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

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Nos. 13-15657, 13-15760

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, Tucson

No. 4:10-cv-00623-AWT

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INTRODUCTION

In 2010, the Arizona Superintendent of Public Instruction (now Attorney General) Tom Horne received public complaints about Tucson Unified School District's (TUSD) Mexican American Studies (MAS) program. Upon investigation, he learned that the MAS program promoted race-based resentment bordering on hatred among public school students in Tucson, Arizona. He discovered disturbing facts about the divisive, biased, and politically radical courses and issued detailed findings (the "2010 Findings") that showed why the MAS program violated A.R.S. § 15-112, an Arizona statute that prohibits curricula founded on race- and class-based resentment. (ER10 at 2183 – 92.)

The 2010 Findings found that the MAS teachers propounded "Critical Race Theory" – which distinguished itself from traditional civil rights by rejecting "incrementalism and step-by-step progress," instead questioning "the very foundation of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law." (*Id*. at 2191.)

The 2010 Findings stated that the curricular materials for the MAS classes included "A Field Guide for Achieving Equity in School." (*Id*.) The Field Guide stated that "privilege" refers to the amount of melanin in a person's skin, hair, and eyes. (*Id*.) The Field Guide instructed the mostly minority students in the MAS

courses that: "[w]hite people tend to dominate the conversation by setting the tone for how everyone must talk and which words should be used" and that "[a]ll of these 'White ways' must be recognized, internalized, and then silently acted on by people of color." (*Id*.) The text stated that "[a]nger, guilt, and shame are just a few of the emotions experienced by participants as they move toward greater understanding of Whiteness," and explained that "White Americans often feel a unique sense of entitlement to Americanism, partly because many never travel beyond the borders of the United States." (*Id*.)

The 2010 Findings described how the textbooks used by the MAS teachers held up José Ángel Gutiérrez as a role model despite Gutiérrez's call upon Chicanos to "kill the gringo" to solve their existing problems. (*Id*. at 2189.) Other teaching materials, addressing the subject of "Conquest and Colonization," informed students that "half of Mexico was ripped off by trickery and violence" and that "Chicanos became a colonized people" who "[i]n the process of being colonized, . . . were robbed of land and other resources." (*Id.* at 2191.)

The 2010 Findings concluded that these texts clearly violated A.R.S. § 15-112 by promoting resentment toward a race or class of people. (*Id*. at 2192.) They noted that if one were to substitute any other race for "Whiteness," it would be obvious how these curricular materials promoted resentment toward a race or a people. (*Id*. at 2191.)

The 2010 Findings included an exchange between the former chairman of the Ethnic Studies Department (and developer of the new multicultural curricula), Augustine Romero, and a CNN reporter regarding the original name of the MAS program – "La Raza." (*Id*. at 2185.) Augustine Romero explained that he named the MAS program "La Raza" after a political movement "so that our students could recognize and connect to their indigenous side, just like the word 'dine' for the Navajo translates to 'the people,' like the word 'o'odham' for the Tohono O'odham translates to 'the people.' The word 'yoeme' for the Yoeme people translates to 'the people.' It was an attempt to connect to our indigenous sides, as well as our Mexican side." (*Id*.) The 2010 Findings concluded that "[i]f one of the purposes of this course is 'an attempt to connect with our indigenous sides, as well as our Mexican side,' then obviously the course is designed primarily for pupils of a particular ethnic group." (*Id*.)

The 2010 Finding incorporated numerous messages and complaints from teachers and former teachers that indicated that this program chilled First Amendment rights. (*Id*. at 2186 – 2188.) The 2010 Findings describe:

> what an officially recognized resentment-based program does to a high school. In a word, it creates fear. Teachers and counselors are being called before their school principals and even the district school board and accused of being racists. And with a cadre of self-acknowledged 'progressive' political activists in the ethnic-studies department on the hunt, the race transgressors are multiplying. (*Id*. at 2186.)

The 2010 Findings described how the TUSD administration intimidated a Hispanic teacher with an Anglo name by removing him from his class and calling him a "racist" after the teacher objected to what Ethnic Studies specialists did in his history class. (*Id*.) The former history teacher stated that this tactic "is fundamentally anti-intellectual because it immediately stops debate by threatening to destroy the reputation of those who would provide counter arguments." (*Id*. at 2187.) The 2010 Findings contain an excerpt written by that former history teacher to Superintendent Horne that said:

> Condition: TUSD uses tax payer funded programs to indoctrinate students, based primarily on ethnic divisions, in the belief that there is a war against Latino culture perpetrated by a white, racist, capitalist system.
>
> Cause: TUSD has hired a group of radical socialist activists who promote an anti-capitalist and anti-Western Civilization ideology. They use ethnic solidarity as their vehicle of delivery. A climate of outright intimidation has stopped many from standing up to this group for fear of being labeled racists. . . .
>
> Effect: Impressionable youth in TUSD have literally been reprogrammed to believe that there is a concerted effort on the part of a white power structure to suppress them and relegate them to a second-class existence. This fomented resentment further encourages them to express their dissatisfaction through the iconoclastic behavior we see—the contempt for all authority outside of their ethnic community and their total lack of identification with a political heritage of this country. (*Id*.)

The 2010 Findings also contain an excerpt from a statement made to Superintendent Horne by a second teacher who described that she heard a MAS teacher tell his students that:

> [T]he U of A is a racist organization because only 12% of students are Latino and they do not support the Latin students there. I heard him tell students that they need to go to college so they can gain the power to take back the stolen land and give it back to Mexico. He personally told me that he teaches his students that republicans hate Latinos and he has the legislation to prove it. When I asked him about Mexican American Republicans who are against illegal immigration, he said this is an example of self-racism. (*Id*.)

A third teacher stated:

> I have, during the last two years, been attacked repeatedly here at Tucson High by members of the Ethnic Studies department because I question the substance and veracity of their American History and Social Justice Government classes. I have been called racist by fellow Tucson High teachers, members of the Ethnic Studies department, and students enrolled in the departments' classes. These charges come simply because I ask the department to provide the primary source material for the perspective they preach. The teachers of these classes not only refuse to stop the name-calling but openly encourage the students' behavior. (*Id*. at 2188)

A fourth teacher reported that:

> I have had Hispanic students tell me that this is NOT the United States of America. . . it is "occupied Mexico". . . I have made simple comments as a substitute such as "please pick up the paper under your desk" only to receive an immediate response of "You don't like Mexicans?" My response was to repeat my request of picking up the papers and calmly add that they must be REALLY confused . . . because I am also of Mexican descent. (*Id*.)

Fifth, a Mexican-born English teacher at a TUSD high school informed Superintendent Horne that the director of Raza Studies accused him of being the "white man's agent," that when this director was a teacher he taught a separatist political agenda, and that his students said that La Raza studies taught them not to "fall for the white man's traps." (*Id.*)

In a subsequent hearing, an independent Administrative Law Judge (ALJ) confirmed that the MAS pedagogy used a "philosophy of 'us against them'" to "cause students to develop a sense of racial resentment toward the 'white oppressor' or 'dominant group.'" (ER6 at 1126.) At that hearing, TUSD's own board president expressed his concern about the way MAS classes "promote[d] racial resentment, and advocate[d] ethnic solidarity instead of treating students as individuals." (*Id.* at 1131.) Another board member described the program as "racial indoctrination." (*Id.*) The ALJ concluded that the elementary curriculum promoted "barrio pedagogy," that the middle school curriculum promoted ethnic solidarity among "black and brown people while the white people are excluded," and that the high school curriculum included materials that "posit[ed] that white, English-speaking individuals are protected by civil rights statutes, but ethnic and racial minorities are not." (*Id.*, at 1132, 1135 – 36, and 1139.) The ALJ thus concluded the MAS Program violated A.R.S. § 15-112(2), (3) and (4). (*Id.* at 1148.)

JURISDICTIONAL STATEMENT

Defendants/appellees accept Plaintiffs/Appellants jurisdictional statement.[1]

ISSUES PRESENTED FOR REVIEW

Arizona law declares that "public school pupils should be taught to treat and value each other as individuals and not be taught to resent or hate other races or classes of people." Ariz. Rev. Stat. ("A.R.S.") § 15-111. In furtherance of that policy, the State Legislature enacted A.R.S. § 15-112, which prohibits a school district or charter school from including courses or classes in its program of instruction if those courses or classes promote the overthrow of the United States government or resentment toward a race or class of people, are designed primarily for pupils of a particular ethnic group, or advocate ethnic solidarity instead of the treatment of pupils as individuals. The Superintendent initiated an enforcement action against TUSD, alleging that its MAS program violated this statute.

---

[1] This case is likely moot. The federal courts have no subject matter jurisdiction over "a claim as to which no effective relief can be granted; such a claim is considered moot because "it has lost its character as a present, live controversy." *United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 698 (9th Cir. 1984). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute "is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013). The MAS program is gone. (ER6 at 1159.) The school district (which is not a party to this lawsuit) has not indicated that it would reinstate the program. In order to maintain a live controversy, the Arce Plaintiffs need to establish that any favorable ruling from this Court is *likely* to alleviate the alleged harm to them. *Maldonado v. Morales*, 556 F.3d 1037, 1043 (9th Cir. 2009). They cannot.

Plaintiffs, who are students who assert a desire to take classes in the challenged program, allege that these statutes, and this enforcement action, violate their constitutional rights. This appeal presents the following issues:

1. Did the district court correctly conclude a State's statutes regarding the State's curricular standards implicate public school students' right to receive information under the Free Speech Clause of the First Amendment?
2. Are A.R.S. §§ 15-111 and 112(A)(2) overbroad in violation of the Free Speech Clause of the First Amendment?
3. Does A.R.S. § 15-112, which does not contain any race-based classifications or create any political obstruction for minorities, violate the Equal Protection Clause of the Fourteenth Amendment on its face?
4. Were A.R.S. §§ 15-111 and -112 enacted or enforced with discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment?
5. Do the Arce Plaintiffs have standing to challenge claims that A.R.S. §§ 15-111 and -112 for vagueness?
6. Is A.R.S. § 15-112 unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment?

ISSUE ON CROSS-APPEAL

7. Is A.R.S. § 15-112 (A)(3),which prohibits classes "primarily for" a particular ethnic group, overbroad or vague?

STATEMENT OF THE CASE

On October 18, 2010, plaintiffs, ten teachers and the director of the MAS Program, (the Arce Plaintiffs) filed suit against then-Superintendent of Public Instruction Tom Horne, in his official capacity, and the members of the Arizona State Board of Education (as nominal parties), in their official capacities (collectively, the Superintendent). (ER12 at 2716 – 17, 2853.)[2] Plaintiffs challenged the constitutionality of A.R.S. §§ 15-111 and -112. (*Id.* at 2853.) In April 2011, the Arce Plaintiffs amended their Complaint to add two students, Maya Arce and Korina Lopez, with Sean Arce and Lorenzo Lopez, Jr., their natural parents and next best friends. (ER12 at 2800 – 02.) Student Nicholas A. Dominguez, and his mother Margarita Elena Dominguez then intervened. (ER 7 at 1347, 1444-66.) Nicholas has since graduated from high school, and thus voluntarily dismissed his claim. (ECF 245.)

The Arce Plaintiffs moved for summary judgment on their First Amended Complaint on June 2, 2011. (ER12 at 2724 – 76.) They then filed a Second

[2] References to "ER" are to the Arce Plaintiffs' Excerpts of Record and include the volume and the page number. References to "ECF" are to the document number in the district court's filing system. References to "OB" are to the Arce Plaintiffs' Opening Brief.

Amended Complaint just two weeks later. (ER12 at 2677 – 2712.) They filed their Third Amended Complaint which includes allegations that the Superintendent's actions violated their rights to equal protection, free speech, freedom of association, and substantive due process, and that § 15-112 is void for vagueness facially and as applied, one month later. (ER10 at 2150 – 2320.)

The Superintendent moved to dismiss the complaint. (ER10 at 2119 – 35.) One month later, the Arce Plaintiffs brought a second motion for summary judgment on their Fourteenth Amendment Due Process and First Amendment overbreadth claims. (ER9 at 2034 – 82.) On November 16, 2011, the Arce Plaintiffs requested a preliminary injunction, seeking to stop the Superintendent from completing his enforcement action, which was ongoing at the time. (ER9 at 1844 – 2118, ER10 at 1884 – 1922.)

On January 10, 2012, the district court granted defendants' motion to dismiss the teachers and the program director for lack of standing. (ER1 at 34 – 50.) The district court also dismissed the Arce Plaintiffs' freedom of association claim, and denied their first motion for preliminary injunction. (*Id*.) The Arce Plaintiffs have not appealed this order.[3]

---

[3] Although the Arce Plaintiffs specifically state that they have not appealed this order (OB at 4, n.2), they nonetheless include it in Volume I of their excerpts of record, despite the Ninth Circuit's clear statement that "the first volume of the excerpts of record shall be limited to specific portions of the transcript containing . . . the orders to be reviewed." 9th Cir. R. 30-1.6(a).

The Arce Plaintiffs filed a second motion for preliminary injunction, which relied on the claims raised in the summary judgment motion as well as their equal protection and substantive due process claims. (ER5 at 897 – 951.) The Superintendent opposed both the second motion for summary judgment and the second request for a preliminary injunction, and filed a cross-motion for summary judgment. (ECF 150, 197.)

On March 8, 2013, the district court denied the Arce Plaintiffs' motion for summary judgment, except as to its claim that A.R.S. § 15-112 (A)(3) was facially overbroad. (ER1 at 32.) It held that provision severable, and granted summary judgment in favor of the Superintendent on all remaining claims. (*Id*.) It also denied the Arce Plaintiffs' Second Motion for Preliminary Injunction as moot. (*Id*.)

STATEMENT OF FACTS

TUSD started its MAS program in 1998. (ER9 at 1851.) MAS classes were conducted at all grade levels—elementary, middle, and high school. In high school, the MAS classes were offered at several schools throughout the District. (ER10 at 2214.) At the high school level, there were MAS classes in American Government/Social Justice Education Project, Latino Literature, American History/Mexican American Perspectives, and art. (*Id.*at 2220 – 21.) Such classes satisfied the "core" curriculum requirements for junior and senior students, and

thus counted toward graduation. (ER4 at 643.) Two middle schools offered electives in "Chicano Studies," while itinerant teachers offered such classes once a week to students at three elementary schools. (*Id.* at 642, 725.) Although many district schools offered MAS classes over some thirteen years, TUSD never approved the MAS curriculum or many of the books used in it. (*Id.* at 531, 728; ER6 at 1120; ER7 at 1298 – 99.)

In 2010, the Arizona Legislature passed a statute declaring that "public school pupils should be taught to treat and value each other as individuals and not be taught to resent or hate other races or classes of people." A.R.S. § 15-111. To promote this policy of equal treatment for all races, this law prohibits a public school from offering any courses or classes that

1. Promote the overthrow of the United States government.
2. Promote resentment toward a race or class of people.
3. Are designed primarily for pupils of a particular ethnic group.
4. Advocate ethnic solidarity instead of the treatment of pupils as individuals.

A.R.S. § 15-112(A).

Superintendent Horne became aware of the MAS program because constituents made complaints about it. (ER10 at 2184.) In late 2010, then-

Superintendent Horne found that TUSD's MAS program violated this law. (ER10 at 2183 – 92.) The present Superintendent of Public Instruction, John Huppenthal, took office on January 3, 2011. Aware of the complaints about MAS, as well as Horne's findings, Huppenthal began an investigation into TUSD's MAS program to determine whether it complied with A.R.S. § 15-112; he directed his staff to conduct an "in depth investigation and review of the Program and its curriculum, materials, content and teacher practices." (ER6 at 1092.)

He began by commissioning Cambium Learning to perform a study of the MAS program for the purpose of determining "(1) how or if the Tucson Unified School District Mexican American Studies Department programs are designed to improve student achievement; (2) if statistically valid measures indicated student achievement occurred; and (3) whether the Mexican American Studies Department's curriculum [was] in compliance with A.R.S. § 15-112(A)." (ER10 at 2201.) After reviewing the completed audit,[4] the Superintendent concluded that it was insufficient, because it did not include a comprehensive review of written curriculum, teachers' lesson plans or units used in the curriculum, textbooks, student assessments, or sample student work in conjunction with classroom observations, all elements that even TUSD's Deputy Superintendent agreed should be included in a curriculum audit. (ER6 at 1120.). In addition, Cambium allowed

[4] The Cambium audit is at ER10 at 2197 – 2320.

one of the creators of MAS to control the structure of the audit, as well as which classes the auditors visited and when. (*Id.* at 1286.) Finally, the Cambium auditors reviewed fewer than twenty percent of the written curriculum units[5] and watched very few classes of instruction. (ER6 at 1122 – 23; ER10 at 2230.)

Because of his concerns about the Cambium audit's insufficiency, Superintendent Huppenthal directed high-ranking Department staff to conduct their own investigation. (ER6 at 1258 – 59.) Based on his staff's investigation as well as his review of the Cambium audit, on June 15, 2011, Superintendent Huppenthal issued findings concluding that TUSD's MAS classes violated A.R.S. § 15-112. (ER6 at 1092 – 94.) Huppenthal also noted TUSD's failure to comply with A.R.S. § 15-341, which requires school boards to exclude from the curriculum "all books, publications, papers or audiovisual material of a sectarian, partisan or denominational character," as well as with A.R.S. §§ 15-721 and 15-722, which require school boards to approve the course of study and basic textbook (or supplemental books) for each course. (*Id.*) The Superintendent then gave TUSD sixty days to bring its MAS Program into compliance, stating that failure to do so would result in withholding of ten percent of state funds. (*Id.*)

[5] A curriculum unit is one week of lessons. There are approximately eighteen weeks in each semester. (ER10 at 2230.) Notably, Sean Arce, director of the MAS Department, put together the curriculum materials that Cambium reviewed. (ER4 at 722 – 23.)

TUSD appealed the Superintendent's finding. (ER6 at 1085 – 91.) An independent Administrative Law Judge then conducted a four-day hearing, and on December 27, 2011, issued a finding denying TUSD's appeal. (ER6 at 1113 – 49.) The ALJ's Order began by noting the issue was not "whether the MAS program should be suspended, dismantled or terminated, or whether the MAS program has achieved a certain level of academic success, or whether the MAS program is an effective program, or whether MAS classes are being taught in accordance with State Standards." (*Id.* at 1113.) Instead, the ALJ identified the sole issue as "whether to uphold Superintendent John Huppenthal's June 15, 2011 determination" that the MAS program violates Arizona law by promoting racial resentment, being designed primarily for one ethnic group, or by advocating ethnic solidarity instead of treating pupils as individuals. (*Id.*)

The ALJ then carefully described his review of the evidence, including: the MAS Program and Pedagogy; the Cambium Report; classroom visits at the elementary, middle and high school and the materials presented during those classes; the MAS website and, the testimony of board members, teachers, parents and experts. (*Id.* at 1119 – 45.) More specifically, he described the deficiencies of the Cambium audit caused by, among other things, the MAS director's failure to provide requested curricular materials. (*Id.* at 1120 – 24.) He pointed out that the MAS website described the MAS program's purpose as creating "a Latino

identity" and being based on "Latino Critical Race Pedagogy." (*Id.* at 1125 – 26.) His review of MAS pedagogy explained that its founders state that its rationale is "premised upon the belief that 'the United States of America was founded and constructed on racism' and that '[f]rom its inception, America and Americans have operated on the belief that whites are superior to all other races.'" (*Id*. at 1127.) The ALJ dismissed the District's expert, because he lacked familiarity with the MAS program, but credited the Department's expert witness, who testified that that MAS program materials "were not academically beneficial," and that the MAS classes promoted racial resentment, advocated ethnic solidarity over treating students as individuals and were designed for students of a particular ethnic group. (*Id.* at 1130 – 31.) He provided examples of elementary curricula that promoted divisive political activism in young children and suggested that Latinos had been "dehumanized." (*Id.* at 1132 – 34.) Middle school lessons taught children that Mexican children had experienced "[f]ive centuries of being at the bottom of the social, political, and economic rung [that] have devastated our humanity." (*Id.* at 1136.) High school classes included "critical race theory" and "critical race pedagogy" both of which taught students that white Americans want to oppress others. (*Id.* at 1139 – 42.) Finally, he concluded with a description of a parent's testimony, discussing the pain her daughter experienced in a MAS class where

students of Mexican and other Hispanic backgrounds would not talk to her because she was white. (*Id.* at 1144.)

The ALJ also noted the MAS Program did not use a written curriculum, and had not sought or received District approval of its curriculum or textbooks. (*Id.* at 1120.)

In upholding the Superintendent's decision, the ALJ concluded:

> A.R.S. § 15-112 (F) permits the historical (objective) instruction of oppression that may, as a natural but unintended consequence, result in racial resentment or ethnic solidarity. However, teaching oppression objectively is quite different than actively presenting material in a biased, political, and emotionally charged manner, which is what occurred in MAS classes. Teaching in such a manner promotes social and political activism against the white people, promotes racial resentment, and advocates ethnic solidarity, instead of treating pupils as individuals.

(*Id*. at 1147.) The ALJ then stated that the Department was to withhold ten percent of TUSD's monthly state aid "until the District comes into compliance with A.R.S. § 15-112." (*Id*. at 1148.) Superintendent Huppenthal accepted the recommended decision on January 6, 2012. (*Id.* at 1150.)

Rather than reform its MAS program to comply with the law, TUSD's Board issued an order suspending its MAS classes just four days later. (*Id.* at 1159.) On

January 12, TUSD directed teachers to remove several books that had been used in the MAS classrooms. (*Id.* at 1165 – 67.)[6]

Because TUSD's decision to suspend the MAS classes addressed the violation of A.R.S. § 15-112, Superintendent Huppenthal notified TUSD that the Department would not withhold any funds while the Department monitored its compliance. (*Id.* at 1161 – 63.) To ensure compliance, the Superintendent asked that TUSD demonstrate that it had made sure that MAS students were transferred to appropriate classes; that it had developed a plan for MAS staff to adopt curriculum in an appropriate manner, while ensuring improved achievement for Hispanic students; that it had removed MAS instructional materials from the classrooms; and that it submit a plan to develop a comprehensive social studies core curriculum. (*Id.*)

SUMMARY OF THE ARGUMENT

The district court correctly upheld the constitutionality of A.R.S. §§ 15-111 and 112(A)(1), (2) and (4), which prohibit public district and charter schools from

[6] Neither the ALJ's decision nor Huppenthal's order accepting it required that any specific books be removed from classrooms. (ER6 at 1289 "[N]othing about my order . . . requires that those books be banned at all.") TUSD nonetheless issued a directive requiring the teachers to remove the following books from their classrooms: Rodolfo Acuna, *Occupied America: A History of Chicanos*; Richard Delgado, *Critical Race Theory*; Elizabeth Martinez, ed., 500 Years of Chicano History in Pictures; Rodolfo Corky Gonzales, *Message to Aztlan*; Arturo Rosales, *Chicano! The History of the Mexican Civil Rights Movement*; Paulo Freire, *Pedagogy of the Oppressed*; Bill Bigelow, *Rethinking Columbus: The Next 500 Years*. (ER6 at 1165 – 67.)

offering courses or classes that inculcate class- and race-based resentment within school children. Enacting such statutes falls well within the state's plenary authority over its curriculum. To the extent that the Free Speech Clause of the First Amendment protects a student's right to receive information, that right is not implicated by a state statute that limits curricula to pursue a goal of reducing racism.

The Arce Plaintiffs' equal protection challenge must also be rejected. The challenged statute does not contain any classifications, and therefore does not violate the Equal Protection Clause on its face. And, the district court correctly concluded that the undisputed facts demonstrate that the Legislature did not act with discriminatory intent in enacting the statute and that the Superintendent did not act with discriminatory intent in enforcing it.

And, the Arce Plaintiffs' due process vagueness challenge fails. The Arce Plaintiffs lack standing to challenge the statute's vagueness. Because it is not unconstitutionally vague in all its applications, it does not apply to the Arce Plaintiffs, and it does not affect their property or liberty interests. Instead, the statute places curricular limits on public schools. Public school boards have specialized knowledge in creating and implementing curricular standards that assists in understanding the statute. The schools also have access to State resources that can provide guidance and assistance in developing conforming

curricula. And, the schools have procedural protections against arbitrary enforcement including a right to a hearing and judicial review of the administrative decision. The Arce Plaintiffs' arguments improperly shift the high burden of showing facial unconstitutionality on to the Superintendent, require an unduly high standard of clarity in analyzing the statute, and fail to recognize that the statute was not vague in at least one circumstance.

Finally, this Court should reverse the district court's decision to hold A.R.S. § 15-112(A)(3) unconstitutional as overbroad in violation of the First Amendment. Subsection (A)(3), like its companion provisions, falls well within the authority of a state over its curriculum, and its proscription against classes "designed primarily for" one ethnic group is clear.

ARGUMENT

I. The Superintendent's Actions Did Not Violate the Arce Plaintiffs' Free Speech Rights.

A. Standard of Review.

This Court reviews a district court's decision on cross-motions for summary judgment de novo. *Blue Lake Rancheria v. United States*, 653 F.3d 1112, 1115 (9th Cir. 2011).

B. Neither the Superintendent's Actions Nor A.R.S. § 15-112 Infringed the Arce Plaintiffs' Right to Receive Information.

The Arce Plaintiffs argue that the district court erred when it failed to address their argument that Arizona's "elimination of MAS" classes violated their First Amendment right to receive information, and that such action constituted impermissible viewpoint discrimination. (OB at 46 – 48.) Their argument rests on two flawed premises: First, that Arizona removed curriculum from TUSD; second, that students have a right to receive any particular curriculum.

1. The Superintendent did not remove any curricular materials from the classroom; TUSD did.

The Superintedent did not eliminate TUSD's MAS curriculum. TUSD, a nonparty, made that decision.[7] The Superintendent merely conducted an

[7] In fact, in their Statement of the Case, the Arce Plaintiffs acknowledge this by stating, "[a]fter TUSD eliminated MAS." (OB at 4.) In addition, their record cites do not support their contention that the Department of Education or the Superintendent "eliminated the MAS program," or "prohibited" MAS students from using specific books. For example, the Arce Plaintiffs cite to ER6 1167 to support the contention that "MAS students were prohibited from accessing seven books with Mexican American perspectives after Huppenthal concluded they had impermissible passages." (OB at 51.) ER6 1167 is a January 11, 2012, email from TUSD Deputy Superintendent Maria Menconi, directing that several books "specifically mentioned in the court order" be "cleared from classrooms, boxed up and sent to the Textbook Depository." (ER6 1165 – 67.) At that time, the only possible "court order" was the ALJ decision that Superintendent Huppenthal had affirmed, which did not direct any particular action with respect to any books. (*Id.* at 1161 – 63.)

investigation and issued findings, determining that the MAS curriculum violated A.R.S. § 15-112 because the curriculum promoted resentment, was designed primarily for pupils of a particular ethnic group, and advocated solidarity instead of treating pupils as individuals. (ER6 at 1092 – 94.) The Superintendent also found that TUSD had failed to follow both state law and its own district policies regarding the adoption of curriculum and textbooks. (*Id*.) Arizona thus gave TUSD sixty days to "bring the Mexican American Studies Program into compliance" or face withholding of ten percent of its state funds. (*Id*.) On appeal, the ALJ affirmed the Superintendent's determination, again giving TUSD the opportunity to come into compliance. (*Id*. at 1148.)

Instead of bringing the MAS program into compliance with Arizona law, TUSD's Board moved, within days, to shut down its program. (ER6 at 1159.) Because TUSD made the decision to eliminate the MAS program, rather than to bring it into compliance, this Court need not consider the Arce Plaintiffs' argument that the Superintendent violated their First Amendment rights.

Because the Superintendent did not remove materials from the curriculum, the Arce Plaintiffs' authority addressing this issue is inapposite. Authority discussing a school board's rights to determine curricular content is not relevant because the question here is the State's right to set curricular standards for public schools.

2. Because the Constitution places few restrictions on the States right to establish curricular standards, the district court erroneously concluded that A.R.S. § 15-112 implicated the Arce Plaintiffs' right to receive information.

As the district court correctly recognized, A.R.S. § 15-112 does not limit what students may say in the classroom, and therefore, their First Amendment claim cannot be sustained on that basis. (ER1 at 10.) The district court also concluded that students "have an established right to receive information and ideas in the classroom" and thus applied limited scrutiny in analyzing the Arce Plaintiffs' First Amendment claim. (*Id.* at 15) The appropriate standard for addressing state curricular decisions is far more deferential.

The State is obligated to educate its youth. *See Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 812 (Ariz. 1994) (stating that, from the inception of its statehood, Arizona's public "schools were to be forever under the exclusive control of the state") (*citing* Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 570); *see also* Ariz. Const. art. XI, § 1 (requiring the Legislature to "enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system"). It is the State's right to establish curricular standards for its elementary and secondary school students while it is the schools' obligation to ensure that its policies and procedures are "not inconsistent with law

or rules prescribed by the state board of education."[8] *See* A.R.S. §§ 15-203 (A)(12)-(13) (state board of education's authority); A.R.S. § 15-341 (A)(1) (school districts' obligations).

In finding that A.R.S. 15-112 implicated the Arce Plaintiffs' right to receive information, the district court not only failed to account for the State's plenary authority over curricular standards as well as a school's obligation to abide by them, but also the community's "legitimate, even [] vital and compelling interest in 'the choice (of) and adherence to a suitable curriculum for the benefit of our young citizens.'" *Zykan v. Warsaw Cmty Sch. Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980) (citation omitted). The district court failed to defer to what the Supreme Court termed the "claim of absolute discretion in matters of curriculum" arising from the "duty to inculcate community values." *Board of Educ. v. Pico*, 457 U.S. 853, 861 (1982). It also failed to consider that the Supreme Court cautioned courts addressing matters of education, because "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *see also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation

[8] Arizona's academic standards can be found at http://www.azed.gov/standards-practices/# (*last accessed* Feb. 21, 2014).

raises problems requiring care and restraint."); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) ("affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools").

While there are "certain constitutional limits upon the power of the State to control even the curriculum and classroom," *Pico*, 457 U.S. at 861,[9] the role of the First Amendment as a limit on the power of the State in setting curricular standards is unclear. *Pico* itself noted that "Petitioners might well defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values." *Id*. at 869. Thus, as the Fifth Circuit explained in *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184 (5th Cir. 1995),[10] the level of First Amendment scrutiny for a curricular decision is much lower than that for a non-curricular decision. *See Griswold v. Driscoll*, 625 F. Supp. 2d 49, 54 (D. Mass. 2009) ("the curriculum of public schools is a fully protected form of state speech"), *citing Rosenberger v. Rector*, 515 U.S. 819, 833 (1995); *Seyfried v. Walton*, 668

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[9] *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (noting that State's power to prescribe curriculum was not at issue in striking down a statute criminalizing the teaching of German in schools as a violation of the individual's due process right); *Epperson*, 393 U.S. 97 (statute forbidding the teaching of evolution violated Establishment Clause).

[10] *Campbell* reversed *Delcarpio v. St. Tammany Parish Sch. Bd.*, 865 F. Supp. 350 (E.D. La. 1994), a case the Arce Plaintiffs rely upon. (OB at 51.)

F.2d 214, 216 (3d Cir. 1981) (a student has no First Amendment right to study a particular aspect of history because the "selection of course curriculum [is] a process which courts have traditionally left to the expertise of educators.")

Thus, while it is true "that there is no strong consensus among the circuit courts regarding the application of First Amendment principles to the selection of curricular materials by school boards," *Chiras v. Miller*, 432 F.3d 606, 616 (5th Cir. 2005), it is also clear that where "speech or expression begins to implicate the school as speaker, First Amendment rights have been limited." *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), (citing *Hazelwood*, 484 U.S. at 270-73).[11] The *Downs* court described a school district's bulletin boards as an "an expressive vehicle for the school board's policy of 'Educating for Diversity,'" and not a forum for either limited or unlimited discussion. *Id*. at 1012. Because the bulletin boards were the government's own speech, its speech was "not subject to the constraints of constitutional safeguards and forum analysis, but [was] instead measured by practical considerations." *Id*. at 1013.

Chiras reached a similar conclusion in rejecting a textbook author's claim that the Texas State Board of Education had engaged in impermissible viewpoint

[11] Notably, *Hazelwood* imposed its (limited) constraints on the school's ability to control student speech in a student newspaper after first concluding that the student newspaper was a limited public forum for student expression. *Hazelwood*, 484 U.S. at 263. Here, in contrast, the State's curricular standards do not create a forum for student (or teacher) expression.

discrimination in rejecting his textbook. 432 F.3d at 614. In so doing, the Fifth Circuit emphasized that when a state board of education devises a curriculum for a state, "it is the state speaking." *Id.* It reasoned that, "the government, including its educational institutions, has the discretion to promote policies and values of its own choosing free from forum analysis or the viewpoint-neutrality requirement."[12] *Id*. at 613. Under the *Downs/Chiras* analysis, the Arce Plaintiffs have no claim that the Superintendent engaged in impermissible viewpoint discrimination when it required TUSD to comply with the challenged statute.

The *Chiras* court also rejected a student's claim that her right to receive information had been violated when the State Board of Education declined to approve the textbook. 432 F.3d at 620. After noting the possible existence of an ill-defined right to receive information, based on *Pico*, the Fifth Circuit granted the Texas State Board of Education "a wide degree of discretion in performing its traditional function of selecting curriculum which promotes the state's chosen education policy." *Id*. It thus rejected the claim that any right on the part of a

[12] The *Chiras* court explained that this principle follows from *Rosenberger* and *Rust v. Sullivan*, 500 U.S. 173 (1991). *Rosenberger* distinguished between a university's ability to control its own message and the requirement that it "not discriminate based on the viewpoint of private persons whose speech it facilitates." 515 U.S. at 834. *Rust* upheld the ability of the government to fund programs it believes to be in the public interest, without at the same time funding other programs that address the issue differently, because "[a] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." 500 U.S. at 193.

public school student to receive information would extend to the right to select textbooks for a classroom. *Id*. Similarly here, the Arce Plaintiffs' right to receive information does not grant them the right to demand a specific course of study, curriculum, or textbooks, or to complain when the State institutes enforcement proceedings to ensure that TUSD complies with state law regarding public school curricula.

The district court here rejected the *Downs* analysis, concerned about "improperly granting the State absolute discretion in devising its curriculum." (ER1 at 14.) The district court's concerns are not well founded. As the Supreme Court established in *Meyer v. Nebraska* and *Epperson v. Arkansas*, there are constitutional constraints on State's curricular choices. *See* note 9 *supra*. The district court distinguished the teacher who sought to speak for the government in *Downs* from the students here who seek "to vindicate their passive right to be exposed to information and ideas." (ER1 at 14.) But the teacher who sought to present his own message on the school's bulletin boards in *Downs* and the students here who seek to specify the curriculum both want to require the government to deliver their messages, rather than its own. Therefore, the court's distinction is invalid. Relying on that invalid distinction, the district court improperly scrutinized the State's effort to control the message it seeks to convey through statutes that set limits on districts' curricula under the lens of a First Amendment

right to receive information. Although the district nonetheless correctly upheld three of the four provisions of A.R.S. § 15-112, it erroneously found one provision invalid under this incorrect standard.

C. The Challenged Statute Is Not Overbroad in Violation of the First Amendment.

The Arce Plaintiffs challenge the district court's decision that A.R.S. § 15-112 (A)(1), (2) and (4) are not impermissibly overbroad in violation of the First Amendment.[13] (ER1 at 19, 21.) They assert that the use of the words "any courses or classes" and "includes any" in (A)(2) makes the statute overbroad because the inclusion of prohibited content in even one class is sufficient to result in an order invalidating entire courses, even if those courses contained permissible material. (OB at 52 – 3.) They object to the use of the word "promote" in (A)(2), which prohibits course or classes that "promote resentment toward a race or class of people" because it does not refer to intentional conduct. (OB at 54 – 7.) This court should reject their challenge to phrases "any courses or classes" and "includes any," because it was not raised below. *See Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) (stating that the appellate courts do not generally

[13] The Arce Plaintiffs have waived their First Amendment overbreadth challenge to A.R.S. §§ 15-112 (A)(1), relating to classes that promote the overthrow of the government, and (A)(4), relating to classes that advocate ethnic solidarity over treatment of pupils as individuals. *See Estate of Ferdinand E. Marcos Litig.*, 978 F.2d 493, 495, n.2 (9th Cir. 1992) (stating that the Court will not consider arguments that are not raised in the opening brief).

consider issues raised for the first time on appeal). It should reject their challenge to the use of the word "promote" for the same reasons that the district court did; when read in the context of the entire statute, it is clear that a "substantial number" of the applications of the statute are "reasonably related to a legitimate pedagogical interest." (ER1 at 19.)

In a facial challenge to a law's validity under the First Amendment, the "law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460 (2010) (internal quotation marks omitted). "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). In construing the meaning of "promote" in A.R.S. § 15-112(A)(2) in the context of the entire statute, it is clear that the statute's prohibition against courses or classes that "promote resentment" is reasonably related to the State's legitimate goal of reducing racism.

The statute begins with its "Declaration of Policy" which states: "The legislature finds and declares that public school pupils should be taught to treat and value each other as individuals and not be taught to resent or hate other races or classes of people." A.R.S. § 15-111. And 112(E) and (F) specifically provide that

the curricula may include courses or classes "that include the history of any ethnic group [] that are open to all students," that "include the discussion of controversial aspects of history," or that address genocide or the historical oppression of a people. Also relevant is the title of A.R.S § 15-112, which is "Prohibited courses and classes," as well as the fact that its enforcement provisions are solely directed to schools. A.R.S. § 15-112 (B).

The next step is to examine the meaning of classes that "promote resentment" using the commonly accepted meaning of "promote." *TDB Tucson Group, LLC v. City of Tucson*, 263 P.3d 669, 672 (Ariz. App. 2011) *see also* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language."). The court properly relied on the dictionary definition, which is "to contribute to the growth, enlargement or prosperity of," to "further" and to "encourage." (ER1 at 17.) *E.g*., *Sierra Tucson, Inc. v. Pima Cnty.*, 871 P.2d 762 (Ariz. App. 1994) (using dictionary to help define terms and noting that in interpreting statute, court gives effect to "statutory terms in accordance with their commonly accepted meanings").

Finally, the ALJ's "sensible construction" of the provision guides inquiry into its meaning.[14] *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131

[14] The district court also properly relied on the Superintendent's assertions that the statute's goal is to prohibit classes that promote racism. (ER1 at 16.)

(1992). The ALJ concluded that the statute permits the "historical (objective) instruction of oppression that may, as a natural but unintended consequence, result in racial resentment or ethnic solidarity" while prohibiting the presentation of material "in a biased, political, and emotionally challenged manner." (ER6 at 1147.)

In sum, the district court correctly rejected the Arce Plaintiffs' assertion that the statute covers "student-driven class discussion that inadvertently brings about resentment towards a race or class of people," such as a discussion of Mark Twain's *Huckleberry Finn* or Richard Wright's *Black Boy* because such discussion might promote resentment. (OB at 55.) The court also correctly concluded that the statute "targets the design and implementation of courses and curricula."[15] (ER1 at 17.) This is the only construction that makes sense and gives meaning to the entirety of the statute, which limits a school district's and charter school's inclusion of material in its "program of instruction any courses or classes." A.R.S. § 15-112.

[15] Contrary to the Arce Plaintiffs' assertion (OB at 53-4), one need not rewrite the statute to conclude that it applies to the design and implementation of courses and curricula, given the multitude of references throughout the statute to courses and classes. It is a logical extension of the statute's plain meaning. *Valle del Sol v. Whiting*, 732 F.3d 1006, 1021 (9th Cir. 2013), is inapposite, as it addresses an opportunity to substitute language in a statute for a "nonsensical" phrase. In any event, *Valle del Sol* involved a vagueness challenge under the Due Process Clause.

D. The District Court Erred When It Struck Down A.R.S. § 15-112(A)(3), Which Prohibits Courses or Classes Designed Primarily for Pupils of a Particular Ethnic Group.[16]

The district court struck down A.R.S. § 15-112 (A)(3), which prohibits "courses or classes . . . designed primarily for pupils of an particular ethnic group." The court found this provision overbroad in violation of the Free Speech Clause because it did "not promote any legitimate interest that is not already covered by A.R.S § 15-112 (A)(2) and (A)(4), and also likely would chill the teaching of legitimate ethnic studies courses," and concluded that "it does not further any legitimate pedagogical interest." (ER1 at 20.) The district court applied the wrong standard. As explained in Section I(B)(2) above, a State might well claim "absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values." *Pico*, 457 U.S. at 869. The district court thus erred, in failing to judge whether the State's broad discretion in matters of curricular standards allowed it to limit classes "designed primarily for pupils of a particular ethnic group."

When the State's broad discretion to set curricular standards and its expressed interest in reducing racism are considered, it is clear that subsection's (A)(3)'s prohibition falls well within the State's authority, and is constitutional. The statute's Declaration of Policy, in A.R.S. § 15-111, states that "public school

[16] The Superintendent makes his argument on cross-appeal in this section.

pupils should be taught to treat and value each other as individuals and not be taught to resent or hate other races or classes of people." Subsections (A)(1) and (2) address the stated goal of not promoting resentment or hatred. Subsections (A)(3) and (A)(4) together accomplish the purpose of teaching pupils to value one another as individuals. Subsection (A)(3) complements the remaining provisions of the statute, by ensuring that all courses and classes in all Arizona public schools are not segregative and are designed for students of all ethnic groups. Considering the statute in its entirety and with its purpose in mind, subsection (A)(3) falls within the State's broad authority over matters of curriculum. This Court should reverse the district court's determination that it is overbroad.

E. Section 15-112(A)(3) Is Severable.

If the Court affirms the district court's determination that A.R.S. § 15-112(A)(3) is unconstitutionally overbroad, it should also affirm the court's conclusion that A.R.S. § 15-112(A)(3) is severable. In Arizona, courts will not declare an entire statute unconstitutional if the constitutional portions of the statute can be separated from that which is unconstitutional.[17] *Randolph v. Groscost*, 989 P.2d 751, 754 (Ariz. 1999) (severing unconstitutional portions of Proposition 302

[17] "[W]hen the constitutionality of a state statute is challenged, principles of state law guide the severability analysis and [this Court] should strike down only those provisions which are inseparable from the invalid provisions." *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 886 (9th Cir. 2008).

from constitutional portions). On numerous occasions, the State's courts have held that "if part of an act is unconstitutional and by eliminating the unconstitutional portion the balance of the act is workable, only that part which is objectionable will be eliminated and the balance left intact." *Id*. Here, the Court can separate subsection (A)(3)—pertaining to classes for a particular ethnic group—from the remainder of the statute.

The Court must first "consider whether that portion of an act remaining after we sever the invalid portion is independent of the invalid part and enforceable standing alone." *Id.*; *see also State v. Pandeli*, 161 P.3d 557, 573 (Ariz. 2007) (same); *State v. Coursey*, 225 P.2d 713, 719 (Ariz. 1950) (same). Here, the remaining provisions in A.R.S. § 15-112(A)—prohibiting courses or classes that promote the overthrow of the government, promote resentment against a race or class of people, or advocate ethnic solidarity instead of the treatment of people as individuals—can be enforced independent of subsection (A)(3). As the district court found, the provisions are not so intertwined that excising (A)(3) affects the ability to enforce the statute. (ER1 at 20.) Indeed, the Arce Plaintiffs do not seriously contend otherwise. (OB at 58 – 61.)

Instead, the Arce Plaintiffs rely on the legislative history. (*Id.* at 58 – 60.) But a court's examination of the legislative history should begin from the premise that a provision is severable unless the parts are "so intimately connected as to

raise the presumption that the legislature would not have enacted one without the other." *Millet v. Frohmiller*, 188 P.2d 457, 459-60 (Ariz. 1948). In other words, the question of the legislative intent regarding severability begins with an examination of the statute's construction. Here, the statute's construction clearly indicates that (A)(3) is severable, because while the provisions complement each other, they operate independently and do not depend on each other.[18] Even without subsection (A)(3), the remaining provisions will promote the legislative intent of the statute as declared in A.R.S. § 15-111, that "public school pupils be taught to treat and value each other as individuals and not be taught to resent or hate other races or classes of people." *See State Comp. Fund v. Symington*, 848 P.2d 273, 281 (Ariz. 1993) (severing unconstitutional provisions where it was clear that remaining provisions would promote the overall goal of the act). Under these circumstances, this Court should affirm the district court's determination that subsection (A)(3) is severable.

[18] The Arce Plaintiffs urge this Court to rely on statements of individual legislators to conclude that the statute would not have passed without (A)(3). (OB at 58-60.) As explained in Section II(C), the statements of individual legislators cannot be imputed to the entire legislature for the purpose of divining legislative intent.

II. Neither the Challenged Statute Nor Its Enforcement Violated the Arce Plaintiffs' Equal Protection Rights.

A. Standard of Review.

A district court's decision to enter summary judgment sua sponte is within its discretion. *Corales v. Bennett*, 567 F.3d 554, 570 (9th Cir. 2009).

B. The Statute Does Not Violate Equal Protection on Its Face.

The Arce Plaintiffs claim on appeal that A.R.S. § 15-112 discriminates on its face on the basis of ethnicity and race because the statute uses phrases such as "ethnic group" and "ethnic solidarity." (OB at 27 – 28.) At the same time, they have conceded that the statute did not include an express classification. (ER5 at 913.) Thus, the district court correctly noted that the challenged statute does not create explicit *classifications* of any kind. (ER1 at 25.) The mere use of the word "ethnic" does not create a suspect classification based on race or alienage.

C. The Arce Plaintiffs Failed to Show Discriminatory Intent.

The Arce Plaintiffs next argue that, even if the law is facially neutral, A.R.S. § 15-112 should be subject to strict scrutiny because it was enacted and enforced with discriminatory intent. (OB at 28 – 36.) But, as the district court correctly found, the Arce Plaintiffs failed to establish the prima facie elements of an as-applied equal protection challenge. (ER1 at 30.)

A law that is neutral on its face may be unconstitutional if it was motivated by a discriminatory purpose and has a racially discriminatory impact. *Vill. of*

Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). In *Arlington Heights*, the Supreme Court identified the following non-exhaustive "subjects of proper inquiry" for discerning discriminatory intent: (1) whether the historical background of the decision "reveals a series of official actions taken for invidious purposes"; (2) whether the sequence of events leading up to the challenged decision reveals discriminatory intent; (3) whether there were departures from the normal procedural sequence; (4) whether the factors usually considered important by the decisionmaker "strongly favor" a decision contrary to the one reached; and (5) the legislative or administrative history. *Id.* at 265 – 68. The *Arlington Heights* factors do not reveal the existence of discriminatory intent in this case for the following three reasons.

First, the Arce Plaintiffs allege that the single enforcement of the challenged statute shows a gross statistical disparity that establishes the discriminatory nature of the law. (OB at 30-31.) However, a single instance of enforcement does not indicate a "clear pattern, unexplainable on grounds other than race." *See Arlington Heights*, 429 U.S. at 266. As the Superintendent explained in the district court, many valid reasons motivated the initiation of the investigation and subsequent enforcement action against the TUSD. (ER8 at 1754 – 55.) First, it is not feasible to initiate an investigation into every Arizona school's curricula. (*Id.*) Second, the MAS program was the largest of its kind in the State. (*Id.*) Third, it was the most

controversial course of study, generating numerous constituent complaints over the span of several years. (*Id.*) And fourth, it was the only program that the Superintendent knew about that offered courses toward fulfillment of graduation requirements. (*Id.*) Each of these reasons is a rational justification for the Superintendent's action; none indicates discriminatory intent.

Second, the Arce Plaintiffs argue that the legislators' statements provide evidence of discriminatory intent that this Court should consider in evaluating their equal protection challenge. (OB at 26 – 27, 32 – 33). In support of this argument, they ask this Court to judicial notice of statements made during legislative hearings on HB2281 and predecessor legislation. (*See* Request to Take Judicial Notice, Dkt. 13, Items 5 – 8.)[19] Such evidence, however, is not reliable. "[T]he views of a single legislator, even a bill's sponsor, are not controlling." *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 752 (2012); *see also Sempre Ltd. P'ship v. Maricopa Cnty.*, 235 P.3d 259, 264, n. 1 (Ariz. App. 2010) ("Additionally, '[t]he rule is clearly established in Arizona that one member of a legislature which passes a law

[19] Defendants request that this Court decline to take judicial notice as to Items 5 through 7. Item 8 of the Request to Take Judicial Notice would seem to be unnecessary, as the district court considered statements made at that legislative hearing. (ER1 at 27, n. 16.) While it is true that a court "takes judicial notice of public records not subject to reasonable dispute," including legislative histories, to the extent legislative histories "represent the statements of individual legislators," the court should consider the weight to give the statements, because such statements "may be subject to dispute." *Rocky Mountain Farmers Union v. Goldstene*, 719 F. Supp. 2d 1170, 1186 (E.D. Cal. 2010).

is not competent to testify regarding the intent of the legislature in passing that law.'") (*quoting Golder v. Dep't of Revenue*, 599 P.2d 216, 221 (Ariz. 1979)).[20] Furthermore, "[s]tray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely." *In re Kelly*, 841 F.2d 908, 912, n. 3 (9th Cir. 1988) (*superceded by statute on other grounds*).

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. (ER10 at 2183.) Former Superintendent Horne also stressed that the Department of Education promulgated standards, performance objectives, and multicultural curricular standards that encouraged students to learn together. (*Id*.)

The Arce Plaintiffs also allege that individual legislators invoked racial stereotypes by using "code" words, which they claim constitutes additional

[20] As the *Sempre* court explained, "[I]t is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof." *Id.* (*quoting United States v. Trans–Missouri Freight Ass'n.*, 166 U.S. 290, 318–19 (1897)). *See also* Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 Hofstra L. Rev. 1125, 1139 (1983) (floor debates are "least reliable kinds of legislative history").

evidence of discriminatory intent. (OB at 31-33.) They cite *Flores v. Pierce*, 617 F.2d 1386, 1390 (9th Cir. 1980) for the proposition that the explanations given by the defendants were simply pretexts to conceal an intent to act upon racial animus. (*Id*. at 33.) In fact, supporters of the legislation were clear regarding their concerns about the MAS program; former Superintendent Horne wrote an "Open Letter" explaining his disagreement with the MAS teachings in 2007 and unequivocally stated his concerns about the MAS program in the legislative committee hearings. (ER1 at 27.) As the district court noted, defendants did not dispute that Arizona's legislature enacted § 15-112 in response to complaints about the MAS program. (*Id*.) This Court should reject the Arce Plaintiffs' insistence that legislators used a "hidden code" to cloak a secret discriminatory intent because the legislative history shows that legislators openly acknowledged their concerns about the segregated nature of, and curricular deficiencies in, the MAS program. Furthermore, the court correctly held that this facet of the legislative history did not reveal discriminatory intent because a law "passed in response to single manifestation of a perceived problem does not necessarily show that the motivating instance was unfairly—let alone unconstitutionally—targeted." (*Id*.)

Third, the Arce Plaintiffs assert that former Superintendent Horne's departures from normal procedures indicate discriminatory intent. (OB at 34.) In so doing, they place undue emphasis on the superceded Findings of Violation.

(ER10 at 2183 – 92.) The district court correctly noted that Superintendent Huppenthal's issuance of his own Findings corrected any procedural defects. (ER1 at 27 – 28.)

The Arce Plaintiffs argue that Superintendent Huppenthal showed discriminatory intent by unreasonably rejecting the Cambium audit, failing to investigate programs that may violate the statute (despite the lack of constituent complaints), and relying on a small sample of written curricula and books in his findings and testimony before the ALJ. (OB at 34 – 36.) The district court carefully reviewed this evidence, however, and concluded,

> Considering the record as a whole, and even drawing all reasonable inferences in Plaintiffs' favor, Plaintiffs have not shown that Defendants acted with discriminatory intent. Although some aspects of the record may be viewed to spark suspicion that the Latino population has been improperly targeted, on the whole, the evidence indicates that Defendants targeted the MAS program, not Latino students, teachers, or community members who supported or participated in the program.

(ER1 at 29.) For example, the court noted that the deficiencies Superintendent identified in the Cambium audit—including the lack of information provided to the auditors by the MAS program and the limited number of classroom observations (which lasted just under thirty minutes on average)—"provided a reasonable basis for [his] decision to disregard" that report. (*Id.*)

The Arce Plaintiffs do not identify any disputed material facts that create a triable issue sufficient to withstand summary judgment. The district court correctly entered summary judgment for the Superintendent. (ER1 at 30.)

D. The District Court Did Not Abuse Its Discretion by Dismissing the Arce Plaintiffs' Equal Protection Claims Sua Sponte.

The Arce Plaintiffs argue that the district court's decision to grant summary judgment sua sponte on their equal protection claim deprived them of the opportunity to come forward with evidence to defeat summary judgment. (OB at 24.) This Court should reject this claim because the Arce Plaintiffs had ample opportunity to fully and fairly ventilate the issues surrounding their equal protection claim. (*Id.* at 24 – 25.)

This Court will affirm a "grant [of] summary judgment without notice if the losing party has had a 'full and fair opportunity to ventilate the issues involved in the motion.'" *United States v. Grayson*, 879 F.2d 620, 625 (9th Cir. 1989) (*quoting Waterbury v. T.G. & Y. Stores Co.*, 820 F.2d 1479, 1480 (9th Cir.1987)); *see also Cool Fuel v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982) (affirming sua sponte grant of summary judgment where "the parties had every opportunity to explore and expound the issues . . . and did so to the extent they deemed advisable").

The Arce Plaintiffs here, like the party in *Grayson*, "developed their factual allegations and legal theories" at great length. The Arce Plaintiffs' Second Motion

for Preliminary Injunction devoted some twenty-two pages to the equal protection argument, addressing every element of an equal protection claim and the evidence they believed supported that claim. (ER5 at 911 – 933.) They fully addressed their arguments that A.R.S. §§ 15-111 and -112 were directed at TUSD's MAS program, that the law singled out Latino students, that the Department engaged in selective enforcement, that the law was invalid both facially and as applied, that strict scrutiny should apply, and that the Department's actions with respect to the MAS program established a pattern of discrimination. (*Id*.) The district court fully considered each of the Arce Plaintiffs' arguments, carefully analyzing the law and addressing the relevant evidence, before rejecting the equal protection claim, saying that "the Court cannot conclude, on this record, that Defendants' actions were motivated by discriminatory intent." (ER1 at 24 – 29.)

This Court should also reject the Arce Plaintiffs' contention that they did not present their equal protection arguments in connection with their request for a preliminary injunction as fully as they would have if summary judgment were at issue. (OB at 26.) In fact, the Arce Plaintiffs acknowledged that because they sought a mandatory injunction, they were required to meet a higher standard of proof. (ER2 at 246 – 47.) "[M]andatory injunctions 'are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.'" *Marlyn*

Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009) (quoting *Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1980).

The Arce Plaintiffs identify only two pieces of evidence that they would add to the record if the equal protection claim were remanded: emails from legislators that purportedly evince animus against Mexican-Americans and evidence of the relationship between Arizona's anti-immigration efforts and the passage of the ethnic studies ban.[21] As discussed in Section II(C), above, such evidence has limited usefulness and would not demonstrate that the Legislature as a whole was motivated by discriminatory intent in enacting A.R.S. § 15-112.

E. The Challenged Statute Does Not Burden Minorities' Access to Political Process.

The Arce Plaintiffs claim that A.R.S. § 15-112 violates equal protection because it burdens the ability of Mexican-Americans seeking a curricular change to remedy past education inequities.[22] (OB at 36-38; citing *Washington v. Seattle Sch. Dist*, 458 U.S. 457, 470 (1982) and *Hunter v. Erickson*, 393 U.S. 385, 389-91

[21] The Arce Plaintiffs also assert that they were unable to show that the Superintendent has allowed a predominantly white charter school that uses Paulo Freire's methodology to expand, while purportedly "eliminating" MAS in part because of its reliance on Freire's works. (OB at 26.) However, the Arce Plaintiffs did raise and argue this issue in their second motion for a preliminary injunction. (ER5 at 917, n. 82.)

[22] TUSD operates pursuant to a Post-Unitary Status Plan, entered in a long-running school desegregation lawsuit brought by Mexican-American and African-American students in the 1970s. *Fisher v. Lohr*, No. 4:74-DV-00009-DCB (D. Ariz. Feb. 29, 2012.)

(1969)). However, as the district court correctly found, A.R.S. § 15-112 does not impede Mexican-Americans' ability to use the political process to remedy racial discrimination. (ER1 at 26.) It does not "remov[e] the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests," *Seattle Sch. Dist.*, 458 U.S. at 474; it simply limits the ability of a public school to offer certain coursework.

This case resembles *Valeria v. Davis*, 307 F.3d 1036, 1039 (9th Cir. 2002). There, this Court rejected minority plaintiffs' argument that Proposition 227, a law prohibiting California schools from offering bilingual education programs, "unconstitutionally restructure[d] the political process by placing decision-making over bilingual education, and only bilingual education, at the state-wide level." *Id*. at 1039. The Court held that the decision to mandate English immersion programs for all school districts did not place a political obstruction in the way of minorities seeking to remedy unequal treatment because the "purpose and function of California's bilingual education program was, and is, to improve education, not to remedy racial discrimination." *Id.* at 1041.

Similarly, here, a prohibition on courses and classes, in furtherance of the goal of ensuring that students are taught "to treat and value each other as individuals and [are] not . . . taught to resent or hate other races or classes of people," A.R.S. § 15-111, does not impede minorities' ability to use the political

process for the purpose of remedying past discrimination. Instead, it "is simply a limit on certain coursework that was adopted in connection with efforts to remedy past discrimination." (ER1 at 26.) Minority students and parents continue to participate fully in developing the Post-Unitary Status Plan in *Fisher v. Lohr*, No. 4:74-DC-00009 DCB.

In spite of the Arce Plaintiffs' voluminous briefs, evidence, and contributions to the record, they fail to provide any probative evidence of purposeful racial discrimination sufficient to survive summary judgment. Nor can they explain what evidence they might discover to support their claim that the State must have had been motivated by animus against Mexican-Americans when it established curricular limitations on its schools. Based on all of these factors, the district court correctly rejected the Arce Plaintiffs' argument that the statute placed undue political obstructions on Mexican-American students. (ER1 at 24 – 25.)

III. The Challenged Statute Is Not Unconstitutionally Vague in Violation of the Due Process Clause.

A. Standard of Review.

This Court reviews the district court's decision on cross-motions for summary judgment de novo. *Blue Lake Rancheria v. United States*, 653 F.3d 1112, 1115 (9th Cir. 2011).

B. The Arce Plaintiffs Do Not Have Standing to Challenge the Statute for Vagueness.

The Court should not consider the claim that A.R.S. § 15-112 is unconstitutionally vague on its face because the Arce Plaintiffs do not have standing to bring this challenge. A party has standing to challenge a statute facially "if no standard of conduct is specified at all" and it "is impermissibly vague in all of its applications." *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1347 (9th Cir. 1984) (internal quotations omitted). The district court assumed, but did not decide whether the Arce Plaintiffs had standing to assert a vagueness challenge. (ER1 at 22 n. 11.) They do not have standing to assert a vagueness challenge for three reasons.

First, to show a statute is vague on its face, the Arce Plaintiffs bear the high burden of proving that every application of the law is unconstitutional and that "no set of circumstances exists under which the statute would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). And the Ninth Circuit has declared that the *Salerno* "no set of circumstances" standard applies to facial challenges outside of the First Amendment and abortion contexts. *Alphonsus v. Holder*, 705 F.3d 1031, 1042 (9th Cir. 2013). The Arce Plaintiffs did not make such a showing here. The Arce Plaintiffs did not even argue (except in a conclusory caption to their argument) that the law was unconstitutionally vague in every application and could never be valid. As the district court correctly acknowledged, the Arce Plaintiffs'

school district clearly violated the statute; the law is therefore not vague in at least one circumstance. (ER1 at 23.) The Arce Plaintiffs therefore lack standing to raise a vagueness challenge.

Second, the statute does not apply to individuals, but to public district and charter schools. *See* A.R.S. § 15-112 (A) ("A school district or charter school in this state shall not include in its program of instruction any courses or classes that include any of the following" enumerated curricular categories.) Because the statute, if vague, is only vague as-applied to a public district or charter school in Arizona, the Arce Plaintiffs cannot therefore argue that the statute is vague "as-applied" to them. *United States v. Backlund*, 689 F.3d 986, 997 (9th Cir. 2012) ("Vagueness challenges to statutes that do not involve First Amendment violations must be examined as applied to the defendant."); *United States v. Dischner*, 974 F.2d 1502, 1510 (9th Cir. 1992) ("Outside of the First Amendment context, a party has standing to raise a vagueness challenge only if the statute is vague as applied to his or her specific conduct") (*overruled on other grounds by United States v. Morales*, 108 F.3d 1031, 1035 (9th Cir. 1997)).

Third, the Arce Plaintiffs cannot meet the threshold requirement to a Fourteenth Amendment Due Process claim because they have not identified any liberty or property interest that is protected by the Constitution and implicated by the challenged statute. *See Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 996

(9th Cir. 2008) ("A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution."). Without some articulated personal liberty or property interest in the constitutionality of A.R.S. § 15-112, the Arce Plaintiffs only have a generalized interest in the validity of an Arizona law that applies only to school districts. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (stating that such a "generalized grievance" no matter how sincere, is insufficient to confer standing.)

C. The Statute Is Not Vague on Its Face or As-Applied to TUSD.

Even if the Arce Plaintiffs have standing to challenge the statute as vague, their claim must fail. A statute is not unconstitutionally vague if it provides a person of ordinary intelligence fair notice of what is prohibited or provides standards that discourage arbitrary and discriminatory enforcement. *Maldonado v. Morales*, 556 F.3d 1037, 1045 (9th Cir. 2009). "[D]ue process does not require impossible standards of clarity." *Kolender v. Lawson*, 461 U.S. 352, 361 (1983). And, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Instead, the degree of vagueness that the Constitution tolerates depends in part on the nature of the enactment. *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982). "It will always be true that the fertile legal imagination can

conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question." *Grayned*, 408 U.S. at 110 n. 15 (internal quotation omitted).

The Arce Plaintiffs allege that the challenged statute is vague because it does not define key terms and subjects students to the caprices of enforcers. (OB at 40.) The Arce Plaintiffs have engaged in creative thinking, but it is difficult to imagine that no public school in Arizona would be able to determine how to conform its curricula to the law, especially given the availability of administrative guidance from the Department of Education and the due process rights of administrative hearings and judicial review by the state courts. Their arguments are based on six fundamental errors.

First, A.R.S. § 15-112(A) clearly applies only to public district and charter schools. It does not touch student conduct. As the district court correctly stated, "numerous facets of § 15-112 indicate that it is directed to school curricula. Thus, the statute expressly limits what a "school district or charter school" may do, and what a "program of instruction" may include." (ER1 at 10.)

Second, the Arce Plaintiffs improperly shift the high burden of showing facial unconstitutionality to the Superintendent and presume that any lack of clarity renders the statute unconstitutionally vague. *See Hoye v. City of Oakland*, 653 F.3d 835, 848 (9th Cir. 2011) ("[S]tatutes will be interpreted to avoid constitutional difficulties."). The Arce Plaintiffs assume that the statute's use of marginally

unclear terms render an otherwise valid statute void for vagueness by arguing that the words used in the statute may have multiple potential meanings. (*See* OB at 40) (alleging that the phrase "resentment toward a race or class of people" has no objective meaning); *see also* (OB at 42) (claiming that the phrase "ethnic solidarity" is vague).

Third, the Arce Plaintiffs rely on cases requiring a higher standard of clarity to argue that A.R.S. § 15-112 is vague. (OB at 41-42.) They rely on cases involving laws that result in criminal penalties or infringe a constitutionally protected right to make their arguments. (*Id.*) This reliance is fundamentally flawed because the standard of certainty that due process requires is higher where a statute imposes criminal penalties or infringes on a constitutionally protected right such as abortion or free speech.[23] *See Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 555 (9th Cir. 2004). Here, there are no criminal penalties (for plaintiff students or for the public schools). The Constitution thus permits a lower standard of clarity. *Id.* In order to sustain a vagueness challenge to a law that does not implicate a constitutionally protected right and does not result in a criminal penalty, the Arce Plaintiffs must prove that the "enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but

[23] While the Arce Plaintiffs do claim a violation of their free speech rights to receive information, as described in Section I(B)(2), *supra*, that right is tenuous, at best, given a State's plenary authority over curriculum.

comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Vill. Of Hoffman Estates*, 455 U.S. at 495, n. 7 (quotation omitted). They cannot.

Fourth, the Arce Plaintiffs do not establish that it would be difficult for public schools in Arizona to understand the meaning of the statute so that they could determine how to conform their curricula to it. *See Recreational Dev. of Phoenix, Inc. v. City of Phoenix*, 83 F. Supp. 2d 1072, 1087 (D. Ariz. 1999), *aff'd* 238 F.3d 430 (9th Cir. 2000) (finding that the plaintiffs did not show that an ordinance was vague on its face because they did not establish that they could not understand the meaning of the law sufficiently to determine how to conform their behavior to it). District and charter schools have fair notice of what is prohibited and have adequate procedural safeguards for clarifying and preventing arbitrary enforcement. "[I]f the statutory prohibition involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class, the standard is lowered and a court may uphold a statute which uses words or phrases having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them." *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993).

This statute applies to district and charter schools. Schools have specialized knowledge in the creation and implementation of curricular standards. *See, e.g.*,

Hazelwood, 484 U.S. at 273. Arizona's Department of Education and Board of Education have resources available to schools that need assistance in creating curricula. In this case, after notice, hearing, and an administrative finding that the MAS program violated § 15-112 (ER6 at 1151-53), the Superintendent and the Department of Education provided TUSD a letter outlining steps for compliance and offering State assistance with curricular planning (*Id.* at 1163). The letter of assurances acknowledged that curricular planning was a long-term process of creation, review, revision, and implementation. (*Id*.) Any school that has questions regarding curricular or instructional alignment with state standards may request similar assistance. If schools plan appropriately and consult with the State's educational agencies prior to implementing questionable curricula, there is no danger that they will be taken by surprise by the operation of the law.

Fifth, a public school that violates the law has several layers of protection against arbitrary and discriminatory enforcement. If the Superintendent or State Board finds that a school violated A.R.S. § 15-112, they will notify the school that it is in violation of the statute. A.R.S. § 15-112 (B). The school then has sixty days to comply with the statute. *Id.* If the school does not comply with the statute, the school has the right to an administrative hearing before funds are withheld from the school. *See* A.R.S. §§ 15-112 (C), 41-1092.02. A school aggrieved by the result of the administrative hearing may seek judicial review of the administrative

decision. A.R.S. §§ 12-902, -904. This "right to judicial review is inconsistent with Plaintiffs' claims that the Superintendent's discretion is unfettered." (ER1 at 23.)

Sixth, the statute was not vague as applied to TUSD. (ER1 at 23.) Facial invalidation is inappropriate "if the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . .." *Parker v. Levy*, 417 U.S. 733, 760 (1974) (*citation omitted*). As adjudicated by an independent and objective factfinder who analyzed curricular materials and considered testimony of multiple witnesses, TUSD violated the statute in a whole range of identified and proscribable ways. (ER1 at 23.) The district court concluded that "the ALJ's Decision was sufficiently detailed to provide notice of how the MAS program was deemed to violate § 15-112. In short, the lack of detail in the two sets of Findings does not render the statute vague as applied to the MAS program." (*Id*.) The fact that this statute validly applied to one school district makes a facial vagueness challenge logically impossible. And it renders the Arce Plaintiffs' as-applied challenge null.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the district court below, finding that A.R.S. § 15-112(A)(1), (2) and (4) are

constitutional but should reverse the district court's decision that A.R.S. § 15-112(A)(3) was overbroad.

Respectfully submitted this 3rd day of March, 2014.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants/Cross-Appellants state that they are not aware of any related cases pending in the Ninth Circuit.

s/Leslie Kyman Cooper
Leslie Kyman Cooper
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ADDENDUM

All applicable statutes and constitutional provisions are contained in the addenda to Appellants' brief.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,331 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 3rd day of March, 2014.

s/Leslie Kyman Cooper
Leslie Kyman Cooper
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that 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 on March 3, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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