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Amici Curiae Brief on Behalf of Chief Earl Warren Institute on Law and Social Policy, and the Anti-Defamation League, In Support of Plaintiffs-Appellants

Counsel for Amici Curiae

Nos. 13-15657, 13-15760

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAYA ARCE, et al.,

Plaintiffs-Appellants,

v.

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

Defendants-Respondents.

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

AMICI CURIAE BRIEF ON BEHALF OF CHIEF EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY, AND THE ANTI-DEFAMATION LEAGUE, IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, undersigned counsel for amici make the following disclosures. The Chief Earl Warren Institute for Law and Social Policy is a public institution comprising a research center within Berkeley Law School. The Anti-Defamation League is a not-for-profit organization recognized as tax-exempt under Internal Revenue Service code 501(c)(3).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

I. STATEMENT OF CONSENT

Both parties have consented to the filing of this amicus brief. No party or party's counsel authored or paid for this brief.

II. IDENTITY AND INTEREST OF AMICI

The Chief Justice Earl Warren Institute on Law and Social Policy ("Warren Institute") is a research center within Berkeley Law School, funded principally from research grants from Boalt Hall alumni. The Warren Institute is a multidisciplinary venture to produce research-based policy prescriptions on the most challenging issues facing the Nation, including civil rights and education. The Warren Institute's mission is to engage the most difficult topics in a wide range of legal and public policy subject areas.

The Anti-Defamation League ("ADL") was founded a hundred years ago, in 1913, to combat anti-Semitism and other forms of discrimination, and to secure justice and fair treatment for all. As part of its work, ADL advocates for equal educational opportunity by seeking ways to close racial and ethnic disparities in educational outcomes.

III. BACKGROUND AND STANDARD OF REVIEW

The Warren Institute and ADL submit this brief urging reversal because the district court failed to consider an animus theory of equal protection. Under this

theory, the State exhibited unconstitutional and irrational animus against the Tucson Unified School District's Mexican American Studies community by singling it out as the only group to have its cultural heritage classes banned. As explained below, the necessary inquiry into unconstitutional animus is highly fact-dependent, and the district court erred in granting summary judgment *sua sponte*.

Because this appeal asks the Court to "review a grant of summary judgment, [the Court] view[s] the evidence in the light most favorable to [Plaintiffs], the nonmoving party, and accept[s] all disputed facts most favorable to [them]." *Drummond v. City of Anaheim*, 343 F.3d 1052, 1054 n.1 (9th Cir. 2003). Pursuant to that standard, *Amici* agree with the facts laid out in Plaintiffs' Opening Brief, and present only those facts relevant to *Amici*'s argument. Similarly, *Amici* agree with Plaintiffs' other equal protection arguments.

A. The Origins of the Mexican American Studies Program in Tucson Unified School District.

In 1974, a group of Hispanic and black students sued Tucson Unified School District ("TUSD") in federal court "alleging intentional segregation and unconstitutional discrimination on the basis of race and national origin." *Fisher v. Tucson Unified School District*, 652 F.3d 1131, 1134 (9th Cir. 2011). In 1978 the District Court for Arizona entered a consent decree that has governed TUSD ever since. *Id*. *See also Fisher v. Lohr*, No. CV 74-90-TUC-DCB, at *2 (D. Ariz. Feb.

6, 2013) (memorandum order) ("Deseg. Order") (collectively the "Desegregation Case"). The consent decree required that the school district meet its "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Deseg. Order at *2 (internal quotation marks and citations omitted). A key part of TUSD's "affirmative duty" included eliminating unequal academic opportunities for minority students. *Id*. at *3.

To facilitate its efforts to desegregate its schools and address achievement gaps for its minority students, TUSD established four programs to provide culturally responsive curricula: African American Studies, Mexican American Studies ("MAS"), Native American Studies, and Pan Asian Studies. The impetus for these programs was the belief that providing classes that emphasize the cultural and historical accomplishments of various ethnicities, would help these students achieve the same challenging state standards as all other students.

Under almost every measure, the MAS program was a resounding success. During a six-year period, 2005-2010, Hispanic students who took an MAS course had a cumulative graduation rate that was 7.7% higher than their comparison group, Hispanic students who did not take an MAS course. ER 2244. Better still, that rate was getting progressively better: in 2010 the graduation rate for MAS

students was 10.9% higher than their non-MAS peers. ER 2244. Likewise, MAS students performed substantially better on state tests. During that same six-year stretch, MAS students had a 12% higher passage rate on the state reading test than the comparison group, and an 11.2% higher passage rate on the state writing test. ER 2242. In short, to the extent MAS was designed to promote student achievement amongst traditionally disadvantaged students with high dropout rates and low test scores, MAS was working.

And yet, despite the MAS program's successful track record in eliminating the achievement gap and promoting graduation rates for Hispanic students in TUSD, a growing number of State officials, including the State Superintendent of Public Instruction sought to end the program based on anecdotal stories about members of Tucson's MAS community.

B. Targeting the Mexican American Studies Community of Tucson Unified School District, the Arizona Legislature Enacted A.R.S. § 15-112.

In 2006, an assembly at Tucson High School erupted into controversy when a guest speaker, Dolores Huerta, a longtime civil rights leader, stated that "Republicans hate Latinos." ER 1054-55. The backlash was immediate and Arizona's then-Superintendent of Public Instruction Tom Horne dispatched his Deputy Superintendent, Margaret Garcia-Gugan, to rebut Huerta's statement. *Id*.

During Garcia-Gugan's speech, a group of students staged a silent demonstration, taping their mouths shut to symbolize their silence because the students were not permitted to ask any questions. *Id*. After the speech, the students walked out in silence. *Id*. Horne publicly decried the students' protest as "disrespectful," and blamed Tucson's MAS community for the students' actions, claiming that the MAS program taught them to behave this way. ER 1056-57. Horne then published an "Open Letter" to Tucson blaming the MAS program for fostering "racial resentment" within the Mexican American community, and revealing his commitment to end Tucson's MAS program. ER 1054-58.

Despite Horne's letter vilifying the MAS program, TUSD continued the popular and successful program. Frustrated by its perseverance, Horne shifted his efforts to the legislature. Arizona's House Bill 2281 ("H.B. 2281"), which Horne supported, sought to ban Tucson's MAS program. Now codified as A.R.S. § 15-112, the law prohibits state school districts from providing courses that (1) "promote the overthrow of the United States government," (2) "promote resentment toward a race or class of people," (3) "are designed primarily for pupils of a particular ethnic group," and (4) "advocate ethnic solidarity instead of treatment of pupils as individuals." A.R.S. § 15-112(A). Under the law, the State

Superintendent of Public Instruction is empowered to order that noncompliant programs be changed or dismantled. *Id*. § 15-112(B).

The State acknowledges that A.R.S. § 15-112 "was passed in response to complaints about the MAS program. Indeed, the testimony before the Senate Committee confirms that this was the case." ER 27. Then-Superintendent Horne testified before the Senate and House committees considering H.B. 2281, and his testimony focused entirely on Tucson's MAS program. *See id*. (noting that when "Horne's informal effort failed, he became the driving force behind the enactment of [H.B. 2281]," and that Horne "stated unequivocally that his support for [H.B. 2281] arose from his concerns about the MAS program"). Horne's efforts paid off when the legislature passed the bill, and Arizona Governor Jan Brewer signed it on May 10, 2010. The law's effective date was January 1, 2011, the day *after* Horne's tenure as Superintendent would end.

When the law passed, the TUSD School Board immediately adopted a resolution requiring compliance with the law and conducted training sessions for MAS instructors. ER 1117. Despite those efforts, and months before the law's effective date, then-Superintendent Horne ordered the MAS program investigated for potential violations. On his last day in office, and one day *before* the law took effect, Horne released a finding that Tucson's MAS program was in violation of

A.R.S. 15-112. ER 27. The timing of Horne's decision "means that Horne necessarily applied the statute retroactively, without any effort to show that the problematic materials were in use at the time of the Finding." ER. 27. Horne unequivocally declared that the program could not be fixed, and that it had to be banned in its entirety. ER 2184. In that same letter, Horne acknowledged that other programs "could be found in violation" of the law, but did nothing to investigate those programs. ER 28.

Horne's successor as State Superintendent of Public Instruction continued Horne's crusade against Tucson's MAS community. On January 1, 2011, former State Senator John Huppenthal, a key supporter of A.R.S. § 15-112 while he was in the state legislature, succeeded Horne as State Superintendent. Acknowledging that Horne's investigation and findings were legally dubious, Superintendent Huppenthal ordered his own investigation of Tucson's MAS program. ER 28; 1257. As part of that investigation, the State hired Cambium Learning, Inc., to audit Tucson's MAS program ("Cambium Audit"). ER 1257. The Cambium auditors collected curriculum material, visited classrooms to observe teaching methods and student behavior, and evaluated TUSD's data on test scores and graduation rates. ER 2266. The Cambium Audit made three key findings. First, the auditors concluded that the MAS program did not violate A.R.S. § 15-112.

Second, the auditors "found the courses to be rigorous and that students were held to high standards of performance." Deseg. Order at *15; *see also* ER 2229. And finally, the auditors analyzed data on test scores and graduation rates of MAS and non-MAS students, and concluded that the MAS program was substantially responsible for narrowing the achievement gap for Hispanic students enrolled in the program. ER 2247.

Even though it commissioned the report, Superintendent Huppenthal's office immediately sought to discredit the Cambium Audit. However, the Special Master appointed by the district court in the Desegregation Case later commissioned his own study, the "Cabrera Report," which reached similar conclusions about the program's effectiveness. Deseg. Order at *15. But all the data that showed the MAS program promoted academic achievement and helped close the achievement gap for Hispanic students in TUSD—even the data in the State's own audit—would not be enough to save the program. On June 15, 2011, Superintendent Huppenthal issued a terse three-page finding that Tucson's MAS program violated A.R.S. § 15-112 because its classes (1) promoted racial resentment, (2) were designed primarily for Hispanic students, and (3) promoted ethnic solidarity rather than individuality. ER 2194-96.

Though the State concedes that other ethnic studies programs violate A.R.S. § 15-112, "[t]o date, no other programs have been investigated or found to be in violation of [A.R.S. § 15-112]." ER 28. In short, the Mexican American Studies community in Tucson is the only group whose cultural heritage program has been targeted, investigated, and dismantled by the State pursuant to A.R.S. § 15-112.

C. Plaintiffs Challenge the Constitutionality of A.R.S. § 15-112, But the District Court Prematurely Grants Summary Judgment to the State.

After the Superintendent declared Tucson's MAS program dismantled, Plaintiffs filed this action alleging that A.R.S. § 15-112 violates several constitutional principles, including over breadth, vagueness, and equal protection. ER 2150. On October 21, 2011, Plaintiffs filed a motion for summary judgment on its claims that A.R.S. § 15-112 is unconstitutionally broad and vague. ER 2034. Plaintiffs did not move for summary judgment on their equal protection claims. The State filed a cross-motion for summary judgment on Plaintiffs' over breadth and vagueness claims, but did not move for summary judgment on Plaintiffs' equal protection claim. ER 472; 1387. *See also* ER 8 (district court acknowledging that neither party briefed equal protection at the summary judgment stage).

The district court granted in part, and denied in part, both parties' motions for summary judgment. Specifically, the district court denied all of Plaintiffs'

vagueness and over breadth challenges, except with respect to § 15-112(A)(3), which barred classes designed primarily for one ethnic group. The district court concluded that provision was unconstitutionally overbroad. ER 20. Instead of stopping there, however, the district court went on to grant the State summary judgment, *sua sponte*, on Plaintiffs' equal protection claim. ER 24-30.

Because neither party moved for summary judgment on the equal protection claims, the district court first had to determine which equal protection theories it would apply to Plaintiffs' claim. The court considered only two theories: (1) whether the law facially discriminates against Hispanics under the "political structure" theory of discrimination, as outlined in *Hunter v. Erickson*, 393 U.S. 385 (1969), *Washington v. Seattle School District*, 458 U.S. 457 (1982), and *Valeria v. Davis*, 307 F.3d 1036 (9th Cir. 2002); and (2) whether the statute passes muster under a "discriminatory impact" theory of equal protection jurisprudence, as outlined in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). ER 25-30. After reviewing those cases, the district court granted summary judgment, *sua sponte*, to the State on Plaintiffs' equal protection claims. The district court did not consider any other theory of equal protection jurisprudence.

D. The Desegregation Case: In A Separate But Parallel Action, the District Court Requires Culturally Relevant Courses

Parallel to this case, the District Court of Arizona has continued to exercise jurisdiction over the federal consent decree requiring TUSD to achieve unitary status (the Desegregation Case). On July 19, 2011, a month after Superintendent Huppenthal ordered TUSD to eliminate its MAS program, the Ninth Circuit ruled in the Desegregation Case that TUSD had not yet "eliminated the vestiges of racial discrimination." *Fisher*, 652 F.3d at 1140. Following the Ninth Circuit's decision, the district court adopted the parties' stipulated Unitary Status Plan ("USP") on February 2, 2013. Deseg. Order at 4-5.

In adopting the USP, the court pointed out that the plan is designed "to improve the academic achievement and educational outcomes of [TUSD's] African American and Latino students, using strategies aimed at closing the achievement gap and eliminating the racial and ethnic disparities for these students in academic achievement, dropout and retention rates, discipline, [and] access to advanced learning experiences." *Id*. at 12. To achieve this goal, the plan requires the adoption of "culturally responsive teaching methods" and "culturally relevant courses of instruction designed to reflect the history, experiences, and culture of African American and Mexican American communities." *Id*. at 12-13.

Not a party to the Desegregation Case, the State filed an amicus brief and a motion to intervene focused on "the sole question of whether the USP may include a provision allowing the return of the discontinued [MAS] courses." *Id*. at 5. The State objected to the USP's requirement that TUSD offer ethnic studies courses on the grounds that "there is a real possibility that the supporters of the illegal, biased, political, and emotionally charged MAS program that promoted social and political activism against 'white people' and fomented racial resentment, will have used a federal court-sanctioned avenue to resurrect this illegal course of instruction." *Id*. at 14.

The court denied the State's motion to intervene. It first pointed out that the "State does not dispute the merits of culturally relevant courses to improve academic achievement for minority students." *Id*. at 15. It also noted that the court's appointed "Special Master concluded that both studies [Cambium and Cabrera] suggest that students who took the MAS courses were more likely to graduate from high school on time and to pass state achievement tests than similarly situated peers." *Id*. at 15. The court further explained that the State objected only to the MAS program, not the other ethnic studies courses, even though the USP does not "adopt[] any specific culturally relevant course." In

other words, the State objected to any MAS course, regardless of its compliance with A.R.S. § 15-112, but did not object to other similar courses.

IV. ARGUMENT

A. The District Court Erred in Granting Summary Judgment, *Sua Sponte*, to the State on Plaintiffs' Equal Protection Claims Because It Failed to Consider an Animus Theory of Equal Protection.

This Court should vacate the district court's summary judgment order because that court only considered two equal protection theories (political structure and discriminatory impact), while failing to consider a separate theory altogether: animus. Animus can be described as "a bare . . . desire to harm a politically unpopular group." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). State action motivated by animus toward any group—even if it is not a traditionally protected group—violates the Fourteenth Amendment's Equal Protection Clause. *See United States v. Windsor*, -- U.S. --, 133 S. Ct. 2675, 2693 (2013) (concluding that Defense of Marriage Act is unconstitutional, in part, because the law was motivated by animus).

The summary judgment standard is particularly relevant here. As explained below, the record viewed in the light most favorable to Plaintiffs demonstrates that A.R.S. § 15-112 effectively creates two classes of persons for purposes of approving ethnic studies programs: one class is composed of those associated with

the Tucson MAS program, including current and former MAS students, parents, and faculty ("MAS community"); the other class consists of those individuals associated with the other ethnic studies and other programs (*i.e.*, current and former students, parents, and faculty associated with African American Studies, Pan Asian Studies, or Native American Studies). In practical effect, the law took away the first group's ethnic studies program, leaving the others' ethnic studies programs intact. The State's subsequent enforcement actions—which carved out the MAS program for special treatment, superseding the TUSD school board, its own audit, and a separate independent study—reinforce the notion that the law targeted Tucson's MAS community.

Resolving all factual disputes and drawing all reasonable inferences for Plaintiffs—as the summary judgment standard requires—the record strongly suggests that animus motivated the passage and enforcement of A.R.S. § 15-112. Because the district court never considered this theory this Court should vacate the summary judgment order so that the parties can fully brief this claim and resolve the factual disputes underlying it.

B. Laws Motivated by Animus Violate the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the

laws." U.S. const., amend. XIV. The Clause essentially directs that all persons similarly situated be treated alike. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982). The general rule is that a legislative classification will be sustained if it is rationally related to a legitimate state interest. *Moreno*, 413 U.S. at 533. This general rule "gives way, however, when the statute classifies by race, alienage, or national origin," because these factors "are so seldom relevant to the achievement of any legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Laws based on these so-called "suspect classifications" are subjected to strict scrutiny, which requires that they be "suitably tailored to serve a compelling state interest." *Id.*

But even where the legislative classification does not deal with a "suspect class," courts will find that a law violates equal protection principles if there is evidence that animus against a particular group motivated the law's enactment or enforcement. *See Windsor*, 133 S. Ct. at 2693. Because a law that burdens a particular group for its own sake is never rational, animus-based laws fail even the most deferential level of scrutiny. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

Courts apply a two-step test to determine whether state action was unconstitutionally motivated by animus. First, a court will determine whether there is evidence that the state acted with a desire to harm a certain group.

Moreno, 413 U.S. at 434 (striking down legislation indirectly targeting "hippies"). Several factors inform this determination such as (a) whether the legislative history suggests that animus against this group motivated the law, *see Romer*, 517 U.S. at 624; (b) whether the state action was consistent with popular bias against this group, *see id*.; and (c) whether the state action treated similarly situated groups differently, *see Cleburne*, 473 U.S. at 450.

Second, having identified animus against a particular group, the court will then closely examine the state's purported interest in drawing the classication to determine whether that interest is legitimate, and whether the state's actions are rationally related to accomplishing those interests. *See id*. at 449; *Moreno*, 413 U.S. at 534-35. By requiring some rational relationship between the classification caused by state action and the purported legislative end, the court "ensures that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

Applying the animus framework here, alongside the summary judgment standard, there are at least two factual disputes material to such an equal protection claim:

1. Whether the State's actions—in passing and selectively enforcing the law— were designed specifically to target the one group actually burdened by the law: Tucson's MAS community; and
2. Whether those actions are rationally related to accomplishing legitimate interests.

As explained below, the leading Supreme Court precedents on animus (*Moreno*, *Cleburne*, and *Romer*) each demonstrate that if the district court had resolved those factual disputes in Plaintiffs' favor, Plaintiffs would have prevailed at the summary judgment stage on an animus claim.

C. The State's Actions Were Motivated By Animus

Ultimately, every state program (or programmatic change to an existing program) draws some classification, often between those who benefit from it and those who are burdened by it. In most cases, these classifications are constitutional. But a classification motivated by a "bare desire to harm a politically unpopular group" can never be rational or constitutional. *Romer*, 517 U.S. at 634. Here, the State violated the Equal Protection Clause by enacting and enforcing A.R.S. § 15-112 in a manner that reflected animus against one group: Tucson's MAS community.

The state actions in this case—enactment and enforcement—are two sides of the same coin: a statute whose enactment was motivated by animus violates the Fourteenth Amendment, even if that statute is facially neutrally, *Moreno*, 413 U.S. at 538; likewise, animus-motivated enforcement of an otherwise neutral law also violates the Equal Protection Clause, *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."). Taken together, a state cannot do through enforcement what it could not do through enactment (and vice versa). Here, the district court focused on whether the State's actions discriminated against the "Latino population," including "Latino students, teachers, or community members." ER 29. But the court never examined whether, regardless of race, the State acted with animus toward Tucson's MAS community, even though the district court acknowledged that "the evidence indicates that Defendants targeted the MAS program." *Id*.

Once again, applying the proper summary judgment standard by resolving all facts and drawing all reasonable inferences for Plaintiffs, the following facts establish that unconstitutional animus motivated the State's actions:

1. Then-Superintendent Horne blamed the MAS community for insulting his deputy after a few students staged a silent protest;
2. The legislative testimony in support of A.R.S. § 15-112 focused solely on Tucson's MAS program;
3. The State ordered Tucson's MAS program investigated and dismantled before A.R.S. § 15-112 went into effect;
4. The State ignored its own audit (the Cambium Report), which concluded that the MAS program promoted student achievement and did not violate A.R.S. § 15-112;
5. The State disregarded TUSD's own data, and the Special Master's separate study (the Cabrera Report), each of which showed that the MAS program dramatically improved student achievement;
6. Rather than attempt to fix the program, the State completely dismantled it, and has aggressively sought to prevent any other MAS program from taking root;

7. The State has not investigated any other program even though it has admitted that other programs may also violate the law;
8. The State has treated other similarly situated communities differently, such as the Anglo American,[1] African American, Asian American, and Native American studies programs; and
9. As documented in the Desegregation Case, TUSD had a long history of racial discrimination, particularly against Hispanic students.

Considered in the light most favorable to Plaintiffs, this record suggests that unconstitutional animus against Tucson's MAS community motivated the State's actions. Because animus is not a legitimate state interest, the Court erred in granting summary judgment to Defendants.

D. The State's Actions Were Not Rationally Related to Any Legitimate Purpose

Because the State's actions singled out Tucson's MAS community, the question is whether that classification's "relationship to [any] asserted goal is so attenuated as to render the distinction arbitrary and irrational." *Cleburne*, 473 U.S. at 446. The Supreme Court's decisions in *Moreno*, *Cleburne*, and *Romer*

[1] Mainstream or traditional history, literature, and cultural studies programs that focus on the accomplishments of Anglo and other European Americans must be included as ethnic studies courses subject to the restrictions of A.R.S. § 15-112. If the term "ethnic" does not include Anglo and European Americans, it is difficult to see how there can be any dispute that the statute discriminates on its face.

demonstrate that the State's actions are not rationally related to accomplishing legitimate interests, and fail even the most deferential scrutiny.

1. *U.S. Department of Agriculture v. Moreno*

Moreno, one of three leading Supreme Court precedents on animus, is particularly instructive here. 413 U.S. 528 (1973). In *Moreno*, the Supreme Court considered the practical and intended effect of Congress's decision to amend the Food Stamp Act of 1964 to deny food stamps to any household containing an individual who is unrelated to any other member of the household. *Id*. at 529. The Court began by observing that the amendment created two classes of persons for food stamp purposes: "one class is composed of those individuals who live in households all of whose members are related to one another, and the other class consists of those individuals who live in households containing one or more members who are unrelated to the rest." *Id*. Because the law did not create a "suspect" classification, the question for the Court was whether the law created "an irrational classification in violation of the equal protection [clause]." *Id*. at 532-33.

Noting that the classification was "irrelevant to the stated purposes of the Act," which was to provide nutrition among low-income households, the Court determined that the amendment was actually intended "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."

Id. at 534. The Court reasoned that animus towards hippies could not sustain the act because "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate purpose." *Id*. The government nevertheless tried to save the amendment by arguing that the classification was rationally related to *other* legitimate interests, such as preventing fraud. *Id*. The Court rejected these other interests because they were based on unsubstantiated assumptions, and because denying food stamps to otherwise eligible households did not constitute "a rational effort" to deal with those concerns. Having determined that Congress was motivated by animus against a particular group (*i.e.*, hippies), the Court concluded that the Food Stamp amendment violated the Equal Protection Clause. *Id*. at 537.

Like the Food Stamp Act, the legislative history and selective enforcement of A.R.S. § 15-112 against only Tucson's MAS program show that the State was motivated by unconstitutional animus toward Tucson's MAS community. For instance, as the district court acknowledged, the legislative testimony focused exclusively on the MAS program, even though the State concedes that other programs (*e.g.*, African American Studies) might also violate the act. The State dismisses any notion of selective enforcement by claiming it is simply responding

to complaints about the MAS program. *See* ER 28. But the State cannot "avoid the strictures of [the Equal Protection Clause] by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne*, 473 U.S. at 448. *See also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect."). Moreover, the extent to which the State is responding to complaints, rather than enforcing a policy based on animus, is a question of fact that cannot be resolved at the summary judgment stage.

Additionally, like the government in *Moreno*, here the State has attempted to identify *other* legitimate purposes of A.R.S. § 15-112 to show that the State was not motivated by animus. But the State's actions are not rationally related to these other interests. Most importantly, A.R.S. § 15-112 is clearly not relevant to the underlying purposes of public education. The MAS program was created to *promote* student achievement amongst traditionally low-performing populations like Hispanics and African Americans. And by all accounts, the MAS program worked: increasing test scores, graduation rates, and overall student achievement for students enrolled in the program. While the State may disagree with the Cambium Audit and the Cabrera Report on this issue, the standard at summary judgment requires the Court to resolve all factual disputes and draw all reasonable

inferences for Plaintiffs. Therefore, the State's actions—singling out Tucson's MAS community like Congress singled out "hippies" in *Moreno*—cannot be justified by reference to other educational goals.

The State has asserted that ending the MAS program served another interest: ending racial resentment. But like the government's purported interests in *Moreno*, the State's assertions are based on "wholly unsubstantiated assumptions concerning the differences between [those associated with the MAS program and those associated with other ethnic studies programs]." *Moreno*, 413 U.S. at 535. The State cannot argue that the MAS program is materially different than any other ethnic studies program, because the legislature and Superintendent have focused exclusively on the MAS community. Moreover, the State even admitted that other programs violate the law, but none have been investigated, much less shut down. ER 28. Viewed in the light most favorable to Plaintiffs, the evidence shows that the State's actions were not motivated by a general purpose to end racial resentment, but instead were motivated by animus against Tucson's MAS community.

Even if the State's assumptions about the MAS program are true, the State's decision to eliminate MAS wholesale—rather than reform it—did not "constitute a rational effort to deal with these concerns" and further demonstrate the State's

animus. *Moreno*, 413 U.S. at 536. Just like the Food Stamp Act had separate provisions to address fraud, here the State had other safeguards to ensure that the MAS program did not run afoul of state standards. The TUSD school board had authority to review and amend the program, and after concluding that the program did not violate A.R.S. § 15-112, the board voted 4-1 to maintain the program. The Superintendent's own audit reached the same conclusion. ER 2198. The existence of these other safeguards, juxtaposed with the program's documented success, "necessarily casts considerable doubt upon the proposition that [A.R.S. § 15-112] could rationally have been intended to prevent those very same abuses." *Moreno*, 413 U.S. at 537.

Thus, taken together and applying the correct summary judgment standard, the State's actions cannot be justified by reference to Arizona's general interest in promoting student achievement (because it affirmatively dismantled a program that increased test scores and graduation rates), or by reference to the amendment's other purported interests (because eliminating the program altogether was irrational and based on unsubstantiated assumptions). Instead, the record shows that unconstitutional animus against Tucson's MAS community motivated the passage and enforcement of A.R.S. § 15-112.

2. *City of Cleburne v. Cleburne Living Center*

Like this case, *Cleburne* involved a challenge to a state action that included both the adoption of a law and its enforcement. The ordinance in *Cleburne* required a "special use permit" for certain multi-unit projects, including "[h]ospitals for the insane or feeble-minded. 473 U.S. at 436 (citation omitted). The plaintiff, Cleburne Living Center ("CLC"), had leased a building in Cleburne intending to operate a group home for individuals with intellectual disabilities. *Id.* at 435. The City classified the proposed group home as a "hospital for the feeble-minded," and required a special use permit—which the City then denied. *Id.* at 436-37. The question for the Court was whether "the city [may] require the permit for this facility when other care and multiple-dwelling facilities are freely permitted." *Id.* at 448. Or, put differently, "whether it is rational to treat the mentally retarded differently." *Id.* at 449.

The Court considered the City's specific objections to the CLC facility—including its fear that students from a nearby school might harass the occupants, that the facility would be located on a flood plain, and the facility's proposed size—rejecting each because none were rational reasons to treat intellectually disabled persons differently. *Id.* 449-50. The Court identified two primary reasons for concluding that the zoning classification between the mentally disabled and all

other residents was not rational: (1) the classification was the result of irrational fear and animus, and (2) the City did not impose the same hardships on other groups that posed the same alleged problems. Specifically, the Court noted that denying CLC the permit based on "vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation." *Id*. It also concluded that there was no evidence that "the characteristics of the intended occupants [of the banned home] rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes." *Id*. at 450. The Court then struck down Cleburne's ordinance.

The state action at issue in *Cleburne* is parallel to the state action in this case. Like the Cleburne City Council's decision to require CLC to apply for—and then deny—a special use permit, here the Superintendent decided to investigate and then dismantle only one program: the one belonging to the Tucson MAS community. The Court's reasoning in *Cleburne* illustrates why the State's actions here are not rationally related to any legitimate purpose.

First, like the City Council's motivations in *Cleburne*, the record here suggests that the State's concerns reflect "the negative attitude of the majority of [legislators and some complainants]." *Id*. These negative attitudes "or fear[s],

unsubstantiated by factors which are properly cognizable . . . are not permissible bases for treating a [program] for the [Mexican American community] differently from [programs for other ethnicities or communities]." *Id*. Rather than focusing on concrete evidence—such as the Superintendent's own audit or the TUSD Board's vote in favor of MAS—the State instead cited anecdotal complaints, thereby "deferring to the wishes or objections of some fraction of the body politic." *Id*. (citations omitted). Moreover, the State's objections here are not rational reasons to treat the MAS community differently but are instead based on "vague, undifferentiated fears." *Id*. The State cannot so easily "avoid the strictures" of the Equal Protection Clause. *Id*.

Second, like the apartment dwellings that would otherwise have been permitted under Cleburne's ordinance, other ethnic studies programs have been "freely permitted" to continue, even though State officials have admitted that these other programs might also violate the law. *Cleburne*, 473 U.S. at 448. In fact, based on the State's own reasoning, ***all*** of TUSD's ethnic studies programs probably violate the proscription in A.R.S. § 15-112 against courses "primarily designed for one ethnic group." For instance, the African American Studies program is designed to "improve[] the academic achievement of African American students and promote[] cultural sensitivity throughout the TUSD community," and

its "**primary focus is African American students**." *See* Tucson Unified School District, "African American Student Services," *available at* http://tusd1.org/contents/depart/aastudies/index.asp (last visited: Oct. 12, 2013) (emphasis added). *See also* "Asian Pacific American Student Services," *available at* http://tusd1.org/contents/depart/panasian/mission.asp (last visited: Oct. 12, 2013) (noting that one service the program provides is to "advocate on behalf of **all API [Asian Pacific Islander]** students and families) (emphasis added); "Native American Student Services," *available at* http://tusd1.org/contents/depart/Native/aboutus.asp (last visited: Oct. 12, 2013) (explaining that the program was established "to meet the unique educational and culturally related academic needs **of American Indian and Alaska Natives** enrolled in TUSD schools so that they can achieve the same challenging state standards as all students") (emphasis added).

Although these other programs are similarly designed for one ethnic group, none have been investigated or targeted like MAS. Thus, as in *Cleburne*, the key question is whether the classification the State necessarily draws—between the MAS community and the other ethnic studies communities—is "rationally related to a legitimate government purpose." *Id*. at 446. Like the differences between CLC's facility and an apartment building, there is no evidence that MAS

"threaten[s] legitimate interests of the [State] in a way that other permitted [programs] . . . would not." *Id*. at 448.

3. *Romer v. Evans*

The Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), provides additional support for the notion that the State's actions had no rational relationship to a legitimate interest. *Romer* concerned an amendment to the Colorado constitution that repealed all local antidiscrimination laws based on sexual orientation, and prevented local jurisdictions from enacting future laws to protect sexual minorities. *Id*. As the Court observed, the amendment "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination." *Id*. at 627. In short, the State's action "impose[d] a special disability" upon one group alone. *Id*. at 631.

After outlining the law's effects, the Court concluded that the Colorado amendment violated equal protection because it was not rationally related to legitimate state interests. *Id*. at 632. The Court reasoned that the amendment was "at once too narrow and too broad" because it "identifie[d] persons by a single trait and then denie[d] them protection across the board." *Id*. at 633. The state cited two interests served by the amendment: citizens' freedom of association to object to homosexuality, and conserving state resources to fight discrimination against

other groups. *Id*. at 635. The Court rejected both because the law was "so far removed from these particular justifications that [it was] impossible to credit them." *Id*. Given that the law imposed a special disability on "a politically unpopular group," and that it was not rationally related to a legitimate state interest, the Court found an "inevitable inference that the disadvantage imposed [was] born of animosity toward the class of persons affected." *Id*. at 634-35 (citing *Moreno*, 413 U.S. at 534). The Court struck down the law, concluding that the amendment was "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id*. at 635-36.

The Court's reasoning in *Romer* provides strong support for an animus-based equal protection claim against the State's action here. First, like the law in *Romer*, the State's actions have both retrospective and prospective effects: the State not only dismantled a program that had been established to address discrimination within TUSD (like the local ordinances that Colorado's amendment repealed), but also made it difficult—if not impossible—to reestablish any semblance of an MAS program in the future. In fact, in its motion to intervene in the Desegregation Case, the State cites its own decision to dismantle the MAS program in support of its objection to including any new MAS program in the Unitary Status Plan.

Second, like the law in *Romer*, the State action here has no rational relationship to a legitimate interest because "[i]t is at once too narrow and too broad." *Id*. at 633. Specifically, the State—by passing and enforcing A.R.S. § 15-112—identified Tucson's MAS community "by a single trait and then denie[d] [it] protection across the board." *Id*. There is no evidence in the record that the State worked with the Tucson MAS community to reform the program or to remove only those parts that violated the A.R.S. § 15-112. Instead, the State abolished the MAS community's ethnic studies program wholesale.

Third, the State "withdraws from [the MAS community], but no others" an ethnic studies program that had been designed to address "injuries caused by discrimination." *Id*. at 627. Specifically, the State has dismantled a program that was designed to help desegregate Tucson's schools and close the achievement gap for traditionally low-performing Hispanic students. For the community that had been benefitting from the MAS program's success in increasing test scores and graduation rates, this is a "severe consequence." *Id*. at 639. Moreover, like the law in *Romer*, there is a glaring "absence of precedent" for a law like A.R.S. § 15-112, which itself is a strong signal that the law is "obnoxious to the constitutional provision." *Id*. at 633. Thus, like the amendment targeting sexual minorities, the State "imposes a special disability" upon group alone. *Id*. at 631.

Here, the State's actions, which narrowly targeted one group with a unique and peculiar law, and which were not rationally related to a legitimate interest, give way to an inference of animus that is far more direct, but no less inevitable than the law in *Romer*. As in *Romer*, the record here suggests that A.R.S. § 15-112 was drawn and enforced explicitly to classify the intended target—the MAS community—for its own sake, "something the Equal Protection Clause does not permit." *Id*. at 636.

V. CONCLUSION

The Court's decisions in *Moreno*, *Cleburne*, and *Romer*, provide the basic framework for determining when a state action was motivated by unconstitutional animus. Here, the State enacted and enforced a law with one group in mind: the MAS community in Tucson. Once passed, the law was used to harm its intended target, thereby making this group unequal to other similarly situated groups. This Arizona cannot do. While the State may disagree with this interpretation of the facts, it is nevertheless the version that should have prevailed at summary judgment. If the Plaintiffs' factual assertions are correct, then A.R.S. § 15-112 cannot be reconciled with the Equal Protection Clause.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE
PURSUANT TO FED. R. APP. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 13-15657

I certify that pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less.

DATED this 25th day of November, 2013.

PERKINS COIE LLP

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STATEMENT OF RELATED CASES

To counsel's knowledge, there are no related cases pending before this Court.

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

U.S. Court of Appeals Docket Number: 13-15657

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECFsystem on November 25, 2013.

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Signature: /s/ *David A. Perez*