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Appellees' Reply Brief

Attorneys for Defendants

Nos. 13-15657, 13-15760

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAYA ARCE *et al*.,

Plaintiffs-Appellants/
Cross-Appellees,

v.

JOHN HUPPENTHAL, *et al*.,

Defendants-Appellees/
Cross-Appellants.

On appeal from the United States District Court for the District of Arizona, Tucson

No. 4:10-cv-00623-AWT

APPELLEES' REPLY BRIEF

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INTRODUCTION

The district court's determination that A.R.S. § 15-112(A)(3) is facially overbroad (ER1at 20) depends upon its premise that students have "an established right to receive information and ideas in the classroom" (ER1 at 15). This Court should reverse the district court's decision that section 15-112(A)(3) is facially overbroad in violation of the First Amendment because the district court's premise and its conclusion are both incorrect. The contours of a student's First Amendment right to receive information are uncertain, ill-defined, and—most importantly—subject to the State's broad and plenary authority over curricular matters. Moreover, any right that a student has to receive information is not implicated by this subsection of the statute, which does not prohibit all ethnic studies classes, but only prohibits those that are "designed primarily for pupils of a particular ethnic group." A.R.S. § 15-112(A)(3). Subsection 15-112(A)(3) is not overbroad either. When read in connection with the statute's remaining provisions, including the Declaration of Policy, it complements those provisions by assuring that the State's goal of reducing racism in schools is met by preventing districts from implementing curriculum that balkanizes schools.

ARGUMENT

I. Arizona Revised Statutes § 15-112(A)(3) Does Not Implicate Any First Amendment Right of a Student to Receive Information.

The district court relied on *Board of Education v. Pico*, 457 U.S. 853, 861 (1982) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988) as support for its premise "that limits on curriculum should be upheld as long as they reasonably relate to legitimate pedagogical concerns." (ER1 at 16.) Neither, in fact, addresses limits on the State's power to set curriculum, and neither is sufficient support for that proposition. *Pico* addressed the removal of books from a school library. And while it began with a reminder that the Supreme Court's "precedents have long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom," 457 U.S. at 861, it also emphasized that "the current action does not require us to re-enter this difficult terrain," and that "[r]espondents do not seek . . . to impose limitations on their school Board's discretion to prescribe the curricula" (*id.*, at 862). It further emphasized that "public education in our Nation is committed to the control of state and local authorities" and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." *Id.* at 864 (internal quotation marks omitted). While the district court paid lip service to these principles and even recognized that any curricular restrictions would be subject to only limited scrutiny, it in fact failed

to accord sufficient respect to state and local authorities' ability to "defend [their] claim of absolute discretion in matters of curriculum."[1] (ER1 at 11-12, 15) (quotation marks omitted).

The Arce Plaintiffs failed to address *Hazelwood* in their Response and Reply, perhaps because this decision, although relied upon by the district court, does not address a student's right to receive information. Rather, it involves school officials' control of student speech in a school-sponsored newspaper, allowing such control as long as it is "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. Importantly, the *Hazelwood* Court stated further that "[i]t is only when the decision to censor a school-sponsored . . . vehicle of student expression has no valid educational purpose that the First Amendment is so directly and sharply implicate[d] as to require judicial intervention to protect students' constitutional rights." *Id.* (internal quotation marks and citations omitted). Here, of course, the State is not censoring student expression; it is instead carrying out its constitutionally mandated responsibility to educate Arizona's youth.

The district court also cites *Johnson v. Stuart*, 702 F.2d 193 (9th Cir. 1983), and *Monteiro v. Tempe Union High School District*, 158 F.3d 1022 (9th Cir. 1998),

[1] As the State pointed out in Appellees' Principal and Response Brief, not only does it possess substantial authority over curriculum, but Arizona's Constitution obligates it to educate the state's youth. (Doc. 44 at 23-24)

to support its conclusion regarding a student's purported First Amendment right to receive information. Neither justifies that conclusion. *Johnson* assumed without analysis that a student has a right to receive information. 702 F.2d at 195. *Monteiro* involved a parent's effort to have *Huck Finn* removed from the classroom based on the on the Civil Rights Act and the Equal Protection Clause; the Ninth Circuit wisely rejected that effort because other students' "First Amendment rights are infringed when books that have been determined by the school district to have legitimate educational value are removed from a mandatory reading list because of threats of damages, lawsuits, or other forms of retaliation." 158 F.3d at 1029.

While as the district court noted, *Monteiro* does rely on *Pico* in recognizing that students have some kind of First Amendment right to receive information, *id.* at 1027 n.5, it also notes that such a claim would "significantly interfere with the District's discretion to determine the composition of its curriculum." *Id.* at 1029. Here, the State stands in a stronger position than did the school district in *Monteiro*, because it is constitutionally obligated to educate its youth. *See supra*, n.1. Thus, this Court should, as it did in *Monteiro*, respect the educational determination that the State has made. *Id.* (deferring to school board's determination regarding students' education).

The Arce Plaintiffs commit the same error as the district court and compound it by erecting straw men, suggesting that the State is somehow arguing that its plenary authority over curriculum would allow it to remove materials from schools for any reason or even for a bad reason. (Doc. 52 at 34.) They give too little weight to the State's acknowledgement that the Constitution plays a role in limiting a State's discretion over curriculum (Doc. 44 at 25) while at the same time insisting that the State removed material from Tucson Unified School District's classrooms and that it seeks to justify its right to do so here and in the future. But, as the State made clear both below and in its Principal and Response Brief, the Arce Plaintiffs' argument that the State removed books from TUSD or required elimination of the Mexican American Studies program is entirely unsupported by any evidence. (Doc. 44 at 21-22.) Instead of pointing to evidence that demonstrates that the State removed books or eliminated the program, the Arce Plaintiffs recycle their tired and misleading argument that the State's actions "caused" the removal of books or had the effect of removing the program. (Doc. 52 at 32-33.) The Arce Plaintiffs' failure to controvert the State's evidence that TUSD, a nonparty, removed the books and shut down the program is a tacit concession as to the truth of the State's position.

II. Arizona Revised Statutes § 15-112(A)(3) Is Not Overbroad.

The Arce Plaintiffs and the district court's conclusion that A.R.S. § 15-112(A)(3) is overbroad suffers from the same deficiency as does their analysis of a student's right to receive information. In neither analysis do they sufficiently credit the State's responsibility and obligation over public school curricula. Subsection 15-112(A)(3) represents the State's legitimate concern that courses and classes not be designed to promote the balkanization of schools. The desire to ensure that curricula does not promote segregation of ethnic groups is a separate, complementary purpose that helps carry out the statute's stated goal of ensuring that "public school pupils [are] taught to treat and value each other as individuals." A.R.S. § 15-111. As such, it is a legitimate exercise of the State's plenary authority over curriculum, and the district court should not have struck it down.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's decision striking down subsection A.R.S. § 15-112 (A)(3).

Respectfully submitted this 21st day of July, 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,302 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

Dated this 21st day of July, 2014.

s/Leslie Kyman Cooper
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court form the United Statement Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 21, 2014.

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