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Gonzalez v. Douglas Trial Transcript of Proceedings, Day 10

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

NOAH GONZÁLEZ; JESÚS GONZÁLEZ, his father and next friend, et al., Plaintiffs, vs. DIANE DOUGLAS, Superintendent of Public Instruction, in her Official Capacity; et al., Defendants.	Case No. 4:10-cv-00623-AWT Tucson, Arizona July 21, 2017

Before the Honorable A. Wallace Tashima

Transcript of Proceedings

Bench Trial Day 10

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P R O C E E D I N G S

(Proceedings commenced at 8:32 a.m., as follows:)

THE COURT: Good morning. Let's all be seated.

PARTIES IN UNISON: Good morning.

THE COURT: All right. Now my recollection is yesterday defense finished putting on its case, right?

MS. COOPER: That's correct, Your Honor.

THE COURT: So, I didn't ask you, but you now rest?

MS. COOPER: We do. We have a few exhibit clean-up matters that we'd like to address with you at the appropriate time.

THE COURT: Well, let's do it now.

MS. COOPER: Mr. Ellman will handle that.

MR. ELLMAN: Your Honor, the defense would like to move five exhibits into evidence. We've discussed this with plaintiffs' counsel, and they are not going to object. The exhibits are number 500, number 536, number 605, number 606, and number 607.

MS. BARRINGTON: No objection, Your Honor.

THE COURT: You agree, no objection? All right. Then, without objection, exhibits just enumerated by Mr. Ellman are now admitted.

MR. ELLMAN: Thank you, Your Honor.

THE COURT: Anything in a preliminary way?

Yes, ma'am.

MS. BARRINGTON: Your Honor, we'd also like to move in one exhibit without objection from the state, and that would be Plaintiffs' 232.

THE COURT: 232.

MS. BARRINGTON: Yes.

THE COURT: No objection?

MR. ELLMAN: No objection.

THE COURT: All right. Exhibit 232 is also admitted.

So then we're on the rebuttal case. Has defense decided how many witnesses they're going to call? I mean plaintiffs. Excuse me.

MR. REISS: Yes, we have, Your Honor. And I think you'll be pleased with the number. It's zero.

THE COURT: Is that right?

MR. REISS: Yes, Your Honor. We don't feel the need for a rebuttal case.

THE COURT: Well, you see, he does with a show of confidence. All right. I am pleased, though.

Then are counsel ready to go into closing argument?

MR. REISS: Yes, Your Honor.

THE COURT: So the record, with respect to the reception of evidence, is closed now. Right? I assume the parties have had all the opportunity they need to offer exhibits they believe they need and haven't yet offered, and, as Mr. Reiss said, there is no rebuttal, so then we will go to

closing argument.

Now, you're going to give the entire closing argument?

MR. REISS: I am, Your Honor.

THE COURT: Including your -- you might have rebuttal?

MR. REISS: Yes, Your Honor.

THE COURT: So it's up to you now to save your time. Right? I'm giving each side an hour.

MR. REISS: Yes, Your Honor. And I would -- I think, frankly, I think the Court realizes we've been very efficient, and we've gotten through the trial in 10 days.

THE COURT: I agree with that, yes.

MR. REISS: I will be candid, I think, Your Honor, I can get through this closing in an about hour. There might be a couple minutes longer. I would like to have at least ten minutes for rebuttal. But we think, given the length of time this case has gone on, six years, and given the trial, we do think it would help the Court to have a rather fulsome closing.

Again, I think I can get through this in an hour. It's not going to be that much longer, but I can't tell the Court that it's going to be an hour and not an hour and two minutes. I'm just being open. And maybe less.

THE COURT: That's fine.

MR. REISS: Thank you, Your Honor.

THE COURT: Of course, you know, you're lucky you're in what we call the lower courts, because, as you know, in some

courts, you know, when it goes on, it's like the gallows coming down. Right?

MR. REISS: I've been stopped mid-sentence in the Supreme Court, and I've had the red light go on in the courts of appeals, and I know exactly what that's like, Your Honor.

THE COURT: So then, Mr. Reiss, you may proceed.

MR. REISS: Thank you, Your Honor. Closing.

So, Your Honor, we've got a dec that I think will help the Court follow along with our closing, and obviously we're going to talk about what's happened at trial and intersperse that with what we view, and what the Ninth Circuit has decided, is the legal framework for analyzing the two claims in this case. And the two claims in this case are an equal protection violation under the Fourteenth Amendment and a viewpoint discrimination claim under the First Amendment.

Now, let's talk first about the equal protection violation.

You know, Your Honor, we've heard a lot of testimony in the courtroom about whether Mr. Horne was a racist, whether Mr. Huppenthal was a racist. We'll get to that. But that's not the issue. Racial discrimination doesn't require hatred, it doesn't require racial hatred.

Racial discrimination -- and it's clear from the case law -- it can be paternalistic, it can be willful blindness, it can be ignorance, it can be indifference, it can be any of those things. And more importantly, for purposes of this case,

as the Ninth Circuit has held in this case, the way --

THE COURT: Just a minute. I hate to interrupt closing argument --

MR. REISS: Sure.

THE COURT: But I want you to keep this in mind and address it if you think you need to. My understanding is what the Ninth Circuit said was there has to be proof of racial animus. Now, to me, animus connotes a state of mind.

MR. REISS: Yes.

THE COURT: And all these, you know, different statuses that you've just gone through don't necessarily depend on a state of mind. So I'm not sure quite, you know, how to reconcile those, but I just want you to know I have a little problem there.

MR. REISS: Thank you, Your Honor. But I do think that someone who is, for example, in the sexual discrimination, paternalistic views are the kind that prohibit a mental state, that would give rise to a violation.

And you infer -- look, this isn't -- you know, we're long past the time in this country when a public official is going to come into court or even outside of court and admit that he is a racist or say things that are blatantly racist. Frankly, shockingly, we actually have that in this case with Mr. Huppenthal, and I'll get to that.

But the way you now decide on whether officials have acted

within proper animus is exactly the framework that the Ninth Circuit set out, and that's the Arlington Heights framework; and that leads you to infer exactly the state of mind Your Honor is talking about.

And what does Arlington Heights say? Arlington Heights looks at five factors. The impact of the official action, whether it bears more heavily on one race than another. The historical background of the decision. The specific sequence of events leading to the challenged decision. The defendants' departures from normal procedures or substantive conclusions. And finally, the relevant legislative and administrative history.

And the legal framework, Your Honor, is if the Arlington Heights factors prove that discrimination against Mexican-Americans was the sole motive for defendants' actions, then it's strict scrutiny. And, you know, strict in theory, fatal in fact.

If the Arlington Heights factors prove discrimination against Mexican-Americans was one of the motives for defendants' actions, then defendants must prove, defendants must prove, that they had other actual, actual, non-racial motives that were not pretextual.

Let's now go to the Arlington Heights factor, the first factor, which was the discriminatory impact of A.R.S. Section 15-112 and its enforcement on Mexican-Americans.

The Ninth Circuit, by the way, has already found disproportionate impact on Mexican-Americans. And there's the quote from the actual case in the Ninth Circuit. And that's because the very purpose of the Mexican-American Studies Program, it existed for over a decade prior to its elimination. And that was, in fact, because it was part of the desegregation order.

And its purpose -- and we saw that purpose was really accomplished -- its purpose was to close the achievement gap and change the trajectory of traditionally failing students.

And you see Curtis Acosta's testimony -- I won't read it all -- was that it accomplished exactly that purpose. Mr. Acosta, a teacher in the program, took the stand, I will submit to the Court was highly, highly credible, and he said that's exactly, exactly, what the MAS program accomplished.

And there was a method to the MAS program. This wasn't some random hodgepodge of materials thrown together as defendants would have you believe. That's just nonsense.

The method of the program was the students could see themselves in the curriculum, it was research-based, and you heard from the expert with the most knowledge of Mexican-American Studies Program in the United States. You heard from Angela Valenzuela that these courses, they've been studying how to do these courses and how to tweak these courses and how to make them better for many years. And there are a

lot of people involved in that, and it was her major breakthrough theory on Subtractive Schooling that really led to the implementation of more and more effective Mexican-American Studies classes.

And, again, you have is testimony from Mr. Arce, you have testimony from Mr. Acosta, and, again, Your Honor, it's a bench trial, you're a finder of credibility. You saw Mr. Arce and you saw Mr. Acosta, and I submit to you they are not some wild-eyed indoctrinating radicals. They are highly thoughtful, highly dedicated educators who actually accomplished the mission they sent out to accomplish.

What's the result of the MAS program?

And Your Honor, in a sense, this is why we're here. This is why we're here.

Dr. Cabrera's empirical analysis. And I submit to Your Honor, Dr. Cabrera, you saw him on the stand, his analysis was unimpeachable. Based on four-year regression models, students who took MAS classes were more likely to graduate and more likely to pass standardized AIMS tests, and, importantly, the trend increased the more MAS classes students took. That finding published in a peer-reviewed, the most prestigious peer-reviewed journal in education in the United States.

And I will tell Your Honor, somewhat surprisingly, Mr. -- Dr. Cabrera's analysis was confirmed and even supported by their own expert, Dr. Haladyna, whose testimony here, totally

honest, very credible man, says: If Dr. Cabrera's claims are true, then we have an incredibly important intervention in education that will help millions of students, including Mexican-American and other ethnic/racial groups.

And it is true. And it was confirmed by another study by the head of the Stanford education school looking at a similar program in the San Francisco school district. We are at the cusp of something that can affect major extraordinary educational change in this country. And it's shut down -- and we're going to get there -- because some people don't like snippets in books, they don't like snippets of pictures, and for those reasons they're willing to deny an educational program with extraordinary results.

Look at Cambium's audit. What does Cambium say about it? TUSD's MAS program claims not only to improve student achievement, but to surpass and outperform similarly situated peers. The findings of the auditors agree student achievement has occurred and is closing the achievement gap based on the reanalysis, their own analysis, and findings of TUSD's Department of Accountability and Research. That's in the Cambium report.

Now, we have firsthand observations -- I won't belabor the point -- with Mr. Acosta, how effective the MAS program was.

Defendants tried to shift the program. The one thing they really don't want to talk about is how effective this program

was. They'd rather not look at that. They talk about evil ideas, toxic -- I don't know what was toxic -- training revolutionaries, un-American, Marxism. They even say some of the books were written by murderers. That's their defense.

Let's look at the second Arlington Heights factor. It was enacted and enforced during an anti-Mexican-American climate. Now, you have the background, and I have some of the bullet points here. Mexican-Americans have obviously experienced discrimination in education throughout the 20th century.

In the six years preceding HB2281, which obviously became 15-112, there were many anti-Mexican-American legislative measures, including Proposition 100, which denied bail to Mexican-American immigrants; Proposition 102 denying immigrants punitive damages; and, most notably, 1070, a notorious, notorious law, many portions of which were subsequently declared unconstitutional. Mr. Huppenthal was a co-sponsor of that law.

Now, again, I won't belabor all of these points, Your Honor, but you had on the stand the foremost expert on Mexican-American history in the United States, Dr. Stephen Pitti, a full tenured professor at Yale. And I will submit to Your Honor, Your Honor saw him, I don't have to -- this man was the most extraordinarily knowledgeable person about virtually everything relating to Mexican-American history in this country. And he reached a number of conclusions. I have them

written down on this page, I don't want to belabor them by reading them all, but his conclusions were overwhelming, overwhelmingly support that second Arlington Heights factor; including his analysis of code words, including his analysis of the supposed reasons justifying the enactment.

If you look at the third bullet: In addition, it's my opinion that many of the reasons offered to justify enactment and enforcement of HB2281 were not legitimate and instead were based on mischaracterization of Mexican-American Studies -- that's for sure -- Mexican-American Studies program educators -- that's for sure -- and students, and Mexican-American Studies curricula -- that's for sure -- and pedagogical approaches.

And he also says, if I can point you down to the last bullet: I also argue that this was part of the history of anti-immigrant, anti-Mexican-American politics in Arizona that was surging around 2010, exactly the year 2281 was passed. In fact, 2281 was passed in April of 2010, the exact month that 1070 was passed.

And there was a reason for this surge in anti-Mexican-American feeling, and that's because there was a lot more pressure at the borders in the Tucson area, and anti-Mexican-American, anti-Mexican immigrant bias just morphs into anti-Mexican-American bias. And the notion that there is some bright divide between illegal anti-Mexican-American

immigrants on the one hand and Mexican-Americans who are here on the other is just fantasy.

Let's look at the third Arlington Heights factor: Specific sequence of events that shows defendants discriminatorily enacted and enforced A.R.S. 15-112.

This, Your Honor, is just an overview of the timeline. I think Your Honor is familiar with it. But this is a concerted campaign, a concerted campaign, to eliminate this program. And it starts on April 3rd, with Dolores Huerta's speech at Tucson High; and then it goes with Ms. Dugan's response; June 11th, 2007, Horne's open letter; 2008, when the predecessor to 15-112, 1108, is introduced, supported by Horne. He also introduces 1069 in 2009. In February 2010, Horne drafts -- he drafts HB2281 to get rid of the MAS program.

By the way, in 2010, Horne, then superintendent, is running for Attorney General, and we're going to talk a little bit more about how he ran for Attorney General. December 30th, Horne issues his premature, undoubtedly premature -- and we'll talk a little bit more about that -- finding. And then he boasts, boasts, about eliminating the MAS program after he's elected Attorney General.

Also, if you look at the Huppenthal actions, April 2010, he's also involved in the passage of 15-112. He amends 2281 to delay the effective date until January 1st and to give himself the enforcement power. January 1st, 2011, 15-112 goes into

effect. January 4th -- we'll get to this -- Huppenthal is sworn in and he issues his statement. February 2011 to May 2011 is the Cambium audit, and we'll talk a little bit more about that. June 15th, 2011, Huppenthal rejects the Cambium audit's findings, issues a finding that MAS program violated, A.R.S. 15-112. January 13, 2012, after the ALJ decision, the textbooks -- by the way, January 6th, following the ALJ decision, Huppenthal issues his finding that the MAS program is in violation of the statute, and less than a week later the textbooks are physically removed from the MAS classrooms.

Then we have, of course, blogging activity admitted to by Mr. Huppenthal, blogging activity which took place the entire time that he is acting to eliminate the MAS program.

And, finally, literally the day before he leaves office, literally the day before he leaves office, he pulls a Horne, and finds that the next iteration of the Mexican-American Studies Program -- actually it's not an iteration. It's a completely watered-down version, culturally relevant curriculum. He finds that that's in violation of the statute.

That's an overview of the timeline.

Let's look at the fourth Arlington Heights factor: Defendants' departures from procedural and substantive conclusions. Your Honor, there's a lot of things that fall into this, and we've tried to edit them to be efficient.

Let's start with Huppenthal's classroom visit. By the way,

this is the only time anyone from the Department of Education ever visits an MAS classroom before the program is eliminated. This is it, this singular classroom visit by Huppenthal. That's it. It's done while he's senator, not even while he's a superintendent. Okay? It was before 15-112 was in effect. So it obviously couldn't form the basis for a violation, and, even more importantly, wasn't even a regular class.

In fact, he wanted to watch Mr. Acosta teach a class, and the class was taking place during the time the ACT test was being administered, so it wasn't a normal school day. Mr. Acosta said, you know, it would be better if you came back and watched a regular class, but Mr. Huppenthal came and watched that class. And, Your Honor, I never played the entire video of the class, which we have. That class had an enormous number of positive things about it. In fact, Mr. Huppenthal even admitted that. He was impressed with the students. He was very impressed with Mr. Acosta.

But what did he take away from that class? This is what he took away. He was offended by the remarks, not even of Mr. Acosta, by another MAS teacher, discussion about Ben Franklin. He could not believe that anyone would have anything but a pantheistic view of Benjamin Franklin. Despite the fact that Ben Franklin was a slave owner and the despite the fact that Ben Franklin's solution to the racial problem at the time in the United States was to ship all blacks back to Africa.

Some people might actually consider that a somewhat offensive view.

He was also offended by the fact that there was a poster of Che Guevara in the classroom, and Your Honor has heard this repeatedly. He never figured out, never thought to find out why the poster was up. It was put there because a student wanted to put it up. And this is just an insight into Mr. Huppenthal's frame of mind, which was unyielding and unconvinceable to anyone else's point of view.

Question: But you understand, do you not, that large swaths of the world, South America, view Che Guevara as a hero? You're aware of that, right?

Answer: I am.

Okay.

And I think it's toxic.

He doesn't care what the rest of the world thinks. He doesn't think that large number of peoples could have a different view. He thought it was toxic. And that drove him, drove him obsessively, to eliminate this program.

What was he offended by? I asked him. This is the one class he visited.

Do you think that Mexican-American culture didn't value freedom and success in the same way as the culture that you were advocating?

Answer: I don't believe that classroom valued it at all.

And there are further points.

But when you talked about Mr. Acosta's class in the Senate, what you brought up was the Che Guevara poster on the wall and a comment made by another person, not even Mr. Acosta, about Ben Franklin, right? Those were the only two things you focused on, right?

Answer: Yes, the comment by Mr. Romero, who was heavily involved in the MAS classes and --

And the senators never heard about all those really positive things that you believe were present in Mr. Acosta's class, right?

Answer: Yes.

Horne's political campaign. While HB22 is in the legislature, he admits: I fought hard to get the legislature to pass a law so that I could put a stop to the Raza studies program.

And he was happy to campaign on it and happy to tout that achievement, his own testimony.

Huppenthal campaigned on a platform to stop La Raza, right?

And in your campaign for superintendent of education, you campaigned on a platform to stop La Raza, right?

The answer, yes.

That was an important part of your campaign, right?

Answer: Yes.

And by "La Raza," what did you mean?

La Raza, the specific meaning of the words means "the race." But its meaning in the context of a Republican primary campaign, it became shorthand, code word, for stop the slandering of the Founding Fathers, stop the unbalanced examination of the Founding Fathers, stop indoctrination of students into a Marxist oppressed/oppressor framework.

Those are exactly the kinds of code words that Dr. Pitti talked about.

Horne's December 30, 2010 finding. You've got to really, Your Honor, shake your head about this one.

He makes a finding -- and I know Your Honor is very familiar with this.

On December 30th, 2010, the law doesn't go into effect until January 1st, 2011. Why is he doing that? It's because he's worried he's not going to be the superintendent of education any more and he wants to be the person to eliminate the program. So he makes the finding, completely and utterly unlawful, that the program is violative on December 30. Not only is the law -- the law is not in effect. It can't even reach behavior until the behavior starts on January 1st.

And this goes to credibility as well, Your Honor. Your Honor saw Mr. Horne up there. Your Honor will make your own judgments. Mr. Horne, who was proud to be a lawyer for 46 years, the former Attorney General of this state, and he wouldn't admit that prior behavior, behavior before a law goes

into effect, can't violate the law. Every first-year law student knows that. Every person who watches a law enforcement show on TV knows that.

Question: Isn't it fair to say that the statute itself couldn't be applied to behavior that occurred before it went into effect? You're a lawyer. You know that, don't you?

Well, in my view, that it was -- that it was a continuing violation and that it needed to stop.

Mr. Quinn: Could you read back the question.

Reads back the question.

The Witness: I stand by that answer.

Question: Let me ask you one more time. Yes or no, it's fair to say, is it not, that the statute could not be enforced based on things that happened before its enactment?

Mr. Ellman objects, asked and answered.

And Your Honor says: Well, asked, but maybe not answer he expected, so I'll give the witness one more opportunity to answer if he wishes to take that opportunity.

Because Your Honor knew that answer was utter nonsense.

Witness: I stand by my answer. It was a continuing violation. It wasn't a changing situation.

This from the former Attorney General of Arizona.

And then Horne's finding. And this, Your Honor, there are so many windows into their mind in this case, it's actually astounding.

His finding of violation -- and he admits this on the stand. He basically -- he says it himself. "Oh, I plagiarized." "I plagiarized myself."

What does that mean? He plagiarized his June 2007 open letter to the Tucson community. He writes this open letter in 2007 obsessed with trying to get the MAS program eliminated, and he copies parts of that very letter in his 2010 finding. Law's still not in effect. But that shows you what is driving him. It is clear demonstrative evidence of his bias and his drive to eliminate this program.

He focuses on rudeness, the rudeness of the silent, silent, protestors. Wouldn't admit it's part of their First Amendment right.

But here are the problems, even more deep problems, with what he did. He assumed, without any basis, that the protestors were MAS students. In fact, there were Caucasian protestors, there were black protestors. And you heard from Mr. Acosta and Mr. Arce, the MAS teachers had nothing to do with the protest. He just leaped to that conclusion.

And he said: Well, they didn't learn rudeness at home. They must have learned it from the MAS teachers.

Really? That's not a race-based assumption on his part?

So let's just summarize the problems with Horne's -- beyond the fact it was totally unlawful, his December 30th, 2010 finding. Most of the evidence was over three years old, he

admits that. No visits by him or anyone to any MAS classroom. And you know why? He said, Oh, well, what good would visits do? They would just make pretend they weren't doing anything I didn't like. Doesn't make any sense to visit the classroom. I knew what they were doing. I knew what they were doing. Without ever visiting a classroom. I knew, based on stuff I read, based on these passages I don't like. That's how he knew. He knew nothing.

And here is what's even worse. Termination was the only sanction he considered.

Question: In the finding itself, you concluded that the program had to be eliminated. Can't a program simply come into compliance with A.R.S. 15-112?

Well, John Huppenthal thought so. I didn't think so because I -- it was my view, that based on a lot of information I had about what the teachers were doing in the classroom, they would agree to whatever curriculum you said they should agree to, and they would do what they wanted in the classroom and it was beyond reform. That was my view. I don't care what anyone said, I knew that the whole program had to be eliminated, full stop, end of question.

He knew. So much he didn't know.

By the way, yeah, I'm being pretty hard on Mr. Horne, because he deserves it. But I'm not the only one. Mr. Huppenthal didn't trust Mr. Horne either.

Question: What was Mr. Huppenthal's opinion of Mr. Horne, do you know?

Answer: He was very much a politician and not as much a public servant.

That's from Ms. Morley. Okay? And there's other quotes along this same line.

And, again, Ms. Morley.

So he, Mr. Huppenthal, was concerned that Mr. Horne had not conducted a fair and unbiased investigation of the MAS program at this time, correct?

Answer: Yes.

So, by the way, there was no -- and I don't mean to beat a dead horse, but there was no evidence, couldn't be evidence of a violation.

Now we're moving into January 4th, 2011. And just to refresh Your Honor's situation on the timeline, Horne is now Attorney General. I think he's sworn in on January 3rd, and Huppenthal is now superintendent. He believes he may have been sworn in on January 3rd, which is a Monday and a public holiday, but it's possible. But at 12:47 a.m., a.m., it's really the evening of January 3rd, he announces that he accepts Horne's finding.

And I asked Mr. Hibbs, who testified here yesterday:

Right. So at 12:47 a.m. on Tuesday, January 4th, there had been absolutely no activity in the Tucson Unified School

District that could have come under 15-112, right?

Answer: I would agree with that.

And even more importantly, Mr. Huppenthal.

I asked Mr. Huppenthal: And you never formally withdrew your January 4th, 2011 statement, right?

Answer: No.

This is smoking gun stuff, Your Honor. Let's look at the timeline of the ADE's actions.

So on January 4th, you have Huppenthal's adoption of Horne's statements. And it gets more extraordinary. Huppenthal issues the statement adopting Horne's finding. He never read Horne's statement.

Question: Your statement in the press release that you had read Superintendent Horne's finding of violation by TUSD was false because you had not read that finding, right?

Answer. This is Huppenthal: I think I was orally briefed on it. But I think you're correct, that I did not -- to my recollection, I don't recall reading it, but I may have, but I don't recall reading it.

Do you recall during your deposition you telling me when I showed you this document that it was the first time you saw it?

Answer: Yes.

March. Now we get to Cambium. We get to Cambium. Okay. And Cambium, there's an RFQ, an RFP for an independent, unbiased, outside auditor of the MAS program. And Cambium

responds. And they receive Cambium's audit plan and they review it. Right?

And this is from Ms. Hrabluk, who is the point person, she's the point person at ADE with Cambium.

Question: And then you receive Cambium's audit plan and review it and you're fine with the audit plan, right?

Answer: Yes.

You never criticize it or tell them it's insufficient, you say it's fine, right?

Answer: Right, because their plan met the scope of work.

And April, Ms. Hrabluk and the ADE is supervising regularly the Cambium audit. And you can see that again, Ms. Hrabluk admits that. At no point during this process is the Arizona Department of Education conducting its own audit. No, instead, they're monitoring the Cambium audit.

May 2nd. Cambium sends a draft report, a draft report, to the Arizona Department of Education. And this, Your Honor, this is the smoking gun. Okay? And this comes from the mouths of the very people the State has put up as its main defense witnesses.

I asked Ms. Hrabluk -- no, it's not even me. I'm sorry. The State asks Ms. Hrabluk.

Question: At the conclusion of your review of the Cambium audit -- this is the draft Cambium audit on May 2nd. At the conclusion of your review of the Cambium audit, did you feel

that the department had enough information to determine whether the MAS classes violated A.R.S. 15-112?

Answer: No, we concluded we did not have enough information. Ms. Hrabluk says that.

Then I ask her: So, okay, on May 9th, before you even receive the final Cambium report, Mr. Hibbs has already made a judgment that Cambium, quote, missed the boat. Right?

Answer: Well, those are his words, yes. Those are Elliott's words.

So then we have Mr. Hibbs, that's Elliott, and here's what Mr. Hibbs testifies to.

You were asked about this on your direct examination. This is from you to Ms. Hrabluk, Monday, May 9th: Kathy, please forward the link at the bottom to Luanne and company to get a better understanding of how they missed the boat. Right?

Answer: Yes.

And the boat they missed is the SS Violation, right? That is that there was a violation of 15-112.

Answer: I am going to say yes because there was material in there based again on the discussions with Kathy and John that -- by the way that's John Stollar, a witness they never called, although they said they would -- that on their own they would have said they should have reached a conclusion that there was a violation.

And just to be absolutely clear, Mr. Hibbs' testimony:

Now, at that point in time, May 9th, 2011, had the team reached a final decision, final decision, about whether TUSD was in violation of the statute?

Answer: Well, yeah, I would say that the team had, based on the information provided, reached a conclusion that there was a violation of the statute.

This is before they even received the final Cambium report, and it is indisputably before they have taken a single action to conduct their own investigation, which was supposedly necessarily.

And then I ask Ms. Hrabluk: So on May 12th, before receiving the final Cambium report, you and Mr. Hibbs and Mr. Stollar had concluded -- it was called a conclusion -- that the Tucson public schools' MASD program was in violation of 15-112. Right?

Answer: Even based on the draft report that we had read, yes.

And you had not conducted any of your own investigation at that point, right?

Answer: That's correct.

Why is this important? I take you back to the State's opening. The state's opening, where they said he -- meaning Mr. Huppenthal. He did things he didn't have to do to make sure that the Mexican-American Studies Program had an opportunity to demonstrate that it didn't violate the statute.

And there was, as I said, a unanimous conclusion that it did, a unanimous conclusion that the audit was deficient and that they needed to investigate further.

That's a complete sham. It's a complete pretext. The State's representation is utterly disproved at trial. They didn't need to investigate further, because from the mouth of Ms. Hrabluk and from the mouth of Mr. Hibbs, the two people the state has put up here to defend this decision, they both said we had made that decision on May 9th, before we even got the final version of the Cambium report, and before we had taken any steps, not one, to conduct our own investigation.

They get the Cambium report on May 15th, and there are a number of announcements about the rejection of the Cambium report and the finding of violation.

And then, of course, you know, again, just to, you know, I'm not making this up, there's obviously a huge amount of documentary support. This is the initial announcement of finding of violation, on January 4th, 12:47 a.m.: I support former superintendent Tom Horne's decision that a violation of one or more provisions of A.R.S. 15-112 has occurred.

And just to remind the Court, the Cambium report is huge. It's 137-odd pages. It's not some two-page, "oh, no violations, take our word for it, we'll go home." The Cambium report was extensive. Extensive. 130 some-odd pages with appendices.

And some reason, just to remind the Court, because if you listen to Mr. Huppenthal and you read all his public announcements, you would never know what the Cambium report found because they never say what it found, because they really don't want anyone to know that this independent, well-documented report issued a conclusion completely contrary to what Mr. Huppenthal's conclusion was.

And just to remind the Court very briefly what the Cambium report found, Outcome Measure 3 Summary: During the curriculum audit period, no observable evidence was present to suggest that any classroom, Tucson Unified School District, is in direct violation of the law, A.R.S. 15-112(A). A culture of respect exists, and students receive additional assistance beyond the regular classroom instruction to support their academic learning. If this program were expanded and made available to more students, it is likely there would be upon even more diversity of students within the courses.

This, by the way, is just documentation of the "missed the boat." May 9th.

Again, this was the conclusion that was reached by Mr. Hibbs, Ms. Hrabluk, Mr. Stollar on May 12th. The conclusion, this is Plaintiffs' Exhibit 86. I think Your Honor will recall it.

The conclusion on May 12th: The existing TUSD's MAS program of study must be terminated, suspended, immediately and

will not be permitted to operate. Before receiving even the final draft of the Cambium report.

And these are some of the communications finding that the TUSD MAS program is in violation. These are communication from Mr. Huppenthal finding that the program is in violation.

And, as I said, none of those official communications, not a one -- and I won't belabor the point, and I won't go through them all -- not one mentioned the results of the Cambium audit. An audit for which the state paid $110,000, an audit for which the state paid full price. And never -- you heard that from Mr. Hibbs -- they didn't cut the price, they paid the contract price, because Cambium did what it was supposed to do.

Now, what's their excuse? What's their excuse? They didn't like some of the Cambium report.

By the way, they think the Cambium report somehow missed the boat. But it is undeniable from the words of their own witnesses that the Cambium report was actually just what it was meant to be. It was fair and it was balanced.

And how do we know that? Because the Cambium report cited certain curricular materials that they say, you know, we're not sure about these curricular materials, we never looked at these curricular materials. The Cambium report wasn't a whitewash in favor of the MAS program, that's for sure, despite the concern that they had that maybe Cambium was not conservative enough. You'll recall that e-mail.

The Cambium report was in no way, shape, or form a whitewash or a political document or a bias document. It noted the problems with some materials. That's a badge of candor. That's a badge of bias. They liked those parts of the Cambium report. What they didn't like was the conclusion that they didn't violate 15-112.

And here's their excuse. Well, Cambium had to do it on a short time frame, we really had to get this done. You know, yes, yes, it was three weeks, and we really needed to get this done. Not enough time, really, but we did it.

Where did that come from?

So I asked Mr. Hibbs: Right. And that time frame was when that was imposed by the Department of Education, right?

Answer: Correct.

It could have been changed, right?

Sure, it could have been extended if necessary.

The time frame's a complete red herring. They controlled the time frame. There was no reason why they couldn't have extended this examination or review into the fall. None whatsoever. None.

This is the final decision, post ALJ decision. Mr. Huppenthal adopts the ALJ decision. Again, I'm calling up some significant documents. And his decision to withhold ten percent, ten percent, of the monthly apportionment of state aid that would otherwise be due the district effective from

August 15, 2011. And it's dated January 6th, 2012.

What's wrong with all of this? Well, let's look at it a little more closely. All the ALJ found, all the ALJ found was that at least one or more classes or courses violate A.R.S. 15-112.

Huppenthal withheld the maximum amount. And, Your Honor, the statute does not require that. It says up to 10 percent. He could have withheld 1 percent, 3 percent, 4 percent. No, he withheld 10 percent. And he made it retroactive back to August. So he basically penalized the TUSD for exercising its statutory right to appeal through the ALJ decision.

And this is what's the most disturbing. The entire MAS program -- elementary school, middle school, high school -- gets wiped out. 43 courses, 1300 students. Even though Huppenthal admitted that not every class violated A.R.S. 15-112. What he said was, well, the intent of the program was to radicalize students.

Do I believe that was going on in every class, every day? No.

Even Shakespeare, The Tempest, was banned. And you know that from Curtis Acosta. Once I gave the synopsis to my superiors, they said, the quote was, "You should throw it out." The question: "Throw out The Tempest?" "Yeah."

Now, I am not going to belabor the Huppenthal blog post, Your Honor has seen them enough. But what's most revealing is

not these awful blog posts. And they are awful. And we've just picked out ten, by the way. There are a lot more of them. It's what he said about them in this courtroom that's meaningful, even more meaningful. And what Mr. Horne said about them. It's what Mr. Horne said about them. What did Mr. Horne say about Mr. Huppenthal's blogs?

Question: If you were equated, for example, to be part of the KKK -- and you will recall that "MAS equals KKK" blog -- I assume you would consider that hate speech, wouldn't you?

Answer: Yes.

And I asked Mr. Huppenthal in court, I said: You did apologize for the blogs, right?

Answer: I viewed it more as apologizing for the distraction.

Question: Did you believe there was nothing to apologize for in those blogs?

Answer: Now I believe -- I've had a chance to sort of get rested and look back at it, and I don't -- I don't apologize for any of it.

This courtroom. Those blogs. This is as close as you get to raw, unadulterated animus by a public official.

It's get better. Worse. I don't know if it's better or worse.

Question: And if a program --

Because he doesn't care. He doesn't care if the program is

actually helping Mexican-American students. He sat up there all "I'm dedicated," "I am devoted," "It is my aim in life to help these students." Really?

If a program significantly increases the graduation rates of Mexican-American students in Tucson public high schools, that's a good thing, right?

Answer: Yes.

And that's a successful program if the program both increases the passing rates on AIMS tests of Mexican-American students and increases the graduation rate of Mexican-American students. That's a successful program, right?

Answer: Not necessarily. The philosophical issues can't be set aside just based on academic associations.

Translation: I don't care about the results if I don't like the philosophy.

And here's his philosophy. He said it. It's a memorable piece of testimony in this courtroom.

But, in fact, Mr. Huppenthal, you said your war with MAS was a battle that never ends, right?

Answer: It's eternal. It goes back to the plains of the Serengeti, you know, when we were evolving as a human race, the battle between the forces of collectivism and individualism. It defines us as a human race.

That's his mindset.

Let's look at Arlington Heights Factor 5. Relevant

legislative or administrative history.

I am not going to spend a lot of time on this. The relevant history with Mr. Horne is clear. He wanted A.R.S. 15-112 to eliminate the MAS program. That's absolutely clear.

Mr. Anderson, who was working for him, says: We need to satisfy Tom Horne, who wants to be able to get rid of the La Raza program in Tucson and Representative Crandall who thinks the sentence is too broad.

And there are some more e-mails from Mark Anderson. I am not going to belabor them.

I just read HB2281. This was the Lopez amendment. In my opinion, this guts the bill. The La Raza program will not be shut down after all.

Mark Anderson, he is working for Mr. Horne.

And Mr. Horne: Well, you know, yeah, he was there, but, you know, he wasn't really that close to me, you know.

Really? This is a guy who's working with the legislature, who's working for the superintendent, he knows exactly what Tom Horne wants, and Tom Horne won't be candid enough on the stand to admit it.

Huppenthal's amendments to HB2281 delays the effective date until January 1st. Why? Well, he knows he'll be the superintendent after that date. And he extends the enforcement authority of 15-112 to the superintendent of public instruction. Why? Because that's what he wants to be and

that's what he's campaigning for and that's what he becomes. And he does all this while campaigning on the platform of "stop La Raza."

And here, Your Honor, again, there are so many windows into just how awful this was, just how incredibly improper this was. They didn't need 15-112 to fix the supposed problems they had with any of the materials being used. They didn't need it at all.

There was a statute already on the book that could have gotten any of the supposedly offending materials, if they were offending, eliminated.

And this is from Mr. Huppenthal: And under your analysis of the materials that justified your decision to terminate the MAS program, those materials could have been removed from the schools by the school districts under Section 15-341, could they not?

Answer: Yes.

Kathy Hrabluk, same thing. Stacey Morley, same thing.

They had a statute on the books that could enable them to deal with any offending materials if they really were offending. But you know what that statute didn't do? It didn't enable them to wipe out the MAS program completely, and that's what they wanted to do.

There's more.

MAS was the sole focus throughout the legislative process.

That's clear beyond argument. There are other things though. And we mentioned them, I'm not going to belabor all of them.

The Court has heard a lot of evidence about Paulo Freire because the Paulo Freire book, Pedagogy of the Oppressed, was a book that Horne and Huppenthal were obsessed about. Constantly mentioned it. Constantly mentioned it. Based on Freirean pedagogy, which, by the way, has nothing to do with oppression.

But if they were so concerned about the Paulo Freire pedagogy, you would have thought that they might have looked into the Paulo Freire School, which Mr. Horne knew about, indisputably knew about. He may not have known that the Paulo Freire schools were majority white, but he certainly knew about the Paulo Freire schools and said he was bothered by it.

They never looked at it, they never looked at it, because what they really wanted to do was eliminate Mexican-American Studies.

They never looked at any or considered any non-MAS materials that may have violated the statute. And this -- Your Honor, I think, focused on this and was very much affected by it.

The American Vision textbook, which is, by the way, a standard adopted textbook and was actually seen in use by the Cambium auditors in an MASD history classroom, if you take snippets from that textbook, they look pretty awful. And Your Honor saw the snippets, and they were comparable, there were

snippets in that textbook comparable to the snippets that the state didn't like.

Now, you have to look at the whole textbook, you have to look at how it's being taught. But they never did that. They never looked at American Vision, even though it was a standard textbook, even though it was in use in an MAS history course.

Now, if, in fact -- and we think the evidence is overwhelming: Based on the Arlington Heights factors, defendants' actions are unexplainable on grounds other than race. It's strict scrutiny and they're done.

But even if it's not the sole motivation, if it was a motivating factor, shifts the burden of the defendants to prove that they had actual other non-discriminatory reasons that they actually relied on at the time. You know, post hoc justifications -- and they tried to float some by you on preliminary motions -- don't count. Pretextual reasons, like curricular deficiencies, don't count.

I do want to say, Your Honor, before I close, because it's important to also mention the viewpoint discrimination claim. Obviously, the Court has written a very good decision on this claim in denying the State's motion to dismiss that claim. Students obviously have a First Amendment right. And defendants can only remove curricular materials if reasonably related to legitimate pedagogical concerns. And that's what this Court ruled.

The Court ruled defendants cannot remove curricular materials if exercised in a narrowly partisan or political matter or for racist reasons. And plaintiffs may establish that reasons offered by defendants are pretextual. And we don't have to prove racial animus on the First Amendment claim, as Your Honor has noted.

So when we look at the First Amendment claim, there are a couple of factors we look at that come from the case law. First, whether "established, regular, and facially unbiased procedures" were used for the review of the materials in question.

Answer: No.

They were looking at ad hoc books sent to them by -- some of them sent to them by crazy people, which they admitted, Laura Leighton. They looked at those. They got them. No established procedure. Totally ad hoc. Oh. Look at that passage. Whoa. That's really bad. Let's look at that one. No established procedure.

Whether the "advice of literary experts," or the "views of librarians and teachers," in the school were considered. This is what's shocking. They were not. They never talked to the teachers. They didn't talk to the librarians. If they had spoken with Angela Valenzuela, she would have explained the entire ethnic studies movement, the curriculum, how it's used, Subtractive Schooling, how these books are so helpful. Didn't

do any of that.

Whether there was "an independent review of other books" that may be inappropriate; "the decision was based solely on the fact that the books were targeted by certain individuals."

Well, that's exactly what happened here. The books were targeted by Horne and Huppenthal, and they were targeted by Horne and Huppenthal in 2006 and in 2007 before there was any statute.

And whether the state complied with regular procedures for reviewing potentially inappropriate material.

No, they didn't.

They had 15-341. They didn't use that. They invented a new statute so they could completely blow up for every kid in those programs. Elementary school, middle school, high school. All 1300 of them. So they could blow up the MAS program.

Now, the courts acknowledge that some racial -- evidence of racial discrimination under Arlington Heights also violates the First Amendment, and you've each got Horne and Huppenthal using their crusade -- and it was a crusade, no other way to characterize it -- against MAS as a platform for both of their campaigns.

Horne's philosophical opposition to all ethnic studies. He just doesn't like ethnic studies. That's his view. Because he knows better.

The mischaracterization of "Raza," "MEChA," "Aztlán."

These people had no idea what those terms really meant. The MEChA is laughable. It's actually sad, but it's laughable.

To become obsessed, Horne becomes obsessed, with MEChA because he sees a librarian at the Tucson High School wearing a MEChA T-shirt. Happens that the librarian is not Mexican-American. Happens that he knows nothing about MEChA. Happens that he tries to justify his antipathy to MEChA by going on a website -- if he ever actually did -- and pulling up a historical document from the 1960s, which Dr. Cabrera explained most MEChA current members have no idea about. And not what MEChA does currently.

Didn't stop Mr. Horne. MEChA is evil. Revolutionary. Awful. Anyone associated with MEChA is a radical, and we've got to eliminate that effect.

Code word. Misuse of code words. Pure animus. He made it up out of ignorance, or worse, studied ignorance.

Horne expected MAS textbooks to be used in Mexican public schools, not in taxpayer-supported American public schools. And you've already seen their obsession with Freire, Che Guevara, Ben Franklin.

Now, let's just look -- I'm almost finished, Your Honor -- the purported pedagogical reasons, purported pedagogical reasons, for terminating the MAS program. And they are all pretextual.

Indisputably -- and you haven't seen a shred of evidence to

the contrary -- indisputably a highly successful program.

Failure to use existing education statute, 15-341, to remove problematic materials. Rejection of the Cambium audit. The failure to visit a single MAS classroom, not one, while A.R.S. 15-112 was in effect. No investigation into the Paulo Freire Freedom Schools, despite their obsession with Paulo Freire. No investigation at all into other ethnic studies programs, despite Horne's acknowledgement that he viewed at least two others in violation of the statute. Ultimately, a number of the banned books were returned to the classrooms, which shows there really was no pedagogical justification for taking them out in the first place.

And here is the thing that's most upsetting. The over-enforcement, the gross, gross, over-enforcement of this statute to eliminate all MAS classes, every single one, all 43. Elementary school, middle school, high school. The MAS art class, for God's sake. Really? That offended Mr. Horne and Mr. Huppenthal? An art class? That shows you what's really going on.

Finally, Your Honor, I won't -- Your Honor remembers this textbook. You know what? I used to be a professor. I could take any book, any book, any book, and pull something out of that book that's going to offend people, at least offend some people.

All right. This was the American Vision, standard

textbook, adopted by the Tucson Unified School District for history classes, seen in use in an MAS history course by the Cambium auditors. Okay? And there were a minimum of two team members of Cambium attending these classes. Okay?

Here is one of the offending passages that so annoyed the ADE people and Horne and Huppenthal. It's from 500 Years of Chicano History in Pictures, and they cited this as a basis for eliminating the MAS program.

The quote From 500 Years of Chicano History in Pictures: Ever since the birth of the U.S., its rulers had dreamed of expanding across the continent. So the Anglo expansionists first took over Texas by deception and force. They deliberately provoked the war on Mexico in 1846-'48. The invasion ended with the treaty of Guadalupe Hidalgo. U.S. forces treated the Mexicans living there as a conquered, inferior race.

They found that offensive. You know, it's actually true. They didn't like it, but it's true.

But if you compare that with a passage from the very textbook that the Tucson Unified School District adopted in history for their history courses, and which was actually in use in the Mexican-American history courses, here's the paragraph on Anglo-Saxonism: The work which the English race began when it colonized North America is destined to go on until every land that is not already the seat of an old

civilization shall become English in its language, in its religion, in its political habits, and traditions, and, to a predominant extent, in the blood of its people.

Pulled out of context, that snippet is more or less, frankly probably more offensive, than the snippet that they pulled out of 500 Years of Chicano History.

And, Your Honor, I want to close -- because I think Your Honor very much focused on this in your own questions to Ms. Hrabluk. These are your questions.

You asked her: How did you come to the conclusion that the materials were missed when you know there was virtually no classroom visits and there's no curriculum?

Answer: When we asked for curricular materials to be submitted, what was submitted were textbooks and books, reading books, plus some lesson plans, but disconnected across grade levels. And we took those materials as they had been submitted at face value.

Your Honor says: When you say "face value," you mean whatever statement was made was taught as the truth? Is that what you mean by "face value"?

Answer: Yeah. However the lesson was written or however the material was written, that would be the way it would be used. Because there was no further explanation as to how this material --

Your Honor: I mean, would that apply, for instance, to the

quotes that Mr. Reiss highlighted in the American Vision textbooks about the enslaving power of Anglo-American entrepreneurship, for example? You took that as literal, you know, truth, that it was taught as literal truth?

Answer: Well, you don't -- without an explanation of how it was used, how did the teachers --

Question from Your Honor: That's what I say. There was no explanation at all.

Answer: Right. No.

Your Honor: So you accepted that as being taught as literally true?

Answer: Well, we accepted those materials as the materials were used in instruction, yes.

Your Honor, if that's not a First Amendment violation, I don't know what is. Thank you.

THE COURT: All right. Thank you, Mr. Reiss.

It's 10:50. Is it going to be Mr. Ellman?

MS. COOPER: No, it's me, Your Honor. Isn't it 9:50?

THE COURT: Excuse me. 9:50. But I know you're going to go on for at least an hour, so I think we should take a break first, all right, at this time.

MS. COOPER: That would increase the chance that it's less than an hour, Your Honor. I do appreciate that.

THE COURT: Fine. Then we'll stand at recess at this time.

MS. COOPER: Thank you.

(A recess was taken from 9:50 a.m. to 10:12 a.m.)

THE COURT: Let's all be seated. This is now defendants' opportunity to present their closing statement. I understand Ms. Cooper is going to present, right?

MS. COOPER: That's correct, Your Honor.

THE COURT: All right. Go ahead, please.

MS. COOPER: It's undisputed at this point that the MAS program brought the issue of ethnic studies classes to the forefront in Arizona. The question here is what motivated defendants to take action against that program. Did Horne and Huppenthal take action against the MAS program because it taught Mexican-American students or because of what it taught Mexican-American students?

Plaintiffs haven't provided the Court with much more information that would indicate that it should change the decision that it made in this regard four years ago.

Plaintiffs began by trying to redefine the standard for discriminatory intent that's consistent with the effort that their expert, Dr. Angela Valenzuela, made to redefine the way in which curriculum is measured, by looking at implicit curriculum instead of explicit curriculum.

But what we know is that when we decide whether the removal of materials from a classroom constituted impermissible viewpoint discrimination is whether the materials were removed

for reasons that were reasonably related to legitimate pedagogical concerns or whether they were pretextual. And we submit that the evidence will establish that the only concerns were legitimate pedagogical concerns, and that plaintiffs' only evidence that defendants acted with a discriminatory purpose when they proceeded against TUSD's Mexican-American Studies Program is circumstantial, indirect, and requires the Court to draw multiple tenuous inferences.

We are here because plaintiffs avowed to the Ninth Circuit in 2015 that they would present evidence regarding several issues, overwhelming evidence that would demonstrate that the Court erred in granting summary judgment. They promised four kinds of evidence to the Ninth Circuit. E-mails from legislators evincing animus against Mexican-Americans while advocating for HB2281. Evidence of a relationship between the State's purportedly anti-immigration efforts and HB2281. More evidence about the decision to reject the Cambium audit, and information that other ethnic studies programs in TUSD were indistinguishable from the MAS program.

The Ninth Circuit said this evidence would be highly relevant to plaintiffs' Equal Protection claim. But plaintiffs haven't delivered. There's almost no evidence at all about Arizona legislators, let alone evidence that they acted with discriminatory intent against Mexican-Americans.

There are no e-mails showing that Arizona legislators who

supported HB2281 also supported what plaintiffs deemed to be anti-immigrant legislation. In fact, I don't think there are many e-mails from legislators at all in the record.

There is no link anywhere between support for HB2281 and other anti-immigrant legislation. No evidence from the legislative hearings, the official record, that shows that HB2281 was passed in a climate that was charged with animus against Mexicans and Mexican-Americans.

Little new evidence about the decision to reject the Cambium audit that would compel a conclusion that it was rejected based on a discriminatory animus. And no evidence supporting their allegation that the department decided not to investigate the Paulo Freire Freedom Schools because its students were white.

And the evidence that there were complaints about other ethnic studies didn't bear fruit and, in any event, they haven't even tried to establish that those ethnic studies programs were comparable to the MAS program, offering core classes for graduation credit instead of tutoring and family services, family support services.

Now let's look at what we've learned.

We have learned, in this proceeding more about the MAS program. Let's begin with the name of the program.

It's the "Mexican-American Studies" program now, but for many years it was the "La Raza Mexican-American Studies"

program. "La Raza" was supposed to mean all of the Hispanics in the Americas; but that, in fact, represented a narrowing of the original conception, the Hispanic Studies program. So what we see is a program that has consistently narrowed its focus over the years. It contradicts their claims of unity and inclusiveness.

Now, we also know that the MAS program violated A.R.S. 15-112. An ALJ heard three and a half days of testimony, 12 witnesses, dozens of exhibits, wrote a detailed, 37-page decision finding the program violated the statute. TUSD decided to terminate the program when the superintendent accepted that decision. They didn't appeal it. They didn't go to the Superior Court. They didn't try to modify the program. They didn't take Huppenthal up on his many opportunities to work with him. They simply terminated the program.

We are here to decide whether the facts leading up to that ALJ decision, and then the subsequent decision to adopt the detailed finding, were motivated by discriminatory animus.

So we need to understand what we learned about the MAS program from plaintiffs' witnesses at trial.

What we know, the program was small, never more than three percent of Tucson's student body at its peak. And we know that it never really had an impact on TUSD's dismal academic performance. Its director told us that its program materials were in what might charitably be called "chaotic disarray."

Scattered everywhere, a shared drive, paper copies, alternative media, and even kept by individual teachers.

He told us that the MAS -- the teachers teaching MAS materials might be under his control or might not, and that he didn't know what was being taught by any teacher at any time and there was no way for anyone to figure out that information.

We know there is no evidence of a comprehensive, coherent curriculum. Even Dr. Valenzuela admitted that there was no explicit MAS curriculum. And he confirmed what the Cambium auditors found, that the MAS program lacked a well-defined curriculum, and it used controversial materials.

MAS teacher Curtis Acosta told us about the program as well. He is a teacher who honored Che Guevara with a place on the wall of his classroom next to John and Robert Kennedy and Martin Luther King. He offered the statement that, well, the students asked for the poster to be placed there, without apparently understanding that it might be the role of the teacher to address and provide the necessary context around that.

A teacher who would not even admit that it was disrespectful to prepare a rap to perform at a student-led festival, where he referred to his superintendent as a "butt-kissing wankster," the governing board president as "Stoogeman," and AG Horne and Superintendent Huppenthal as "Neanderthals on Geritol." That is the example of MAS teaching

that plaintiffs chose to present to this Court.

Their words spoke volumes, but I don't think they said what they meant.

Acosta claims the program was pedagogically sound, but revealed himself as someone whose disrespect for authority and personal political views were clearly infecting his teaching. He demonstrated the validity of Horne's and Huppenthal's perceptions. Everything from his hateful rap song ridiculing public officials and intended for an audience of students, to Che Guevara posters and books written by cop killers on his reading list, books that had nothing to do with the topic he was hired to teach students: Latino literature.

We looked at some of the materials that Horne and Huppenthal, that ADE investigators, that Cambium auditors, and the ALJ found objectionable. A curriculum unit about HB2281 that taught that bill was a manifestation of xenophobia. It told students what point of view to take in developing action plans about HB2281. Even Dr. Valenzuela agreed that it was inappropriate for MAS teachers to tell students what to think instead of teaching them how to think.

We saw materials for children as young as fourth grade that included graphic pictures of lynchings, and no context at all that would indicate that such difficult subjects, which must be taught, were approached with sensitivity and caution.

We saw a reading list for Latino literature that was short

on literature and long on politics. There wasn't much by Latinos on there, whether you use Dr. Pitti's narrow definition or some other. But it did include a book by a cop killer, a speech by Che Guevara, and no explanation at all of the literary merit of these works. We saw, instead, a collection of books about for education that presented only one view.

But what we didn't see about the MAS program is just as important as what we did see. We didn't see evidence that demonstrated that the MAS program presented challenging, controversial, important material in a balanced way that let students determine what they thought about these significant topics.

The most important thing of all that we learned about the MAS material came from one of the plaintiffs himself. Once plaintiff Jesus González learned about the materials in the MAS classes, he said he wasn't sure he wouldn't want his children to take the classes.

And, by the way, Mr. González's honest statement for which he should be given ample credit establishes that the Arizona legislature was correct in requiring school boards to adopt their curriculum in public meetings for the reasons that John Huppenthal and Kathy Hrabluk described.

It is important for a community to understand the details of the public education supported by their tax dollars and offered to their children.

Plaintiffs' defense is that the defendants don't know which materials were used and which were not. That's not much of a defense if plaintiffs themselves can't make that determination. But we should look at the context in which the materials were requested and received.

Tom Horne asked TUSD to send him the programs, the materials it used in the MAS program. He had no reason to doubt that TUSD sent him anything other than what it was using. Huppenthal's team made the same request, and they were entitled to rely on the same assumption. And, frankly, it doesn't make sense that the MAS program would turn over materials it wasn't using, given the provocative controversial nature of what it did disclose, and it doesn't make sense that it held back instructional materials that contained the balance and the diversity that everyone else has found lacking.

It really doesn't make sense that TUSD would pass up three opportunities to demonstrate that the MAS program taught students how to think rather than what to think if it had evidence to support that proposition.

Now, we all understand by this point how Tom Horne first learned about the MAS program. He heard Dolores Huerta, a noted labor activist, tell students that Republicans hate Latinos. And he witnessed students standing with duct tape over their mouths raising their fists and turning their backs on his deputy superintendent, Margaret Garcia Dugan, who had

gone there to tell them that it was important for them to figure out what they thought about politics and not to just adopt someone else's view.

This incident, by the way, was like nothing Tom Horne had seen in hundreds or even thousands of school visits. He was entitled to label the behavior "rude," and to mean what he said when he used that word, on the basis of what he had seen as a Superintendent of Public Instruction and after 24 years on the Paradise Valley Unified School District board.

Now, not surprisingly, this incident garnered lots of publicity. Tucson teachers came to Tom Horne to tell him about TUSD's MAS program, the way it politicized education, its biased presentation that taught Mexican-American students to see themselves as oppressed and made white students believe that they were the oppressors.

He considered the information the teachers provided. He read the materials they gave him. He asked TUSD to send more. He took his concerns about this program to the people of Tucson, and he was very clear about the basis for his pedagogical opposition to ethnic studies programs. He explained the information that he had about the MAS program and asked them to tell their board to close it down. But they didn't.

Tom Horne then turned to -- his open letter describes the materials that he relied on: Occupied America, the

Mexican-American Heritage, 500 Years of Chicano History in Pictures, Critical Race Theory, Pedagogy of the Oppressed.

These are, incidentally, the very same books that the Cambium auditors found troubling, identifying in their audit as questionable sources based on their content. The same books, too, that Huppenthal's team of experienced, unbiased, non-partisan administrators and educators found troubling for the same reason.

Horne turned next to the legislative process, which is hardly the process that a determined racist would employ to terminate a program.

Now, plaintiffs tried to demonstrate, as they must, to meet their Arlington Heights factors, that there were procedural irregularities that, in fact, infected the passage of HB2281. But they have no credible evidence that there was an irregular procedure or that a discriminatory animus affected the legislature.

Let's go back first to the information that plaintiffs avowed to the Ninth Circuit that they present regarding this topic.

E-mails from legislators evincing animus against Mexican-Americans while advocating for HB2281. We didn't see any much e-mails.

Evidence of a relationship between the state's purported anti-immigration efforts and HB2281. There wasn't any evidence

of that either. In fact, there was very little evidence of legislative communications presented to this Court.

They didn't present any evidence from the debates that suggested discriminatory evidence. They didn't present evidence of communications that evinced discriminatory animus. In short, they simply haven't substantiated their claims that anti-immigrant rhetoric affected the passage of HB2281.

But although they didn't present the evidence, they did tell the Ninth Circuit they have. Of course, we've been here for nine days, and they did present other evidence.

But it doesn't even take a close review to see that plaintiffs can't show discriminatory animus in the legislative history of HB2281.

Their primary evidence of the legislative process came from Mark Anderson, a department employee, and he didn't identify anything but legitimate pedagogical motives as the reason for the legislator's concerns.

Now plaintiffs raised -- he asserted that Tom Horne never told him anything that would indicate racial animus. And plaintiffs say that you should question Mr. Anderson's credibility in that regard. But Mr. Anderson testified forthright and credibly the information that he recalled. There is no reason to doubt the truth of his statements.

Plaintiffs didn't even try to suggest that there was an irregular legislative procedure, and, in fact, the bill took

the legislature season to go through the process, it was heard in committee, it was debated by both sides. It was, in fact, an ordinary process.

But it did try to make something of the amendment, at least one amendment, the amendments that were offered. They argued that Huppenthal sought to amend the bill to take authority from -- to ensure that he himself as a superintendent had authority to enforce the bill against the MAS program.

But Huppenthal testified why he felt it was important for the superintendent of public instruction to have enforcement authority, because he knew that the state board of education was too small, and he probably suspected that the department would have to do the work of enforcement anyhow.

And Stacey Morley added that it was common for both the superintendent and the state board to have dual enforcement authority.

The other amendment is the amendment that delayed the effective date of this statute. It's been suggested that Huppenthal proposed that change in the effective date so that he could be sure that it was he who was entitled to make the decision about the MAS program and not Horne. But his testimony was credible. Huppenthal proposed to change then the effective date to take the matter out of politics.

Even Stephen Pitti, plaintiff's Yale historian, didn't provide evidence that supports his conclusion that animus

against Mexican-Americans must have infected the process because he didn't take the trouble to familiarize himself with the actual evidence of what occurred in the passage of HB2281 until after he'd offered his expert report.

He didn't bother, when he rendered his opinion, he hadn't even examined the legislative history of HB22. He didn't watch the videos of testimony. He didn't review the transcripts that plaintiffs prepared. In short, he doesn't know what happened when HB22 passed. He was just doing a post hoc analysis based on secondary sources, when it really wouldn't have taken all that much time to look at the primary sources.

A majority of Arizona's elected lawmakers agreed with Tom Horne that schools shouldn't be able to offer ethnic studies programs that were divisive and separatist, like the TUSD MAS program. And while it's clear the concern about TUSD's MAS program motivated this legislation, none of the legislators who spoke in favor of the bill said anything discriminatory about Mexican-Americans.

And plaintiffs, by the way, have operated on an assumption that they haven't proved. They've assumed that opponents of illegal immigrants are racist. But, in fact, opposing illegal immigration shows nothing but that one opposes illegal immigration. And the assumption that it's racist demonstrates that plaintiffs see racism everywhere.

Let's turn to the statute that was passed after this

ordinary process. Its purpose, as the Ninth Circuit has noted, is laudable. Public school students 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.

That's Tom Horne's philosophy that motivated his actions here, and it's a philosophy that the majority of Arizona legislators agreed with.

The statute that was passed applies to all public school programs, all public school programs. It limits the ability to segregate groups of students from one another while still preserving the ability to teach Arizona's public school students about both the contributions from different cultures and ethnicities to our civic landscape as well as the difficult episodes in the history of Arizona, the United States, and the world.

The bill that Horne drafted includes significant procedural protections. It doesn't give the superintendent or the state board the authority to terminate a program. A program may only be found in non-compliance. It provides time for a program to come into compliance. 60 days.

There's a right to an appeal. Not to an internal agency appeals board, which is the tact that Horne might have taken if he wanted to ensure a right of appeal and then find a rubber stamp, but instead to Arizona's Office of Administrative Hearings, an independent agency with law-trained judges who

follow standard rules of administrative hearing procedures for every matter they consider. Importantly, that appeal occurs at the department's expense, not at the challenging district's expense.

It does provide for a financial penalty for schools that don't comply, but schools that come into compliance get any money that was withheld back when they reach compliance.

And although it was Horne's personal philosophy, as he testified quite clearly to this Court, that he was opposed to all ethnic studies classes, he instead authored a bill that simply barred ethnic studies classes from crossing certain lines. He didn't ban all such classes, he just defined the terms upon which they could operate.

It doesn't make sense that a racist would put this bill together this way, with these procedural protections.

Now, plaintiffs have argued that Horne's finding displays discriminatory intent for three principal reasons. He relied on old information; it was issued as the statute became effective; it called for the termination of the program.

But Horne's findings included his reasons. Horne explained his reasons for issuing the finding when he did. At that point he had more than three years of investigation, reading MAS materials, listening to MAS teachers, hearing from constituents. It had convinced him that the program was toxic and had to be terminated.

But as opposed as Tom Horne was to the Mexican-American Studies Program itself, there is no evidence that he took action against the program because of a discriminatory animus against the Mexican-American students taking those classes. In fact, he was clear and transparent in his reasoning and labeled it an historical accident that the radicals indoctrinating students with these ideologies and notions of impression and victimization were Mexican-Americans instead of some other ethnicity, and we have no reason to doubt the credibility of that statement.

And the date of the finding, whether it's December 30th, January 1st, January 3rd, doesn't indicate discriminatory intent, but it is consistent that Superintendent Horne would, at the earliest possible moment, take action against the program that he found toxic and harmful to public school students.

Similarly, termination was consistent with his views, and there is no indication that those decisions were taken for racist reasons.

When Horne left office, it became Huppenthal's turn to address the issues. And the evidence shows that Huppenthal composed a team who had the best interests of Arizona's public school students, including its Mexican-American students, at heart. They were non-partisan and non-political. They applied their professional judgment to the public at hand. There is no

evidence that these educators and administrators, who did the heavy lifting in evaluating the Cambium audit and the remaining MAS materials, were acting based on a discriminatory animus or with narrowly partisan or political views.

When Huppenthal took office, he examined Horne's finding. He realized that the finding identified serious problems with the program, a program that he was familiar with from his time in the legislature. But he didn't, as he had promised during his campaign, just stop La Raza, because, as he testified, he immediately realized that governing was different from campaigning.

But he developed his views about the MAS program before he came to the office of the superintendent. He'd witnessed real problems in the class that he visited. A class that he visited, by the way, on a date chosen by the person who makes his schedule. He didn't ask to see Curtis Acosta's class. He didn't know the ACT test was being administered that day. That was the day that the superintendent, a busy man, could be in Tucson to see a class, and he took the opportunity to do so. And when he did, he saw things that troubled him deeply.

A teacher who honored Che Guevara with a poster on the wall next to true icons of American history, administrators who provided one-sided views of Benjamin Franklin, and students, whose discussion of oppression raised troubling questions in his mind about what was being taught. That information, along

with the information he had heard in the legislature, was enough to prompt him to read many -- some of the MAS books as well, like Pedagogy of the Oppressed and Critical Race Theory.

Now, if Huppenthal had wanted to stop La Raza, he had been provided with the tools to do so. He had a finding that the program was not in compliance and had to be terminated. He could have simply handed the enforcement of that finding over to Tom Horne, the man who had written it and who had made his concerns and his beliefs about the MAS program public.

But John Huppenthal isn't a racist, and he didn't hand the decision over to Tom Horne. He handed the decision to the top people in his department: Elliott Hibbs, a well-regarded, experienced Arizona state government administrator; Kathy Hrabluk, with decades of experience as a teacher and administrator; John Stollar, an experienced teacher and school administer (sic); Stacey Morley, in charge of policy and government relations, had witnessed the bill's passage through the legislature, and was familiar with the state's education laws.

He didn't tell them what result to reach. He didn't tell them, You have to stop La Raza. No, he handed them a problem. He expected them to evaluate it, to come up with solutions based on their professional judgment.

So, as we know, that team decided to employ an auditor to get unbiased advice. That is a decision that it itself speaks

volumes about ADE's motivations. And, in fact, the decision to retain the auditor says more about ADE's motives than its decisions to set aside the auditor's conclusions because its findings were inconsistent.

After a slow start to the audit process -- because it was hard to find an auditor to take on the politically charged job here -- they hired Cambium, a well respected company known to the department, who immediately subcontracted the work to NAEP, a Florida company unknown to ADE. But an audit plan was prepared, and it was found to be an accepted plan.

But unfortunately the auditors, for whatever reason, didn't carry out the plan. And this is something that Kathy Hrabluk saw. She was handed the responsibility of monitoring the progress of the auditors. She testified that she spoke with them weekly and that when she did so, and as the audit progressed, she developed concerns, concerns that she raised with the auditors and described to this Court regarding their ability to comply with the plan. Concerns that the auditors weren't reviewing enough materials. Concerns that Cambium couldn't talk to the MAS director or MAS teachers. Concerns that it wouldn't observe enough classrooms teaching MAS materials.

The draft audit arrived, as we know, as the school year was ending. Hrabluk, Hibbs, and Stollar reviewed it and quickly realized that its findings weren't consistent with its

conclusions.

The audit stated that there was no observable evidence of a violation of the law, but what, in fact, a reading of the audit demonstrated was that the auditors hadn't actually observed much of anything, and that what they did see they found to be troubling.

The most significant problem the auditors identified with the MAS program was its lack of a well-defined, integrated curriculum. Even Dr. Valenzuela agreed that the MAS program lacked a well-defined, integrated curriculum. And the auditors even recommended that TUSD develop and adhere to best practices for curriculum development and management.

For Kathy Hrabluk, an experienced educator and administrator, the lack of a curriculum was a major red flag. This feeling was a serious problem for her. She explained that a curriculum defines what is to be taught throughout the school year. It identifies the goals of the class and how they will be met, and that without a curriculum there is no way to know what teachers are planning to teach.

The curriculum, in other words, supplies essential context, showing how curriculum units fit into the whole to help students achieve specific and specified learning objectives. It provides the context for classroom materials that allow an experienced educator like Hrabluk or Stollar to understand the purpose and use of the materials they are reviewing.

And Kathy Hrabluk needed and wanted that context. She needed to know how MAS teachers might use pictures of lynchings. She needed to know why a unit on HB2281 taught students that the bill was a manifestation of xenophobia and included an action plan about how to attack the bill. And she clearly stated that a lesson about HB2281 would be valuable because it would likely capture the attention of high school students. But she emphasized, as Margaret Dugan had four years, five years earlier, that it was important that the teachers give the students the tools to develop their own views about controversial topics and not be taught what to think.

Without a curriculum and the accompanying documents that describe how it be implemented, like a scope and sequence and a pacing guide and lesson plans, ADE was left with no choice but to take the instructional materials, the biased, politicized materials, at face value.

Now plaintiffs have suggested that the same problem exists with textbooks, like American Vision. They put up one quote that's similar to one snippet from the MAS program. But that's an 800-page textbook, and the Court is entitled to presume that a high school textbook presents information in a balanced, unbiased way for the purpose of teaching students to think for themselves, as opposed to a book like Critical Race Theory, which is devoted entirely to one point of view.

Now, in addition to finding that there was no curriculum,

that Cambium auditors only viewed nine curriculum units, nine curriculum units out of what were likely hundreds if we accept Sean Arce's testimony at face value. But they identified in that tiny fraction of the curriculum units they reviewed a substantial use of problematic materials. And they found, as I noted earlier, that the same books that Tom Horne found objectionable were objectionable to them. They found materials that dehumanized political figures and showed a lack of respect for them. They even recommended that TUSD stop using the inimical "La Raza" name.

And then finally, in reviewing the Cambium audit, ADE found substantial failings in the classroom observations.

The auditors reviewed very few MAS teachers teaching MAS classes. So the context for the materials that they reviewed that might have been supplied by the curriculum or the classroom observations was missing. Those flaws completely undercut any conclusions that the Cambium audit might have reached, which were, by the way, very carefully worded: No observable evidence. Not "no evidence"; "no observable evidence," over and over again.

Troubled by the failure of the Cambium auditors, Hrabluk and Stollar looked at the materials themselves. They reached tentative conclusions about whether the MAS program violated the statute. It's true there appears to be disagreement on exactly when the ADE administrators reached their conclusion

that the MAS program was in violation of the statute, but that's not surprising, given that six years has passed.

But we still have the Cambium audit, and we can see that in fact its inconsistencies doom its conclusions, and we have no reason not to believe that Kathy Hrabluk and John Stollar and Stacey Morley continued their review of the MAS program materials that they had received.

They found at the conclusion of their review that the materials revealed problems with profoundly disturbing pedagogical implications. That conclusion had no connection to racial animus. It was solely rooted in educators' legitimate pedagogical concerns.

It's true that ADE didn't conduct classroom visits, but Kathy Hrabluk explained why. Without the necessary context of curriculum, they knew they would see nothing but what the teachers chose to teach at that moment. They knew they wouldn't be able to draw any conclusions about the MAS program at all.

And by the way, Horne, of course, also did not visit any MAS classes because he was concerned that a show would be presented for his benefit, but he did offer to videotape all of the MAS classes, at state expense, so he could learn what was going on.

After the review and further investigation, the ADE team reached a unanimous conclusion that the program was in

violation of statute, a conclusion that they presented to Huppenthal.

Huppenthal accepted the recommendation of the well-qualified team he had appointed to help in his decision. He signed the finding drafted by his director of policy and government relations; and when he issued that finding, he offered, as he had several times before, to help TUSD bring its program into compliance with the statute.

He didn't issue a finding, by the way, that terminated the program. And he never made an effort either to replace the program with one of his own choosing.

But the question here is not whether someone else, faced with the same situation as ADE, would make a different decision about the Cambium audit. The question here is whether the ADE decision to depart from Cambium auditor's conclusion was motivated by discriminatory animus. And none of the evidence that plaintiffs presented supports the conclusion that anything other than a legitimate pedagogical purpose motivated Huppenthal and his team at this time. Nothing suggests that they took action based on narrowly political and partisan motives.

And nothing supports the conclusion that ADE tried to suppress the Cambium audit. Stacey Morley testified that it was a public record, and she said everybody knew about it.

Now, once Huppenthal issued his finding, TUSD appealed.

This is the part of the story that plaintiffs skip over, but it's essential. The appeal was included in the statute Horne drafted. It is an essential part of the process. It provided that in the event of a dispute over a finding of violation regarding this statute, an independent, law-trained arbiter would be the final -- would make the recommended -- would take the evidence upon which the final decision was made.

The ALJ, as we've noted, heard several days of testimony under oath, dozens of examples of MAS program materials. TUSD had an ample opportunity to establish that the program was balanced and unbiased, unpoliticized, that it taught students how to think rather than what to think.

But the ALJ, after carefully weighing the evidence, issued a detailed 37-page decision concluding that the program violated the statute.

Huppenthal, as he was required to, looked at the decision, read the transcript. He agreed that the ALJ had supported his conclusions, and he adopted the recommended decisions.

Plaintiffs understand that this was an ordinary administrative process. They haven't even tried to challenge it as irregular, but they want to skip over it, despite the fact it's a part of the statute that we are discussing today.

Why would a goal-oriented racist, bent on eliminating the MAS program, include a right of appeal to an independent agency in the statute that he wrote? There's no sensible answer to

that question.

Significantly, TUSD accepted the decision. It terminated the MAS program. It removed materials.

If Curtis Acosta wasn't allowed to teach The Tempest anymore, it wasn't because ADE told him he couldn't do so. In fact, he testified it was his superiors.

TUSD also didn't, at least immediately, take up ADE's decision to revise the program, but it did eventually move forward with new culturally responsive pedagogy, a program that is in effect and thriving today, a program where ADE offered the assistance that Huppenthal had offered from January 4th, 2011 to his decision -- his announcement of his decision in January 2012 that the program was in violation.

Now, plaintiffs have presented some other evidence instead of the evidence that they told the Ninth Circuit they'd have. They used their time to offer up a boat-load of red herrings, which is, of course, a standard technique in weak cases.

They talked about English immersion, which as we know is standard pedagogy for English language learners. Fluency of English language learner teachers, which is, as we know, required by federal law. Enforcement of the statutes that keep residents of other states, or countries, from attending Arizona schools, again, required by state law. Paulo Freire Freedom Schools, properly chartered schools about which no complaints have ever been received, and, I might add, schools that may or

may not have been predominantly white. But as both Horne and Huppenthal testified, neither knew the ethnic composition of those schools, and neither would have considered it relevant in determining whether to issue a finding.

They did raise the question of other ethnic studies programs, but those are in fact the kind of ethnic studies programs that comply with the statute and that have prompted no complaints.

There was a lot of talk about Russell Pearce, that he had nothing to do or say about HB22; Laura Leighton, a constituent who passed along the results of her public records requests. Kathy Hrabluk testified that she asked the auditors to first determine whether Laura Leighton's materials were used in the classes. She didn't just assume that Ms. Leighton was correct.

We've heard a lot about SB1070 as well. That's a favorite topic. The only connection there is temporal. We spent time on irrelevant issues like whether Elliott Hibbs, the chief operating officer of ADE, ever visited a MAS classroom. Well, that's a contention that just demonstrates desperate ignorance of ordinary good government.

And we've talked about the figurative meaning of "La Raza," an argument that ended up proving defendants' point. There's a little bit about a January 2015 finding, but no real evidence. And an emphasis on a statute, 15-341, that governs school district governing boards; separate, distinct legal entities

that do not have authority coterminous with that of the superintendent of the board or the board of education.

Now, plaintiffs' claim that the MAS program was indisputably highly successful, but that ignores the fact that Dr. Franciosi and Dr. Haladyna dispute those conclusions. But Dr. Haladyna was very clear. He wants the claims that the MAS proponents make about their program to be true because he wants to help these students. But he applied unbiased professional knowledge and examined the work that Dr. Cabrera did carefully and concluded that those findings haven't been substantiated.

The most important point here though with respect to student achievement is that even credible evidence of student achievement would not exempt an otherwise unlawful program of instruction from A.R.S. 15-112. In other words, some principles matter more than test scores, an ethos to which Dr. Valenzuela would undoubtedly subscribe. An effective program that promoted student achievement could still violate the statute if it abdicated ethnic solidarity or promoted resentment against one group.

But there's really no evidence -- there's not much evidence to support plaintiffs' assertions of student achievement. The program operated for 12 years in TUSD to claims of great success that aren't backed up by actual evidence.

The MAS program didn't present any studies here before 2010, there aren't any studies published by TUSD before the

bill was passed, and there is no indication that student achievement ever increased in the 12 years that the program operated.

But Horne understood that the claims of student achievement couldn't be ignored and that, in fact, student achievement is important. So he sought out evidence. He commissioned Dr. Franciosi, the director of accountability, to look at MAS student achievement. He didn't tell him what result to reach, he didn't tell him how to do his research, and Dr. Franciosi drew on his years of training and experience with educational statistics to analyze the information in the manner that he decided was most appropriate. He reached the conclusion that the claims of achievement were not substantiated, and he passed those along to Superintendent Horne.

Horne accepted those conclusions as true and had no reason to leave them out when making his decisions. Huppenthal agreed that claims of student achievement should be examined. He was aware that the Cambium study was required, and in fact the Cambium study was required to look at student achievement. He asked them to determine if statistically valid measures indicated student achievement occurred. He wanted an unbiased examination of whether the MAS program promoted student achievement, but what he got was merely a reprint of information for TUSD passed off as reanalysis. But Huppenthal looked at that information, used his experience as an engineer,

determined it wasn't valid.

Plaintiffs also rely on Nolan Cabrera, a U of A professor. But we know he is biased. He's committed his career to the study of Latinos in general and Mexican-Americans in particular. He doesn't hide the fact that he is a MAS supporter. He published an article called a State-Mandated Epistemology of Ignorance, Arizona's HB2281 and Mexican-American Raza studies, where he defined white supremacy as the denial that racism exists or an averted epistemology, an epistemology of ignorance.

Frankly, you don't need to know anything else about that article except the title. Dr. Cabrera believes that HB2281 represents state-enforced ignorance of oppression on the part of legislators, Superintendents Horne and Huppenthal, and the TUSD governing board.

So, with that background, it's no surprise that he found the MAS program promotes student achievement. But his study suffered from several flaws. It didn't look at other factors that promote student achievement, didn't look at whether TUSD's subsequent program, which serves over 3,000 students, has a similar effect. He had the data, but he didn't examine it.

But Dr. Haladyna identified what he called a fatal flaw that discredited the study. Selection bias. In other words, as Dr. Haladyna explained, only volunteers took the MAS classes, and only volunteers were studied. In other words, as

Dr. Cabrera found that high school students who chose to take a program do better than those who didn't, and he didn't make any effort to control for that variable, and a recent published study identified that as a significant flaw in Dr. Cabrera's work.

Also, Dr. Cabrera didn't measure Mexican-American students' achievement using standard measures of academic achievement that measure increases in cognitive abilities. He used a different standard: Passing AIMS and graduating high school.

He didn't look at whether students became better readers, writers, or mathematicians as a result of the program. And he doesn't know anything about the program or how it might help students learn the skills that public schools are supposed to teach and that are necessary, as Dr. Haladyna said, for true success in life. His choice of standard, quite frankly, raises questions about his confidence in MAS students' abilities.

But that work, even if we accept it as face value, wasn't available to Horne and Huppenthal. The earliest iteration wasn't published until after the MAS program had been terminated by TUSD.

So it can't be evidence. It can't help support the claim that Horne or Huppenthal ignored legitimate evidence as student achievement when they acted or that their actions were somehow a pretext because they terminated a successful program. His information simply wasn't available to them.

And plaintiffs' attack on Dr. Robert Franciosi, a fact witness in this matter, speaks volumes about their case as well. In their desperation and willingness to find racism everywhere and anywhere, they accused him, an ADE statistician they know nothing about, of subscribing to racist beliefs about Mexican-American students being unable to take undertake challenging coursework.

Now plaintiffs' expert, Dr. Haladyna, approached this with an open mind but as a supporter of ethnic studies in general and a man who is deeply interested in the success of public school students. He was qualified to analyze Cabrera's work. He provided professional tools to evaluate it and identified the important shortcomings that I have listed. Selection bias that wasn't accounted for, a lack of a theory to explain results, and its failure doesn't address cognitive abilities. Haladyna not only impeached Cabrera, he discredited him.

Angela Valenzuela was another expert that plaintiffs relied upon. She brought decades of experience in ethnic studies to this matter, as well as firmly held opinions about its efficacy. She relied on the latter in offering her opinions. She purported to conduct a study of K-12 curriculum based on two samples: one elementary, one high school. She used two tools in her analysis, neither of which was suited to the evaluation of curriculum and pedagogy. She relied on a focus group of MAS teachers, believing every word they told her about

the success of the program they had created and taught. And she used invented terms like "implicit curriculum" and "community connectedness" and whatever else it is that's standing in for outdated concepts like teaching students how to read and write and do math to justify her opinions. Her claims of impact do not withstand scrutiny, nor do her claims that the MAS program employed an accepted pedagogical method.

Now, Dr. Stephen Pitti, a Yale historian, came down from his ivory tower to visit us. He's also biased. Much of his work centers on the discrimination experience by Mexican-Americans and the United States. And he is very knowledgeable, but he didn't know anything about the legislative history of HB2281, or Raul Castro, Arizona's first Mexican-born governor. He went to unprecedented lengths to avoid answering even the most straightforward questions. Anyone who tries that hard to answer a question is simply not worthy of credibility. And he didn't answer -- he should have supplied information that would help this Court evaluate the Arlington Heights Factor relating to legislative history, but he couldn't do that. Without so much as setting foot in Arizona during his dubious research into secondary sources, he simply accepted other supposed experts' conclusions that most Arizonans have a strong tendency to believe that most Hispanics are illegal immigrants. He purports to research the question of whether Mexican-Americans have ever experienced

discrimination, as though anyone would disagree.

Code words are a convenient way to cry "racist." You only mean what you say when self-appointed experts whose conclusions are immune to proof or disproof say so. But this Court heard Tom Horne and John Huppenthal explain in their own words. This Court can evaluate their credibility and determine for itself whether they meant what they said when they described their reasons for opposing the MAS program.

Tom Horne, according to Stephen Pitti, can't rely on MEChA information because it's ahistorical, even though it's on the website that presumably exists to provide information to the public about the program. But Dr. Pitti can talk about events from the 19th century and claim they are evidence of racial animus in the 21st. He is very comfortable in his ivory tower accusing Arizona legislators and elected officials of racism, but he can't be bothered to find out what they actually said when they were debating the bill.

Dr. Pitti doesn't have any true experience evaluating what other people mean, and he didn't claim to be able to do that here. He admitted he can't use his code words methodology to analyze any one person's intent. And, in fact, as we've noted, he didn't really spend that much time looking at the words used by the defendants. He didn't look at the debates, the transcripts, the communications among legislators; doesn't know what Superintendent Horne and Huppenthal said, he didn't read

many of their communications about MAS. This Court should reject his effort to tell us what defendants meant and rely on the testimony of the defendants themselves.

Tom Horne and John Huppenthal testified credibly and forthrightly about these events. John Huppenthal acknowledged his comments on the blogs. But as is often true, actions speak louder than words, and Huppenthal actions speak volumes.

In retirement, he teaches math to at-risk students as a volunteer. He's clearly deeply committed to their success. And every witness agreed that he was deeply committed to the success of every student in Arizona while he was superintendent. He didn't display racial animus in any action that he took, and he didn't display racial animus in this action.

But, most importantly, those private comments don't reflect the public reasons for taking action against TUSD's MAS program. Huppenthal composed a qualified team to investigate the program. He didn't tell them what to do, he didn't dictate their conclusion. No one at the time was aware of the comments, and nor were those comments reflected in the directives he issued regarding the program.

There are other reasons why this Court shouldn't find those blog posts determinative and should not conclude that they taint the well-supported finding of violation that was affirmed by the ALJ.

Horne had already found that there was a violation. Elliott Hibbs said no one suspected that finding was influenced by racism.

A goal-oriented person, as we've said, who is motivated by racial animus, would have stood on the Horne finding. A goal-oriented person would not delegate the investigation to thwart non-partisan unbiased persons. A goal-oriented person would not have left them to their professional skill to find a result. He would have dictated it. He didn't interfere or even participate in their investigation. A goal-oriented person motivated by racial animus would not have retained the services of an independent auditor or perhaps one that might even have been too liberal or too conservative. And all four non-partisan executive level staffers, well qualified to conduct the work with which they were entrusted, reached the unanimous and firmly held conclusion that the TUSD program violated the statute.

There is no indication that racial animus affected that decision.

And Huppenthal repeatedly reached out to TUSD in an effort to reform the MAS program to bring it into compliance. He did so in his very first week in office and when he issued the finding in June, as well as in January 2012.

A goal-oriented racist wouldn't hold out a helping hand. In fact, he passed on several opportunities to shut down the

MAS program.

And there is, of course, no indication at all that the ALJ's decision, accepting and affirming Huppenthal's finding, was influenced by racism. And, in fact, his independent conclusion regarding the MAS program can be taken as evidence the decision was not motivated by racism.

Plaintiffs' efforts to paint Horne as a racist don't fare any better. He's an immigrant himself, the child of immigrants to Canada who fled Nazi Germany. He understands all too well the consequences of divisive, separatist rhetoric. He obliterated charges of racism in his testimony. He articulated consistent, principled, pedagogical, and philosophical views behind every decision. He is not anti-Mexican in policy or personal beliefs. He taught himself to speak Spanish. He's proud of the relationships that he developed with Mexican officials, and he's even read all of the Mexican history books in the Phoenix Public Library in Spanish. He believes in English immersion because it's effective. He may have been happy about the campaign benefits of being able to stop illegal school attendance in Ajo, but that doesn't mean race was a factor.

The timing of his finding reflects a determination to make the finding itself, but it doesn't say anything about the motivation. We know it can't be viewpoint discrimination because the bill that he drafted doesn't give the department

the right to replace the offending program with one of its own. And Horne was obviously sincere in his concern that the education was harming the future of the students because they weren't learning to think. He loves debate and controversy because he loves the crucible of competing ideas and the better intellectual product that results from provocative challenges.

His decision was unrelated to race. His desire to eliminate all ethnic studies is actually consistent with his views. He didn't want to just get rid of the Mexican-American Studies, he wanted to get rid of all of them because he finds them separatist and chauvinistic. But despite his personal philosophy, he authored a statute that defined the conditions under which such programs could exist.

The past four years of litigation haven't brought much new information to light, at least from the Ninth Circuit's perspective. They haven't come forward with the evidence they promised, and they didn't find much else to help prove their case. They have no direct evidence of discriminatory animus, and their indirect evidence isn't persuasive.

Their argument in viewpoint discrimination appears to be not much more than politicians took action and talked about it, so it must be political or partisan. But that's not the standard. An action doesn't violate the First Amendment merely because it was taken by a politician or discussed by that politician in a campaign.

MR. REISS: Your Honor, could I have five minutes? I promise it will be a brief rebuttal.

THE COURT: All right. First of all, thank you, Ms. Cooper.

MS. COOPER: You're welcome. And I'm sorry for going over time.

THE COURT: We will take a brief recess at this time. All right?

MR. REISS: Thank you, Your Honor.

(A recess was taken from 11:26 a.m. to 11:39 a.m.)

THE COURT: Okay. Let's all be seated. We'll proceed with -- well, we're at rebuttal, aren't we?

MR. REISS: Thank you, Your Honor. Yes, we are.

THE COURT: Go ahead.

MR. REISS: I am not quite sure why it's that important to the defendants, but when we talk about the commitments plaintiffs made in the Ninth Circuit, every one of them was met. E-mails, we see the e-mails from Mr. Anderson, obviously with the legislature, about Mr. Horne's desire to eliminate the MAS program.

With respect to anti-immigration efforts and the connection to this law, Dr. Pitti was exhaustive and compelling. And, you know, Your Honor, it's your credibility determination to make, and I will tell you now, I am delighted for this Court to make whatever credibility determinations it has to make with respect

to Dr. Pitti, with respect to Dr. Valenzuela, and with respect to Dr. Cabrera.

Dr. Pitti, I must say, I am not easily impressed by academics, but his encyclopedic knowledge, his answer to every question, Your Honor will be the Judge, and his findings, his conclusions, his support, his documentation in this courtroom were not just adequate or professionally sound, they were compelling. They were compelling, as was his hundred-page declaration in this courtroom.

I understand why Ms. Cooper is so desperate, so desperate, to try to knock out Dr. Cabrera's report. But Your Honor saw Dr. Cabrera. I'll say the same thing about Dr. Cabrera that I said about Dr. Pitti. I am completely, utterly comfortable with the Court making a determination about the forthrightness, candor, credibility, incisiveness, and professionalism of Dr. Cabrera and his report.

In fact, I am totally comfortable with the Court taking Dr. Haladyna at his word, because, in all frankness, Your Honor, at the conclusion of Dr. Haladyna's testimony, I thought he was a plaintiffs' witness, not a defense witness. He basically completely supported Dr. Cabrera. He has some quibbles around the edges of the way Dr. Cabrera conducted his study, a study that he agreed was published in the most prestigious peer-reviewed journal on educational matters. There is no question that study is valid. The most analytical,

comprehensive, well-done study, with four years of MAS students. And the reason they're so desperate to debunk it is because it shows what Dr. Haladyna said were incredibly impressive results, astounding results.

As for Dr. Valenzuela, their criticism of Dr. Valenzuela, what she did or didn't do to evaluate curriculum, she explained how she evaluated curriculum. She explained what she looked at, and she is an expert in the area.

But here is the irony. Here is the irony. They criticize Dr. Valenzuela, but she did far more in analyzing the MAS curriculum than the Arizona Department of Education ever did before they terminated the program.

Now, the State also says that, you know, we didn't come through with our promise to the Ninth Circuit concerning the decision to reject the Cambium report. That assertion astounds me. What we showed -- and frankly, I didn't expect to show this coming into this courtroom -- we showed it through their witnesses. The decision to reject the Cambium report was made before their own supposed investigation even started. We thought the issue would be, well, how deficient was their investigation. We didn't even have to get to that point. They admitted they made the decision before any investigation, based purely on what they read with Cambium. They disagreed with the conclusions.

So I think what we've showed in this courtroom concerning

the rejection of the Cambium report is compelling, compelling, and far worse than anything I think we anticipated.

And finally, evidence concerning other ethnic studies courses, don't take it from me, take it from Mr. Horne, who found, way back when he was finding the MAS problem had problems, he said the other ethnic programs also violated (A)(3), which was then in effect, or which was being drafted. They were ethnic studies aimed primarily at particular ethnic groups, which Mr. Horne said he completely opposed. And he noted that. No action was ever taken against those.

So, in terms of our commitment to the Ninth Circuit, we did everything we said we would do and more.

Now, let me take on a couple of major themes that you have heard from the defendants.

One is about pedagogy, MAS had pedagogical problems, wasn't pedagogically sound.

What valid pedagogy, what valid pedagogy looks at materials and takes them at them as face value for their truth without analyzing or understanding or investigating how they're taught. That is the most illegitimate pedagogy. It's not pedagogy. Okay? It's not pedagogy. But that's what they're saying. Not only that was not only what was done, it's what they continue to do in this courtroom.

You just heard it: Let's take an example of a picture. Do you think it's right to show this picture of lynchings to

10-year-olds?

Well, you know, it may well be right to show that to 10-year-olds. They are not naïve. They know what's going on. They live in a society where they see this kind of violence on their video games, in movies, on the internet. The notion that it's just absolutely ridiculous to think about showing the picture of the lynching of Mexican-Americans to 10-year-olds is nonsense.

There are many legitimate reasons why you would show that picture to 10-year-old students. But they just say that shows, that shows these materials, that shows these courses violated the statute.

That's just nonsense.

Mr. Acosta, they attack Mr. Acosta for writing a rap poem and a rap song that was never talked about in school, never discussed in school, he did on his own time. You know what? Just as with our experts, I am happy to have the Court make a determination about Mr. Acosta's credibility. He was forthright, honest, sincere, dedicated, and we need more teachers like him. And, in fact, even Mr. Huppenthal agreed to that. So I'm fine with Mr. Acosta, whatever rap songs or poetry he might write in his spare time. And, by the way, they were pretty talented.

Let's talk about curriculum. Big theme. Curriculum.

Curriculum didn't have pacing maps or this chapter or

this step. Let me ask a fundamental question. Let's step back and look at reality. How could a curriculum that was in the kind of disarray they claim the MAS was in, how could that curriculum have the effects that Nolan Cabrera found it had? How could that be?

The Court has to ask a fundamental, rational, basic question: If the curriculum was as disarrayed, as incoherent, as atomistic, as untied together as they say, it would never have dramatically increased the graduation rate of the students in those classes, it would never have dramatically increased the passing grade on AIMS tests. That is just a complete bogus red herring disproved by what happened in the MAS students.

And the notion -- I mean, you have to scratch your head. The notion that somehow it's really not that important to determine whether the MAS program affects the passing rates on AIMS tests, or the graduation rates, the notion that that's really not that important is patent nonsense.

And Dr. Haladyna agreed with me. What matters to a student is whether they graduate from high school. It's what matters to everybody. It has been the Holy Grail of education with respect to minority education in this country for 60 years.

You've seen that in the Stanford study that is admitted into evidence.

And the ethnic studies programs, the well-designed ethnic studies programs, are apparently the biggest breakthrough in

actually improving dramatically this educational performance of the students in those courses. And we're learning that more and more. Yes, we're learning it. We are at the outset of learning that, but we now have two really well-documented peer-reviewed studies: Mr. Cabrera's and the Dee and Penner study. And there will be more.

But, Your Honor, any time there is a revolutionary development, there is always resistance. It was true with Copernicus. It was true with Galileo. Galileo was even imprisoned and killed for -- I am not equating this development with the revelation that the earth actually revolves around the sun and not vice versa. But I am saying, especially given Dr. Haladyna's report, this is the first kind of programmatic development in education that is shown to have dramatic effects on the educational performance of Mexican-American students and other ethnic minorities. The notion that we would kill or squash these programs in their infancy, it's just a shame. Worse than a shame.

Now, a couple of statements that I must say I find somewhat astounding coming from the state.

They claim that there was no irregular procedure involved here.

They didn't need the law. They passed, enacted, and enforced a law they didn't need. They could have used 15-231. But instead they passed a law that enabled them to completely

submarine, blow up, the entire Mexican-American Studies Program.

The other thing they say, which is an equal level of astonishment, is that the superintendent didn't terminate the program, the TUSD did. Your Honor, we know that's wrong. You know how we know that's wrong? Because the Ninth Circuit said that's utter nonsense. The TUSD terminated the program because they were going to have 10 percent of funding withheld, and that was the death knell. Ninth Circuit said it. The notion that they're making that argument again in this courtroom, frankly, is somewhat astounding.

Another somewhat astounding assertion by the state, that Mr. Huppenthal could simply have taken Mr. Horne's finding and said, that's it, I'm done with it. How can that possibly be? Mr. Horne's finding was made before the statute was in effect, based on no activity -- none, zero, full stop -- that actually was covered by the statute. And yet the state stands here and says it would have been fine if Mr. Huppenthal adopted that finding. Really? A finding that violates the most fundamental principles of American law. That's utter nonsense.

You know, Your Honor, I am very appreciative of the Court's patience, and I think I'm just about done.

Ms. Cooper said that the plaintiffs see racism everywhere. I don't think that's true. There may be racism everywhere. But I see it in this case, I see it in the enactment of this

statute, and I see it in the enforcement of the statute.

Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Reiss.

All right. That's the conclusion, in the District Court at least, of counsel's participation in this case. I want to thank counsel on both sides. I think it's a very competent, very professional, lawyerly-like presentation, and it's a pleasure to preside over a case with competent counsel like you are.

So I am going to take this case under submission. You know, it's been around for, what, eight or nine years. So I want to be as prompt as I can in issuing a decision. I hope it will be -- all I can say is the next few weeks. All right?

MR. REISS: Your Honor, two questions, if I might.

THE COURT: Yes.

MR. REISS: One, and I can give a copy instead, I do have a copy of the PowerPoint if the Court wants it. If not, I understand.

THE COURT: A copy of what?

MR. REISS: Of the PowerPoint of our closing argument. If the Court would want it. I can provide a copy to the state as well.

THE COURT: Give a copy to the state and give a copy to the clerk.

MR. REISS: The other question I had, Your Honor, was

whether the Court would find it useful to have a post-trial briefing. I don't know what your practice is.

THE COURT: Well, you know, I gave you both a chance to -- well, under the pretrial order, you both submitted proposed findings and conclusions, right? I don't know if you think the evidence that actually came in is different enough from what you envision that you think you want to change your emphasis or something like that. You know, I am not going to require it, but, at the same time, if you want to go through the work, I'll be happy to receive it.

Do you want to present further briefing?

MS. COOPER: No, Your Honor.

THE COURT: You think it's sufficiently briefed, right?

MS. COOPER: We do. And we think that it should be the same for both parties.

THE COURT: That's what I am getting at. Mr. Reiss?

MR. REISS: Your Honor, we might have some additions or modifications to the proposed findings of facts and conclusions. I don't think they'll be extensive, but there may be some. I think there probably would be some additions.

MS. COOPER: Extensiveness and the amount of work are not coextensive.

THE COURT: What I should have said, and I would have cut this off, is you can have either closing argument or

post-trial brief. Fortunately, in this case, we're going to have, I think, transcripts available. So I don't think -- because of that circumstance, I don't think I need further briefing.

MS. COOPER: Thank you, Your Honor.

THE COURT: Especially since, you know, there are only two issues, legal issues, right, that were remanded for trial. I mean, I regard the Ninth Circuit mandate as quite specific. The law that applies to the presentation of those, those issues that have been briefed, you know, starting with the post briefing on summary judgment, you know, motion to dismiss, in limine motions. So I think I have a fair grasp of the law and I can, you know, go back and look at the file.

On the other hand, you know, when it first went on appeal, I thought I had a pretty good grasp of the law, too, see?

(Laughter in the courtroom.)

THE COURT: You know, we all make some mistakes.

MS. COOPER: Not in the state's mind, Your Honor.

THE COURT: So I appreciate your invitation, but I am going to forgo further briefing. All right?

MS. COOPER: Thank you, Your Honor.

THE COURT: Anything else from counsel?

MR. REISS: No. Your Honor, just on a personal note, it's really -- it's been a pleasure to be in your courtroom. I really appreciate it.

THE COURT: Thank you.

MS. COOPER: The state echoes those comments.

THE COURT: Thank you. All right. Then this case is now under submission for a final decision and judgment, and we are now adjourned. Thank you.

(Proceedings concluded in this matter at 11:58 a.m.)

C E R T I F I C A T E

I, A. TRACY JAMIESON, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true and accurate transcript of the proceedings contained herein, held in the above-entitled cause on the date specified therein, and that said transcript was prepared by me.

Signed in Tucson, Arizona, on the 21st day of July, 2017.

s/A. Tracy Jamieson
A. Tracy Jamieson, RDR, CRR