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Docket No. 13-15657(L), 13-15760

In the

United States Court of Appeals

for the

Ninth Circuit

MAYA ARCE, SEAN ARCE, KORINA ELIZA LOPEZ
LORENZO LOPEZ, JR., MARGARITA ELENA DOMINGUEZ
and NICOLAS ADRIAN DOMINGUEZ,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Arizona (Tucson), No. 10-cv-00623-AWT · Honorable A. Wallace Tashima

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983. This Court has jurisdiction to review the decision below pursuant to 28 U.S.C. § 1291. On March 8, 2013, the district court issued its final decision through its Memorandum Order and Judgment. ER 1-2; 3-33. Plaintiffs timely filed their Notice of Appeal pursuant to Fed. R. App. P. 4(a)(1)(A) on April 5, 2013. ER 102. Defendants timely filed their Notice of Cross-Appeal on April 17, 2013. ER 57.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in granting summary judgment *sua sponte* for Defendants on Plaintiffs' Equal Protection Claim when (1) the issue was not fully and fairly ventilated; (2) the statute facially discriminates against ethnic minorities; (3) material issues of fact exist as to whether Defendants enacted and enforced the statute based on animus towards Mexican Americans; (4) the statute uniquely burdens Mexican Americans seeking to remedy past discrimination in education; and (5) the statute is not rationally related to a legitimate governmental interest since it was enacted and enforced based on animus toward a politically unpopular group.

2. Whether the district court erred in concluding that A.R.S. 15-112 was not unconstitutionally vague when the statute prohibits courses that promote

"resentment" and "ethnic solidarity instead of the treatment of pupils as individuals" and when Superintendents Horne and Huppenthal sought enactment of the statute and enforced it solely against Mexican American Studies (MAS) at Tucson Unified School District (TUSD) in a manner that aligned with their pre-formed personal biases against MAS.

3. Whether the district court erred in concluding that Defendants did not violate the First Amendment (1) by engaging in unlawful viewpoint discrimination when it enforced A.R.S. § 15-112 against MAS without any pedagogical justification; or (2) because the statute is unconstitutionally overbroad when the term "promotes resentment towards a race or class of people" prohibits or chills protected speech and when the terms "any courses or classes" or "includes any" can result in the termination of an entire program without a finding that all courses violate the statute.

4. Whether the district court erred in holding that A.R.S § 15-112(A)(3) is severable from the rest of the statute when (1) there is no severability clause; (2) section (A)(3) was the driving force behind the statute and it is unlikely that the statute would have passed without the clause; and (3) severing section (A)(3) impairs the legislative intent and purpose behind the statute.

STATEMENT OF THE CASE

In 2010, the Arizona state legislature enacted H.B. 2281, now codified as A.R.S. §§ 15-111 & 112, to eliminate Tucson Unified School District's ("TUSD") Mexican American Studies ("MAS") program. H.B. 2281 prohibits Arizona school districts and charter schools from including in their programs of instruction 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[; or] (4) advocate ethnic solidarity instead of the treatment of pupils as individuals." A.R.S. § 15-112(A). Enforcement of the statute against MAS at TUSD, ER 1150-53, led to MAS's termination, ER 1158-59, depriving plaintiff students the opportunity to take MAS courses. ER 1941-43.

On October 18, 2010, ten teachers and the director of TUSD's MAS program challenged the constitutionality of H.B. 2281 in federal district court, seeking declaratory and injunctive relief. ER 2853, 2867. The complaint was amended on April 12, 2011, to add two TUSD students, Maya Arce and Korina Lopez, designating Sean Arce and Lorenzo Lopez, Jr., Maya and Korina's respective natural parents and next best friends. ER 2799-2802.[1]

[1] Nicholas A. Dominguez, another TUSD student, and his mother, Margarita Elena Dominguez, intervened on Dec. 31, 2011, ER 1347, 1444. While awaiting disposition of cross-motions for summary judgment, Nicholas graduated from high

On January 10, 2012, the district court dismissed the teachers and the director of the program based on lack of Article III standing; dismissed Plaintiffs' freedom of association claim; and denied Plaintiffs' first motion for a preliminary injunction, finding that they did not face irreparable harm. ER 50.[2]

On Oct. 21, 2011, Plaintiffs sought partial summary judgment on their overbreadth and vagueness claims, but did not move for summary judgment on their viewpoint discrimination, equal protection, or substantive due process claims. ER 2034. Defendants cross-moved for summary judgment on Plaintiffs' First Amendment and vagueness claims. ER 472, 1387.

After TUSD eliminated MAS, Plaintiffs again sought a preliminary injunction on March 6, 2012, asserting irreparable harm and likelihood of success based on overbreadth, vagueness, equal protection, viewpoint discrimination, and substantive due process. ER 897.

On March 19, 2012, Judge Tashima, sitting by designation, heard oral argument on the cross-motions for summary judgment. ER 383. On March 8, 2013, the district court denied Plaintiffs' summary judgment motion except as to A.R.S. § 15-112(A)(3) (prohibiting courses that "are designed primarily for pupils of a particular ethnic group"), which it held was facially overbroad. ER 20. It held,

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school, rendering their claim for declaratory and injunctive relief moot. Notice of voluntary dismissal of Intervenors-Plaintiffs has been filed with this Court.

[2] Plaintiffs do not appeal this order.

though, that (A)(3) was severable, *id.*, and granted Defendants summary judgment on Plaintiffs' First Amendment and vagueness claims. ER 32. The court also granted summary judgment, *sua sponte*, on Plaintiffs' remaining claims, including their equal protection claim. ER 7, 32. This appeal followed.

STATEMENT OF FACTS[3]

Because the decision under review granted summary judgment to Defendants on all issues except for the overbreadth of A.R.S. § 15-112(A)(3), we present the facts in the light most favorable to the plaintiffs.

On January 13, 2012, Nicholas Dominguez was attending American History-Mexican American Perspectives, a MAS course offered at Tucson High Magnet School, when two teachers came into the classroom to collect the class's Mexican American history textbooks, placing them into boxes and removing them from the classroom. ER 1046, ¶¶ 4-8. The principal of Nicholas's school came several times to his MAS classes and told students that the curriculum could not focus on MAS perspectives and that teachers' materials and student work would be collected to determine compliance with state law. ER 1046-47, ¶9. When asked what would be considered a MAS perspective, the principal was unable to offer a definition. ER 1047, ¶10. After this, aware that student essays, poems, and art work had been used

[3] Plaintiffs-Appellants have filed with this Court a Request for Judicial Notice in Support of Opening Brief regarding legislative history, including publicly available legislative hearings; public records of the Arizona State Board of Education and the Arizona Department of Education; and a court filing.

to enforce H.B. 2281 against TUSD, Nicholas censored his own coursework, including deleting the word "oppression" when writing a paper about Dr. Martin Luther King. ER 1047-48, ¶¶11, 12, 15.

When Superintendent John Huppenthal enforced A.R.S. § 15-112 against TUSD, Plaintiffs Korina Eliza Lopez and Maya Arce—both Mexican-American students—lost the opportunity to take MAS classes they intended to take. ER 1051-52, ¶¶16-19; ER 1045, ¶¶21-23. These courses were part of a highly effective program developed to address the educational needs of Mexican American students, ER 1042, ¶7, similar to courses TUSD continues to offer for African Americans and Native Americans. ER 2256.

Mexican American students in TUSD have suffered historically from high dropout rates and lesser academic achievement relative to their white peers. ER 641. TUSD adopted MAS courses in 1998 based on the recommendation of an external audit that found a "glaring" absence of Mexican American perspectives in the existing curriculum, meaning the most "at risk" students were not being served by the TUSD curriculum.[4] MAS courses proved highly effective, and by April 2011, 1,343 middle and high school students enrolled in at least one of forty-three MAS courses in six high schools and five middle schools. ER 2203.

[4] Mendoza Response to Petition, Statement of Facts, Ex. C: 1998 Bilingual Education and Hispanic Studies Department Audit at 87-89, *Fisher v. United States*, Civ. No. 4:74-90 (D. Ariz. Filed July 19, 2006) (*Fisher* Dkt. No. 1148-7, 8, 37-39).

While MAS teachers used a wide range of curricular material and rigorous pedagogical strategies, all MAS courses incorporated Mexican American contributions alongside state standardized curricula. ER 2216. MAS rejected the deficit model of education and instead validated students' backgrounds and prior knowledge. ER 2216. This approach was based on research that found that classes grounded in students' cultural reality are highly effective at accelerating minority student achievement by strengthening students' identity, self-esteem, and ultimately motivation. ER 641, 646-47. Classes fostered student engagement by incorporating students' real world experiences, including poverty and racism, into the classes, and facilitated critical thinking by employing pedagogical strategies including use of Socratic questioning and comparing, contrasting, and clarifying text. ER 2226. By bolstering engagement and promoting higher order thinking, MAS provided significant academic benefits to students, substantially improving their state test scores and graduation rates. ER 197-203; 1854-79; 2247.

An analysis of TUSD's own data demonstrates that from 2007 to 2010, MAS students, predominantly Mexican American, closed the achievement gap in state standardized test scores with the general student population. ER 2241. MAS courses were particularly beneficial for the most at-risk students; in 2010, students who had previously failed one state test were 64 percent more likely to pass their reading, writing, and math courses after taking one MAS course, and from 2008-

2011 all MAS students were between 51 and 108 percent more likely to graduate from high school. ER 202-03.

Nonetheless, state officials turned their focus to the program after Dolores Huerta addressed an assembly of students at TUSD, suggesting that "Republicans Hate Latinos." ER 1054-55. Superintendent of Public Instruction Tom Horne arranged for his then-deputy, Margaret Dugan, to speak at TUSD in response to this incident, during which a group of students walked out. *Id*.

On June 11, 2007, Horne published "An Open Letter to the Citizens of Tucson," advocating the elimination of TUSD's MAS classes. ER 1054-58. Addressing Tucson residents of "all mainstream ideologies," Horne argued that ethnic studies programs promoted racial division and encouraged Mexican American students to regard themselves as oppressed. ER 1054. Horne focused on the protesters at the Dugan event, whom he described as "a group of La Raza Studies students" that were "rude[ ]," and "defiant[ ], and claimed that they created a "hostile atmosphere" for non-Latino students. ER 1045-55. He cited the MEChA [Movimiento Estudiantil Chican@ de Aztlán] constitution in his critique of MAS, without explaining whether or not it had any relationship with MAS. ER 1056. Horne concluded that "The Time for Action is Now," and urged "the citizens" to eliminate ethnic studies at TUSD. ER 1058.

However, TUSD's Governing Board voted to formally incorporate and expand MAS courses and similar African American Studies courses into its Post Unitary Status Plan to meet its desegregation obligations. ER 1965, 1995-98.

Legislative Proposals and Enactment of H.B. 2281

Next, Horne turned to the state legislative process, although unsuccessful with the first two bills aimed at eliminating MAS courses. Senate Bill ("S.B.") 1108 (Ariz. 2008); S.B. 1069 (Ariz. 2009). During the legislative hearings on these bills, sponsors and proponents described MAS classes and Mexican American students as anti-American, "hostile," and even threatening U.S. security interests.

In Spring 2008, legislators amended S.B. 1108 to prohibit public schools from teaching classes that "promote, assert as truth or feature as an exclusive focus any political, religious, ideological or cultural beliefs or values that denigrate, disparage or overtly encourage dissent from the values of American democracy and Western civilization." *See* H. Appropriations Comm. Adopted Strike Everything Amendment to S.B. 1108 (2008), *available at* http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/48leg/2r/proposed/h.1108rp2.doc.htm&Session_ID=86 (last visited Nov. 17, 2013). During hearings held on April 16, 2008, Representative Pearce characterized MAS classes at TUSD as "anti-American" and as "sedition, in reality, they advocate the elimination of borders and the takeover of the Southwest United States." Hearing on S.B. 1108

Before the H. Appropriations Comm., 00:16:45-17:00, 48th Leg., 2d Reg. Sess. (Ariz. 2008), *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=3485 (last visited Nov. 17, 2013) (hereinafter "H. Appropriations Comm. Hearing"). Representative John Kavanagh, distinguishing Mexican-Americans from Irish-Americans and Jewish-Americans, stated, "This bill basically says, 'You're here. Adopt American values . . . . If you want a different culture, then fine, go back to that culture.'" *Id.* at 00:31:35-33:45. The statement was met with applause. *Id.*

The next year in 2009, legislators amended S.B. 1069 to prohibit classes "designed primarily for pupils of a particular ethnic group" and that "advocate ethnic solidarity instead of treatment of pupils as individuals." Comm. on Judiciary Senate Amendments to S.B. 1069, *available at* http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/49leg/1r/adopted/s.1069jud.doc.htm&Session_ID=87 (last visited Nov. 17, 2013). The amendment was debated and eventually adopted by the Senate Judiciary Committee, on which Senator Huppenthal served as vice-chair. *See* Hearing on S.B. 1069 Before the S. Judiciary Comm., 49th Leg., 1st Reg. Sess. (Ariz. 2009), *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=5630 (last visited Nov. 17, 2013) (hereinafter "S. Judiciary Comm. Hearing"). During those hearings, Superintendent Horne testified in support of the amendment. *Id.* at

02:35:27-02:57:30. He argued that "the most fundamental of fundamental American values is that we are individuals and not exemplars of whatever ethnic group we were born into," and that MAS classes rejected that notion and prevented students from transcending their "narrow backgrounds." *Id*. at 2:35:52, 2:43:10. When Senator Cheuvront asked for the definition of ethnic group, Horne responded:

> I don't think we need a definition in the statute. I think those who are English proficient know what we're talking about. In the case of the ethnic studies program, they divide it into Raza Studies, African American Studies, Asian Studies, Native American Studies . . . those are obviously ethnic groups.

Id. at 2:38:53. Other legislators also supported the bill, including then Senator John Huppenthal, who noted his "suspicion . . . that inside these [MAS] classes students are being indoctrinated by people in power to have a certain mindset of us versus them." *Id.* at 3:22:40.

The third effort proved to be successful. *See* A.R.S. § 15-112. In introducing H.B. 2281 before the House Education Committee, Representative Montenegro stated that MAS classes were creating "racial warfare" at TUSD: "I do not subscribe to any type of racial separatism or racial division, so this is why I have brought this bill forward." Hearing on H.B. 2281 Before H. Educ. Comm. at 1:12:18-20, 1:16:35, 49th Leg., 2nd Reg. Sess. (Ariz. 2010), *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=6760 (last

visited Nov. 17, 2013) (hereinafter "H. Educ. Comm. Hearing"). During that hearing, Horne stated that it was intended "to prohibit grouping students by race." *Id*. at 1:31:18-33.

On April 7, 2010, the Senate Education Accountability and Reform Committee held hearings on H.B. 2281. *See* Hearing on H.B. 2281 Before S. Educ. Accountability & Reform Comm., 49th Leg., 2nd Reg. Sess. (Ariz. 2010), at 2:11:00-3:00:20, *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7405 (last visited Nov. 17, 2013) (hereinafter "S. Educ. Comm. Hearing"). Much of the discussion, including comments by bill sponsor Representative Montenegro, Senator Huppenthal, and Superintendent Horne, focused on MAS and the problem with courses directed toward a particular race or ethnic group. *Id*. at 2:11-14, 2:24:18, 2:46:07-2:48:50. Bill sponsor Montenegro stated directly that "[t]he focus of the bill is to prevent the courses from teaching [students] because they are of that ethnic group." *Id*. at 2:42:47.

On the day of the final senate vote, April 28, 2010, Huppenthal successfully introduced two amendments: one vesting authority to the state superintendent to enforce the bill and the other delaying the effective date of the statute to the beginning of 2011. ER 1256-57.

On May 11, 2010, Governor Brewer signed H.B. 2281 into law, with an effective date of "from and after Dec. 31, 2010." ER 1955, ¶77.

Enforcement of H.B. 2281

Following the enactment of the bill, Huppenthal and Horne continued to target Mexican-American students and MAS courses in their political campaigns for Superintendent of Education and Attorney General, respectively. ER 2169, ¶113. Huppenthal ran advertisements stating that if elected he would "Stop La Raza," *id*., while Horne described MAS students as "rude" and "getting in peoples [sic] faces," and promised to use his office to "put a stop to it." ER 1802.

On December 30, 2010, just before Horne and Huppenthal assumed their new respective offices as Attorney General and Superintendent of Public Instruction, and one day before H.B. 2281 went into effect, Horne found that that all of TUSD's MAS courses violated A.R.S. § 15-112, and gave TUSD sixty days to eliminate all of its Mexican American Studies courses or have ten percent of its budget withheld. ER 2192. The finding noted that TUSD had three ethnic studies programs that "could be found in violation" of § 15-112, ER 2184, but focused on MAS, citing reports that MAS students had "contempt" for the United States and a "total lack of identification with the political heritage of this country." ER 2187-88. He further relied on passages from textbooks and curricula on Mexican American civil rights leaders and history, which he asserted that students "swallow

. . . whole," as demonstrated by their "rude behavior" at demonstrations. ER 2189-91.

Upon assuming office on January 4, 2011, Huppenthal issued a press release supporting Horne's finding.[5] However, Huppenthal did not enforce the Horne Finding, and instead conducted his own investigation, retaining an independent auditor, Cambium Learning, Inc. ER 1257. Cambium was paid $110,000 to: (1) determine MAS's compliance with A.R.S. § 15-112; (2) assess whether MAS classes and curriculum were sufficiently aligned with the Arizona State Standards established by the State Board of Education; and (3) evaluate "how or if TUSD's MASD programs are designed to improve student achievement and [] if statistically valid measures indicate student achievement occurred." ER 1060.

From March 7, 2011, to May 2, 2011, Cambium audited MAS courses by reviewing documents and textbooks, holding focus group interviews, and conducting unannounced site visits to study the curriculum's implementation. ER 2266. Cambium auditors also directly observed classroom instruction, curriculum, materials, and the learning environment in eleven TUSD schools offering MAS classes, including three elementary schools, two middle schools, and all six high

[5] *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 Nov. 17, 2013).

schools that offered MAS Classes. ER 2213-14. In all, auditors visited 39.5% of the high school Mexican American Studies classes. ER 2262.

On May 2, 2011, Cambium submitted a 120-page report (Cambium Report) concluding that "no observable evidence was present to indicate that any classroom within Tucson Unified School District is in direct violation of the law, A.R.S. 15-112(A). In most cases, quite the opposite is true." ER 2198-2201; 2248. The report stated:

> No observable evidence exists that instruction within the Mexican American Studies Department promotes resentment towards a race or class of people. The auditors *observed the opposite*, as students are taught to be accepting of multiple ethnicities of people. . . . Additionally, all ethnicities are welcomed into the program and these very students of multiple backgrounds are being inspired and taught in the same manner as Mexican American students. All evidence points to peace as the essence for program teachings. Resentment does not exist in the context of these courses.

ER 2253 (emphasis added). The auditors also concluded that the evidence indicated that MAS was not designed primarily for pupils of a particular ethnic group. ER 2257.

Cambium reviewed the full books and lessons that Horne quoted from in his December finding. While it could not verify the use of much of the material, ER 2233-39, it found that many passages, read in context, did not violate the statute, ER 2237-39, and that even if some individual course materials raised questions, none rendered entire MAS courses in violation of the statute. ER 2240-41, 2248.

The Report also reviewed and verified claims that MAS measurably improved student performance with regard to test scores and graduation rates. ER 2247.

However, Huppenthal rejected the Cambium Report, purportedly because auditors did not visit enough classes or view sufficient curricular materials. ER 1259-62. Accordingly, Huppenthal directed Arizona Department of Education ("ADE") officials to re-investigate MAS. ER 1258-59. In the next six weeks, they (along with Huppenthal) reviewed a portion of the same curricular materials that Cambium reviewed—without visiting classes or interviewing students—and reached a contrary conclusion. ER 1092, 1262. Based on this review, on June 15, 2011, Superintendent Huppenthal found all TUSD MAS courses to violate A.R.S. § 15-112(a)(2)-(4). ER 1095. Huppenthal issued a three-page notice of violation giving TUSD sixty days to come into compliance ("Huppenthal finding" or "finding"). ER 1092. His finding included a table entitled "Supports Finding of Violation: Selected References," containing passages from books or course materials, ER 1098-1104; additional passages from newspaper reports and course materials dating back to 2005 and 2006, ER 1105-11; and select references to the Cambium Report, ER 1092-94. The finding did not specify how, when, or whether the materials were used in any particular MAS courses nor explain how they proved a violation the statute, and instead made the following three general findings to conclude all MAS courses violated the statute. *Id*.

As to subsection (A)(2) ("promoting resentment towards a race or class of people"), Huppenthal found "limited [MAS] materials" "repeatedly referenc[ed] white people as being 'oppressors' and 'oppressing' the Latino people" and "present[ing] only one perspective of historical events, that of the Latino people being persecuted[,] oppressed[,] and subjugated by the 'hegemony'—or white America." ER 1093. As to (A)(3) (courses designed for "pupils of a particular ethnic group"), Huppenthal found a violation based on the fact that "an extraordinary percentage" of the students in MAS courses were Mexican American (over ninety percent), and statements on the MAS website regarding the program's focus on Mexican American students' academic success. ER 1093. Finally, as to (A)(4) (promoting ethnic solidarity), Huppenthal relied on the program's purported focus on oppression, as well as references to historical events that "repeatedly emphasize[d] the importance of building Hispanic nationalism and unity in the face of assimilation and oppression." ER 1093.

TUSD Appeal and ALJ Proceeding

The TUSD Governing Board appealed Huppenthal's finding on June 22, 2011, to an Administrative Law Judge ("ALJ"). ER 1085-1091. On December 27, 2011, the ALJ upheld the Huppenthal finding, concluding only that at least one MAS course violated A.R.S. § 15-112. ER 1146. The ALJ found that the ADE had not reviewed any texts to establish that some MAS courses violated the statute,

including Latino Literature 7,8 or Chicano Art. ER 1141-42. The ALJ further noted that the education experts and teachers that had observed MAS classes and spoke with students after the effective date of the statute had concluded that MAS courses did not violate the statute. ER 1118, 1122-23, 1131, 1134-35, 1142. In reaching its conclusion that "at least one class" violated the law, the ALJ relied on selective excerpts from textbooks, lessons developed by MAS teachers, and student work from some MAS courses. ER 1132-42. However, the ALJ did not identify specific courses that violated the statute. *Id*. Finally, the ALJ agreed with Huppenthal's position that "given the viewpoints expressed in certain excerpts from materials used in the MAS program . . . there is no way to use the [MAS] materials without being in violation of the law." ER 1146. Accordingly, the ALJ specified that "on the effective date of the Order entered in this matter, the Department shall withhold 10% of the monthly apportionment of state aid until the District comes into compliance with A.R.S. § 15-112." ER 1148. This order did not give TUSD sixty days to come into compliance as mandated under A.R.S. § 15-112(B).

On January 6, 2012, Huppenthal issued an order "accepting the recommended decision." ER 1151. However, Huppenthal modified the decision and found that all the Mexican American Studies courses violated A.R.S. § 15-112(A)(2), (3), and (4) since June 15, 2011. *Id.* As a result, Defendant Huppenthal instructed the Department of Education to withhold ten percent of state aid until

the violation was corrected. ER 1152. Further, Huppenthal retroactively applied the fine as of August 15, 2011, *id.*, approximately sixty days after the June 15 Huppenthal Finding.

Compelled Elimination of MAS

Facing severe financial sanctions, TUSD ceased all MAS classes and activities and immediately removed all books and other materials that had been used in MAS classes. ER 260, 1159. Because Huppenthal and the ALJ found that textbooks could not be used without violating the statute, TUSD banned from MAS classrooms seven books mentioned in the Huppenthal and ALJ Decisions, including teachers' personal copies. ER 1051, ¶14. The books included:

> 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 Gonzalez, *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*

ER 1167. MAS teachers were directed to teach from multiple perspectives, but prohibited from teaching from—or encouraging students to use—a "MAS perspective," though that phrase was not defined. ER 1039-41,¶11-18; 1044-45, ¶17-19; 1169. Following the termination of all MAS courses and the removal of all MAS teaching materials, Huppenthal issued a Letter of Assurances requiring MAS

materials to be collected and preserved as evidence as well as unannounced visits to former MAS classrooms. ER 1161-62.

SUMMARY OF ARGUMENT

In both its enactment and enforcement, A.R.S. § 15-112 was designed to deprive Mexican-American students of the benefits of MAS—a highly effective curriculum that improved their graduation rates and other key educational outcomes. In implementing the statute, Defendants arbitrarily overrode the judgment of TUSD, national experts, and even their own independent auditors, violating the First and Fourteenth Amendments.

1. Equal Protection: The district court erred in granting summary judgment on both procedural and substantive grounds. Procedurally, the district court erred by granting summary judgment *sua sponte* based on briefing in support of a preliminary injunction, which was not intended to prove the existence of disputes of material fact. Substantively, there are numerous disputes of fact regarding whether Defendants had a discriminatory motive in enacting and enforcing the statute that, if resolved in Plaintiffs' favor, would trigger the application of strict scrutiny. Among these indications of discriminatory intent are: 1) the statute's disproportionate affect on Mexican-American students; 2) the many instances of legislative history and other contemporaneous statements that show bias against Mexican-Americans; and 3) inexplicable procedural anomalies in the enforcement

proceedings leading to MAS's elimination. Further, the statute uniquely burdens minority students and parents by eliminating TUSD's ability to implement certain curricular reforms designed to benefit them. Finally, even if strict scrutiny does not apply, the district court failed to consider whether Defendants' enforcement of the statute was so arbitrary as to fail rational basis review.

2. Vagueness: The district court erred by failing to consider whether the statutory language was so standardless as to permit arbitrary and discriminatory enforcement. The phrase "promote resentment toward a race or class of people" lacks objective meaning because it turns on idiosyncratic listener responses. Likewise, the prohibition against courses that "advocate ethnic solidarity" is vague, and—contrary to the district court—that vagueness is not cured by the addition of "instead of the treatment of pupils as individuals," which is equally unclear. Further, the statute's vagueness allowed Defendants to target MAS based on their personal predilections, and despite its positive outcomes.

3. First Amendment: As the district court observed, the First Amendment protects students' rights to receive information in school curricula. And, while state and local officials have discretion in selecting curricular material, that discretion does not extend to removing curricular materials based on ideological viewpoint, rather than legitimate pedagogical concerns. Moreover, there is a dispute of fact as

to Defendants' motives in enforcing the statute against MAS, which the district court failed to consider.

Additionally, the statute is overbroad. First, it permits the elimination of entire curricular programs based on a finding that just a handful of individual classes contained prohibited books or other materials. Second, the district court's attempt to save the statute by construing it narrowly (to target only design and implementation of courses, rather than the execution of individual classes) is precluded by the statute's plain language.

4. Severability: Although the district court correctly found that A.R.S. § 15-112(A)(3) (prohibiting classes designed for pupils of a particular ethnic group) was overbroad, it then erred by concluding the remainder of the statute was severable. Not only does the statute not contain a severability clause, but legislative history shows that (A)(3) was the heart of the law, so that allowing the remainder of the statute to stand is inconsistent with legislative intent.

Ultimately, the record reflects no plausible legitimate reason to eliminate MAS, thereby depriving Mexican-American students of highly effective courses designed to address their educational needs. First, the legislative and enforcement decisions were characterized by racial and ethnic stereotyping. Second, the statute is both vague and overbroad, and its capaciousness allowed Defendants to effectuate their biases against MAS and Mexican Americans.

STANDARD OF REVIEW

A district court's decision on cross motions for summary judgment is reviewed *de novo*. *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002). Summary judgment is appropriate only where "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing a grant of summary judgment, this Court views "the evidence and inferences therefrom in the light most favorable to the party against whom the district court ruled." *Allen v. A.H. Robins Co., Inc.*, 752 F.2d 1365, 1368 (9th Cir. 1985).

The district court's decision to *sua sponte* enter summary judgment against Plaintiffs on their equal protection claim is reviewed for abuse of discretion, *see Corales v. Bennett*, 567 F.3d 554, 570 (9th Cir. 2009); its substantive decision to enter summary judgment against Plaintiffs on that claim is reviewed *de novo*, *id.* at 562. In determining whether the district court erred in *sua sponte* entering summary judgment against Plaintiffs, this Court inquires whether Plaintiffs were given "a full and fair opportunity to ventilate the issues" prior to the entry of judgment, *United States v. Grayson*, 879 F.2d 620, 625 (9th Cir. 1989), drawing inferences in favor of Plaintiffs, *see Massey v. Del Labs., Inc.*, 118 F.3d 1568, 1572 (Fed. Cir. 1997) (applying Ninth Circuit law).

ARGUMENT

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

This Court should reverse the district court's grant of summary judgment on Plaintiffs' Equal Protection claims for both procedural and substantive reasons. Procedurally, the district court improperly granted summary judgment *sua sponte*, depriving Plaintiffs of a meaningful opportunity to come forward with evidence to defeat summary judgment.

Substantively, the district court misapplied the summary judgment standard in concluding that there was no triable issue of fact as to whether the statute was discriminatory on its face or in its purpose and effect. In reaching that conclusion, the district court erred by resolving numerous factual disputes in Defendants' favor.

A. The District Court Erred in Granting Defendants Summary Judgment *Sua Sponte*.

"As a general rule, a district court may not grant summary judgment *sua sponte* without giving the losing party . . . notice and an opportunity to present new evidence," unless the party previously had "a full and fair opportunity to ventilate the issues." *United States v. Grayson*, 879 F.2d 620, 625 (9th Cir. 1989); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (district court may grant summary judgment only when "the losing party was on notice that she had to come

forward with all of her evidence"). Here, Plaintiffs had neither notice nor an opportunity to fully ventilate their Equal Protection claim.

First, Plaintiffs had no notice that the court would rule on their Equal Protection claim. The district court deemed it appropriate to reach that claim because Defendants stated in their cross-motion for summary judgment that "Plaintiffs' legal basis for their complaint is insufficient," which the court took to mean that Defendants sought summary judgment on all claims. ER 7. But Defendants did not brief the Equal Protection claim, and even stated on reply that they sought summary judgment only "as to the claims pertaining to the First Amendment, and alleged vagueness." ER 472. Thus, Defendants' boilerplate statement of legal "insufficiency" was itself insufficient to notify Plaintiffs to identify disputes of fact on Equal Protection. *See Greene v. Solano Cnty. Jail*, 513 F.3d 982, 990 (9th Cir. 2008) (reversing *sua sponte* summary judgment against two of plaintiff's claims because plaintiff did not have notice of, or opportunity to oppose, summary judgment on those claims when defendant's briefing sought summary judgment on different claim).

The district court also erred in holding that Plaintiffs' Second Motion for Preliminary Injunction sufficiently ventilated their Equal Protection claim. ER 7. The proof required for a preliminary injunction is different than that produced in opposing summary judgment, a dispositive motion, as a "party…is not required to

prove his case in full at a preliminary-injunction hearing." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Pugh v. Goord*, 345 F.3d 121, 125 (2d Cir. 2003) (reversing *sua sponte* dismissal because "preliminary injunction motion papers should not be treated as if they were a response to a motion for summary judgment"). Further, converting Plaintiffs' preliminary injunction motion into a summary judgment opposition deprived Plaintiffs of the opportunity to seek additional discovery under Rule 56(d). Thus, a preliminary injunction motion cannot substitute for an opposition to summary judgment.

Because Plaintiffs did not have a meaningful opportunity to oppose summary judgment on their Equal Protection claim, this case should be remanded so that Plaintiffs can oppose summary judgment by introducing evidence regarding Defendants' discriminatory intent, including:

- Emails from legislators evincing animus against Mexican-Americans while advocating for the ethnic studies ban.
- Evidence of the relationship between the State's anti-immigration efforts and the passage of the ethnic studies ban.
- Evidence that although Huppenthal purportedly eliminated MAS in part because it taught Mexican-Americans using a pedagogy developed by Paulo Friere, he allowed a predominantly white public charter school that uses Friere's pedagogy—the Paulo Friere Freedom School—to expand.

B. A.R.S. § 15-112 Facially Discriminates And Was Enacted And Enforced With Discriminatory Intent.

Courts strictly scrutinize legislation and enforcement actions that discriminate based on race, either facially or in purpose and effect. *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Here, the district court erred in concluding that A.R.S. § 15-112 is not facially discriminatory and that no material issues of fact exist as to whether it was enacted or enforced with discriminatory intent, ultimately leading it to grant summary judgment to Defendants. ER 26.

1. A.R.S. § 15-112 Facially Discriminates On the Basis of Ethnicity and Race.

A.R.S. § 15-112 prohibits classes "designed primarily for pupils of a particular ethnic group" or that "advocate ethnic solidarity." A.R.S. § 15-112 (A)(3) & (A)(4). Although the term "ethnic" is not defined in the statute, and despite Defendants' claims that the statute is neutral on its face, ER 1752, legislative history makes clear it refers to ethnic minorities. *Cf. United States v. Am. Trucking Ass'n*, 310 U.S. 534, 543-44, 546-49 (1940) (appropriate to look to legislative history "[w]hen aid to the construction of the meaning of words, as used in the statute, is available,…however clear the words may appear on 'superficial examination'"). Horne, who helped draft versions of the bill, stated that it was unnecessary to define "ethnic group" because for anyone "who was English-proficient," the term "obviously" referred to minorities such as Mexican-

Americans and African Americans. *See* S. Judiciary Comm. Hearing, at 2:38:53. The State has offered no justification for subjecting ethnic minorities for disadvantageous treatment.

2. A.R.S. § 15-112 Was Enacted And Enforced With Discriminatory Intent.

Even if facially neutral, A.R.S. § 15-112 is still subject to strict scrutiny if it was enacted or enforced "at least in part 'because of,'. . . its adverse effects upon an identifiable [racial, ethnic, or national origin] group" or is unexplainable on grounds other than race. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999); *Wayte v. United States*, 470 U.S. 598, 608 (1985) (enforcement policy cannot be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"). Here, the district court itself recognized that "some aspects of the record may be viewed to spark suspicion that the Latino population has been improperly targeted," ER 29, and that Horne's "single-minded focus on terminating the MAS program . . . is at least suggestive of discriminatory intent." ER 28. Yet, it improperly weighed the evidence "on the whole" and concluded that Defendants "targeted the MAS program, not Latino students, teachers, or community members who supported the program." ER 29-30. However, as both that acknowledgement and the record shows, a reasonable factfinder could conclude that the statute was both enacted and enforced because of its effects on

Mexican-American students. Therefore, the district court's grant of summary judgment should be reversed.[6]

Courts must consider both direct and circumstantial evidence of discriminatory intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 229 U.S. 252, 266 (1977); *Diaz v. San Jose Unified Sch. Dist.*, 733 F.2d 660, 663 (9th Cir. 1984). The "subjects of proper inquiry" include, but are not limited to, the law's impact; the sequence of events leading up to law's passage or enforcement; departures from the normal sequence of events or substantive standards; and the legislative or administrative history. *Arlington Heights*, 229 U.S. at 266-68. Upon establishing a *prima facie* case by showing that a racially discriminatory purpose was a motivating factor in the enactment of a law, the burden shifts to the state to establish "that the same decision would have resulted even had the impermissible purpose not been considered." *Id.* at 270 n.21.

[6] For strict scrutiny to apply, a facially neutral statute must also have a discriminatory effect. *See, e.g., Richards v. City of Los Angeles*, 261 Fed. App'x 63, 65 (9th Cir. 2007) (unpublished). Although the district court did not address this prong, it is undisputed that the State's enforcement against MAS disproportionately affected Mexican-American students. MAS was designed initially to address the educational needs of Mexican-American students and ninety percent of students in MAS were Mexican American. *See supra*, at 6, text accompanying n.4. Additionally, Defendants singled out MAS while allowing classes designed for all other racial or ethnic groups. *See United States v. Armstrong*, 517 U.S. 456, 465 (1996) (plaintiffs can also establish discriminatory effect in a selective enforcement case with evidence the statute was not enforced against similarly situated individuals).

"When a plaintiff opts to rely on the *Arlington Heights* factors to demonstrate discriminatory intent through direct or circumstantial evidence, the plaintiff need provide 'very little such evidence . . . to raise a genuine issue of fact . . . ; any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a fact-finder.'" *Pac. Shores Props. LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013) (quoting *Schnidrig v. Columbia Mach, Inc.*, 80 F.3d 1406, 1409 (9th Cir. 1996)). Accordingly, we discuss the relevant factors in turn.

Disparate impact. Evidence that a statute "bears more heavily on one race than another" suggests discriminatory intent. *Arlington Heights*, 229 U.S. at 266 (citing *Washington v. Davis*, 426 U.S. 229 (1976)). If "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face," evidence of disparate impact may be dispositive. *Id.* (citing *Yick Wo v. Hopkins*, 188 U.S. 356 (1886) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). Such a "clear pattern" may be proved by evidence of "gross statistical disparities," which "can satisfy the intent requirement where it tends to show that some invidious or discriminatory purpose underlies the policy." *Committee Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690 (9th Cir. 2009) (hereinafter "*CCCI*").

Students in MAS are ninety percent Mexican American, even though Mexican Americans made up only sixty percent of all TUSD students. ER 2202-03. Similar disparities have led this Court to conclude that a triable issue of fact exists as to discriminatory intent. *See CCCI*, 583 F.3d at 703-05 (reversing summary judgment based on tax sharing agreement that excluded neighborhoods that were 71% Latino and included neighborhoods that were 48% Latino). The impact on Mexican Americans is particularly invidious since MAS students have been found to be between 51 and 108 percent more likely to graduate. ER 202-03.

Sequence of events leading to the challenged law. Courts may rely upon legislative history and other events preceding the passage of a law to find evidence of discriminatory intent, particularly where there are contemporaneous statements or reports by those advocating for the law. *Arlington Heights*, 429 U.S. at 267. Because "officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority," courts examine whether officials have "camouflaged" invidious intent by using code words. *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064, 1066 (4th Cir. 1982) (finding that statements about "undesirables" and concerns about personal safety due to "new" people were camouflaged racial expressions"); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 649 F. Supp. 2d 805, 811 (E.D. La. 2009) (finding that

officials' statements regarding the "influx of crime" and need to preserve "shared values" were "camouflaged racial expressions"). Additionally, legislators who act because of constituents' bias are treated as themselves having discriminatory intent; "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti,* 466 U.S. 429, 433 (1984).

The record is replete with similar "coded" language in the legislative history of A.R.S. § 15-112. To fully understand the context of this language, it is important to note that A.R.S. § 15-112 was signed into law days after Arizona's controversial anti-immigration law, S.B. 1070. Both laws moved through the legislature at the same time, both were passed in a climate charged with anti-immigration animus towards Mexicans and Mexican-Americans, and both were based on unfounded fears that Mexicans were taking over Arizona. In the series of bills that were precursors to H.B. 2281, which eventually became A.R.S. § 15-112, advocates of the law made clear that the "ethnic studies ban" was necessary because Mexican-American students in MAS were not sufficiently "American," and needed to "adopt American values." H. Appropriations Comm. Hearing, at 00:31:35-33:45. Beyond calling them un-American, advocates for the bill and advocates for enforcing the law against MAS stereotyped Mexican-American students in MAS as "rude," "defiant[]," "uncivil," and having "contempt for authority." *See* ER

1054-55, 1802, 2191-92. The invocation of these racial stereotypes in support of the statute could lead a factfinder to find discriminatory intent. *See Flores v. Pierce*, 617 F.2d 1386, 1390 (9th Cir. 1980) ("explanations given by the defendants for their actions were simply pretexts to conceal an intent to act upon stereotypic classifications which resulted from a racial animus").

Similarly, the use of false and misleading claims to promote a bill suggests that its proffered justification is pretextual. *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 549, 552 (S.D.N.Y. 2006) (holding that factually unsupported claims regarding problems caused by targeted daylaborers were "negative and stigmatizing," providing "evidence of racism"). Here, Horne overtly exploited anti-Mexican-American sentiment by falsely linking MAS students with MEChA, claiming they wanted to eliminate the border between the U.S. and Mexico.[7] ER 1056. Similarly, private citizens testifying in favor of the bill alleged that Mexico was orchestrating a plan to take over America through the Reconquista Movement. H. Appropriations Comm. Hearing, at 00:37:15. Senator Pearce, who also authored S.B. 1070, claimed that the ethnic studies ban was necessary because course materials taught Mexican Americans to "[i]ncite riots" and "promote[d] the killing of people." S. Judiciary Committee Hearing, at 2:59:10.

[7] In condemning MAS, Horne made other references to MEChA, such as the fact that MEChA exists at TUSD and that he observed a Tucson High librarian wearing a shirt with a MEChA design. ER 1056.

Departures from normal procedures. Horne issued his Finding of Violation on his last day in office as Superintendent before A.R.S. § 15-112 went into effect. ER 27. The district court noted that the timing of the finding, which "necessarily applied the statute retroactively without any effort to show that the problematic materials were in use at the time of the Finding" only "underscores Horne's determination to do away with the MAS program." *Id*. The court further noted that "Horne's finding seemed to circumvent the 60-day safe harbor period." ER 28. Although the district court acknowledged these irregularities were "at least suggestive of discriminatory intent," *id.*, it deprived a factfinder of the opportunity to weigh them.

Further, the district court also overlooked a number of other irregularities in the enforcement of § 15-112 to eliminate MAS, including that Horne found the MAS program in violation without ever attending a single MAS class or conducting a curriculum audit.

Huppenthal shared Horne's "single-minded focus" on eliminating MAS. He amended the law to give enforcement authority to the State Superintendent, a position he was running for, so he could make good on his campaign promise to "Stop La Raza," ER 1288, a double *entendre* demonstrating that his pursuit of MAS was motivated by animus against Mexicans and Mexican Americans.

Once in office, Huppenthal targeted Mexican-American students by auditing only MAS, even though there were at least two other ethnic studies programs (African American and Asian American Studies) that arguably violated the statute.[8] Huppenthal then ignored his own commissioned audit of MAS, the Cambium Report, when it failed to give him the results he wanted. ER 1258-62.

The district court decided Huppenthal's rejection of the Cambium Report was reasonable because auditors observed only 39.5% of high school MAS courses at "an average of 29.6 minutes per class period." ER 29. But a reasonable factfinder could come to another conclusion, particularly considering that neither Huppenthal nor any ADE officials visited *any* classes during their investigation of TUSD, despite rejecting the Cambium audit for incompleteness—a fact the court did not consider.

Further, although Huppenthal testified that he rejected the Cambium findings of a potential "variance between the written materials and what was actually going on in the classroom," ER 1268, Defendants relied almost exclusively on a small sample of excerpts of written curriculum and books in their findings and testimony before the ALJ, without verifying whether or how they were presented to students, or whether they were used after the statute's effective

[8] Though the district court noted that the state had not received complaints about other programs, ER 28, Huppenthal's refusal to investigate apparently similar ethnic studies programs is indicative of selective enforcement.

date. *See, e.g.*, ER 1065-83, 1092-1111, 1265. Likewise, the former MAS director testified that he could not verify whether any disputed materials were used in classes. ER 627-629.

This evidence is typical of evidence of discriminatory intent in other cases. *See, e.g.*, *Pac. Shores*, 730 F.3d at 1162 (reversing summary judgment based on statute's disparate impact and evidence of discriminatory statements made by councilmembers and citizens, procedural irregularities, and selective enforcement); *Cal. Parents for the Equalization of Educ. Materials v. Noonan*, 600 F. Supp. 2d 1088, 1112 (E.D. Cal. 2009). Accordingly, there is a triable issue of fact as to whether the statute was enacted and enforced with discriminatory intent under the *Arlington Heights* factors.

C. A.R.S. § 15-112 Uniquely Burdens Mexican Americans Who Seek Ethnic Studies Courses To Remedy Past Discrimination in Education.

Separate from its discriminatory enactment and enforcement, A.R.S. § 15-112 violates the Equal Protection Clause by placing exceptional burdens on Mexican-Americans seeking implementation of curriculum to remedy past educational inequities. The district court erred in entering summary judgment because Plaintiffs raised triable issues of fact as to (1) whether §15-112 was racial or ethnic in nature and (2) whether the statute "uses the racial nature of an issue to define the governmental decisionmaking structure, . . . impos[ing] substantial and

unique burdens on racial minorities." *See Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 470 (1982); *see also Hunter v. Erickson*, 393 U.S. 385, 389-91 (1969) (finding law that treated racial housing matters differently than other housing matters to be an "explicitly racial classification" and "the reality is that the law's impact falls on the minority").

As a practical matter, § 15-112 burdens only Mexican American students and parents who advocate for MAS in response to historic discrimination by TUSD. *See Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (provision requiring approval by voters for housing discrimination ordinances was an "explicitly racial classification" placing special burden on racial minorities even though facially neutral). The singling out of ethnic studies generally and MAS specifically for uniquely disadvantageous treatment inevitably raises the danger of impermissible motivation. *Seattle*, 458 U.S. at 486 n.30. Rather than "allocat[ing] governmental power on the basis of any general principle," § 15-112 "imposes substantial and unique burdens on racial minorities." *Id*. at 470. By explicitly threatening school districts with sanctions for offering courses deemed to have "ethnic" content, § 15-112 both: (1) effectively removes the school district's statutory authority and responsibility to approve curriculum, *see* A.R.S. §§15-341(A)(5), -701(C)(1), -701.01(B)(1); and (2) requires minorities to protect ethnic studies programs at the state (rather than local) level, either by seeking repeal of § 15-112 or protesting an

adverse decision before the state board of education or superintendent of public instruction, A.R.S. § 15-112(B). *See Seattle*, 458 U.S. at 474 (striking anti-busing initiative because "[t]hose [seeking desegregation] now must seek relief from the state legislature, or from the statewide electorate[, y]et authority over all other student assignment decisions…remains vested in the local school board.").

Nevertheless, the district court erroneously characterized § 15-112 as "simply a limit on certain coursework." ER 26. But as it recognized, "§ 15-112 could be construed as an 'obstruction' of an effort to remedy past discrimination." ER 25-26. Initially developed voluntarily by TUSD, ER 1950-51, ¶59, MAS was ordered, and in fact expanded, as part of TUSD's educational equity efforts in its 2009 Post Unitary Status Plan. ER 26 n.15; ER 1995-97.

Thus, the district court erred in finding no violation because § 15-112 dismantles a local school district's efforts to remedy past discrimination and leaves its proponents to advocate for, and protect, their interests, "at a new and remote level of government." *Seattle*, 458 U.S. at 483.

D. Even If the Court Does Not Find Strict Scrutiny Applies, A.R.S. § 15-112 Fails Rational Basis Review.

Even if A.R.S. § 15-112 is not subject to strict scrutiny, the district court still erred in granting summary judgment because it did not consider whether the statute is rationally related to any legitimate governmental interest. The statute fails to meet even this low standard because even under the district court's reading of the

statute—as targeting a course benefitting Mexican Americans rather than Mexican Americans themselves—its enactment and enforcement was motivated by desire to disadvantage a politically unpopular group: the students, teachers, and parents who supported the MAS program. *See supra*, Part I.B. This cannot be a legitimate state interest, even under rational basis review. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 633 (1996); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

II. A.R.S. § 15-112 IS UNCONSTITUTIONALLY VAGUE, LEADING TO ITS ARBITRARY AND DISCRIMINATORY ENFORCEMENT AGAINST MAS.

The district court erred in concluding that A.R.S. § 15-112 is not unconstitutionally vague because it is so standardless that it can be enforced arbitrarily and discriminatorily, and because material issues of fact exist as to whether A.R.S. § 15-112 was vague as applied to MAS.[9] A statute is impermissibly vague under the Due Process Clause of the Fifth Amendment when it "fails to provide a reasonable opportunity to know what conduct is prohibited, *or* is so indefinite as to allow arbitrary and discriminatory enforcement." *United States v. Mincoff*, 574 F.3d 1186, 1201 (9th Cir. 2009) (internal quotations omitted)

[9] While the district court expressed doubt regarding the students' standing to challenge the statute's vagueness, ER 22 n.11, individuals may challenge a statute that impairs their right to receive, even when the statute is directed at the conduct of another. *See Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 621 n.5 (1976) (recognizing vagueness challenge by individuals who were not canvassers, who alleged that canvasser registration statute impaired their right to receive information).

(emphasis added). Here, while the district court addressed notice, ER 22-23, it failed to analyze the statute's risk of arbitrary or discriminatory enforcement, a separate, independent basis, and "the more important aspect of vagueness doctrine." *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (citation omitted).

A. The Statute Is Facially Vague Because It Allows Officials To Enforce It In An Arbitrary And Discriminatory Manner.

A.R.S. § 15-112 is unconstitutionally vague because it lacks explicit standards governing its application, posing a danger of ad hoc, subjective, and discriminatory enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Kolender*, 461 U.S. at 358. By failing to define key terms with multiple potential meanings, A.R.S. § 15-112 invites discriminatory enforcement and leaves all students, including Plaintiffs, at the caprice of its enforcers.

1. A.R.S. § 15-112(A)(2) Gives Officials Unfettered Discretion To Determine When A Course Or Class Promotes "Resentment Towards A Race Or Class Of People."

The district court erred by focusing only on the word "promote" in its analysis of § 15-112(A)(2), ignoring the vagueness inherent within the remainder of the clause. ER 22. Specifically, the phrase "resentment toward a race or class of people" has no objective meaning.

Statutes anchored in subjective experiences are void for vagueness because they invite arbitrary enforcement. Thus, this Court struck down a requirement that physicians treat patients "with consideration, respect, and full recognition of the

patient's dignity and individuality" because the terms "consideration," "respect," "dignity," and "individuality" had widely variable meanings to different people. *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 554 (9th Cir. 2004). Consequently, the provision was "too vague and subjective for providers to know how they should behave in order to comply, as well as too vague to limit arbitrary enforcement." *Id.*

"Resentment" as used in A.R.S. § 15-112(A)(2) is no more objective than "consideration," "respect," or "dignity," which is to say it is unconstitutionally vague. It is defined as "the *feeling* of displeasure or indignation at some act, remark, person, etc., *regarded as* causing injury or insult." Merriam-Webster Dictionary (2013) (emphasis added). By definition, "resentment" may only be experienced subjectively, and thus may have widely variable meanings to different people.

2. A.R.S. § 15-112(A)(4) Vests Officials With Unfettered Discretion To Determine When A Course Or Class "Advocate[s] Ethnic Solidarity Instead Of The Treatment Of Pupils As Individuals."

Similarly, (A)(4)'s prohibition against courses that "advocate ethnic solidarity instead of the treatment of pupils as individuals" is vague because it has no objective meaning. First, agreeing that the phrase "advocate ethnic solidarity" was "arguably vague," ER 22, the district court nonetheless reasoned that it was "sufficiently clear given its juxtaposition with the mandate to prioritize the

'treatment of pupils as individuals.'" *Id*. However, this reasoning was based on a fundamentally flawed assumption: namely, that stating the two phrases in the "alternative," ER 21, cures any problem because "the treatment of pupils as individuals" can clarify the scope of "ethnic solidarity." ER 22. Yet, this Court has recognized that the term "individuality" is itself vague because it has widely variable meanings to different people. *Tucson Woman's Clinic*, 379 F.3d at 554. Thus, the statute's dichotomy offers no additional clarification, as illustrated by the fact that, for many, an understanding of one's individuality is inextricably tied to one's sense of ethnic solidarity. Section (A)(4)'s prohibition of courses that "advocate ethnic solidarity instead of the treatment of pupils as individuals" is unconstitutionally vague.

B. Material Issues Of Fact Exist As To Whether A.R.S. § 15-112 Is Vague As Applied.

Material issues of fact exist as to whether A.R.S. § 15-112's standardlessness allowed discriminatory enforcement that targeted MAS and harmed Plaintiffs. When a statute allows officials freedom "to react to nothing more than their own preferences," the statute is unconstitutionally vague as applied. *Smith v. Goguen*, 415 U.S. 566, 578 (1974) (striking law against "contemptuous[]" treatment of the flag); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (invalidating vagrancy ordinance because "it furnishe[d] a convenient tool for 'harsh and discriminatory enforcement by

local prosecuting officials, against particular groups deemed to merit their displeasure'").

Huppenthal's pre-formed biases are evidenced by his role as a state senator in supporting H.B. 2281 and its precursor bill. This included offering key amendments giving the state superintendent—a position for which he was then running—enforcement authority, and delaying the effective date of the statute so that the newly elected state superintendent would be the one to enforce the statute. ER 1256-57. Then, as Superintendent, Huppenthal was able to fulfill his campaign promise to "Stop La Raza." ER 2169, ¶113.

Record evidence reflects that as Superintendent, Huppenthal used the subjective, standardless language of A.R.S. § 15-112 to act on his hostility to MAS. He strategized to eliminate MAS well before any independent evaluation of the program. ER 273. Then, after the Cambium audit team concluded that "no observable evidence was present" to indicate that MAS violated A.R.S. § 15-112, ER 2248, Huppenthal rejected those findings and issued his own finding that MAS violated A.R.S. § 15-112. ER 1095.

Huppenthal later elaborated on his "strategy" to eliminate MAS. During a February 2012 interview, he explained, "we carefully laid out our strategy," and "stretched the[m] [MAS] out for a whole year" during which it lost students and had to defend itself in the press. ER 273-74. This, he explained, allowed him to

deliver the "knockout punch" before the ALJ. ER 274. This strategy culminated with Huppenthal's January 2012 official finding that MAS violated A.R.S. § 15-112. ER 1151-52.

In sum, a factfinder could conclude that Huppenthal was able to use the vague statutory language to target a "particular group[] deemed to merit [his] displeasure." *Papachristou*, 405 U.S. at 170. Accordingly, the statute is void for vagueness as applied.

C. The ALJ Did Not Clarify the Meaning of A.R.S. § 15-112.

The district court erred in concluding that the ALJ cured any vagueness because the ALJ's decision failed to clarify the statute's terms and failed to identify how MAS violated those terms in any manner that would protect against future arbitrary enforcement. First, the ALJ failed to define what it means to "promote resentment" or "advocate ethnic solidarity instead of the treatment of pupils as individuals," terms that are necessarily subjective, as argued above. Second, the ALJ failed to identify why or how the examples in his Findings of Fact violated particular sections of A.R.S. § 15-112. *See* ER 1145-46. School districts, as well as teachers and students, are left to guess the meaning of those sections. ER 1044, ¶17; ER 1047-48, ¶¶11, 12, 15. Third, the ALJ's interpretation that the statute applies only to material presented "in a biased, political, and emotionally charged manner," ER 1147, ¶10, inserted words into the statute not supported by

its plain language and therefore cannot clarify A.R.S. § 15-112. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 946 (9th Cir. 2011) (internal quotation marks omitted) (rejecting City Attorney's narrowing interpretation of anti-solicitation ordinance because, "[a]lthough [the court] must consider the City's limiting construction . . . we are not required to . . . adopt an interpretation precluded by the plain language of the ordinance"). Further, the inserted language raises additional vagueness concerns because whether materials are taught "in a biased, political, and emotionally charged manner" necessarily relies on subjective judgments. *See Tucson Woman's Clinic*, 379 F.3d at 554 (holding that the words "consideration," "respect," and "individuality" were too vague to limit arbitrary enforcement).

Accordingly, this Court should hold that the statute is vague on its face or, in the alternative, reverse the district court's grant of summary judgment because a reasonable factfinder could conclude that Defendants used the statute's vagueness to eliminate MAS based on their personal predilections.

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

The district court erred by rejecting without consideration Plaintiffs' arguments that Defendants' selective enforcement of A.R.S. § 15-112 against MAS discriminated based on viewpoint without legitimate pedagogical justification, an issue as to which there are substantial issues of material fact. Additionally, the

district court erred in concluding that the statute, with the exception of § 15-112(A)(3), was not overbroad.

A. The First Amendment Applies To Decisions To Remove Materials From The Curriculum.

As the district court correctly held, the First Amendment protects "students' right to receive information and ideas" in the context of the school curriculum. ER 13 (citing *Johnson v. Stuart*, 702 F.2d 193, 195 (9th Cir.1983) (holding that students had standing to challenge textbook screening system)); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1028–29 (9th Cir. 1998). "The right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom," *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982), and is "a fundamental principle of the American government," *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

To be sure, this and other courts have held that school boards enjoy broad discretion to determine curriculum content. *See Pico*, 457 U.S. at 864 (school boards "must be permitted to establish and apply their curriculum in such a way as to transmit community values" to the students) (plurality) (internal quotation marks omitted). Accordingly, in *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), this Court rejected a teacher's claim that a school district discriminated based on viewpoint by barring the posting of anti-gay materials on

school bulletin boards, where pro-gay materials were posted. In particular, *Downs* held that the bulletin boards constituted government speech, to which forum analysis was inapplicable. *Id*. at 1014.

However, the district court correctly held that *Downs* does not apply to this case. *Downs* emphasized that its decision was narrow, and—of particular relevance here—implied that viewpoint-based *removal* of material from a curriculum is nonetheless subject to First Amendment scrutiny. *Id*. at 1015. Thus, *Downs* cited with approval prior cases of this and other courts subjecting the elimination of materials from curricula to First Amendment scrutiny. *Id*. (citing, *inter alia*, *Monteiro*, 158 F.3d at 1028-31 & *Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771 773 (8th Cir. 1982)).

Of the cases cited in *Downs*, *Pratt* bears the closest similarity to this case. There, the school board, responding to citizen complaints, excised from the curriculum a film depicting Shirley Jackson's *The Lottery*. After students sued to reinstate the film, the Eighth Circuit reasoned that "school boards do not have an absolute right to remove materials from the curriculum," and specifically that boards may not remove curricular material in service of "a particular religious or ideological viewpoint." 670 F.2d at 776. Thus, that Court required that the school district have a "substantial and reasonable governmental interest" to justify removing the film. *Id*. at 777 & 779 (holding school failed to carry burden of

establishing "that a substantial governmental interest existed for interfering with the students' right to receive information").

Likewise, this Court stated in *Monteiro* that "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." 158 F.3d at 1029 (holding that lawsuit challenging curricular materials deemed appropriate by school district, if successful, would infringe students' rights to receive information). These cases show that the First Amendment limits school district authority to eliminate curricular materials to those situations in which the removal is justified by a legitimate interest. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 268-69 (1988) (school board regulation of curriculum-related student speech must be "reasonably related to legitimate pedagogical concerns"); *Virgil v. Sch. Bd. of Columbia Cnty.*, 862 F.2d 1517, 1518 (11th Cir. 1989) (school board could remove previously approved textbook if its decision was reasonably related to legitimate pedagogical concerns).

Accordingly, while the district court correctly concluded that Plaintiffs have a First Amendment interest in receiving the MAS curriculum, it erred by failing to address Plaintiffs' argument that the elimination of MAS constituted impermissible viewpoint discrimination.

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.

There are disputes of fact as to whether the elimination of MAS was motivated by a "particular . . . ideological viewpoint," *Pratt*, 670 F.2d at 776, rather than a legitimate pedagogical interest. Courts have held that school districts' deviations from accepted procedures in the curriculum context are suggestive of impermissible motivations. *See Pico*, 457 U.S. at 875 (school board's ignoring advice of both Superintendent and Book Review Committee was evidence of impermissible motivation); *Pratt*, 670 F.2d at 777 (school board acted improperly in deferring to citizen complaints and overruling "challenge committee" appointed to evaluate curricular materials). Particularly where such deviations exist, it is critical for courts to examine the "true motives of the school board . . . to answer a First Amendment challenge" in order to ensure that the school board is not hiding improper ideological motives. *McCarthy v. Fletcher*, 254 Cal. Rptr. 714, 724 (1989).

Here, as in *Pratt* and *Pico*, the timing and other circumstances surrounding the decision to eliminate MAS suggest that Defendants' decision was motivated by ideology, and entirely unmoored from legitimate pedagogical interests. To begin, Horne began his campaign to eliminate MAS shortly after students whom Horne believed were affiliated with MAS protested the Deputy Superintendent's speech,

ER 1054, suggesting a retaliatory motive. *See Coszalter v. City of Salem*, 320 F.3d 968, 977 (9th Cir. 2003) (temporal proximity between protected activity and adverse decision can show retaliation was motivating factor). Moreover, Huppenthal disregarded not only TUSD's judgment that the MAS program was beneficial and pedagogically appropriate, but also the recommendation of his own independent auditor, in part for not attending enough MAS classes or reviewing enough curriculum materials to reliably assess them, ER 1259-62. Meanwhile, Huppenthal found MAS in violation of the statute without any courses being observed and on the basis of at most a cursory review of limited MAS curriculum materials. ER 1092, 1262. These procedural deviations are more than sufficient for a trier of fact to find that Defendants were not motivated by legitimate pedagogical concerns, but instead by impermissible ideological commitments.

Additionally, viewpoint neutrality requires that "once the government has chosen to permit discussion of certain subject matters, it may not then silence speakers who address those subject matters from a particular perspective." *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Yet, teachers were required to remove all class materials, curricula, and books containing Mexican American perspectives, including personal copies of books and posters depicting Latino figures of historical significance. ER 1051, ¶14; ER 1043-44,

¶¶14-18. This means that students may take History, Literature, and Social Studies classes from European, African American, Native American, Asian American, and Women's perspectives—but not Mexican American perspectives. *See* ER 1216-52.

Finally, the record reflects that Huppenthal treated books that were part of the MAS curriculum differently than similar books that were not part of that curriculum. Thus, while MAS students were prohibited from accessing seven books with Mexican American perspectives after Huppenthal concluded they had impermissible passages, ER 1167, there was no restriction on similar books written from other perspectives. Further, Huppenthal reasoned that these books violated the statute because they characterized history and oppression as "always being in the context of a white Caucasian power structure and Hispanics." ER 1264. However, dislike of materials that present controversial perspectives on race is not a legitimate pedagogical interest. *Delcarpio v St. Tammany Parish Sch. Bd.*, 865 F. Supp. 350 (E.D. La. 1994) (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, and violated First Amendment); *Loewen v. Turnipseed*, 488 F. Supp. 1138 (N.D. Miss. 1980) (school district's textbook committee violated First Amendment by selecting books that sought to perpetuate the committee's racial bias by furthering the committee's own ideas of segregation and racism).

Accordingly, there exists an issue of material fact as to whether Defendants' elimination of MAS was motivated by ideological discrimination, and not justified by a legitimate pedagogical purpose.

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

The threat of enforcement of an overbroad law deters individuals from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. *United States v. Williams*, 553 U.S. 285, 292 (2008). A law is unconstitutionally overbroad when it punishes a substantial amount of protected free speech, unless a limiting construction can narrow it sufficiently to remove the threat to constitutionally protected expression. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). Here, while the district court properly found A.R.S. § 15-112(A)(3) overbroad, it erred in rejecting overbreadth challenges to the rest of § 15-112(A).

1. The Phrases "Any Courses or Classes" and "Includes Any" Are Overbroad Because a Violation in a Single Class Period Can Result in the Termination of an Entire Program.

A.R.S. § 15-112 suffers from substantial overbreadth because it imposes onerous penalties on schools if prohibited content is found in "any courses or classes."[10] The statute contains no limiting language.

[10] "Course" is defined as "organized subject matter in which instruction is offered within a given period of time and for which credit toward promotion, graduation or certification is usually given." A.R.S. § 15-101(9). While "class" is not statutorily defined, it is used in the Arizona Revised Statutes to refer to a discrete class period.

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. ER 1508 ("Although the District argued and presented evidence to show that there are schools and MAS classes that are not in violation of the law, such evidence *does not prevail* over the Department's evidence that showed that the MAS program has at least one class or course that is in violation."). The ALJ focused on putative violations in individual *classes*, but then deemed entire *courses* to be in violation. Thus, whereas the ALJ found that only a small percentage of instructional time was devoted to impermissible material, its order invalidated the balance of the relevant courses, which contained permissible material. Thus, the statute overrides TUSD's curricular choices, interfering with students' right to receive that does not even violate the statute on its own terms. It chills what can take place in the classroom, as evidenced by Nicholas Dominguez refraining from using the word "oppression" in an assignment because he feared that his coursework, subject to review by TUSD and the ADE, would result in a finding of violation, ER 1046-48, ¶¶9, 10, 12, 15.

See, e.g., A.R.S. § 15-807 (establishing that notification of parent or guardian is required when student is absent from a *class*).

2. The Phrase "Promote Resentment Toward a Race or Class of People" Is Overbroad.

In holding that the phrase "to promote" "does not require intentional or purposeful conduct," the district court suggested that class discussion about discrimination could accidentally violate the statute if it happened to have the incidental effect of bringing about resentment toward a race or class of people. ER 17. Yet it erred by nonetheless rejecting Plaintiffs' overbreadth argument, attempting to cure the potential overbreadth by first by rewriting the statute and then construing the exemption for the instruction of "historical oppression" in section 15-112(F). ER 17-18.

As this Court recently stated, "'[A]ny narrowing construction of a state statute adopted by a federal court must be a reasonable and readily apparent gloss on the language.'" *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1021 (9th Cir. 2013) (quoting *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004)). Yet, the district court interpreted the statute in a manner inconsistent with its plain language. 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." ER 17 (emphasis added). However, the words "design" and "implementation" are nowhere to be found in (A)(1) or (A)(2). Rather, (A)(1) and (A)(2) prohibit courses or classes that merely "include" the prohibited content. Further, the legislature

deliberately used the word "design" only in (A)(3) (prohibiting classes "designed primarily for pupils of a particular ethnic group"), excluding a statutory interpretation that makes course "design" an element of all sections.

Thus, interpreted as written, the statute covers even student-driven class discussion that inadvertently brings about resentment towards a race or class of people.[11] 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 Monteiro*, 158 F.3d at 1029 (describing controversy over teaching *Huckleberry Finn* in schools). Likewise, there have been numerous attempts to eliminate Richard Wright's *Black Boy* from school curricula, which is listed in Arizona's Common Core Standards, "Texts Illustrating the Complexity, Quality, and Range of Student Reading 6-12"[12] In other words, *Black Boy*—a book that is offered by the Arizona State Board of Education as an example illustrating the desired complexity, quality, and range of student reading at the 11th through the college credit level—could violate (A)(2) because it promotes resentment toward a race or class of

[11] Further, as discussed in Part II.B.1., the term "resentment" lacks precise definition. *Cf. Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002) ("ill will" in a school's racial harassment policy was unconstitutionally overbroad, but "racially divisive" not overbroad).

[12] Arizona Dep't of Educ., Common Core State Standards for English Language Arts & Literacy in History/Social Studies, Science, and Technical Subjects, at 58, *available at* http://www.corestandards.org/assets/CCSSI_ELA%20Standards.pdf (last visited Nov. 17, 2013).

people. *Cf. Pico*, 457 U.S. at 856 n.3 (listing *Black Boy* as one of books initially removed).

Thus, eliminating the district court's unsupported narrowing of the statutory text reveals that that court's initial impression—that "promote resentment" is overbroad because many class discussions could inadvertently violate the statute—was the correct one.[13]

Further, the district court erred in concluding that any statutory overbreadth was cured by the exemption contained in A.R.S § 15-112(F) (stating that "nothing in this section shall be construed to restrict or prohibit the instruction of the holocaust, any other instance of genocide, or the historical oppression of a particular group of people based on ethnicity, race, or class."). ER 17-18. The opposite is true; A.R.S. § 15-112(F) only exacerbates the statute's problems.

[13] Similarly, the district court erred in holding that (A)(4), which prohibits classes that "advocate ethnic solidarity instead of the treatment of pupils as individuals," was not overbroad. The district court correctly acknowledged that prohibiting the *teaching* of ethnic solidarity would be unconstitutionally overbroad because "there is nothing inherently racist or divisive about ethnic solidarity." ER 21. However, the court then erred in reasoning that the overbreadth was cured by restricting only "advocacy" of ethnic solidarity and by phrasing ethnic solidarity in the alternative to "the treatment of pupils as individuals." *Id*. However, if there is nothing inherently racist or divisive about ethnic solidarity, then the advocacy of ethnic solidarity also is not properly a target of the statute. Further, phrasing "ethnic solidarity" in the alternative to the "treatment of pupils as individuals" also fails to narrow the provision's scope, for the reasons expressed above, in Part II.A.2.

Evidence shows that this provision has been enforced in an arbitrary fashion. For example, Rodolfo Acuna's *Occupied America*, which discusses controversial statements made by a historical figure in Chicana/o history, was offered as evidence of violation before the legislature, S. Educ. Comm. Hearing, at 2:20:43, and in Horne's Finding of Violation. ER 1055. In contrast, Huppenthal has stated that *Mein Kampf* could be taught in schools. ER 262, 1265-66. Arguably, both works could fall under (F); that only *Occupied America* was not covered under that provision raises questions about the status of works such as Frederick Douglass's "The Meaning of July Fourth for the Negro"; *Jefferson Davis: The Essential Writings*; *The Autobiography of Malcolm X: As Told to Alex Haley*; and anything about the Constitutional Convention.

Thus, the district court erred in holding that, with the exception of (A)(3), A.R.S. § 15-112(A) was not overbroad. Because of that overbreadth, the threat of enforcement chills the development and implementation of culturally relevant courses for Mexican-American and African-American students as part of TUSD's ongoing desegregation case. ER 166, 173-74; *see Monteiro*, 158 F.3d at 1030 ("Many school districts would undoubtedly prefer to 'steer far' from any controversial book and instead substitute 'safe' ones in order to reduce the possibility of civil liability and the expensive and time-consuming burdens of a lawsuit—even one having but a slight chance of success").

IV. BECAUSE SECTION (A)(3) IS NOT SEVERABLE UNDER ARIZONA LAW, A.R.S. § 15-112 SHOULD BE INVALIDATED IN ITS ENTIRETY.

Though the district court correctly found (A)(3) unconstitutional, it erred by severing it and upholding the remainder of A.R.S. § 15-112. A statute's severability is determined under state law. *See Dep't of Treasury v. Fabe*, 508 U.S. 491, 509 n.8 (1993). In Arizona, a statutory provision that is determined to be unconstitutional will be severed only if "the legislature intended that the act be severable" and "(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 v. Albrecht*, 960 P.2d 634, 639-40 (Ariz. 1998).

A. Section (A)(3) Was a Driving Force Behind the Statute and It Is Unlikely the Legislature Would Have Enacted the Statute Without It.

Legislative history, especially statements by a bill's sponsor, is important in determining severability. *See Randolph v. Groscost*, 989 P.2d 751, 755 (Ariz. 1999) (emphasizing role of legislative history in determining if legislature "would have adopted the valid portion of a statute absent the invalid portion"); *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). Here, (A)(3) is not severable because the prohibition on any courses or classes "designed primarily for pupils of a particular ethnic group" was a driving force and

focus of the entire statute, which was designed to prevent division of students based upon ethnicity. *See* S. Educ. Comm. Hearing, at 2:43:03-13 (bill's sponsor, Representative Montenegro, stated: "focus of this bill is to prevent the courses from teaching [students] because they are of that ethnic group"); and H. Educ. Comm. Hearing, at 1:31:18-33 (former Superintendent Tom Horne stated bill intended "to prohibit grouping students by race"). House Bill 2281's original text and amendments provide further support that (A)(3) induced the legislature to enact the entire statute, as it targeted teaching "based on ethnic background." H.B. 2281, Introduced Version, *available at* http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2281p.htm&Session_ID=93 (last visited Nov. 17, 2013). Moreover, what became section (A)(3) was a core provision in the original bill, which contained only two prohibitions, both focused on ethnicity. *Id*. The declaration of policy and the two original prohibitions indicate a singular focus on ethnicity and ethnic grouping.

The significance of (A)(3) to the entire statute is even more apparent when, after it was excised, the provision was re-introduced by the bill's sponsor on the House floor on the day of the vote. *See* Amendment to H.B. 2281, *available at* http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/adopted/h.2281sm.doc.htm&Session_ID=93 (last visited Nov. 17, 2013). Only then, with

section (A)(3) included, did the House approve the bill. When it went to the Senate, classes designed for certain ethnic groups remained a strong focus in hearings. *See* S. Educ. Comm. Hearing, at 2:38:54 (criticizing such classes). Because (A)(3) was such a significant driver during the legislative process, it cannot be said that the legislature "would have adopted the valid portion of a statute absent the invalid portion." *Randolph*, 989 P.2d at 755.

B. Section (A)(3) Cannot Be Severed Without Substantially Impairing the Legislative Intent and Purpose of the Statute.

To be severable, not only must the valid portions be "effective and enforceable standing alone," *Hull*, 960 P.2d at 639-40, but the remaining portions must also "be reasonable in light of the act as originally drafted." *State Comp. Fund v. Symington*, 848 P.2d 273, 281 (Ariz. 1993) (citations omitted). Here, (A)(3) is not severable from the remainder of the statute because the prohibition of a class designed for a particular ethnic group is so enmeshed with the general scope of the act that, should it be stricken, effect could not be given to the legislative intent. As discussed *supra* Part IV.A., H.B. 2281 was created specifically "to prohibit grouping students by race" and to "prevent the courses from teaching [the students] because they are of that ethnic group." Even if the law could be enforced technically without (A)(3), its excision would contravene the legislative intent to prohibit a class designed for a particular ethnic group. Thus, severance is

inappropriate because striking (A)(3) would result in an unreasonable law in light of the purpose and intent of the statute.

C. The Absence Of A Severability Clause Signals The Legislators' Intent To Have All Provisions Operate Together, Or Not At All.

Arizona courts have found the absence of a severability clause to be evidence that a law was not intended to be severable. *See Ruiz v. Hull*, 957 P.2d 984, 1002 (Ariz. 1998) (holding constitutional amendment not severable in part because it did not contain severability clause). A.R.S. § 15-112 does not contain a severability clause. The absence of a severability clause, coupled with its legislative history and the purpose and intent of the statute, justifies the conclusion that section (A)(3) and the remainder of the statute cannot be considered separately. The unconstitutionality of section (A)(3) is fatal to the statute, and A.R.S. § 15-112 should be found unconstitutional in its entirety.

CONCLUSION

For the foregoing reasons, 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: November 18, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 13,837 words.

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

ADDENDUM

1

U.S. CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ADDENDUM

2

U.S. CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ADDENDUM

3

U.S. CONSTITUTION, AMENDMENT XIV

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ADDENDUM

4

15-101. Definitions

In this title, unless the context otherwise requires:

1. "Accommodation school" means either:
(a) A school that is operated through the county board of supervisors and the county school superintendent and that the county school superintendent administers to serve a military reservation or territory that is not included within the boundaries of a school district.
(b) A school that provides educational services to homeless children or alternative education programs as provided in section 15-308, subsection B.
(c) A school that is established to serve a military reservation, the boundaries of which are coterminous with the boundaries of the military reservation on which the school is located.
2. "Assessed valuation" means the valuation derived by applying the applicable percentage as provided in title 42, chapter 15, article 1 to the full cash value or limited property value, whichever is applicable, of the property.
3. "Charter holder" means a person that enters into a charter with the state board for charter schools. For the purposes of this paragraph, "person" means an individual, partnership, corporation, association or public or private organization of any kind.
4. "Charter school" means a public school established by contract with a district governing board, the state board of education, the state board for charter schools, a university under the jurisdiction of the Arizona board of regents, a community college district with enrollment of more than fifteen thousand full-time equivalent students or a group of community college districts with a combined enrollment of more than fifteen thousand full-time equivalent students pursuant to article 8 of this chapter to provide learning that will improve pupil achievement.
5. "Child with a disability" means a child with a disability as defined in section 15-761.
6. "Class A bonds" means general obligation bonds approved by a vote of the qualified electors of a school district at an election held on or before December 31, 1998.
7. "Class B bonds" means general obligation bonds approved by a vote of the qualified electors of a school district at an election held from and after December 31, 1998.
8. "Competency" means a demonstrated ability in a skill at a specified performance level.
9. "Course" means organized subject matter in which instruction is offered within a given period of time and for which credit toward promotion, graduation or certification is usually given. A course consists of knowledge selected from a subject for instructional purposes in the schools.
10. "Course of study" means a list of required and optional subjects to be taught in the schools.
11. "Dual enrollment course" means a college level course that is conducted on the campus of a high school or on the campus of a joint technical education district, that is applicable to an established community college academic degree or certificate program and that is transferable to a university under the jurisdiction of the Arizona board of regents. A dual enrollment course that is applicable to a community college occupational degree or certificate program may be transferable to a university under the jurisdiction of the Arizona board of regents.
12. "Fiscal year" means the year beginning July 1 and ending June 30.
13. "Governing board" means a body organized for the government and management of the schools within a school district or a county school superintendent in the conduct of an accommodation school.
14. "Lease" means an agreement for conveyance and possession of real or personal property.
15. "Limited property value" means the value determined pursuant to title 42, chapter 13, article 7. Limited property value shall be used as the basis for assessing, fixing, determining and levying primary property taxes.
16. "Parent" means the natural or adoptive parent of a child or a person who has custody of a child.
17. "Person who has custody" means a parent or legal guardian of a child, a person to whom custody of the child has been given by order of a court or a person who stands in loco parentis to the child.
18. "Primary property taxes" means all ad valorem taxes except for secondary property

taxes.
19. "Private school" means a nonpublic institution where instruction is imparted.
20. "School" means any public institution established for the purposes of offering instruction to pupils in programs for preschool children with disabilities, kindergarten programs or any combination of grades one through twelve.
21. "School district" means a political subdivision of this state with geographic boundaries organized for the purpose of the administration, support and maintenance of the public schools or an accommodation school.
22. "Secondary property taxes" means ad valorem taxes used to pay the principal of and the interest and redemption charges on any bonded indebtedness or other lawful long-term obligation issued or incurred for a specific purpose by a school district or a community college district and amounts levied pursuant to an election to exceed a budget, expenditure or tax limitation.
23. "Subject" means a division or field of organized knowledge, such as English or mathematics, or a selection from an organized body of knowledge for a course or teaching unit, such as the English novel or elementary algebra.

ADDENDUM

5

15-111. Declaration of policy

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.

ADDENDUM

6

15-112. Prohibited courses and classes; enforcement

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:
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.
B. If the state board of education or the superintendent of public instruction determines that a school district or charter school is in violation of subsection A, the state board of education or the superintendent of public instruction shall notify the school district or charter school that it is in violation of subsection A. If the state board of education or the superintendent of public instruction determines that the school district or charter school has failed to comply with subsection A within sixty days after a notice has been issued pursuant to this subsection, the state board of education or the superintendent of public instruction may direct the department of education to withhold up to ten per cent of the monthly apportionment of state aid that would otherwise be due the school district or charter school. The department of education shall adjust the school district or charter school's apportionment accordingly. When the state board of education or the superintendent of public instruction determines that the school district or charter school is in compliance with subsection A, the department of education shall restore the full amount of state aid payments to the school district or charter school.
C. The department of education shall pay for all expenses of a hearing conducted pursuant to this section.
D. Actions taken under this section are subject to appeal pursuant to title 41, chapter 6, article 10.
E. This section shall not be construed to restrict or prohibit:
1. Courses or classes for Native American pupils that are required to comply with federal law.
2. The grouping of pupils according to academic performance, including capability in the English language, that may result in a disparate impact by ethnicity.
3. Courses or classes that include the history of any ethnic group and that are open to all students, unless the course or class violates subsection A.
4. Courses or classes that include the discussion of controversial aspects of history.
F. Nothing in this section shall be construed to restrict or prohibit the instruction of the holocaust, any other instance of genocide, or the historical oppression of a particular group of people based on ethnicity, race, or class.

ADDENDUM

7

15-341. General powers and duties; immunity; delegation

A. The governing board shall:

1. Prescribe and enforce policies and procedures for the governance of the schools, not inconsistent with law or rules prescribed by the state board of education.
2. Exclude from schools all books, publications, papers or audiovisual materials of a sectarian, partisan or denominational character. This paragraph shall not be construed to prohibit the elective course permitted by section 15-717.01.
3. Manage and control the school property within its district.
4. Acquire school furniture, apparatus, equipment, library books and supplies for the use of the schools.
5. Prescribe the curricula and criteria for the promotion and graduation of pupils as provided in sections 15-701 and 15-701.01.
6. Furnish, repair and insure, at full insurable value, the school property of the district.
7. Construct school buildings on approval by a vote of the district electors.
8. Make in the name of the district conveyances of property belonging to the district and sold by the board.
9. Purchase school sites when authorized by a vote of the district at an election conducted as nearly as practicable in the same manner as the election provided in section 15-481 and held on a date prescribed in section 15-491, subsection E, but such authorization shall not necessarily specify the site to be purchased and such authorization shall not be necessary to exchange unimproved property as provided in section 15-342, paragraph 23.
10. Construct, improve and furnish buildings used for school purposes when such buildings or premises are leased from the national park service.
11. Purchase school sites or construct, improve and furnish school buildings from the proceeds of the sale of school property only on approval by a vote of the district electors.
12. Hold pupils to strict account for disorderly conduct on school property.
13. Discipline students for disorderly conduct on the way to and from school.
14. Except as provided in section 15-1224, deposit all monies received by the district as gifts, grants and devises with the county treasurer who shall credit the deposits as designated in the uniform system of financial records. If not inconsistent with the terms of the gifts, grants and devises given, any balance remaining after expenditures for the intended purpose of the monies have been made shall be used for reduction of school district taxes for the budget year, except that in the case of accommodation schools the county treasurer shall carry the balance forward for use by the county school superintendent for accommodation schools for the budget year.
15. Provide that, if a parent or legal guardian chooses not to accept a decision of the teacher as provided in section 15-521, paragraph 4, the parent or legal guardian may request in writing that the governing board review the teacher's decision. This paragraph shall not be construed to release school districts from any liability relating to a child's promotion or retention.
16. Provide for adequate supervision over pupils in instructional and noninstructional activities by certificated or noncertificated personnel.
17. Use school monies received from the state and county school apportionment exclusively for payment of salaries of teachers and other employees and contingent expenses of the district.
18. Make an annual report to the county school superintendent on or before October 1 in the manner and form and on the blanks prescribed by the superintendent of public instruction or county school superintendent. The board shall also make reports directly to the county school superintendent or the superintendent of public instruction whenever required.
19. Deposit all monies received by school districts other than student activities monies or monies from auxiliary operations as provided in sections 15-1125 and 15-1126 with the county treasurer to the credit of the school district except as provided in paragraph 20 of this subsection and sections 15-1223 and 15-1224, and the board shall expend the monies as provided by law for other school funds.
20. Establish bank accounts in which the board during a month may deposit miscellaneous monies received directly by the district. The board shall remit monies

deposited in the bank accounts at least monthly to the county treasurer for deposit as provided in paragraph 19 of this subsection and in accordance with the uniform system of financial records.
21. Prescribe and enforce policies and procedures for disciplinary action against a teacher who engages in conduct that is a violation of the policies of the governing board but that is not cause for dismissal of the teacher or for revocation of the certificate of the teacher. Disciplinary action may include suspension without pay for a period of time not to exceed ten school days. Disciplinary action shall not include suspension with pay or suspension without pay for a period of time longer than ten school days. The procedures shall include notice, hearing and appeal provisions for violations that are cause for disciplinary action. The governing board may designate a person or persons to act on behalf of the board on these matters.
22. Prescribe and enforce policies and procedures for disciplinary action against an administrator who engages in conduct that is a violation of the policies of the governing board regarding duties of administrators but that is not cause for dismissal of the administrator or for revocation of the certificate of the administrator. Disciplinary action may include suspension without pay for a period of time not to exceed ten school days. Disciplinary action shall not include suspension with pay or suspension without pay for a period of time longer than ten school days. The procedures shall include notice, hearing and appeal provisions for violations that are cause for disciplinary action. The governing board may designate a person or persons to act on behalf of the board on these matters. For violations that are cause for dismissal, the provisions of notice, hearing and appeal in chapter 5, article 3 of this title shall apply. The filing of a timely request for a hearing suspends the imposition of a suspension without pay or a dismissal pending completion of the hearing.
23. Notwithstanding sections 13-3108 and 13-3120, prescribe and enforce policies and procedures that prohibit a person from carrying or possessing a weapon on school grounds unless the person is a peace officer or has obtained specific authorization from the school administrator.
24. Prescribe and enforce policies and procedures relating to the health and safety of all pupils participating in district sponsored practice sessions or games or other interscholastic athletic activities, including:
(a) The provision of water.
(b) Guidelines, information and forms, developed in consultation with a statewide private entity that supervises interscholastic activities, to inform and educate coaches, pupils and parents of the dangers of concussions and head injuries and the risks of continued participation in athletic activity after a concussion. The policies and procedures shall require that, before a pupil participates in an athletic activity, the pupil and the pupil's parent must sign an information form at least once each school year that states that the parent is aware of the nature and risk of concussion. The policies and procedures shall require that a pupil who is suspected of sustaining a concussion in a practice session, game or other interscholastic athletic activity be immediately removed from the athletic activity. A coach from the pupil's team or an official or a licensed health care provider may remove a pupil from play. A team parent may also remove the parent's own child from play. A pupil may return to play on the same day if a health care provider rules out a suspected concussion at the time the pupil is removed from play. On a subsequent day, the pupil may return to play if the pupil has been evaluated by and received written clearance to resume participation in athletic activity from a health care provider who has been trained in the evaluation and management of concussions and head injuries. A health care provider who is a volunteer and who provides clearance to participate in athletic activity on the day of the suspected injury or on a subsequent day is immune from civil liability with respect to all decisions made and actions taken that are based on good faith implementation of the requirements of this subdivision, except in cases of gross negligence or wanton or wilful neglect. A school district, school district employee, team coach, official or team volunteer or a parent or guardian of a team member is not subject to civil liability for any act, omission or policy undertaken in good faith to comply with the requirements of this subdivision or for a decision made or an action taken by a health care provider. A group or organization that uses property or facilities owned or operated by a school district for athletic activities shall comply with the requirements of this subdivision. A school district and its employees and volunteers are not subject to civil

liability for any other person or organization's failure or alleged failure to comply with the requirements of this subdivision. This subdivision does not apply to teams that are based in another state and that participate in an athletic activity in this state. For the purposes of this subdivision, athletic activity does not include dance, rhythmic gymnastics, competitions or exhibitions of academic skills or knowledge or other similar forms of physical noncontact activities, civic activities or academic activities, whether engaged in for the purposes of competition or recreation. For the purposes of this subdivision, "health care provider" means a physician who is licensed pursuant to title 32, chapter 13 or 17, an athletic trainer who is licensed pursuant to title 32, chapter 41, a nurse practitioner who is licensed pursuant to title 32, chapter 15, and a physician assistant who is licensed pursuant to title 32, chapter 25.
25. Prescribe and enforce policies and procedures regarding the smoking of tobacco within school buildings. The policies and procedures shall be adopted in consultation with school district personnel and members of the community and shall state whether smoking is prohibited in school buildings. If smoking in school buildings is not prohibited, the policies and procedures shall clearly state the conditions and circumstances under which smoking is permitted, those areas in a school building that may be designated as smoking areas and those areas in a school building that may not be designated as smoking areas.
26. Establish an assessment, data gathering and reporting system as prescribed in chapter 7, article 3 of this title.
27. Provide special education programs and related services pursuant to section 15-764, subsection A to all children with disabilities as defined in section 15-761.
28. Administer competency tests prescribed by the state board of education for the graduation of pupils from high school.
29. Ensure that insurance coverage is secured for all construction projects for purposes of general liability, property damage and workers' compensation and secure performance and payment bonds for all construction projects.
30. Keep on file the resumes of all current and former employees who provide instruction to pupils at a school. Resumes shall include an individual's educational and teaching background and experience in a particular academic content subject area. A school district shall inform parents and guardians of the availability of the resume information and shall make the resume information available for inspection on request of parents and guardians of pupils enrolled at a school. This paragraph shall not be construed to require any school to release personally identifiable information in relation to any teacher or employee, including the teacher's or employee's address, salary, social security number or telephone number.
31. Report to local law enforcement agencies any suspected crime against a person or property that is a serious offense as defined in section 13-706 or that involves a deadly weapon or dangerous instrument or serious physical injury and any conduct that poses a threat of death or serious physical injury to employees, students or anyone on the property of the school. This paragraph does not limit or preclude the reporting by a school district or an employee of a school district of suspected crimes other than those required to be reported by this paragraph. For the purposes of this paragraph, "dangerous instrument", "deadly weapon" and "serious physical injury" have the same meanings prescribed in section 13-105.
32. In conjunction with local law enforcement agencies and local medical facilities, develop an emergency response plan for each school in the school district in accordance with minimum standards developed jointly by the department of education and the division of emergency management within the department of emergency and military affairs.
33. Provide written notice to the parents or guardians of all students affected in the school district at least ten days prior to a public meeting to discuss closing a school within the school district. The notice shall include the reasons for the proposed closure and the time and place of the meeting. The governing board shall fix a time for a public meeting on the proposed closure no less than ten days before voting in a public meeting to close the school. The school district governing board shall give notice of the time and place of the meeting. At the time and place designated in the notice, the school district governing board shall hear reasons for or against closing the school. The school district governing board is exempt from this paragraph if it is determined by the governing board

that the school shall be closed because it poses a danger to the health or safety of the pupils or employees of the school. A governing board may consult with the school facilities board for technical assistance and for information on the impact of closing a school. The information provided from the school facilities board shall not require the governing board to take or not take any action.
34. Incorporate instruction on Native American history into appropriate existing curricula.
35. Prescribe and enforce policies and procedures:
(a) Allowing pupils who have been diagnosed with anaphylaxis by a health care provider licensed pursuant to title 32, chapter 13, 14, 17 or 25 or by a registered nurse practitioner licensed and certified pursuant to title 32, chapter 15 to carry and self-administer emergency medications, including auto-injectable epinephrine, while at school and at school-sponsored activities. The pupil's name on the prescription label on the medication container or on the medication device and annual written documentation from the pupil's parent or guardian to the school that authorizes possession and self-administration is sufficient proof that the pupil is entitled to the possession and self-administration of the medication. The policies shall require a pupil who uses auto-injectable epinephrine while at school and at school-sponsored activities to notify the nurse or the designated school staff person of the use of the medication as soon as practicable. A school district and its employees are immune from civil liability with respect to all decisions made and actions taken that are based on good faith implementation of the requirements of this subdivision, except in cases of wanton or wilful neglect.
(b) For the emergency administration of auto-injectable epinephrine by a trained employee of a school district pursuant to section 15-157.
36. Allow the possession and self-administration of prescription medication for breathing disorders in handheld inhaler devices by pupils who have been prescribed that medication by a health care professional licensed pursuant to title 32. The pupil's name on the prescription label on the medication container or on the handheld inhaler device and annual written documentation from the pupil's parent or guardian to the school that authorizes possession and self-administration shall be sufficient proof that the pupil is entitled to the possession and self-administration of the medication. A school district and its employees are immune from civil liability with respect to all decisions made and actions taken that are based on a good faith implementation of the requirements of this paragraph.
37. Prescribe and enforce policies and procedures to prohibit pupils from harassing, intimidating and bullying other pupils on school grounds, on school property, on school buses, at school bus stops, at school-sponsored events and activities and through the use of electronic technology or electronic communication on school computers, networks, forums and mailing lists that include the following components:
(a) A procedure for pupils, parents and school district employees to confidentially report to school officials incidents of harassment, intimidation or bullying. The school shall make available written forms designed to provide a full and detailed description of the incident and any other relevant information about the incident.
(b) A requirement that school district employees report in writing suspected incidents of harassment, intimidation or bullying to the appropriate school official and a description of appropriate disciplinary procedures for employees who fail to report suspected incidents that are known to the employee.
(c) A requirement that, at the beginning of each school year, school officials provide all pupils with a written copy of the rights, protections and support services available to a pupil who is an alleged victim of an incident reported pursuant to this paragraph.
(d) If an incident is reported pursuant to this paragraph, a requirement that school officials provide a pupil who is an alleged victim of the incident with a written copy of the rights, protections and support services available to that pupil.
(e) A formal process for the documentation of reported incidents of harassment, intimidation or bullying and for the confidentiality, maintenance and disposition of this documentation. School districts shall maintain documentation of all incidents reported pursuant to this paragraph for at least six years. The school shall not use that documentation to impose disciplinary action unless the appropriate school official has investigated and determined that the reported incidents of harassment, intimidation or bullying occurred. If a school provides documentation of reported incidents to persons other than school officials or law enforcement, all individually identifiable information shall

be redacted.
(f) A formal process for the investigation by the appropriate school officials of suspected incidents of harassment, intimidation or bullying, including procedures for notifying the alleged victim on completion and disposition of the investigation.
(g) Disciplinary procedures for pupils who have admitted or been found to have committed incidents of harassment, intimidation or bullying.
(h) A procedure that sets forth consequences for submitting false reports of incidents of harassment, intimidation or bullying.
(i) Procedures designed to protect the health and safety of pupils who are physically harmed as the result of incidents of harassment, intimidation and bullying, including, if appropriate, procedures to contact emergency medical services or law enforcement agencies, or both.
(j) Definitions of harassment, intimidation and bullying.
38. Prescribe and enforce policies and procedures regarding changing or adopting attendance boundaries that include the following components:
(a) A procedure for holding public meetings to discuss attendance boundary changes or adoptions that allows public comments.
(b) A procedure to notify the parents or guardians of the students affected.
(c) A procedure to notify the residents of the households affected by the attendance boundary changes.
(d) A process for placing public meeting notices and proposed maps on the school district's website for public review, if the school district maintains a website.
(e) A formal process for presenting the attendance boundaries of the affected area in public meetings that allows public comments.
(f) A formal process for notifying the residents and parents or guardians of the affected area as to the decision of the governing board on the school district's website, if the school district maintains a website.
(g) A formal process for updating attendance boundaries on the school district's website within ninety days of an adopted boundary change. The school district shall send a direct link to the school district's attendance boundaries website to the department of real estate.
(h) If the land that a school was built on was donated within the past five years, a formal process to notify the entity that donated the land affected by the decision of the governing board.
39. If the state board of education determines that the school district has committed an overexpenditure as defined in section 15-107, provide a copy of the fiscal management report submitted pursuant to section 15-107, subsection H on its website and make copies available to the public on request. The school district shall comply with a request within five business days after receipt.
40. Ensure that the contract for the superintendent is structured in a manner in which up to twenty per cent of the total annual salary included for the superintendent in the contract is classified as performance pay. This paragraph shall not be construed to require school districts to increase total compensation for superintendents. Unless the school district governing board votes to implement an alternative procedure at a public meeting called for this purpose, the performance pay portion of the superintendent's total annual compensation shall be determined as follows:
(a) Twenty-five per cent of the performance pay shall be determined based on the percentage of academic gain determined by the department of education of pupils who are enrolled in the school district compared to the academic gain achieved by the highest ranking of the fifty largest school districts in this state. For the purposes of this subdivision, the department of education shall determine academic gain by the academic growth achieved by each pupil who has been enrolled at the same school in a school district for at least five consecutive months measured against that pupil's academic results in the 2008-2009 school year. For the purposes of this subdivision, of the fifty largest school districts in this state, the school district with pupils who demonstrate the highest statewide percentage of overall academic gain measured against academic results for the 2008-2009 school year shall be assigned a score of 100 and the school district with pupils who demonstrate the lowest statewide percentage of overall academic gain measured against academic results for the 2008-2009 school year shall be assigned a score of 0.

(b) Twenty-five per cent of the performance pay shall be determined by the percentage of parents of pupils who are enrolled at the school district who assign a letter grade of "A" to the school on a survey of parental satisfaction with the school district. The parental satisfaction survey shall be administered and scored by an independent entity that is selected by the governing board and that demonstrates sufficient expertise and experience to accurately measure the results of the survey. The parental satisfaction survey shall use standard random sampling procedures and provide anonymity and confidentiality to each parent who participates in the survey. The letter grade scale used on the parental satisfaction survey shall direct parents to assign one of the following letter grades:
(i) A letter grade of "A" if the school district is excellent.
(ii) A letter grade of "B" if the school district is above average.
(iii) A letter grade of "C" if the school district is average.
(iv) A letter grade of "D" if the school district is below average.
(v) A letter grade of "F" if the school district is a failure.
(c) Twenty-five per cent of the performance pay shall be determined by the percentage of teachers who are employed at the school district and who assign a letter grade of "A" to the school on a survey of teacher satisfaction with the school. The teacher satisfaction survey shall be administered and scored by an independent entity that is selected by the governing board and that demonstrates sufficient expertise and experience to accurately measure the results of the survey. The teacher satisfaction survey shall use standard random sampling procedures and provide anonymity and confidentiality to each teacher who participates in the survey. The letter grade scale used on the teacher satisfaction survey shall direct teachers to assign one of the following letter grades:
(i) A letter grade of "A" if the school district is excellent.
(ii) A letter grade of "B" if the school district is above average.
(iii) A letter grade of "C" if the school district is average.
(iv) A letter grade of "D" if the school district is below average.
(v) A letter grade of "F" if the school district is a failure.
(d) Twenty-five per cent of the performance pay shall be determined by other criteria selected by the governing board.
41. Maintain and store permanent public records of the school district as required by law. Notwithstanding section 39-101, the standards adopted by the Arizona state library, archives and public records for the maintenance and storage of school district public records shall allow school districts to elect to satisfy the requirements of this paragraph by maintaining and storing these records either on paper or in an electronic format, or a combination of a paper and electronic format.
42. Adopt in a public meeting and implement by school year 2013-2014 policies for principal evaluations. Before the adoption of principal evaluation policies, the school district governing board shall provide opportunities for public discussion on the proposed policies. The policies shall describe:
(a) The principal evaluation instrument, including the four performance classifications adopted by the governing board pursuant to section 15-203, subsection A, paragraph 38.
(b) Alignment of professional development opportunities to the principal evaluations.
(c) Incentives for principals in one of the two highest performance classifications pursuant to section 15-203, subsection A, paragraph 38, which may include:
(i) Multiyear contracts pursuant to section 15-503.
(ii) Incentives to work at schools that are assigned a letter grade of D or F pursuant to section 15-241.
(d) Transfer and contract processes for principals designated in the lowest performance classification pursuant to section 15-203, subsection A, paragraph 38.
B. Notwithstanding subsection A, paragraphs 7, 9 and 11 of this section, the county school superintendent may construct, improve and furnish school buildings or purchase or sell school sites in the conduct of an accommodation school.
C. If any school district acquires real or personal property, whether by purchase, exchange, condemnation, gift or otherwise, the governing board shall pay to the county treasurer any taxes on the property that were unpaid as of the date of acquisition, including penalties and interest. The lien for unpaid delinquent taxes, penalties and interest

on property acquired by a school district:
1. Is not abated, extinguished, discharged or merged in the title to the property.
2. Is enforceable in the same manner as other delinquent tax liens.
D. The governing board may not locate a school on property that is less than one-fourth mile from agricultural land regulated pursuant to section 3-365, except that the owner of the agricultural land may agree to comply with the buffer zone requirements of section 3-365. If the owner agrees in writing to comply with the buffer zone requirements and records the agreement in the office of the county recorder as a restrictive covenant running with the title to the land, the school district may locate a school within the affected buffer zone. The agreement may include any stipulations regarding the school, including conditions for future expansion of the school and changes in the operational status of the school that will result in a breach of the agreement.
E. A school district, its governing board members, its school council members and its employees are immune from civil liability for the consequences of adoption and implementation of policies and procedures pursuant to subsection A of this section and section 15-342. This waiver does not apply if the school district, its governing board members, its school council members or its employees are guilty of gross negligence or intentional misconduct.
F. A governing board may delegate in writing to a superintendent, principal or head teacher the authority to prescribe procedures that are consistent with the governing board's policies.
G. Notwithstanding any other provision of this title, a school district governing board shall not take any action that would result in a reduction of pupil square footage unless the governing board notifies the school facilities board established by section 15-2001 of the proposed action and receives written approval from the school facilities board to take the action. A reduction includes an increase in administrative space that results in a reduction of pupil square footage or sale of school sites or buildings, or both. A reduction includes a reconfiguration of grades that results in a reduction of pupil square footage of any grade level. This subsection does not apply to temporary reconfiguration of grades to accommodate new school construction if the temporary reconfiguration does not exceed one year. The sale of equipment that results in a reduction that falls below the equipment requirements prescribed in section 15-2011, subsection B is subject to commensurate withholding of school district district additional assistance monies pursuant to the direction of the school facilities board. Except as provided in section 15-342, paragraph 10, proceeds from the sale of school sites, buildings or other equipment shall be deposited in the school plant fund as provided in section 15-1102.
H. Subsections C through G of this section apply to a county board of supervisors and a county school superintendent when operating and administering an accommodation school.

ADDENDUM

8

15-701. Common school; promotions; requirements; certificate; supervision of eighth grades by superintendent of high school district; high school admissions; academic credit

A. The state board of education shall:

1. Prescribe a minimum course of study, as defined in section 15-101 and incorporating the academic standards adopted by the state board of education, to be taught in the common schools.

2. Prescribe competency requirements for the promotion of pupils from the eighth grade and competency requirements for the promotion of pupils from the third grade incorporating the academic standards in at least the areas of reading, writing, mathematics, science and social studies. Notwithstanding section 15-521, paragraph 3, the competency requirements for the promotion of pupils from the third grade shall include the following:

(a) A requirement that a pupil not be promoted from the third grade if the pupil obtains a score on the reading portion of the Arizona instrument to measure standards test, or a successor test, that demonstrates that the pupil's reading falls far below the third grade level.

(b) A mechanism to allow a school district governing board or the governing body of a charter school to promote a pupil from the third grade who obtains a score on the reading portion of the Arizona instrument to measure standards test, or a successor test, that demonstrates that the pupil's reading falls far below the third grade level for any of the following:

(i) A good cause exemption if the pupil is an English learner or a limited English proficient student as defined in section 15-751 and has had fewer than two years of English language instruction.

(ii) A child with a disability as defined in section 15-761 if the pupil's individualized education program team and the pupil's parent or guardian agrees that promotion is appropriate based on the pupil's individualized education program.

(c) Intervention and remedial strategies developed by the state board of education for pupils who are not promoted from the third grade. A school district governing board or the governing body of a charter school shall offer at least one of the intervention and remedial strategies developed by the state board of education. The parent or guardian of a pupil who is not promoted from the third grade and the pupil's teacher and principal may choose the most appropriate intervention and remedial strategies that will be provided to that pupil. The intervention and remedial strategies developed by the state board of education shall include:

(i) A requirement that the pupil be assigned to a different teacher for reading instruction.

(ii) Summer school reading instruction.

(iii) In the next academic year, intensive reading instruction that occurs before, during or after the regular school day, or any combination of before, during and after the regular school day.

(iv) Online reading instruction.

3. Provide for universal screening of pupils in preschool programs, kindergarten programs and grades one through three that is designed to identify pupils who have reading deficiencies pursuant to section 15-704.

4. Develop intervention and remedial strategies pursuant to paragraph 2, subdivision (c) of this subsection for pupils in kindergarten programs and grades one through three who are identified as having reading deficiencies pursuant to section 15-704.

5. Distribute guidelines for the school districts to follow in prescribing criteria for the promotion of pupils from grade to grade in the common schools. These guidelines shall include recommended procedures for ensuring that the cultural background of a pupil is taken into consideration when criteria for promotion are being applied.

B. Beginning in the 2010-2011 school year, school districts and charter schools shall provide annual written notification to parents of pupils in kindergarten programs and first, second and third grades that a pupil who obtains a score on the reading portion of the Arizona instrument to measure standards test, or a successor test, that demonstrates the pupil is reading far below the third grade level will not be promoted from the third grade. If the school has determined that the pupil is substantially deficient in reading before the end of grade three, the school district or charter school shall provide to the parent of that pupil a separate written notification of the reading deficiency that includes

the following information:
1. A description of the current reading services provided to the pupil.
2. A description of the available supplemental instructional services and supporting programs that are designed to remediate reading deficiencies. Each school district or charter school shall offer at least one intervention strategy and at least one remedial strategy for pupils with reading deficiencies. The notification shall list the intervention and remedial strategies offered and shall instruct the parent or guardian to choose the strategy that will be implemented for that child.
3. Parental strategies to assist the pupil to attain reading proficiency.
4. A statement that the pupil will not be promoted from the third grade if the pupil obtains a score on the reading portion of the Arizona instrument to measure standards test, or a successor test, that demonstrates the pupil is reading far below the third grade level, unless the pupil is exempt from mandatory retention in grade three or the pupil qualifies for an exemption pursuant to subsection A of this section.
5. A description of the school district or charter school policies on midyear promotion to a higher grade.
C. Pursuant to the guidelines that the state board of education distributes, the governing board of a school district shall:
1. Prescribe curricula that include the academic standards in the required subject areas pursuant to subsection A, paragraph 1 of this section.
2. Prescribe criteria for the promotion of pupils from grade to grade in the common schools in the school district. These criteria shall include accomplishment of the academic standards in at least reading, writing, mathematics, science and social studies, as determined by district assessment. Other criteria may include additional measures of academic achievement and attendance.
D. The governing board may prescribe the course of study and competency requirements for promotion that are in addition to or higher than the course of study and competency requirements the state board prescribes.
E. A teacher shall determine whether to promote or retain a pupil in grade in a common school as provided in section 15-521, paragraph 3 on the basis of the prescribed criteria. The governing board, if it reviews the decision of a teacher to promote or retain a pupil in grade in a common school as provided in section 15-342, paragraph 11, shall base its decision on the prescribed criteria.
F. A governing board may provide and issue certificates of promotion to pupils whom it promotes from the eighth grade of a common school. Such certificates shall be signed by the principal or superintendent of schools. Where there is no principal or superintendent of schools, the certificates shall be signed by the teacher of an eighth grade. The certificates shall admit the holders to any high school in the state.
G. A governing board may request certificates of promotion from the county school superintendent. If a governing board requests these certificates from the county school superintendent, the county school superintendent shall furnish and sign the certificates.
H. Within any high school district or union high school district, the superintendent of the high school district shall supervise the work of the eighth grade of all schools employing no superintendent or principal.
I. A school district shall not deny a pupil who is between the ages of sixteen and twenty-one years admission to a high school because the pupil does not hold an eighth grade certificate. Governing boards shall establish procedures for determining the admissibility of pupils who are under sixteen years of age and who do not hold eighth grade certificates.
J. The state board of education shall adopt rules to allow common school pupils who can demonstrate competency in a particular academic course or subject to obtain academic credit for the course or subject without enrolling in the course or subject.

ADDENDUM

9

15-701.01. High school; graduation; requirements; community college or university courses; transfer from private schools; academic credit

A. The state board of education shall:

1. Prescribe a minimum course of study, as defined in section 15-101 and incorporating the academic standards adopted by the state board of education, for the graduation of pupils from high school.

2. Prescribe competency requirements for the graduation of pupils from high school incorporating the academic standards in at least the areas of reading, writing, mathematics, science and social studies. The academic standards prescribed by the state board of education in social studies shall include personal finance. This paragraph does not allow the state board of education to establish a required separate personal finance course for the purpose of the graduation of pupils from high school.

3. Develop and adopt competency tests pursuant to section 15-741. English language learners who are subject to article 3.1 of this chapter are subject to the assessments prescribed in section 15-741.

B. The governing board of a school district shall:

1. Prescribe curricula that include the academic standards in the required subject areas pursuant to subsection A, paragraph 1 of this section.

2. Prescribe criteria for the graduation of pupils from the high schools in the school district. These criteria shall include accomplishment of the academic standards in at least reading, writing, mathematics, science and social studies, as determined by district assessment. Other criteria may include additional measures of academic achievement and attendance.

C. The governing board may prescribe the course of study and competency requirements for the graduation of pupils from high school that are in addition to or higher than the course of study and competency requirements that the state board prescribes.

D. The governing board may prescribe competency requirements for the passage of pupils in courses that are required for graduation from high school.

E. A teacher shall determine whether to pass or fail a pupil in a course in high school as provided in section 15-521, paragraph 4 on the basis of the competency requirements, if any have been prescribed. The governing board, if it reviews the decision of a teacher to pass or fail a pupil in a course in high school as provided in section 15-342, paragraph 11, shall base its decision on the competency requirements, if any have been prescribed.

F. Graduation requirements established by the governing board may be met by a pupil who passes courses in the required or elective subjects at a community college or university, if the course is at a higher level than the course taught in the high school attended by the pupil or, if the course is not taught in the high school, the level of the course is equal to or higher than the level of a high school course. The governing board shall determine if the subject matter of the community college or university course is appropriate to the specific requirement the pupil intends it to fulfill and if the level of the community college or university course is less than, equal to or higher than a high school course, and the governing board shall award one-half of a carnegie unit for each three semester hours of credit the pupil earns in an appropriate community college or university course. If a pupil is not satisfied with the decision of the governing board regarding the amount of credit granted or the subjects for which credit is granted, the pupil may request that the state board of education review the decision of the governing board, and the state board shall make the final determination of the amount of credit to be given the pupil and for which subjects. The governing board shall not limit the number of credits that is required for high school graduation and that may be met by taking community college or university courses. For the purposes of this subsection:

1. "Community college" means an educational institution that is operated by a community college district as defined in section 15-1401 or a postsecondary educational institution under the jurisdiction of an Indian tribe recognized by the United States department of the interior.

2. "University" means a university under the jurisdiction of the Arizona board of regents.

G. A pupil who transfers from a private school shall be provided with a list that indicates those credits that have been accepted and denied by the school district. A pupil may request to take an examination in each particular course in which credit has been denied.

The school district shall accept the credit for each particular course in which the pupil takes an examination and receives a passing score on a test designed and evaluated by a teacher in the school district who teaches the subject matter on which the examination is based. In addition to the above requirements, the governing board of a school district may prescribe requirements for the acceptance of the credits of pupils who transfer from a private school.

H. If a pupil who was previously enrolled in a charter school or school district enrolls in a school district in this state, the school district shall accept credits earned by the pupil in courses or instructional programs at the charter school or school district. The governing board of a school district may adopt a policy concerning the application of transfer credits for the purpose of determining whether a credit earned by a pupil who was previously enrolled in a school district or charter school will be assigned as an elective or core credit.

I. A pupil who transfers from a charter school or school district shall be provided with a list that indicates which credits have been accepted as an elective credit and which credits have been accepted as a core credit by the school district. Within ten school days after receiving the list, a pupil may request to take an examination in each particular course in which core credit has been denied. The school district shall accept the credit as a core credit for each particular course in which the pupil takes an examination and receives a passing score on a test designed and evaluated by a teacher in the school district who teaches the subject matter on which the examination is based.

J. The state board of education shall adopt rules to allow high school pupils who can demonstrate competency in a particular academic course or subject to obtain academic credit for the course or subject without enrolling in the course or subject.

K. Pupils who earn a Grand Canyon diploma pursuant to article 6 of this chapter are exempt from the graduation requirements prescribed in this section. Pupils who earn a Grand Canyon diploma are entitled to all the rights and privileges of persons who graduate with a high school diploma issued pursuant to this section, including access to postsecondary scholarships and other forms of student financial aid and access to all forms of postsecondary education. Notwithstanding any other law, a pupil who is eligible for a Grand Canyon diploma may elect to remain in high school through grade twelve and shall not be prevented from enrolling at a high school after the pupil becomes eligible for a Grand Canyon diploma. A pupil who is eligible for a Grand Canyon diploma and who elects not to pursue one of the options prescribed in section 15-792.03 may only be readmitted to that high school or another high school in this state pursuant to policies adopted by the school district of readmission.

ADDENDUM

10

15-807. Absence from school; notification of parent or person having custody of pupil; immunity

A. If a pupil in a kindergarten program or grades one through eight is absent from school without excuse as provided in this article or without notice to the school in which the pupil is enrolled of authorization of the absence by the parent or other person who has custody of the pupil, the school in which the pupil is enrolled shall make a reasonable effort to promptly telephone and notify the parent or other person who has custody of the pupil of the pupil's absence from school:

1. Within two hours after the first class in which the pupil is absent for a pupil in kindergarten or grades one through six.
2. Within two hours after the first class in which the pupil is absent for a pupil in grade seven or eight if the first class in which the pupil is absent is the pupil's first class of the school day.
3. Within five hours after the first class in which the pupil is absent for a pupil in grade seven or eight if the first class in which the pupil is absent is after the pupil's first class of the school day.

B. On or before the enrollment of a pupil in a kindergarten program or grades one through eight, the school district shall notify parents or other persons who have custody of a pupil of their responsibility to authorize any absence of the pupil from school and to notify the school in which the pupil is enrolled in advance or at the time of any absence and that the school district requires that at least one telephone number, if available, be given for purposes of this section. The school district shall require that the telephone number, if available, be given at the time of enrollment of the pupil in school and that the school of enrollment be promptly notified of any change in the telephone number.

C. A school district, governing board members of a school district and employees or agents of a school district are not liable for failure to notify the parent or other person who has custody of a pupil of the pupil's absence from school as provided in this section.

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kirstin Largent