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Gonzalez v. Douglas Trial Transcript of Proceedings, Day 4

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NOAH GONZÁLEZ; JESÚS)	Case No. 4:10-cv-00623-AWT
GONZÁLEZ, his father and)	
next friend, et al.,)	
)	
Plaintiffs,)	
)	Tucson, Arizona
vs.)	June 29, 2017
)	
DIANE DOUGLAS,)	
Superintendent of Public)	
Instruction, in her)	
Official Capacity; et)	
al.,)	
)	
Defendants.)	

Before the Honorable A. Wallace Tashima

Transcript of Proceedings

Bench Trial Day 4

Proceedings reported and transcript prepared by:

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1 P R O C E E D I N G S

2 (Proceedings commenced at 9:06 a.m. as follows:)

3 THE COURT: Good morning. Be seated.

4 MR. MARTINEZ: Good morning, Your Honor.

5 THE COURT: We are with the direct of Mr. Arce, right,
6 is going to continue?7 MR. MARTINEZ: Yes, Your Honor. I have a procedural
8 question I would like to address with the Court at the
9 beginning.

10 THE COURT: Go ahead.

11 MR. MARTINEZ: With respect to the pro offer, Your
12 Honor, I have two questions --13 THE COURT: Wait a minute. You're talking about an
14 offer of proof that you intend to make sometime in the future,
15 right?16 MR. MARTINEZ: So one question was when you want me to
17 do it.

18 THE COURT: Right. Okay.

19 MR. MARTINEZ: And if you want me to do it in your
20 presence or just to the court reporter? I'd prefer to read it
21 at this time, but I don't know when you want it.

22 THE COURT: Well, you want to make it orally, right?

23 MR. MARTINEZ: Yes.

24 THE COURT: Let's do it right after lunch, how's that?

25 MR. MARTINEZ: That's fine, Your Honor. I just needed

1 to know when you wanted it.

2 THE COURT: Let's do that. That's fine.

3 MR. MARTINEZ: Okay. Thank you.

4 **SEAN ARCE**, WITNESS, PREVIOUSLY SWORN

5 DIRECT EXAMINATION (RESUMED)

6 BY MR. MARTINEZ:

7 Q. Good morning, Mr. Arce.

8 A. Good morning.

9 Q. I'm going to try and stick to one mic and not wander.

10 MR. MARTINEZ: Let me ask you, can you please bring up
11 Exhibit 541? I believe 541 has been admitted or is stipulated
12 to as an exhibit, Your Honor. These are the Huppenthal
13 findings. I was checking with counsel that she agreed it was
14 stipulated to.

15 MS. COOPER: There's just a housekeeping matter that
16 we would like to address, if it's all right with the Court.

17 MR. MARTINEZ: Can we deal --

18 THE COURT: I'm sorry, a what matter?

19 MS. COOPER: A housekeeping matter with respect to a
20 couple of exhibits. But we can address it later.

21 THE COURT: All right. Fine. Let's do it later.

22 MR. MARTINEZ: Okay. I just wanted to confirm on
23 541 --

24 MS. COOPER: Yes.

25 MR. MARTINEZ: -- it's an admitted exhibit.

1 MR. QUINN: Richard, it's admitted.

2 MS. COOPER: Yes, Your Honor.

3 MR. MARTINEZ: Thank you.

4 BY MR. MARTINEZ:

5 Q. Mr. Arce, I just want to give you a minute to look through
6 these three pages, so if you could just read Page 1, Page 2,
7 and Page 3, just review it, and my question will be if you
8 recognize the document. If you let us know when you've read
9 Page 1, then we'll go to Page 2.

10 A. Next page, please. Next page, please. Yes, I am familiar
11 with this document.

12 Q. Do you recognize this as Mr. Huppenthal's findings in June
13 of 2011?

14 A. Yes.

15 Q. And on that day, or shortly thereafter, it was made
16 available to you?

17 A. Yes.

18 Q. And your position at the time was?

19 A. I was the director of MAS.

20 Q. Mexican-American Studies?

21 A. Mexican-American Studies, yes.

22 Q. Thank you. You'll note at Page 3 that the finding includes
23 specific reference to the website that -- do you see a
24 reference there to the Mexican-American Studies website?

25 A. Yes.

1 Q. Let's back up for a moment and then we're going to come
2 back to that. Was there in fact during the period of time that
3 you were director of Mexican-American Studies a TUSD website
4 that included a place where you could go to a specific web page
5 for Mexican-American Studies?

6 A. Yes, there was.

7 Q. And was that in place throughout the time that you were
8 director?

9 A. Yes.

10 Q. And was that in place during the period you would have been
11 assistant director?

12 A. That's correct, yes.

13 Q. Did you consider that to be a web page that essentially was
14 the web page -- the district-sponsored web page for your
15 department?

16 A. That's correct, yes.

17 Q. Your program?

18 A. Yes, that's correct.

19 Q. And what was the intent of the web page? Just generally.

20 A. To inform the public and parents and students in the school
21 district of the mission of our Mexican-American Studies
22 Department; what course offerings we had, what our curriculum,
23 what our pedagogy entailed.

24 Q. So, fair to say that by being on the web page, it was
25 intended to provide the general public information about the

1 program?

2 A. Yes.

3 Q. Did that include a mission statement?

4 A. Yes, it did.

5 Q. If we could turn to Exhibit 149. First of all, I'd like
6 you again to look at this particular exhibit. Let us know when
7 you're ready. I need you to look at that so that I can ask you
8 some foundational questions about the exhibit. If you could
9 let us know when you're ready for the next page, we'll go.

10 A. Next page.

11 Q. I don't need you to read it line for line. Just look at
12 it, review it enough to be able -- the question I'm going to
13 ask you is: Do you recognize the document?

14 A. Yes, I do.

15 Q. I believe it is 12 pages.

16 A. Okay. Okay. Okay. Okay. Okay. Okay.

17 Q. Are we back to Page 1?

18 A. Yes, I'm ready.

19 Q. We're back to Page 1. Thank you. Mr. Arce, do you
20 recognize this document?

21 A. Yes, I do.

22 Q. Is this what I'll call paper copy, but obviously it's being
23 projected electronically, of the TUSD Mexican-American Studies
24 website?

25 A. It appears to be so, yes.

1 Q. And does it accurately reflect, at the time that you were
2 director, the content of the Mexican-American Studies TUSD
3 website?

4 A. Yes.

5 Q. And this is a website, the contents of this website, is
6 this something you were personally familiar with?

7 A. Yes.

8 Q. And that was true throughout the time you were director?

9 A. That is correct.

10 MR. MARTINEZ: I'd move for the admission of Exhibit
11 149, Your Honor.

12 MS. COOPER: No objections, Your Honor.

13 THE COURT: Without objection, 149 is admitted.

14 BY MR. MARTINEZ:

15 Q. Mr. Arce, initially what I'd like you to do is I believe on
16 Page 2 is the mission statement. Would you take a moment to
17 read this.

18 A. Okay.

19 Q. Does this accurately reflect the mission statement of the
20 program, the Mexican-American Studies Program, during the
21 period that you worked there?

22 A. Yes, it does.

23 Q. Throughout the period?

24 A. Yes, it does.

25 Q. Now, in this mission you used the phrase: "Raza

1 populations." Do you see that?

2 A. Yes.

3 Q. It says: "Understanding the interests of Raza
4 populations." Could you please briefly, in that sentence, as
5 the term "Raza" is used, explain to us what you meant by that
6 word?

7 A. Yes. When referring to Raza populations, like I mentioned
8 yesterday, we're talking about Spanish-speaking peoples and
9 other indigenous peoples within the Americas.

10 Q. And when you say the "Americas," what are we talking about?

11 A. We're talking about North, Central, and South America.

12 Q. Was that word, when you focus on the word "Raza" or "Raza
13 populations," intended to communicate an exclusion that the
14 program had a mission of excluding any other racial groups?

15 A. No.

16 Q. Was it intended to communicate in any way, for example,
17 that Raza populations were somehow in a contentious position
18 with respect to the white population in the United States?

19 A. No.

20 Q. Yesterday, you know, you told us a bit that you were
21 familiar with other web -- I'm sorry -- the other programs:
22 Mexican-American Studies, Native American Studies,
23 African-American studies, and Pan Asian?

24 A. Yes.

25 Q. Did they maintain websites also?

1 A. Yes. To my recollection, they did.

2 Q. And on their websites did they have a section that was
3 entitled "frequently asked questions"?

4 A. I believe so, yes.

5 Q. Were you familiar with those sections on their websites?

6 A. Yes, I was.

7 Q. So let's look at Exhibit 57. Excuse me. Before we do
8 that, could you go to the frequently asked questions in this
9 exhibit for a moment. If you'll take a moment to look at this.
10 I'm not going to ask you, but among the questions, the first
11 question in frequently asked questions is: "What students does
12 the Mexican-American Studies Department serve?" Correct?

13 A. Yes.

14 Q. And at the end of the second line and going into the third,
15 if we could highlight for me. It says: "Developed to help all
16 students." Do you see that?

17 A. Yes, I do.

18 MS. COOPER: Objection. Relevance. The document
19 speaks for itself.

20 THE COURT: Sustained.

21 BY MR. MARTINEZ:

22 Q. So if we could turn to Exhibit 57. If you would take a
23 moment to look through Exhibit 57, and could we make this a
24 little bigger on the screen. Again, if you would take the time
25 to look at this for a moment, please.

1 A. Yes, I will. Okay. Okay.

2 Q. Again, Mr. Arce, during the time that you were the director
3 of Mexican-American Studies, were you familiar with the
4 African-American Studies web page of TUSD?

5 A. Yes, I was.

6 Q. And does this, these two pages, accurately reflect the
7 content of that web page during the time period that I've
8 identified?

9 A. Yes.

10 MS. COOPER: Objection. Foundation. The document is
11 undated.

12 THE COURT: The objection is overruled.

13 MR. MARTINEZ: I would move the admission, Your Honor,
14 of Exhibit 57.

15 MS. COOPER: Objection. Relevance. Document speaks
16 for itself.

17 MR. MARTINEZ: I'd move its admission.

18 THE COURT: What's the number?

19 MR. MARTINEZ: Number 57, Your Honor.

20 THE COURT: The objection's overruled, and 57 is
21 admitted.

22 MR. MARTINEZ: Thank you, Your Honor.

23 BY MR. MARTINEZ:

24 Q. With respect to the African-American Studies web page in
25 TUSD during the same time period that Mexican-American Studies

1 had, they too addressed the question of frequently asked
2 questions, correct?

3 A. Yes.

4 Q. And that particular web page, they answer such questions as
5 what does African-American Studies do, correct?

6 A. Yes.

7 Q. What types of services are provided?

8 A. Yes.

9 MS. COOPER: Objection. Relevance. The type of
10 services that the African-American Studies Department provided
11 to its students do not go to the state's mind, the defendants
12 in this matter.

13 THE COURT: Well, I don't know if that objection is
14 sustained, but the document speaks for itself. He doesn't have
15 to tell us what it says.

16 BY MR. MARTINEZ:

17 Q. If we could turn to Exhibit 66. Again, if you could please
18 blow it up. Then if you would, as before, take your time to
19 look through this and then we can move to the next page when
20 you're ready.

21 A. Okay. Okay.

22 Q. Do you recognize the content that's reflected in this
23 exhibit?

24 A. Yes, I do.

25 MS. COOPER: Objection.

1 THE COURT: It's overruled. The answer may stand.

2 BY MR. MARTINEZ:

3 Q. With respect to the content of this exhibit, do you
4 recognize this as being the content that was on the Asian
5 Pacific-American Studies website for TUSD during the period
6 we've identified, which is the time that you're director of the
7 Mexican-American Studies program?

8 A. Yes, I do.

9 Q. And does this exhibit accurately reflect, to your
10 knowledge, the content of that website during the period that
11 you were director?

12 A. Yes, it is.

13 MR. MARTINEZ: We would move the admission of this
14 exhibit, Your Honor.

15 MS. COOPER: We object to its relevance.

16 THE COURT: What's the number?

17 MR. MARTINEZ: This is 66.

18 THE COURT: Five-six or six-six?

19 MR. MARTINEZ: Six-six, Your Honor. It's the
20 Plaintiffs' 66.

21 THE COURT: The objection is overruled, and Exhibit 66
22 is admitted.

23 BY MR. MARTINEZ:

24 Q. Again, within the web page for the Asian Pacific-American
25 Studies, there's a section about frequently asked questions

1 that pertains specific to that program, correct?

2 A. Yes.

3 Q. Thank you. I'd like to turn for a moment back to Exhibit

4 140. I'm sorry, I did not mean 140. I apologize. 541. My

5 mistake. Page 2. The second paragraph, could you please blow

6 that up. Just the second paragraph. This paragraph

7 specifically states: "Finally, while invited to participate in

8 the curriculum audit process, key leadership in the

9 Mexican-American Studies Department refused to cooperate,

10 including the director of the department." Do you see that?

11 A. Yes, I do.

12 Q. At the time it's being made reference to by Mr. Huppenthal

13 and his finding of June 2011, who is the director?

14 A. I was the director.

15 Q. Were you aware of there being a Cambium report?

16 A. Yes.

17 Q. During the period of time -- excuse me. Were you aware of

18 there being a Cambium audit?

19 A. Yes.

20 Q. And what understanding, if any, did you have with respect

21 to on whose behalf the Cambium audit was being conducted?

22 A. It was on behalf of the Arizona Department of Education,

23 State Superintendent Huppenthal.

24 Q. If we could go to the complaint, Document 1. I'd like to

25 show you what is Document 1 from the Court docket in this case.

1 Do you recognize this first page?

2 A. Yes, I do.

3 Q. What is it?

4 A. It's a filing of a lawsuit.

5 Q. And the date that's reflected on top?

6 A. October 18th, 2010.

7 Q. All right. The identified plaintiffs, is your name there?

8 A. Yes, it is.

9 Q. And do you recognize the other names in the caption of the
10 complaint?

11 A. Yes, I do.

12 THE COURT: I don't understand what you're getting at.
13 What is the relevance of asking what's in the complaint? It's
14 a part of the file in this case.

15 MR. MARTINEZ: It ties directly back to the allegation
16 of refusal to cooperate, Your Honor. Just a couple questions.

17 THE COURT: Does it make any difference whether he
18 recognizes the other names of the plaintiffs to your question?

19 MR. MARTINEZ: Because what that paragraph said in the
20 Huppenthal finding is that Mr. Arce is director, and the
21 Mexican-American Studies educators refused to cooperate, and I
22 am trying to address that specific point, Your Honor.

23 THE COURT: I don't understand why you have to ask him
24 who the name of the original plaintiffs are.

25 MR. MARTINEZ: I want to establish if they are all

1 educators in the Mexican-American Studies Department.

2 THE COURT: I thought there were some students.

3 MR. MARTINEZ: Excuse me?

4 THE COURT: I thought there were some students in the
5 original complaint.

6 MR. MARTINEZ: Not at this stage, Your Honor. If you
7 recall, there was a motion, a challenge to dismiss, and then we
8 amended the complaint and when we asked you to leave -- to add
9 students. And in a subsequent ruling, Your Honor, you did
10 dismiss the educator --

11 THE COURT: So the complaint is --

12 MR. MARTINEZ: So this is the initial filing, Your
13 Honor.

14 THE COURT: I still don't understand what difference
15 it makes. Why don't you just ask him the question, all right?

16 MR. MARTINEZ: Yes, sir.

17 THE COURT: Without going into all this who are the
18 plaintiffs, who are the defendants, what date was the filing,
19 what's the number of the case. You know, it's all a matter of
20 record.

21 MR. MARTINEZ: I understand, Your Honor.

22 THE COURT: Ask him a question of relevance.

23 MR. MARTINEZ: I just have one question on that point.

24 BY MR. MARTINEZ:

25 Q. Were these people working --

1 THE COURT: No, no. No question on this point.

2 MR. MARTINEZ: Okay. Then we're done with this
3 exhibit. If you'd bring up the answer.

4 BY MR. MARTINEZ:

5 Q. This is the answer to that complaint. Do you recognize
6 that?

7 A. Yes, I --

8 THE COURT: No, don't ask him about the answer. It
9 doesn't matter whether he recognizes the answer. Ask him about
10 facts he's aware of, all right?

11 MR. MARTINEZ: I'll do that, Your Honor.

12 THE COURT: You can ask him, what does Interrogatory
13 25 say? What difference does it make whether he knows what's
14 in the file?

15 MR. MARTINEZ: I'll come back in.

16 BY MR. MARTINEZ:

17 Q. So by December 30th, the state had entered an answer to
18 your lawsuit, right?

19 A. Yes.

20 Q. All right. Let's return back to the finding and the
21 paragraph at Page 2, the second paragraph, where it indicates,
22 again, that you refused to cooperate. Do you see that?

23 A. Yes, I do.

24 Q. At the time of the Cambium study you were a plaintiff in
25 this case?

1 A. That's correct.

2 Q. And that lawsuit had been answered?

3 A. Yes.

4 Q. And with respect to the Cambium report, you told us that
5 this was a study that was being done by or on behalf of the
6 defendant in this case?

7 A. That's correct.

8 Q. And with respect to the Cambium audit, were you given
9 specific instructions as a plaintiff with respect to what to do
10 or not do with respect to the Cambium audit?

11 A. Yes, I was.

12 MS. COOPER: Objection. Relevance.

13 THE COURT: Well, instructions from whom?

14 MR. MARTINEZ: From counsel.

15 THE COURT: All right. So you're waiving
16 attorney/client on this --

17 MR. MARTINEZ: On that point, yes, sir.

18 THE COURT: Well, on this transaction. I just want to
19 make it clear. Go ahead. You can answer.

20 A. Yes.

21 BY MR. MARTINEZ:

22 Q. All right. And what was the instruction?

23 A. To not talk with Cambium.

24 THE COURT: Just a minute. Do you have an objection?

25 MS. COOPER: Yes, we have an objection. The reason

1 that Mr. Arce didn't participate in the Cambium audit is
2 irrelevant. The fact is that he didn't.

3 THE COURT: No, no, no. The objection is overruled.
4 Because the inference from, I think it was Mr. Huppenthal,
5 somebody testified that he was being uncooperative, so it was
6 difficult to do the report. So you can go ahead with your
7 question.

8 MR. MARTINEZ: Thank you, Your Honor.

9 BY MR. MARTINEZ:

10 Q. And with respect to that instruction or the basis of the
11 instruction, was that explained to you at the time?

12 A. Yes.

13 Q. And to your knowledge, was that instruction not only
14 provided to you, but was that communicated to the defendants,
15 counsel for the defendants in this case?

16 A. Yes.

17 Q. Do you know if that occurred in writing?

18 A. Yes, it did.

19 Q. Do you know if that same position was also communicated to
20 Tucson Unified School District?

21 A. It certainly was.

22 Q. In writing?

23 A. Yes.

24 Q. And do you recall there being specific references to the
25 rules of professional conduct which prohibited contact by the

1 agents of the defendant outside that permitted within
2 discovery?

3 A. That's correct.

4 MS. COOPER: Objection. Relevance.

5 THE COURT: Just a minute. Sustained.

6 MR. MARTINEZ: Let's move on.

7 BY MR. MARTINEZ:

8 Q. I'd like to turn your attention to the statute, 15-112.

9 Mr. Arce, do you recognize this as a copy of A.R.S. 15-112?

10 A. Yes.

11 Q. Was this a statute that was utilized by the State of
12 Arizona ultimately in January of 2012 to eliminate the
13 Mexican-American Studies in Tucson Unified School District?

14 A. Yes, it was.

15 Q. I'd like to draw your attention to the (E)(1) provision.

16 If we could blow that up. Do you see this section says: "This
17 section shall not be construed to restrict or prohibit courses
18 or classes for Native American pupils that are required to
19 comply with federal law"?

20 A. Yes.

21 Q. Do you recall yesterday you looked at a map --

22 A. Yes.

23 Q. -- that showed the boundaries of the Tucson Unified School
24 District?

25 A. Yes, I did.

1 Q. And that particular map, it identified the high schools?

2 A. Yes.

3 Q. Specifically the high schools for Mexican-American Studies.

4 A. That's correct.

5 Q. But in your position in the number of years that you worked
6 for the Tucson Unified School District, were you familiar with
7 the district's boundaries?

8 A. Yes, I was.

9 Q. The east, west, north to south?

10 A. That's correct.

11 MS. COOPER: Objection. Relevance.

12 THE COURT: Sustained.

13 BY MR. MARTINEZ

14 Q. Were you -- to your knowledge, sir, did any portion of the
15 Tucson Unified School District -- excuse me. Let me rephrase
16 that.

17 To your knowledge, sir, were any schools of the Tucson
18 Unified School District located on a native reservation?

19 MS. COOPER: Objection. Relevance.

20 THE COURT: Sustained. Same line of questioning.

21 MR. MARTINEZ: Is that something we can address now?

22 THE COURT: No, can't address it.

23 MR. MARTINEZ: In the offer of proof?

24 THE COURT: No. The only reason this came up is I
25 made a comment yesterday, something about there's something in

1 the statute about Native Americans, and you gave a long speech
2 about why it didn't apply, and there's really no evidence on it
3 at all. Nobody made an issue of it. So it's completely
4 irrelevant. That's why you cannot address it.

5 MR. MARTINEZ: I'm sorry. Can I read -- I didn't hear
6 your comment. Can I look at the comment?

7 THE COURT: No. The only part that's important is
8 it's irrelevant.

9 MR. MARTINEZ: If it's not applicable, Your Honor,
10 because there's no schools on federal land --

11 THE COURT: I'm not going to argue about it. It's
12 irrelevant. Move on to another subject.

13 MR. MARTINEZ: I am, Your Honor.

14 If we could turn to Exhibit 542. On the second page,
15 the second, third paragraph. Excuse me. The third paragraph.
16 If you could blow that up. I believe 542 is admitted.

17 MS. COOPER: It is.

18 BY MR. MARTINEZ:

19 Q. You see that within this statement from the Arizona
20 Department of Education at the time, it says: Mexican-American
21 Studies department teachers travel from school to school
22 conducting their classes. Principals are not allowed to
23 conduct classroom visits within their own schools of
24 Mexican-American Studies Program classes to ascertain student
25 learning levels, quality of instruction, and appropriateness of

1 instructional materials. Do you see that?

2 A. Yes.

3 Q. Let's first talk about what's in the first sentence. It
4 says: Mexican-American Studies Department teachers travel from
5 school to school conducting their classes. Do you see that?

6 A. Yes.

7 MS. COOPER: Objection. Relevance to this line of
8 questioning. This has to do with support for the underlying
9 ALJ decision, which was not challenged and is stare decisis.

10 THE COURT: Overruled. You can answer.

11 MR. MARTINEZ: Excuse me.

12 THE COURT: I said it's overruled. You can answer.

13 BY MR. MARTINEZ:

14 Q. Do you know which teachers are being made reference to
15 here?

16 A. Yes.

17 Q. And I'm not asking by name, I'm asking by position.

18 A. Yes.

19 Q. Who's being referenced to?

20 A. Our Mexican-American Studies.

21 Q. Did you have on your staff, department staff, teachers who
22 went to, for example, some of the high schools because you did
23 not have a high school teacher there who taught the
24 Mexican-American Studies class or they were providing an
25 additional class?

1 A. That's correct.

2 Q. Then it goes on to say with respect to your staff who are
3 teachers of these high schools: The principals are not allowed
4 to conduct classroom visits within their own schools of
5 Mexican-American Studies program classes to ascertain student
6 learning levels. Is that true?

7 A. That's false.

8 Q. Same allegations made that principals where your teachers
9 were teaching, that the principal couldn't go in, or site
10 administrators couldn't go in for the quality of instruction.
11 Is that true?

12 A. That's untrue.

13 Q. And with respect to the last assertion that's made here, is
14 that principals or their site administrators were prohibited
15 from going into the classes to assess the appropriateness of
16 the instructional materials. Was that true?

17 A. That's another falsehood.

18 Q. Could you give us just one school, for an example, where
19 this was occurring during the time you were director, where
20 you're having people go and teach a class from your staff?

21 A. Tucson High School.

22 Q. What about Rincon?

23 A. Rincon also.

24 Q. Did Rincon have staff teachers teaching their classes or
25 was it only your teachers?

1 A. It was only Mexican-American Studies Department teachers.

2 Q. In order for your teachers to be on the Rincon site, did
3 that require the site administrator's permission?

4 A. Yes, it did.

5 Q. Did it require the site administrator and his or her team
6 to be able to access and know what was going on in your
7 classrooms?

8 MS. COOPER: Objection. Relevance.

9 THE COURT: Overruled. You can answer.

10 A. At any time they were in and out of the classrooms making
11 observations.

12 BY MR. MARTINEZ:

13 Q. Did you provide your teachers any directions -- did you,
14 Mr. Arce, provide your teachers any direction as to how they
15 should interact or comport themselves with site administrators
16 when they were the guest teachers?

17 A. Yes.

18 Q. And what was that?

19 A. That was the direction of collaboration. Any type of
20 assistance the site principal may have needed, the teachers
21 were to collaborate with that and help out in any way they
22 could.

23 MR. MARTINEZ: Exhibit 526, please. Could we blow
24 this up, please, in its entirety? If you could please capture
25 the name.

1 Your Honor, I believe 526 is an exhibit the state has
2 stipulated to?

3 MS. COOPER: It is not. You objected. If you
4 withdraw your objection and would like to put it on the
5 stipulated list, that's fine. But this -- we challenge the
6 ability of this witness to address the document.

7 MR. MARTINEZ: We would move the admission of
8 Exhibit 526, Your Honor.

9 THE COURT: Any objection?

10 MS. COOPER: No objection, Your Honor.

11 THE COURT: All right. 526, which ironically I guess
12 is a defense exhibit, is admitted. .

13 MR. MARTINEZ: Yes, sir.

14 THE COURT: On the plaintiffs' motion.

15 BY MR. MARTINEZ:

16 Q. If you would take a moment to read this e-mail. Do you
17 remember yesterday we spoke about John Ward?

18 A. Yes, we did.

19 Q. And you see this is an e-mail that is sent in January of
20 2011.

21 A. Yes.

22 Q. To Mr. Huppenthal.

23 A. Yes.

24 Q. By the time that he's sending this e-mail, how many years
25 had it been, to your knowledge, since Mr. Ward had worked for

1 Tucson Unified School District?

2 A. Seven years.

3 Q. And from the date of this e-mail to Mr. Huppenthal, how
4 many years had it been since Mr. Ward had been in the
5 Mexican-American Studies class?

6 A. Seven years.

7 Q. And he -- in January of 2011 -- if you look at the third
8 paragraph, he makes reference to Mexican-American Studies as
9 Raza studies. Do you see that?

10 A. Yes.

11 MS. COOPER: Objection. The document speaks for
12 itself.

13 THE COURT: Sustained.

14 BY MR. MARTINEZ:

15 Q. In January of 2011, what was the name of the department?

16 A. Mexican-American Studies.

17 Q. And he makes allegations here that essentially the
18 department, the classes, are attempting to hide the real nature
19 of what is being taught in the classes. Do you see that?

20 A. Yes.

21 MS. COOPER: Objection. Relevance. Speaks for
22 itself.

23 THE COURT: Well, I don't think he's asked a question.
24 The question is -- I think he's leading to a question. So it's
25 overruled.

1 BY MR. MARTINEZ:

2 Q. If you turn back to -- if we could go back to Exhibit 149.
3 This is the web page, correct?

4 A. That's correct.

5 Q. And in this web page, are all of the classes that are being
6 offered in Mexican-American Studies listed here? Do you see
7 there you have a curriculum guide section? Correct?

8 A. Yes.

9 Q. Please go on to the next page. Go past frequently asked
10 questions. So here you identify for everyone, for example, in
11 specific reference to Hispanic heritage links, things that
12 address the art movement. Correct?

13 A. Yes.

14 Q. Border studies, civil rights movement, Arab revolutions?

15 THE COURT: I don't think you have to read the entire
16 list. It speaks for itself. Do you have a question?

17 MR. MARTINEZ: Yes, I do, Your Honor. I was just
18 reading it. I apologize.

19 BY MR. MARTINEZ:

20 Q. So when it's Hispanic Heritage Month, is it accurate to say
21 that the topics that were being covered were available on the
22 web page?

23 MS. COOPER: Objection, Your Honor. Misstates the
24 document. The document speaks for itself.

25 THE COURT: Sustained. He doesn't have to

1 characterize the document.

2 MR. MARTINEZ: All right. I'll move on.

3 BY MR. MARTINEZ:

4 Q. I'd like to turn back to Mr. Ward for a moment. Were you
5 familiar with who employed Mr. Ward after he left the Tucson
6 Unified School District?

7 A. Yes.

8 MS. COOPER: Objection. Relevance.

9 THE COURT: Sustained.

10 MR. MARTINEZ: May we make an offer of proof on that
11 now?

12 THE COURT: No, because that's been done over before.

13 MR. MARTINEZ: Not to who employed --

14 THE COURT: Just a minute. I believe that name has
15 already been identified.

16 MR. MARTINEZ: The name has been identified, but not
17 if he went to work for Mr. Horne.

18 THE COURT: I think so, too, yeah. The objection is
19 sustained.

20 MR. MARTINEZ: Yesterday, Your Honor --

21 THE COURT: The objection is sustained.

22 MR. MARTINEZ: Yesterday the question was the
23 fundraising that Mr. Horne did for him for his lawsuit, Your
24 Honor. I did not ask a question yesterday with respect to
25 Mr. Horne employing, as the superintendent of education,

1 Mr. Ward. I did not ask that question yesterday.

2 MS. COOPER: Objection. Relevance. Mr. Arce's
3 knowledge of that fact has nothing to do with the elements of
4 the claims at issue here.

5 MR. MARTINEZ: Your Honor, I believe we are entitled
6 to show bias on the part of witnesses or reporting both as
7 to --

8 THE COURT: My recollection may be wrong, but I think
9 that's already been gone into, so the objection is sustained.
10 Besides, he's not the best witness to get that from anyway.

11 BY MR. MARTINEZ:

12 Q. I'd like to touch upon some words that have been referenced
13 or used by people like Mr. Horne and Mr. Huppenthal. One of
14 the words that I'd like you to first address is have you ever
15 heard the term "Aztlán"?

16 A. Yes.

17 Q. Does it appear in the titles of some of the books that were
18 utilized?

19 A. Yes.

20 Q. Do you have an understanding of what the term means?

21 A. Yes.

22 MS. COOPER: Objection. Relevance. Mr. Arce's
23 understanding of this term has nothing to do with the claims
24 that --

25 THE COURT: I think it's foundational to further

1 questions. I'll overrule the objection.

2 BY MR. MARTINEZ:

3 Q. What does it mean?

4 A. "Aztlán" has multiple meanings. One of the meanings is a
5 term popularized during the U.S. Chicano movement, referred to
6 homeland, the ancient homeland of the Aztecs. There's an
7 anthropological linguistic meaning to it that suggests that the
8 Uto-Aztecan language base is -- covers most of the U.S.
9 Southwest.

10 MS. COOPER: Move to strike. Mr. Arce is attempting
11 to testify as an expert again.

12 THE COURT: No. No. I accept as long as it's his
13 understanding of the word. So you can finish your answer.

14 A. There's anthropological and a linguistic understanding of
15 Aztlán.

16 BY MR. MARTINEZ:

17 Q. In talking with students in MAS classes, was that -- you
18 taught classes, didn't you?

19 A. Yes.

20 Q. Would you at times make reference or use that term?

21 A. Yes.

22 Q. Did you use it in a manner that's consistent with what you
23 just told us was your understanding of the term?

24 A. Yes.

25 Q. Have you ever heard the term, sir, "Reconquista"?

1 A. Yes, I have.

2 Q. What is your understanding of that particular term?

3 A. My understanding is those who utilize that term and apply
4 that term and oftentimes that term has been applied to us
5 within the Mexican-American Studies Department in our
6 teachings, claiming that there's an attempted takeover or a
7 reconquest of the U.S. Southwest.

8 Q. So just to put this in context, we know historically that
9 history tells us that part of the United States that used to be
10 Mexico is now the United States.

11 A. That's correct.

12 Q. Including where we sit today, where this courthouse is.

13 A. That is correct.

14 Q. This courthouse would be in the Gadsden Purchase area.

15 A. That is correct.

16 Q. And how the boundary line changed between the two nations,
17 is that something that you or your teachers would talk with
18 students about?

19 A. Yes, we did.

20 Q. And in doing so, did the boundaries change geographically
21 between the two countries? Did you, in talking with students,
22 promote some kind of Reconquista agenda?

23 A. No, we did not.

24 Q. Did you ever even bring up such a -- that a concept should
25 be agreed to and then somehow operationalized or something?

1 A. No.

2 Q. Arizona and New Mexico, Colorado, California, is that the
3 United States or is that Mexico?

4 A. That is currently the United States, yes.

5 Q. And in the classes that you taught to the students, was it
6 recognized that's all of the United States?

7 A. Yes.

8 Q. Did you, you know, your department, in talking to students,
9 it's been suggested that you offered an un-American message or
10 an anti-American message. Are you aware of that?

11 A. Yes.

12 Q. Did your department have such a message for students?

13 A. No.

14 Q. Did you have a position that you spoke with students about
15 in terms of how they could integrate themselves successfully
16 into our larger society?

17 A. Yes, that was one of our main objectives of our department.

18 Q. Was that a goal?

19 A. Yes.

20 Q. Was that part of the mission?

21 A. Yes.

22 Q. And successful integration to our society means what?

23 A. In terms of -- in terms of our department, it meant being
24 academically successful, matriculating into college, being able
25 to operate in multiple worlds, in their home worlds, in their

1 barrios, in mainstream society, in school.

2 Q. What about economically?

3 A. Can you repeat that.

4 Q. What about economically?

5 A. Economically, politically, socially.

6 Q. In your classes did you talk with students about the
7 engagement?

8 A. Yes, we did.

9 MS. COOPER: Objection, Your Honor. This is straying
10 a long ways from the state of mind of the defendants in this
11 matter.

12 THE COURT: I think that's correct. I mean, you know,
13 we've heard a lot about the program already. I think you've
14 gone into it enough. Any further question in this area is
15 sustained.

16 MR. MARTINEZ: All right. I'll move on, Your Honor.
17 Thank you.

18 BY MR. MARTINEZ:

19 Q. I'd like to focus your attention for a moment on Mr. Horne.
20 Do you recall there being a point in time where Mr. Horne
21 issued a finding of violations of A.R.S. 15-112?

22 A. Yes, I do.

23 Q. Do you recall if at that time, or close in that time, he
24 held a press conference?

25 A. Yes.

1 Q. Do you recall as to whether or not he showed a picture as a
2 part of his presentation to the media on that date?

3 A. Yes.

4 Q. Do you recall where that picture was?

5 A. Yes, I do.

6 Q. Where was it? What was depicted in the picture?

7 A. It was on the corner of -- one of the corners of Tucson
8 High School.

9 Q. And included in that picture, were there any students who
10 were dressed in a manner that would be consistent with the
11 Brown Berets?

12 A. Yes.

13 Q. Let's talk about the Brown Berets for a moment. Are you
14 aware or do you know about the Brown Berets?

15 A. Yes, I am.

16 Q. Where do they fit historically in the U.S. history for
17 Mexican-Americans in this country?

18 A. The Brown Berets emerged out of the Chicano movement.

19 Q. So it goes back to the '60s?

20 A. Yes.

21 Q. Was that during an era when Mexican-Americans or Chicanos
22 were part of the Chicano movement?

23 A. That's correct, yes.

24 Q. During the Civil Rights movement?

25 A. Yes.

1 Q. And do you recall Mr. Horne's characterization, either by
2 him or -- let's just focus on him -- of the Brown Berets in the
3 picture?

4 A. Yes, I do.

5 Q. He said, "They're dressed in revolutionary garb"?

6 A. That's correct.

7 Q. "They're wearing sunglasses."

8 A. Yes.

9 Q. "Some of them have their face covered."

10 A. Yes.

11 Q. Sir, Brown Berets, to your knowledge, do they even, you
12 know, organizationally, viably exist anymore?

13 A. In a limited -- in a limited fashion or a limited....

14 Q. And were the Brown Berets a part of the Mexican-American
15 Studies Department?

16 A. No.

17 Q. And were you utilizing them in some way to promote some
18 kind of revolutionary message?

19 A. No.

20 Q. There was also reference by Mr. Horne, excuse me,
21 Mr. Huppenthal -- too many Hs, I apologize. Let's stick with
22 Mr. Horne -- to an organization known as M.E.Ch.A.?

23 A. Yes.

24 Q. M.E.Ch.A. is Movimiento Estudiantil Chicano de Aztlán?

25 A. That is correct.

1 Q. Are you aware of its origins?

2 A. Yes.

3 Q. What was it?

4 A. That also came out of the Chicano movement, primarily a
5 college, university-based organization, although it did exist
6 in high schools.

7 Q. So for the last 50, 60, 70 years, have M.E.Ch.A. clubs
8 existed?

9 A. Yes.

10 Q. High schools?

11 A. Yes.

12 Q. Colleges?

13 A. Definitely.

14 Q. Throughout the United States?

15 A. Throughout the United States, yes.

16 Q. Did such clubs exist in the Tucson Unified School District?

17 A. Yes.

18 Q. With district approval?

19 A. That is correct, yes.

20 Q. And in Tucson Unified during the period that you're the
21 director --

22 MS. COOPER: I did not hear your question.

23 MR. MARTINEZ: I'm sorry?

24 MS. COOPER: I did not hear your question.

25 BY MR. MARTINEZ:

1 Q. I said in the Tucson Unified School District, during your
2 period as director, were there M.E.Ch.A. clubs such as at
3 Tucson High?

4 A. Yes.

5 Q. At other high schools?

6 A. Yes.

7 Q. And were you familiar with them?

8 A. Yes, I was.

9 Q. What was the purpose of having a M.E.Ch.A. club?

10 A. The purpose was to advocate for higher education, to
11 advocate for their community, to advance educationally to
12 college and university.

13 Q. And is it accurate to say that M.E.Ch.A.'s clubs at the
14 high schools were independent of the Mexican-American Studies
15 Department?

16 A. Yes.

17 Q. They were student organizations?

18 A. Yes.

19 Q. During this same time period, Mr. Arce, were there other
20 clubs that other groups had, for example, student groups for
21 African-Americans or Native Americans or Pan Asians?

22 A. Yes, there was.

23 MS. COOPER: Objection. Relevance.

24 THE COURT: Sustained. You're talking about Horne.

25 MR. MARTINEZ: Your Honor, selective enforcement.

1 THE COURT: Sustained. It's really quite far afield.

2 BY MR. MARTINEZ:

3 Q. There has been testimony offered in this case by

4 Mr. Huppenthal --

5 THE COURT: Are you through with Horne?

6 MR. MARTINEZ: Yes, sir.

7 THE COURT: Good.

8 MR. MARTINEZ: I was moving on. You may not like
9 these questions any better, but we are on Mr. Huppenthal.

10 BY MR. MARTINEZ:

11 Q. There has been testimony offered yesterday by

12 Mr. Huppenthal where he suggested or characterized that you or
13 your teachers in the program talking with students used, quote,
14 revolutionary language -- that revolutionary language was
15 something that's found and common in the teachings, in talking
16 with students.

17 MS. COOPER: Objection. Vague.

18 BY MR. MARTINEZ:

19 Q. Is that true?

20 A. No.

21 THE COURT: The vagueness challenge is overruled. The
22 answer was "no"?

23 THE WITNESS: "No," Your Honor.

24 BY MR. MARTINEZ:

25 Q. And he also suggested that -- and let me back up for a

1 moment, foundationally, that your department did engage in
2 providing professional instruction or professional advancement
3 training for teachers. Is that correct?

4 A. Yes, sir, providing professional development for teachers.

5 Q. Thank you for the word "development." And in that regard,
6 were those opportunities open?

7 A. Yes, they were.

8 Q. And the purpose of that? Just real briefly, one sentence.
9 The purpose of that training?

10 A. To develop the necessary skill sets among the teachers to
11 successfully implement ethnic studies, Mexican-American
12 Studies, in their classrooms.

13 Q. And in speaking with or training teachers or offering them
14 training, did your department utilize or have a constant use of
15 revolutionary language?

16 A. No.

17 Q. There was reference by Mr. Huppenthal to the word -- or the
18 book known as "Pedagogy of the Oppressed"?

19 A. Yes.

20 Q. Are you familiar with that book?

21 A. Yes, I am.

22 Q. The author --

23 A. Yes, I am.

24 Q. The author is?

25 A. Paulo Freire.

1 Q. Mr. Huppenthal was concerned about the fact that he
2 characterized or labels Mr. Freire as, I believe, a Marxist or
3 a communist, something of that nature.

4 A. Yes.

5 Q. Were you aware of that?

6 A. Yes, I am.

7 Q. The fact that you used the book authored by him, does that
8 mean that in your classes you were speaking to students in a
9 manner to promote Marxism?

10 A. No.

11 Q. Or communism?

12 A. No.

13 Q. Or socialism?

14 A. No.

15 Q. Is he considered, to your knowledge, a major figure within
16 education?

17 A. He's a pretty mainstream figure in education, yes, Paulo
18 Freire is.

19 Q. Is that throughout the United States?

20 A. Yes.

21 MS. COOPER: Objection. Foundation.

22 THE COURT: Overruled.

23 BY MR. MARTINEZ:

24 Q. Were you aware of Mr. Huppenthal's use in his campaign to
25 become superintendent of education the phrase: "Stop La Raza"?

1 A. Yes, I was.

2 Q. Were you concerned about that?

3 A. Yes.

4 MS. COOPER: Objection. Irrelevant.

5 THE COURT: Sustained.

6 BY MR. MARTINEZ:

7 Q. Did you consider it racial?

8 A. Yes, I did.

9 MS. COOPER: Objection. Irrelevant.

10 THE COURT: Overruled. The answer may stand.

11 BY MR. MARTINEZ:

12 Q. There was allegations made in this courtroom on
13 Mr. Anderson, who worked for the department, that in your
14 department, in your classes, you were speaking to students for
15 the purpose of indoctrinating them with certain political views
16 that were not in their best interest.

17 MS. COOPER: Objection. Misstates the testimony.

18 THE COURT: Overruled. You can answer.

19 BY MR. MARTINEZ:

20 Q. Was that going on? Were you speaking of students?

21 A. That was not accurate.

22 Q. There's also an allegation made that you or your staff were
23 confronting others, professionals in this district, whether
24 they were administrators or teachers, classroom educators, as
25 being racists. Was that part of your program's activities?

1 A. We'd have conversations with teachers when we felt they
2 were saying inappropriate things to our students or
3 discriminatory remarks aimed at our students. We would pull
4 them aside professionally and have discussions with them.

5 Q. Was that done in a professional manner?

6 A. Yes.

7 Q. Without giving us any names, could you give us -- were you
8 involved in such conversations at any time as director?

9 A. Yes. That was one of my duties, obligations that I needed
10 to fulfill as a director, to have those conversations.

11 Q. Is that something that the Tucson Unified School District
12 charged you with?

13 A. Yes.

14 Q. And without, again, naming any names, could you just give
15 us the one example and occasion when you might have a
16 professional conversation with a TUSD educator in that manner?

17 A. Yes.

18 MS. COOPER: Objection. Relevance.

19 THE COURT: I'll overrule the relevance objection to
20 one illustration.

21 MR. MARTINEZ: Thank you, Your Honor. Understood.

22 BY MR. MARTINEZ:

23 Q. One quick example.

24 A. One quick example? One particular teacher at Tucson High
25 threatened our students to call Border Patrol and have them

1 deported, so I felt a need to confront him and have a
2 discussion with him.

3 Q. All right. And I want to be real quick. When you say,
4 "confront him," what do you mean?

5 A. To ask him, to have a discussion with him. To tell him
6 about that's inappropriate, it's discriminatory, it's
7 threatening.

8 Q. And to your knowledge, within -- let's just talk about the
9 school district, Tucson Unified. How close are we to the
10 border?

11 A. 60 miles, roughly.

12 Q. With Mexico, right?

13 A. That's correct, yes.

14 Q. And within the school population, to your knowledge, did we
15 have undocumented students?

16 A. Yes, we did.

17 Q. Just sticking to that one example just for a moment, did
18 you yell at this person?

19 A. No.

20 MS. COOPER: Objection. Relevance.

21 THE COURT: Overruled.

22 BY MR. MARTINEZ:

23 Q. Did you threaten him with discipline?

24 A. No. I didn't supervise him.

25 Q. Did you understand that in having that conversation, it was

1 to -- let me ask the question in a non-leading manner: What
2 was your purpose in having that conversation with this specific
3 individual?

4 A. To have him cease those threatening remarks towards our
5 students.

6 Q. And to get that person to understand how the person on the
7 receiving end may feel?

8 A. Yes.

9 Q. Mr. Anderson also suggested that in addition to having a
10 program that was speaking to students for the purpose of
11 indoctrinating them, that it was there primarily to promote
12 ethnic divisions in the belief that there is a war against
13 Latino culture perpetuated by a white, racist, capitalist
14 system. Was that the purpose of the Mexican-American Studies
15 Department?

16 A. No.

17 Q. Was that the message of the Department to students?

18 A. No.

19 Q. Or to this community?

20 A. No.

21 Q. What was the message from the department with respect to,
22 for example, Mexican-Americans and their relationships with the
23 non-Mexican-American segments of our community?

24 A. Yeah. Our message was contrary to those remarks that you
25 just made -- that you just referenced, I'm sorry. It's to

1 create greater cultural historical understanding of intergroup
2 relations, intergroup dynamics.

3 Q. Let me just use one example. In American History,
4 Mexican-American Perspectives, that was a class?

5 A. Yes.

6 Q. For juniors?

7 A. That's correct.

8 Q. The focus is U.S. history?

9 A. Yes.

10 Q. Centered through the Mexican-American lens or experience?

11 A. That's correct.

12 Q. Could, in the course of that class, a teacher have the
13 opportunity to teach historic events specifically to the things
14 that happened to Mexican-Americans?

15 A. Definitely, yes.

16 Q. Could, in the course of that, a teacher speak with students
17 about such things as the Zoot Suit Riots?

18 A. Yes.

19 Q. And the Zoot Suit Riots were -- what was the period when
20 that occurred?

21 A. During the World War II era.

22 MS. COOPER: Objection. Relevance.

23 THE COURT: Sustained. You're just wandering far
24 afield. We don't need these examples.

25 MR. MARTINEZ: I'll make it separately then.

1 BY MR. MARTINEZ:

2 Q. If any historic event of that type was talked about with
3 students, was the intent to create resentment?

4 A. No.

5 Q. Was the intent to create divisiveness?

6 A. No.

7 MS. COOPER: Objection. May I request that the
8 witness be instructed to allow me to object when he sees me --

9 THE COURT: No, the objection is sustained. This is
10 getting repetitive, right? And you're asking him leading
11 questions. It's all repetitive, so the objection is sustained.

12 MR. MARTINEZ: Thank you, Your Honor.

13 BY MR. MARTINEZ:

14 Q. I'd like to return just for a moment to -- yesterday we
15 started with a map of high schools.

16 A. Yes.

17 Q. I'd like you to look just for a moment at a map of where
18 the junior high school/middle schools were.

19 A. Sure.

20 Q. In my day it was "junior high school." Middle schools are
21 which grades?

22 A. Six through eight.

23 Q. And you have projected some of the identified middle
24 schools within the Tucson Unified School District?

25 A. That is correct.

1 Q. And with respect to the five schools that are identified,
2 what classes was the Mexican-American Studies providing in
3 these sites during the time that you were the director or
4 assistant director?

5 A. Yes. Teachers were providing Mexican-American Studies at
6 those sites.

7 MS. COOPER: The defendants are willing to stipulate
8 as to where Mexican-American Studies classes were provided
9 during the relevant time period, although I don't find it to be
10 of relevance at this point, but it would move things along.

11 THE COURT: Well, I really don't know what
12 Mr. Martinez is getting at, so I'll let him proceed for a
13 little ways.

14 MR. MARTINEZ: It goes in part to the overbreadth of
15 the enforcement action, Your Honor.

16 BY MR. MARTINEZ:

17 Q. With respect to the interactions by teachers,
18 Mexican-American Studies teachers and classes with this age
19 group, grade six, seven, and eight, were you familiar with what
20 was going on?

21 A. Yes, I was.

22 Q. Was age appropriateness of the content a consideration?

23 A. Yes, age appropriateness was always taken into
24 consideration.

25 Q. And what was the purpose in having these classes at the

1 middle school?

2 A. The purpose was so that students could see themselves in
3 the curriculum. So this was all research-based, and when
4 students see themselves in the curriculum, they fare better
5 academically, socially.

6 MS. COOPER: Objection. I move to strike. The
7 witness is attempting to testify as an expert again.

8 THE COURT: Overruled. The answer may stand.

9 BY MR. MARTINEZ:

10 Q. With respect to -- and just limit yourself for a moment to
11 Mexican-American students.

12 A. Can you repeat, Counsel?

13 Q. Sure. Yes. I'm going to ask you a question, but I want
14 you to limit yourself to Mexican-American students.

15 A. Okay.

16 Q. Was there a concern on your part as director about
17 Mexican-American youth as they completed the eighth grade and
18 they're showing up for ninth grade, the no-show rate or the
19 dropout rate, was there a concern about that?

20 A. Yes, there was, yes.

21 Q. What was that concern?

22 A. That students were being pushed out in middle school.
23 That's what the educational literature and our own analysis
24 within the district, data from the district, had illustrated.

25 Q. Let's look at the map for a moment for elementaries. With

1 respect to the schools that are highlighted in yellow and the
2 names in red, what does that signify?

3 A. This signifies where we had curriculum integration and
4 instruction at the elementary level.

5 Q. So Mexican-American Studies --

6 A. Yes. I'm sorry. Mexican-American Studies curriculum
7 integration and instruction taking place.

8 Q. And did you have a staff member or a couple of staff
9 members who worked with elementary teachers?

10 A. Yes, we did.

11 Q. And were they essentially in a resource capacity?

12 A. Yes, resource capacity, model instruction, yes.

13 Q. And at these schools where this was being offered, what was
14 the Mexican-American representation at these particular
15 schools, elementaries?

16 A. Yeah, they were definitely a majority of Mexican-American
17 students at those schools.

18 Q. You've been an educator for many years?

19 A. Yes.

20 Q. Is a concern to educators that Mexican-American students in
21 the Tucson Unified School District early on would get behind in
22 certain skill sets such as reading or writing?

23 A. Yes, that was always a concern.

24 Q. How was that concern then -- was that concern any part of
25 where you were trying to offer the Mexican-American services at

1 the elementary level?

2 A. Yes.

3 MR. MARTINEZ: May I have a moment, Your Honor?

4 THE COURT: Let's do this. We'll take a recess now.
5 You can go over your notes and see what else you need to go
6 into.

7 MR. MARTINEZ: Thank you very much.

8 THE COURT: We'll take our mid-morning recess at this
9 time.

10 MR. MARTINEZ: Thank you.

11 (A recess was taken from 10:23 a.m. to 10:52 a.m.)

12 THE COURT: All right. Let's all be seated.

13 Mr. Martinez, I guess you can continue with your direct.

14 MR. MARTINEZ: Your Honor, I just wanted to confirm
15 for you that I had nothing further on direct at this time.

16 THE COURT: All right. Fine. Thank you. Then we'll
17 start with the cross, right?

18 MS. COOPER: Yes, Your Honor.

19 THE COURT: Then we're going to go over -- you're
20 going to make an offer of proof after lunch.

21 MR. MARTINEZ: Yes, Your Honor. And with your
22 permission, Your Honor, I am going to sit over here. I will be
23 sure to speak loudly if I have any objection.

24 THE COURT: All right. That's fine.

25 MR. MARTINEZ: Thank you.

1 CROSS-EXAMINATION

2 BY MS. COOPER:

3 Q. Good morning, Mr. Arce.

4 A. Good morning.

5 Q. I'm Leslie Cooper. You recall that we met when I took your
6 deposition, correct?

7 A. Yes, I do.

8 MS. COOPER: Before we get to the matter of Mr. Arce,
9 there's one exhibit, Plaintiffs' Exhibit 13, that we had
10 withdrawn our objections to and we asked that it be admitted.

11 THE COURT: Plaintiffs' 13?

12 MS. COOPER: Yes, Your Honor.

13 THE COURT: I am correct in assuming the plaintiffs
14 still want to offer 13, is that right? Somebody on the
15 plaintiffs' side? Yes? Or not?

16 MR. MARTINEZ: Your Honor, in light of your rulings
17 with respect to curriculum, we don't believe that you would
18 allow it in at this juncture. So if curriculum is an entire
19 area off the table for Mr. Arce and others in his similar
20 position, then we would withdraw the exhibit. If it's an
21 exhibit --

22 THE COURT: I don't think I made a ruling that the
23 curriculum is entirely off the table. In fact, I think one
24 side or the other has a curriculum expert on their list, right?

25 MR. MARTINEZ: Yes, but you limited it -- you said

1 Mr. Arce could not address that topic area, and so I said for
2 witnesses like Mr. Arce --

3 THE COURT: Well, all I can do is ask you this: In
4 the light of the record as you understand it now, you still
5 want to offer 13 or not? Do you still want 13 on your exhibit
6 list, or do you oppose the --

7 MR. MARTINEZ: We --

8 THE COURT: Do you object to the defendant's motion to
9 admit it?

10 MR. MARTINEZ: We object, Your Honor. Withdraw the
11 exhibit for the reasons stated.

12 THE COURT: And the objection is based on what, that
13 it's irrelevant because of the Court's ruling on the subject
14 matter of curriculum?

15 MR. MARTINEZ: Yes, sir.

16 THE COURT: All right. Do you still want to offer it?

17 MS. COOPER: Yes, I do. We have one, two, three
18 similar exhibits. If I could ask the witness the foundational
19 questions as to all three at the same time and then move them
20 together.

21 THE COURT: Well, okay. Just remember when you make
22 the offer, just remember to mention 13 with the other ones.
23 All right?

24 MS. COOPER: I will.

25 THE COURT: I'm not ruling on 13, but I understand

1 plaintiffs withdraw their offer of 13 and now object to its
2 admission. Okay.

3 MR. MARTINEZ: In addition, Your Honor, just so it's
4 clear, counsel, the other basis for our objection is there is
5 absolutely no evidence that any of these curriculums were ever
6 utilized in the classroom, and certainly relied in the
7 classroom during the relevant period, but if you do pre-15-112
8 or post-15-112, there's absolutely no evidence that they were
9 ever utilized.

10 THE COURT: All right. I understand that objection.
11 So I'll consider it at the time we get to the offer, all right,
12 of I guess the three -- four exhibits together. Go ahead,
13 start your examination.

14 MS. COOPER: Thank you, Your Honor.

15 BY MS. COOPER:

16 Q. Mr. Arce, you spoke about a Transformative Institute that
17 was offered by the MAS department, correct?

18 A. Yes, I did.

19 Q. And that was a summer program that involved professional
20 development for MAS teachers, other teachers in other areas,
21 parents and community members, correct?

22 A. That's correct, yes.

23 Q. And one of the things that you offered at these
24 Transformative Institutes was information about pedagogy that
25 could be used in the MAS program?

1 MR. MARTINEZ: Objection, Your Honor. In the direct
2 examination, not only did the state object to any such
3 questions of Mr. Arce with respect to pedagogy, those
4 objections were sustained, and it would be my position that the
5 state cannot now go into that subject matter area.

6 MS. COOPER: I don't intend to go into it.

7 THE COURT: At this point, I think it's only
8 foundational, so it's overruled, but overruled without cutting
9 you off from making a further objection as we get further down
10 the line.

11 MR. MARTINEZ: Thank you, Your Honor.

12 BY MS. COOPER:

13 Q. Did the Transformative Institute offer information about
14 MAS pedagogy?

15 A. That was one of the areas of emphasis, yes.

16 Q. And did it offer curriculum units that MAS teachers could
17 use?

18 A. Yes, we did.

19 MR. MARTINEZ: Again, same objection, Your Honor, for
20 the reasons stated.

21 THE COURT: Overruled.

22 BY MS. COOPER:

23 Q. Now, I would like to direct your attention to Plaintiffs'
24 Exhibit 13, which is on the screen before you. Do you
25 recognize that?

1 A. Yes, I do.

2 Q. And that is a 12th Annual Institute For Transformative
3 Education, the Chicano Educational Crisis and the Persistent
4 Use of the Deficit Model?

5 A. Yes, I do.

6 Q. And that was offered at the 12th Annual Institute For
7 Transformative Education?

8 A. Okay. Yes.

9 Q. I am asking you.

10 A. Yeah. I don't see the year on there, but that sounds about
11 right, yes.

12 Q. Well, let's look here at Plaintiffs' Exhibit 569, and that
13 has information about the 12th Annual Institute for
14 Transformative Education, and it indicates that the date is
15 July 13th to July 16th, 2010, correct?

16 A. I see that, yes.

17 Q. So would you believe that the exhibit that we just looked
18 at, Plaintiffs' Exhibit 13, was probably offered at this
19 July 2010 Institute for Transformative Education?

20 A. Yes.

21 Q. And do you recognize this document?

22 A. Yes, I do.

23 Q. And, in fact, you are listed, if we look at the next page,
24 as the director of Mexican-American Studies with respect to
25 this?

1 A. That's correct.

2 Q. Did you have substantial responsibilities in connection
3 with the Institute for Transformative Education?

4 A. Yes, I did.

5 Q. We have one more. This is Defendants' Exhibit 570. Again,
6 at the 12th Annual Institute for Transformative Education, the
7 Struggle for Ethnic Studies in Tucson, Protection Under the
8 First and Fourteenth Amendments, by Maria Christina Federico
9 Brummer. Correct?

10 A. That is correct.

11 Q. Grade Level High School?

12 A. Yes.

13 Q. And do you believe this to be a curriculum unit that was
14 offered to teachers and other -- MAS teachers and other
15 participants at the 12th Annual Institute for Transformative
16 Education?

17 A. Yes, it was.

18 MS. COOPER: I would move for the admission of
19 Plaintiffs' Exhibit 13, Defendants' Exhibit 570, and
20 Defendants' Exhibit 563E into evidence.

21 THE COURT: Just a minute. 563E?

22 MS. COOPER: Yes.

23 THE COURT: 563E.

24 MS. COOPER: I'm sorry. I misspoke, Your Honor. Let
25 me start again. Defendants' Exhibit 516, Defendants' Exhibit

1 570, and Plaintiffs' Exhibit 13.

2 THE COURT: 516. All right. And Plaintiffs' 13.

3 MS. COOPER: Correct.

4 THE COURT: Objection?

5 MR. MARTINEZ: Yes, Your Honor, for the reasons
6 stated, that with respect to this Court's ruling, with respect
7 to the pedagogy or curriculum, that it was a matter in which
8 Mr. Arce was not allowed to testify.

9 And in addition to that, Your Honor, with respect to
10 these being the limitations on the testimony about curriculum
11 being available, there has been no testimony as to the
12 utilization of these curriculum units, and it would be our
13 position that in light of your ruling, it would be inconsistent
14 with that to now allow their admission.

15 If they are admitted, then I believe then the door has
16 been opened that should permit counsel, the plaintiffs, to then
17 go into the subject matter area as she -- you know, the state
18 objected, and now they appear to want to open that door.

19 THE COURT: What's the defendants' response?

20 MS. COOPER: We don't intend to ask Mr. Arce any
21 questions about the content of those exhibits at this point.
22 We merely seek to get them introduced into evidence with
23 respect to other testimony to be provided later by different
24 witnesses.

25 MR. MARTINEZ: Your Honor, that's exactly --

1 THE COURT: Just a minute. She's not through.

2 On what subject?

3 MS. COOPER: The question of what the state reviewed
4 and what the Cambium auditors had available to them in
5 connection with the review of the curriculum.

6 THE COURT: All right.

7 MS. COOPER: So basically the basis for the finding
8 that was issued.

9 THE COURT: Anything further?

10 MR. MARTINEZ: Well, Your Honor, if they want to go
11 into those weeds, then obviously it's our position that we
12 should have that same opportunity to address those matters in
13 the detail that would be required.

14 THE COURT: All right. I am ready to rule.
15 Plaintiffs' Exhibit 13 and Defendants' Exhibits 569, 570, are
16 admitted for the limited purpose of -- as background for the
17 questioning of other witnesses that Ms. Cooper just indicated,
18 over the objection of the plaintiffs.

19 Okay. Let's proceed.

20 BY MS. COOPER:

21 Q. Now, Mr. Arce, it's true, is it not, that you did not
22 speak, that you were invited to speak with the Cambium auditors
23 to tell them about the MAS program? Correct?

24 A. Can you repeat that, please?

25 Q. I'm sorry. It's true that you were invited to speak with

1 the Cambium auditors about the MAS program, isn't it?

2 A. That is correct.

3 Q. And it's true as well that you did not speak with the
4 Cambium auditors, correct?

5 A. That is correct.

6 Q. And you did so on the advice of your attorney, correct?

7 A. Yes.

8 Q. Your decision to follow the advice of your attorney and not
9 speak to the Cambium auditors had the consequence of depriving
10 them of information about the MAS program, correct?

11 MR. MARTINEZ: Objection, Your Honor. Calls for
12 speculation.

13 THE COURT: Overruled. I think he knows, in his own
14 mind, whether he has any information about the MAS program. So
15 it's overruled.

16 MR. MARTINEZ: Other sources.

17 THE WITNESS: Can you repeat that one more time,
18 please?

19 BY MS. COOPER:

20 Q. Your decision to take the advice of your attorney and to
21 not speak with the Cambium auditors had the effect of depriving
22 them of information about the MAS program that you had,
23 correct?

24 MR. MARTINEZ: Same objection.

25 THE COURT: Same ruling. Overruled.

1 A. I can't speculate what may have happened or what
2 information I would have given them, if it would have deprived
3 them or not.

4 BY MS. COOPER:

5 Q. Did you give them any information about the MAS program?

6 A. No, I did not.

7 Q. And do you have information about the MAS program from your
8 four years as the director?

9 A. Yes.

10 Q. And do you have information about the program from your
11 many years as the assistant director?

12 A. Depending. It depends upon what information we are talking
13 about.

14 Q. Do you have information about the MAS program from your
15 many years as the assistant director?

16 MR. MARTINEZ: Your Honor, counsel need not yell at
17 Mr. Arce.

18 THE COURT: If that's an objection, it's overruled.
19 You can answer yes or no, Mr. Arce.

20 THE WITNESS: Can she repeat, Your Honor?

21 MS. COOPER: Could you please read it back?

22 (Reporter read the previous question.)

23 A. I was assistant director for two years.

24 BY MS. COOPER:

25 Q. Do you have information about your time as the assistant

1 director of the MAS program?

2 A. Yes.

3 Q. And you were a teacher as well in the MAS program --

4 A. That is correct.

5 Q. Please let me finish. It's much easier for the court
6 reporter.

7 A. Will do.

8 Q. And did you give any of the information that you had about
9 the MAS program from your years as a teacher, assistant
10 director, or director to the Cambium auditors?

11 A. No, I did not give them any information.

12 Q. And that would have included information not only about
13 your own teaching but your supervision of the MAS teachers,
14 correct?

15 MR. MARTINEZ: Objection. Asked and answered, Your
16 Honor. This is cumulative.

17 THE COURT: She sort of picked it up from you, didn't
18 she? Objection's overruled.

19 MS. COOPER: Do you need the question read back, sir?

20 THE WITNESS: Please. Please.

21 (Reporter read the previous question.)

22 A. Yes.

23 BY MS. COOPER:

24 Q. You discussed with Mr. Martinez this morning the question
25 of whether principals had the ability to evaluate MAS teachers

1 and observe MAS teachers and teaching for the purpose of
2 evaluating teachers, correct?

3 A. Yes, we did.

4 MR. MARTINEZ: Objection, Your Honor.

5 THE COURT: The objection is overruled. Finish your
6 answer.

7 MR. MARTINEZ: It misstates the testimony, Your Honor,
8 and it's compound.

9 THE COURT: Finish your answer.

10 BY MS. COOPER:

11 A. Yes, we did.

12 Q. I want to show you a page from Exhibit 93, which has been
13 admitted. This is a page from the Cambium audit. I want to
14 direct your attention to the highlighted language:

15 One principal whose school offers MASD courses brings up a
16 different point, voicing a concern of his own. Some of the
17 MASD courses are taught by traveling curriculum specialists,
18 even at the high school level. These teachers report directly
19 to the MASD director, and all observations and evaluations are
20 completed by this individual and not by any of the high school
21 principals.

22 The students being taught in these classes are ultimately
23 his responsibility, so he would like to be allowed to view the
24 MAS instruction and has not felt welcome to do so.

25 Do you see that, Your Honor? Excuse me. Do you see that,

1 Mr. Arce?

2 MR. MARTINEZ: Again, Your Honor --

3 THE COURT: There's no question pending.

4 MR. MARTINEZ: Objection.

5 THE COURT: There's no question yet, except do you see
6 it.

7 A. Yes, I do see this.

8 BY MS. COOPER:

9 Q. Do you see that at least one principal told the Cambium
10 auditors that it was not his responsibility to observe and
11 evaluate instruction? Correct?

12 MR. MARTINEZ: Objection. First of all, I'm objecting
13 on the basis of prior rulings.

14 THE COURT: No, I don't want you to argue your
15 objection. Objection on what ground?

16 MR. MARTINEZ: Hearsay.

17 THE COURT: All right. Overruled. You may answer.

18 MS. COOPER: Do you need the question back?

19 THE WITNESS: Can you complete the question, please.

20 MS. COOPER: I believe the question was completed.

21 Ms. Jamieson?

22 (Reporter read the previous question.)

23 A. Yes.

24 THE WITNESS: May I expand upon this?

25 MS. COOPER: No.

1 It's never terrific when I have to be my own tech
2 person.

3 BY MS. COOPER:

4 Q. Do you recognize the document that's been placed on the
5 screen before you, which is Defendants' Exhibit 563E?

6 A. Yes, I do.

7 Q. Can you tell me what it is, please.

8 A. It's a high school curriculum unit, social studies.

9 Q. Does it bear your name?

10 A. Yes.

11 Q. Was it prepared by you?

12 A. Yes, it was.

13 Q. Was it available to be taught to -- in high school social
14 studies classes in the MAS program?

15 A. Yes, it was.

16 MS. COOPER: I move the admission of Defendants'
17 Exhibit 563E.

18 MR. MARTINEZ: Objection.

19 THE COURT: Objection?

20 MR. MARTINEZ: Yes, sir.

21 THE COURT: What's the grounds?

22 MR. MARTINEZ: The grounds is on the basis of the
23 Court's rulings with respect to this witness being permitted to
24 address issues of curriculum, the curriculum units that were
25 available --

1 THE COURT: The objection is overruled.

2 MR. MARTINEZ: -- or even used in the Court.

3 THE COURT: Objection is overruled. What's the
4 number?

5 MS. COOPER: 563E, Your Honor.

6 THE COURT: 563E is admitted.

7 BY MS. COOPER:

8 Q. Mr. Arce, you don't believe that Arizona law prohibits
9 schools from teaching students that what is now Arizona was
10 once part of Mexico, do you?

11 A. Can you repeat that, please?

12 Q. You don't believe that Arizona law prohibits schools from
13 teaching students that what is now Arizona was once part of
14 Mexico, do you?

15 A. I would have -- I would have to see the full context in
16 that.

17 Q. It's a simple yes-or-no question.

18 A. I can't speculate without understanding the fuller context.

19 Q. Do you believe that under Arizona law it is illegal for
20 teachers to teach students that what is now Arizona was once
21 part of Mexico?

22 A. That would depend upon the context and who was enforcing
23 that law, who's evaluating the teachers.

24 Q. It's a yes-or-no question.

25 A. I cannot speculate on that.

1 Q. You don't know whether Arizona law permits or prohibits
2 teachers from teaching that what is now Arizona was once part
3 of Mexico?

4 A. It is part of the Arizona state standards.

5 Q. So it's permitted to be taught?

6 A. Depending upon the enforcement of the law, from my
7 experiences.

8 Q. It's a yes-or-no question.

9 A. You would have to repeat the question because I have to
10 fully contextualize your question in order to accurately answer
11 that question.

12 Q. Mr. Arce, were you a social studies or history teacher?

13 A. Yes.

14 Q. Were you certified as such?

15 A. Yes.

16 Q. Did you study history in college?

17 A. I sure did, yes.

18 Q. U.S. history?

19 A. Yes.

20 Q. Including the history of whether Arizona was once part of
21 Mexico?

22 A. Yes.

23 Q. And do you have an understanding as a person who was at
24 least at one time certified to teach history in Arizona as to
25 whether that information could be imparted to Arizona students?

1 A. Yes.

2 Q. And what is your understanding?

3 A. My understanding, that Arizona was part of Mexico.

4 Q. And you could teach that to your students, right?

5 A. Yes.

6 Q. And you could teach your students about the Gadsden

7 Purchase as well, correct?

8 A. Yes.

9 Q. I want to talk just briefly about the origins of this
10 program. You mentioned that this -- the program that is now
11 MAS studies started in the late 1990s, right?

12 A. That is correct.

13 Q. Do you recall what the name of the program was then?

14 A. The first name of the program was Hispanic Studies.

15 Q. And does that refer to Hispanics in North, Central, South
16 America, and Europe?

17 MR. MARTINEZ: Foundation.

18 BY MS. COOPER:

19 Q. To the best of your knowledge.

20 A. Not Europe, no.

21 Q. So the Hispanic Studies department never referred to
22 European Hispanics? It never included European Hispanics?

23 A. There was an examination, but the emphasis was on North,
24 South, Central America.

25 Q. Do you recall that the name of the Hispanic Studies

1 department changed?

2 A. Yes, I do.

3 Q. And do you recall what it changed to?

4 A. Mexican-American/Raza Studies.

5 Q. Do you recall approximately when that occurred?

6 A. Roughly 2002.

7 Q. I'm going to place before you a document as to which the
8 Court has stated that we may take judicial notice, and I'll
9 show you that it's the minutes of a governing board meeting for
10 the Tucson Unified School District from March 30th, 2004. Do
11 you see that?

12 A. Yes, I do.

13 Q. And do you understand that this is a public record of what
14 occurred at that meeting?

15 A. That's what I understand the minutes to be, yes.

16 Q. Because you've attended a lot of governing board meetings
17 in your time, correct?

18 A. Several, yes.

19 Q. I want to direct your attention to Study Action Item 5,
20 which is on Page 3, and to the highlighted information. And do
21 we see there that there was a friendly amendment that changed
22 the name of the Hispanic Studies Department to Raza
23 Mexican-American Studies?

24 A. Yes, I see that.

25 Q. Now we've gone from a name that at least marginally

1 included European Hispanics to one that only includes Hispanics
2 from the Americas and Mexican-Americans, correct?

3 MR. MARTINEZ: Objection.

4 THE COURT: On what grounds?

5 MR. MARTINEZ: Form of the question, Your Honor.

6 THE COURT: I can't hear you.

7 MR. MARTINEZ: I apologize. Form of the question.
8 Foundation.

9 THE COURT: Objection's overruled. You can answer.

10 THE WITNESS: May you repeat the question, please.

11 BY MS. COOPER:

12 Q. The original name of the department was Hispanic Studies,
13 right?

14 A. That's correct.

15 Q. And that referred to Hispanics everywhere, correct?

16 A. Yes.

17 Q. And yesterday you testified that Raza was meant to be
18 inclusive of persons of Hispanic origin in the Americas,
19 correct?

20 A. I believe that's a mischaracterization of my testimony.

21 Q. You testified that Raza included Hispanics in North,
22 Central, and South America, correct?

23 A. I did not use the term "Hispanic."

24 Q. What was the term that you used?

25 A. I believe I alluded to Spanish-speaking peoples of the

1 Americas.

2 Q. So we're focused on the Americas, correct?

3 A. Yes.

4 Q. Not Europe?

5 A. That is correct.

6 Q. And now we've brought in this emphasis on

7 Mexican-Americans, right?

8 A. That is correct.

9 Q. Now, at some point the name of the department became

10 Mexican-American Studies, right?

11 A. Yes.

12 Q. So we're no longer referring to the members of Raza,

13 correct?

14 A. Can you repeat that, please?

15 Q. Raza was dropped from the name of the department, right?

16 A. That is correct.

17 Q. And that was a term that was meant to be inclusive.

18 A. Yes.

19 Q. So the inclusive term has been dropped from the name of the

20 department, right?

21 A. Yes.

22 Q. And it now just refers to Mexican-Americans.

23 A. Well, the department no longer exists, but at the time are

24 you saying it just referred to Mexican-Americans?

25 Q. Correct.

1 A. Yes.

2 Q. And are you aware of the makeup of Spanish-speaking
3 immigrants in TUSD?

4 A. I am not aware of -- the demographic makeup?

5 Q. Let me ask the question differently.

6 A. Can you clarify, please?

7 Q. Are you aware that there are immigrants in TUSD from
8 Spanish-speaking countries like El Salvador, Honduras, and
9 Guatemala?

10 A. Definitely, yes.

11 Q. And they're not Mexican-American, right?

12 A. No.

13 Q. So the name of the department doesn't include them, does
14 it?

15 A. I believe that's an inaccuracy.

16 Q. Does the name Mexican-American Studies refer to persons
17 from Guatemala, El Salvador, or Honduras?

18 A. Yes, it does, because our histories are inextricably
19 linked.

20 Q. Now, you were present when Margaret Garcia Dugan spoke to
21 the students in 2006, right?

22 A. Yes.

23 Q. And you heard her describe her background, correct?

24 A. Yes.

25 Q. And she told the students to think for themselves?

1 A. To my recollection, yes.

2 Q. To develop the ability to form their own political beliefs?

3 A. Yes.

4 Q. And you saw students stand in silent protest with their
5 backs turned and their mouths taped when she delivered that
6 message, right?

7 A. Yes, while she proudly proclaimed that she was a
8 Republican, yes.

9 Q. Is it respectful of students to stand with duct tape over
10 their mouths and their backs turned to a speaker from the State
11 Department of Education with their fists raised?

12 A. The First Amendment protects that right, yes.

13 Q. I didn't ask you whether the First Amendment protects that
14 right. That's not at issue here. My question is whether it's
15 respectful.

16 A. Yes.

17 Q. Do you think that even if you believe it's respectful, that
18 it could cause another reasonable objective observer to become
19 concerned that so many students in one school would behave in
20 this manner?

21 MR. MARTINEZ: Objection. Calls for speculation.

22 THE COURT: Sustained.

23 BY MS. COOPER:

24 Q. Let's talk about some of the other ethnic studies programs
25 briefly. Now, you mentioned that you are aware that there were

1 several teachers who had complained to Mr. Horne about the
2 ethnic studies classes, right?

3 A. Yes.

4 Q. And in fact, you were aware that there were a number of
5 naysayers with respect to the MAS classes, correct?

6 A. Yes.

7 Q. In fact, there was strong opposition in some circles,
8 right?

9 A. Yes.

10 Q. Now, were you aware of any complaints to Tom Horne about
11 any of other ethnic studies classes that you talked about this
12 morning?

13 A. I was not aware of any complaints.

14 Q. Were you aware of any complaints to John Huppenthal about
15 any of those other ethnic studies programs?

16 A. No.

17 Q. Now, you were responsible, at least in part, for the
18 development of MAS curriculum, correct?

19 A. That is correct.

20 Q. Are you aware of whether state law requires that a school
21 board approve curriculum and materials in a public meeting?

22 A. Yes.

23 Q. And is it correct that that is required?

24 A. Yes.

25 Q. Now, you testified you were present when the governing

1 board approved the MAS department, right?

2 A. That is correct.

3 Q. That was in the late 1990s?

4 A. Yes.

5 Q. And do you recall whether they approved any curriculum at
6 that point?

7 MR. MARTINEZ: Objection, Your Honor.

8 THE COURT: Overruled. You can answer.

9 MR. MARTINEZ: It's for relevance, Your Honor, and the
10 issue --

11 THE COURT: It's already overruled. You can answer
12 it.

13 THE WITNESS: I'm sorry. Can you repeat?

14 MS. COOPER: Can you please read it back.

15 (Reporter read the previous question.)

16 BY MS. COOPER:

17 Q. In 1998.

18 A. That was part of the objectives of creating the
19 Mexican-American Studies -- well, at the time it was Hispanic
20 Studies Department -- was to provide direct classroom
21 instruction, so that is an assumption that I made.

22 Q. That wasn't my question. My question was a little bit
23 simpler: Do you recall if the governing board approved
24 curriculum and text for the Hispanic Studies Department at that
25 time?

1 A. No, I don't.

2 Q. And do you recall if the -- would it have been part of your
3 responsibilities as the MAS director to ensure that curriculum
4 complied with State law and was properly presented to the State
5 board for its approval?

6 A. What time frame are we -- it always is -- our curriculum
7 was always aligned to State standards.

8 Q. I didn't ask you if your curriculum was aligned to State
9 standards. I asked if it was your responsibility as the
10 director of the Mexican-American Studies Department to ensure
11 that curriculum was properly approved by the governing board as
12 required by State law?

13 MR. MARTINEZ: Objection. Relevance.

14 THE COURT: Overruled.

15 A. We were operating and providing and implementing curriculum
16 based upon a district-approved curriculum.

17 BY MS. COOPER:

18 Q. Did you ever see -- did you ever bring any Mexican-American
19 Studies Department curriculum before the Tucson Unified School
20 District board for its approval?

21 A. Multiple times over a 13-year period.

22 Q. Can you provide the dates upon which you provided
23 curriculum to the Tucson Unified School District governing
24 board for its approval?

25 A. I can't provide the dates, no.

1 Q. Would you be able to provide the agenda items which
2 evidenced that you were bringing before the Tucson Unified
3 School District board curriculum for its approval?

4 A. I would have to have access to those and look at those
5 documents.

6 Q. If we gave you access over lunch, could you go on the
7 Tucson Unified School District governing board website and find
8 that information?

9 MR. MARTINEZ: Objection. That's an improper
10 question.

11 THE COURT: I don't think so. Objection's overruled.
12 You can answer that yes or no.

13 A. If -- I'm not aware if it's accessible on the website,
14 those type of records.

15 BY MS. COOPER:

16 Q. I'll represent to you that the entirety of the Tucson
17 Unified School District governing board website, materials
18 going back several years are accessible on the web. All right?
19 Now, I want to ask you --

20 MR. MARTINEZ: Your Honor, that's a misstatement, let
21 me object. That website does not include the materials
22 underlying the governing board agendas. To suggest that the
23 volumes of materials that would accompany or be made available
24 to a school board for a school board member, whether it's a
25 study session or action item is not on the website, and that's

1 a complete misrepresentation of that website.

2 MS. COOPER: To the extent I implied --

3 THE COURT: All right. Just a minute. I don't think
4 there's any question pending, so if that's an objection --

5 MR. MARTINEZ: It was an objection.

6 THE COURT: I don't know what it's an objection to.
7 Ask your next question.

8 MS. COOPER: I will do that, Your Honor.

9 BY MS. COOPER:

10 Q. I want to ask you, you recall that you were deposed in this
11 matter on January 25th, 2016, right?

12 A. Yes.

13 Q. I want to direct your attention to Page 150 and show you
14 the question that was asked of you at Line 3: "Are you
15 familiar with the board -- the process of TUSD board approval
16 of curriculum in general?" And there's an objection. And at
17 Line 7 you answer: "I don't believe there is a process of
18 curriculum approval." Do you see that answer?

19 A. Yes, I do.

20 Q. Do you stand by your answer, that there is no process of
21 curriculum approval at the TUSD governing board?

22 A. What is the greater context -- what time frame are we
23 talking about here?

24 Q. I am talking about your time as the MAS director, 2008 to
25 2012.

1 A. Just for further clarification, are these particular lines
2 alluding to that time frame, or is it speaking to a greater
3 time frame?

4 Q. The question before, on Page 151, Line 20: "Was it part of
5 your job" -- no, this is later: "Was it part of your job at
6 any point to ensure that the Mexican-American Studies
7 curriculum was aligned to state --" I'm sorry. I'm mixed up.

8 Let me move on to this question: "Have you ever seen a
9 TUSD governing board approve curriculum?"

10 A. Can I see the exhibit, please?

11 Q. No. I'm asking you for your recollection right now. Have
12 you ever seen the governing board at TUSD approve curriculum?

13 A. I've never personally witnessed them, no.

14 Q. Have you --

15 A. But I am aware of documents when our curriculum was
16 approved, the Mexican-American Studies curriculum.

17 Q. Can you tell me what those documents look like, please?

18 A. They were board agenda documents that had a curriculum and
19 book approval --

20 Q. And what was the time frame for that?

21 A. -- that was I alluding to -- the early 2000s.

22 Q. So from the early 2000s, there are documents from the TUSD
23 governing board that evidence that curriculum was approved,
24 right?

25 A. Yes.

1 Q. And you were a teacher then, right?

2 A. Yes.

3 Q. Was it part of your responsibility as a teacher to see the
4 governing board approved curriculum?

5 A. Yes, because we were a department of three to four maybe at
6 the time.

7 Q. So what about after, did you develop more curriculum after
8 that early time period?

9 A. Yes.

10 Q. In fact, you were developing curriculum all the time,
11 right?

12 A. About 10 to 15 units per year.

13 Q. Did you ever take any of that before the TUSD governing
14 board?

15 A. Yes, we did.

16 Q. You just told me that you took it before the board in the
17 early 2000s.

18 A. You didn't ask for approval. We did some presentations
19 with regard to our curriculum. We shared some lesson plans and
20 some activities that are found within our curriculum units.

21 Q. And when you were sharing that information, were you
22 seeking formal board approval pursuant to 15-721 and 722?

23 A. I would have to see those statutes.

24 Q. Were you seeking formal approval by the governing board
25 that such curriculum could be taught to the students in TUSD?

1 A. I don't recollect.

2 Q. So you don't recall whether or not you --

3 A. No, I do not recall.

4 Q. So you don't have any recollection that in fact the
5 governing board approved that curriculum?

6 A. Yes, I do. I do have -- I do have recollection that the
7 governing board did approve the Mexican-American Studies
8 curriculum.

9 Q. Would it be your belief as a person who has worked in the
10 Tucson Unified School District for -- who worked in it for many
11 years that in fact any approval by the governing board would be
12 in fact evidence in its public records?

13 MR. MARTINEZ: Foundation, Your Honor. It's beyond
14 his competency. How would he know? It's not in the --

15 THE COURT: Overruled. If he doesn't know, he can say
16 "I don't know."

17 THE WITNESS: I'm sorry, can you repeat one more time.

18 BY MS. COOPER:

19 Q. I want to know if you believe that any formal board
20 approval of MAS curriculum would be evidenced in the public
21 records of the governing board.

22 A. I am aware of one instance of evidence of TUSD board
23 approved curriculum with regard to Mexican-American Studies.

24 Q. Do you believe that any other instances of governing board
25 approval would similarly be reflected in the public records of

1 this public body?

2 A. Yes.

3 Q. And so if there are no records reflecting an approval,
4 would that indicate to you that there was in fact no approval?

5 A. If there are no records?

6 Q. That reflect an approval, would that in fact indicate to
7 you that no approval was made by the governing board?

8 A. With regard to Mexican-American Studies?

9 Q. Curriculum.

10 A. Well, I know that there was an approval in the early 2000s
11 of the Mexican-American Studies curriculum. So I can't speak
12 to any other curriculums. I know we were the only --

13 MS. COOPER: I'm sorry, I move to strike, Your Honor.
14 The answer is non-responsive.

15 THE COURT: The motion is granted. Do you want to
16 reask your question?

17 BY MS. COOPER:

18 Q. Do you believe, sir, that the public records of the Tucson
19 Unified School District, a public body, would accurately
20 reflect whether it had approved curriculum presented to it for
21 its approval by the Mexican-American Studies Department?

22 A. With --

23 Q. Yes or no?

24 A. I can't answer that question with a yes or no. Because
25 with specific regard to TUSD, I have submitted documents,

1 volumes of documents, with regards to curriculum, and that was
2 never forwarded to the appropriate parties or the parties that
3 were asking. For instance --

4 MS. COOPER: I'm sorry. Move to strike as
5 non-responsive.

6 THE COURT: I think her question was about the
7 records, official records of the Tucson School Board.

8 MS. COOPER: That is correct.

9 THE COURT: If you don't know, you can say, "I don't
10 know."

11 THE WITNESS: It depends upon the context. I can't
12 answer that -- it requires a further context, it requires much
13 more than a yes or no. Because in our --

14 MS. COOPER: Move to strike as non-responsive.

15 THE COURT: So the answer is --

16 THE WITNESS: No.

17 THE COURT: The answer is it depends on the context?

18 THE WITNESS: Thank you, Your Honor. Thank you. Yes,
19 it depends upon the context.

20 BY MS. COOPER:

21 Q. Do you have any reason to doubt the record-keeping
22 capabilities of the Tucson Unified School District's governing
23 board staff?

24 MR. MARTINEZ: Objection. Calls for speculation. How
25 would he --

1 THE COURT: I think it does, plus I think it's been
2 asked and answered --

3 MS. COOPER: All right. Let's move on.

4 THE COURT: -- to the best of this witness's
5 recollection.

6 BY MS. COOPER:

7 Q. Now, you've talked about the fact that the Department, the
8 MAS Department, maintains curriculum units on a shared drive,
9 correct?

10 A. That is correct.

11 Q. And that was called the M drive?

12 A. To my recollection, yes.

13 Q. And that was a drive to which MAS teachers had access,
14 correct?

15 A. MAS teachers, I would have to -- we would have to define
16 that.

17 Q. I was going to ask one at a time. All right. So why don't
18 you answer that question, and we'll move on to the next one.

19 Did MAS teachers have access to that drive?

20 A. Yes.

21 Q. Did anyone else have access to that drive?

22 A. Yes.

23 Q. And who was that?

24 A. The superintendent, the assistant superintendent, some of
25 our administrative support staff had access to that.

1 Q. You had mentioned that there were teachers teaching MAS --

2 MR. MARTINEZ: Excuse me, Your Honor, it wasn't clear
3 to me whether he finished his answer, if he could be allowed
4 the opportunity to complete his answer if he hasn't.

5 THE COURT: Well, did you finish your answer?

6 THE WITNESS: Yes, Your Honor.

7 THE COURT: That's a sufficient answer. Go ahead.
8 Ask your question.

9 BY MS. COOPER:

10 Q. You had discussed the fact that there were teachers
11 teaching MAS subject matter who were not part of the MAS
12 Department, correct?

13 A. Yes.

14 Q. Did they have access to this shared drive?

15 A. Yes.

16 Q. Now, you mentioned as well that there were hard copies of
17 curriculum units in the district office, correct?

18 A. That is correct, yes.

19 Q. And they were available to be taught in MAS classes?

20 A. That is correct, yes.

21 Q. Would those paper copies of what was on the shared drive or
22 different curriculum, or both?

23 A. They came in various formats. We had hard copies, we had
24 DVD copies, we had copies of our curriculum on pen drives,
25 electronic copies. So it varied.

1 Q. Is it fair to say there were many sources of MAS
2 curriculum?

3 A. Yes.

4 Q. The shared drive and all these other sources that you just
5 mentioned?

6 A. That is correct, yes.

7 Q. Now, you're aware that the Cambium auditors wanted to see
8 MAS materials, right?

9 A. Yes.

10 Q. And in fact, you were asked to collect materials to be
11 given to the Cambium auditors, right?

12 A. I was asked by TUSD legal, yes.

13 Q. I'm not asking for the content of those communications,
14 merely whether you were asked to collect materials about the
15 MAS teaching to be given to the Cambium auditors. Is that
16 clear?

17 A. Before I answer who I submitted it to, I'd have to know who
18 was requesting these materials.

19 Q. Were you asked to collect materials for the Cambium
20 auditors?

21 A. I would have to know by who asked that question.

22 Q. Why do you need to know who asked you that question to know
23 whether or not they were to be submitted to the Cambium
24 auditors?

25 MR. MARTINEZ: Argumentative. He answered the

1 question, Your Honor. It's asked and answered.

2 THE COURT: No, I don't think so. Overruled.

3 A. Yes, I was asked to submit materials, yes.

4 BY MS. COOPER:

5 Q. MAS materials for the Cambium auditors, right?

6 A. Yes.

7 Q. And to be fair, you were receiving requests for MAS
8 materials for lots of purposes at that time, right?

9 A. Yes.

10 Q. So did you collect MAS materials for the Cambium auditors?

11 A. Yes, I did.

12 Q. Did you make a copy of that shared drive that we just
13 discussed for the Cambium auditors?

14 A. I do not recollect.

15 Q. You don't know one way or another whether you did so?

16 A. No. All that information was given to TUSD legal.

17 Q. I am not asking who you gave it to. I'm just asking what
18 you copied. Did you copy the MAS drive, the M drive?

19 A. I don't recollect. I do not recollect.

20 Q. The material that we just spoke about a moment ago that was
21 in all those different forms, paper, DVD, flash drives, did you
22 collect and copy that and give it to anyone for the Cambium
23 auditors?

24 A. Every format that we had was given to TUSD legal.

25 Q. So you did collect all of that other information and give

1 it to TUSD legal for the Cambium auditors?

2 A. Yes.

3 Q. Now, with respect to the M drive, if you don't recall
4 whether you copied it. Do you recall if you gave an
5 instruction to anyone else that it be copied?

6 A. TUSD legal did have access to our M drive.

7 Q. Did you tell them that there was information on the M drive
8 that was -- contained substantial MAS materials?

9 A. That was understood. That was communicated.

10 Q. You did tell TUSD legal, here, you can go look at this
11 M drive, and there's a lot of information on here that the
12 Cambium auditors might want to see?

13 A. My conversations with our TUSD attorney, we understood
14 that, and he accessed those materials on the M drive.

15 Q. What's your basis for saying that TUSD's attorney
16 understood that the M drive contained MAS materials that the
17 Cambium auditors might want to see?

18 A. My communications with Sam Brown, our TUSD attorney, and
19 the -- some of the transcripts from the administrative law
20 judge proceedings also verified that. Sam Brown had access to
21 that M drive, had access to materials.

22 Q. You say he had access. How do you know that he exercised
23 that right of access?

24 A. Because he accessed it and forwarded those materials to the
25 Arizona Department of Education according to the transcripts on

1 the administrative law judge proceedings.

2 Q. I understand -- I'm talking about information that was
3 given to the Cambium auditors. Do you know whether Mr. Brown
4 accessed the M drive to give that information to the Cambium
5 auditors? I'm just asking whether you know, one way or the
6 other.

7 A. Yes, I do.

8 Q. And do you believe that Mr. Brown accessed the M drive and
9 gave the information about the MAS program that was on it to
10 the Cambium auditors?

11 A. I can't speculate that he gave those to the Cambium
12 auditors.

13 Q. So you don't know?

14 A. I don't know.

15 Q. Did you make any effort to collect MAS teaching materials
16 from MAS teachers who are not in your department for the
17 Cambium auditors?

18 A. Yes.

19 Q. What did you do?

20 A. I believe I communicated verbally to those teachers to
21 collect all the materials, books, and we forwarded them to TUSD
22 legal.

23 Q. Do you have any idea what the volume of this material was?
24 Did it cover the entirety of the MAS program from inception to
25 that point?

1 A. Yes.

2 Q. It did cover that point, so it was a large volume of
3 materials?

4 A. Truckloads, yes.

5 Q. Truckloads. Fortunately, they were digital truckloads?

6 A. Not digital truckloads.

7 Q. Both?

8 A. Both.

9 Q. And then you mentioned as well that your summer
10 Transformative Institutes would include 10 to 15 curriculum
11 units each summer, right?

12 A. Yes.

13 Q. And those -- there were 12 of those summer institutes,
14 right?

15 A. Yes.

16 Q. So there were as many as 120 to 150 curriculum units that
17 were provided to MAS teachers that were available for them to
18 use in teaching MAS classes, correct?

19 A. Yes.

20 Q. Do you know if Cambium got those?

21 A. I don't know if Cambium received those.

22 Q. Now I want to move on and talk about the AIMS test and ask
23 you, now students first -- the AIMS test is a standardized
24 test, right, or was a standardized test, right?

25 A. Yes.

1 Q. And students were required to pass it to graduate?

2 A. That is correct, yes.

3 Q. And students first took AIMS for high school in the fall of
4 their sophomore year, correct?

5 A. Yes.

6 Q. Students had multiple additional opportunities to pass the
7 AIMS test, right?

8 A. Yes.

9 Q. In fact, there were five more opportunities, spring of
10 sophomore year, fall and spring of junior year, fall and spring
11 of senior year, correct?

12 A. Yes.

13 Q. Let's go back to a topic I raised at the beginning. The
14 MAS program was controversial, right?

15 A. Yes.

16 Q. There were people in the TUSD community that opposed it,
17 right?

18 A. Yes.

19 Q. Those included other teachers and community members, right?

20 A. Yes.

21 Q. And some members of the TUSD board, correct?

22 A. Definitely.

23 Q. I'm putting before you Defendants' Exhibit 559, which I
24 believe has been admitted. Defendants' Exhibit 559, which has
25 been admitted. That's what my records indicate.

1 MR. CHANG: Yes.

2 BY MS. COOPER:

3 Q. Can you tell me what this is.

4 A. Yes, this is academic journal.

5 Q. All right. It's an article entitled: "Culture As a
6 Resource: Critically Compassionate Intellectualism and its
7 Struggle Against Racism, Fascism, and Intellectual Apartheid in
8 Arizona." Right?

9 A. Yes.

10 Q. And there are two authors. Augustine Romero, he preceded
11 you as the director of the MAS department, right?

12 A. Yes.

13 Q. And you?

14 A. Yes.

15 Q. This article was written in the fall of 2009.

16 A. I don't believe it was --

17 Q. It was published in the fall of 2009. Excuse me.

18 A. Okay. It was published in the fall of 2009.

19 Q. In the Hamline Journal of Public Law and Policy, correct?

20 A. Yes.

21 Q. That article accurately represents your views and
22 perspectives, right?

23 A. Yes.

24 Q. And, in fact, in writing the article, you identified
25 yourself as the Director of Academic Equity for

1 Mexican-American Studies, Tucson Unified School District,
2 right?

3 A. Yes.

4 Q. This article discusses the pedagogy used in MAS classes in
5 TUSD, right? Go ahead and answer.

6 A. Not in its entirety, but some aspects of, yes.

7 Q. Some aspects of this article address some aspects of MAS
8 pedagogy as taught in TUSD, right?

9 A. Yes.

10 Q. In fact, it discusses social justice education project
11 classes at TUSD, right?

12 A. Yes.

13 Q. And it talks about TUSD students in those classes?

14 A. Yes.

15 THE COURT: Mr. Martinez, have a seat, will you? Some
16 people might take your standing as a threat to make an
17 objection.

18 MR. MARTINEZ: I have an old back, Judge. I
19 apologize.

20 BY MS. COOPER:

21 Q. And this article says on Page 946, in the highlighted
22 language: "Furthermore, our pedagogy --" that's a reference to
23 the pedagogy of you and Dr. Romero, right?

24 A. Yes.

25 Q. "-- is grounded in the understanding that race and racism

1 are dominant variables within the tri-dimensionalized reality
2 of our students, their parents, our communities, and within us
3 as emancipatory educators." Is that correct?

4 MR. MARTINEZ: Objection, Your Honor. My objection is
5 on the basis of the rules, the objections made by the state,
6 the rulings by this Court that had disallowed us in direct to
7 address anything with respect to pedagogy or curriculum, and
8 now, you know, they seek to open that door and then get into
9 the details of that.

10 THE COURT: All right. Objection's overruled.

11 I don't think I made a blanket ruling that nothing
12 about pedagogy and curriculum could come in, and, besides, you
13 know, there's more latitude on cross. So the objection is
14 overruled.

15 BY MS. COOPER:

16 Q. You state further in this article at the page bearing Bates
17 Number 80E000952 and then going on to 53: "Within this
18 process, social, historical, and political reality is
19 problematicized and racemized --" did I pronounce that
20 correctly?

21 A. Problematized?

22 Q. No, the next word, "racemized."

23 MR. MARTINEZ: Objection, Your Honor.

24 THE COURT: What was that? I can't hear you.

25 MR. MARTINEZ: I'm sorry. Objection. The document

1 speaks for itself, Your Honor.

2 THE COURT: There's not even a question yet, so the
3 objection is overruled.

4 BY MS. COOPER:

5 Q. This article says: "Within this process social,
6 historical, and political reality is problematicized and
7 racemized through the exercise of praxis and with the intent of
8 fostering self, social, and structural transformation."

9 Correct?

10 MR. MARTINEZ: Same objection, Your Honor.

11 THE COURT: Well, she's just reading the same thing
12 she read before. So I'll just give the same ruling:
13 Overruled.

14 A. It states that, yes.

15 BY MS. COOPER:

16 Q. And that's a statement that reflects your beliefs at this
17 time in this article that addressed MAS pedagogy, correct?

18 A. Yes.

19 Q. Does this article discuss transformative actions?

20 A. I'd have to look at it, but, to my recollection, it alludes
21 to transformation, yes.

22 Q. Does it address the thesis that such actions are necessary
23 to help students overcome their history of oppression?

24 A. Yes.

25 Q. I am going to ask you just a few questions about the number

1 of students in MAS classes. The program operated for about
2 12 years, right?

3 A. Yes.

4 Q. And when the Cambium audit occurred, the program was at its
5 peak in terms of enrollment?

6 A. I would have to look at the numbers. I know there was a
7 peak on or around that time that the Cambium audit took place.

8 But once the law was implemented, I know that the numbers
9 immediately were reduced. Or the legislation was presented.

10 I'm sorry. Not the law was passed, but when the legislation
11 was presented, I know the numbers did reduce considerably.

12 Q. So are you aware of the percentage of TUSD students that
13 participated in MAS programs at the time of the Cambium audit?

14 A. Roughly, yes.

15 Q. Would you agree then it was 2.5 percent of students?

16 A. 2.5 percent of the district?

17 Q. Yeah.

18 A. I would have to see the numbers and look. I would have to
19 have a greater understanding of the demographics of the
20 district.

21 Q. Do you know what culturally relevant courses from a
22 Mexican-American perspective are?

23 A. No.

24 Q. Let's go back to this article. We talked about
25 transformative actions being necessary to help students

1 overcome their history of oppression. Who are the oppressors
2 in that? Who are the oppressors?

3 A. Who are the oppressors within -- can you repeat the
4 sentence, please?

5 Q. We talked about the fact --

6 MR. MARTINEZ: Can Mr. Arce be provided electronically
7 the text --

8 THE COURT: I don't think he needs one now.

9 BY MS. COOPER:

10 Q. You agreed that one of the topics that you addressed in
11 this article was that transformative actions are necessary to
12 help students overcome their history of oppression. Correct?

13 A. Yes.

14 Q. Who are the oppressors that are oppressing those students?

15 A. There's a lot of forces and a lot --

16 Q. I said who, not forces.

17 MR. MARTINEZ: Can he be allowed to answer without
18 interruption of counsel?

19 THE COURT: He is not answering the question.

20 MR. MARTINEZ: Yes, he is.

21 THE COURT: No. Don't argue with me now. That's my
22 ruling. He's not answering the question. She asked about the
23 person, and he said there are a lot of forces. That's not an
24 answer.

25 Tell us who, Mr. Arce.

1 THE WITNESS: Yes. Throughout history, given primary
2 documents --

3 THE COURT: No, the question obviously refers to the
4 contemporary time at the time you wrote that article. So we're
5 not talking about historical figures.

6 THE WITNESS: So dominant society is often --
7 restricts, marginalized and racialized community.

8 BY MS. COOPER:

9 Q. Who is the dominant --

10 A. According to --

11 (Reporter requests answer be repeated.)

12 THE WITNESS: Dominant society, if you look at the
13 disparities that exist within our society, if you look at
14 prison going rates, if we look at a number of indicators, you
15 see that there is, in fact, a dominant society and a
16 subordinate society, and you see that folks are marginalized.
17 So in order to contextualize this question of who the oppressor
18 is, oftentimes dominant society. But at the same time,
19 oftentimes we oppress our own selves as well. So it's not
20 that -- it's a very complex and dynamic answer.

21 BY MS. COOPER:

22 Q. Who is the dominant society?

23 A. It depends upon the context. If we look at certain
24 indicators, you're going to see some groups fare well, fare
25 better, you're going to see that some groups fare better than

1 other groups.

2 Q. Does Mr. Horne represent the dominant society?

3 A. He can be considered a member of dominant society, yes.

4 Q. Mr. Huppenthal?

5 A. He can be considered a member of dominant society, yes.

6 Q. Arizona legislators?

7 A. They, as a collective, can be considered members of
8 dominant society. And they can -- some of them can be members
9 of subordinate society as well.

10 Q. So those are the oppressors, right?

11 A. I can't answer that. It depends upon a given context.

12 Q. Let's look again at the title of your article:

13 "The Struggle Against Racism, Fascism, and Intellectual
14 Apartheid in Arizona." Are you referring to specific persons
15 at racist there?

16 A. No, I am speaking of systems of racism and systems of
17 oppression, systematic, institutionalized racism.

18 Q. What about -- who are the fascists to whom you refer?

19 A. That's equally -- fascism is a system of oppression and a
20 system of thought that oppresses.

21 MS. COOPER: No further questions.

22 THE COURT: Just give me a guess, how long do you
23 think redirect is?

24 MR. MARTINEZ: 30 minutes.

25 THE COURT: 30 minutes. Then I think we should wait

1 until after lunch. I think we should still do the in limine
2 before we get back, is that okay with you? Before we get back
3 to your redirect?

4 MR. MARTINEZ: Yes, sir.

5 THE COURT: So we'll finish with this witness and then
6 we'll get to your offer of proof.

7 MR. MARTINEZ: Thank you.

8 THE COURT: And then the next witness. Unless there's
9 further recross. Okay. Then on that basis, we will stand at
10 recess until 1:30.

11 (A recess was taken from 11:57 a.m. to 1:32 p.m.)

12 THE COURT: Okay. Let's be seated. Since Mr. Arce is
13 here, we're going to finish with him first.

14 MR. MARTINEZ: Whichever way you prefer, Judge. I
15 just have a few questions.

16 THE COURT: Let's finish with him and we'll then do
17 the offer of proof. Go ahead, Mr. Martinez.

18 BY MR. MARTINEZ:

19 Q. Exhibit 93, Page 202, please. If you could expand there.
20 Thank you. This was a text that was pointed out to by counsel.
21 Do you remember that?

22 A. Yes.

23 Q. I'd like to move to the text above. No, not this one. I'm
24 sorry. Right there. Thank you. Starting with where it says,
25 "One principal." Bring that up or highlight that for me,

1 please. Keep going down.

2 This is text that wasn't pointed out, and I'd like you to
3 look at it, Mr. Arce. Isn't it true that within the Cambium
4 report, even on the same page that was pointed out to you, the
5 text provide: "One principal, in particular, speaks for the
6 MASD curriculum, expanding students' minds through the
7 coursework. He emphasizes that the American History,
8 Mexican-American Perspectives course is a true American history
9 class, with Mexican-American culture embedded. He feels
10 strongly that these courses push students to think deeply about
11 topics that matter to them, and that this critical thinking is
12 what creates educated citizens who will some day take (sic) our
13 country a better place."

14 MS. COOPER: Objection. Relevance. Hearsay.

15 BY MR. MARTINEZ:

16 Q. Did I read that correctly?

17 A. Yes.

18 THE COURT: Just a minute. The objection is
19 overruled. And that answer may stand.

20 BY MR. MARTINEZ:

21 Q. So returning to that time frame, and so we're talking
22 Cambium is going to be the spring of 2011, correct?

23 A. Yes.

24 Q. And we would be in the 2010-2011 school year, would we not?

25 A. Yes.

1 Q. During that school year -- and you're director?

2 A. Yes.

3 Q. What was your relationship with site administrators where
4 you had your staff teaching classes on an itinerant basis?

5 A. Yes. My recollection is one of open communication,
6 collaborative nature, supporting each other in both of our
7 capacities, however the department could support the site, vice
8 versa, how the principal could support us as a department. So
9 it was a working -- functionally working collaborative nature,
10 our relationship with site principals.

11 Q. Thank you. I'd like to turn your attention for a moment to
12 some of the questions you were asked about. Some of the
13 curriculum units, several of them, I believe up to four of
14 them, were admitted. Do you recall that?

15 A. Yes.

16 Q. You were also asked some questions that made reference to
17 the fact that what I refer to as the department having
18 essentially a bank -- whether in hard copy or in
19 electronically -- of available curriculum units. Do you recall
20 that?

21 A. Yes.

22 Q. And I am not sure you gave a total in response to
23 cross-examination, but yesterday you made a reference to kind
24 of a ballpark figure of the number of units, curriculum units
25 that might be found there, correct?

1 A. Yes.

2 Q. Do you recall that number?

3 A. Roughly 200 units.

4 Q. And with respect to those curriculum units, did the fact
5 that they were available mean that they were actually utilized
6 and taught in the classroom?

7 A. No.

8 Q. And with respect to which units were utilized by any
9 classroom teacher, whose choice or decision was that?

10 A. That was up to the classroom teacher.

11 Q. With respect to the name change, do you remember being
12 asked some questions about that?

13 A. Yes.

14 Q. Do you know how that name change came about?

15 A. Yes, I do.

16 MS. COOPER: I just can't hear.

17 MR. MARTINEZ: I'll repeat the question.

18 MS. COOPER: Please.

19 BY MR. MARTINEZ:

20 Q. Do you know how that name change came about?

21 A. Yes, I do.

22 Q. How did it come about?

23 A. The current superintendent at TUSD at the time, Dr. Fagan,
24 brought it to our attention as a department that she was
25 getting pressure from Arizona Superintendent Horne about the

1 term "Raza" within our department name.

2 MS. COOPER: Objection. Hearsay.

3 THE COURT: Well, no, it's just the circumstances as
4 to his understanding of what brought about the change, so the
5 objection is overruled.

6 BY MR. MARTINEZ:

7 Q. And were you given any specific instruction by
8 Superintendent Fagan at that time with respect to the name
9 change?

10 A. Yes. Dr. Fagan told us to drop the term "Raza" from our
11 department name.

12 Q. With respect to that change in name, did that reflect in
13 any way a change in the program's inclusive program to all
14 groups?

15 A. Not whatsoever.

16 MR. MARTINEZ: Those are the questions I have. Thank
17 you, Mr. Arce. That's all I have, Your Honor.

18 THE COURT: All right. Thank you, Mr. Martinez. What
19 are we on? Recross? MS. COOPER: Just a couple.

20 MR. MARTINEZ: You're not quite released yet.

21 RE-CROSS EXAMINATION

22 BY MS. COOPER:

23 Q. Just a few minutes, sir. You spoke just a moment ago about
24 the large number of curriculum units that were available for
25 MAS teachers to use, correct?

1 A. Yes.

2 Q. You said that some of them were being used and some of them
3 were not being used, is that correct?

4 A. That is correct.

5 Q. Is there any way to tell, for an outside person like the
6 Cambium auditors, the Department of Education, if they were
7 looking at any particular unit, whether or not it was being
8 used at that time?

9 A. No.

10 MS. COOPER: No further questions.

11 MR. MARTINEZ: I have nothing further, Your Honor.

12 THE COURT: All right, then. Mr. Arce, thank you very
13 much, sir.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: You may step down. You are excused.

16 Let's take up this the offer of proof. I have forgotten,
17 does this have to do with this witness or some other witness?

18 MR. MARTINEZ: Mr. Arce.

19 THE COURT: It came up with Mr. Arce. All right.

20 Then --

21 MR. MARTINEZ: Would you like him to wait outside,
22 Your Honor?

23 THE COURT: Yeah. I don't think he should wait in the
24 courtroom, but he should wait. All right?

25 MR. MARTINEZ: Yes, sir.

1 THE COURT: In case you want to -- in case the ruling,
2 whatever it is, goes in your favor and you want to call him
3 back at this time.

4 MR. MARTINEZ: Your Honor, the offer of proof
5 addresses several items, and I'll take them up one at a time.
6 The first deals with the issue or the topic of curriculum.
7 Yesterday the Court did not allow Mr. Arce to testify about the
8 curriculum used in the MAS program. Had plaintiffs been
9 permitted to ask Mr. Arce questions about the MAS curriculum,
10 he would have testified that speaking as the director of the
11 MAS program, there was no single curriculum for each MAS class.
12 Rather, Mr. Arce would have explained how each MAS teacher
13 adopted their own individual curriculum, and that the MAS
14 department did not require all teachers who taught the same
15 class to use the same curriculum or the curriculum materials.

16 This testimony is relevant to defendants'
17 over-enforcement of A.R.S. Section 15- --

18 THE COURT: No. No. No. The offer of proof is to
19 just tell me what the proof --

20 MR. MARTINEZ: Sure, I will just stick to that, Your
21 Honor. I apologize.

22 The second subject matter -- you want me to go to the
23 second, Your Honor?

24 THE COURT: Yes. If you're through with making your
25 offer of proof on the curriculum.

1 MR. MARTINEZ: Yes, sir.

2 THE COURT: To?

3 MR. MARTINEZ: The second area is in the MAS class
4 staffing, teacher staffing. Yesterday the Court did not permit
5 Mr. Arce to respond to questions about the staffing of
6 Mexican-American Studies classes. That would be by which
7 classroom teachers would teach the class.

8 Had plaintiffs been permitted to ask Mr. Arce
9 questions about the staffing of Mexican-American Studies
10 classes --

11 THE COURT: You recall what the reason -- there must
12 have been an objection that I sustained. Do you remember the
13 reason? Did I give a reason for sustaining the objection?

14 MR. MARTINEZ: I believe -- we can bring it up, Your
15 Honor, but I believe it was relevance.

16 MR. QUINN: It was relevance, Your Honor.

17 THE COURT: Okay. Go ahead. So the testimony would
18 have been?

19 MR. MARTINEZ: The testimony would have been, Your
20 Honor, that he would have testified that not every
21 Mexican-American Studies class was taught by a teacher who was
22 a part of the Mexican-American Studies Department. Rather,
23 some teachers who taught Mexican-American Studies classes were
24 part of the school site staff, not part of the MAS program
25 department.

1 The Mexican-American Studies Department did not
2 supervise those teachers that were site teachers. So, for
3 example, Mr. Acosta would be an example of that being a Tucson
4 High staff member, and as he indicated, supervised Tucson High
5 and not subject to the oversight supervision of Mr. Arce.

6 THE COURT: Next?

7 MR. MARTINEZ: Yes, sir. I'm sorry, Judge. The next
8 is student achievement.

9 Yesterday, Your Honor --

10 THE COURT: Now, can you tell -- go ahead, make your
11 offer first.

12 MR. MARTINEZ: Okay. Thank you. Yesterday, Your
13 Honor, counsel -- I attempted to inquire with Mr. Arce about
14 the role of student achievement in developing the
15 Mexican-American Studies classes. Had plaintiffs been
16 permitted to have Mr. Arce respond to those questions, he would
17 have provided testimony about the role of student -- that the
18 role that student achievement plays in developing
19 Mexican-American Studies classes. He would have testified that
20 the student performance in prior years guides the structure of
21 the MAS classes, because MAS classes are designed to close the
22 achievement gap, which he would have also testified to it being
23 an historic and persistent issue.

24 The next topic would be pedagogy.

25 THE COURT: Okay.

1 MR. MARTINEZ: With respect to pedagogy, Your Honor,
2 again, there was an attempt made to ask Mr. Arce questions
3 about the pedagogy that was utilized during his period in the
4 Department that was utilized in the MAS program.

5 Had plaintiffs been permitted to ask Mr. Arce about
6 that topic area, pedagogy, he would have provided testimony
7 that explained how Mexican-American Studies was taught.
8 Pedagogy being how we teach, or how one teaches, and that how
9 it was different; it was distinct from other pedagogical
10 approaches, but it was one that was also unique, it was
11 ground-breaking, and that it did -- and to which there was some
12 members of the community that did not respond well, favorably
13 to it.

14 So it did become within this community, through the
15 help of some of the public officials who testified in this
16 case, Mr. Huppenthal and certainly including Mr. Horne, they
17 made it a controversial subject matter in this community and in
18 this state. He would have explained that that pedagogy, in
19 spite of that controversy that was created by Mr. Horne and
20 Mr. Huppenthal, was well recognized, successful in promoting
21 student achievement, and that in fact that pedagogical approach
22 was, by his own efforts or the efforts of the district to
23 monitor the impact of the program on student achievement,
24 showing very positive results.

25 The TUSD school board approval, you did hear some

1 testimony on that today, Your Honor --

2 THE COURT: I'm sorry, is this a different topic?

3 MR. MARTINEZ: Yes, sir.

4 THE COURT: Okay. Go ahead.

5 MR. MARTINEZ: With respect to yesterday's efforts to
6 address the issue of board approval, initially the focus was to
7 elicit testimony from Mr. Arce that the TUSD Mexican-American
8 Studies program was, as testified to today, created by or with
9 the Tucson Unified School District governing board approval.

10 He would have also continued to testify, Your Honor,
11 that on a regular basis, as a director, he reported either in a
12 study session of the governing board or in an action area,
13 would usually go through the same governing board meetings.
14 About the details of the department, what classes were being
15 offered, underlying curriculum, in-depth discussion about the
16 contents of the classes, and also about the measurements that
17 were available, specific to such topics as passing AIMS,
18 matriculation to the next grade level, graduation and
19 matriculation to college, and such things as higher attendance
20 rates, lower discipline rates, and then the responses from site
21 administrators who were in support of the program.

22 So it would have provided the Court with evidence with
23 respect to not only was this a program that the governing board
24 was well informed about, but that they were informed such on a
25 regular basis, and that they were provided the kind of

1 information they needed in order to make a reasoned decision as
2 to why they continued to support and fund the program, its
3 curriculum, and the materials that they approved for purchase
4 on an annual basis.

5 That's the topics, Your Honor.

6 THE COURT: All right. Now, let me ask the defendant,
7 do you want to -- does defense want to say anything about any
8 of these offers? I guess the four or five categories there?

9 MS. COOPER: Right. We have nothing to add to our
10 objections from yesterday, but if Your Honor would prefer that,
11 given the amount of information that's been conveyed, that we
12 reiterate those or --

13 THE COURT: No. I just want to give you a chance to
14 make your case if you think you have anything to add. But
15 nothing to add, you stand on --

16 MS. COOPER: We stand on our objections that this has
17 nothing to do with proving the elements of plaintiffs' case
18 here, and some of it remains an improper effort to introduce
19 expert testimony by a person not properly designated as such.

20 THE COURT: All right. Here's my ruling.

21 First of all -- well, an offer of proof is usually not
22 made -- what's the word -- not made with the purpose of
23 changing the Court's mind, it's just to preserve your position
24 of error, right, that an error has been committed. So for that
25 purpose, it's on the record. But, you know, I might as well

1 let you know why or why I haven't changed my mind.

2 I haven't changed my mind on any of this, except maybe on
3 the first subject. The reason being, a lot of this stuff that
4 Mr. Martinez -- that's the subject of Mr. Martinez's offer of
5 proof, evidence has come in on it. So we have a lot of it
6 through Mr. Arce. And to go beyond that to me is -- most of
7 this is not relevant under 803.

8 In other words, the relevance is so attenuated that the
9 time spent in adducing the evidence is not worth the
10 consumption of time taken away from the trial. It's overdoing
11 it.

12 I mean, for instance, I don't think, you know, the extent
13 or the detail to which reports are made to the Tucson School
14 Board and how they -- and how they approved and whether they
15 approved it, I don't think it's a matter or issue in this case.
16 I don't think, you know, whether the board approves something
17 in MAS or didn't approve it or whether they were required to
18 approve it or not would not change the outcome of this case in
19 any way. So it's -- you know, it's just very, very marginally
20 relevant.

21 The same thing with, you know, the use of student
22 achievement in developing a curriculum where you design the
23 course. That's fine if you do that, but whether that's done or
24 not I think is not going to make any difference to the outcome
25 of this case. I don't think there's any charge that Huppenthal

1 or Horne or anybody else's decision to implement the statutory
2 penalty was based upon the failure of, you know, using enough
3 student achievement to design the curriculum or using too much
4 student achievement. I don't think it makes one bit of
5 difference.

6 The decision was made on the basis of result. And the
7 problem with all of this testimony is that, you know,
8 relitigating really whether or not the penalty was legally and
9 justly imposed, that's not what we're here to decide, I don't
10 think. You know, I mean, that's a different case, a different
11 proceeding. And maybe, fortunately or unfortunately, the
12 plaintiffs here were not parties to that proceeding. I suppose
13 you could have intervened, if you wanted to, to take an appeal
14 to the Superior Court, but you didn't do that. And Tucson
15 Unified School District I guess decided that either, you know,
16 they agreed with the finding, or it wasn't worth the cost, or
17 they couldn't afford it, or the substitute program was good
18 enough. Whatever it was, that case is over, and I am not going
19 to try to retry that decision.

20 The question is what was the motive of the -- I think the
21 direction from the Ninth Circuit is pretty clear, is what was
22 the motive of the legislators and the executive actor in the
23 Department of Education in, one, enacting the statute, and,
24 two, implementing the statute, in terms of was it motivated by
25 some kind of racial animus that could be tied to this case.

1 So, I mean, that's the inquiry. I think all these other
2 avenues of inquiry are just barely relevant.

3 I understand counsel's problem, it's partly the same as
4 mine in this case. In other words, the burden of proof is on
5 the plaintiffs to show that legislators had racial animus, and
6 in the same token on defense, is to rebut any such showing.

7 Well, I don't think too many cases like this are tried,
8 maybe thankfully, so there isn't much law or much standard of
9 what kind of proof suffices, what standard of proof applies and
10 all that. So in a sense I think we're all kind of groping in
11 the dark to just do the best we can. So I don't blame you for
12 perhaps trying to protect your case as broadly as you can.
13 But for those reasons, you know, I understand the offers of
14 proof, but I am not going to review any of my prior rulings.

15 Now, but there's one area where I think either I misspoke
16 or you misunderstood what I said, and that has to do with the
17 curriculum. I believe, you know, the gist of my ruling was
18 that Mr. Arce couldn't testify as an expert on curriculum, at
19 least that's where it started. I don't know whether I, like
20 some other actors in this courtroom, whether I wandered too
21 much off course or not, I don't know. But that's where I
22 started. In other words, he couldn't offer expert testimony,
23 and I think that was -- I don't recall precisely, but I think
24 there was an objection that it calls for expert testimony,
25 something like that.

1 Anyway, so, I abide by that ruling, the basic ruling that
2 people other than those identified as experts in the pretrial
3 process cannot give expert opinion on the area of curriculum.

4 Now, by that, and I think I illustrated that at some points
5 in Mr. Arce's testimony with some other subjects, that he can
6 still testify of his action and his understanding as, say, the
7 director, right, of MAS, how he understood the term and how he
8 implemented the term or what he did in terms of curriculum. I
9 really didn't mean to bar that, and if counsel understood it
10 otherwise, it's probably as much my error as his that you had
11 that understanding.

12 So, to that extent, just only in the area of curriculum, I
13 am going to permit you, if you want to recall Mr. Arce and go
14 into that subject -- if you need a couple minutes to confer
15 with him first, that's fine, too; but on that area, I am going
16 to let you examine the witness further. Now, do you want to do
17 that or would you just rather have the error on the books?

18 MR. MARTINEZ: No, I'd rather cure it for all of us,
19 Your Honor.

20 THE COURT: You'd like to call --

21 MR. MARTINEZ: No, I would rather call Mr. Arce, but I
22 would like to make one request in that regard.

23 THE COURT: Go ahead.

24 MR. MARTINEZ: We are prepared to move immediately
25 into Mr. Cabrera's testimony, and, while that's occurring, I

1 would step out and work with Mr. Arce so I can make it concise.
2 And I think we will complete Mr. Cabrera easily in the time
3 frame that's available this afternoon, and I am not sure how
4 long that examin- --

5 Well, you tell me how long you think your examination will
6 be. I am not trying to speak for you, I'm sorry.

7 THE COURT: And we understand, you know, it's just a
8 rough estimate.

9 MS. COOPER: It is my hope that it would be completed
10 today, and that there would be time to accommodate this
11 additional testimony, not knowing, of course, how long you
12 expect it to take, but that would be my hope and expectation at
13 this point.

14 MR. MARTINEZ: And if for some reason we don't get
15 done with Dr. Cabrera, I could have Mr. Arce here first thing
16 in the morning. I don't anticipate it taking long, but if I
17 prepare him, I think we can make it much more concise.

18 THE COURT: That's fine. Let's do it that way. Then
19 our next witness will be --

20 MR. MARTINEZ: Dr. Nolan Cabrera.

21 THE COURT: Nolan Cabrera. Then after he's through --

22 MR. MARTINEZ: Return to Mr. Arce.

23 THE COURT: -- we'll come back for this continued
24 redirect of Mr. Arce, right?

25 MR. MARTINEZ: Yes.

1 THE COURT: Or supplemental redirect, and then
2 hopefully we can finish that today.

3 Now, somebody can talk to Cabrera right in the courthouse?

4 MR. MARTINEZ: Yes, sir.

5 THE COURT: Somebody can call him now.

6 There's one more housekeeping matter that I want to mention
7 while they're calling him, and that's this: I got a
8 stipulation today, right? It was filed, joint stipulation to
9 admit certain trial exhibits. So I'm going to rule on -- so
10 just to make the record right, as of now, I approve the joint
11 stipulation. It's filed today. It's Document 422 on the
12 electronic docket. And so the exhibits mentioned on the eight
13 or nine pages of the Exhibit A to the stipulation are hereby
14 admitted. I think that satisfies the purpose of the
15 stipulation, doesn't it?

16 MS. COOPER: It does, Your Honor.

17 THE WITNESS: All right. Thank you. Then we'll have
18 the next witness.

19 MR. REISS: The plaintiffs, Your Honor, call Dr. Nolan
20 Cabrera. His testimony has already been submitted and filed by
21 the Court, by declaration, and frankly, Your Honor, it's a
22 question -- I don't think it's been separately marked as an
23 exhibit --

24 THE COURT: No.

25 MR. REISS: -- it has been filed, so I don't know if

1 we had to do that, honestly --

2 THE COURT: I think it should be, because it's a part
3 of the record. Let's make it something different from the
4 number -- let's call it -- he's the first expert, so we'll call
5 it E-A, Expert A. Okay. So that's Dr. Cabrera. I happen to
6 have a copy, but obviously I had to re-read it again. So
7 that's his declaration, right?

8 MR. REISS: That's his declaration, and, Your Honor,
9 attached to his declaration, I believe, are five exhibits,
10 including his expert report and other items referred to in his
11 declaration.

12 THE COURT: So Dr. Cabrera's direct testimony in the
13 form of his declaration is now admitted and the exhibit number
14 is Exhibit Number E-A. Okay?

15 MR. REISS: Thank you, Your Honor.

16 THE COURT: Now, then we're going to get to cross,
17 right?

18 MR. REISS: Yes.

19 THE COURT: Is Dr. Cabrera in the courtroom yet?

20 (Dr. Cabrera stood and raised his hand.)

21 THE COURT: All right, sir. Would you step forward
22 here and be sworn, please.

23 MR. REISS: Your Honor, for the witness's convenience,
24 I've got a hard copy of his declaration. Should I just make
25 that available to him?

1 THE COURT: No objection, right?

2 MS. COOPER: No.

3 THE COURT: I think that will be convenient.

4 **NOLAN LEÓN CABRERA, WITNESS, SWORN**

5 THE CLERK: You may be seated. Please speak directly
6 into the microphone, and state your full name and the spelling
7 of your last name for the record, please.

8 THE WITNESS: My name is Nolan León Cabrera, C-a-b, as
9 in "boy," -r-e-r-a.

10 THE COURT: Before you start the cross-examination
11 now, Dr. Cabrera, I'm sure it's been explained to you, right,
12 that you're testifying as an expert witness and that your
13 testimony is in your declaration. You have a copy of the
14 declaration in front of you, don't you?

15 THE WITNESS: Yes, sir.

16 THE COURT: All right. And so you adopt that as your
17 direct testimony in this case, right?

18 THE WITNESS: Yes, sir.

19 THE COURT: And so this is now then the other parties'
20 opportunity to cross-examine the witness, and then the
21 plaintiffs' attorney will have a chance then for redirect
22 examination. So that's the process we'll be going through.

23 So, Ms. Cooper, you may proceed.

24 CROSS-EXAMINATION

25 BY MS. COOPER:

1 Q. Good afternoon, Dr. Cabrera.

2 A. Good afternoon.

3 Q. Thank you for being here today.

4 Your research focuses on -- to the extent it focuses on
5 students, it focuses on Mexican-American students, right?

6 A. It primarily focuses on Mexican-American students and the
7 students who took the Mexican-American Studies classes, which
8 is overwhelmingly Mexican-American.

9 Q. And so your focus hasn't been on any other ethnicities,
10 right?

11 A. No.

12 Q. You've been studying the educational efficacy of the MAS
13 program in Tucson for many years?

14 A. That's correct.

15 Q. In fact, it probably goes back about eight years?

16 A. Probably more like six, but it's roughly.

17 Q. Well, you were a consultant to the -- to some filmmakers
18 who made a movie called Precious Knowledge?

19 A. Yes.

20 Q. And you described that as a film that documents the
21 positive impact that the MAS program had on students'
22 educational and civic engagement?

23 A. Did you say I described the film as such?

24 Q. Yes.

25 A. I don't recall specifically describing the film that way,

1 but it seems relatively accurate.

2 Q. Well, let's take a look at your declaration, all right?

3 THE COURT: You're talking about his declaration.

4 MS. COOPER: I am.

5 THE COURT: The one that's his direct testimony?

6 MS. COOPER: That is correct. That's Exhibit EA, as
7 you indicated, Your Honor.

8 BY MS. COOPER:

9 Q. We'll see here, we're looking at Page 3, Paragraph 7, and
10 at the end of that paragraph you describe the PBS documentary.

11 A. Yes, I see that.

12 Q. And that's still your testimony, right?

13 A. Yes, that's still my testimony.

14 Q. And then you did some work that was published in June of
15 2012, entitled: "An Empirical Analysis of the Effects of
16 Mexican-American Studies Participation on Student Achievement
17 within the Tucson Unified School District." Correct?

18 A. That's correct.

19 Q. And that was submitted to the special master in a case
20 involving the desegregation of TUSD, right?

21 A. That's correct.

22 Q. It was not otherwise published?

23 A. No, it was not published in any other way.

24 Q. And that was after TUSD terminated the program?

25 A. Yes, I believe that it was after the program itself was

1 eliminated.

2 Q. And then you did a work, an Empirical Analysis of Tucson
3 Unified School District's Mexican-American Studies Department
4 2010 Graduating Cohort. Correct?

5 A. Yes, I did that as well.

6 Q. And that was dated January 2012?

7 A. I believe so.

8 Q. And it was submitted, also submitted to the special master
9 in the case regarding the desegregation of TUSD, right?

10 A. That is correct as well.

11 Q. And that was not otherwise published?

12 A. No, it was not.

13 Q. Do you believe that the special master asked you to do that
14 work in connection with TUSD's culturally relevant classes?

15 A. The CRC, to my understanding, wasn't in existence at that
16 time.

17 Q. As of 2012, a person who wanted to read your conclusions
18 about Mexican-American student achievement would have to get
19 that information from you or the special master, right?

20 A. I guess. I don't know exactly how widely it was
21 disseminated.

22 Q. You don't believe it was widely disseminated, do you?

23 A. I don't have any basis for making an assessment one way or
24 the other.

25 Q. Was it published?

1 A. In a peer-reviewed outlet, no, it was not.

2 Q. Was it published in an outlet that was not peer-reviewed?

3 A. To my knowledge, no.

4 Q. Was it posted on the internet?

5 A. That, I don't know.

6 MS. COOPER: On this basis, plaintiffs would move to
7 exclude Dr. Cabrera as an expert witness. He doesn't have any
8 information about student achievements that would have been
9 available to the defendants before the program was terminated
10 by TUSD. It thus cannot go to their state of mind.

11 MR. REISS: Your Honor?

12 THE COURT: Any opposition to that motion?

13 MR. REISS: Your Honor, we've litigated this in
14 motions in limine. Your Honor had briefing, extensive
15 briefing. Your Honor ruled that his expert testimony is
16 admissible. We've resolved this issue, Your Honor.

17 THE COURT: All right. I don't know whether this
18 specific point was brought up in the in limine motion or not.
19 But if it wasn't, I mean, I have to take the in limine motion
20 as an opportunity taken by each party who filed such motion to
21 adduce whatever factors are appropriate that would preclude a
22 witness from testifying as an expert on the chosen subject in
23 this proceeding.

24 And I think on that basis I have to agree with Mr. Reiss,
25 that I did deny the motion, and this little bit more, you'll

1 just have to let it go to the weight of the opinion and not as
2 a ground for precluding him from testifying. So the motion is
3 denied.

4 (A recess was taken from 2:11 p.m. to 2:42 p.m. to allow the
5 reporter to address a computer/technical issue.)

6 THE COURT: All right. Let's be seated, please, and
7 get started. I guess my computer is up. We're okay.

8 We're on the cross, right?

9 MS. COOPER: Correct, Your Honor.

10 BY MS. COOPER:

11 Q. Dr. Cabrera, with respect to the two works that you did for
12 the special master in 2012, did you yourself publish either of
13 those works on the internet at that time?

14 A. At that time, no. Oh, wait, excuse me. Yes, one was
15 published at the College of Ed at the University of Arizona.

16 Q. When was that?

17 A. It was at the time that the Unitary Status Plan was made
18 public, and I am not -- the specific date was probably fall of
19 2012.

20 Q. That's probably in the court record, right?

21 A. That, I don't know.

22 Q. I'll represent to you that the date of the Unitary Status
23 Plan is in the court record, and is it your testimony that that
24 is approximately the time that your work was published --

25 A. Yes.

1 Q. -- on the University of Arizona Department of Education
2 website?

3 A. College of Education.

4 Q. College of Education. Excuse me. If I use the phrase
5 "culturally relevant courses from a Mexican-American
6 perspective," does that have any meaning for you?

7 A. Could you clarify "meaning"? In what way?

8 Q. Do you understand those to refer to classes that are
9 presently being offered by Tucson Unified School District?

10 A. That's beyond my scope of knowledge. I don't have a very
11 thorough knowledge of what is specifically being offered in the
12 current CRC courses.

13 Q. But are you aware that there are courses called, for short,
14 CRC courses, being taught at Tucson Unified School District?

15 A. Yes, I'm aware that there are courses by that name being
16 offered at Tucson Unified.

17 Q. And that some of those courses are from a Mexican-American
18 perspective, right?

19 A. I --

20 MR. REISS: Objection.

21 BY MS. COOPER:

22 Q. Do you know that?

23 THE COURT: Just a minute. Objection on what basis?

24 MR. REISS: Relevance and personal knowledge.

25 THE COURT: Overruled. You can answer.

1 THE WITNESS: Could you restate the question, please.

2 BY MS. COOPER:

3 Q. Do you know whether Tucson Unified School District is
4 presently offering culturally relevant courses from a
5 Mexican-American perspective?

6 A. Yes.

7 Q. Do you know whether they're offering such courses from an
8 African-American perspective?

9 A. I have heard they are. I haven't seen anything beyond
10 that.

11 Q. Have you ever done any work to -- you did your work
12 examining the impact of the Mexican-American Studies program on
13 students, right?

14 A. I prefer the term "efficacy relative to impact," but, yes,
15 it was Mexican-American Studies.

16 Q. Have you done any work examining the efficacy of
17 Mexican-American Studies -- excuse me -- culturally relevant
18 courses from a Mexican-American perspective on student
19 achievement?

20 A. No, I have not.

21 Q. Did you ever request any data from the University of
22 Arizona regarding student achievement -- any data regarding
23 students who are taking culturally relevant courses in the
24 Tucson Unified School District?

25 A. The University of Arizona wouldn't have that information.

1 Q. But did you request that? I'm sorry. Did you request that
2 information from Tucson Unified School District?

3 A. On the culturally relevant curriculum?

4 Q. On its students taking culturally relevant courses.

5 A. It would have been contained in some of the data that I had
6 requested pursuant to my expert testimony.

7 Q. So you do have data upon which you could do an analysis to
8 determine whether or not the culturally relevant courses from
9 a -- for students from a Mexican-American perspective are
10 having an impact on the student achievement?

11 A. I'm sorry. Could you rephrase that question, please.

12 Q. Do you have data that would permit you to examine whether
13 CRC courses from a Mexican-American perspective are having any
14 impact on student achievement?

15 MR. REISS: Objection. Relevance.

16 THE COURT: Overruled. You may answer.

17 A. I don't believe that I can answer that question effectively
18 at this point.

19 BY MS. COOPER:

20 Q. You don't know whether you have the data?

21 A. Specific to CRC, no, I don't know.

22 Q. Do you recall being deposed in this matter on July 13th,
23 2016?

24 A. Yes.

25 Q. Do you see your testimony on Page 76? The question is

1 asked: "Why were you asking about data after the elimination
2 of MAS, the 2012 to 2014 data?"

3 A. Yes.

4 Q. Do you see your answer? "It would be interesting to see
5 what happens to student achievement when you take away the
6 program"?

7 A. Yes.

8 Q. So you have the data that you could use to look at student
9 achievement in the absence of MAS, correct?

10 A. It's a lot more complicated than the question is implying.

11 Q. Okay. Why is that?

12 A. In order to run the kind of analysis that I did on
13 Mexican-American Studies, it requires not only having the data,
14 but understanding what the data say, what's contained within
15 it, and how you can actually run a meaningful analysis on it.
16 And I, at that point, had basically had to terminate -- due to
17 time constraints, I terminated the analysis on the ones that I
18 had already done. I wanted to look further, but I didn't have
19 the time to do it.

20 Q. I am very sorry, I'm going to have for the last sentence of
21 your answer to be read back because I didn't hear a couple
22 words in the middle.

23 (Reporter read the previous answer.)

24 Q. You mentioned a moment ago that you needed not just the
25 data but to understand the data that you had, correct?

1 A. Yes.

2 Q. Did you take the time to understand whether you had the
3 data that would permit you to examine CRC achievement?

4 A. I don't actually think the CRC markers were in the data I
5 received.

6 Q. But do you know?

7 A. I don't know off the top of my head, no.

8 Q. But, nevertheless, you have not done any work to examine
9 whether there is any impact on student achievement as a result
10 of the CRC classes, right?

11 A. That is a fair statement, yes.

12 Q. So you don't know whether students who take CRC classes
13 have a greater student achievement as a result of those
14 classes -- whether student achievement for students in CRC
15 classes, is there a higher correlation between student
16 achievement in CRC classes than there is for students taking
17 MAS classes. Correct?

18 Did I just completely mess that question up?

19 A. I was going to say --

20 Q. That was a very kind look of puzzlement.

21 You examined whether there was a correlation between
22 student achievement and MAS classes, right?

23 A. Yes.

24 Q. Did you examine whether there was a correlation between
25 student achievement and CRC classes?

1 A. No.

2 Q. You don't know whether students taking -- whether there is
3 a higher correlation for students taking CRC classes than those
4 taking MAS classes, correct?

5 MR. REISS: Objection, Your Honor. The State in
6 response to our inquiry in our motion specifically represented
7 that they would not argue that the existence of CRC ameliorated
8 any harm caused by the elimination of MAS, and that's precisely
9 what this line of questioning is designed to do.

10 THE COURT: First of all, do you disagree with the
11 premise of that objection, Ms. Cooper?

12 MS. COOPER: Yes, but if you can give me a moment to
13 make sure. The question is whether it ameliorated the harm.

14 No. We just want to know -- we just want to understand
15 where the conclusion Dr. Cabrera reached with respect to
16 student achievement stands with respect to a number of
17 variables, and some of those I am going to go into, and CRC
18 classes are only one of them.

19 THE COURT: So is that a ground for attacking the
20 validity of the study?

21 MS. COOPER: We believe so --

22 THE COURT: Assuming you get the answer you want?

23 MS. COOPER: We believe so, on the basis of a
24 different study that I will address briefly with Dr. Cabrera.

25 THE COURT: If you believe so, then is that contrary

1 to your understanding with the plaintiffs about not inquiring
2 into the CRC data whether it was tested?

3 MS. COOPER: Well, I don't think we made -- I think
4 what we made was a representation that we weren't saying that
5 there's no harm to students who are taking MAS classes because
6 they can take CRC classes. That is my understanding of the
7 representation that we made --

8 MR. REISS: Your Honor, I will read from the Court's
9 decision.

10 THE COURT: Would you get up to the microphone?

11 MR. REISS: I'm sorry, Your Honor.

12 I will read from Your Honor's decision in the motion
13 in limine. And you wrote in part, in response to ruling on
14 motion in limine 3, which was to limit the use of evidence
15 concerning TUSD's culturally relevant course curriculum, and
16 Your Honor wrote: Plaintiffs say this evidence cannot show
17 amelioration because, quote, "the existence of an allegedly
18 similar program does not negate and cannot undo First Amendment
19 violations," closed quote, with the cite. And you note:
20 "Defendants respond by disavowing any intent to use the
21 evidence to show that plaintiffs' alleged harm has been
22 ameliorated." Your Honor recognized that's what defendants had
23 said.

24 THE COURT: Well, did I understand you correctly?
25 "You" meaning the defendants' position?

1 MS. COOPER: Your Honor, I am not prepared to state
2 what you understood, but what we meant is that we're not
3 arguing that the fact that CRC classes now exist means that the
4 loss of MAS classes is immaterial. That is the representation
5 that we intended to make. And if we were unclear in that
6 regard, it is regrettable.

7 THE COURT: Well, all right. Putting that aside for a
8 minute, where are you going with this? What are you trying to
9 show? What's your line of questioning? In other words, what
10 follows after the answer to this question about CRC?

11 MS. COOPER: Well, there were other -- there was
12 another study done, an unpublished study, that looked upon the
13 impact of other -- looked at whether other factors had an
14 impact on student achievement.

15 THE COURT: And the result of that study was?

16 MS. COOPER: They showed that they had a similar
17 impact to MAS and that you can't distinguish. That's the
18 basis. So that's the basis, it's one of several factors.

19 THE COURT: But, from that, is there sort of like an
20 ultimate question that you want to ask the witness?

21 MS. COOPER: I just want to establish that he can't
22 say whether or not CRC classes would be another one of those
23 factors. That's all. It's merely attempting to close that
24 off. But, honestly, I think I've accomplished that, and I
25 would be ready to move on.

1 THE COURT: There you go.

2 MR. REISS: Thank you, Your Honor.

3 THE COURT: There's no more -- there's no longer a
4 pending objection, right?

5 MR. REISS: Not when the question is being withdrawn,
6 Your Honor.

7 BY MS. COOPER:

8 Q. So, moving on to a different topic. You've written an
9 article called: "Missing the Student Achievement Forest for
10 all the Political Trees, Empiricism and the Mexican-American
11 Studies Controversy in Tucson." And that was published in
12 2014, correct?

13 A. Yes, that's correct.

14 Q. And so each of these, the two unpublished works and this
15 are all looking at the same issues, student achievement for the
16 same group of students, right?

17 A. Yes, that's correct.

18 Q. Is there anyone else who has published any work regarding
19 whether TUSD's MAS program promotes student achievement?

20 A. Published in which way? In peer-reviewed outlets? online?
21 as blog posts published? What do you mean by that?

22 Q. Let's start with peer-reviewed outlets.

23 A. In peer-reviewed outlets, there have been -- I believe I'd
24 be more comfortable if I had my citations in front of me, but I
25 believe that there were a couple of analyses, but they've been

1 primarily descriptive in nature.

2 Q. Can you distinguish a descriptive analysis from the sort of
3 analysis that you did?

4 A. A descriptive analysis takes the data and -- to be very
5 direct, describes trends in it. X percent of students like the
6 class, X percent of students graduated. Just the broad
7 strokes, the broad trends in the data.

8 Q. So you believe that there were probably a couple of
9 descriptive studies in peer-reviewed journals?

10 A. There were a couple that at least incorporated some
11 descriptive analyses in them, yes.

12 Q. Of TUSD MAS students?

13 A. I believe so.

14 Q. Do you know whether those were high school or elementary
15 students?

16 A. I believe they were high school students. But again, I
17 would feel more comfortable if I had the -- if I had Google in
18 front of me, I could find it more quickly.

19 Q. Do you know when those studies were published?

20 A. Again --

21 Q. Relative to the termination of the program?

22 A. I believe they would have been before the termination of
23 the program.

24 Q. What about -- you mentioned peer-reviewed journals, right?

25 A. Yes.

1 Q. Do you know whether there were any statistical analyses
2 similar in nature to yours published in peer-reviewed journals?

3 A. Similar to mine, no.

4 Q. In any other kind of journal?

5 A. A journal in academics has a very specific meaning, so
6 could you help me clarify?

7 Q. I take it from your distinction that there are
8 peer-reviewed academic journals and non-peer-reviewed academic
9 journals. Is that a correct distinction?

10 A. Yes. Yes.

11 Q. Okay. So are you aware of any analysis similar in nature
12 to yours in terms of the statistical analysis that was
13 published in a non-peer-reviewed journal?

14 A. I am not aware of any.

15 Q. And peer-reviewed journals are regarded more highly because
16 they have undergone a peer-review process, right?

17 A. That's correct. It's more academically rigorous.

18 Q. Now, are you aware of any of the unpublished analyses of
19 MAS student achievement by Robert Franciosi?

20 A. Yes, I have heard of that study, yes.

21 Q. And Dr. Franciosi was the Department of Education's
22 director of accountability and research, correct?

23 A. I don't know what his title was.

24 THE COURT: Excuse me. Just for clarity, when you say
25 "department," you mean the department of the U of A?

1 MS. COOPER: Arizona Department of Education. Sorry,
2 Your Honor.

3 THE COURT: All right.

4 BY MS. COOPER:

5 Q. Dr. Robert Franciosi was with the Arizona Department of
6 Education, to your knowledge, correct?

7 A. Again, I don't know what his formal title was.

8 Q. I didn't ask for his title, I just asked --

9 A. Or affiliation. I don't have any background of him
10 personally.

11 Q. But you're aware that he did a distributive analysis,
12 right?

13 A. I'm aware he did a study on the Mexican-American Studies
14 Program.

15 Q. Are you aware of the study by David Scott of TUSD on the
16 MAS Program?

17 A. Again, you need to be a little more specific because
18 Mr. Scott produced a couple of reports.

19 Q. Are you aware of both of his reports?

20 A. I am aware that a couple of reports exist. I don't know if
21 you and I are referring to the same ones.

22 Q. They reached different conclusions than you did, correct?

23 A. It's not correct.

24 Q. No?

25 A. No.

1 Q. What was Dr. Franciosi's conclusion?

2 A. To my recollection, again, I'd feel more comfortable with
3 seeing the report in front of me, but to my conclusion,
4 Dr. Franciosi concluded that there was no discernible impact of
5 the Mexican-American Studies Program. Mr. Scott had multiple
6 studies, and so I need you to be more specific which study
7 you're referring to.

8 Q. Okay.

9 A. Or if you could give me a title, I could be more precise on
10 that.

11 Q. Now, do you have any knowledge as to the MAS curriculum?

12 A. About the -- in which respect? It's a varied curriculum.

13 Q. Do you understand what it encompasses?

14 MR. REISS: Objection. Vague.

15 THE COURT: Overruled. The witness can answer if
16 he -- in the way he understands the question.

17 A. Very broadly speaking, the -- broadly speaking, the MAS
18 classes were language arts and social studies classes, but
19 specifically from a Mexican-American perspective.

20 BY MS. COOPER:

21 Q. Do you have any expertise in curricular development?

22 A. No.

23 Q. Do you have any expertise in curricular analysis?

24 A. What do you mean by "curricular" --

25 Q. Excuse me. About evaluation.

1 A. Programmatic evaluation I do have some expertise in, yes.

2 Q. As a curriculum expert?

3 A. A curriculum expert and a programmatic evaluation are two
4 separate things in academic circles.

5 Q. What is a programmatic evaluation?

6 A. You have a program and you look at its efficacy.

7 Q. Does that require you to understand its curriculum?

8 A. No, it doesn't require you to have an in-depth
9 understanding, more of a tertiary understanding of what's going
10 on.

11 Q. Could you please explain what you mean by "a tertiary
12 understanding."

13 A. I don't have to be necessarily an expert, but I have to
14 have at least some familiarity with what's going on.

15 Q. Is a programmatic evaluation just evaluating whether the
16 program is achieving a specific goal?

17 A. That's one form of programmatic evaluation, yes.

18 Q. Does it involve understanding what it is about the program
19 that relates to the achievement of that goal?

20 A. That's up to the people who are determining why they want a
21 program evaluation. There are some who just say, "Are we
22 meeting our stated goals?" Others say, "We are meeting our
23 stated goals, why is that occurring?"

24 Q. So my question for you here is: Did you perform, in your
25 mind, a programmatic evaluation of the MAS program?

1 A. I did not provide an all-encompassing programmatic
2 evaluation, but I did evaluate one component of the program.

3 Q. And what one component was that?

4 A. The relationship between the taking MAS classes and student
5 academic achievement.

6 Q. Were you required to have any knowledge of the MAS classes
7 in order to perform your evaluation and reach your conclusions?

8 A. Was I required to, no.

9 Q. Did you have any knowledge of the MAS classes that you used
10 to reach your conclusions?

11 A. I had some, yes.

12 Q. And could you describe what knowledge of the MAS classes
13 you had.

14 A. In particular, it was the theoretical model that was part
15 of my AERJ report, excuse me, my AERJ paper, where I offered
16 the theoretical and conceptual underpinnings of the program
17 itself that would help provide a stronger context to the
18 numbers that would come from the regression analyses.

19 Q. Can you define "selection bias" for me?

20 A. Yes. Selection bias occurs when -- at least in a study
21 like this, when you have two samples and they are not
22 equivalent for some specific reason.

23 Q. Would it be correct to say that selection bias is bias
24 introduced by the selection of individual groups or data for
25 analysis in such a way that proper randomization is not

1 achieved, thereby, ensuring that the sample obtained is not
2 representative of the population intended to be analyzed?

3 A. That's a fairly accurate textbook definition of what
4 sampling bias is.

5 Q. I asked for selection bias.

6 A. Or selection bias, sorry.

7 Q. So the selection bias then occurs when you don't have a
8 random sample, correct?

9 A. Yes.

10 Q. And did you have a random sample of MAS students?

11 A. No.

12 Q. In fact, students chose to take those classes, correct?

13 A. Yes. From my understanding, the students were -- it was
14 pretty much their choice if they took the classes or not.

15 Q. Is it possible to correct statistically for selection bias?

16 A. Yes, you can -- it's possible.

17 Q. Did you take any steps to correct for selection bias in
18 your work analyzing the efficacy of MAS classes?

19 A. Yes, I did.

20 Q. And what steps did you take?

21 A. When constructing the regression models, I made sure to
22 include as co-variants a number of other independent variables
23 that would hold constant in the models, the different
24 co-variants to isolate the unique relationship between taking
25 Mexican-American Studies and subsequent student achievement.

1 Q. I want to talk with you about the students who you studied.

2 All right?

3 A. Okay.

4 Q. So you studied students who have extremely low academic
5 achievement, right?

6 A. That's a slight over-generalization, but that's generally
7 where their academics were at initially before taking
8 Mexican-American Studies classes.

9 Q. This is on Page 13. Footnote 13.

10 A. Of which document, please?

11 Q. Your declaration, Exhibit EA: "It is worth noting that a
12 common trend in the students selecting into the MAS program was
13 their extremely low academic performance." And in fact, you
14 refer to that as an issue of selection bias?

15 A. Mmm-hmm. Yes. Right there in my declaration.

16 Q. So most of the students were of extremely low academic
17 performance, right?

18 A. Yes. It's just saying on the average this is where the
19 students were at.

20 Q. There are probably not too many students taking advanced
21 placement classes?

22 A. There were some. That's why it's not so black and white.
23 But generally speaking, they tended to be very low-performing
24 students.

25 Q. And low-performing students aren't taking advanced

1 placement classes, right?

2 A. What I am saying is that there is heterogeneity in the
3 sample that --

4 Q. I asked you a different question.

5 A. Okay. What was the question then?

6 Q. The question was whether the low-performing students are
7 taking advanced placement classes.

8 A. What you asked though was that these students as a whole,
9 and I'm saying within that sample there are low-performing
10 students and high-performing students.

11 Q. I believe what I asked, the immediately preceding question,
12 was whether the extremely low-performing students are taking
13 advanced placement classes?

14 MR. REISS: Objection. Personal knowledge.

15 THE COURT: The objection is overruled.

16 A. I can't definitively say one way or another. My suspicion
17 is that they're not.

18 BY MS. COOPER:

19 Q. Do you know how many of your students in the sample that
20 you studied were involved in extracurricular activities,
21 interscholastic sports, after-school student government, clubs,
22 et cetera?

23 A. Those weren't co-variants that I introduced into the model.
24 No, I don't know that information.

25 Q. Do you know what percentage of your students that were in

1 your study came from families in which both parents had
2 graduate degrees?

3 A. No, I don't have that information either.

4 Q. You defined the student achievement as passing AIMS and
5 graduating, right?

6 A. In this specific analysis, yes. I'm sorry, let me back up.
7 Passing AIMS after initial failure.

8 Q. Passing AIMS after initial failure. So your sample was
9 students who had failed AIMS as sophomores, right?

10 A. For some analyses, yes.

11 Q. For some analyses?

12 A. Yes. For the analyses where AIMS was the outcome, then it
13 was those who failed AIMS. For graduation, it was all the
14 students.

15 Q. Let's talk about the students who failed AIMS as
16 sophomores, all right?

17 A. Okay.

18 Q. That's just a percentage of all students who take AIMS,
19 right?

20 A. Yes, that's correct.

21 Q. Do you know how many students pass AIMS the first time,
22 what percentage?

23 A. Within Arizona as a whole? within the district? within the
24 sample?

25 Q. Any of those.

1 A. Within the sample, it should be reported as the N for the
2 individual in the tables that report those regression
3 coefficients.

4 Q. Did you look at whether the MAS program promotes student
5 achievement on AIMS for students who passed AIMS the first
6 time?

7 A. Implicitly, yes, because the students who passed AIMS the
8 first time are going to be part of the sample regarding
9 graduation. So I wasn't specifically looking at that, but it's
10 kind of part of these other analyses that I had.

11 Q. You're familiar with the fact that the AIMS is a test that
12 has a scale score and that a student receives -- a number is
13 assigned to a student's score on the AIMS, correct?

14 A. That's my understanding of it, yes.

15 Q. And you looked at whether students passed or failed,
16 correct?

17 A. That's correct.

18 Q. And you understand that the score, whether it's low or in
19 the middle or high, is supposed to represent the student's
20 abilities on that particular portion of the test, correct?

21 A. I don't necessarily think that there's consensus around
22 that specific interpretation of AIMS scores.

23 Q. You understand that's one interpretation of AIMS scores,
24 that they reflect the student's abilities at least on that day
25 in that area, correct?

1 A. Again, that's not necessarily -- there's not academic
2 consensus around that specific to this test.

3 Q. Do you think that a gain in AIMS scores should reflect a
4 gain in abilities?

5 A. I don't agree with that either.

6 Q. Is that why you chose only to look at pass/fail?

7 A. No. The reason why I chose to look at pass/fail was that
8 pass and fail is the most relevant determining factor in
9 student later-in-life outcomes. The difference in a scale
10 score really doesn't mean that much for the students
11 individually.

12 Q. You don't think it makes any difference to a student's
13 achievement if they go from barely being in the lowest
14 percentile, achieving enough to get them almost to passing?

15 A. In terms of what?

16 Q. In terms of their ability to perform their schoolwork?
17 Continue to do well and succeed in school, which is what you
18 were looking at, right?

19 A. In order for me to agree with that, I'd also have to say
20 that AIMS is a strong measure of student academic ability, and
21 I'm not entirely comfortable making that as an absolute
22 assessment.

23 Q. Are you any kind of expert in evaluating the efficacy of
24 standardized tests in measuring student ability?

25 A. No.

1 Q. Are you offering an opinion in that area?

2 A. No. But --

3 Q. Yes or no. Are you offering an opinion in that area?

4 A. No, I am not offering an opinion in that area.

5 Q. Did you look at whether your students were more successful
6 in terms of matriculation to college -- or excuse me -- the MAS
7 students were more likely to matriculate to college?

8 A. It wasn't possible with the data housed at TUSD.

9 Q. So you did not?

10 A. Actually I did, and then realized that it wasn't possible
11 in any meaningful scholarly way to make any assessment,
12 positive or negative, on the MAS program.

13 Q. Did you look to see if participation in honors or gifted
14 classes increased?

15 A. I'm sorry, increased as a function of the MAS courses?

16 Q. Correct.

17 A. No, I did not.

18 Q. Did you look at whether other post-high school outcomes
19 that might indicate success, like completion of a career
20 program, increased as a result of participation in MAS classes?

21 A. Again, no, none of those were available on the data set.

22 Q. Did you look at whether there were other factors available
23 to high school students that might increase the likelihood of
24 passing AIMS and graduating, such as participation in career
25 and technical education courses?

1 A. I looked at the -- or I at least included in the models the
2 participation in gifted and talented program, which is usually
3 some sort -- it has some sort of a positive relationship with
4 these academic outcomes.

5 Q. But did you examine whether participation in the gifted and
6 talented program was less likely, more likely, or as likely to
7 increase the likelihood that a student would pass AIMS and
8 graduate as participation in the MAS classes?

9 A. I'm sorry, could you repeat or rephrase your question?

10 Q. I want to know, did you look at -- so you looked at whether
11 participation in MAS classes had an impact on passing AIMS
12 after initial failure and graduating, correct?

13 A. Yes.

14 Q. Did you look at whether participation in gifted -- I asked
15 you -- let me back up.

16 Did you look at whether participation in career and
17 technical education classes was more likely -- was as likely,
18 less likely, or more likely to impact student achievement as
19 participation in MAS classes?

20 A. No, I did not.

21 Q. Did you look at this same question with respect to
22 interscholastic activities?

23 A. No, I did not.

24 Q. I'm going to look at your declaration, Page 17, I
25 believe -- Paragraph 17. This is Page 7, paragraph 17. In it,

1 you discuss prior analyses that suffered from serious
2 shortcomings, right?

3 A. Yes.

4 Q. And one of those is the David Scott study that we mentioned
5 a few minutes ago?

6 A. That's one of David Scott's studies.

7 Q. And then the Robert Franciosi study as well, correct?

8 A. Mmm-hmm, yes.

9 Q. And we'll take those one at a time. You see here your
10 criticism, one of your criticisms, is that Scott also analyzed
11 the relationship between taking MAS classes and improved scores
12 on the ACT, which is a test that students take to get into
13 college, right?

14 But students could take the ACT in the 11th grade before
15 they took MAS classes or while they were taking MAS classes,
16 meaning that the relationship between ACT performance and MAS
17 participation could not be appropriately assessed, correct?

18 A. Yes.

19 Q. And you identified that as a serious shortcoming of David
20 Scott's evaluation of the impact of MAS classes on student
21 achievement, right?

22 A. Among many of them, yes.

23 Q. I'm only asking you about the one. You had the same
24 criticism of Dr. Franciosi's work as well, right?

25 A. Yes.

1 Q. And that's reflected in Paragraph 18 of your declaration in
2 the final sentence of that paragraph, right?

3 A. Yes.

4 Q. And those are serious shortcomings that each of these
5 studies suffered from, that they couldn't say whether the MAS
6 class came before or after an intervention, which -- excuse
7 me -- they couldn't say whether passing AIMS after initial
8 failure came before or after the MAS class, correct?

9 A. Yep.

10 Q. And did you do anything -- does your work correct for that
11 error?

12 A. Correct for, no.

13 Q. Let's talk about this. This is a demonstrative exhibit,
14 you won't have seen it before. I'll walk you through it. I
15 just want to make sure that we understand what we're talking
16 about.

17 We're going to discuss three students here. All right.

18 We've got Student A, this person has failed AIMS as a
19 sophomore. Right?

20 A. Yes.

21 Q. And that is in the spring of his sophomore year. And
22 now -- excuse me, that should be fall. He's got five more
23 opportunities.

24 But his next opportunity, he passes AIMS, right? That's
25 before he takes any MAS classes, correct?

1 A. Yes.

2 Q. And that could happen?

3 A. It could happen.

4 Q. Or we could have a student who fails AIMS, waits a bit,
5 passes it at the same time he is taking AIMS classes, right?

6 A. Hypothetically could happen also.

7 Q. In fact, AIMS classes are only offered to juniors and
8 seniors, right?

9 A. AIMS classes?

10 Q. I'm sorry. MAS classes. I am extremely tired. MAS
11 classes are only offered to juniors and seniors.

12 A. Yes, MAS classes, to my knowledge.

13 Q. And then we could have a student who failed AIMS, took MAS
14 and passed AIMS, right?

15 A. That could also happen.

16 Q. That's the student where we know that the intervention came
17 between the first failure of AIMS and then fail, intervention,
18 pass.

19 A. Mmm-hmm.

20 Q. Right? And so that's where we're most likely to conclude
21 that there's a strong correlation between taking a MAS class
22 and passing AIMS.

23 A. I'm sorry, I didn't know if you were saying that or if that
24 was a question.

25 Q. I'm sorry it wasn't clear as a question.

1 I believe that I asked you a question. Now, this
2 summarizes what we've just looked at about Student A, B, and C.
3 We're going to look at Student C.

4 We're most able to make a correlation between MAS classes
5 and passing AIMS after initial failure if we know that we have
6 the sequence represented by Student C, which is failed AIMS,
7 took MAS, passed AIMS, right?

8 A. If I'm given these three options, then, yes, C is the most
9 likely.

10 Q. Well, didn't you say in your declaration in criticizing
11 Dr. Franciosi for not knowing whether the MAS classes were
12 taken before or after the second attempt at AIMS that the,
13 quote, "impact of the MAS program cannot be measured by tests
14 taken before or while students took MAS classes"?

15 A. For my critique of Franciosi, absolutely that holds.

16 Q. Let me ask you, Dr. Cabrera, did you analyze whether the
17 students that you studied took MAS classes before -- after they
18 failed AIMS but before they passed it?

19 A. There were a few indications in the data that spoke to
20 students taking them before the AIMS classes.

21 Q. What does that mean, "indications in the data spoke" to
22 this?

23 A. On average, students who took MAS classes took three of
24 them, which means that they were taking them during their
25 junior years, and so that means that they were either taking

1 them before or during the next iteration of the AIMS test.

2 Q. A student fails AIMS as a sophomore in the fall, actually.
3 Our demonstrative is incorrect. They can take it again in the
4 spring. Right?

5 A. Yes, but --

6 Q. Right. And if they take it in the spring of their
7 sophomore year, they haven't taken any MAS classes, have they?

8 A. And those students weren't in that sample.

9 Q. Right. And so if they take -- students who pass AIMS at
10 the next possible opportunity are not in your sample? What if
11 a student fails as a sophomore, passes as a sophomore, and
12 takes MAS classes as a junior and a senior, is that person in
13 your sample?

14 A. No, they're not.

15 Q. Why not?

16 A. Because if you took the AIMS test and pass them as a
17 sophomore prior to taking Mexican-American Studies, you're not
18 in the ultimate sample.

19 Q. Well, if you took the AIMS test as a sophomore in the fall,
20 and you failed it, that's your initial failure, right? That's
21 the students that you studied?

22 A. That can be one example of initial failure.

23 Q. What's another example of initial failure?

24 A. If a student transferred in after and took the AIMS their
25 second semester of their sophomore year.

1 Q. Do you have any idea how many students transferred into
2 TUSD, took MAS classes such as they would get themselves into
3 your program and took it as, initially, in the spring semester
4 of their sophomore year?

5 A. No, I don't have an estimate on that.

6 Q. Do you think that would probably be a fairly small number
7 of students?

8 A. I think that's a fair assessment.

9 Q. Let's go back to this. Student fails as a sophomore,
10 passes in the spring of their sophomore year, takes MAS classes
11 as a junior and a senior. Is that person in your study?

12 A. I don't believe that they would be in my study.

13 Q. And why not?

14 A. Because I was looking specifically at students who failed
15 their AIMS during their sophomore years, and I believe that
16 included both iterations during their sophomore year.

17 Q. But you're not certain, are you?

18 A. I would need to go back and look at my data again.

19 Q. So we can't then -- we have to talk about students who fail
20 as sophomores instead of students who failed their initial
21 effort, right?

22 A. Then, yes, we'd need to go back and see, for accuracy sake,
23 which one of those two competing terminologies is correct.

24 Q. All right. So let's move on. Our student fails in the
25 fall of their sophomore year and passes in the fall of their

1 junior year. Right? That's our next sample. Okay?

2 A. Okay.

3 Q. That student, do you know when in the school year -- when
4 in the fall the AIMS test was offered?

5 A. I don't know the specific dates, no.

6 Q. I'll represent to you it was approximately the middle of
7 the semester, so halfway through, about. And the semester is
8 about 18 weeks of classes. So after somewhere between 10, 12
9 weeks of classes, they have taken the AIMS test and they've
10 passed and they're taking a MAS class. Isn't that the student
11 who -- where we can't address the impact of the program because
12 they're taking the class at the same time as they're passing
13 AIMS?

14 A. It would create a serious limitation in the analysis.

15 Q. Is it possible to tell from the information in your
16 declaration whether a student took the AIMS test for a sub- --
17 and passed the AIMS test after initial failure before or after
18 taking MAS classes?

19 A. In my declaration, no.

20 Q. Is it in your report?

21 A. I have, like, three, so could you be more specific, please.

22 Q. In your report, your expert report.

23 A. Expert report, no.

24 Q. But you would agree that it would be important to know that
25 there is, first, the initial failure, second, the intervention,

1 and, lastly, the measure of student achievement, correct?

2 A. Important, yes.

3 Q. And that the efficacy of your results would be limited if
4 the intervention occurred while student achievement was being
5 measured, correct?

6 A. Yeah, I think that's a fair statement.

7 Q. Do you know what it is about the MAS program that
8 purportedly addressed the achievement gap?

9 A. As I am not an expert in curriculum, I'm very speculative
10 on any of these ideas.

11 Q. Well, do you have any theory to explain your results?

12 MR. REISS: Objection. Beyond the scope of his
13 report. He's already said he's not a curriculum expert.

14 THE COURT: The objection is overruled.

15 BY MS. COOPER:

16 Q. Do you have a theory to explain your results?

17 A. I have to rely on the theory that was purported by some of
18 the administrators and teachers in the Mexican-American Studies
19 program to guide that part of my analysis.

20 Q. So you don't know what it was about the MAS program that
21 addressed achievement gaps.

22 A. The empirical results can't speak directly to the why, they
23 can speak more to the what.

24 Q. You don't know if it was the curriculum?

25 A. Exactly what I just said. I can't speak to the why, I can

1 only speak to the -- the efficacy of the program, not the why
2 and the inner mechanisms of why it worked.

3 Q. You don't know if it was the pedagogy?

4 A. The same answer as before, I don't have a clear reason one
5 way or another for -- and the empirical results don't speak to
6 that.

7 Q. You don't know whether it was small class sizes?

8 A. There have been some analyses in TUSD on class size, and
9 they don't seem to be abnormally small or large.

10 Q. You're saying that the MAS classes didn't seem to be
11 abnormally small or large? Is that what you're saying?

12 A. From the analyses that I've seen coming out of TUSD, that's
13 correct.

14 Q. Do you know whether the success, the purported success of
15 the MAS program, could simply be attributed to the fact that it
16 addressed ethnic studies as opposed to the particular means by
17 which it did so? That is to say, any ethnic studies program
18 could have produced the same student achievement?

19 A. I don't think that that would be correct because in the
20 empirical scholarship on ethnic studies, not all ethnic studies
21 programs are actually effective at supporting increasing
22 student achievement or whatever the broad goals are. And so to
23 assume that an ethnic studies program is going to be effective
24 I think is very dangerous.

25 Q. But you don't know what it was about this ethnic studies

1 program as opposed to another that promoted student achievement
2 here or if it could have been something else?

3 A. Again, the empirical results don't give me an indication
4 one way or another about that mechanism you're talking about.

5 Q. You don't know whether it could be have been particularly
6 effective in teaching in classroom instruction, correct?

7 A. Again, I don't have any measures specifically speaking to
8 the efficacy of the individual teachers involved in the
9 program.

10 Q. Or whether it was attributed to particular methods of
11 classroom instruction?

12 A. Same answer.

13 Q. You've published extensively about Mexican-Americans in
14 education, right?

15 A. I wouldn't say "extensively," but I have definitely
16 published on Mexican-Americans in education, yes.

17 Q. Didn't you use the word "extensively"?

18 A. Did I say "extensively"?

19 Q. I believe you did. I also believe that my papers are a
20 mess here.

21 A. It's on Page 3 of my declaration. Yes, I did use that
22 specific terminology.

23 Q. You stand by that?

24 A. Yeah, I stand by that.

25 Q. Okay. You published an article called "Targets But Not

1 Victims: Latina/Latino students in Arizona's Racial Politics"?

2 A. Yes, I published that.

3 Q. "Racial Politics and Racial Identity: A Case Study of
4 Arizona, 2010 to 2011."

5 A. Yes, that's another one of my publications.

6 Q. And "Ganas -- " G-a-n-a-s "-- From the Individual to the
7 Community and the Potential for Improving College in the Land
8 That Texas Forgot"?

9 A. Yes, I published that one as well.

10 Q. "Entering and Succeeding in the Cultural of College: The
11 Story of Two Mexican Heritage Students"?

12 A. I think it's "Culture of College," but, yes, I did publish
13 that one as well.

14 Q. And "Intersectionality Analysis of Latino Men in Higher
15 Education and Their Help-Seeking Behaviors"?

16 A. Yes, I published that one as well.

17 Q. And "Dancing in Higher Education: A Portrait of Latino
18 College Students Entering Four-Year Institutions"?

19 A. Yes, I was the co-author on that one as well.

20 Q. Those are all about Mexican-American and Latino students,
21 right?

22 A. Yes.

23 Q. Did you publish an article with others entitled: "If There
24 is No Struggle, There is No Progress: Transformative Youth
25 Activism and the School of Ethnic Studies"?

1 A. Yes, I published that one as well.

2 Q. And that was in Urban Review in 2013, right?

3 A. Yep, that's correct.

4 Q. And that has several authors and you are the lead author?

5 A. Yes.

6 Q. And does that indicate that you are the person who did the
7 most work on the article?

8 A. It varies in terms of its meaning, highest intellectual
9 contribution, most work. In this one, I'm not actually a
10 hundred percent sure why I'm the lead author, but I am the lead
11 author. Ultimately, I am responsible for its consent.

12 Q. And expresses your views, right?

13 A. It expresses our collective views as four co-authors.

14 Q. Well, doesn't this article actually, in fact, give each of
15 the four coauthors an opportunity to speak?

16 A. Yes, absolutely.

17 Q. So the portion that you wrote in fact reflects your views?

18 A. Yes.

19 Q. And this is written in, as you say -- as the abstract says,
20 in the wake of the Tucson Unified School District dismantling
21 of its highly successful Mexican-American Studies Program?

22 A. Yes.

23 Q. It's about a student response to this event?

24 A. To the dismantling of the program, yes.

25 Q. But it's a student response, right?

1 A. A student response, yes.

2 Q. Now, this article notes that the TUSD governing board, on
3 multiple cases, attempted to eliminate the highly effective MAS
4 program, correct?

5 A. Yes.

6 Q. And in fact, cites you?

7 A. Yes. I'm not sure which citation that is, but, yes, it
8 cites me.

9 Q. It cites you twice, correct?

10 A. That's why I would like to see the bibliography and which
11 ones are being cited.

12 Q. But that Cabrera is you, right?

13 A. Yes, that is me. That's not someone else.

14 Q. Right, right. And you stand by that statement, right?

15 A. Yes.

16 Q. And if we look at Page 11, and I'll flip it as quickly as
17 possible to Page 12, this describes how you first became
18 involved with the Mexican-American Studies program, right?

19 I'll let you read this sentence. A friend of yours asked you
20 to join a protest against the ban on MAS, is that right?

21 A. I think you're -- are you sure you're not reading Elisa
22 Meza's? E-l-i-s-a M-e-z-a.

23 Q. Let's move to your background. I'm fairly certain that
24 would have been subject to an objection.

25 You mentioned an activist background as well, right?

1 A. Yes, I've had that as an orientation in the past.

2 Q. And you became involved running statistics regarding
3 programmatic participation?

4 A. Yes, that's initially how I became involved.

5 Q. You participated in a school of ethnic studies that
6 students put on that day?

7 A. Yes.

8 Q. That was in January of 2012, I think?

9 A. Yeah, that sounds about right.

10 Q. And you write at the conclusion there: "The lasting images
11 of that day keep me going with reminder that progress is always
12 possible"?

13 A. It sounds like something I wrote, but I can't -- since I
14 don't have the previous page, I'm not -- the previous page. It
15 has each one of our names prior to the counternarrative that
16 it's attributed to, and I just want to make sure that that's
17 actually me.

18 Q. You start on Page 16.

19 A. Okay. Okay.

20 Q. And conclude on Page 17?

21 A. Yeah.

22 Q. And we see that Andrea Romero is after you?

23 A. Okay. Yeah, that sounds right.

24 Q. Is your activist background related to MAS?

25 A. That wasn't what I was referring to in that statement.

1 Q. I have a little bit more, but I've got to get organized.

2 I have an article here called "A State-Mandated
3 Epistemology of Ignorance: Arizona's HB2281 and
4 Mexican-American/Raza Studies," by Nolan L. Cabrera. Is that
5 you?

6 A. That is me.

7 Q. This is an article that you wrote and that was published in
8 the Journal of Curriculum and Pedagogy?

9 A. That's also correct.

10 Q. This expressed your views at the time, which was 2012?

11 A. Yes.

12 Q. And your view was that the State of Arizona, through
13 HB2281, had mandated an epistemology of ignorance as an
14 educational practice for communities of color?

15 A. Are you quoting or paraphrasing?

16 Q. I am trying to quote the highlighted line.

17 A. Okay. Yeah, that's a statement I made, I stand by.

18 Q. And is an epistemology of ignorance -- what does that mean?

19 A. An epistemology of ignorance is a structured way of not
20 knowing, eliminating certain information from consideration,
21 specifically, in this instance, along racial lines.

22 Q. So essentially here you're saying that HB2281 represents a
23 structured way of not knowing along racial lines?

24 A. It's a theoretical argument, but, yes, that's the argument
25 I am making.

1 Q. And then you state further down: "The superintendent --"
2 that should probably be apostrophe S "-- findings of
3 non-compliance against TUSD demonstrate how HB2281 in practice
4 represents a state-mandated epistemology of ignorance."
5 Correct?

6 A. Yes.

7 Q. So you see the law as mandating ignorance along racial
8 lines, and you see the state's action as representing mandated
9 ignorance along racial lines?

10 A. In this instance, yes.

11 Q. So we see on the next page, you discuss that Huppenthal's
12 ruling highlighted a simple issue: "Within his epistemology of
13 ignorance, oppression does not exist, and those who taught it
14 were guilty of promoting resentment toward a race or class of
15 people." Is that what you wrote?

16 A. Yes.

17 Q. And does that represent your view?

18 A. Yes.

19 Q. So it's your view that the Huppenthal decision, which was
20 adopted by the ALJ, and then eventually by him, represents the
21 viewpoint that oppression does not exist?

22 A. More accurately, that oppression can lead to -- teaching of
23 oppression leads to resentment and shouldn't, therefore, be
24 taught in the ways it was being done in TUSD.

25 Q. That's not what you said here, is it?

1 A. Yeah. No, I said that oppression -- that in his view,
2 oppression doesn't exist, and from some of the evidence, might
3 have overstated my statement -- or might have made a slight
4 overstatement.

5 Q. Well, this is published in a journal, right?

6 A. Mmm-hmm. Yes.

7 Q. And at the time you made the statement, you believed it was
8 true?

9 A. Yes.

10 Q. And in fact, you go on to state, after discussing a little
11 bit more about the Huppenthal finding: "The only acceptable
12 form of Arizona public education is one that denies this
13 reality, and this reality is that Latino minorities have been
14 and continue to be oppressed by a Caucasian majority."
15 Correct?

16 A. Yes, that's correct.

17 Q. And you believed that statement when you wrote it then,
18 right?

19 A. Yes, I believe -- I believe that statement.

20 Q. And do you still believe that?

21 A. Yes, I think it's clear from his statement above, that
22 that's actually correct.

23 Q. So then we discussed the fact that you believe that the
24 passage of the law represents mandated ignorance, and then the
25 enforcement of the law again represents mandated ignorance, but

1 you also conclude that because the TUSD board capitulated and
2 eliminated MAS, that they too enforced a mandated ignorance?

3 A. You're saying that I believed that they --

4 Q. You accused the TUSD board of capitulating and eliminating
5 MAS, right?

6 A. Yes.

7 Q. And that too demonstrates an epistemology of ignorance,
8 correct?

9 A. It's slightly different being pressured into the
10 elimination, but to the extent that they capitulated, yeah,
11 then they became complicit, yes.

12 Q. And then you say: "Arizona's public education system
13 functions as a state-mandated epistemology of ignorance --"

14 A. I'm sorry. Where are you reading?

15 Q. In the middle of that paragraph.

16 A. Can you turn it, please?

17 Q. I'm sorry. I apologize.

18 A. Thank you.

19 Q. Let me repeat it because I think I spoke too quickly for
20 the court reporter: "Thus, Arizona's public education system
21 functions as a state-mandated epistemology of ignorance, having
22 a two-fold effect." Correct?

23 A. Yes.

24 Q. And you describe the effect that you believe it has.

25 A. Yes.

1 Q. And then you conclude that "if students cannot explore
2 racial oppression, they cannot change it. In the absence of
3 this critical engagement, they are left with more of the same
4 systemic racism where Latino and Latina students are an
5 underclass." Correct?

6 A. Yes.

7 Q. Going back to the top of that page, we discussed your view
8 of Mr. Huppenthal. You state that Horne's epistemology of
9 ignorance forcibly denied this reality. Again, the reality of
10 Latino and Latina oppression by the Caucasian majority?

11 A. Yes.

12 Q. Your article begins with a reference to white supremacy,
13 right?

14 A. Yes. It's right there.

15 Q. Who are the white supremacists that you're referring to in
16 this article?

17 A. That's not what Charles Mills was talking about.

18 Q. I want to know not what Charles Mills is talking about, but
19 whether you are referring -- to whom you are referring when you
20 use the phrase "white supremacist."

21 MR. REISS: Objection. Misstates the article. She's
22 reading.

23 THE COURT: Overruled. You may answer.

24 A. In this conception, white supremacy does not derive from
25 white supremacists, in the same way that capitalism doesn't

1 derive from capitalists. The ideas that racism is a systemic
2 reality that we are all complicit in maintaining, and the name
3 of that systemic racism, as Charles Mills, who I am citing,
4 argues is named "white supremacy." But that systemic reality
5 does not require to be held up by people with overtly white
6 supremacist viewpoints.

7 Q. Who are the representatives of the white supremacy to which
8 you refer in this article?

9 A. Exactly the same response that I just gave. I don't -- I
10 am not intent on articulating that one's individual is a white
11 supremacist. That's not what this does. It's talking about a
12 systemic reality of racial privilege and oppression that he --
13 that -- and the relationship between that and this law.

14 Q. And so you see HB2281 as a furtherance of that systemic
15 oppression,

16 A. It continues to enhance it.

17 Q. And you see the persons, Mr. Horne and Mr. Huppenthal, as
18 persons who are responsible for that, correct?

19 A. They are key actors in it, but it's a lot bigger than two
20 individuals.

21 MS. COOPER: No further questions.

22 MR. REISS: Very briefly, Your Honor.

23 THE COURT: Redirect?

24 MR. REISS: Yes.

25 REDIRECT EXAMINATION

1 BY MR. REISS:

2 Q. Dr. Cabrera, does anything you've heard in this courtroom
3 this afternoon change any conclusion you've reached in your
4 testimony?

5 A. No.

6 Q. Does anything you've heard in this courtroom this afternoon
7 change any conclusion that you've reached in your expert
8 report?

9 A. No.

10 Q. If you had done -- if your analysis that's presented to the
11 Court and is the subject of your expert report had found that
12 MAS did not increase passing rates on AIMS tests and did not
13 increase graduation rates, would you have published the study?

14 A. Absolutely not.

15 Q. You would not have published the study?

16 A. Or sorry. Sorry. If I found that there was no result --
17 okay. Your question is difficult because it's hard to get
18 publishers to publish results that are non-significant.

19 Q. But you would never -- would you have wanted to know if the
20 MAS program was not effective?

21 A. Absolutely.

22 Q. And why is that?

23 A. Because if we have an ineffective program serving our
24 students, it either needs to be modified or eliminated.

25 Q. And if those were the results of your study, would you have

1 buried those results?

2 A. Absolutely not.

3 Q. And why not?

4 A. Because -- there's two reasons. One, it's the livelihood
5 of our community that's involved here and we can't have a
6 threat in the community if we don't have an educated populous,
7 so we can't afford to have ineffective programs. And, two, for
8 my long-term academic integrity, I can't afford to fudge
9 numbers like that or squash numbers. The results are what they
10 are.

11 Q. And in fact, the study that makes up your expert report and
12 is at the base of your testimony before this Court was
13 published -- was it published in a peer-reviewed journal?

14 A. Yes, it was.

15 Q. And what does that mean?

16 A. It means that it goes through a rigorous process of blind
17 review. The editor sends it out to experts in the field on a
18 specific subject. They don't know whose manuscript they're
19 reviewing, and they return feedback to the editor saying the
20 strengths and weaknesses of the article and what it would take
21 for that article to be published in their journal.

22 Q. And what journal was your study published in?

23 A. The American Educational Research Journal.

24 Q. And what can you tell the Court about that journal?

25 A. That it's the flagship journal of AERA, the American

1 Educational Research Association, which is the largest
2 educational research association for social scientists
3 definitely in the country and maybe even in the world, and in
4 terms of its prestige is one of the top ten, give or take,
5 journals in the entire field of education.

6 Q. Did you have any coauthors in that study that was
7 published?

8 A. Yes, I did.

9 Q. Who were they?

10 A. The second author was Jeffrey Milem. He was an endowed
11 chair when he did the study at the University of Arizona in the
12 Department of Educational Policy Studies and Practice. He is
13 now the current dean at the college -- at the College of
14 Education at UC Santa Barbara, has had his work cited by the
15 Supreme Court in affirmative action cases.

16 The third author is Ozan Jaquette. He was an assistant
17 professor also in Educational Policies, Studies and Practice at
18 the U of A. He's now an assistant professor at UCLA in their
19 higher ed program.

20 Then the final author was Ronald Marx, and at the time he
21 was the sitting dean of the College of Education and I believe
22 the longest sitting dean in the entire University of Arizona.

23 Q. Just to be clear, you stand by every conclusion with
24 respect to achievement with respect to students who took MAS
25 that you've testified to in your testimony, right?

1 A. Yes, that's correct.

2 MR. REISS: No further questions.

3 THE COURT: Thank you, Mr. Reiss.

4 MS. COOPER: No further questions.

5 THE COURT: I don't know what to call it. I guess
6 it's recross. No recross.

7 MS. COOPER: No recross.

8 THE COURT: Good. I have to say, Dr. Cabrera, I think
9 you're a lucky guy because you can go home now. You won't have
10 to deal with this mess again. All right? Except in a
11 scholarly manner.

12 Thank you very much, sir, for appearing and you're
13 excused. We have about an hour left. I think we're going to
14 take up now the -- I'll call it the supplemental redirect,
15 right?

16 MR. MARTINEZ: Yes, sir.

17 THE COURT: Of Mr. Arce. He is still around, right?

18 MR. MARTINEZ: Yes, sir.

19 THE COURT: Now, let me ask you, give me an estimate
20 of how long your redirect is going to be?

21 MR. MARTINEZ: Five or 10 minutes, if that.

22 THE COURT: All right. Then if that's true, you won't
23 have a lengthy cross, will you?

24 MS. COOPER: I believe that's correct, Your Honor.

25 THE COURT: The reason I'm bringing this up now, and I

1 am depending more on your estimate than usual because it's 4:00
2 o'clock. I'd like to finish by 5:00 for the sake of the
3 reporter, you know, who takes a beating every time people talk
4 too fast, so I hate to go over 5:00. But if we have to. But I
5 hope we don't have to. Let's proceed with the recall of
6 Mr. Arce, all right?

7 MR. MARTINEZ: Thank you, Your Honor.

8 I believe that they'll be here in about two to three
9 minutes.

10 MR. ELLMAN: Your Honor, while we have a brief break
11 here, may I take the opportunity to introduce two exhibits that
12 opposing counsel told me they don't object to.

13 THE COURT: Certainly.

14 MR. ELLMAN: Exhibit 575 and Exhibit 557D defense
15 offers into admission.

16 THE COURT: Is that true, no objection?

17 MR. MARTINEZ: Your Honor, I think that was a
18 conversation with one of the other attorneys.

19 THE COURT: He's not here?

20 MR. ELLMAN: Mr. Reiss.

21 MR. MARTINEZ: It was with Mr. Reiss. If we could
22 wait a moment for Mr. Reiss.

23 THE COURT: So, anyway, they were 575 and what else?

24 MR. ELLMAN: And 557D.

25 THE COURT: 557.

1 MR. ELLMAN: D, as in Delta.

2 THE COURT: D as in Delta. 557D. Those exhibits are
3 conditionally admitted subject to just confirming with
4 Mr. Reiss that he had no objection. All right.

5 Mr. Arce, would you please resume the witness stand,
6 please.

7 THE WITNESS: Yes, Your Honor.

8 THE COURT: I appreciate your hanging around for this
9 further examination. Go ahead, Mr. Martinez.

10 MR. MARTINEZ: Thank you, Your Honor.

11 **SEAN ARCE**, WITNESS, PREVIOUSLY SWORN

12 FURTHER EXAMINATION

13 BY MR. MARTINEZ:

14 Q. Mr. Arce, is it true that teachers who taught MAS courses
15 could exercise professional judgment in the use of curriculum
16 units?

17 A. Yes.

18 Q. Did their discretion with respect to the exercise of
19 professional judgment include the ability to choose curriculum
20 units?

21 A. Yes.

22 THE COURT: Mr. Arce, did you get the question or do
23 you want it repeated?

24 THE WITNESS: Yes, Your Honor, I did.

25 THE COURT: Go ahead and answer.

1 A. No.

2 BY MR. MARTINEZ:

3 Q. Repeat your answer.

4 A. No.

5 Q. No what?

6 A. If you could repeat the question.

7 Q. Let's start over.

8 A. Please.

9 Q. If you don't hear me, let me know.

10 Did the teachers who taught during your time in the
11 department -- did the teachers who taught Mexican-American
12 courses provide that those teachers could exercise professional
13 judgment in the use of curriculum units?

14 A. Yes.

15 Q. Did this include the ability to choose which curriculum
16 units they wanted to use --

17 A. Yes.

18 Q. -- in their courses?

19 A. Yes, that's correct.

20 Q. Even if they were teaching the same course?

21 A. That is correct, yes.

22 Q. Did this include the ability to adapt and/or modify
23 available curriculum units that were provided for or available
24 from the Mexican-American Studies department in whatever form
25 they chose to retrieve them?

1 A. Yes, that's correct.

2 Q. And did their professional judgment, their exercise or
3 ability to exercise professional judgment include the ability
4 to create, to write new curriculum units?

5 A. Yes.

6 Q. Were the curriculum units in the Mexican-American Studies
7 Department that were used in the teaching of Mexican-American
8 Studies courses expected by your department to meet state
9 standards?

10 A. Definitely, yes.

11 Q. Were the teachers expected, as they implemented and taught
12 those curriculum units, expected to maintain and utilize lesson
13 plans?

14 A. Can you repeat the question, please.

15 Q. Sure. Were the teachers, the Mexican-American Studies
16 teachers, who taught the classes for Mexican-American Studies
17 expected to maintain and keep lesson plans?

18 A. Yes.

19 Q. Now, we know that your oversight was limited, correct?

20 A. Yes.

21 Q. That was to those teachers who reported specifically to you
22 in your department.

23 A. Yes.

24 Q. But you did have the ability to observe all teachers who
25 were teaching Mexican-American Studies courses, did you not?

1 A. Yes, I did.

2 Q. In your capacity as director?

3 A. Yes, I did.

4 Q. And you did have the ability to observe then whether it was
5 an announced or unannounced visit?

6 A. That's correct.

7 MS. COOPER: Objection. This seems to be straying
8 from the topic of curriculum.

9 THE COURT: It is in a way, but you can answer his
10 question.

11 A. Yes.

12 BY MR. MARTINEZ:

13 Q. Did you do that?

14 A. I did, yes.

15 MR. MARTINEZ: Those are the questions I had, Your
16 Honor. Thank you.

17 THE COURT: Okay. Cross.

18 MS. COOPER: No further questions, Your Honor.

19 THE COURT: All right. No further cross. Mr. Arce,
20 that completes your testimony. I appreciate your, as I say,
21 hanging around and you're excused now. I hope I can keep my
22 word this time.

23 MR. MARTINEZ: I kept mine, Judge.

24 THE COURT: You certainly did. I appreciate that. I
25 guess we can recess.

1 And I appreciate, appreciate the succinctness of
2 Mr. Reiss's redirect. You know, some people would take that as
3 a sign that the lawyer has confidence in his expert, but, you
4 know, we'll see.

5 MR. REISS: I think that's a fair statement, Your
6 Honor.

7 THE COURT: Now, so tomorrow then we have -- who is
8 the witness? It's your witness, right?

9 MS. COOPER: It's our witness, and we've discussed
10 that information.

11 THE COURT: It's who?

12 MS. COOPER: Her name is Kathy Hrabluk, H-r-a-b-l-u-k.

13 THE COURT: -b-l-u-k?

14 MS. COOPER: Yes, Hrabluk, H-r-a-b-l-u-k. It's much
15 easier to say if you don't know how it's spelled.

16 THE COURT: Okay. Then both sides expect we'll finish
17 noon or before noon? Is that right?

18 MS. COOPER: I can't say before noon, but I am --

19 THE COURT: Around noon.

20 MS. COOPER: Yeah. Yeah. I am anticipating being in
21 Phoenix for dinner.

22 Obviously, you know about this witness, right?

23 MR. REISS: Yes, Your Honor.

24 THE COURT: So you don't expect the cross to be very
25 lengthy?

1 MR. REISS: Your Honor, I would think that the cross
2 will likely be an hour to an hour and a half. Again, I'm not
3 sure what she's going to testify to --

4 THE COURT: Which is like saying -- almost as long as
5 the direct.

6 MR. REISS: Honestly, Your Honor, it depends on
7 what -- obviously, it depends on what the direct is. If it's
8 limited in a way that will be appropriate, the cross will be
9 more limited.

10 THE COURT: I got you.

11 One more thing. Mr. Ellman offered three exhibits,
12 no, two exhibits, which he represented that the plaintiffs
13 withdrew their objection, but you weren't here when you made
14 that offer, so just for the record, Mr. Ellman, repeat those
15 numbers again. 570 what?

16 MR. ELLMAN: The exhibits were number 575 and number
17 557D.

18 THE COURT: 557D. Right.

19 You agree, Mr. Reiss? No objection?

20 MR. REISS: No objection.

21 THE COURT: All right. Those two exhibits then are
22 admitted without objection.

23 I think that's it for today, isn't it? Anything else
24 counsel want to bring up?

25 MR. REISS: No, Your Honor.

1 MS. COOPER: No, Your Honor.

2 THE COURT: We will then stand in recess at this time
3 until 9:00 o'clock tomorrow morning.

4 Wait a minute. The reason I ask about how long you're
5 going to be, to make sure we get out more or less on time. I
6 mean, if need be, I'm ready to start earlier. You don't think
7 we need it?

8 MS. COOPER: I don't think we can. Ms. Hrabluk is
9 traveling from Phoenix, I believe, tomorrow morning, but I
10 don't think we will need the entirety of the trial day, Your
11 Honor. I really don't.

12 MR. REISS: Your Honor, I will do my absolute best to
13 be efficient.

14 THE COURT: Good. All right. Fine. Then with those
15 representations, we will stand in recess. Thank you, Counsel.

16 (Proceedings concluded in this matter at 4:11 p.m.)

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C E R T I F I C A T E

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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 30th day of June, 2017.

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