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Gonzalez v. Douglas Trial Transcript of Proceedings, Day 10

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NOAH GONZÁLEZ; JESÚS)	Case No. 4:10-cv-00623-AWT
GONZÁLEZ, his father and)	
next friend, et al.,)	
)	
Plaintiffs,)	
)	Tucson, Arizona
vs.)	July 21, 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 10

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P R O C E E D I N G S

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

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

PARTIES IN UNISON: Good morning.

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

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

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

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

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

MS. COOPER: Mr. Ellman will handle that.

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

MS. BARRINGTON: No objection, Your Honor.

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

MR. ELLMAN: Thank you, Your Honor.

THE COURT: Anything in a preliminary way?

Yes, ma'am.

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

4 THE COURT: 232.

5 MS. BARRINGTON: Yes.

6 THE COURT: No objection?

7 MR. ELLMAN: No objection.

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

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

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

14 THE COURT: Is that right?

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

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

19 Then are counsel ready to go into closing argument?

20 MR. REISS: Yes, Your Honor.

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

1 closing argument.

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

3 MR. REISS: I am, Your Honor.

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

5 MR. REISS: Yes, Your Honor.

6 THE COURT: So it's up to you now to save your time.

7 Right? I'm giving each side an hour.

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

11 THE COURT: I agree with that, yes.

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

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

22 THE COURT: That's fine.

23 MR. REISS: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

4 MR. REISS: Sure.

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

9 MR. REISS: Yes.

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

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

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

25 But the way you now decide on whether officials have acted

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

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

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

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

23 Let's now go to the Arlington Heights factor, the first
24 factor, which was the discriminatory impact of A.R.S. Section
25 15-112 and its enforcement on Mexican-Americans.

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

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

11 And you see Curtis Acosta's testimony -- I won't read it
12 all -- was that it accomplished exactly that purpose.

13 Mr. Acosta, a teacher in the program, took the stand, I will
14 submit to the Court was highly, highly credible, and he said
15 that's exactly, exactly, what the MAS program accomplished.

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

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

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

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

12 What's the result of the MAS program?

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

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

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

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

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

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

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

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

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

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

10 In the six years preceding HB2281, which obviously became
11 15-112, there were many anti-Mexican-American legislative
12 measures, including Proposition 100, which denied bail to
13 Mexican-American immigrants; Proposition 102 denying immigrants
14 punitive damages; and, most notably, 1070, a notorious,
15 notorious law, many portions of which were subsequently
16 declared unconstitutional. Mr. Huppenthal was a co-sponsor of
17 that law.

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

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

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

14 And he also says, if I can point you down to the last
15 bullet: I also argue that this was part of the history of
16 anti-immigrant, anti-Mexican-American politics in Arizona that
17 was surging around 2010, exactly the year 2281 was passed. In
18 fact, 2281 was passed in April of 2010, the exact month that
19 1070 was passed.

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

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

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

6 This, Your Honor, is just an overview of the timeline. I
7 think Your Honor is familiar with it. But this is a concerted
8 campaign, a concerted campaign, to eliminate this program. And
9 it starts on April 3rd, with Dolores Huerta's speech at Tucson
10 High; and then it goes with Ms. Dugan's response; June 11th,
11 2007, Horne's open letter; 2008, when the predecessor to
12 15-112, 1108, is introduced, supported by Horne. He also
13 introduces 1069 in 2009. In February 2010, Horne drafts -- he
14 drafts HB2281 to get rid of the MAS program.

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

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

1 effect. January 4th -- we'll get to this -- Huppenthal is
2 sworn in and he issues his statement. February 2011 to May
3 2011 is the Cambium audit, and we'll talk a little bit more
4 about that. June 15th, 2011, Huppenthal rejects the Cambium
5 audit's findings, issues a finding that MAS program violated,
6 A.R.S. 15-112. January 13, 2012, after the ALJ decision, the
7 textbooks -- by the way, January 6th, following the ALJ
8 decision, Huppenthal issues his finding that the MAS program is
9 in violation of the statute, and less than a week later the
10 textbooks are physically removed from the MAS classrooms.

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

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

20 That's an overview of the timeline.

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

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

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

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

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

1 Some people might actually consider that a somewhat offensive
2 view.

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

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

13 Answer: I am.

14 Okay.

15 And I think it's toxic.

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

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

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

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

1 And there are further points.

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

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

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

12 Answer: Yes.

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

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

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

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

22 The answer, yes.

23 That was an important part of your campaign, right?

24 Answer: Yes.

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

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

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

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

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

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

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

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

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

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

9 Mr. Quinn: Could you read back the question.

10 Reads back the question.

11 The Witness: I stand by that answer.

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

15 Mr. Ellman objects, asked and answered.

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

19 Because Your Honor knew that answer was utter nonsense.

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

22 This from the former Attorney General of Arizona.

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

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

4 What does that mean? He plagiarized his June 2007 open
5 letter to the Tucson community. He writes this open letter in
6 2007 obsessed with trying to get the MAS program eliminated,
7 and he copies parts of that very letter in his 2010 finding.
8 Law's still not in effect. But that shows you what is driving
9 him. It is clear demonstrative evidence of his bias and his
10 drive to eliminate this program.

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

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

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

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

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

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

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

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

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

22 He knew. So much he didn't know.

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

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

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

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

7 And, again, Ms. Morley.

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

11 Answer: Yes.

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

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

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

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

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

2 Answer: I would agree with that.

3 And even more importantly, Mr. Huppenthal.

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

6 Answer: No.

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

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

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

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

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

22 Answer: Yes.

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

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

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

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

7 Answer: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

16 Answer: Yes.

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

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

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

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

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

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

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

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

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

20 Answer: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 Where did that come from?

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

14 Answer: Correct.

15 It could have been changed, right?

16 Sure, it could have been extended if necessary.

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

21 This is the final decision, post ALJ decision.

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

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

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

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

12 And this is what's the most disturbing. The entire MAS
13 program -- elementary school, middle school, high school --
14 gets wiped out. 43 courses, 1300 students. Even though
15 Huppenthal admitted that not every class violated A.R.S.
16 15-112. What he said was, well, the intent of the program was
17 to radicalize students.

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

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

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

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

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

10 Answer: Yes.

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

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

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

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

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

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

24 Question: And if a program --

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

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

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

7 Answer: Yes.

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

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

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

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

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

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

24 That's his mindset.

25 Let's look at Arlington Heights Factor 5. Relevant

1 legislative or administrative history.

2 I am not going to spend a lot of time on this. The
3 relevant history with Mr. Horne is clear. He wanted A.R.S.
4 15-112 to eliminate the MAS program. That's absolutely clear.

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

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

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

14 Mark Anderson, he is working for Mr. Horne.

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

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

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

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

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

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

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

17 Answer: Yes.

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

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

24 There's more.

25 MAS was the sole focus throughout the legislative process.

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

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

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

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

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

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

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

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

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

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

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

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

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

12 Answer: No.

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

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

1 do any of that.

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

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

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

11 No, they didn't.

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

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

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

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

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

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

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

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

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

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

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

1 the contrary -- indisputably a highly successful program.

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

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

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

25 All right. This was the American Vision, standard

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 Answer: Right. No.

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

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

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

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

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

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

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

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

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

1 MS. COOPER: Thank you.

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

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

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

7 THE COURT: All right. Go ahead, please.

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

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

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

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

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

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

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

25 There are no e-mails showing that Arizona legislators who

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

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

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

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

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

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

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

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

7 Now, we also know that the MAS program violated
8 A.R.S. 15-112. An ALJ heard three and a half days of
9 testimony, 12 witnesses, dozens of exhibits, wrote a detailed,
10 37-page decision finding the program violated the statute.
11 TUSD decided to terminate the program when the superintendent
12 accepted that decision. They didn't appeal it. They didn't go
13 to the Superior Court. They didn't try to modify the program.
14 They didn't take Huppenthal up on his many opportunities to
15 work with him. They simply terminated the program.

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

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

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

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

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

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

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

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

1 that plaintiffs chose to present to this Court.

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

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

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

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

25 We saw a reading list for Latino literature that was short

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 ordinary process. Its purpose, as the Ninth Circuit has noted,
2 is laudable. Public school students should be taught to treat
3 and value each other as individuals and not be taught to resent
4 or hate other races or classes of people.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 conclusions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Now, once Huppenthal issued his finding, TUSD appealed.

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

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

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

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

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

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

1 that question.

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

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

7 TUSD also didn't, at least immediately, take up ADE's
8 decision to revise the program, but it did eventually move
9 forward with new culturally responsive pedagogy, a program that
10 is in effect and thriving today, a program where ADE offered
11 the assistance that Huppenthal had offered from January 4th,
12 2011 to his decision -- his announcement of his decision in
13 January 2012 that the program was in violation.

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

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

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

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

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

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

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

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

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

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

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

24 The MAS program didn't present any studies here before
25 2010, there aren't any studies published by TUSD before the

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

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

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

1 determined it wasn't valid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 discrimination, as though anyone would disagree.

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

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

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

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

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

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

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

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

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

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

18 There is no indication that racial animus affected that
19 decision.

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

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

1 MAS program.

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

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

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

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

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

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

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

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

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

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

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

9 MR. REISS: Thank you, Your Honor.

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

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

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

14 THE COURT: Go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 10-year-olds?

2 Well, you know, it may well be right to show that to
3 10-year-olds. They are not naïve. They know what's going on.
4 They live in a society where they see this kind of violence on
5 their video games, in movies, on the internet. The notion that
6 it's just absolutely ridiculous to think about showing the
7 picture of the lynching of Mexican-Americans to 10-year-olds is
8 nonsense.

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

13 That's just nonsense.

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

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

25 Curriculum didn't have pacing maps or this chapter or

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

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

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

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

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

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

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

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

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

21 They claim that there was no irregular procedure involved
22 here.

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

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

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

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

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

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

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

2 Thank you, Your Honor.

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

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

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

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

15 THE COURT: Yes.

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

19 THE COURT: A copy of what?

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

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

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

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

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

11 Do you want to present further briefing?

12 MS. COOPER: No, Your Honor.

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

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

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

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

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

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

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

5 MS. COOPER: Thank you, Your Honor.

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

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

16 (Laughter in the courtroom.)

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

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

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

21 MS. COOPER: Thank you, Your Honor.

22 THE COURT: Anything else from counsel?

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

1 THE COURT: Thank you.

2 MS. COOPER: The state echoes those comments.

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

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

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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 21st day of July, 2017.

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