

1 BURCH & CRACCHIOLO, P.A.
702 East Osborn, Suite 200
2 P.O. Box 16882
Phoenix, Arizona 85011-6882
3 (602) 274-7611

4 Bryan Murphy (006414)
bmurphy@bcattorneys.com
5 Daryl Manhart (005471)
dmanhart@bcattorneys.com
6 Melissa G. Iyer (024844)
miyer@bcattorneys.com
7 Jessica Conaway (025401)
jconaway@bcattorneys.com

8 Attorneys for Defendant John Huppenthal, Superintendent
9 of Public Instruction of the State of Arizona

10
11 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

12 CURTIS ACOSTA, et. al.,) Case No. CIV 10-000623-AWT
13 Plaintiffs,)
14 v.) **DEFENDANT SUPERINTENDENT’S**
) **MOTION TO DISMISS PLAINTIFFS’**
) **SECOND AMENDED COMPLAINT**
15 JOHN HUPPENTHAL, Superintendent of)
Public Instruction and Executive Director)
16 of the Arizona State Board of Education,)
et. al.,)
17 Defendants.)
18

19 **INTRODUCTION**

20 Plaintiffs are eleven teachers and two students employed and attending schools
21 in the Tucson Unified School District (“TUSD”). They challenge the constitutionality
22 of HB 2281, now codified at Ariz. Rev. Stat. § 15-112, as unconstitutional on its face
23 and as applied to the Mexican-American Studies program offered to students by
24 TUSD. Plaintiffs have not suffered any concrete injury sufficient to establish their
25 standing to proceed with this lawsuit. Their claim of a “subjective chill” is insufficient
26 because the statute they seek to challenge does not even apply to them. Their

1 secondary concern regarding a potential loss of their employment is both speculative
2 and contingent upon the decisions of their employer, TUSD, who is not a party to this
3 lawsuit.

4 Even if plaintiffs could establish standing, their Second Amended Complaint
5 contains a series of conclusory “the defendant-unlawfully-harmed-me” allegations that
6 are not sufficient to state a claim for relief. Accordingly, dismissal pursuant to Rule
7 12(b)(6) is also appropriate.

8 Finally, TUSD, which does have standing, has initiated an administrative
9 appeal regarding the Mexican-American studies program and its compliance with HB
10 2281. That appeal may resolve the same issues raised here and thus may ultimately
11 moot plaintiffs’ claims. It may also create a conflict in decisions between this Court
12 and the state court regarding the proper interpretation of HB 2281. Accordingly, a
13 decision on the merits of plaintiffs’ constitutional claims as asserted is not immediately
14 necessary. This Court should consider abstaining from ruling on the merits of
15 plaintiffs’ claims and decline to exercise jurisdiction over this case on prudential
16 grounds. In so doing, this Court may avoid having to resolve constitutional issues that
17 will significantly impact education policy in Arizona.

18 For these reasons and those set forth in the attached Memorandum of Points and
19 Authorities, the Superintendent moves to dismiss the Second Amended Complaint.

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. FACTUAL AND PROCEDURAL BACKGROUND**

22 **A. HB 2281**

23 HB 2281 was passed by the Arizona legislature and signed into law by the
24 Governor in the Spring of 2010. (Second Amended Complaint, hereinafter “SAC” at
25 ¶¶ 82-85.) The law is racially neutral. It prohibits any “school district or charter
26 school” from implementing a “program of instruction” that (1) “promotes the

1 overthrow of the United States government,” (2) “promotes resentment toward a race
2 or class of people,” (3) is “designed primarily for pupils of a particular ethnic group,”
3 or (4) “advocate[s] ethnic solidarity instead of the treatment of pupils as individuals.”
4 Ariz. Rev. Stat. § 15-112(A)(1)-(4). The legislative purpose of 15-112 is outlined in
5 § 15-111 which states that “[t]he legislature finds and declares that public school
6 pupils should be taught to treat and value each other as individuals and not be taught to
7 resent or hate other races or classes of people.” By its terms, the law does not apply to
8 individual teachers or students; it does not prohibit any individual conduct and it does
9 not restrict any individual teacher or student’s speech.

10 The statute further provides that the Arizona Superintendent of Public
11 Instruction or the State Board of Education may notify a district if any of its programs
12 have been deemed to be in violation of the statute. Ariz. Rev. Stat. § 15-112(B). If
13 such a notice of violation is issued to any district or charter school, the statute gives
14 the district 60 days to bring the program into compliance. *Id.* If compliance is not
15 achieved within 60 days, the statute empowers the Superintendent of Public Instruction
16 or the State Board of Education to “direct the department of education to withhold up
17 to ten per cent of the monthly apportionment of state aid that would otherwise be due
18 the school district or charter school.” *Id.* Once the program has been brought into
19 compliance (even if after the 60 day window), all withheld monies are then “restored”
20 to the subject school district or charter school. *Id.*

21 The statute applies only to school districts and charter schools. Thus, a partial
22 reduction in state aid is the only statutory remedy available. It does not apply to
23 individual teachers or students and therefore contains no civil or criminal penalties
24 punishable against them. While the law allows the Superintendent of Public
25 Instruction to order a reduction in the district’s state aid, it does not empower the
26 Superintendent to discipline or terminate any teacher or student.

1 Elimination of a program found to violate the statute is not required by any of
2 its provisions. Rather, the statute contemplates that programs will be revised as
3 necessary to achieve “compliance.” Once compliance is achieved, all withheld state
4 aid must be restored to the district. Of course, a district may choose not to bring its
5 programs into compliance and may instead choose to bear the reduction in state aid
6 accordingly. In that case, the subject program would remain in place and unchanged.
7 The statute also provides that a district may administratively appeal any finding that its
8 programs violate HB 2281 in accordance with state law.

9 Former Superintendent Tom Horne found that the Mexican-American Studies
10 program, as implemented by TUSD, violates § 15-112. (SAC, Ex. B.) That finding,
11 however, is superseded by current Superintendent Huppenthal’s recent finding.
12 Though the current Superintendent determined that TUSD’s Mexican-American
13 studies program violates the statute, he has invited the district to revise the program to
14 bring it into compliance with the law and, thus, to avoid the withdrawal of a portion of
15 TUSD’s state aid. (Huppenthal Notice of Violation, attached as Exhibit A.) TUSD
16 has noticed its administrative appeal of Superintendent Huppenthal’s determination
17 that its Mexican-American Studies program violates HB 2281. (*See* TUSD Notice of
18 Appeal, dated June 22, 2011, attached as Exhibit B.)¹

19 **B. The Parties**

20 Plaintiffs are 13 individuals who have various connections to the Mexican-
21 American Studies Department at TUSD. (SAC at ¶¶3-15.) They have collectively
22 filed the present suit to invalidate A.R.S. §§ 15-111 and 15-112 as unconstitutional
23

24 ¹ The Notice of Violation and Notice of Appeal, attached hereto as Exhibit A
25 and B are public records of which this Court may take judicial notice. Thus, reference
26 to public records in support of a motion to dismiss does not convert the motion into a
motion for summary judgment. *Intri-Plex Tech., Inc. v. Crest Group, Inc.*, 499 F.3d
1048, 1052 (9th Cir. 2007).

1 under the First and Fourteenth Amendments to the United States Constitution and are
2 seeking only injunctive and declaratory relief as opposed to damages. (SAC at p. 18-
3 19.)

4 **1. Plaintiff-Teachers/Director’s Alleged Standing**

5 Ten of the plaintiffs hold teaching positions in the Mexican-American Studies
6 Department at TUSD. (SAC at 3, 6, 7, 8, 9, 10, 11, 13, 14, and 15.) One plaintiff
7 (Sean Arce) is the “Director of the Mexican-American Studies Department” at TUSD
8 and also parent to another student-plaintiff, Maya Arce. (SAC at ¶¶ 4-5.) Although the
9 statute plainly does not apply to them, plaintiffs’ argue that they have standing to
10 challenge its constitutionality by urging that its passage and enforcement against
11 TUSD “has chilled [their] use of” curriculum materials including “textbooks, material,
12 posters, content, and the name of the Mexican-American Studies Department . . . thus
13 impermissibly infringing on their Free Speech.” (SAC at ¶ 79.)

14 The only other allegation plaintiffs offer to support standing is to assert that
15 enforcement of HB 2281 against TUSD’s Mexican-American studies program will
16 “result in the immediate termination of the Mexican-American Studies Department
17 and the employment of the adult plaintiffs.” (SAC at ¶ 80, 96.) Plaintiffs
18 acknowledge that they are all still currently employed by TUSD. (SAC ¶¶ 3, 4, 6, 7, 8,
19 9, 10, 11, 13, 14, & 15.) TUSD’s recent appeal from the Superintendent’s notice of
20 violation belies the claim that enforcement of the statute will result in “immediate”
21 elimination of the Mexican-American Studies program and concomitant loss of the
22 plaintiffs’ employment.

23 **2. Plaintiff-Students’ Alleged Standing**

24 Two plaintiff students (children of the plaintiff teachers) have also joined in this
25 suit. Maya Arce is a seventh grader attending middle school at the Safford K-8
26 Magnet School who hopes to attend the Tucson High Magnet school if and when she

1 is promoted to the Ninth Grade. (SAC at ¶ 5.) She alleges that if and when she is
2 admitted to the Tucson High Magnet School she wishes to “register for all Mexican-
3 American Studies course offerings in English-Latino Literature, American History-
4 Mexican-American Perspectives and American Government – Social Justice
5 Education Project.” (SAC at ¶ 5.) She acknowledges that these courses are only
6 “currently available to Junior and Senior students” and that, therefore, she is not
7 presently eligible to enroll in any of them. *Id.*

8 Korina Eliza Lopez is also identified as a student plaintiff and daughter of one
9 of the teacher plaintiffs. (SAC at ¶ 12.) Ms. Lopez is a 9th grader attending the
10 Tucson High Magnet School. She alleges that she wishes to enroll in “all Tucson High
11 Magnet School course offerings in English-Latino Literature, American History-
12 Mexican American Perspectives and American Government – Social Justice Education
13 Project.” (SAC at ¶ 12.) Nevertheless, Ms. Lopez acknowledges that these courses
14 are only “available to Junior and Senior students” and that, therefore, she is currently
15 ineligible to enroll in them.

16 **C. Claims Asserted In the Second Amended Complaint.**

17 The Second Amended Complaint alleges four claims for relief pursuant to 42
18 U.S.C. § 1983 and seeks a declaratory judgment pursuant to 28 U.S.C. § 2201.

19 **1. Count One – Equal Protection**

20 Count One asserts a claim pursuant to the Equal Protection Clause of the
21 Fourteenth Amendment and alleges that “Defendants’ actions against Plaintiffs
22 constitutes [sic] a violation of equal protection and 42 U.S.C. § 1983.” (SAC ¶¶ 102-
23 104.) This conclusory count does not explain how plaintiffs have been discriminated
24 against, which named defendant engaged in such discrimination, and most
25 importantly, how they were harmed by the alleged discrimination.

26 / / /

1 **2. Count Two – First Amendment Free Speech**

2 Count Two (at ¶ 106) again makes a conclusory allegation that “Defendants’
3 actions against Plaintiffs’ constitutes [sic] a violation of free speech.” Although not
4 appearing under the heading of Count Two, plaintiffs appear to be alleging that former
5 Superintendent Tom Horne, who is no longer Superintendent of Public Instruction and
6 not a party to this lawsuit, “engaged in a consistent pattern of conduct that has chilled
7 the use of textbooks, material, posters, content and the name of the Mexican-American
8 Studies Department by all plaintiffs thus impermissibly infringing on their Free
9 Speech.” (SAC at ¶ 79.) Thus, the premise of plaintiffs’ First Amendment claim
10 appears to be that prior enforcement of the statute, by a state official who no longer
11 has that power, may still prevent them from being free to “use” certain curriculum and
12 materials in the course of teaching Mexican-American Studies courses at TUSD. *Id.*
13 Because they also make a generalized reference to the statute being “void for
14 vagueness” (SAC at ¶ 29), it appears that they are making both a facial and “as
15 applied” challenge to the law. Due to the conclusory and disorganized allegations,
16 however, the precise nature of their “First Amendment Free Speech” claim is unclear.²

17 **3. Count Three – First Amendment Freedom of Association**

18 Count Three asserts a “freedom of association” claim asserting (in a similar
19 conclusory fashion) that “Defendants’ actions against Plaintiffs constitutes a violation
20 of free speech and 42 U.S.C. § 1983.” (SAC at ¶ 109.) How this count differs from
21 Count Two is unclear. The only allegation that may remotely relate to this “freedom
22 of association” count asserts that “Plaintiffs believe that House Bill 2281 is the product
23 of racial bias aimed specifically at Hispanics, is unlawful, results in impermissible

24 _____
25 ² Plaintiffs’ Motion for Summary Judgment, of course, clarifies that they are
26 indeed making at least a facial challenge to the statute on First Amendment grounds.
But statements by their counsel in subsequent memoranda is not an appropriate
method of amending their pleadings.

1 deprivations of rights guaranteed by the United States Constitution, have voiced their
2 opinions of such in the work place and publicly and been confronted for expressing
3 such beliefs.” (SAC 99.) Plaintiffs do not explain where they were “confronted” for
4 expressing their opinions on HB 2281 or who “confronted” them about their
5 “opinions” and do not otherwise assert that they have been formally disciplined,
6 prosecuted, or otherwise penalized for their expression of opinions regarding HB
7 2281.

8 **4. Count Four – Fourteenth Amendment Due Process**

9 The Fourth and final count asserts that “Defendants’ actions constitute
10 violations of due process and 42 U.S.C. § 1983.” (SAC at ¶ 112.) Yet again, plaintiffs
11 fail to describe what “actions” violated their due process rights, which of the named
12 defendants committed the violation, or even whether their claim is based on a right to
13 substantive or procedural due process.

14 **II. LEGAL ARGUMENTS**

15 **A. Plaintiffs Do Not Have Standing to Challenge HB 2281.**

16 “The burden of establishing Article III standing remains at all times with the
17 party invoking federal jurisdiction.” *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d
18 646, 654 (9th Cir. 2002). “[T]hose who seek to invoke the jurisdiction of the federal
19 courts must satisfy the threshold requirements imposed by Article III of the
20 Constitution by alleging an actual case or controversy.” *City of Los Angeles v. Lyons*,
21 461 U.S. 95, 101 (1983).

22 [T]he irreducible constitutional minimum of standing contains
23 three elements: (1) the plaintiff must have suffered a concrete and
24 particularized “injury in fact,” which is neither speculative nor
25 conjectural; (2) there must be a causal connection between the injury
26 alleged and the challenged conduct; and (3) it must be “likely,” as
opposed to merely “speculative,” that the injury will be “redressed by a
favorable decision.”

1 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

2 “Abstract injury is not enough” to satisfy federal standing requirements; rather,
3 “[i]t must be alleged that the plaintiff ‘has sustained or is immediately in danger of
4 sustaining some direct injury.’” *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) (quoting
5 *Massachusetts v. Melon*, 262 U.S. 447, 488 (1923)). Moreover, the “injury” alleged
6 must be an invasion of a legally protected interest that is concrete and particularized
7 (*i.e.*, the injury must affect the plaintiff in a personal and individual way) and actual or
8 imminent as opposed to conjectural or hypothetical. *Lujan*, 504 U.S. at 560-61.

9 In First Amendment cases, plaintiffs must allege something more than a
10 “subjective chill” of their protected speech to satisfy the standing requirements. *San*
11 *Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). Even
12 “pre-enforcement” plaintiffs, who are asserting a facial challenge to the
13 constitutionality of a law “must still satisfy ‘the rigid constitutional requirement that
14 plaintiffs must demonstrate an injury in fact to invoke a federal court’s jurisdiction.’”
15 *Lopez v. Candaele*, 630 F.3d 775, 785-86 (9th Cir. 2010) (quoting *Dream Palace v.*
16 *Cnty of Maricopa*, 384 F.3d 990, 999 (9th Cir. 2004)). In determining whether a
17 sufficient injury was alleged in cases involving a facial challenge by “pre-
18 enforcement” plaintiffs, the Ninth Circuit utilizes three factors to analyze standing:

- 19 (1) “whether pre-enforcement plaintiffs have failed to show a
20 reasonable likelihood that the government will enforce the
challenged law against them;”
- 21 (2) “whether the plaintiffs have failed to establish with some degree
22 of concrete detail, that they intend to violate the challenged law;”
and
- 23 (3) “whether the challenged law is inapplicable to the plaintiffs,
24 either by its terms or as interpreted by the government.”

25 *Id.* at 786. The third factor is dispositive of the standing issue because

26 “inapplicability” of the statute to the plaintiffs “weighs against both the plaintiffs’

1 claims that they intend to violate the law, and also their claims that the government
2 intends to enforce the law against them.” *Id.* at 786. Thus, “[t]he mere existence of a
3 statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a
4 case or controversy within the meaning of Article III.” *Scott v. Pasadena Unified Sch.*
5 *Dist.*, 306 F.3d 646 (9th Cir. 2002). *See also Leonard v. Clark*, 12 F.3d 885, 888-889
6 (9th Cir. 1994) (firefighters had no standing to challenge provision of collective
7 bargaining agreement where the restriction “by its plain language [applied] only to the
8 Union and not to its individual members.”).

9 The foregoing analysis was applied in *Johnson v. Stuart*, 702 F.2d 193 (9th Cir.
10 1983). The facts in *Johnson* are also remarkably similar to those presented here for
11 purposes of standing. In *Johnson*, the Ninth Circuit held that teacher-plaintiffs had no
12 standing to challenge the facial constitutionality of an Oregon state law that prohibited
13 the use of any textbook, which “speaks slightly of the founders of the republic or of
14 those who preserved the union or which belittles or undervalues their work.” *Id.* at
15 195. The court rejected the argument that the “mere existence” of the statute chilled
16 the plaintiffs’ free speech. *Id.* The court noted that nothing in the Oregon statute
17 sought to regulate teacher or student speech, but instead sought only to limit the use of
18 certain texts in the classroom and curriculum. *Id.* Accordingly, the Ninth Circuit held
19 that the teachers had no standing to challenge the facial constitutionality of the law.

20 In so doing, *Johnson* relied heavily on the precedent set by the Supreme Court
21 in *Younger v. Harris*, 401 U.S. 37, 41-42 (1971). In *Younger*, multiple plaintiffs
22 challenged a California law that criminalized teaching communism. The Supreme
23 Court concluded that three of the plaintiffs, who had not alleged that they have ever
24 been “threatened with prosecution, that a prosecution is likely, or even that a
25 prosecution is remotely possible,” but merely that they felt “inhibited” in advocating
26

1 political ideas or in teaching about communism, did not have standing to challenge the
2 constitutionality of the law. *Id.* at 41-42.

3 **1. Similar to the Plaintiffs in *Johnson and Younger*, Plaintiffs
4 Here Allege Nothing More Than A “Subjective Chill”
5 Insufficient to Support Their Standing.**

6 Section 15-112, by its terms, does not apply to restrict teacher or student speech
7 either in or out of the classroom. To the contrary, the statute plainly applies only to a
8 “school district or charter school” and prohibits such districts or charter schools from
9 implementing certain “program[s] of instruction.” The statute does not impose any
10 civil penalties³ or criminal liability⁴ upon teachers or students. Rather, the only
11 sanction which might result from a violation is the temporary reduction in state aid
12 allocated to the district.⁵ Ariz. Rev. Stat. § 15-112(B). Accordingly, plaintiffs’
13 allegation in the Second Amended Complaint that the passage and enforcement⁶ of

14 ³ Compare with *California Teachers Ass’n v. Davis*, 64 F. Supp. 2d 945 (C.D.
15 Cal. 1999), where teachers were held to have standing only because the statute
16 imposed direct civil penalties upon any teacher who violated it by teaching in a
17 language other than English.

18 ⁴ In *Younger*, teachers could be criminally prosecuted for teaching communism
19 and yet still lacked standing when they had not shown that they had actually been
20 prosecuted or were likely to be prosecuted. 401 U.S. at 41-42.

21 ⁵ The state is free to make a “value judgment” regarding programs and “to
22 implement that judgment by the allocation of public funds.” *Maher v. Roe*, 432 U.S.
23 464, 474 (1977).

24 ⁶ Plaintiffs’ allegations relating to the “chilling” of their speech are really only
25 expressly asserted as resulting from enforcement of the statute by former
26 Superintendent Tom Horne. Tom Horne is no longer Superintendent of Public
Instruction and any claims for prospective relief arising out of his conduct are now
moot. And, as noted above, “[p]ast exposure to illegal conduct does not in itself show
a present case or controversy regarding injunctive relief . . . if unaccompanied by any
continuing, present adverse effects.” *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-
61.

1 Ariz. Rev. Stat. § 15-112 “has chilled [their] use of” curriculum materials, including
2 “textbooks, material, posters, content, and the name of the Mexican-American Studies
3 Department,” is merely an assertion of “subjective chill” similar to that which was
4 rejected as a basis for standing in *Johnson and Younger*. (SAC at ¶ 79.)

5 **2. Plaintiffs’ Loss of Employment is Speculative and Contingent**
6 **Upon the Conduct of TUSD – A Non-Party to this Lawsuit.**

7 In addition to their “subjective chill,” plaintiffs also speculate that enforcement
8 of the statute will “result in the immediate termination of the Mexican-American
9 Studies Department and the employment of the adult plaintiffs.” (SAC at ¶ 80, 96.)
10 They acknowledge, however, that they are still currently employed by TUSD. (SAC
11 ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15.)

12 Contrary to the plaintiffs’ allegation, elimination of the Mexican-American
13 Studies program is not a *fait accompli*. Even though the program has been determined
14 to violate HB 2281, TUSD may respond to the notice of violation in any number of
15 ways only one of which would be to eliminate the program altogether. First, the
16 district could choose to revise the curriculum to ensure compliance with the statute. In
17 that event, the program would remain in place and the teacher plaintiffs would suffer
18 no loss of employment. Second, the district could choose to accept the 10% reduction
19 in state aid and leave the program in place without revision. Again, if this were the
20 course taken the plaintiffs would presumably remain in their posts. Next, the statute
21 provides for an administrative appeal process whereby a district found to be in
22 violation may administratively appeal the notice of violation at the Superintendent’s
23 expense. Ariz. Rev. Stat. § 15-112(B). Indeed, TUSD has already availed itself of this
24 remedy by filing a notice of appeal. (*See* Exhibit B.) TUSD’s effort to challenge the
25 Superintendent’s determination belies the claim that plaintiffs will suffer an
26 “immediate” loss of employment if not permitted to proceed with the present suit.

1 Again, if TUSD's appeal is successful, the program will remain in place and plaintiffs
2 will remain employed.⁷ Finally, it is also possible that the program could be
3 eliminated, but even that would not necessarily mean that the teachers would not
4 remain employed, but teaching other classes. In short, plaintiffs' alleged "loss of
5 employment" is entirely dependent upon speculation about "contingent future events,"
6 which is generally insufficient to establish standing. *See Nelson v. King County*, 895
7 F.2d 1248, 1252 (9th Cir. 1990) ("Both the Supreme Court and our circuit have
8 repeatedly found a lack of standing where the litigant's claim relies upon a chain of
9 speculative contingencies.").

10 **3. The Student-Plaintiffs Are Not Enrolled or Eligible to Enroll**
11 **in Any Mexican-American Studies Class.**

12 Standing for the two student plaintiffs is even more tenuous than it is for their
13 teacher parents. Ms. Arce is a middle school student who hopes to attend Tucson High
14 Magnet School and to eventually enroll in courses offered to junior and senior high
15 school students once she does. She acknowledges, however, that she is not currently
16 enrolled in such courses and will not be eligible to enroll in those courses for at least
17 three years and only assuming she is able to matriculate to the Tucson High Magnet
18 School as she hopes to. Ms. Lopez attends the high school, but is only in 9th grade.
19 Because Mexican-American studies courses at the school are only offered to juniors
20 and seniors, she is not currently enrolled or eligible to register for any Mexican-
21 American studies course offered at TUSD, either. Clearly, these two students have

22 ⁷ Even if TUSD chose to eliminate the program or to discipline or terminate any
23 of the plaintiff teachers, such injuries could not be remedied against the
24 Superintendent in this suit. The Superintendent of Public Instruction has no power to
25 hire, fire, or discipline teachers or students. That is within the exclusive prerogative of
26 the school district's local governing board. Ariz. Rev. Stat §§ 15-341(16), (21); 15-
502(A); 15-539. Nothing in § 15-112 interferes with the power of the local governing
board of TUSD to make such independent determinations regarding these or any other
teacher's positions in the district.

1 suffered no actual injury from being deprived of enrolling in courses they are not
2 otherwise eligible to take. This would be so even assuming the courses were directly
3 impacted by the passage and enforcement of § 15-112 (as noted above, however, there
4 is no such direct impact). Accordingly, like their teacher/parents, these two students
5 do not have standing to challenge the constitutionality of § 15-112 on its face or as
6 applied to the Mexican-American Studies program at TUSD.

7 **B. Even if Standing Could Be Established, Plaintiffs' Second Amended**
8 **Complaint Does Not State A Claim for Relief.**

9 “[T]he pleading standard Rule 8 announces does not require ‘detailed factual
10 allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-
11 harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell*
12 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “[A] plaintiff’s obligation to provide
13 the grounds of his entitle[ment] to relief requires more than labels and conclusions,
14 and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*,
15 550 U.S. at 555 (internal quotation marks omitted).

16 Although it is eighteen pages long, the substantive allegations in Counts 1-4 of
17 the Second Amended Complaint comprise only 14 of the 115 numbered paragraphs
18 and make a series of conclusory assertions that certain of their constitutional rights
19 have been violated. Defendant has compared the enumerated counts to the “general”
20 allegations in the Second Amended Complaint to attempt a response. Nevertheless,
21 the precise nature of the claims remains unclear.

22 Under Count One, for instance, plaintiffs assert an equal protection challenge.
23 They do not explain how they have been discriminated against, which of the state
24 defendants have discriminated against them, and what injury resulted from the
25 purported discrimination.
26

1 Under Count Two, plaintiffs summarily assert a First Amendment Free Speech
2 claim, but do not allege how their free speech rights have been infringed or which one
3 of the state defendants is responsible for the violation. It also seems unclear whether
4 the plaintiffs are making a facial challenge as well as an applied challenge to HB 2281.

5 Under Count Three plaintiffs' broadly assert a "freedom of association" claim,
6 but the only allegation that seems to support this claim is set forth in paragraph 29 of
7 the Second Amended Complaint, which merely states that plaintiffs were "confronted"
8 for expressing negative opinions about HB 2281. It does not explain where this
9 alleged "confrontation" occurred or how the "confrontation" amounted to a
10 constitutional deprivation by any of the state defendants.

11 Finally, plaintiffs assert a claim for a "due process" violation pursuant to Count
12 Four, but do not identify whether the basis for the alleged violation is grounded in
13 substantive or procedural due process. Plaintiffs also fail to explain how their due
14 process rights have been violated apart from a generalized reference to the statute
15 being "void for vagueness." (SAC at ¶ 29.) Plaintiffs also fail to allege how any of
16 the named defendants have acted to contribute to the alleged violation. Accordingly,
17 these conclusory allegations do not satisfy the bare minimum pleading standards and
18 should be dismissed pursuant to Rule 12(b)(6).

19 **C. In Light of TUSD's Administrative Appeal, This Court Should**
20 **Abstain From Ruling on the Merits of Plaintiffs' Claims.**

21 Abstention by a federal court may be especially appropriate where, as here,
22 identical issues will likely be resolved in state administrative proceedings presently
23 pending. "Whether it is labeled 'comity,' 'federalism,' or some other term,' the policy
24 objective behind . . . abstention is to 'avoid unnecessary conflict between state and
25 federal governments.'" *United States v. Morros*, 268 F.3d 695, 707 (9th Cir. 2001).
26 Where timely and adequate state-court review is available, a federal court sitting in

1 equity must decline to interfere with the proceedings or orders of state administrative
2 agencies. *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 n.29 (1943). Section 15-112
3 provides for an administrative hearing of any notice of violation issued pursuant to the
4 statute and TUSD has chosen to exhaust its administrative remedies in that regard.
5 Notably, many of the arguments regarding vagueness are asserted as a basis for the
6 administrative appeal and if TUSD's appeal is successful, plaintiffs' claims that they
7 have been harmed by the passage and enforcement of HB 2281 will be moot. Thus,
8 abstention by this Court in ruling on these constitutional questions is especially
9 appropriate in light of the district's notice of appeal. Accordingly, defendant moves to
10 dismiss the plaintiffs' suit on prudential grounds as well.

11 **CONCLUSION**

12 For all the foregoing reasons, defendant Superintendent John Huppenthal
13 requests dismissal of the Second Amended Complaint.

14 DATED this 27th day of June, 2011.

15
16 BURCH & CRACCHIOLO, P.A.

17 By: /s/Melissa G. Iyer

18 Bryan Murphy, Esq.

19 Daryl Manhart, Esq.

20 Melissa G. Iyer, Esq.

Jessica Conaway, Esq.

Burch & Cracchiolo, P.A.

702 East Osborn, Suite 200

Phoenix, Arizona 85014

Attorneys for Defendant

John Huppenthal, Superintendent

of Public Instruction and

Executive Director of the

Arizona State Board of Education

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Richard M. Martinez, Esq. Richard@richardmartinezlaw.com
Attorney for Plaintiffs

Kevin D. Ray, Esq. Kevin.Ray@azag.gov
Assistant Attorney General
Office of the Attorney General
State of Arizona
*Attorney for Defendants Arizona State Board of Education,
including members named in their Official Capacity*

With a copy mailed this same date to:

Jinju Park Hurtado, Esq.
Assistant Attorney General
Office of the Attorney General
State of Arizona
1275 West Washington Street
Phoenix, AZ 85007
*Attorney for Defendants Arizona State Board of Education,
including members named in their Official Capacity*

s/Leslie Chatburn _____