

1 **RICHARD M. MARTINEZ, SBA No. 7763**
307 South Convent Avenue
2 Tucson, Arizona 85701
(520) 327-4797 phone
3 (520) 320-9090 fax
4 richard@richardmartinezlaw.com
Counsel for Plaintiffs

5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE DISTRICT OF ARIZONA

7 CURTIS COSTA, SEAN ARCE,
8 MAYA ARCE, MARIA
FEDERICO BRUMMER,
9 DOLORES CARRION,
ALEXANDRO EXCAMILLA,
10 JOSE GONZALEZ, NORMA
GONZALEZ, LORENZO LOPEZ,
11 JR., KORINA ELIZA LOPEZ,
RENE F. MARTINEZ, SARA
12 "SALLY" RUSK, and YOLANDA
SOTELO,

13 Plaintiffs,

14 v.

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

17 Defendants.
18

No. CV 10 - 623 TUC AWT

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

(Oral Argument Requested)

19 Plaintiffs, through their undersigned counsel, hereby submit their motion for
20 preliminary injunction and ask the Court to enter an order enjoining defendant
21 Superintendent Huppenthal from proceeding with his enforcement action pursuant
22 to authority granted by A.R.S. §§15-112 and 41-1092 et seq. At issue are the
23 prohibitions and enforcement of A.R.S. §15-112(A) against courses or classes that:
24 (1) promote the overthrow of the United States government, (2) promote resentment
25 toward a race or class of people, (3) are designed primarily for pupils of a particular
26 ethnic group, and (4) advocate ethnic solidarity instead of the treatment of pupils as
27 individuals. These express but incomprehensible prohibitions are all designed to limit
28 what history, literature or art is allowed in the public classrooms of Arizona.

1 The vagueness and overbreadth of HB 2281 and its enforcement by
2 Superintendents Huppenthal and Horne violate the plaintiffs' constitutional rights.
3 Further, the statute and its application violate the plaintiffs' rights to Equal Protection,
4 Free Speech and Substantive Due Process.

5 Enforcement action is underway and nearing to a close. As a direct result,
6 elimination of the Mexican American Studies ("MAS") program is imminent.
7 Cognizable constitutional harm has and continues to be inflicted upon the plaintiffs,
8 which will only increase in severity if the enforcement action undertaken remains
9 unchecked. Plaintiffs herein demonstrate that they are likely to succeed on the
10 merits of their claims, that they will suffer irreparable harm in the absence of
11 injunctive relief, that the balance of hardships tilts sharply in their favor, and that an
12 injunction is in the public interest. Absent an injunction, students who attend the
13 Tucson Unified School District will be foreclosed from completing the MAS classes
14 they are currently enrolled in and the student plaintiffs will be foreclosed from
15 enrolling in any MAS classes. Similarly, the educators who have taught the MAS
16 curriculum at the elementary, middle school and high school levels for the past
17 twelve years will be left without a department. Banishment of MAS includes
18 elimination of the director's position, and the loss of continued employment for
19 plaintiff Sean Arce. Those MAS teachers who are unable to find other positions
20 within the district face unemployment.

21 MAS has been taught to Tucson Unified's students for twelve consecutive
22 years; the record of achievement during that period has consistently proven the
23 efficacy of the program. Latino students destined for failure have been redirected to
24 graduate and excel. The state of Arizona is without a single legitimate reason for
25 imposing the immediate termination of the program.

26 Plaintiffs respectfully request that the their motion be granted.

27 Submitted this 14th day of November, 2011.

28 *s/Richard M. Martinez, Esq.*
RICHARD M. MARTINEZ, ESQ.
Counsel for Plaintiffs

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. NECESSITY FOR A PRELIMINARY INJUNCTION**

3 HB 2281¹ exists for one reason: to give the Arizona Superintendent of Public
4 Instruction the means to end Tucson Unified School District's ("TUSD") MAS
5 program. Superintendent Huppenthal's opportunity to do so is fast approaching. In
6 his 2010 campaign, he promised to end the MAS program with his pledge to "Stop
7 La Raza." There is no reason to doubt that Superintendent Huppenthal will carry out
8 that promise. Unless this Court enjoins him from proceeding with the enforcement
9 action, the MAS program will be terminated within the next few weeks.²

10 TUSD appealed Superintendent Huppenthal's Finding³ that MAS is in violation
11 of HB 2281. That administrative appeal is now drawing to a close. However, the
12 administrative proceeding is designed to ensure that Superintendent Huppenthal will
13 prevail. Irrespective of how the Administrative Law Judge ("ALJ") rules,
14 Superintendent Huppenthal has full discretion to impose a devastating sanction on
15 TUSD in an amount equal to ten percent of its budget.⁴ The timing of Superintendent
16 Huppenthal's action is central to this motion and controlled, at its outer limits, by
17 Arizona's Uniform Administrative Hearing Procedures at A.R.S. §41-1092.08(A) and
18 (B).

19 The ALJ will soon close the record in the appeal, at an unspecified time within
20 his discretion, after the parties make their final filings, which he has ordered them to
21 do by November 18, 2011.⁵ Then, he must issue his recommended decision within
22

23 ¹ Codified as A.R.S. §§ 15-111 and 112.

24 ² In other pleadings, the plaintiffs have set out the history, background and
25 purpose of the MAS program, including detailed accounts of Superintendents
26 Huppenthal and Horne's efforts to end it. In the interests of economy, the plaintiffs will
27 not repeat all of those facts here, but direct the Court's attention to those documents.
28 See Ct. Doc. Nos. 89 and 91.

³ Ct. Doc. No. 84, Exhibit D, hereinafter referred to as "Huppenthal Finding."

⁴ A.R.S. §15-112(B).

⁵ See Order Setting Deadlines For Post-Hearing Submissions, filed by
Administrative Law Judge Lewis D. Kowal, Case No. 11F-002-ADE, attached hereto as
Exhibit 1.

1 twenty days of closing the record.⁶ Thus, the ALJ could close the record as early as
2 November 19 and issue his recommended decision on that day.⁷ Upon receipt of the
3 ALJ's decision, Superintendent Huppenthal may issue his order either accepting,
4 rejecting or modifying the decision, also on November 19 at the earliest. Once
5 November 18 passes, any day could be the end of the MAS program in TUSD.⁸

6 The urgency with which the plaintiffs seek this preliminary injunction is entirely
7 generated by Superintendent Huppenthal. Since issuing his Finding on June 15,
8 2011, he has vigorously prosecuted this enforcement action and consistently
9 indicated that he will act to eliminate this program.⁹ The plaintiffs recently proposed
10 a stipulation by which Superintendent Huppenthal would agree to stay any
11 enforcement action until such time as the Court rules on the merits of the plaintiffs'
12 claims.¹⁰ Superintendent Huppenthal rejected that offer. Thus, Superintendent
13 Huppenthal's enforcement action is proceeding and the plaintiffs must seek a

14
15 ⁶ A.R.S. §41-1092.08(A).

16 ⁷ Although the likelihood that ALJ Kowal would close the record and issue his
17 decision on the first possible day might be small, the plaintiffs have no control over this
18 issue and cannot know when the ALJ will issue his recommended decision. Once the
19 November 18 deadline passes, the ALJ's decision could come at any day.

20 ⁸ Superintendent Huppenthal must issue his order within thirty days of
21 transmission of the ALJ's recommended decision to him. See A.R.S. §41-1092.08(B).
22 Thus, the outer limit of when Superintendent Huppenthal's order could come is fifty days
23 after ALJ Kowal closes the record. Plaintiffs have no way of knowing when ALJ Kowal
24 will close the record, when, within his twenty-day time limit he will issue his
25 recommended decision and when, within his thirty-day time limit Superintendent
26 Huppenthal will issue his order. For the purposes of informing the Court in order to rule
27 on this motion for preliminary injunction, the plaintiffs must advise the Court of the
28 earliest possible date when Superintendent Huppenthal could enforce the penalty
against TUSD.

⁹ In light of this conduct, his recent statement to the Court that "the
Superintendent has not determined whether the Tucson Unified School District's
("TUSD") Mexican-American Studies program violates the state law at issue" strains
credulity. Ct. Doc. No. 104, p.2. This Court recognized that Superintendent Huppenthal
already made this determination through his Finding, calling it a "significant
development—an action taken by Defendants relating to the heart of the case..." Ct. Doc
No. 83, p.1.

¹⁰ See letter dated November 2, 2011, from Richard M. Martinez to Bryan
Murphy, attached as Exhibit 2.

1 preliminary injunction now to avoid the prejudice they would suffer by the elimination
2 of the MAS program.

3 **II. MEXICAN AMERICAN STUDIES AND HB 2281.**

4 **A. The Plaintiffs and TUSD'S Mexican American Studies Program.**

5 The plaintiffs include eleven career educators who work in certificated
6 positions in TUSD¹¹ and two TUSD students. The plaintiff teachers provide
7 classroom instruction for the approved MAS curriculum at the high school, middle
8 school and elementary school level; plaintiff Sean Arce is the director of the MAS
9 program.¹² More than a decade ago, the TUSD Governing Board approved the MAS
10 program in an effort to remedy the District's historical failure to educate Latino
11 students. This effort to enhance the academic achievement of Latino students has
12 never been limited to Latinos, but open to all students who choose to take MAS
13 classes.¹³ From the 1998 school year to the 2010 school year, the program grew as
14 it established its curriculum and proved its efficacy with consistent unprecedented
15 results.¹⁴ The enactment and enforcement of HB 2281 has halted all growth and
16 caused substantial reductions in the number of classes offered and students
17 enrolled.¹⁵ Absent an injunction, the 804 students who currently are enrolled in MAS
18

19 ¹¹ TUSD is the largest public school district in the Tucson metropolitan area. It is
20 comprised of thirteen high schools, seventeen middle schools, four K-8 schools, 62
21 elementary schools, one K-12 school and fourteen alternative educational programs.
22 The 2010-2011 student population was 52,987, of which 60 per cent were Latino. See
23 Ct. Doc. No. 84-1, p.5, Cambium Learning Group, Inc. Audit Report, hereinafter
"Cambium Report." (The entire 120-page Cambium Report is filed in four sections at
Ct. Doc. Nos. 84-1, 85, 86 and 87.)

24 ¹² Plaintiffs' Third Amended Complaint (TAC), Ct. Doc. No. 84, ¶¶3-15, 36-71.

25 ¹³ Declaration of Martin Sean Arce, attached hereto as Exhibit 3. MAS is
26 currently implemented as part of TUSD's obligations pursuant to the Post-Unitary Plan,
27 adopted as part of a long-running desegregation action. See Ct. Doc No. 92-2, TUSD
28 Post-Unitary Plan, pp. 31-33. The Ninth Circuit recently remanded the desegregation
case, *Fisher v. TUSD*, 2011 U.S. App. LEXIS 14688 (9th Cir. 2011), to the district court
with instructions to maintain jurisdiction until TUSD has demonstrated that it is in good
faith compliance with the Post-Unitary Plan over a reasonable period of time.

¹⁴ See Cambium Report, pp. 49-50.

¹⁵ Exhibit 3, Arce Declaration ¶¶ 10-15.

1 classes will be denied the opportunity to complete those classes.¹⁶ Similarly, the
2 educators who currently teach the MAS curriculum at the elementary, middle school
3 and high school levels will be left without a department and face the loss of
4 continued employment.¹⁷ Banishment of MAS includes elimination of the director's
5 position, and the loss of continued employment for plaintiff Sean Arce.¹⁸

6 **B. Origin and Applications of HB 2281**

7 HB 2281 was drafted and championed by Superintendent Horne for the
8 expressed purpose of ending the MAS program.¹⁹ On December 30, 2010, the day
9 before the effective date of HB 2281, Superintendent Horne issued his Finding that
10 the MAS program was in violation of the statute.²⁰ After taking office on January 2,
11 2011, Superintendent Huppenthal initiated his own investigation as to whether MAS
12 classes violated the new statute due to the premature nature of the Horne Finding.²¹

13 To accomplish this, he commissioned Cambium Learning, Inc. to perform a
14 curriculum audit. Cambium spent several months reviewing texts and materials,
15 conducting classroom observations and numerous interviews of teachers, students,
16 administrators, parents and community members. Cambium's audit report found,
17 not only that MAS classes do not violate HB 2281, but that MAS effectively promotes
18 student achievement and recommended the expansion of course offerings.²²
19 Instead of immediately releasing the Cambium Report, Superintendent Huppenthal
20 waited six weeks to release it, along with his own contradictory Finding that the MAS
21 program violates HB 2281. Since then, Superintendent Huppenthal's enforcement
22 of HB 2281 against TUSD's MAS program has proceeded without delay or
23 interruption.

24
25 ¹⁶ *Ibid.*, ¶¶ 11-16.

26 ¹⁷ *Ibid.*, ¶¶ 16-17.

27 ¹⁸ *Ibid.*, ¶ 18.

28 ¹⁹ Ct. Doc. No. 84, Exhibit B, hereinafter referred to as "Horne Finding."

²⁰ *Ibid.*

²¹ Huppenthal Finding, p.1.

²² See Cambium Report, pp. 66-67.

III. PRELIMINARY INJUNCTION STANDARDS.

“The basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits.”²³ To merit the Court’s grant of a preliminary injunction, the plaintiffs “must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.”²⁴ The Court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief” and “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”²⁵ The Ninth Circuit includes the “serious questions” test when applying the requirements of *Winter*. Thus, the Court must balance the elements of the preliminary injunction test “so that a stronger showing of one element may offset a weaker showing of another.”²⁶ This insures that “[f]lexibility is the hallmark of equity jurisdiction.”²⁷

Injunctive relief is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”²⁸ Here, the plaintiffs establish that clear showing. State Superintendents Huppenthal and Horne have engaged in a course of conduct to enforce HB 2281 by imposing the severe statutory sanction for the purpose of shutting down TUSD’s MAS program. Superintendent Horne initiated this enforcement action before HB 2281 went into effect and Superintendent Huppenthal has continued without interruption since. Absent immediate relief, MAS in TUSD will cease to exist.

//

//

²³ *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 710 (9th Cir. 1988).

²⁴ *Winter v. NRDC*, 129 S.Ct. 365, 374 (2008).

²⁵ *Winter*, 129 S.Ct. at 376-77.

²⁶ *Alliance for the Wild Rockies v. Cottrell* 632 F.3d 1127, 1131 (9th Cir. 2011).

²⁷ *Ibid.*, citing *Winter*, 129 S.Ct. at 391 (Ginsberg, J., dissenting).

²⁸ *Winter*, 129 S.Ct. at 376.

1 **IV. HB 2281 AND ITS APPLICATION BY SUPERINTENDENTS HUPPENTHAL**
2 **AND HORNE ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD**

3 The plaintiffs' claims that HB 2281 and its application by Superintendents
4 Huppenthal and Horne are impermissibly vague and overbroad have been briefed
5 in the plaintiffs' Motion for Summary Judgment and supporting documents.²⁹ They
6 are core claims which demonstrate the plaintiffs' likelihood of success on the merits.
7 In the interest of efficiency, the plaintiffs incorporate those claims and arguments in
8 support herein in their entirety.

9 **V. THE STATE OF ARIZONA HAS DENIED THE PLAINTIFFS' RIGHTS TO**
10 **EQUAL PROTECTION OF THE LAWS**

11 The Equal Protection Clause of the Fourteenth Amendment states: "No State
12 shall. . .deny to any person within this jurisdiction the equal protection of the laws."
13 In this case, the actions taken by the two successive Superintendents of Public
14 Instruction discriminate against Mexican Americans in violation of the Equal
15 Protection clause.

16 "The first step in Equal Protection analysis is to identify the [defendant's]
17 classification of groups."³⁰ To accomplish this, the plaintiffs may show a classification
18 by one of three ways: "by showing that the law, on its face, employs a classification;
19 by showing that the law is applied in a discriminatory fashion; or by showing that the
20 law is 'in reality. . .a device designed to impose different burdens on different classes
21 of persons.'"³¹ Where a law is facially neutral, the plaintiff must also prove that the
22 law has a discriminatory purpose.³² In this case, a classification is shown because
23 HB 2281 discriminates against Latinos on its face and because Superintendents
24 Huppenthal and Horne have applied HB 2281 against Latino students and educators

25 ²⁹ See Ct. Doc. Nos. 97-8.

26 ³⁰ *Country Classics Dairy, Inc. v. St. of Mont., Dep't. Of Commerce Milk Control*
27 *Bur.*, 847 F.2d 593, 596 (9th Cir. 1988).

28 ³¹ *Christy v. Hodel*, 857 F.2d 1324, 1331 (9th Cir 1988).

³² *Personnel Admin. Of Mass. v. Feeney*, 442 U.S. 256 (1979) (discriminatory
impact alone insufficient for Equal Protection violation; proof of discriminatory intent
required.)

1 in a discriminatory manner.

2 **A. Superintendents Huppenthal And Horne Have Specifically**
 3 **Targeted And Discriminated Against Latinos Who Choose To**
 4 **Study And Teach Mexican American History, Literature, Culture**
 5 **And Art.**

6 A classification is found here where Superintendents Huppenthal and Horne
 7 have taken steps to shut down *only* the MAS program; thus they discriminate on the
 8 basis of the choice made by Latino students and educators to enroll and work in a
 9 program that is designed to improve the academic success of Latinos through the
 10 study of the Mexican American perspective of history, literature and art.³³
 11 Superintendents Huppenthal and Horne's discriminatory application of HB 2281
 12 provides ample and undeniable proof of the discriminatory purpose behind their
 13 enforcement action.

14 To determine whether an "invidious discriminatory purpose" is a motivating
 15 factor behind official action, the Court must make "a sensitive inquiry into such
 16 circumstantial and direct evidence of intent as may be available."³⁴ Sources of
 17 evidence surrounding the action include: (1) "a clear pattern, unexplainable on
 18 grounds other than [race and ethnicity]", (2) the historical background of the
 19 decision, (3) departures from the normal procedural sequence, (4) substantive
 20 departures and (5) the legislative and administrative history.³⁵

21 **1. Superintendents Huppenthal and Horne Have Applied HB**
 22 **2281 Exclusively Against the MAS Program Designed to**
 23 **Improve the Academic Success of Latino Students.**

24 It is undisputed that Superintendents Huppenthal and Horne have applied HB
 25 2281 exclusively against the MAS program. Moreover, with the unchecked discretion
 26

27 ³³ *Cf. Lazy Y Ranch, Ltd. v. Behrens*, 546 F.3d 580, 589 (9th Cir. 2008)
 28 (classification shown where state officials made the bidding process for grazing leases
 29 more cumbersome and denied leases "because they discriminated on the basis of
 30 whether a bidder was a conservationist (or perceived to be a conservationist) and new
 31 to the Idaho grazing market.")

³⁴ *Village of Arlington Hts. v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266
 (1977).

³⁵ *Arlington Hts.*, 429 U.S. at 266-67.

1 vested in the Superintendent of Public Instruction by HB 2281,³⁶ they have shown
2 no intention of pursuing any other program, even when presented with the
3 opportunity. In his Finding, Superintendent Horne stated his belief that three of
4 TUSD's Ethnic Studies Department programs are in violation of A.R.S. §15-112(A),
5 but that he chose to enforce the statute only against MAS.³⁷ Subsequently,
6 Superintendent Huppenthal ignored Superintendent Horne's conclusion that other
7 programs also violate HB 2281. Neither Superintendent has indicated any intent to
8 enforce the statute against TUSD's African American, Native American or Pan-Asian
9 Studies programs. This is a clear case of a law administered "so exclusively against
10 a particular class of persons as to warrant and require the conclusion, that. . .they
11 are applied. . .with a mind so unequal and oppressive as to amount to a practical
12 denial" of Equal Protection.³⁸

13 Although the legislature and State Superintendents have exclusively targeted
14 the MAS program with HB 2281, the prohibitions of the statute apply to every public
15 and charter school K-12 classroom in Arizona. There are numerous other
16 classrooms where students are taught about racism and oppression. In Arizona
17 schools, students learn about the legacy of discrimination and hate through learning
18 about subjects such as Jim Crow laws and *Brown v. Bd. of Education*, and by
19 reading books like *To Kill a Mockingbird* and *The Diary of Anne Frank*. Yet
20 Superintendents Huppenthal and Horne have not accused any other teachers or
21 school districts of conducting courses or classes that "promote resentment toward
22
23

24 ³⁶ See A.R.S. §112(B), the enforcement provision of HB 2281, which gives no
25 definitions, examples or guidelines for the Superintendent's determination of violation
26 and provides for an administrative appeal with the final decision to be made by the
27 Superintendent. The total discretion given to the Superintendent by subsection 112(B)
28 allows for the subjective and discriminatory enforcement seen here against MAS and
renders the statute unconstitutionally vague. See Ct. Doc. No. 91, Plaintiffs' Motion for
Summary Judgment, parts III, A, 6, pp.20-22 and IV, B, pp.33-40.

³⁷ Horne Finding, p.1.

³⁸ *Yick Wo v. Hopkins*, 118 U.S. 356, 372 (1886).

1 a race or class of people.”³⁹ Rather, they have solely targeted their efforts against
 2 Latino students to deny them the opportunity to enhance their academic success
 3 through learning about the Mexican American perspective of U.S. history and
 4 government, literature and art.

5 Both State Superintendents campaigned specifically to ban the MAS program.
 6 On his attorney general election website, Tom Horne admits that he has singled out
 7 MAS with the following explanation:

8 “In the Tucson Ethnic Studies programs they divided the kids by race. African
 9 American Studies for African Americans. Raza Studies for the Latino kids.
 10 “Raza” means race in Spanish. Indian Studies for the Native American kids.
 11 Asian Studies for the Asian kids. It just sounds like the Old South. And
 12 particularly in Raza Studies they taught the kids that the country is dominated
 13 by a white racist, imperialist power structure that is out to oppress them....
 14 And these kids are being taught not to deal with civil disagreements in a civil
 15 way, but to deal with everybody by getting into people’s faces and being rude
 16 and that means they are going to be unsuccessful adults. So it’s a
 17 dysfunctional education and I fought hard to get the legislature to put a – to
 18 pass a law so that I can put a stop to it. And as the attorney general, I will give
 19 the legal aid to the Department of Education to be sure that we do put a stop
 20 to it.”⁴⁰

21 Significantly, Superintendents Huppenthal and Horne have made no effort to
 22 eradicate learning about European perspectives. Many Arizona high schools offer
 23 classes such as Advanced Placement European History and classes that feature
 24 learning about British and European literature and art. The State Superintendents
 25 target Latino students who choose to learn about Mexican American culture, but do
 26 not similarly target European American students who choose to learn about their
 27

28 ³⁹ A.R.S. §15-112(A)(2).

⁴⁰ Tom Horne election website <http://www.electtomhorne.com> with link to video
 at <http://www.youtube.com/user/TomHorneforAG#p/u/22/nA3HfVBRz0o> titled “Tom
 Horne – Ended Ethnic Studies (Already performing Attorney General duties!)” at
 minutes 0:31 to 1:00 and 2:07 to 2:30. In this video clip, Mr. Horne also presents
 compelling evidence of how the traditional perspective of U.S. history excludes the
 Mexican American perspective. In reference to Latino students in the MAS program, he
 states, “I’ll tell you, these kids’ parents and grandparents **came to this country, most
 of them legally**, because this is the land of opportunity.” *Ibid.* at minute 1:07 to 1:13.
 Mr. Horne fails to recognize that the ancestors of many of the Latino students in the
 MAS program, like so many other Mexican Americans, have resided in what is now
 Arizona and the United States for centuries.

1 heritage.⁴¹ The educators who teach MAS are similarly targeted.

2 That MAS is the first and only victim of HB 2281 provides no defense. The
3 program and the majority-Latino students enrolled in MAS, along with the educators,
4 were always intended to be the targets. The lack of a “consistent pattern of official
5 race discrimination” is not a barrier to an Equal Protection claim.⁴² “A single
6 invidiously discriminatory governmental act. . . would not necessarily be immunized
7 by the absence of such discrimination in the making of other comparable decisions.”⁴³
8 Superintendents Huppenthal and Horne’s actions taken exclusively against a
9 program designed to advance the academic performance of Latino students and
10 their desire to unravel the substantial gains made by those students is
11 “unexplainable on grounds other than [race and ethnicity].”⁴⁴

12 This is one of the “rare” cases where the starkness of the exclusivity of
13 enforcement allows a finding of purposeful discrimination.⁴⁵ Just as an ordinance
14 which effectively prohibited the operation of laundries in buildings made from wood,
15 where all laundries owned by Chinese operators were housed in wooden buildings,
16

17 ⁴¹ The fact that non-Latinos also would be shut out of MAS classes does not
18 negate the States’ discrimination against Latino students. In *Griffin v. Co. Sch. Bd. of*
19 *Prince Edward Co.*, 377 U.S. 218 (1964), the school board’s decision to close all of its
20 schools, rather than to integrate them, discriminated against African American students,
21 despite that fact that the schools were closed to white students, as well. The closing of
22 the schools “[bore] more heavily on Negro children in Prince Edward County” and was
23 done specifically with the intent to discriminate against them. *Ibid.*, 377 U.S. at 230.
24 Whatever nonracial grounds might support closing public schools, “the object must be a
25 constitutional one, and grounds of race and opposition to desegregation do not qualify
26 as constitutional.” *Ibid.*, 377 U.S. at 231. Superintendents Huppenthal and Horne’s
27 desire to eliminate MAS out of a desire to deny Latino students the opportunity to
28 improve their education through learning about Mexican Americans is a violation of their
right to Equal Protection.

⁴² See *Arlington Hts.*, 429 U.S. at 266, fn. 14.

⁴³ *Ibid.*, citing *City of Richmond v. United States*, 422 U.S. 358, 378 (1975)
(annexation taken for the purpose of discriminating against African Americans has no
legitimacy under the Constitution).

⁴⁴ *Ibid.*, 429 U.S. at 266.

⁴⁵ *Ibid.*, citing *Yick Wo*, 118 U.S. 356; *Gomillion v. Lightfoot*, 364 U.S. 339
(1960).

1 is unexplainable on grounds other than race,⁴⁶ so too is HB 2281, which was drafted
2 specifically to eliminate the MAS program and applied exclusively against it.
3 Superintendents Huppenthal and Horne's actions targeting MAS to the exclusion of
4 any other program, proves that they acted with the requisite discriminatory purpose.

5 **2. The Historical Background of the Huppenthal and Horne**
6 **Findings Reveals Their Intent to Discriminate Against**
7 **Latinos.**

8 The historical background of the decision is relevant, "particularly if it reveals
9 a series of official actions taken for invidious purposes."⁴⁷ Superintendents
10 Huppenthal and Horne's efforts to eliminate MAS over several years, culminating in
11 their respective Findings of violations of HB 2281, reveal this type of invidious intent
12 and prove a discriminatory purpose. They have specifically attacked and questioned
13 **explicitly condemned** the goal of creating a curriculum designed to enhance the
14 academic success of Latino students, who represent ninety percent (90%) of MAS
15 students.⁴⁸ In 2007, in his official capacity as Superintendent of Public Instruction,
16 Superintendent Horne issued a call to citizens of Tucson to end the MAS program.⁴⁹
17 In support, he accused MAS of advocating "a kind of destructive ethnic chauvinism"
18 and pointed to the fact that "[t]he very name 'Raza' is translated as 'the race,'" to
19 him, a negative connotation of the term.⁵⁰ He complained that Tucson High School
20 students participate in MEChA, a Chicano youth organization, as an extracurricular
21 activity and disapprovingly noted that he observed a Tucson High School librarian
22 wearing a shirt with the MEChA insignia.⁵¹ Also in the letter, Superintendent Horne
23 claimed that the Mexican American history textbooks "Occupied America" and "The
24

25 ⁴⁶ *Yick Wo*, 118 U.S. 356.

26 ⁴⁷ *Arlington Hts.*, 429 U.S. at 267.

27 ⁴⁸ Cambium Report, p.6.

28 ⁴⁹ Ct. Doc. No. 64-2, Horne's Open Letter to the Citizens of Tucson, hereinafter,
"Open Letter."

⁵⁰ *Ibid.*, p. 2.

⁵¹ *Ibid.*, p. 3.

1 Mexican American Heritage” are inappropriate for students in MAS classes.⁵²

2 When the citizens of Tucson chose not to take up Superintendent Horne’s call
3 to eliminate MAS, he drafted the legislation that was eventually introduced and
4 passed as HB 2281.⁵³ In their 2010 campaigns, both Superintendents Huppenthal
5 and Horne pandered to anti-Mexican American sentiment in Arizona to their
6 advantage by making the eradication of MAS central to their campaign platforms.
7 In an obvious display of racial and ethnic bias, Superintendent Huppenthal ran
8 television and radio advertisements in which an announcer stated that, “He is one
9 of us,” followed by a pledge that he will “Stop La Raza.” Superintendent Horne also
10 seized the opportunity to cast the Mexican American experience as outside of the
11 American experience in a campaign video that opened with the statement, “On May
12 11, Tom Horne’s bill to end Tucson’s *anti-American* Ethnic Studies program in
13 Arizona was signed into law.”⁵⁴

14 **3. Superintendent Horne’s Departure From the Normal** 15 **Procedural Sequence Reveals His Intent to Discriminate** 16 **Against Latinos.**

17 This method of proving discriminatory intent involves scrutiny of the “specific
18 sequence of events leading up to the challenged decision” to shed light on the
19 decisionmaker’s purpose.⁵⁵ A departure from the “normal procedural sequence” may
20 provide evidence that an improper purpose motivated the action.⁵⁶ In issuing his
21 Finding against MAS, Superintendent Horne’s departure from the normal procedural
22 sequence of events is significant evidence that he was motivated by an intent to

23 ⁵² *Ibid.*, pp.2-3

24 ⁵³ Horne Finding, p. 1; see also video clip on Tom Horne attorney general
25 election website referenced, *supra*, at fn.40.

26 ⁵⁴ This video was previously found on Tom Horne’s Attorney General campaign
27 website at http://www.electtomhorne.com/tom_tv.htm titled “The U.N. and Liberals Want
28 to Stop Tom Horne’s Fight Against Taxpayer Funded Ethnic Studies.” (Last accessed
July 14, 2011.) This video, along with Tom Horne’s numerous other videos and
statements regarding the MAS program, has recently been removed from his web site
and replaced with the one video cited, *supra*, at fn.40.

⁵⁵ *Arlington Hts.*, 429 U.S. at 267.

⁵⁶ *Ibid.*

1 discriminate against Latinos.

2 HB 2281 did not become effective until December 31, 2010, when MAS
3 classes were adjourned for the winter break.⁵⁷ However, Superintendent Horne
4 prematurely declared that TUSD's MAS program was in violation of HB 2281 in his
5 Finding dated December 30, 2010, and released on January 2, 2011, hours before
6 he left office to become the Arizona Attorney General.⁵⁸ Thus, the Horne Finding not
7 only predates the effective date of the statute, but it cites and relies upon facts that
8 all occurred **before** the statute was the enforceable law of the state of Arizona.

9 Superintendent Horne offered no explanation for completing his Finding before
10 HB 2281's effective date. Nor did he explain his decision to issue his Finding mere
11 hours before leaving office, rather than allow his successor the opportunity to
12 properly investigate whether any violation occurred after classes resumed for the
13 spring semester and after the statute came into force. Nor has he ever explained
14 how the MAS program could have violated the statute when MAS classes had not
15 yet been conducted after the statute's effective date. Instead, Superintendent Horne
16 engaged in an unusual last-minute rush to find MAS in violation. Unable to deny
17 Superintendent Horne's irregularities, Superintendent Huppenthal consequently
18 conceded that those flaws required him to "determine if, in fact, TUSD was in
19 violation of the statute post January 1, 2011."⁵⁹

20 **4. Superintendents Huppenthal and Horne's Rejection of**
21 **Factors Usually Considered Important By An Educational**
22 **Decision Maker Reveals Their Intent To Discriminate Against**
23 **Latinos.**

24 A substantive departure from the normal sequence of events may also be
25 relevant, "particularly if the factors usually considered important by the

26 ⁵⁷ Ct. Doc. No. 84, Exhibit A (HB 2281) to TAC, p. 4.

27 ⁵⁸ Horne Finding, p.1.

28 ⁵⁹ Huppenthal Finding, p. 1. (In his Finding, Superintendent Huppenthal
erroneously describes the Horne Finding as issued on January 1, 2011 and the effective
date of the statute as January 1, 2011.)

1 decisionmaker ***strongly favor a decision contrary to the one reached.***⁶⁰ For
 2 example, where re-zoning for a low-income housing development in a white
 3 neighborhood was denied, yet the city planning directors testified that there was no
 4 reason “from a zoning standpoint” why the parcel should not be re-zoned to match
 5 the surrounding zoning classification, the court found that the lack of rational
 6 decision making proved invidious racial discrimination.⁶¹ In this case, Superintendent
 7 Huppenthal continued the biased enforcement action commenced by Superintendent
 8 Horne despite convincing evidence that the MAS program does not violate HB 2281
 9 and actually helps at-risk students to succeed in school.

10 **a. Superintendent Huppenthal’s Rejection of the**
 11 **Cambium Audit Report Reveals His Intent to**
 12 **Discriminate Against Latinos.**

13 Shortly after taking office, Superintendent Huppenthal contracted with
 14 Cambium Learning Group, Inc., to perform an independent audit of the MAS
 15 program.⁶² The audit had three declared purposes:

16 [T]o determine: (1) how or if the Tucson Unified School District Mexican
 17 American Studies Department programs are designed to improve
 18 student achievement; (2) if statistically valid measures indicated student
 19 achievement occurred; and (3) whether the Mexican American Studies
 20 Department’s curriculum is in compliance with A.R.S. §15-112(A).⁶³

21 The audit included an extensive review of the curriculum and materials, many hours
 22 of classroom observations and site visits, and a multitude of personal interviews with
 23 administrators, teachers, parents, students, and community members.⁶⁴ On May 2,
 24 2011, after nearly two months of work, Cambium issued its 120-page comprehensive
 25 audit report to Superintendent Huppenthal.⁶⁵ Rather than immediately release the
 26 audit report to the public, he held on to the report for six weeks.

27 Superintendent Huppenthal’s next action provides some of the starkest

28 ⁶⁰ *Arlington Hts.*, 429 U.S. at 267 (emphasis added).

⁶¹ *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970).

⁶² It has been reported that this study cost \$110,000.00.

⁶³ Cambium Report, p. 4.

⁶⁴ *Ibid.*, pp.12-18.

⁶⁵ Cambium Report, p.1.

1 evidence of his intent to discriminate against Latinos. After receiving the audit report
2 that he commissioned, Superintendent Huppenthal waited until June 15, 2011, to
3 reject the Cambium Report and issue his own three-page Finding declaring MAS to
4 be in violation of HB 2281. On that date, the reason for Superintendent Huppenthal's
5 reticence became obvious: The Cambium Report confirms the success of MAS in
6 all three aspects of its evaluation.⁶⁶

7 First, the "programs are designed to improve student achievement based on
8 the audit team's findings of valuable unit and lesson design, engaging instructional
9 practices, and collection inquiry strategies through values of diversity and inter-
10 cultural proficiency."⁶⁷ Second, statistically valid measurements demonstrate
11 improved student achievement and "closing the achievement gap."⁶⁸ Third, the audit
12 team observed no evidence that MAS violated A.R.S. §15-112(A)(1) through (4).⁶⁹

13 In summary:

14 During the curriculum audit period, no observable evidence was
15 present to suggest that any classroom within Tucson Unified School
16 District is in direct violation of the law A.R.S. §15-112(A). Schools
17 associated with [the Mexican American Studies Department] courses
18 promote a culture of excellence and support a safe and orderly
19 environment conducive to learning. Teachers collectively are building
20 nurturing relationships with students and work to improve student
21 achievement and attendance as identified in numerous focus group
22 interview sessions. A culture of respect exists and students receive
23 additional assistance beyond the regular classroom instruction to
24 support their academic learning. As a result, students from many
25 ethnicities are physically sitting in Mexican American Studies
26 Department classes and are learning that different perspectives are
27 valuable, that Americans come from many backgrounds, and that being
28 an American means that all people are accepted.⁷⁰

22 Cambium also recommended that TUSD "[m]aintain Mexican American Studies
23 courses as part of a core curriculum for high school courses" in "U.S. History,
24 American Government and Literature."⁷¹

26 ⁶⁶ *Ibid.*, pp. 18-63.

27 ⁶⁷ *Ibid.*, p.68.

28 ⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, p.63.

⁷¹ *Ibid.*, pp.66-67.

1 Remarkably, in his Finding, Superintendent Huppenthal barely acknowledged
2 the existence of the Cambium Report and *never mentioned* its lengthy and overall
3 positive conclusions. Rather, in an obvious effort to obfuscate, he accused TUSD of
4 failing to properly approve textbooks used in MAS classes in violation of board
5 policies and state statutes, allegations which are entirely irrelevant to alleged
6 violations of A.R.S. §15-112(A) and the ensuing enforcement action.⁷²

7 Superintendent Huppenthal's decision to ignore the Cambium Report, which
8 was designed to provide him with the facts necessary to make his determination,
9 exposes the reality that nothing would prevent him from carrying out his campaign
10 pledge to "Stop La Raza." On June 21, 2011, he publicly declared that the
11 observations of the Cambium audit team were unreliable because they did not match
12 the "information" as to what takes place in MAS classrooms that had been reported
13 to him.⁷³ Superintendent Huppenthal's failure to account for the possibility that the
14 reported information might be biased and flawed and that what took place in the
15 classrooms during the auditors' many hours of observation is what genuinely takes
16 place in MAS classrooms is strong evidence of his intent to discriminate. He

17 _____
18 ⁷² See Huppenthal Finding, pp.2-3.

19 ⁷³ On the Buckmaster Radio show broadcast on June 21, 2011, the following
20 exchange took place between host Bill Buckmaster and Superintendent Huppenthal:
21 BILL BUCKMASTER: But do you – what about the audit, stating on page 50, "During
22 the curriculum audit period, no observable evidence was present to indicate that any
23 classroom within TUSD is in direct violation of the law. In most cases, quite the
24 opposite is true." and – "quite the opposite is true," and I think this is what has people
25 here in Tucson confused. They read that sentence in the audit report but then what
26 you're ruling is in, really, a contradictory – there's a disconnect between the two.
27 JOHN HUPPENTHAL: Absolutely. And the thing that weighed heavily on our mind to
28 set aside that observation of what they observed in the classroom, two things. One, the
– the Mexican American Studies knew that the audit would be taking place that week.
And the nature of an audit is you're supposed to define facts and you – we have – ***we
have a lot of information that what was going on in Mexican American Studies did
not match what they observed in that week. So that was what led us to set aside
those observations as not being reliable for that week.***

Ct. Doc. No. 98-4, transcript of recorded interview of The Buckmaster Show, June 21,
2011, p.5 (emphasis added).

1 predetermined his narrative of what goes on in MAS classrooms. When the auditors
2 saw something different, Superintendent Huppenthal rejected both the Cambium
3 Report's observations, as well as its conclusions.

4 Another important factor to an educational decision maker that would strongly
5 favor a decision contrary to Superintendent Huppenthal's is the data indicating the
6 MAS program's effectiveness in student achievement and graduation.⁷⁴ In this
7 regard, the evidence proves the overwhelming success of the program. Over a four-
8 year period, the primarily at-risk Latino students who participate in MAS consistently
9 closed the achievement gap with non-MAS students in standardized test scores in
10 each of the four years and in each of the three sections: reading, writing and
11 mathematics.⁷⁵ As the highest-ranking education official in Arizona, Superintendent
12 Huppenthal's persistence in denigrating the MAS program without ever
13 acknowledging its data-proven successes demonstrates an invidious motive.

14 **b. The Lack of Evidence To Support the Findings**
15 **Reveals Superintendents Huppenthal and Horne's**
16 **Intent to Discriminate Against Latinos.**

17 Equally damning of Superintendent Huppenthal's decision to ignore the
18 voluminous data and conclusions of the Cambium Report is the dearth of evidence
19 he musters to purportedly support his fundamentally flawed finding that MAS violates
20 HB 2281. With regard to subsection 112(A)(2), which prohibits classes or courses
21 that promote resentment toward a race or class of people, the Finding merely cites
22 to "materials" that "reference white people as being 'oppressors' and 'oppressing'
23 Latino people and "materials" that "present only one perspective of historical events,
24 that of Latino people being persecuted, oppressed and subjugated by the
25 'hegemony'-or white America."⁷⁶ Superintendent Huppenthal fails to identify the
26 specific materials from which he takes these quotes, the context in which the texts

27 ⁷⁴ See Cambium Report, pp.43-50; Arce Declaration ¶ 19.

28 ⁷⁵ See "Final AIMS Data," attached to Arce Declaration as Exhibit A; Cambium
Report, pp.43-50.

⁷⁶ Huppenthal Finding, p. 2.

1 use them, or when, where, how, and if the materials were used in class.

2 The surreality culminates in Superintendent Huppenthal's conclusion that with
3 the few words quoted above, found in unidentified "materials," without any evidence
4 as to their use, Arizona law gives him the unilateral and wholly unrestricted
5 discretion to withhold \$1 to \$3 million per month in school district funding from the
6 more than 50,000 students in TUSD.⁷⁷

7 The following section, finding an alleged violation of subsection 112(A)(3) for
8 having classes that "are designed primarily for pupils of a particular ethnic race,"
9 demonstrates explicit ethnic discrimination. Applying this twisted logic,
10 Superintendent Huppenthal contends the following goals for TUSD students cross
11 the line drawn by the Arizona Legislature and render the entire MAS program illegal:
12 "The [Mexican American Studies] Model shows the focus to be academic
13 achievement for Latino Students" and the "[TUSD] [w]ebsite clearly states the
14 Department was formed to specifically enhance the academic success of Latino
15 students although it can benefit all students. . . ." ⁷⁸

16 In any state but Arizona, the enhanced "academic success of Latino students"
17 would be seen, not only as a crucial educational goal, but as a federal mandate.⁷⁹
18 Yet, Superintendent Huppenthal pounces on the language to justify withholding more
19 than \$1 million per month in order to bully TUSD into eliminating MAS. Accordingly,
20 these aspirations for Latino students cannot be tolerated and HB 2281 stands to
21 prevent TUSD from promoting the achievement of Latino students through the
22 vehicle of learning about Mexican Americans. Superintendent Huppenthal's
23 unapologetic actions to prevent TUSD from addressing the educational needs of its

24
25 ⁷⁷ Ct. Doc. No. 84, TAC ¶17; Huppenthal Finding, p.3.

26 ⁷⁸ Huppenthal Finding, p. 2.

27 ⁷⁹ See e.g. Elementary and Secondary Education Act ("No Child Left Behind"),
28 Title I, Sec. 1001(3) Statement of Purpose, (purpose to ensure that all children have a
fair, equal and significant opportunity to obtain a high-quality education can be
accomplished by "closing the achievement gap between high- and low-performing
children, **especially the achievement gaps between minority and nonminority
students.**")

1 Latino students prove his desire and intent to discriminate against Latinos.

2 **c. Superintendents Huppenthal and Horne's Failure to**
 3 **Apply the Statutory Exceptions to A.R.S. §15-112(A)**
 4 **Reveal Their Intent to Discriminate Against Mexican**
 5 **Americans.**

6 The exceptions contained in subsections 112(E) and (F) are critical factors
 7 that would strongly favor a decision contrary to that of Superintendents Huppenthal
 8 and Horne. Inexplicable by any legitimate explanation in their Findings, neither State
 9 Superintendent mentions the exceptions at all.

10 Those subsections provide that HB 2281 does not prohibit or restrict
 11 “[c]ourses or classes that include the history of any ethnic group,”⁸⁰ “the discussion
 12 of controversial aspects of history,”⁸¹ or “the instruction of the holocaust, any other
 13 instance of genocide, or the historical oppression of a particular group of people
 14 based on ethnicity, race, or class.”⁸² And yet, Superintendents Huppenthal and
 15 Horne have based their allegations of violations on materials that fall well within the
 16 exceptions, and proceed as if the exceptions did not exist at all.

17 The Horne Finding is rife with examples of alleged violations, taken out of
 18 context, that should come within the exceptions of subsections 112(E) and (F).
 19 Foremost is Superintendent Horne’s inescapable conclusion that books that present
 20 history from a Mexican American perspective should be banned.⁸³ As evidence of

21 ⁸⁰ A.R.S. §15-112(E)(3).

22 ⁸¹ A.R.S. §15-112(E)(4).

23 ⁸² A.R.S. §15-112(F).

24 ⁸³ Superintendent Horne’s Finding reveals an element of duplicity where he
 25 states his oft-repeated (see e.g. Open Letter, p. 1) interpretation of the “philosophy
 26 which underlay the statute: People are individuals, not exemplars of racial groups.
 27 What is important about people is what they know, what they can do, their ability to
 28 appreciate beauty, their character, and not what race into which they are born.” Horne
 Finding, p. 1. However, when describing his own heritage, Superintendent Horne writes
 that, as a Jew, the “long cultural tradition in Judaism of valuing scholarship” directly
 benefitted his family, in that his “father’s knowledge of history” enabled his family to
 escape the Holocaust. Jewish News of Greater Phoenix, 6/9/06, Vol. 58, No. 37,
<http://www.jewishaz.com/issues/printstory.my?060609+elected>. Superintendent Horne’s
 sincere understanding of the value of his own culture and the importance of that culture
 to successive generations contrasts with the invidious nature of his attempts to prevent

1 a violation of §15-112, Superintendent Horne finds it is “certainly strange to find a
2 textbook in an American public school taking the Mexican side of the battle at the
3 Alamo.”⁸⁴ In a display of hubris, Superintendent Horne disputes a textbook’s
4 contextualization of an early Chicano leader’s statement, “kill the gringo,” as meaning
5 “to end white control over Mexicans,” with the naked assertion that the book’s
6 interpretation “contradicts [the speaker’s] clear language.”⁸⁵ Superintendent Horne
7 also quotes the following statement from another textbook that refers to the more
8 current phenomenon of Mexican migration to the American Southwest: “Apparently
9 the U.S. is having as little success as Mexico had when they tried to keep the North
10 Americans out of Texas in 1830.”⁸⁶ Rather than ponder a thought-provoking
11 observation, as intended by the author, Superintendent Horne laments the fact that
12 “books paid for by the American taxpayers used in American public schools are
13 gloating over the difficulty we are having in controlling the border.”⁸⁷ Superintendent
14 Horne ignores the issue of whether these passages qualify pursuant to the statutory
15 exceptions as “controversial aspects of history” or “historical oppression of a
16 particular group of people based on ethnicity.”

17 Likewise, Superintendent Huppenthal points to unnamed “[r]eviewed
18 materials” which “present only one perspective of historical events, that of Latino
19 people being persecuted oppressed and subjugated by the ‘hegemony’—or white
20 America.”⁸⁸ He never explains why this material is not allowed under subsection
21 112(F) as “the historical oppression of a particular group of people based on
22 ethnicity.”

23 The fact that both Superintendents Huppenthal and Horne proceeded to
24

25 Latino students from learning about the same types of values and significance of their
26 culture.

27 ⁸⁴ Horne Finding, p. 7.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, pp.7-8.

⁸⁸ Huppenthal Finding, p.2.

1 enforce HB 2281 against MAS as if the exceptions did not exist is strong evidence
2 that they never intended to fairly apply the statute and that their motivation was an
3 intent to discriminate against Latino students.

4 **5. The Administrative History of the Huppenthal and Horne**
5 **Findings Reveal Their Intent To Discriminate Against**
6 **Latinos.**

7 The legislative or administrative history may be “highly relevant” to the issue
8 of discriminatory intent, especially the “contemporary statements” of the
9 decisionmakers or reports.⁸⁹ In this case, Superintendents Huppenthal and Horne’s
10 official conduct as the relevant administrative decisionmakers in pursuit of their
11 mission to eliminate the MAS program and classes designed to enhance the
12 academic success of Latino students displays their invidious intent to discriminate
13 against Latinos. Superintendent Huppenthal declared MAS to be in violation of HB
14 2281 without specifying what changes are necessary to bring the program into
15 compliance. His lack of direction prompted TUSD, in its Notice of Appeal, to
16 complain that the Finding’s “lack of specificity makes it impossible for TUSD to
17 identify and remedy any alleged violation.”⁹⁰

18 Superintendent Horne did not even suggest that MAS could come into
19 compliance. Rather, he exceeded his statutory authority by issuing an edict that
20 TUSD had sixty days to “**eliminate** the Mexican American Studies courses....”⁹¹
21 However, A.R.S. §15-112(B) does not contain any provision authorizing the
22 Superintendent to order the elimination of a program in his Finding. Rather, it
23 requires him to give the school district sixty days to come into compliance and then
24 make a determination whether the district has complied. Moreover, Superintendent
25 Horne’s Finding provided TUSD with no information as to how to bring the program
26 into compliance. He had no interest in assisting TUSD to alter the classes. His
27 mission was to fulfill his promise to “end Tucson’s anti-American Ethnic Studies

28 ⁸⁹ *Arlington Hts.*, 429 U.S. at 268.

⁹⁰ TUSD Notice of Appeal, Ct. Doc. No. 88-1, Exhibit A, p.4.

⁹¹ Horne Finding, p.10 (emphasis added).

1 program.”

2 Both Superintendents’ Findings describe in racial/ethnic terms what they do
3 not like about MAS classes. They object to students learning that Mexican
4 Americans have suffered oppression.⁹² They explicitly target Latino students by
5 objecting to the program’s goal of “increas[ing] academic achievement for Latino
6 students.”⁹³ These actions explicitly based on racial/ethnic criteria constitute a racial/
7 ethnic classification.⁹⁴

8 Under Superintendents Huppenthal and Horne’s leadership, the Arizona
9 Department of Education (“ADE”) has engaged in other administrative actions that
10 discriminate against Latinos. Most recently, the U.S. Department of Justice, Civil
11 Rights Division (“CRD”) and the U.S. Department of Education, Office of Civil Rights
12 (“OCR”) concluded a joint investigation of the ADE’s policy of monitoring the fluency
13 in English of teachers of English language learners by using subjective evaluations.⁹⁵
14 The ADE conducted these subjective on-site fluency monitoring practices despite the
15 fact that the school districts had already assessed the teachers’ English fluency
16 using objective measures and had **no concerns** about the teachers’ fluency. As a
17 result of its subjective evaluations, the ADE accused teachers who pronounce “the”
18 as “da”, “another” as “anuder,” and “lives here” as “leeves here” of lacking sufficient
19 fluency in English.⁹⁶ The CRD and OCR were concerned that the ADE’s subjective
20 evaluations “discriminat[e] against Hispanics. . .who work as or wish to work as
21 public school teachers in Arizona, and that ***such discrimination could deny public
22 school students in Arizona equal educational opportunities on the basis of***
23

24
25 ⁹² Huppenthal Finding, p. 2; Horne Finding, p. 7.

26 ⁹³ Huppenthal Finding, p. 2; Horne Finding, p. 3.

27 ⁹⁴ See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (racial classification found where
28 judge denied custody to mother because of her interracial marriage.)

⁹⁵ See August 26, 2011 letter from CRD and OCR attorneys to State
Superintendent Huppenthal notifying him of the determination of the statewide
discrimination complaint, attached hereto as Exhibit 4.

⁹⁶ *Ibid.*, p.2.

1 ***national origin in violation of Title VI and the EEOA.***⁹⁷ The ADE initially
 2 defended its actions, but later “confirm[ed] its commitment to change its on-site
 3 teacher English fluency monitoring practices” and limit its inquiry to whether school
 4 districts “have certified that their teachers are fluent in English.”⁹⁸

5 In this case, the same government actors take exception to teaching primarily
 6 Latino students about Latinos in a meaningful way. More importantly, these two non-
 7 Latino officeholders take exception to teaching Latino students about Mexican
 8 Americans from the perspective of Mexican Americans. The inescapable implication
 9 is that Superintendents Huppenthal and Horne believe that learning about Mexican
 10 Americans from the perspective of Mexican Americans is harmful to Latino students
 11 due to both Superintendents’ biased perception of the need to impose a cultural
 12 genocide on Latino students.⁹⁹ “The Constitution cannot control such prejudices but
 13 neither can it tolerate them. Private biases may be outside the reach of the law, but
 14 the law cannot, directly or indirectly, give them effect.”¹⁰⁰

15 **B. The Elimination of MAS Is Not Narrowly Tailored to Further the**
 16 **State’s Interest in Treating Pupils as Individuals and Not Teaching**
Them to Hate Other Races or Classes of People.

17 The result of finding an race/ethnic classification is that Superintendent
 18 Huppenthal must prove that his action is narrowly tailored to further a compelling
 19 governmental interest.¹⁰¹ “Absent searching judicial inquiry into the justification for
 20 such [race/ethnic]-based measures, there is simply no way of determining what
 21 classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated
 22 by illegitimate notions of [racial/ethnic] inferiority or simple [racial/ethnic] politics.”¹⁰²
 23 In this regard, “[c]ontext matters when reviewing [race/ethnic]-based governmental
 24
 25

26 ⁹⁷ *Ibid.*

27 ⁹⁸ *Ibid.*, pp.2-3.

28 ⁹⁹ See text accompanying fn.40.

¹⁰⁰ *Palmore*, 466 U.S. at 433.

¹⁰¹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁰² *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

1 action under the Equal Protection Clause.”¹⁰³ Courts use this type of strict scrutiny
2 to “‘smoke out’ illegitimate uses of [race/ethnicity] by assuring that the legislative
3 body is pursuing a goal important enough to warrant use of a highly suspect tool.”¹⁰⁴
4 Strict scrutiny provides the “framework for carefully examining the importance and
5 the sincerity of the reasons advanced by the governmental decisionmaker for the
6 use of [race/ethnicity] in that particular context.”¹⁰⁵ And finally, strict scrutiny also
7 ensures that “the means chosen ‘fit’ this compelling goal so closely that there is little
8 or no possibility that the motive for the classification was illegitimate [racial/ethnic]
9 prejudice or stereotype.”¹⁰⁶ In this case, Superintendent Huppenthal cannot meet
10 this strict scrutiny test.

11 The stated purpose behind the statute drafted by Superintendent Horne is
12 “that public schools pupils should be taught to treat and value each other as
13 individuals and not be taught to hate other races or classes of people.”¹⁰⁷ Although
14 the interests identified are logical, it has not been demonstrated that Arizona schools
15 have problems with treating pupils as individuals or with teaching them to hate other
16 races or classes of people. Even assuming that these interests rise to the level of
17 compelling, the elimination of MAS does nothing to advance them.

18 Superintendent Huppenthal has visited a MAS classroom and never reported
19 observing that students were taught to hate or that they were not treated as
20 individuals. There is no credible, relevant evidence that MAS students are not
21 treated as individuals and are taught to hate other people. In fact, as reported in the
22 Cambium Report:

23 “No observable evidence exists that instruction within the Mexican
24 American Studies Department promotes resentment towards a race or
25 class of people. The auditors observed the opposite, as students are

26 ¹⁰³ *Grutter*, 539 U.S. at 327.

27 ¹⁰⁴ *Richmond*, 488 U.S. at 493.

28 ¹⁰⁵ *Grutter*, 539 U.S. at 327; *Smith v. Univ. of Washington*, 392 F.3d 367, 372 (9th
Cir. 2004), *cert. denied* 546 U.S. 813 (2005).

¹⁰⁶ *Richmond*, 488 U.S. at 493.

¹⁰⁷ A.R.S. §15-111.

1 taught to be accepting of multiple ethnicities of people. [Mexican
2 American Studies Department] teachers are teaching Cesar Chavez
3 alongside Martin Luther King, Jr. and Gandhi, all as peaceful protesters
4 who sacrificed for people and ideas they believed in. Additionally, all
5 ethnicities are welcomed into the program and these very students of
6 multiple backgrounds are being inspired and taught in the same
7 manner as Mexican American students. **All evidence points to peace
8 as the essence for program teachings. Resentment does not exist
9 in the context of these courses.**¹⁰⁸

6 The Cambium Report provides compelling evidence that MAS classes actually
7 **further** the State's interest in treating pupils as individuals and not teaching them to
8 hate others. In this respect, Superintendents Huppenthal and Horne's mission to
9 shut down MAS is a paradox. The program they so revile actually supports the same
10 interests that HB 2281 claims to promote.

11 This contradiction reveals the insincerity of the purported governmental
12 interest of teaching pupils not to hate other races or classes of people as applied in
13 the context of the propriety of teaching students from the perspective of Mexican
14 Americans. It also establishes that the means chosen to pursue this interest does
15 not fit "so closely that there is little or no possibility that the motive for the
16 classification was illegitimate [ethnic] prejudice or stereotype."¹⁰⁹ To the contrary, it
17 does not fit at all.

18 The reason for this disconnect is clear. Superintendents Huppenthal and
19 Horne have drawn the MAS students into their scheme to garner votes in Arizona's
20 current racially-charged atmosphere. Strict scrutiny of their official conduct reveals
21 that their conduct is motivated in fact by "simple [race/ethnic] politics."¹¹⁰
22 Superintendent Huppenthal cannot prove that the elimination of MAS is narrowly
23 tailored to promote treating pupils as individuals and not teaching them to hate
24 others and his application of HB 2281 must be struck down as in violation of the
25 Equal Protection Clause.

26 //

27 _____
28 ¹⁰⁸ Cambium Report, p. 55 (emphasis added).

¹⁰⁹ *Richmond*, 488 U.S. at 493.

¹¹⁰ *Ibid.*

1 **VI. A.R.S. §15-112 ON ITS FACE VIOLATES THE PLAINTIFFS' RIGHTS TO**
 2 **EQUAL PROTECTION.**

3 **A. A.R.S. §15-112 Constitutes a Facial Race/Ethnic Classification.**

4 HB 2281 prohibits classes “designed primarily for pupils of a particular ethnic
 5 group.”¹¹¹ TUSD’s Ethnic Studies programs, including MAS, are designed to
 6 effectively target the persistent achievement gaps generally suffered by ethnic and
 7 racial minority students.¹¹² Therefore, as an attack on efforts to improve the
 8 performance of racial and ethnic minority students, but not on any other groups of
 9 students, the statute creates an racial/ethnic classification. Subsection (A)(4)
 10 prohibits classes that “[a]dovcate ethnic solidarity instead of the treatment of pupils
 11 as individuals” in the misguided belief that learning about ethnicity negates one’s
 12 ability to interact with others on an individual level. This subsection, too, creates a
 13 racial/ethnic classification.

14 Classifications based on race/ethnicity “carry a danger of stigmatic harm.”¹¹³
 15 For that reason, they must be “strictly reserved for remedial settings” in order to
 16 avoid promoting “notions of racial inferiority. . .lead[ing] to a politics of racial
 17 hostility.”¹¹⁴ In this case, the race/ethnic classifications and targeting of HB 2281
 18 solely against the MAS program have stigmatized Latinos in Arizona and caused
 19 racial/ethnic hostility to be directed toward them.

20 HB 2281's racial/ethnic classification is not facially neutral despite the fact that
 21 the law does not explicitly single out learning about Mexican Americans.¹¹⁵ The
 22 impact of the law falls primarily on Latinos, who comprise 90 percent of MAS

23 ¹¹¹ A.R.S. §15-112(A)(3).

24 ¹¹² Arce Declaration, ¶ 20.

25 ¹¹³ See *Richmond*, 488 U.S. at 493.

26 ¹¹⁴ *Ibid.*

27 ¹¹⁵ See *Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (Even though a “law on its
 28 face treats Negro and white, Jew and gentile in an identical manner, [where] the reality
 is that the law’s impact falls on the minority,” an ethnic classification is found.”); see *a/so*
Ho by Ho, 147 F.3d 854, 863 (9th Cir. 1998) (“Misuse of race by government for over
 three centuries in America must make any new governmental use of race stand suspect
 and in pressing need of justification.”)

1 students and teachers. The ethnic classification scheme is further exposed by an
2 exception to the prohibitions contained in §15-112(A). §15-112(F) provides:

3 F. Nothing in this section shall be construed to restrict or prohibit the
4 instruction of the Holocaust, any other instance of genocide, or the
5 historical oppression of a particular group of people based in ethnicity,
6 race, or class.

7 In subsection F, the legislature creates a racial/ethnic and religious classification that
8 permits teaching about the particular religious, racial or ethnic groups targeted by
9 Nazis in the Holocaust, thus making them favored by the statute. The explicit
10 determination that the experiences of some racial/ethnic and religious groups may
11 be validly taught, while others may not, creates a constitutionally impermissible
12 classification.

13 **B. HB 2281 Is Not Narrowly Tailored to Further the State's Interest in
14 Treating Pupils as Individuals and Not Teaching Them to Hate
15 Other Races or Classes of People.**

16 Superintendent Huppenthal cannot meet the strict scrutiny test by proving that
17 HB 2281 is narrowly tailored to further a compelling governmental interest. The
18 statute describes its purpose as teaching public school students to “treat and value
19 each other as individuals and not be taught to hate other races or classes of
20 people.”¹¹⁶ Assuming that this is a compelling state interest, the provisions of the
21 statute are not narrowly tailored to achieve it.

22 Subsection 112(A)(3), which prohibits courses or classes designed primarily
23 for pupils of a particular ethnic group, is not only not narrowly tailored, but has no
24 relationship to treating pupils as individuals. Courses designed for pupils of a
25 particular ethnic group are designed to remedy problems in student achievement.
26 In fact, the No Child Left Behind Act (“NCLB”) requires that states be held
27 accountable for student achievement and report required data for ethnic and racial
28 subgroups.¹¹⁷ In the case of MAS, issues of race and ethnicity and their role in
history and society is the vehicle by which the curriculum brings cultural relevancy

¹¹⁶ A.R.S. §15-111.

¹¹⁷ See, *infra*, fn. 79.

1 to its academic subjects.¹¹⁸ But learning about and discussing race and ethnicity
2 does not mean that students are not treated as individuals. Discussions about race
3 and ethnicity occur every day and those who engage in those discussions do not
4 *ipso facto* fail to treat others as individuals. The statute prohibiting courses designed
5 primarily for pupils of a particular race/ethnic group is not narrowly tailored to
6 promote treating students as individuals and must be struck down.

7 **C. HB 2281 Is Not Rationally Related to the Purpose of Treating**
8 **Students as Individuals.**

9 Even if judged by the most deferential constitutional standard, the
10 classification contained in HB 2281 must fail. Where a law “neither burdens a
11 fundamental right nor targets a suspect class, [courts] will uphold the legislative
12 classification so long as it bears a rational relation to some legitimate end.”¹¹⁹
13 Although judges “may not substitute [their] personal notions of good public policy for
14 those of the legislature, the rational-basis standard is ‘not a toothless one.’”¹²⁰ The
15 link between the classification and objective is necessary to “provide guidance and
16 discipline for the legislature,” so that it may “know what sort of laws it can pass.”¹²¹
17 The requirement of “a rational relationship to an independent and legitimate
18 legislative end. . .ensure[s] that classifications are not drawn for the purpose of
19 disadvantaging the group burdened by the law.”¹²²

20 Much like the statute at issue in *Romer*, which attempted to deny
21 homosexuals equality under the laws of Colorado, HB 2281 is “born out of animosity
22 toward the class of persons affected,” in this case, Latinos.¹²³ The Ninth Circuit
23 recently warned the State of Arizona against “the selective application of legislation
24 to a small group” by quoting Justice Jackson:

25
26 ¹¹⁸ Arce Declaration, ¶ 21.

27 ¹¹⁹ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

28 ¹²⁰ *Navarro v. Block*, 72 F.3d 712, 717 (9th Cir. 1995) (citations omitted).

¹²¹ *Romer*, 517 U.S. at 632.

¹²² *Ibid.*, 517 U.S. at 633.

¹²³ *Ibid.*, 517 U.S. at 634.

1 “The framers of the Constitution knew, and we should not forget today, that
 2 there is no more effective practical guaranty against arbitrary and
 3 unreasonable government than to require that the principles of law which
 4 officials would impose upon a minority must be imposed generally.
 5 Conversely, nothing opens the door to arbitrary action so effectively as to
 6 allow those officials to pick and choose only a few to whom they will apply
 7 legislation and thus to escape the political retribution that might be visited
 8 upon them if larger numbers were affected. Courts can take no better
 9 measure to assure that laws will be just than to require that laws be equal in
 10 operation.”¹²⁴

11 By denying school districts the opportunity to develop programs to enhance
 12 the academic success of Latino students, subsection 112(A)(3) singles out
 13 race/ethnicity as a prohibited basis, while districts are free to strive to improve
 14 academic performance based on other criteria. School districts have a myriad of
 15 programs, such as those funded by Title I, which target students of low socio-
 16 economic status. Also, NCLB specifically allows the development of single-sex
 17 schools and programs to target student achievement.¹²⁵ Arizona cannot prohibit its
 18 school districts from similarly promoting the achievement of Latinos.

19 The National Governors Association has identified the achievement gap
 20 between “minority and disadvantaged students and their white counterparts” as “one
 21 of the most pressing education-policy challenges that states currently face.”¹²⁶ On
 22 the other hand, Arizona is unique in its prohibition of programs designed to close the
 23 achievement gap for Latino students. “If the adverse impact on the disfavored class
 24 is an apparent aim of the legislature, its impartiality [is] suspect.”¹²⁷ In passing HB
 25 2281, the Legislature’s impartiality is clearly suspect because its expressed aim is
 26 to eliminate MAS, and thereby deny to Latino students a successful avenue for
 27 improving their educational outcomes and for closing the achievement gap. Further,
 28

25 ¹²⁴ *Diaz v. Brewer*, 2011 U.S. App. LEXIS 18467, 14-15 (9th Cir. 2011), citing
 26 *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972), (quoting *Ry. Express Agency v. New*
 27 *York*, 336 U.S. 106, 112-113 (1949)(Jackson, J., concurring.))

27 ¹²⁵ See 20 U.S.C. §7215(a)(23).

28 ¹²⁶ See policy primer on “Closing the Achievement Gap,” published by the
 National Governors Association at <http://www.subnet.nga.org/educlear/achievement>
 (last accessed November 6, 2011).

¹²⁷ *R.Rd. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980), Stevens, J., (concurring).

1 HB 2281 appears to be a one of a kind statute in its objective of eliminating a
 2 program designed to improve the academic performance of Latino students
 3 purportedly in order to treat them as individuals. This absence of precedence is itself
 4 instructive, since “discriminations of an unusual character especially suggest careful
 5 consideration to determine whether they are obnoxious to the constitutional
 6 provision.”¹²⁸ Here it is clear that eliminating a program designed to enhance the
 7 academic achievement of Latino students has no affect on whether teachers treat
 8 their students as individuals and HB 2281 fails the rational relationship test.

9 **VII. A.R.S. §15-112 DISCRIMINATES ON A RACE/ETHNIC BASIS AGAINST
 10 THE PLAINTIFFS’ RIGHT TO ENGAGE IN THE POLITICAL PROCESS**

11 HB 2281 violates the Equal Protection Clause because it targets a program
 12 that focuses on a racial or ethnic issue, in this case the persistent achievement gap
 13 affecting Latino students, and removes the school districts’ authority to address **only**
 14 this racial or ethnic issue to a more remote level of government in a manner that puts
 15 “special burdens” on Latinos’ ability to benefit from the program.¹²⁹ The *Hunter* and
 16 *Seattle* cases “yield a simple but central principle:” A state may not “allocate[]
 17 governmental power nonneutrally, by explicitly using the **racial** nature of a decision
 18 to determine the decisionmaking process.”¹³⁰

19 A program has this type of racial focus if it “inures primarily to the benefit of
 20 the minority, and is designed for that purpose.”¹³¹ Second, the law must work a
 21 reallocation of political power or reordering of the decisionmaking process that
 22 places special burdens on a minority group’s ability to achieve its goals through that
 23 process.¹³² State action of this kind, “places **special** burdens on racial minorities
 24 within the governmental process” and makes it “**more** difficult for certain racial and
 25

26 ¹²⁸ *Romer*, 517 U.S. at 633.

27 ¹²⁹ See *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle Sch.*
Dist., 458 U.S. 457 (1982).

28 ¹³⁰ *Seattle*, 458 U.S. at 469-70.

¹³¹ *Ibid.*, 458 U.S. at 472.

¹³² *Ibid.*, 458 U.S. at 460.

1 religious minorities than for other members of the community to achieve legislation
2 that is in their interest.”¹³³

3 In passing HB 2281, the Arizona Legislature restricted the TUSD Governing
4 Board’s authority to address the educational inequities affecting Latino and other
5 racial and ethnic minority students by prohibiting the Governing Board from
6 implementing programs that “are designed primarily for pupils of a particular ethnic
7 group.”¹³⁴ This impermissible reallocation of decision making is much like that in
8 *Seattle*, where the school district devised a magnet school program with busing to
9 integrate the schools. After opponents failed to convince the school board to reverse
10 the program, they successfully promoted a state-wide initiative that prohibited
11 assigning students to schools other than to their closest neighborhood schools.
12 Under the new scheme, minority groups that wished to implement the busing plan
13 would no longer be able to do so by convincing the local school board, but would be
14 compelled to mount a state-wide campaign to overturn the initiative. The Supreme
15 Court found the unconstitutional vice of the initiative was that it “placed **burdens** on
16 the implementation of educational policies designed to deal with race on the local
17 level” by “treating educational matters involving racial criteria differently from other
18 educational matters.”¹³⁵

19 HB 2281 is equally flawed. The MAS program, like the busing program in
20 *Seattle*, “at bottom inures primarily to the benefit of the minority, and is designed for
21 that purpose. Education has come to be a ‘principle instrument in awakening the
22 child to cultural values, in preparing him to adjust normally to his environment’”¹³⁶

24
25 ¹³³ *Ibid.*, 458 U.S. at 470.

¹³⁴ A.R.S. §15-112(A)(3).

¹³⁵ *Seattle*, at 469, quoting *Hunter*, at 719 (emphasis in original).

¹³⁶ *Seattle*, at 472; quoting *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954).

27 Superintendent Huppenthal concedes that HB 2281 targets a program that
28 “inures primarily to the benefit of the minority” by alleging that TUSD’s MAS
program was “formed to specifically enhance the academic success of Latino
students.” See Huppenthal Finding, p.2.

1 The MAS program was borne out of the community's long-standing desire to provide
2 TUSD's Latino students with a curriculum that would engage them with the material,
3 resulting in the reversal of many negative educational trends that affect Latinos.¹³⁷
4 Data from four years of standardized AIMS testing has proven the success of the
5 MAS program in making academic gains with primarily Latino students, a group that
6 has had limited achievement in general academic programs.¹³⁸

7 In response to community pressure, the TUSD Governing Board created MAS
8 pursuant to its statutory responsibility for the function of its schools and to set
9 curricula.¹³⁹ When Superintendent Horne failed in his efforts to convince Tucson
10 citizens to lobby the Governing Board to shut down the program,¹⁴⁰ he drafted and
11 successfully promoted the passage of HB 2281.¹⁴¹ The statute removed the
12 Governing Board's authority to act affirmatively in a curricular matter involving racial
13 or ethnic criteria, but left intact the Board's authority to deal with all other types of
14 curricular matters. Like supporters of the Seattle integration plan, supporters of MAS
15 now must not only convince the TUSD Governing Board to implement the program,
16 as supporters of any **other** type of educational program must do. Rather, HB 2281
17 puts an **additional** burden on those who seek programs to address the achievement
18 gap generally suffered by Latino and other minority students by "lodging
19 decisionmaking authority over the question at a new and remote level of
20 government."¹⁴² They now must clear a much higher hurdle and also convince the
21 Arizona Legislature, a body well-known for passing legislation hostile to Latinos, to
22
23
24

25 ¹³⁷ Arce Declaration, ¶ 7.

26 ¹³⁸ Arce Declaration, Exhibit A.

27 ¹³⁹ A.R.S. §15-341(A)(5); see *Savage v. Glendale H.S. Union Sch. Dist.*, 343
28 F.3d 1036, 1044-48 (9th Cir. 2003) (discussing the decentralized nature of Arizona
public schools, placing primary responsibility with the local governing boards.)

¹⁴⁰ Open Letter.

¹⁴¹ Horne Finding, p.1.

¹⁴² *Seattle*, 458 U.S. at 483.

1 overturn HB 2281.¹⁴³

2 It makes no difference that the State has the power to set curricula. The State
3 has delegated that power to the local governing boards.¹⁴⁴ Just as the Supreme
4 Court confronted in *Seattle*, the issue here is not whether the State has the “authority
5 to intervene in the affairs of local school boards; it is, rather, whether the State has
6 exercised that authority in a manner consistent with the *Equal Protection Clause*.”¹⁴⁵
7 “In a most direct sense, this implicates the judiciary’s special role in safeguarding the
8 interests of those groups that are ‘relegated to such a position of political
9 powerlessness as to command extraordinary protection from the majoritarian
10 political process.’”¹⁴⁶ Here, the Arizona Legislature has exercised its considerable
11 power to impermissibly deny Latinos the ability to advocate for an educational
12 program that benefits their community. This Court should require that Arizona extend
13 Equal Protection of the laws to all of its citizens and strike down HB 2281.

14 //

15 //

17 ¹⁴³ The reasoning of the Ninth Circuit ruling in *Coalition for Economic Equity v.*
18 *Wilson*, rejecting a constitutional challenge on the basis of the Equal Protection clause’s
19 political process theory, does not apply to the facts at issue here. 122 F.3d 692, 696 (9th
20 Cir. 1997). *Wilson* involved an amendment to the California constitution prohibiting
21 public race and gender **preferences**. The constitutional challenge was only to the
22 prohibition of government affirmative action programs. *Ibid.*, 122 F.3d at 697-98. The
23 Ninth Circuit distinguished *Seattle* on the basis that the California prohibition on racial
24 and gender preferences “prohibits all its instruments from discriminating against or
25 granting preferential treatment to anyone on the basis of race or gender” and that its law
26 “addresses in a neutral-fashion race-related and gender-related matters. *Ibid.*, 122 F.3d
27 at 707. Critical to the court’s decision was the fact that the amendment at issue did not
28 present an obstruction to equal treatment, but rather to preferential treatment that
creates a situation where there are winners and losers. *Ibid.*, 122 F.3d at 708. On the
other hand, like the law at issue in *Seattle*, HB 2281 grants no preferences that benefit
one group while disadvantaging another and does not address ethnic-related matters in
a neutral fashion. Rather, it singles them out for different treatment and thus presents
an obstruction to equal treatment.

¹⁴⁴ A.R.S. §15-341(A)(5)

¹⁴⁵ 458 U.S. at 476.

¹⁴⁶ *Ibid.*, 458 U.S. at 486 (citation omitted).

1 **VIII. SUPERINTENDENT HUPPENTHAL'S FINDING AND HB 2281 VIOLATE**
 2 **PLAINTIFFS' RIGHT TO FREE SPEECH**

3 HB 2281 represents an illegitimate attempt to stifle the voices of teachers and
 4 students speaking within an approved curriculum in Arizona classrooms. "First
 5 Amendment rights, applied in light of the special characteristics of the school
 6 environment, are available to teachers and students. It can hardly be argued that
 7 either students or teachers shed their constitutional rights to freedom of speech or
 8 expression at the schoolhouse gate."¹⁴⁷ The Supreme Court "ha[s] not failed to apply
 9 the First Amendment's mandate in our education system where essential to
 10 safeguard the fundamental values of freedom of speech and inquiry and of belief."¹⁴⁸
 11 Along with the broad discretion of the States and school boards to manage school
 12 affairs comes the limitation that such discretion "must be exercised in a manner that
 13 comports with the transcendent imperatives of the First Amendment."¹⁴⁹ Although
 14 state and local boards may enforce regulations "reasonably related to pedagogical
 15 concerns,"¹⁵⁰ they must discharge their "important, delicate, and highly discretionary
 16 functions" within the limits and constraints of the First Amendment.¹⁵¹ "Because First
 17 Amendment freedoms need breathing space to survive, [the] government may
 18 regulate in the area only with narrow specificity."¹⁵²

19 Neither the Supreme Court nor the Ninth Circuit has "definitively resolved
 20

21 ¹⁴⁷ *Tinker v. Des Moines Indep. School District*, 393 U.S. 503, 506 (1969).

22 ¹⁴⁸ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

23 ¹⁴⁹ *Pico*, 457 U.S. 853, 864 (1982) (school board may not remove books from
 24 school library on the basis of partisan or political disapproval); see also, *Meyer v.*
 25 *Nebraska*, 262 U.S. 390 (1923) (state may not forbid teaching foreign language in public
 and private schools); *Epperson*, 393 U.S. 97 (state may not prohibit the teaching of
 evolution).

26 ¹⁵⁰ *Hazelwood Sch. Dist. v. Kuhlmer*, 434 U.S. 260, 273 (1988); see also,
California Teachers Assoc., 271 F.3d at 1149.

27 ¹⁵¹ *Pico*, 457 U.S. at 865; see also *Citizens United*, 130 S.Ct. at 911 ("Where
 28 Congress finds that a problem exists, we must give that finding due deference; but
 Congress may not choose an unconstitutional remedy.")

¹⁵² *Keyishian*, 385 U.S. at 605, citing *N.A.A.C.P. v. Button*, 371 U.S. 432-433
 (1963).

1 whether and to what extent a teacher's instructional speech is protected by the First
 2 Amendment."¹⁵³ However, the Ninth Circuit has noted that *Hazelwood* supports the
 3 limited right to classroom speech in furtherance of the course curriculum.¹⁵⁴ In
 4 *Downs v. LAUSD*, the court recognized that where "activities may fairly be
 5 characterized as a part of the school curriculum, whether or not they occur in a
 6 traditional classroom setting," the "educators' authority in this area enable[s] them
 7 to 'assure that the participants learn whatever lessons the activity is designed to
 8 teach...."¹⁵⁵ Thus, in the educational setting, teachers and students have the right to
 9 communicate within the curriculum in a manner that facilitates learning the intended
 10 lesson.¹⁵⁶

11 Beyond protecting the rights of a teacher to express ideas, the First
 12 Amendment also protects the students' right to receive information and ideas.¹⁵⁷

14 ¹⁵³ *Cal. Teachers Assoc.*, 271 F.3d at 1148. Nor have the Supreme Court or the
 15 Ninth Circuit applied the restrictions on the Free Speech rights of public employees,
 16 recognized by the Supreme Court in *Garcetti v. Ceballos*, to public school teachers'
 17 speech within the curriculum. 547 U.S. 410, 425 (2006) (The Court does not decide
 18 whether "the analysis we conduct today would apply in the same manner to a case
 19 involving speech related to scholarship or teaching."); *cf. Johnson v. Poway Unified*
 20 *Sch. Dist.*, 2011 U.S. App. LEXIS 18882 (9th Cir. 2011)(no First Amendment violation
 where teacher ordered not to preach his personal religious views to students in
 classroom.)

20 ¹⁵⁴ 484 U.S. 260 (1988).

21 ¹⁵⁵ 228 F.3d 1003, 1010 (2000), quoting *Hazelwood*, 484 U.S. at 271.

22 ¹⁵⁶ A teacher's instructional speech entitled to First Amendment protection is not
 23 to be confused with the governing board's curricular speech. A.R.S. §15-341(A)
 24 delegates the authority to develop public school curricula to local governing boards.
 25 The curriculum is "a case of the government itself speaking," in this case, TUSD. See
 26 *Downs*, 228 F.3d at 1011. HB 2281, on the other hand, is not a curriculum. A curriculum
 27 is "a course of study in one subject at a school or college." Dictionary.com,
<http://dictionary.reference.com/browse/curriculum> (last accessed July 20, 2011.). HB
 28 2281 does not describe a "course of study." Rather it seeks to shut down one program
 in one school district. See *Epperson*, 393 U.S. at 105 (1968)(recognizing "the freedom
 of teachers to teach and of students to learn"); *Pico*, 457 U.S. at 867 ("the Constitution
 protects the right to receive information and ideas.")

¹⁵⁷ *Pico*, 457 U.S. at 867, citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969);
 see also *Monteiro v. Tempe Union H.S. Dist.*, 158 F.3d 1022, 1027, n.5 (students' right
 to receive broad range of information to freely form own thoughts is necessary predicate

1 This right is an inherent corollary of the rights to free speech and press that
 2 are explicitly guaranteed by the Constitution, in two senses. First the right to
 3 receive ideas follows ineluctably from the *sender's* First Amendment right to
 4 send them: "The right of freedom of speech and press. . .embraces the right
 5 to distribute literature, and necessarily protects the right to receive it." [citation
 6 omitted.] The dissemination of ideas can accomplish nothing if otherwise
 willing addressees are not free to receive and consider them. It would be a
 barren marketplace of ideas that had only the sellers, and no buyers. [citation
 omitted.] More importantly, the right to receive ideas is a necessary predicate
 to the *recipient's* meaningful exercise of his own rights of speech, press, and
 to political freedom.¹⁵⁸

7 It is axiomatic that "[i]n our system, students may not be regarded as closed-circuit
 8 recipients of only that which the State chooses to communicate. . . [S]chool officials
 9 cannot suppress 'expressions of feeling' with which they do not wish to contend."¹⁵⁹

10 The history and context of HB 2281 reveal that it was not motivated by
 11 legitimate curricular concerns, but rather by invidious viewpoint discrimination.¹⁶⁰
 12 Superintendents Huppenthal and Horne and other politicians created, passed, and
 13 implemented HB 2281 solely because they do not like the Mexican American
 14 perspective presented by the curriculum authorized by TUSD.

15 In *Morse v. Frederick*, the Supreme Court rejected the claim that the First
 16 Amendment allows the suppression of speech based on this type of viewpoint
 17 discrimination.¹⁶¹ In that case, both the school district and the United States
 18 unsuccessfully urged the broad argument "that the First Amendment permits public
 19 school officials to censor any student speech that interferes with a school's
 20 'educational mission.'"¹⁶² Pursuant to that discredited theory, for example, a school
 21 that defined its mission as solidarity with soldiers could have tried to ban the black
 22 armbands worn in *Tinker*, or a school with an educational mission to promote world

23 _____
 24 to meaningful exercise of his own rights of speech, press and political freedom.)

25 ¹⁵⁸ *Pico*, 457 U.S. at 867 (emphasis in original).

26 ¹⁵⁹ *Pico*, 457 U.S. at 868, quoting *Tinker*, 393 U.S. at 511.

27 ¹⁶⁰ Cf. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)
 28 ("[S]ome purported interests—such as a desire to suppress support for a minority party
 or an unpopular cause, or to exclude the expression of certain points of view from the
 marketplace of ideas...are...plainly illegitimate.").

¹⁶¹ 551 U.S. 393 (2007).

¹⁶² 551 U.S. at 423, Alito, J. concurring.

1 peace could have sought to ban buttons expressing support for the troops.¹⁶³ Or, in
2 this case, lawmakers with an educational mission to treat and value pupils as
3 individuals could seek to ban discussions of the legacy of oppression in the United
4 States in the context of learning about Mexican Americans from the perspective of
5 Mexican Americans.¹⁶⁴ Justice Alito further declared that “the ‘educational mission’
6 argument would give public school authorities a license to suppress speech on
7 political and social views based on disagreement with the viewpoint expressed. The
8 argument, therefore, strikes at the very heart of the First Amendment.”¹⁶⁵

9 HB 2281 ostensibly seeks to value students as individuals. In reality, it gives
10 life to politicians’ efforts to drive out a curriculum that teaches about Mexican
11 Americans and is designed to lift up Latino students. HB 2281 does not represent
12 a “curriculum.”¹⁶⁶ Rather, it represents an illegitimate “educational mission” that is
13 beyond the State’s authority to set curriculum and impermissibly burdens teachers’
14 and students’ speech, speech which is otherwise properly within the district-
15 approved MAS curriculum.

16 While “public education is committed to the control of state and local
17 authorities,” “[t]he vigilant protection of constitutional freedoms is nowhere more vital
18 than in the community of American schools.”¹⁶⁷ “Teachers and students must always
19 remain free to inquire, to study and to evaluate, to gain new maturity and
20 understanding; otherwise our civilization will stagnate and die.”¹⁶⁸ In light of the
21

22 ¹⁶³ *Ibid.*

23 ¹⁶⁴ See A.R.S. §15-111.

24 ¹⁶⁵ 551 U.S. at 423.

25 ¹⁶⁶ See text accompanying fn. 156.

26 ¹⁶⁷ *Epperson*, 393 U.S. at 104, citing *Shelton v. Tucker*, 364 U.S. 479, 481
27 (1960).

28 ¹⁶⁸ *Keyishian*, 385 U.S. at 603, citing *Sweezy v. State v. State of New
Hampshire*, 354 U.S. 234, 250 (1957); see also, *Erznoznik v. City of Jacksonville*, 422
U.S. 205, 213 (1975)(“minors are entitled to a significant measure of First Amendment
protection,” citing *Tinker*, 393 U.S. 503, “and only in relatively narrow and well-defined
circumstances may government bar public dissemination of protected materials to
them.”)

1 plaintiffs' First Amendment rights, the Court is compelled to closely scrutinize the
2 statute at issue and its application. HB 2281 must provide a high degree of
3 specificity and clarity.¹⁶⁹

4 TUSD adopted a legitimate curriculum in its creation of MAS and its students
5 have a right to receive instruction that the Governing Board deems "to be of
6 legitimate educational value."¹⁷⁰ As the Ninth Circuit recognized, "Certainly when a
7 school board identifies information that it believes to be a useful part of a student's
8 education, that student has the right to receive the information."¹⁷¹ On the other
9 hand, HB 2281 is an exceptional piece of legislation that goes beyond a legitimate
10 exercise of power and does not create a "curriculum" in any sense of the word.
11 Rather, HB 2281 is motivated by the goal of using invidious discrimination to deny
12 TUSD's legitimate efforts to enhance students' academic achievement thorough the
13 vehicle of learning about Mexican American history, literature, and culture from the
14 perspective of Mexican Americans. Superintendent Huppenthal and the State's
15 endorsement of this type of discriminatory viewpoint suppresses the plaintiffs' rights
16 of free speech and must be invalidated.

17 This protected speech is unlike the government speech at issue in *Downs*.
18 In that case, the Ninth Circuit determined that the message of school-sponsored
19 bulletin boards was under the control of the school and was "government speech."¹⁷²
20 The school district dictated the message to be communicated on the boards.¹⁷³ The
21 school was in control of materials on the boards and within its rights to remove items
22 inconsistent with its message.¹⁷⁴ Therefore, the teacher "had no *First Amendment*
23 right to dictate or **contribute** to the content of that speech."¹⁷⁵

25 ¹⁶⁹ *Erznoznik*, 422 U.S. at 217-218.

26 ¹⁷⁰ *Monteiro*, 158 F.3d at 1028.

27 ¹⁷¹ *Ibid.*

28 ¹⁷² *Downs*, 228 F.3d 1003.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*, 228 F. 3d at 1009 (emphasis added).

1 But “government speech” in the form of a bulletin board is qualitatively
2 different from “government speech” in the form of a prescribed curriculum. The
3 curriculum dictates general content, but individual teachers are responsible for
4 communicating that content in unique and creative ways. School districts do not
5 provide teachers with scripts to communicate lessons. Every school day, thousands
6 of Arizona teachers engage in classroom speech to communicate the curriculum.
7 School principals do not, cannot, and should not desire to control every word a
8 teacher says in the classroom, in the way that the school in *Downs* desired and was
9 **able** to control the message conveyed by the bulletin boards. While a teacher has
10 no right to contribute to a school-sponsored bulletin board, a teacher possesses not
11 only a right, but also an obligation to contribute to the curriculum in a classroom.
12 Only if the district determines that the teacher has stepped outside of the prescribed
13 curriculum does that right cease. The plaintiffs here do not assert a First Amendment
14 right to dictate the curriculum adopted by TUSD, but rather to teach it.

15 Along with the broad discretion of the States and governing boards to manage
16 school affairs comes the limitation that such discretion “must be exercised in a
17 manner that comports with the transcendent imperatives of the First Amendment.”¹⁷⁶
18 Courts should not intervene in school affairs unless conflicts arise that “directly and
19 sharply implicate basic constitutional values.”¹⁷⁷ That is the case here. HB 2281 is
20 not a curriculum. Rather, it was designed to shut down one program in one school
21 district. In finding that MAS is in violation of HB 2281, Superintendent Huppenthal
22 joins the Legislature in acting far beyond legitimate government discretion in
23 curricular matters.¹⁷⁸ To allow the government to regulate education in this awkward
24

25 ¹⁷⁶ *Pico*, 457 U.S. at 864 (school board may not remove books from school
26 library on the basis of partisan or political disapproval); see also, *Meyer*, 262 U.S. 390
27 (state may not forbid teaching foreign language in public and private schools);
28 *Epperson*, 393 U.S. 97 (state may not prohibit the teaching of evolution).

¹⁷⁷ *Ibid.* 393 U.S. at 104.

¹⁷⁸ “Education is not criticized or challenged on legal grounds because it has a message but, rather, because the government has exceeded its authority-in effect, that

1 and aggressively viewpoint-discriminatory manner would insulate all purported
2 curricular decisions, regardless of their invidious nature, from First Amendment
3 protection or control. This is not the law under our Constitution and should not be the
4 law. The issue before the Court is not whether the Constitution applies, but whether
5 the Constitution has been violated.

6 Viewpoint discrimination is especially harmful where it distorts the nature of
7 important institutions. In *Arkansas Educ. Television Comm. v. Forbes*, the Supreme
8 Court recognized that “candidate debates are of exceptional significance in the
9 electoral process.”¹⁷⁹ Therefore, to allow a public television station to exclude a
10 political candidate from a televised debate on the basis of viewpoint discrimination
11 would present the “inevitability of skewing the electoral dialogue.”¹⁸⁰ Likewise, in *LSC*
12 *v. Velazquez*, the government violated the First Amendment by funding legal
13 representation, but imposing viewpoint-based restrictions on the lawyers, prohibiting
14 them from making certain arguments on behalf of their clients. The Court explained
15 that such restrictions “distort[] the legal system by altering the traditional role of the
16 attorneys.”¹⁸¹

17 In this case, HB 2281 and Superintendent Huppenthal and Horne’s
18 discrimination against the viewpoint communicated by the MAS curriculum distorts
19 the role of education. Rather than “safeguard the fundamental values of speech and
20 inquiry and of belief,”¹⁸² and “teach by example the shared values of a civilized social
21 order,”¹⁸³ Superintendents Huppenthal and Horne give the students a remarkable
22 lesson. They give them a first-hand lesson in government oppression.

23 This is not a case of a court determining the authority of a school or school
24

25 what the government is doing with its educational institutions is *not* educating.” “The
26 Many Faces of Government Speech,” Randall P. Bezanson and William G. Buss, 86
Iowa L. Rev. 1377, 1421 (2001).

27 ¹⁷⁹ 523 U.S. 666, 675 (1998).

¹⁸⁰ *Ibid.* 523 U.S. at 676.

¹⁸¹ 531 U.S. 533, 534 (2001).

¹⁸² *Epperson*, 393 U.S. at 104.

¹⁸³ *Fraser*, 478 U.S. at 683.

1 district to engage in its day-to-day operations. A principal has the authority to
2 withhold publication of a student newspaper story that is potentially defamatory and
3 an invasion of family privacy,¹⁸⁴ or to take down a teacher's materials on a bulletin
4 board that do not comport with the school-sponsored message.¹⁸⁵ Likewise, a
5 student may be disciplined for a sexually provocative speech at a mandatory school
6 program,¹⁸⁶ or for displaying a banner at a school-sanctioned event that appears to
7 promote illegal drug use.¹⁸⁷ Even as argued by the dissenting opinions, none of
8 these cases present a scenario of unfettered government authority.

9 But the present case is much different. Here, the State and Superintendents
10 Huppenthal and Horne seek to censor the very stories that American schoolchildren
11 are taught about their nation and its principles, conflicts, wars, and treatment of
12 others. No court should endorse such an absolute power over these types of lessons
13 where the government censorship is racially discriminatory, vague, selectively
14 designed, selectively enforced, and viewpoint-specific. Superintendent Huppenthal
15 and Horne's Findings and HB 2281 embody invidious discrimination and have been
16 applied to suppress the plaintiffs' First Amendment rights to free speech. This Court
17 should strike them down.

18 **IX. ELIMINATION OF MEXICAN AMERICAN STUDIES VIOLATES** 19 **PLAINTIFFS' SUBSTANTIVE RIGHT TO DUE PROCESS**

20 The Fourteenth Amendment provides, "No State shall. . .deprive any person
21 of life, liberty, or property, without due process of law." As a liberty interest, the law
22 "affords constitutional protections to personal decisions relating to. . . education,"¹⁸⁸
23 although such decisions are not afforded heightened protection as a fundamental
24

25 ¹⁸⁴ *Hazelwood*, 484 U.S. 260.

26 ¹⁸⁵ *Downs*, 228 F.3d 1003.

27 ¹⁸⁶ *Fraser*, 478 U.S. 675.

28 ¹⁸⁷ *Morse*, 551 U.S. 393.

¹⁸⁸ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851
(1992); see also *Meyer*, 262 U.S. at 399 (Liberty interest encompasses right of
individual "to acquire useful knowledge.").

1 right.¹⁸⁹ Ethnic studies programs in general,¹⁹⁰ and TUSD's MAS program in
2 particular,¹⁹¹ have proven to be of particular benefit to enhance the academic
3 achievement of Latino students. On the other hand, elimination of courses designed
4 to benefit a particular ethnic group has no effect on whether students are treated as
5 individuals. Thus, the goal of HB 2281 to eliminate the MAS program does not
6 rationally further any legitimate state interest and HB 2281 unreasonably infringes
7 upon the student and parent plaintiffs' liberty to choose this type of educational
8 program that has been demonstrated to be of particular value to them as Latino
9 students, and is offered by the school district.

10 Under the substantive due process analysis, Superintendent Huppenthal has
11 the burden to prove that his action to terminate MAS is rationally related to a
12 legitimate state interest that justifies intruding into the educational decisions of
13 parents and their children.¹⁹² A.R.S. §15-111 declares the State's interest in treating
14 students as individuals. But in reality, there is no legitimate state interest because
15 HB 2281 is borne out of an invidious attempt to deny Mexican American identity and
16 culture. Much like the Colorado law prohibiting anti-discrimination laws protecting
17 homosexuals which was struck down by the Supreme Court in *Romer*, HB 2281 is
18 "inexplicable by anything but animus toward the class it affects."¹⁹³

19 This case is similar to *Meyer v. Nebraska*, where the Supreme Court
20 invalidated a state law prohibiting students younger than eighth grade from learning
21 in a language other than English.¹⁹⁴ Important to the Court's determination that
22 parents have a right to control their children's education and that students have the
23

24 ¹⁸⁹ *Meyer*, 262 U.S. at 399.

25 ¹⁹⁰ See "The Academic and Social Value of Ethnic Studies: A Research Reveiw"
26 by Christine E. Sleeter, PhD., attached hereto as Exhibit 5.

27 ¹⁹¹ Cambium Report, pp.49-50; Arce Decl.

28 ¹⁹² See *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("if a law neither burdens a
fundamental right nor targets a suspect class, we will uphold the legislative classification
so long as it bears a rational relation to some legitimate end.")

¹⁹³ *Ibid.*, 517 U.S. at 632.

¹⁹⁴ 262 U.S. 390.

1 right to acquire knowledge, was the regard for education and acquisition of
2 knowledge by the American people “as matters of supreme importance that should
3 be diligently promoted.”¹⁹⁵ Specifically, the Court held that the state’s desire “to foster
4 a homogenous people with American ideals” went beyond the State’s legitimate
5 authority and conflicted with the right to conduct classes in a language other than
6 English.¹⁹⁶ Likewise, any attempt by the State of Arizona to shut down the MAS
7 program in the interest of fostering a homogenous people with an exclusive version
8 of American ideals is also an illegitimate interest.

9 Arizona’s current political climate is hostile to Mexican Americans. The
10 Supreme Court has warned that “times can blind us to certain truths and later
11 generations can see that laws once thought necessary and proper in fact serve only
12 to oppress.”¹⁹⁷ Should the State be successful in its efforts to eliminate MAS, the
13 stigma to Latino students, as well as to Mexican Americans in general would be
14 inevitable, as was the stigma that attached to the Texas law criminalizing
15 homosexual conduct in *Lawrence v. Texas*.¹⁹⁸ There is no legitimate state interest
16 that can justify this type of intrusion into students’ lives and educational choices.

17 According to the Cambium Report, there is no indication that teachers in MAS
18 classes fail to treat students as individuals or in any way violate HB 2281. To the
19 contrary, auditors observed that “teachers collectively are building nurturing
20 relationships with students,” that “a culture of respect exists,” and that “students from
21 many ethnicities are physically sitting in Mexican American Studies Department
22 classes and are learning that different perspectives are valuable, that Americans
23

24 ¹⁹⁵ *Ibid.*, 262 U.S. at 400.

25 ¹⁹⁶ *Ibid.*, 262 U.S. at 402. The Supreme Court also criticized the Nebraska
26 Supreme Court’s exemption of teaching Latin, Greek or Hebrew from the foreign
27 language ban, much like HB 2281 specifically exempts the instruction of the Holocaust
28 and other incidences of genocide, while attempting to ban teaching about the
oppression of Mexican Americans. See A.R.S. §15-112(F).

¹⁹⁷ *Lawrence v. Texas*, 539 U.S. 558, 579 (2003); *Raich v. Gonzalez*, 500 F.3d
850, 865 (9th Cir. 2007).

¹⁹⁸ 539 U.S. at 575.

1 come from many backgrounds, and that ***being an American means that all people***
 2 ***are accepted.***¹⁹⁹

3 Elimination of the MAS program will not further the state's interest in treating
 4 students as individuals. To the contrary, by eliminating a program that teaches
 5 students that "being an American means that all people are accepted," the state will
 6 damage its own purported interest. HB 2281 is not rationally related to a legitimate
 7 state purpose and must be struck down.

8 **X. PLAINTIFFS SATISFY THE REMAINING ELEMENTS REQUIRED FOR A
 9 PRELIMINARY INJUNCTION.**

10 **A. Only An Injunction Can Prevent Irreparable Harm.**

11 The Supreme Court has recognized that the "loss of First Amendment
 12 freedoms, for even minimal periods of time, unquestionably constitutes irreparable
 13 injury."²⁰⁰ In the Ninth Circuit "an alleged constitutional infringement will often alone
 14 constitute irreparable harm."²⁰¹ The plaintiffs, as educators and students residing in
 15 Arizona have alleged substantial ongoing violations of their Constitutional rights,
 16 which would continue to cause irreparable harm in the absence of an injunction.

17 HB 2281 and both Superintendents Huppenthal and Horne's Findings have
 18 all had substantial negative effects on the MAS program and on the plaintiffs.
 19 Politicians and the media have intensely scrutinized and denigrated the program.
 20 As a result of Superintendent Huppenthal's Finding, the Governing Board has found
 21 itself embroiled in an administrative appeal.

22 A recommendation from the ALJ is expected as early as November 19.
 23 However, the Superintendent of Public Instruction has full discretion to accept, reject
 24 or modify the recommendation.²⁰² Moreover, TUSD's claims are not coextensive with

25
 26 ¹⁹⁹ Cambium Report, p. 63 (emphasis added).

27 ²⁰⁰ *Elrod v. Burns*, 427 U.S. 347, 373 (1976); see also *Thalheimer v. City of San*
Diego, 2011 U.S. App. LEXIS 11590, 48 (9th Cir. 2011).

28 ²⁰¹ *U.S. v. Arizona*, 641 F.3d 339, 2011 U.S. App. LEXIS 7413, 70-71 (9th Cir.
 2011)(citation omitted).

²⁰² A.R.S. §41-1092.08(B)

1 the plaintiffs' claims for violations of their Constitutional rights. The plaintiffs have
2 alleged substantial violations of their rights to Equal Protection, Freedom of Speech
3 and Due Process. Regardless whether the ALJ finds for or against TUSD,
4 Superintendent Huppenthal will impose the ten percent sanction, effectively forcing
5 TUSD to terminate the program and putting an end to the plaintiffs' efforts to
6 vindicate those rights in this Court. Further, Superintendent Horne designed the
7 draconian penalty imposed by HB 2281 of withholding millions of dollars to create
8 a situation in which it would be practically impossible for TUSD to pursue an appeal
9 from the Superintendent's final agency decision. TUSD is in an administrative forum
10 where the Superintendent is the judge, jury and executioner and where litigation of
11 the plaintiffs' constitutional claims against the validity of HB 2281 and of
12 Superintendent Huppenthal's Finding cannot receive a full and adequate review.

13 Also, the livelihoods of the plaintiff teachers and director Sean Arce are at
14 stake. As the director of the MAS program, Mr. Arce will lose his employment if the
15 program is eliminated.²⁰³ If the plaintiff teachers do not continue in their jobs as MAS
16 teachers, it is likely that they will not have positions with TUSD.²⁰⁴ This is an action
17 for equitable relief and there is no opportunity for the teachers to recover lost wages.
18 The Ninth Circuit has recognized irreparable harm where a teacher was to be
19 removed from his teaching position and placed in an administrative position at an
20 equal salary.²⁰⁵ In *Chalk*, the HIV-positive teacher was specially trained to teach
21 hearing-impaired students and the district wanted to remove him from the classroom
22 due to fear of transmission of the virus. The court found that the emotional harm of
23 removal due to his closeness with his students would cause irreparable harm despite
24 the lack of monetary damage.²⁰⁶ Similarly, MAS teachers face the same emotional

25
26 ²⁰³ Arce Declaration, ¶¶ 16-18.

27 ²⁰⁴ Arizona public school teachers have no tenure or seniority rights in their
28 employment. A.R.S. §15-502(H). Due to budget cuts and staff reduction, laid off
teachers face the likelihood of unemployment.

²⁰⁵ *Chalk*, 840 F. 2d at 710.

²⁰⁶ *Ibid.*

1 harm plus the loss of employment and income. They will be irreparably harmed more
2 than the teacher in the *Chalk* case unless the Court grants the injunction.²⁰⁷

3 Time is in short supply. In *Thalheimer*, where the plaintiff sought to engage in
4 political speech, the Ninth Circuit recognized that “timing is of the essence in politics”
5 and that “a delay of even a day or two may be intolerable.”²⁰⁸ Delays in education are
6 equally intolerable. Should the program be suspended due to Superintendent
7 Huppenthal’s Finding, the plaintiff students could also lose the opportunity to take
8 MAS classes while litigation continues for months or years.²⁰⁹

9 An order from this Court enjoining the enforcement of the Huppenthal and
10 Horne Findings until the merits of the present action are resolved would preserve
11 the status quo and prevent the irreparable damage to the plaintiffs’ that a shut down
12 of MAS would inevitably cause.

13 **B. The Balance of Equities Tips in Favor of the Plaintiffs.**

14 In assessing whether the plaintiffs have carried this burden of what the Ninth
15 Circuit refers to as “the balance of hardships,” the district court must “balance the
16 interests of all parties and weigh the damage to each.”²¹⁰ In this case, all of the
17 damage is to the plaintiffs. The students could lose the opportunity to benefit from
18 a successful program and to gain a potentially transformative educational
19 experience. Superintendent Huppenthal and HB 2281 have violated the plaintiff’s
20 rights to Equal Protection, Free Speech and Due Process. The MAS program has
21 been targeted for elimination and the plaintiffs have been forced to operate under a
22

23
24 ²⁰⁷ See also *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008)(“[T]he loss of
25 one’s job does not carry merely monetary consequences; it carries emotional damages
26 and stress, which cannot be compensated by mere back payment of wages.”);
Stormans v. Selecky, 586 F.3d at 1138; *Enyart v. Nat. Conf. of Bar Examiners*, 630 F.3d
27 1153, 1165 (9th Cir. 2011)(Irreparable harm where plaintiff would lose opportunity to
28 pursue chosen profession.)

²⁰⁸ 2011 U.S. App. LEXIS at 48.

²⁰⁹ Plaintiff Ms. Lopez is in tenth grade and will be eligible to take the classes in
the fall of 2012.

²¹⁰ *Storman’s*, 586 F. 3d at 1138.

1 vague statute, not knowing what type of classroom speech and materials might
2 cause a catastrophic loss of district funding. The teachers and director are in danger
3 of losing their jobs and the students are in danger of losing the educational
4 opportunity that the district has offered to other students in the other Ethnic Studies
5 programs. In addition, Tucson's Latino community faces an unconstitutional
6 marginalization of its political voice. Moreover, they are all at risk of suffering the
7 indignity of having a marker of Mexican American educational advancement wiped
8 out for invidious reasons.

9 On the other hand, Superintendent Huppenthal would be unaffected and suffer
10 no harm by preservation of the status quo. Under these circumstances, the balance
11 of hardships tilts sharply in the plaintiffs' favor.

12 **C. An Injunction Is In the Public's Interest.**

13 "The public interest analysis for the issuance of a preliminary injunction
14 requires [the Court] to consider whether there exists some critical public interest that
15 would be injured by the grant of preliminary relief."²¹¹ There are none. It is the
16 plaintiffs' constitutional harms that loom large here. It is not in the public's interest
17 to allow the state to violate the Constitution, "especially where there are no adequate
18 remedies available to compensate the . . . plaintiffs for the irreparable harm that
19 would be caused by the continuing violation."²¹²

20 The public has a paramount interest in education. In determining whether to
21 issue an injunction, the Court should carefully consider the effect on those at-risk
22 students that the program is designed to help. It would most certainly not be in the
23 public interest to deny them the opportunity to improve their academic performance
24 through a program that has been proven especially successful in reaching them
25 where other programs fail. It also would not be in the public interest to allow a band
26

27 ²¹¹ *Wild Rockies*, 632 F.3d at 1138 (citation omitted).

28 ²¹² *Cal. Pharmacists Assoc. v. Maxwell-Jolley*, 563 F.3d 847, 852-53 (9th Cir. 2009); see also *U.S. v. Arizona*, 2011 U.S. App. LEXIS 7413, 71; *Enyart*, 630 F.3d at 1167 (public clearly has interest in enforcement of anti-discrimination laws).

1 of politicians to exploit anti-Mexican American sentiment for political gain. And it
2 certainly would not be in the public interest to allow one public official to exercise
3 unchecked authority to drive out learning about a particular viewpoint from the
4 perspective of Mexican Americans.

5 **D. The Plaintiffs Have Satisfied the Serious Questions Test.**

6 Since the Plaintiffs have met all four elements necessary to grant a preliminary
7 injunction, the Court may balance the prongs of the test, “so that a stronger showing
8 of one element may offset a lesser showing of likelihood of success on the merits.”²¹³
9 “In other words, ‘serious questions going to the merits’ and a hardship balance that
10 tips sharply toward the plaintiff can support issuance of an injunction, assuming the
11 other two elements of the *Winter* test are also met.”²¹⁴

12 Plaintiffs have proved the likelihood of success on the merits and there is little
13 doubt that the hardship balance tips sharply in their favor. By preserving the serious
14 questions test, the Ninth Circuit has endorsed “the longstanding discretion of a
15 district judge to preserve the status quo with provisional relief until the merits could
16 be sorted out in cases where the clear irreparable injury would otherwise result and
17 at least ‘serious questions’ going to the merits are raised....”²¹⁵ The Court should
18 exercise its equitable powers and discretion to preserve the status quo and enjoin
19 the application of A.R.S. §15-112.

20 **XI. CONCLUSION**

21 Among the many flaws contained in HB 2281 is the unmistakable message
22 to our youth that the promise of the Constitution to protect them all equally is a myth;
23 that the history, literature and culture of at least one group is not worthy of being
24 taught in school. If the State of Arizona can take away the right of students to learn
25 about the historical, literary and artistic contributions of Mexican Americans to the
26 American experience, then the Constitution is a hollow document. The fact that the

27
28 ²¹³ *Wild Rockies*, 632 F.3d at 1131.

²¹⁴ *Wild Rockies*, 632 F.3d at 1132.

²¹⁵ *Wild Rockies*, 632 F.3d at 1134.

1 teachers “are educating the young for citizenship is a reason for scrupulous
2 protection of Constitutional freedoms of the individual, if we are not to strangle the
3 free mind at its source and teach youth to discount important principles of our
4 government as mere platitudes.”²¹⁶ Whatever legitimate role the State may have in
5 setting curriculum standards in Arizona, it must be “within the limits of the Bill of
6 Rights.”²¹⁷ This is the fundamental requirement that HB 2281 and its application fails
7 to meet.

8 Plaintiffs do not seek the intervention of this Court to controvert or supersede
9 the legitimate role of the local Governing Board to make curricular decisions. To the
10 contrary, plaintiffs seek to preserve the role of the elected officials of TUSD to decide
11 what curriculum is appropriate and necessary and beneficial for its student
12 population.²¹⁸

13 Whereas the plaintiffs respectfully request that the Court grant the relief
14 requested in this motion for preliminary injunction.

15 Submitted this 14th day of November, 2011.

16 *s/Richard M. Martinez, Esq.*
17 RICHARD M. MARTINEZ, ESQ.
18 Counsel for Plaintiffs
19
20
21
22
23

24
25 ²¹⁶ *West Virginia St. Bd. of Ed. v. Barnette*, 139 U.S. 624, 637 (1943).

26 ²¹⁷ *Pico*, 457 U.S. at 864.

27 ²¹⁸ See *Hazelwood*, 484 U.S. at 273 (“education of the Nation’s youth is primarily
28 the responsibility of parents, teachers, and state and local officials, and not federal
judges.”)(citations omitted); see also, *Pico*, 457 U.S. at 864 (“At the same time,
however, we have necessarily recognized that the discretion of the States and local
school boards in matters of education must be exercised in a manner that comports with
the transcendent imperatives of the First Amendment.”)

Certificate of Service

I hereby certify that on November 14, 2011, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of the instant motion via the Notice of Electronic Filing to the CM/ECF registrants of record.

s/Richard M. Martinez, Esq.
RICHARD M. MARTINEZ, ESQ.
Counsel for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28