinic
Seattle University School of Law
1215 East Columbia Street, Law Annex
Seattle, Washington 98122
(206) 398-4025 Tel.; (206) 398-4162 Facsimile
changro@seattleu.edu

Sujal J. Shah
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
(415) 393-2000 Tel.; (415) 393-2286 Facsimile
sujal.shah@bingham.com

Attorneys for Appellants Maya Arce, Sean Arce, Korina Eliza Lopez, and Lorenzo Lopez, Jr.

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PRELIMINARY STATEMENT

Tucson Unified School District ("TUSD") is Arizona's second largest public school district. Latinos comprise over 60 percent of the student population, and each school year they become a larger percentage of TUSD's student population. Historically, Mexican American students attending TUSD have performed poorly, experiencing excessive failure and drop-out rates. Approximately 50 percent of Mexican American 8th graders will drop out before graduation.

In an effort to reverse these disastrous results, TUSD developed the Mexican American Studies ("MAS") Program, an innovative curriculum based upon restorative educational practices. The intent was to move away from a deficit viewpoint, i.e., that the students, their families, and neighborhoods were "defective" and thus destined to fail in school.

MAS worked. Students with years of poor performance found themselves engaged in their education and striving to graduate and even go on to college. At the core of MAS was the fundamental belief that every student and her or his family has worth and is capable of moving forward and achieving success.

The promise of MAS was taken away by elected officials who did not understand the program, were threatened by the curriculum, and were openly fearful of Arizona's growing Mexican and Mexican American population. Their response was A.R.S. § 15-112, a vague and overbroad state law based upon racial

bias and fears that gave the Arizona State Superintendent of Public Instruction and the Arizona State Board of Education arbitrary and discretionary enforcement power. Essentially, the law allowed state officials to force assimilation into a rigid orthodoxy that returned every TUSD Mexican American student to the same morass that existed before MAS.

MAS may be innovative, creative, and challenging, but it is based upon a sound educational strategy intended to stop the cycle of failure too many Mexican American students experience in their education. Successful students who are critical thinkers should never be feared, even if they are Mexican American.

COUNTER STATEMENT REGARDING FACTS[1]

In a lengthy introduction that precedes their statement of facts, Defendants relate in detail then State Superintendent Tom Horne's 2010 Finding ("Horne Finding") against TUSD and MAS. Appellees' Principal and Response Brief ("Appellees' Br.") at 1-6. The Horne Finding, ER10 2183-92, dated two days before the January 1, 2011, effective date of A.R.S. §15-112, was found by the district court to involve retroactive application of the statute and to contain "problematic assumptions and implicit biases." ER1 28-29. And in a section styled "Testimony of Witnesses," the Horne Finding asserts as truth unsworn, mostly anonymous statements. ER10 2186-88. This "evidence" is in the record solely

[1] Plaintiffs offer this counter statement to address certain factual characterizations made by Defendants.

through the premature Horne Finding. Repeating hearsay as fact does not make it reliable, and this Court should regard Horne's narrative not for the truth of its characterizations of the MAS Program, but rather as reflecting "problematic assumptions and implicit biases" recognized by the court below. ER1 29.

Moreover, Defendants' contention that Superintendent Huppenthal did not eliminate MAS, Appellees' Br. at 21, ignores the fact that as state senator he inserted the amendment that gave enforcement authority to the state superintendent, an office for which he was then running, and that once he assumed that office, Huppenthal proceeded to enforce the statute against TUSD until he was assured that the program was terminated and that all MAS textbooks and instructional material were removed from TUSD classrooms. Opening Br. at 12, 14, 16-20.

Huppenthal's actions, while campaigning for state superintendent and once he assumed that office, echoed Horne's problematic assumptions and biases. First, he campaigned on a promise to "stop La Raza." ER10 at 2169. Although the MAS program was previously called "Mexican American/Raza Studies," Huppenthal's campaign promise reflected a deeper animus toward Mexicans and Mexican Americans. TUSD changed the name of the program to MAS in October 2009, ER9 1952 ¶ 68, before Huppenthal's campaign to become state superintendent. More importantly, Huppenthal's campaign ad did not say that he was going to stop

"Raza Studies"; instead, the same politician who had voted as a state senator for SB 1070 promised in a statewide election campaign to "stop La Raza," where "La Raza" is a term commonly used and understood to refer to people of Mexican descent.[2]

Second, after ordering an independent audit, Huppenthal disregarded the auditor's final report ("Cambium Audit") when the auditor found not only that TUSD was not in violation of A.R.S. § 15-112(A) but rather that "the opposite is true." Opening Br. at 15 (citing ER10 2198-2201; 2248). Huppenthal admits that he rejected the audit because he claimed to "have a lot of information that what was going on in Mexican-American Studies did not match what [Cambium] observed in that week." ER9 2025. The audit did not confirm the accusation he made in 2009 during a state senate committee hearing, that students in MAS classes were being indoctrinated "to have a certain mindset of us versus them." Opening Br. at 11 (quoting S. Judiciary Comm. Hearing). In other words, Huppenthal contemporaneously explained that he disregarded the Cambium Audit because it did not conform to his preconceived notions of what happened in MAS classrooms.

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[2] *See American Heritage Dictionary of the English Language* (*online*), *available at* http://ahdictionary.com/word/search.html?q=la+raza&submit.x=0&submit.y=0 (last visited June 2, 2014) (defining "La Raza" as "Mexicans or Mexican Americans considered as a group, sometimes extending to all Spanish-speaking people of the Americas").

Further, two reasons offered by Defendants to justify disregarding the Cambium Audit are at odds with facts in the record. First, Defendants claim that Huppenthal rejected the Cambium Audit because "Cambium allowed one of the creators of MAS to control the structure of the audit, as well as which classes the auditors visited and when." Appellees' Br. at 13-14.[3] However, the factual finding made by the ALJ and adopted by Huppenthal was that the MAS director told the MAS teachers that "the auditors were going to make unannounced observations of their classes." ER6 1122. Likewise, the Cambium Audit stated that "[t]he classroom observations and class visitation schedule was neither announced, nor released to TUSD personnel with the goal of obtaining the most reliable data and maintain the integrity of the audit." ER10 2213. Second, Defendants claim that Huppenthal discredited the Cambium Audit because the auditors "watched very few classes of instruction." Appellees' Br. at 14. *But see* Opening Br. at 15 ("auditors visited 39.5% of the high school Mexican American Studies classes"). Yet when the Arizona Department of Education subsequently conducted its own investigation at Huppenthal's order, it conducted zero classroom observations. ER6 1265 (Huppenthal admitting during ALJ hearing that to his knowledge no one on his staff conducted any classroom visits or focus groups). In their effort to discredit

[3] Defendants' only citation to the record is to the identical, unsupported allegation made by Huppenthal in a television program interview. *See* Appellees' Br. at 13-14 (citing ER6 1286).

the Cambium Audit, Defendants go too far.

Although Defendants seek to demonize MAS[4] as a horrific, "resentment-based program," Appellees' Br. at 1-6, the program examined by Cambium, and known to TUSD administrators, teachers, and students, was far different. For example, the former principal of Tucson High Magnet School had, over a seven-year period, conducted formal observations of MAS classes and teachers, made numerous informal "walk-throughs," and spoke with students about their experiences in MAS classes. ER4 662, 665-71. He observed academically rigorous classes in which MAS teachers taught critical thinking by elucidating various viewpoints from students and fostering classroom dialogue in a respectful manner. ER4 669. More importantly, no MAS students or their parents complained of the classes or teachers, other than the types of complaints made about any class, such as grading disputes. ER4 674-75.

[4] In addition to the hearsay discussed *supra*, Appellees' introduction relies upon selected quotes from books taken out of context and which were not established as being assigned in MAS courses. Appellees' Br. at 1-2. *But see* Brief for Authors Rodolfo Acuna et al. as Amici Curiae Supporting Appellants at 5-18, ECF No. 22 (criticizing the state's use of "out-of-context fragments, excerpts and intentionally omitted text" in books by amici and others removed from MAS classrooms). Further, even if assigned, the quoted text is presented without evidence of how the material was taught. *Cf*. Brief for 48 Public School Teachers as Amici Curiae Supporting Appellants at 2, ECF No. 24 ("[r]emoving books based on isolated and purportedly offensive snippets or on generalizations . . . 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"). Defendant Huppenthal admits as much when he said that Adolf Hitler's *Mein Kampf* could be taught, albeit with care, in the classroom. ER2 253.

After an extensive three-phase audit, Cambium confirmed the former principal's assessment that there was no evidence that MAS courses promoted resentment. ER10 2253. In fact, "auditors observed the opposite, as students are taught to be accepting of multiple ethnicities of people."[5] *Id*. Cambium concluded that MAS courses did not promote resentment, that students from varied backgrounds participated in MAS courses, and that students from varied backgrounds were taught and inspired in the same manner as their Mexican American counterparts. *Id*. Thoughtful and respectful engagement and analysis were core expectations of lessons, whether students were discussing instructional material or their own projects. ER10 2248-53. And, by utilizing material relevant to students' present and historical experiences, MAS educators maximized student engagement,[6] evidenced also by the growth of the program from its inception in 1998 to April 2011, the term immediately preceding the June 15, 2011, Huppenthal

[5] As an example of MAS promoting understanding, Cambium cited a MAS guiding principle, En Lak'ech: "You are my other me. If I do harm to you, I do harm to me. If I love and respect you, I love and respect myself." ER10 2251. A student enrolled in MAS explained, "It's almost impossible for us to be racist in these classes because, [En Lak'ech] – like, you are my other me. It's like impossible – we are taught to be the opposite of racist." ER10 2253.

[6] Amici National Education Association and Arizona Education Association discuss the way that ethnic studies programs serve a crucial role in fostering minority academic achievement generally and specifically how the MAS Program was a pedagogically sound and well-designed ethnic studies program. *See* Brief for National Education Association and Arizona Education Association as Amici Curiae Supporting Appellants at 8-20, 20-26, ECF No. 18.

Finding of Violation, when 1,343 students in six high schools and five middle schools were enrolled in at least one of 43 MAS courses offered. Opening Br. at 6.

Increased student engagement and the teaching of critical thinking resulted in improved test scores and graduation rates as demonstrated by an internal MAS study, ER9 1854-79; independently verified by the Cambium Audit, ER10 2247; and confirmed by University of Arizona researchers retained by the special master in the ongoing TUSD desegregation lawsuit, ER2 197-203. Perhaps not surprisingly, the 2009 Post Unitary Status Plan ("PUSP") for TUSD required that MAS be retained and expanded to meet student needs. ER11 2425-26. The successful results achieved by the program were relied upon in the desegregation case to require in the new USP the development of culturally relevant courses and classes for Mexican American and African American students. *See* Brief for Chief Earl Warren Institute on Law and Social Policy and Anti-Defamation League as Amici Curiae Supporting Appellants at 12, ECF No. 21-2 ("Warren Amicus Br.").[7]

Finally, Defendants' contention that the case is likely moot because this Court will be unable to grant a remedy, Appellees' Br. at 7 n.1, ignores the fact that Arizona continues to seek enforcement of A.R.S. § 15-112 in Tucson's longstanding desegregation case. *See* Warren Amicus Br. at 11-13, ECF No. 21-2. In denying the state's motion to intervene in the desegregation case, the court

[7] We include the ECF number for this docket for amicus briefs filed in the present appeal.

noted that the "State objects to subsection D(6), Engaging Latino and African American students, only as to the Latino students," and that the "State does not appear to argue any and all culturally relevant courses will necessarily violate A.R.S. § 15-112 because it does not object to culturally relevant courses for African American students." Order at 12, 16, *Fisher v. Lohr*, No. CV 74-90-TUC-DCB (D. Ariz. Feb. 6, 2013), ECF No. 1436. The State continues to single out Latino students for different treatment. *See* ER2 166-67 (State's Second Motion for Reconsideration of Its Motion to Intervene Due to Major Changes in Circumstance). In the present case, Plaintiffs seek declaratory and injunctive relief that would put a stop to the State's ongoing enforcement activity, which will free Plaintiffs and their siblings (who are seeking to join as plaintiffs)[8] from the State's efforts to unconstitutionally infringe their right to receive information and right to due process of law and equal protection under the law.

SUMMARY OF ARGUMENT

Equal Protection. The District Court erred in granting summary judgment on Plaintiff's Equal Protection claims on procedural and substantive grounds. First, the District Court erred by granting summary judgment based on preliminary injunction briefing, and Circuit precedent shows Defendants' arguments to the contrary are inapposite.

[8] Motion for Joinder Submitted Jointly by Plaintiffs and Proposed Joinder Plaintiffs has been filed contemporaneously with this brief.

Second, the District Court erred substantively by granting summary judgment after resolving factual disputes against the Plaintiff. Defendants attempt to discount Plaintiffs' evidence showing that racial animus was at the heart of the enactment and enforcement of A.R.S. § 15-112 by looking at each piece of evidence individually, and ignoring the cumulative effect of all of the evidence. This evidence reflects, *inter alia*, that Defendants singled out the MAS program for scrutiny, that the legislators who passed the statute made contemporaneous remarks reflecting their discriminatory animus, and that the process by which Defendants enforcing the statute against TUSD was marked by procedural irregularities. Finally, the statute should be subject to strict scrutiny under the political process Equal Protection theory because the state displaced a local program designed to remedy discrimination.

First Amendment. Preliminarily, Defendants' sweeping argument that the state has plenary control over curricular decisions overstates the law in this Circuit. The First Amendment bars Defendants from eliminating programs such as MAS based solely on viewpoint and without a legitimate pedagogical objective. Moreover, questions of fact exist as to whether Defendants did exactly that when they required TUSD to eliminate MAS on pain of losing 10 percent of its funding on a retroactive basis.

The District Court correctly held that A.R.S. § 15-112(A)(3), which prohibits courses "designed primarily for pupils of a particular ethnic group," was overbroad. Further, and contrary to the District Court, the remainder of the statute is also overbroad, threatening to chill legitimate expression. For example, § 15-112 bans classes that "promote resentment toward a race or class of people," or "advocate ethnic solidarity," but does not define any of these terms.

The statute is also unconstitutionally vague, infringing Plaintiffs' First Amendment right to receive information. Defendants do not argue that the statute is clear, but instead advance a variety of arguments that fail because they ignore (1) that Plaintiffs' claim is rooted in the First Amendment; and (2) that Plaintiffs can establish a statute is vague if it invites arbitrary enforcement. Defendants' rejoinders that the statute was not vague because they can advise districts on its meaning or because it was actually enforced against TUSD only exemplify the dangers of arbitrary enforcement posed by a vague statute.

Finally, A.R.S. § 15-112(A)(3) is not severable because legislative intent suggests the statute would not have been enacted without that provision.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFFS' EQUAL PROTECTION CLAIMS.

The district court's *sua sponte* grant of summary judgment on Plaintiffs' Equal Protection claims was improper and should be reversed on procedural and substantive grounds.

A. The District Court's *Sua Sponte* Grant Was Procedurally Improper.

Defendants do not claim Plaintiffs had notice that their Equal Protection claims were subject to summary judgment. Rather, they argue the issue was fully and fairly ventilated because the standard for obtaining a preliminary injunction is higher than the standard to survive summary judgment. Appellees' Br. at 43-45. This distinction is meaningless. Although the cases cited by Defendants state the standard for a preliminary injunction, they are silent on whether evidence presented in a preliminary injunction motion results in an issue being fully and fairly ventilated. Defendants fail to address the authorities cited in Plaintiffs' Opening Brief holding that a preliminary injunction motion is insufficient to fully or fairly ventilate an issue for the purposes of summary judgment. Opening Br. at 25-26.

Defendants attempt to minimize the additional evidence Plaintiffs would introduce if properly given an opportunity to oppose summary judgment.

Appellees' Br. at 45. But even the non-exhaustive evidence identified by Plaintiffs in their Opening Brief is significant. *See* Opening Br. at 26. For example, Defendants claim complaints justified their decision to target MAS while ignoring other ethnic studies programs. Appellees' Br. at 38-39. But evidence regarding the relationship between the ethnic studies ban and Arizona's anti-immigration efforts targeting Mexicans and Mexican Americans, as well as emails between legislators and private citizens advocating the ban, demonstrate that many of these complaints were rooted in animus towards Mexicans irrespective of their country of birth. Defendants cannot justify the law by claiming they were only acceding to the private biases of its citizens. *See* Part I.B.2. (Disparate Treatment) below.

B. The District Court Substantively Erred in Granting Summary Judgment.

Defendants fail to show that undisputed facts merit summary judgment on Plaintiffs' Equal Protection claims. They merely single out pieces of evidence and declare each individually insufficient, ignore other pieces of evidence, or dispute the conclusions to be drawn from the evidence. But "the evidence and inferences therefrom" are to be viewed "in the light most favorable to the party against whom the district court ruled." *Allen v. A.H. Robins Co.*, 752 F.2d 1365, 1368 (9th Cir. 1985). "Courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton,* 134 S. Ct. 1861, 1866 (2014) (*per curiam*). In *Tolan*, the Court held that the Fifth Circuit committed reversible error

"[b]y failing to credit evidence that contradicted some of its key factual conclusions," and had "improperly 'weigh[ed] the evidence' and resolved disputes in favor of the moving party." *Id*. (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Thus, the proper test is whether the evidence, *taken as a whole and viewed in a light most favorable to Plaintiffs*, is enough to create a triable issue of material fact as to whether Defendants enacted or enforced A.R.S. § 15-112 with discriminatory intent. Under this standard, because the district court did not credit Plaintiffs' evidence that contradicted the court's factual conclusions and improperly weighed the evidence and resolved disputes in favor of Defendants, summary judgment should be reversed.

1. A.R.S. § 15-112 Facially Discriminates.

At the outset, A.R.S. § 15-112 is subject to strict scrutiny because it discriminates on its face.[9] The term "ethnic," as it is used in the statute, connotes an ethnic minority. Horne admitted as much when he stated, in response to a request to define the term, that ethnic "obviously" referred to racial minorities such as Mexican Americans. Opening Br. at 27-28. This admission may properly be considered as an expression of legislative intent, and used to interpret the statute if

[9] Plaintiffs have never conceded, as Defendants claim, Appellees' Br. at 37 (citing ER5 913), that the statute does not include an express classification. The district court made the same error. ER1 25. Although Plaintiffs concede the statute does not expressly single out Mexican Americans, they have always claimed the law is "not facially neutral." ER5 913.

its plain meaning is ambiguous. *See Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1045 (9th Cir. 2005) ("[W]hen a statute's terminology is not clear on its face, it is appropriate to seek guidance in the legislative history." (citation omitted)).

2. The Enactment and Enforcement of A.R.S. § 15-112 Were Motivated by Discriminatory Intent.

Even if facially neutral, A.R.S. § 15-112 and Defendants' enforcement actions are subject to strict scrutiny because the statute's enactment and enforcement were motivated by discriminatory intent. Opening Br. at 28-36. Defendants agree that *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977), states the relevant "non-exhaustive" factors to be considered to determine discriminatory intent. Appellees' Br. at 38. However, like the district court, they misapply these factors by minimizing the importance of relevant evidence, characterizing the evidence in a light most favorable to the State, and looking at each piece of evidence separately rather than the larger picture. This Court has made clear that under the *Arlington Heights* analysis, "'very little … evidence'" of discriminatory intent is needed "'to raise a genuine issue of fact.'" *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 2013) (quoting *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1409 (9th Cir. 1996)). "'*[A]ny indication of discriminatory motive* … may suffice to raise a question that can only be resolved by a fact-finder.'" *Id.*

(emphasis added). Even the district court noted that Defendants' actions were "suggestive of discriminatory intent." ER1 28. Defendants simply ignore the applicable standard needed to survive summary judgment; significantly, they do not even reference the well-established presumption that evidence and inferences are read in Plaintiffs' favor when reciting the standard of review. *Compare* Appellees' Br. at 20 *with* Opening Br. at 23. The evidence, considered in totality, shows that Defendants were motivated by animus toward Mexican Americans. At the very least, there is enough such evidence to raise a genuine issue of material fact.

Disparate Treatment

Defendants concede that A.R.S. § 15-112 was specifically passed in response to MAS classes in TUSD, Appellees' Br. at 41, and that it has only been enforced against MAS, *id*. at 38. But they claim, without support, that a "single instance of enforcement" cannot show a pattern of discrimination. *Id*. That is nonsense. TUSD's MAS courses were the only school district-adopted K-12 Mexican American Studies courses in the state. There was no other MAS program for Defendants to eliminate, and Defendant Huppenthal investigated no other program in the state, nor did he consider investigating any other classes in the state. ER6 1257. Ninety percent of the students in MAS were Latinos. ER10 2203. Defendants' enforcement action affected thousands of Mexican Americans who

were either enrolled in MAS classes or eligible to enroll in order to benefit from the substantial educational advantages it provided to Mexican American students. ER10 2242-47 (documenting positive impact of MAS on test scores and graduation rates). Because Defendants did not enforce the statute against any other ethnic studies program, this single act is evidence of discriminatory treatment, which disparately impacted Mexican Americans.

Next, Defendants offer purported justifications for targeting MAS. Appellees' Br. at 38-39. Their claim that it is not feasible to investigate every Arizona school's curricula does not address the undisputed fact that two other TUSD programs – its African American Studies program and Pan Asian Studies program – potentially violate the statute and that both Horne and Huppenthal knew of these potential violations. The 2010 Horne Finding stated: "Three of the four [ethnic studies programs] could be found in violation under criterion three, courses designed for pupils of a particular ethnic group." ER10 2184. Huppenthal acknowledges his awareness of other ethnic studies programs in the state but claims that those programs are done right, ER5 805, even though he admits that he never investigated any other ethnic studies program. ER6 1257.

Defendants then claim that MAS was "the largest of its kind in the State" and "was the only program the Superintendent knew about that offered courses

toward fulfillment of graduation requirements."[10] Appellees' Br. at 38-39. First, because nothing in the statute speaks to the size of a program or whether it offers courses that fulfill graduation requirements, these reasons provide no statutory basis for targeting MAS. Second, Defendants offered these justifications for the first time during the course of litigation. Defendants cannot hide their discriminatory intent by offering *post hoc* justifications that are merely a pretext to provide constitutional cover for the impermissible actions taken. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (a justification for discriminatory action "must be genuine, not hypothesized or invented *post hoc* in response to litigation"). At the very least, whether the justification provided by Defendants is a pretext is a material issue of disputed fact that must be determined after a trial.

Finally, Defendants claim MAS was the only program that generated complaints. Appellees' Br. at 38-39. However, this squarely presents genuine issues of material fact regarding whether the complaints were infected with impermissible racial animus towards Mexican Americans. There is ample evidence that the complaints about MAS in the record and legislative history were infected with impermissible racial animus towards Mexican Americans. Opening Br. 9-12, 33 (discussing remarks by legislators and private citizen complaints). It is

[10] Whether MAS courses were the only ethnic studies courses offered for credit is a disputed issue of material fact. *See*, *e.g.*, ER6 1235, 1245 (Pueblo Magnet and Tucson Magnet High School course catalogs indicating that "Literature, Native American, 1 2" satisfies English 11).

impermissible for the law to give effect to private biases. *See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Pac. Shores*, 730 F.3d at 1163 n.26 ("legislatures may not 'defer[] to the [discriminatory] wishes or objections of some fraction of the body politic.'") (quoting *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985)).

Sequence of events leading to the challenged law and its enforcement.

The legislative history behind A.R.S. § 15-112, which the district court never considered before granting summary judgment *sua sponte*, is also highly suggestive of discriminatory intent. Defendants concede that historical background, the sequence of events leading to the law and its enforcement against MAS, and legislative history are all relevant factors under the *Arlington Heights* analysis. Appellees' Br. at 38. However, they dismiss and mischaracterize the evidence regarding these factors – particularly statements of legislators – as "not reliable" and "subject to dispute." Appellees' Br. at 39-40 & 39 n.19.[11] First, this

[11] Defendants ask this Court to deny Plaintiffs request for judicial notice, citing *Rocky Mountain Farmers Union v. Goldstene*, 719 F. Supp. 2d 1170, 1186 (E.D. Cal. 2010). Appellees' Br. at 39 n.19. But in *Rocky Mountain*, the court took judicial notice of the legislative histories and, to the extent that the legislative histories conflicted, resolved all disputes in favor of plaintiffs on a motion to dismiss. 719 F. Supp. 2d at 1186. Here, it is appropriate for this Court to take judicial notice of legislative history, and, to the extent there are any disputes regarding the legislative history, this Court must view the evidence in a light most favorable to Plaintiffs. *Tolan*, 134 S. Ct. at 1866. Additionally, the other

inverts the summary judgment standard on its head. Defendants can argue the reliability and weight of the evidence, and dispute any inferences therefrom, *at trial*. But at the summary judgment stage, this evidence must be viewed in a light most favorable to Plaintiffs, with all "reasonable inferences … drawn in favor of the nonmoving party." *Tolan*, 134 S. Ct. at 1868. Second, Defendants' claim that this evidence is not reliable is plainly contrary to *Arlington Heights*, which states that "the legislative . . . history may be highly relevant, *especially where there are contemporary statements by members of the decisionmaking body*." 429 U.S. at 268 (emphasis added). Courts routinely look at statements by legislators to determine whether discriminatory intent motivated the passage of a law. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 231-33 (1985) (relying on legislative history to invalidate Alabama's felon disfranchisement provision because it was "motivated by a desire to discriminate against blacks on account of race"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540-42 (1993) (examining city council members' motives and comments to determine whether law was passed with improper purpose).

Defendants do not dispute that the legislative and official statements Plaintiffs identified in the enactment and enforcement of the statute were

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documents subject to Plaintiffs' RJN are reports of administrative bodies or publicly available agency files and are thus judicially noticeable. *See Oregon Ass'n of Homes for the Aging, Inc. v. Oregon*, 5 F.3d 1239, 1243 n.2 (9th Cir. 1993).

suggestive of animus. Rather, they wrongly characterize the evidence as the "views of a single legislator" or "stray comments."[12] Appellees' Br. at 39-40. But the evidence shows that multiple legislators made comments evincing animus towards Mexicans and Mexican Americans while advocating for the bill, consistently describing Mexican Americans as not sufficiently "American," and as "anti-American," "rude," "separatists," and "seditious." Opening Br. at 9-13, 32-33 (describing comments of multiple legislators).

Furthermore, Defendants employed similar discriminatory language. *See* Opening Br. at 13-14 (discussing language in Horne Finding and Huppenthal's campaign). In his campaign for State Superintendent, Huppenthal promised that if elected he would "stop La Raza," a double entendre that could be understood as a promise to stop the Mexicans, which serves as clear evidence that his pursuit of MAS was motivated by animus against Mexicans and Mexican Americans. *Id*. at 13, 34.

[12] The cases Defendants rely on, Appellees' Br. at 39-40, are inapposite because they do not address whether a law was passed with discriminatory intent, which implicates the motivation and potential animus of the legislators passing the law. Instead, all of Defendants' cases discuss statements by legislators only with regard to statutory interpretation. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012) (discussing how the views of an individual legislator affects statutory interpretation); *Sempre Ltd. P'ship v. Maricopa Cnty.*, 235 P.3d 259 (Ariz. Ct. App. 2010) (same); *Golder v. Dep't of Revenue*, 599 P.2d 216 (Ariz. 1979) (same); *In re Kelly*, 841 F.2d 908 (9th Cir. 1988) (same).

Similar coded language about Mexicans and Mexican Americans was used by numerous legislators and citizens advocating for the ethnic studies ban equating Mexican Americans and MAS students with being rude, resentful, defiant, angry, and anti-American. *See* Opening Br. at 32-33; Brief for Latina and Latino Critical Legal Theory, Inc. as Amicus Curiae Supporting Appellants at 13-16, ECF No. 23 ("LatCrit Amicus Br."). Courts have found similar statements and "coded" language containing group-based suppositions and pernicious stereotypes based on race or other group characteristics evidence of racial animus. *See, e.g.*, *Kesser v. Cambra*, 465 F.3d 351, 354-56 (9th Cir. 2006) (reversing summary judgment based on evidence of racial animus where prosecutor relied on "blatant racial and cultural stereotypes" characterizing certain Native Americans as "troublesome," "resistive," and "somewhat suspicious" of the criminal justice system); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1051-1052, 1062-63 (9th Cir. 2002) (finding genuine issue of fact existed due to government officials' stereotypes and presumptions about African Americans, hip hop music, and crime, which constituted "direct evidence" of discriminatory intent); *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 549, 552 (S.D.N.Y. 2006) (holding statements by community members and government officials characterizing Latino day laborers as dangerous and violent constituted evidence of animus).

Finally, Defendants simply ignore additional evidence that legislators and government officials used false and misleading claims to promote the bill and enforce it against MAS classes. *See* Opening Br. at 33. Here, Horne exploited anti-Mexican American sentiment by falsely claiming that MAS students wanted to eliminate the border between the U.S. and Mexico, ER6 1056, revealing an animus towards Mexican Americans. Similarly, Defendants' sweeping and inflammatory mischaracterizations of all MAS courses and texts as "un-American" that teach exclusively about "their culture" and "narrow backgrounds" and perpetuating a "mental model of failure" is highly probative of discriminatory intent.

Departures from normal procedures.

Defendants do not dispute that Horne departed from normal procedures when he issued his Finding of Violation by applying the statute retroactively and circumventing the 60-day safe-harbor period. Opening Br. at 33-34. Rather, they argue, as the district court found, that Huppenthal corrected any procedural defects by issuing his own findings. Appellees' Br. at 41-42. Their argument misses the point, which is not whether procedural defects were corrected. Instead, the fact that the procedure was distorted in the first place is evidence of animus. This also ignores evidence showing that Huppenthal shared Horne's "single-minded focus," ER1 28, on eliminating MAS and that he engaged in additional procedural irregularities to ensure MAS was found in violation of the law.

It is undisputed that Huppenthal rejected the very audit he commissioned – the Cambium Report – and its finding that MAS did not violate A.R.S. § 15-112, purportedly because auditors only observed 39.5 percent of high school MAS courses for an average of approximately thirty minutes per class period. Opening Br. at 35; Appellees' Br. at 42. Defendants argue that Huppenthal was justified in rejecting the Cambium Report because of these alleged "deficiencies." Appellees' Br. at 42. But to believe this purported "justification," one would have to accept that Huppenthal and the ADE "cured" these "deficiencies" by visiting *no classes at all*. ER6 1262. Similarly, Defendants ignore Huppenthal's reliance on a small sample of written excerpts of course materials – without verification of whether or how those excerpts were presented to students – even though he rejected the Cambium Report because of a purported "variance between the written materials and what was actually going on in the classroom." ER6 1268. Defendants offer no explanation for the discrepancy between Huppenthal's assessment of the Cambium audit (which he found lacking) and his own far more deficient and superficial "analysis" of MAS. The only reasonable explanation is that Huppenthal was intent on finding that MAS violated the statute, regardless of the evidence, to make good on his promise to "Stop La Raza." ER6 1288.

Finally, Huppenthal's sweeping elimination of all MAS classes, ER6 1151-52, despite the ALJ's more limited finding only that "at least one or more classes

or courses" violated the statute, ER6 1148, is both a substantive departure from his statutorily proscribed duties as Superintendent, *see* A.R.S. § 15-251, as well as an irregular application of the statute, and evidence of discriminatory intent. *See, e.g., Pac. Shores Props*, 730 F.3d at 1164; *Diaz v. San Jose Unified Sch. Dist.*, 733 F.2d 660, 663 (9th Cir. 1984).

Totality of Evidence

Under the *Arlington Heights* factors, a proper analysis looks at the totality of evidence to determine whether discriminatory animus was a motivating factor behind the law. *See, e.g., Pac. Shores Props.*, 730 F.3d at 1162-64. Defendants attempt to hide the animus motivating the enactment and enforcement of A.R.S. § 15-112 by addressing each piece of evidence in isolation and declaring it insufficient. But a court must look at the totality of the evidence aggregated in Plaintiffs' Opening Brief, at 30-35, including:

- Ninety percent of students in MAS were Latinos, even though only sixty percent of students in TUSD are Latinos.
- The sole purpose of A.R.S. § 15-112 was to eliminate MAS. Defendants concede the law was passed specifically in response to complaints about MAS. It has only been enforced against MAS.
- The law was passed in a climate charged with anti-immigration animus towards Mexicans and Mexican Americans, which Defendants do not

dispute. Rhetoric surrounding the anti-immigration debate included unfounded fears that Mexicans wanted to "reconquer" Arizona.

- Similar rhetoric surrounded the enactment of A.R.S. § 15-112. For example, supporters of the bill claimed Latino students in MAS were not sufficiently "American" and that they needed to "adopt American values." Students were stereotyped as "rude," "defiant[]," "uncivil," and "having contempt for authority." ER6 1054-55, ER8 1802, ER10 2191-92. Mexican Americans were compared unfavorably to Irish-Americans and Jewish-Americans because they would not assimilate like those latter groups.
- Supporters made false and misleading statements to promote the bill, including falsely claiming MAS was teaching students to "incite riots" and kill people, and alleging that MAS was orchestrated by Mexico to take over America.
- Defendants ignored other programs that appeared to violate the statute on their face, including programs designed for African Americans and Asian Americans. Defendants' *post hoc* reasons for why they targeted MAS apply only to MAS. These additional "requirements" necessary to find a violation into the law are pretexts used to attack MAS while ignoring other programs.

- Horne's issuance of a Finding of Violation on his last day of office and Huppenthal's rejection of his own commissioned Cambium Report after it failed to give him the result he wanted demonstrate that they both were intent on finding MAS in violation regardless of the facts.
- Huppenthal campaigned on the promise that he would "stop La Raza," a double entendre which can be understood as a promise to stop the Mexicans.

When viewed together, this evidence shows that animus towards Mexicans and Mexican Americans was a motivating factor behind the law. It is more than enough to clear the bar of "very little such evidence" this Court has set "to raise a genuine issue of fact" under *Arlington Heights*. *Pac. Shores Props.*, 730 F.3d at 1159 ("any indication of discriminatory motive … may suffice to raise a question that can only be resolved by a fact-finder") (quoting *Schnidrig*, 80 F.3d at 1409).

C. Questions of Material Fact Exist as to Whether A.R.S. § 15-112 Encourages the Infliction of an Injury Based on Race by Discontinuing and Removing from Local Control Efforts to Remedy Past Discrimination in Education.

Defendants contend that A.R.S. § 15-112 does not violate the Equal Protection Clause because it does not impede citizens' access to the political process to remedy discrimination, but "simply limits the ability of a public school to offer certain coursework." Appellees' Br. at 46. Defendants' argument rests on a fundamental misapprehension of the relevant standard under *Washington v. Seattle*

School District No. 1, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969). Further, it ignores and mischaracterizes the purpose, history, and effect of both A.R.S. § 15-112 and TUSD's MAS classes. *See* Opening Br. at 36-38. Specifically, by characterizing § 15-112 as simply "limit[ing] the ability of a public school to offer certain coursework," Appellees' Br. at 46, Defendants elide the key fact that the MAS program was designed to remedy past discrimination. See LatCrit Amicus Br. at 2-6, ECF No. 23 (discussing role of MAS in remedying de facto and past de jure discrimination against Mexican American students); Warren Amicus Br. at 2-4, ECF No. 21-2 (same). It was Defendants' decision to eliminate and then remove local control over a program designed to remedy past discrimination that triggers strict scrutiny under the "political process" Equal Protection doctrine.

Defendants' argument rests on a fundamental misapprehension of the relevant precedent. In *Seattle* and *Hunter*, the Court applied strict scrutiny to government decisions to restructure the political process by imposing uniquely onerous impediments for remedying racial discrimination; these decisions had "the serious risk, if not purpose, of causing specific injuries on account of race." *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight For Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1633 (2014). In both the *Seattle* and *Hunter* cases, local government attempted to

remedy discrimination only to face referenda that both eliminated the remedy and removed the locality's authority to remedy similar discrimination in the future. *Schuette*, 134 S. Ct. at 1631-33 (describing *Hunter* & *Seattle*).

Similar to the laws challenged in *Hunter* and *Seattle*, A.R.S. § 15-112 was enacted to target and eliminate a local program (MAS classes) adopted by the traditional decision-making body (TUSD Governing Board) to address discrimination—here, the substantial educational disadvantages faced by Mexican Americans. The TUSD Governing Board voted to expand MAS as part of its 2009 PUSP remedying past discrimination because the classes significantly improved test scores and graduation rates. ER1 26 n.15; ER9 1995-97. Further, like the laws challenged in *Hunter* and *Seattle*, A.R.S. § 15-112 targeted racial minorities by altering the political procedures available to effectively remedy past discrimination. Specifically, the statute (1) removed the TUSD Governing Board's statutory authority to prescribe curricula only with respect to a program that remedies discrimination, *cf.* A.R.S. § 15-341(A)(5); and (2) required proponents of the program to seek "relief from the state legislature" rather than TUSD, *Seattle*, 458 U.S. at 474.[13] Thus, A.R.S. § 15-112 did not simply "limit[] . . . coursework,"

[13] This history also serves to distinguish *Valeria v. Davis*, 307 F.3d 1036, 1040 (9th Cir. 2002), on which Defendants rely. The *Valeria* Court found that, standing alone, the facts that Proposition 227 had "a uniquely 'racial focus,'" and affected a program "that inures primarily to the benefit of racial minorities," did not make out a constitutional deprivation. *Id.* at 1042. However, the *Valeria* court recognized the

Appellees' Br. at 46, but rather was an impermissible, intentional, and "carefully tailored" reworking of the political process that had both the risk and purpose of causing injuries on account of race. *Schuette*, 134 S. Ct. at 1633 (quoting *Seattle*, 458 U.S. at 471).[14]

Finally, Defendants imply that A.R.S. § 15-112 does not burden the political process because minority students and parents can participate in developing a desegregation remedy in TUSD's longstanding desegregation litigation, *Fisher v. Lohr*. No. 4:74-90 (D. Ariz.). Appellees' Br. at 47. Yet, in that case, Defendants relied on A.R.S. § 15-112 when they moved to intervene in order to block the implementation of a court-ordered Unitary Status Plan mandating TUSD offer

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continued viability of the political process doctrine where governmental action targets programs that "remedy identified patterns of racial discrimination." *Id.* at 1040.

[14] As illustrated above, the Supreme Court's recent plurality opinion in *Schuette* does not change the analysis. Unlike this case, *Schuette* involved the Michigan electorate's vote to stop the practice of racial preferences in school admissions, a policy aimed at achieving diversity rather than remedying existing discrimination. 134 S. Ct. at 1629-30. In his controlling opinion, Justice Kennedy rejected a broad reading of *Seattle* in which "any state action with a 'racial focus' that makes it 'more difficult for certain racial minorities than for other groups' to 'achieve legislation that is in their interest' is subject to strict scrutiny." *Id.* at 1634. That principle has no application in a case, like this one, where the state imposed and selectively enforced a purposefully discriminatory policy that interfered with TUSD voters' ability to remedy educational disparities resulting from widespread de facto and de jure school segregation. *See id.* at 1632 (procedural restructuring results in invidious discrimination where "there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated").

culturally relevant classes for Mexican American students as a remedy to TUSD's intentional discrimination, ER2 160-196, 230-34, and is currently appealing the district court's denial of intervention before this Court. *See* Ariz. Br., *Fisher v. United States*, No. 13-15691 (9th Cir. Aug. 16, 2013), ECF No. 15-1.

D. Even If Not Subject to Strict Scrutiny, A.R.S. § 15-112 Fails Rational Basis Review.

A.R.S. § 15-112 is also invalid because it is not rationally related to any legitimate governmental interest. Even if this Court concludes that Defendants' actions against MAS were based on animus towards the students, teachers, and parents who supported the MAS program rather than Mexican Americans, Defendants' decision to punish a politically unpopular or "controversial" group cannot be a legitimate state interest, even under rational basis review. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635 (1996); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973); Warren Amicus Br. at 20-33, ECF No. 21-2. (arguing that State's enforcement against MAS fails rational basis review). Defendants offer no response to that assertion.

II. DEFENDANTS VIOLATED THE FIRST AMENDMENT WHEN THEY ELIMINATED MAS.

A. The First Amendment Applies to Decisions to Remove Materials From the Curriculum.

Quite crucially, Defendants do not challenge the District Court's conclusion

that the First Amendment limits the government's authority to remove materials from a public school's curriculum. ER1 13. Indeed, it is firmly established that the First Amendment protects "students' right to receive information and ideas" in the context of the school curriculum. *Johnson v. Stuart*, 702 F.2d 193, 195 (9th Cir. 1983); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1028-29 (9th Cir. 1998).

Rather, Defendants' contention is that "the Superintendent did not eliminate TUSD's MAS curriculum. TUSD, a nonparty, made that decision." Appellees' Br. at 21. This, though, ignores that the Superintendent directly caused TUSD to remove books from its curriculum by finding that TUSD was not in compliance with state law because of its MAS program, ER6 1092-1094; imposing a fine of 10 percent of TUSD's state funding retroactive to August 15, 2011, and until TUSD came into compliance, ER6 1152; and requiring proof that all MAS instructional material was removed from classrooms, ER6 1162. As shown below, there was no way to keep a MAS program consistent with the Superintendent's decree and Defendants do not offer any alternative to the contrary. Instead, Defendants assert that, rather than shutting down its MAS program, TUSD could have brought it into compliance with state law. Appellees' Br. at 22. In other words, Defendants argue that TUSD could have implemented a different program in place of the MAS program. But that point—itself doubtful—is entirely non-responsive to Plaintiffs'

argument that it was unconstitutional for the Superintendent to compel the elimination of the MAS program.

Appellees ignore that on December 30, 2010, Superintendent Horne found that that *all* of TUSD's MAS courses violated A.R.S. § 15-112, and gave TUSD 60 days to eliminate *all* of its Mexican American Studies courses or have 10 percent of its budget withheld. ER10 2192. Superintendent Huppenthal immediately affirmed this decision and then later, on June 15, 2011, found *all* TUSD MAS courses to violate A.R.S. § 15-112(A)(2)-(4). ER10 2194-96. On January 6, 2012, despite a finding by the ALJ only that "at least one or more classes or courses . . . were in violation," Huppenthal again found the entire MAS program in violation. ER6 1151. In light of these conclusions by the Superintendents, it is disingenuous for Defendants to suggest that TUSD had any alternative except to eliminate the MAS program or face severe sanctions. The State of Arizona, through its Superintendents of Schools, ordered an end to the MAS program, and the Defendants cannot now avoid responsibility for this decision when TUSD carried out its order.

Defendants also argue that the Constitution places "few restrictions on the State's right to establish curricular standards." Appellees' Br. at 23. In fact, Defendants go so far as to claim that the government has "plenary authority over curricular standards." *Id*. at 24. This, however, significantly overstates the

government's authority and entirely ignores the First Amendment. Many Supreme Court decisions and rulings of this Court have recognized "certain constitutional limits upon the power of a State to control even the curriculum and the classroom." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 861 (1982); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (striking down statute prohibiting teaching of foreign languages in public and private schools); *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968) (striking down law banning teaching of evolution in public schools and universities); *Monteiro*, 158 F.3d at 1027-29 (discussing constitutional limits on power of state to control curriculum).

The Defendants' claim of "plenary authority" over the curriculum would mean that a school district could do anything it wants. It could remove all books written by authors known to be Democrats or all works criticizing the governor. Although, of course, there is deference to the government in making curricular decisions, the cases are clear that the deference is not unlimited and does not warrant judicial abdication. The government violates the First Amendment when it makes curricular decisions in an effort to suppress a particular viewpoint and when it interferes with the ability of students to receive information. *Pico*, 457 U.S. at 867. *See also* Brief for Freedom to Read Foundation et al. as Amici Curiae Supporting Appellants at 7-10, ECF No. 17 ("Freedom to Read Amicus Br.") (discussing cases that make clear that state may not restrict curricular materials for

narrowly partisan or political reasons). That is exactly what Defendants did in eliminating the MAS program.

B. Questions of Material Fact Exist as to Whether Defendants Eliminated Forty-Three MAS Classes and Seven Books Based on Ideology Rather than Legitimate Pedagogical Concerns.

At the very least, there are important questions of material fact as to the reasons why the Superintendent eliminated the MAS classes and ordered the removal of books. Even with great deference to the government in making curricular decisions, it cannot eliminate a class or order the removal of a book purely out of dislike for the viewpoint or ideology expressed and without a legitimate pedagogical objective. As the Supreme Court has noted, ‘‘[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right.’’ *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994); *see also Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000) (state university may require students to pay a student activity fund so long as it does not engage in viewpoint discrimination in distributing the money).

The motive of the government in ordering the elimination of the MAS classes and the removal of the books is absolutely crucial in determining whether the First Amendment was violated. As this Court observed, “a student’s First Amendment rights are infringed when books that have been determined by the

school district to have legitimate educational value are removed from a mandatory reading list because of threats of damages, lawsuits, or other forms of retaliation." *Monteiro*, 158 F.3d at 1029; *see also Delcarpio v. St. Tammany Parish Sch. Bd.*, 865 F. Supp. 350, 362-63 (E.D. La. 1994) (First Amendment violated where removal from school libraries of book about African tribal religions was based on school board members' judgment that book gave students access to ideas board members considered objectionable), *rev'd on other grounds sub nom. Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 191 (5th Cir. 1995) (reversing grant of summary judgment and remanding because genuine issue of material fact existed whether school board members' motivations violated students' First Amendment right to receive information); *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1154 (N.D. Miss. 1980) (First Amendment violated by school district's textbook committee by selecting books that supported segregation).

The district court erred by not making a factual determination as to the motivations of the Superintendent in finding that TUSD's MAS program violated state law and effectively ending it. As explained in Appellant's Opening Brief, the circumstances of the decision and the statements surrounding it provide a strong basis for inferring an impermissible motive. Opening Br. at 49-51; *see also* Freedom to Read Amicus Br. at 13-14, ECF No. 17 (discussing facts showing that Superintendents Horne and Huppenthal eliminated MAS for political reasons). At

the very least, this case must be remanded for an inquiry as to the motivation of the Superintendent and whether it was an impermissible desire to suppress a particular viewpoint from being expressed and from being received by the students.

C. A.R.S. § 15-112 Is Facially Overbroad Because It Prohibits or Will Chill a Substantial Amount of Protected Speech.

The overbreadth doctrine protects against the chilling of constitutionally protected speech that may arise from a threat of enforcement of an overbroad law. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (en banc). The district court properly found A.R.S. § 15-112(A)(3) overbroad, but erred in rejecting overbreadth challenges to the rest of § 15-112(A). The concern with overbroad laws is always that they will chill constitutionally protected speech. Teachers in the TUSD know that if their speech is deemed to run afoul of the Arizona law it could cost the entire district 10 percent of its funding. Teachers thus know to stay far away from anything that might be deemed to violate A.R.S. § 15-112. This Court has recently emphasized that the First Amendment protects the speech of teachers. *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014) (holding the First Amendment protects the speech of teachers while on the job in the scope of their duties). This Court strongly reaffirmed:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of

> constitutional freedoms is nowhere more vital than in the community of American schools."

Id. at 411 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)); *see also* LatCrit Amicus Br. at 30-32, ECF No. 23 (discussing overbreadth of A.R.S. § 15-112 based on chilling of teacher and student speech).

1. The District Court Was Correct in Holding that A.R.S. § 15-112(A)(3) Is Unconstitutionally Overbroad.[15]

A.R.S. § 15-112(A)(3) prohibits courses that "[a]re designed primarily for pupils of a particular ethnic group." The district court held that this was unconstitutionally overbroad and risked chilling speech protected by the First Amendment. The district court declared:

> [S]ection (A)(3) threatens to chill the teaching of legitimate and objective ethnic studies courses. The provision certainly is not an outright ban on ethnic studies courses because such courses are not solely for the benefit of members of the ethnicity being studied. But the provision's broad and ambiguous wording could deter school districts from teaching ethnic studies. Significantly, such trepidation would not be unjustified given that Superintendent Horne found that three of the four Ethnic Studies courses at TUSD "could be found in violation" of § 15-112(A)(3). That then-Superintendent Horne elected to enforce the statute only against the MAS program, and not the other two programs, only underscores the breadth and ambiguity of this provision.

ER1 19-20.

[15] Plaintiffs-Appellants/Cross-Appellees make their response to Defendants' cross-appeal in this section.

The district court emphasized that § 15-112(A)(2) already prohibits a class that "promote[s] resentment towards a race." It thus explained, "But if such a class *does not* promote resentment, then what legitimate purpose is served by forbidding such classes?" ER1 19. The district court thus "conclude[d] that § 15-112(A)(3) is facially overbroad. The provision does not promote any legitimate interest that is not already covered by § 15-112(A) (2) and (A)(4), and also likely would chill the teaching of legitimate ethnic studies courses. In sum, it does not further any legitimate pedagogical interest." ER1 20.

Defendants respond to this by repeating their assertion of the "State's broad discretion to set curricular standards and its expressed interest in reducing racism." Appellees' Br. at 33. But the State's discretion does not include the ability to enact laws that are substantially overbroad and risk the chilling of protected speech. No Supreme Court decision or ruling of this Court has held that the overbreadth doctrine is inapplicable in the context of public schools.

Defendants argue that "Subsection (A)(3) complements the remaining provisions of the statute, by ensuring that all courses and classes in Arizona public schools are not segregative and are designed for students of all ethnic groups." *Id.* at 34. But this does not address the conclusions of the district court that these goals are already achieved by the other provisions in the statute and that the broad language of (A)(3) – prohibiting courses that "[a]re designed primarily for pupils

of a particular ethnic group" – "threatens to chill the teaching of legitimate and objective ethnic studies courses." The statute offers no definition or criteria for determining what is a course "designed primarily" for those of a "particular ethnic group." *Any* ethnic studies course could be perceived this way under the very broad statutory language. It is for exactly this reason that the district court correctly concluded that Subsection (A)(3) is unconstitutionally overbroad.

2. The District Court Erred in Rejecting the Overbreadth Challenge to the Other Parts of A.R.S. § 15-112(A).

Section § 15-112(A) is substantially overbroad in using phrases such as "any courses or classes" and "promote resentment toward a race or class of people." The concern with the former is that the ALJ found the inclusion of any prohibited content in "at least one class" was enough to find a violation of the statute, even if that content was not pervasive. ER7 1508. For example, an English class covering Mark Twain's *The Adventures of Huckleberry Finn* could be found to violate A.R.S. § 15-112(A)(2). *See* Opening Br. at 55-56. This example illustrates the statute's compounded overbreadth—not only is the statute overbroad in that Defendants could potentially conclude that *Huckleberry Finn* promotes resentment toward a race or class of people, but its inclusion in any part of a curriculum would be cause to eliminate the entire curriculum. *United States v. Stevens*, 559 U.S. 460, 473 (2010) (a law is unconstitutionally overbroad if it regulates substantially more

speech than the Constitution allows to be regulated). *See also* Freedom to Read Amicus Br. at 22-23, ECF No. 17 ("specter of the serious financial and political consequences of violating . . . [A.R.S. § 15-112(A)(2)], combined with the uncertainty regarding which materials may be found improper, will lead Arizona's responsible teachers to avoid materials that raise themes of racism, imperialism, or genocide").

The phrase "promote resentment toward a race or class of people" ((A)(2)) is impermissibly overbroad. There is no definition and there are no criteria for what it means to "promote resentment." Even accepting the government's interest in preventing "resentment," the statutory language would be violated if anyone spoke negatively about a race or class of people in any way. The concern with this, like all overbroad laws, is that it will chill constitutionally protected speech. As the Supreme Court has expressed, the concern with such a "prohibition of alarming breadth" is that it will chill constitutionally protected expression. *Stevens*, 559 U.S. at 474.

Defendants echo the district court and argue that the restrictions in § 15-112(A) are not overbroad because "the statute 'targets the design and implementation of courses and curricula.'" Appellees' Br. at 32. The problem, though, is that the statute nowhere says that it is limited to the design and implementation of class and curricula. This would be a significant limit on the

reach of the law, but it is not in the statute.[16] As the ALJ found, under the terms of the Arizona statute, a single class or even a single comment could be seen as "promoting" resentment based on race. It is precisely for this reason that the law is unconstitutionally overbroad.

Similarly, (A)(4) ("advocate ethnic solidarity instead of the treatment of pupils as individuals") is overbroad. The district court noted correctly that prohibiting the teaching of ethnic solidarity would be unconstitutionally overbroad because "there is nothing inherently racist or divisive about ethnic solidarity." ER1 21. The court erred though in finding that the phrase, "instead of the treatment of pupils as individuals," somehow corrects the overbreadth problem. *Id*. This presupposes that ethnic solidarity is somehow antithetical to the treatment of pupils as individuals and ignores that ethnic groups are made up of individuals. A further difficulty is that (A)(4)'s vagueness, Opening Br. at 41-42, lends to its overbreadth problem.

Defendants have no response to Plaintiffs' argument about the overbreadth of (A)(4), perhaps because they argue that Plaintiffs waived their overbreadth challenge to (A)(4) because it was not raised in Plaintiffs' opening brief. Appellees' Br. at 29 n.13. This is simply wrong. *See* Opening Br. at 56 n.13

[16] Defendants do not address our statutory construction argument about the explicit use of the word "designed" in (A)(3) and the failure to use the word "designed" in (A)(1), (2) and (4) other than a conclusory statement that theirs is the only construction that makes sense. Appellees' Br. at 32.

(arguing that district court erred in finding (A)(4) not overbroad).[17]

The issue of overbreadth is properly before this Court; overbreadth arguments for (A)(1) and (A)(4) were not waived; the court below was correct in deciding that (A)(3) was overbroad; but the court below erred in not finding the other provisions of A.R.S. § 15-112(A) overbroad.

III. A.R.S. § 15-112 IS UNCONSTITUTIONALLY VAGUE.

Defendants offer little argument in support of A.R.S. § 15-112's clarity. Instead, they offer arguments that mischaracterize the basis for Plaintiffs' challenge (the First Amendment right to receive information). They ignore the core principle that a statute is impermissible if its vagueness invites arbitrary or discriminatory enforcement—Plaintiffs need not *also* demonstrate that the statute fails to give notice of what is prohibited. And, seeking to make virtue out of vice, Defendants make the circular argument that the fact that the statute was enforced against TUSD proves that it is not vague. Appellees' Br. at 55. These arguments do not save the statute.

[17] Defendants' contention that Plaintiffs waived overbreadth with regard to (A)(1) is also incorrect. See Opening Br. at 52-53 (arguing that the phrases "any courses or classes" and "includes any" make all the proscriptions in A.R.S. § 15-112(A) overbroad). Further, Defendants' contention that this argument was not raised below, Appellees' Br. at 29, ignores that the court below ruled explicitly on this issue when it held that sections (A)(1) and (A)(2) were not overbroad because they do "not restrict *individual class* discussions, but instead only target[ ] the design and implementation of courses and curricula." ER1 17 (emphasis added).

A. Plaintiffs Have Standing to Challenge A.R.S. § 15-112's Vagueness Because It Impairs Their Right to Receive Information Through Programs Such as MAS.

Defendants argue that Plaintiffs lack standing to challenge A.R.S. § 15-112 as unconstitutionally vague because (1) Plaintiffs do not allege that the statute is vague in every application; (2) A.R.S. § 15-112 applies to schools, not individuals; and (3) Plaintiffs must identify a constitutionally protected liberty or property interest. Appellees' Br. at 48-49. All of these arguments fail for the same reason—that Plaintiffs' vagueness challenge implicates their First Amendment right to receive information.[18] In short, their right to receive information is a liberty interest that was infringed when the statute was applied to TUSD. Moreover, as Defendants themselves repeatedly recognize, prudential standing requirements are relaxed in vagueness challenges implicating speech. Appellees' Br. at 48 & 49; *see Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir. 2009) ("[a]lthough plaintiffs are generally limited to enforcing their own rights, standing is broader for facial First Amendment challenges"). As we discuss further below, Plaintiffs

[18] There is significant overlap between Defendants' standing and merits arguments, which are flawed for similar reasons. *E.g.*, Appellees' Br. at 52 (arguing for application of vagueness standard that applies when a law "does not implicate a constitutionally protected right"). We discuss in greater detail below Defendants' argument that Plaintiffs are required to show that A.R.S. § 15-112 is vague is all of its applications, Appellees' Br. at 48-49. *Infra* Part III.B.1.

need not show that the statute is vague in every application or that it was applied to them. *See Maldonado*, 556 F.3d at 1044.

Defendants ignore well-established precedent allowing plaintiffs to challenge restrictions on others' conduct if the result is impairment of their own First Amendment right to receive information. *See Johnson*, 702 F.2d at 195-96 (holding students had standing to challenge Oregon statute banning textbooks that spoke slightingly of the founders of the republic); *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 614-15, 621 n.5 (1976) (rejecting ordinance requiring canvassers to register, and noting that potential listeners had standing to challenge the vagueness of the canvassing statute based on impairment of their right to receive information from canvassers). "[W]here a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both." *Johnson*, 702 F.2d at 195 (holding existence of authors whose textbooks took banned perspective established that there were speakers willing to convey the information) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976)).

Here, TUSD consistently sought to continue offering the MAS program. After Huppenthal's finding that MAS violated A.R.S. § 15-112, TUSD administratively appealed that finding, ER6 1085-1091, and terminated its MAS program only after Huppenthal's order adopting the ALJ's decision and directing

the withholding of TUSD funding. ER6 1151-52, 1159, 1161-63. This is enough to confer standing on the Plaintiff students to sue to protect their right to receive the benefits of that program. Moreover, this is true even if TUSD could not assert a First Amendment claim itself. *See Kleindienst v. Mandel*, 408 U.S. 753, 762 & 65 (1972) (plaintiffs could bring First Amendment claim based on right to receive information even though unadmitted and nonresident alien potential speaker could not have asserted First Amendment claim).

Finally, Defendants argue that Plaintiffs "have not identified any liberty or property interest" at stake in this case. But this again ignores that the right to receive is a liberty interest for the purposes of Due Process. *See Krug v. Lutz*, 329 F.3d 692, 696-97 (9th Cir. 2003) (holding that inmate, challenging the review of incoming materials excluded as obscene, had a liberty interest in the receipt of his subscription mailings sufficient to trigger procedural due process guarantees). Thus, Defendants' standing arguments fail, and the Plaintiff students have standing to challenge A.R.S. § 15-112 because it deprives them of the opportunity to receive the information contained in the MAS curriculum.[19]

[19] Because Plaintiffs assert that A.R.S. § 15-112 impairs their right to receive the MAS curriculum, they assert more than a "generalized grievance." Appellees' Br. at 50 (quoting *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013). Unlike plaintiffs in *Hollingsworth v. Perry*, who had no stake in the enforcement of Proposition 8 distinguishable from the general interest of every citizen, Plaintiffs,

B. A.R.S. § 15-112 Is Vague Because It Is Susceptible to Arbitrary and Discriminatory Enforcement.

1. Plaintiffs Need Not Show There Is "No Set of Circumstances" Under Which the Statute Is Valid.

Preliminarily, Defendants argue that Plaintiffs "bear the high burden of proving that every application of the law is unconstitutional." Appellees' Br. at 48 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The flaw in this argument is apparent from Defendants' very next sentence—the "no set of circumstances" standard does not apply to facial challenges arising in the First Amendment context. *Id*. (citing *Alphonsus v. Holder*, 705 F.3d 1031, 1042 (9th Cir. 2013)). For example, the *Hynes* Court struck down on vagueness grounds a statute requiring canvasser registration without first considering whether there was any conceivable circumstance in which the statute could be applied. 425 U.S. at 620-21; *see also Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (striking down ordinance prohibiting "three or more persons to assemble . . . in a manner annoying to persons passing by" on vagueness grounds, even though the ordinance "encompass[es] many types of conduct clearly within the city's constitutional

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as TUSD students who seek, but are unable, to benefit from MAS, allege unique injury from the operation of A.R.S. § 15-112 to terminate MAS.

power to prohibit"). Thus, Plaintiffs need not show that the statute satisfies the "no set of circumstances" test in order to proceed with their facial challenge.[20]

Likewise, that the statute has been applied to TUSD does not make a facial or an as-applied vagueness challenge "logically impossible." Appellees' Br. at 55. Were this true, there would be no post-enforcement appeals overturning statutes on vagueness grounds. *Cf. Morales*, 527 U.S. at 50, 60 (finding statute facially vague in appeal from criminal convictions); *Coates*, 402 U.S. at 612, 615 (same); *United States v. Jae Gab Kim*, 449 F.3d 933, 942 (9th Cir. 2006) (describing procedure for criminal defendant to bring as-applied vagueness challenge after "the jury finds, on sufficient evidence, that he committed the statutory offense").

2. A.R.S. § 15-112 Is Vague Because It Lacks Standards Discouraging Arbitrary or Discriminatory Enforcement.

Defendants' argument that the statute is not unconstitutionally vague rests on a fundamental misapprehension of the applicable standard. Specifically, Defendants assert that a statute is "not unconstitutionally vague" if it provides "fair notice of what is prohibited *or* provides standards that discourage arbitrary and discriminatory enforcement." Appellees' Br. at 50 (emphasis added). Accordingly,

[20] In any event, as this Court has observed, the ongoing validity of *Salerno*'s "no set of circumstances" test was called into doubt in *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). *Alphonsus*, 705 F.3d at 1042 n.11 (noting that *Morales* plurality "cast some doubt on the 'no set of circumstances' requirement for facial challenges"); *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003) (*Morales* plurality "stated that the *Salerno* formulation was dictum").

they devote much of their argument to showing that school districts have adequate notice of what is prohibited. That argument (itself contestable) is premised on a misstatement of law. In fact, a statute is unconstitutionally vague if it either fails to provide adequate notice of the prohibited conduct *or* it is so indefinite that it permits arbitrary and discriminatory enforcement—it need not fail under both prongs of the vagueness test. *Maldonado*, 556 F.3d at 1045 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). Thus, much of Defendants' vagueness argument is simply non-responsive to Plaintiffs' argument that A.R.S. § 15-112 is unconstitutionally vague because it permits arbitrary and discriminatory enforcement. *See* Appellees' Br. at 51, 53 & 54 (discussing whether schools have notice of what is prohibited by A.R.S. § 15-112).

Moreover, Defendants' arguments for why TUSD had adequate notice of what was prohibited illustrate exactly why the statute is prone to arbitrary and discriminatory enforcement. For example, Defendants argue there is "no danger" that a school district will "be taken by surprise by the operation of the law" because schools may "request assistance" from ADE.[21] Appellee Br. at 54. In other

[21] Defendants cite Huppenthal's January 30, 2012, letter to TUSD, arguing that districts are provided resources to help with curricular planning, ER6 1163, but that letter refers to his offer of assistance in creating a new curriculum *after* TUSD was found in violation of A.R.S. § 15-112; it did not clarify the meaning of the statute *prior to* enforcement against TUSD. Further, while Defendants also argue that schools have "specialized knowledge" in the creation and implementation of curricular standards, Appellees' Br. at 53-54, Defendants do not identify any

words, Defendants do not argue that the statute is clear; instead, they tout their own willingness to offer school districts the Superintendent's interpretation of A.R.S. § 15-112. The danger in this offer goes almost without saying—it leaves Defendants free to both advise school districts and enforce the statute according to their own whims, interpreting language such as promote "resentment toward a race or class of people" and "advocate ethnic solidarity" to ban unpopular programs. *Cf. Morales*, 527 U.S. at 64 (anti-loitering statute vague because it "affords too much discretion to the police and too little notice to citizens who wish to use the public streets").

Further, the danger that programs may be banned based on personal biases and popular will is more than hypothetical. Defendants themselves state that they pursued an enforcement proceeding against MAS because "constituents made complaints about it," Appellees' Br. at 12, and because the MAS program "was the most controversial course of study, generating numerous constituent complaints," Appellees' Br. at 38-39. This arrangement—in which many schools could be said to violate the statute but enforcement decisions turn on constituent complaints or whether the program is "controversial"—creates a "real risk" of arbitrary and discriminatory enforcement where such complaints may reflect complainants'

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person or entity that had any specific knowledge, specialized or otherwise, of the meaning of the statute's key terms, such as what courses "promote resentment" or "advocate ethnic solidarity instead of the treatment of pupils as individuals."

biases. *See United States v. Lanning*, 723 F.3d 476, 483 (4th Cir. 2013) (discussing "real risk" of arbitrary and discriminatory enforcement where "citizen complaints" drive enforcement, because complaints may reflect complainants' biases); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1072) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

Defendants' only response to Plaintiffs' argument about the risks of arbitrary and discriminatory enforcement is that "a public school that violates the law" has several layers of protection against such arbitrary and discriminatory enforcement. Appellees' Br. at 54. But none of the post-enforcement procedures that Defendants identify—notice of violation, the 60 days to come into compliance, the ability to request an administrative hearing, and the ability to seek judicial review, Appellees' Br. at 54—cure the vagueness inherent in A.R.S. § 15-112. First, these asserted protections are available only *after* Defendants have exercised their discretion to declare a school district in violation of the law so cannot guard against arbitrary and discriminatory enforcement. Second, a statute is no less vague if an aggrieved party has the opportunity to seek judicial review of an adverse action. *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (fact that individual arrested under statute had opportunity to and in fact appealed was not

considered in holding that statute requiring a suspect to provide "credible and reliable" identification was unconstitutionally vague). Third, none of these procedures clarified what it means to promote "resentment towards a race or class of people," A.R.S. § 15-112(A)(2), or "advocate ethnic solidarity instead of the treatment of pupils as individuals," A.R.S. § 15-112(A)(4). *See* Opening Br. at 40-42. Contrary to Defendants' claim that the ALJ decision cured the vagueness of the statute, Appellees' Br. at 55, that decision failed to define the statute's terms, Opening Br. at 44-45. Fourth, the availability of an administrative appeal provides no protection against arbitrary and discriminatory enforcement because, under Arizona law, the Superintendent can reject or modify the ALJ's decision, A.R.S. § 41-1092.08(B), leaving the ultimate decision within the Superintendent's discretion. Further, where, as in the present case, the Superintendent decides to impose statutory penalties retroactively, a district takes an enormous risk by appealing. Here, after adopting the ALJ's findings on January 6, 2012, Superintendent Huppenthal ordered that TUSD's state funding be withheld retroactively, to August 15, 2011. ER6 1152. Thus, a district appealing a Superintendent's decision does so only if it accepts the risk that it will be required to return funds to the State if the district is unsuccessful.

Finally, even if the post-enforcement procedures cited by Defendants could provide a measure of protection against arbitrary and discriminatory enforcement

(they cannot), the procedures in this case did not because Defendants were intent on finding MAS in violation of the statute. On December 30, 2010, the day *before* the effective date of A.R.S. § 15-112, Superintendent Horne found the entire MAS program in violation of the statute and gave TUSD 60 days to eliminate all of its MAS classes or have ten percent of its budget withheld. ER10 2192. Five days later, on his fourth day in office, Superintendent Huppenthal issued a press release supporting Horne's finding. *See* Superintendent of Public Instruction John Huppenthal's Official Statement on TUSD Violation of A.R.S. § 15-112, *available at* http://www.azed.gov/public-relations/files/2011/08/pr01-04-11.pdf (last visited May 15, 2014). On June 15, 2011, after rejecting the findings of the independent Cambium audit, ER6 1259-62, Huppenthal issued his own findings that all MAS courses violated § 15-112, giving TUSD 60 days to come into compliance, ER6 1092. At the conclusion of TUSD's administrative appeal, the ALJ ordered the withholding of funds to the District on the effective date of his order, ER6 1148, giving TUSD neither criteria it could implement in order to comply nor time to comply after issuing its ruling.

None of the post-enforcement procedures utilized in the present case cured the vagueness of the statute. Instead, the manner in which the post-enforcement procedures were applied underscores that the statute was enforced against MAS in an arbitrary and discriminatory manner. The statute's vague terms allowed

Defendants to enforce A.R.S. § 15-112 according to their own "personal predilections," *Smith v. Goguen*, 415 U.S. 566, 575 (1974), and TUSD, having no clarity as to the statute's meaning and faced with the forfeiture of millions of dollars in State funding, ER5 903, had no choice but to deny the MAS program to its students.

IV. PROHIBITION (A)(3) IS NOT SEVERABLE BECAUSE IT CANNOT BE ESTABLISHED THAT THE LEGISLATURE WOULD HAVE ENACTED THE VALID PORTIONS ABSENT (A)(3).

As set forth in our opening brief, Opening Br. at 58, the Arizona Supreme Court has made clear that severability of an unconstitutional statutory provision turns on "whether the legislature intended that the act be severable." *Hull v. Albrecht*, 960 P.2d 634, 639 (Ariz. 1998) (citing *State Comp. Fund v. Symington*, 848 P.2d 273, 280 (Ariz. 1993); *State v. Pandell*, 161 P.3d 557, 530 (Ariz. 2007) ("[s]everability is a question of legislative intent") (quoting *State v. Watson*. 586 P.2d 1253, 1257 (Ariz. 1978)). Arizona courts use a two-prong test: "We will sever the statutory provision *only if* we can determine that (1) the valid portions are effective and enforceable standing alone *and* (2) the legislature would have enacted the valid portions of the statute absent the invalid provision." *Hull*, 960 P.2d at 639-40 (citing *Symington*, 848 P.2d at 280) (emphasis added); Opening Br. at 58.

Defendants' rule statement for severability is incomplete at best (and misleading at worst) because it addresses only the first prong of the test and

ignores the second.[22] Appellees' Br. at 34-35. Even assuming the first prong of the test is satisfied and the remaining portions are grammatically separate and theoretically could be enforced independently, Defendants do little to address whether "the legislature would have enacted the valid portions of the statute absent the invalid provision." *Hull*, 960 P.2d at 639 (citing *Symington*, 848 P.2d at 280).

The limited arguments Defendants make with regard to legislative intent do not support severance. First, they argue that the remaining portions of the statute after severing (A)(3) are enforceable because they are consistent with the general goals of the statute. Appellees' Br. at 36. As discussed above, that is not the applicable legal standard. Further, Defendants' reliance on *Symington* is misplaced. In that case, the legislature enacted a statute seeking the transfer of money from various special funds to the general fund to balance the state budget. 848 P.2d at 275. The court held that, while provisions imposing an alternative minimum tax on the State Compensation Fund were unconstitutional, they were severable from

[22] Defendants rely on *Randolph v. Groscost*, 989 P.2d 751, 754 (Ariz. 1999), to suggest that, in determining whether a statute is severable, a court looks only to whether the non-offensive terms are grammatically separate and independently enforceable. Appellees' Br. at 34-35. However, that case involved a voter proposition, not a legislative enactment, and the court made clear, though, that when dealing with a legislative enactment, courts properly look to legislative history as a guide. *Randolph*, 989 P.2d at 755 (citing *Hull*, 960 Ariz. at 639-40). Defendants further state, without citation, that the court's inquiry into legislative intent with regard to severability "begins with" examining only the wording of the statute, Appellees' Br. at 36, an argument that ignores the second part of the *Hull* test.

parts of the statute requiring transfers from other, wholly different funds. *Id.* at 281. While, in that case, the transfers from the other funds were not dependent on the transfers from the State Compensation Fund, evidence in the present case establishes that (A)(3), which targeted courses "primarily designed for pupils of a particular ethnic group," was a driving motivation for the enactment of A.R.S. § 15-112.

Second, while Defendants argue that "the statements of individual legislators cannot be imputed to the entire legislature," Appellees' Br. at 36 n.18, legislative history in the form of statements by the bill sponsor and the bill's author, as well as the direct history of (A)(3) through legislative committees and before the legislature, is highly relevant in determining whether the legislature would have enacted the statute without the offensive provision.[23] In the present case, the legislative history makes clear that the unconstitutional provision, (A)(3) (prohibiting courses or classes that "[a]re designed primarily for pupils of a particular ethnic group"), was a driving force behind the statute's enactment. *See* Opening Br. at 59-61. For example, bill Sponsor Representative Montenegro

[23] *Compare N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1986) (sponsor's statements "are an authoritative guide" and were accorded special weight in interpreting scope of Title IX) *with Mims*, 132 S. Ct.at 752 ("views of a single legislator, even a bill's sponsor, are not controlling"). Plaintiffs never argue that Montenegro's statements are controlling, but rather that the bill sponsor's statements are important and part of the broader legislative history that Arizona courts look to in making severability determinations.

stated: "I do not subscribe to any type of racial separatism or racial division, so this is why I have brought this bill forward." Opening Br. at 11. Even if there is uncertainty regarding what weight to give to statements by the bill sponsor, Defendants essentially concede that (A)(3) was the impetus of the statute:

> To the extent that an expression of legislative intent by any one person is relevant, this Court should consider former Superintendent Horne's own description of the impetus for this statute—that "[p]eople are individuals, not exemplars of racial groups" and that "*[i]t is fundamentally wrong to divide students up according to their racial group*" and teach them separately.

Appellees' Br. at 40 (quoting ER10 2183) (emphasis added). This is further corroborated by Horne's statements to the House Education Committee when he stated that the bill was intended "to prohibit grouping students by race." Opening Br. at 12.

The full legislative history demonstrates that A.R.S. § 15-112 was enacted to prevent Mexican American Studies courses because of the fear that such courses would attract Mexican American students who, once they learned history, literature, and art that emphasized Mexican American perspectives, might be resentful toward other racial groups or identify more strongly as a Mexican American. Without (A)(3) which, as the court below noted, could chill the teaching of all ethnic studies courses, ER1 19, the feared "segregated" setting would not exist for what then-Senator Huppenthal described as the indoctrination of students within MAS classes "to have a certain mindset of us versus them." Opening Br. at

11. Legislative history shows that ethnic studies classes for minority students were viewed as the setting or predicate for the fostering of resentment and ethnic solidarity. Thus, (A)(3) is not severable because the statute was enacted, not to simply prohibit teaching materials and concepts that might lead to resentment and solidarity, but to prevent the teaching of materials and concepts that might lead to resentment and solidarity among ethnic minority students.

The legislative history make clears that Defendants cannot establish that (A)(3) is severable, as the Arizona courts will sever the unconstitutional provision "*only if* we can determine that . . . (2) the legislature would have enacted the valid portions of the statute absent the invalid provision." *Hull*, 960 P.2d at 640.

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs' Opening Brief, the district court's ruling should be affirmed with respect to the overbreadth of A.R.S. 15-112(A)(3), and otherwise reversed and remanded for further proceedings.

Dated: June 2, 2014

Respectfully submitted,

/s/ Robert S. Chang

Robert S. Chang
Lorraine K. Bannai
Charlotte Garden
Fred T. Korematsu Center for Law and Equality
Ronald A. Peterson Law Clinic
Seattle University School of Law

Richard M. Martinez
Law Office of Richard M. Martinez

Sujal J. Shah
Bingham McCutchen LLP

Anjana Malhotra
SUNY Buffalo Law School

Erwin Chemerinsky
University of California, Irvine
School of Law

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 28.1(e)(2)(A). This brief contains 13,992 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii), and uses a proportional typeface and 14-point font.

Dated: June 2, 2014

Respectfully submitted,

/s/ Robert S. Chang
Robert S. Chang
Attorney for Plaintiffs-Appellants/Cross-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Alice O'Brien
National Education Association
Office of General Counsel
1201 16th Street, NW
Washington, DC 20036-3290

/s/ Robert S. Chang