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

12 CURTIS ACOSTA, et. al.,
13 Plaintiffs,

14 v.

15 JOHN HUPPENTHAL, Superintendent of
Public Instruction and Executive Director
16 of the Arizona State Board of Education,
et. al.,
17 Defendants.
18

) Case No. CIV 10-000623-AWT
)
)

**DEFENDANT SUPERINTENDENT'S
MOTION TO DISMISS PLAINTIFFS'
THIRD AMENDED COMPLAINT**

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
27 secondary concern regarding a potential loss of their employment is both speculative
28

1 and contingent upon the decisions of their employer, TUSD, who is not a party to this
2 lawsuit.

3 Moreover, TUSD, which does have standing, has initiated an administrative
4 appeal regarding the Mexican-American studies program and its compliance with HB
5 2281. That appeal, which is nearing conclusion, may resolve the same issues raised
6 here and thus may ultimately moot plaintiffs' claims. It may also create a conflict in
7 decisions between this Court and the Arizona judiciary regarding the proper
8 interpretation of HB 2281. Accordingly, a decision on the merits of plaintiffs'
9 constitutional claims as asserted is not immediately necessary. This Court should
10 consider abstaining from ruling on the merits of plaintiffs' claims and decline to
11 exercise jurisdiction over this case on prudential grounds. In so doing, this Court may
12 avoid having to resolve constitutional issues that will significantly impact education
13 policy in Arizona.

14 Lastly, and in the alternative, plaintiffs' First Amendment claims under Counts
15 Two and Three do not state a claim for relief pursuant to 42 U.S.C. § 1983. These
16 plaintiff-teachers and students have no constitutional right to dictate the curriculum in
17 Mexican American Studies or any other courses and without a predicate constitutional
18 violation, their claims pursuant to § 1983 necessarily fail. Dismissal of these claims
19 pursuant to Fed. R. Civ. P. 12(b)(6) is therefore proper.

20 For these reasons and those set forth in the attached Memorandum of Points and
21 Authorities, the Superintendent moves to dismiss the Third Amended Complaint.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. FACTUAL AND PROCEDURAL BACKGROUND**

24 **A. HB 2281**

25 HB 2281 was passed by the Arizona legislature and signed into law by the
26 Governor in the Spring of 2010. TAC at ¶¶ 89-92. The law is racially neutral. It
27 prohibits any "school district or charter school" from implementing a "program of
28 instruction" that (1) "promotes the overthrow of the United States government," (2)

1 “promotes resentment toward a race or class of people,” (3) is “designed primarily for
2 pupils of a particular ethnic group,” or (4) “advocate[s] ethnic solidarity instead of the
3 treatment of pupils as individuals.” Ariz. Rev. Stat. § 15-112(A)(1)-(4). The
4 legislative purpose is outlined in § 15-111 which states that “[t]he legislature finds and
5 declares that public school pupils should be taught to treat and value each other as
6 individuals and not be taught to resent or hate other races or classes of people.” By its
7 terms, the law does not apply to individual teachers or students; it does not prohibit
8 any individual conduct; and it does not restrict any individual teacher or student’s
9 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 school district or charter school, the statute
14 gives the district or school 60 days to bring the program into compliance. *Id.* If
15 compliance is not achieved within 60 days, the statute empowers the Superintendent of
16 Public Instruction or the State Board of Education to “direct the department of
17 education to withhold up to ten per cent of the monthly apportionment of state aid that
18 would otherwise be due the school district or charter school.” *Id.* Once the program
19 has been brought into compliance (even if after the 60 day window), all withheld
20 monies are then “restored” 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.

27 Elimination of a program found to violate the statute is not required by any of
28 its provisions. Rather, the statute contemplates that programs will be revised as

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

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

17 **B. The Parties**

18 Plaintiffs are 13 individuals who have various connections to the Mexican-
19 American Studies Department at TUSD. TAC at ¶¶3-15. They have collectively filed
20 the present suit to invalidate A.R.S. §§ 15-111 and 15-112 as unconstitutional under
21 the First and Fourteenth Amendments to the United States Constitution and are seek-
22 ing only injunctive and declaratory relief as opposed to damages. TAC at pp. 22-23.

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27 ¹ The Notice of Appeal, attached hereto as Exhibit A, is a public record of
28 which this Court may take judicial notice. Thus, reference 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 **1. Plaintiff-Teachers/Director’s Alleged Standing**

2 Ten of the plaintiffs hold teaching positions in the Mexican-American Studies
3 Department at TUSD. TAC at ¶¶ 3, 6-11, 13-15. One plaintiff (Sean Arce) is the
4 “Director of the Mexican-American Studies Department” at TUSD and also parent to
5 another student-plaintiff, Maya Arce. TAC at ¶¶ 4-5. Although the statute plainly
6 does not apply to them, plaintiffs’ argue that they have standing to challenge its
7 constitutionality by urging that its passage and enforcement against TUSD “has chilled
8 [their] use of” curriculum materials including “textbooks, material, posters, content,
9 and the name of the Mexican-American Studies Department . . . thus impermissibly
10 infringing on their Free Speech.” TAC at ¶ 84.

11 The only other allegation plaintiffs offer to support standing is to assert that
12 enforcement of HB 2281 against TUSD’s Mexican-American studies program will
13 “result in the immediate termination of the Mexican-American Studies Department
14 and the employment of the adult plaintiffs.” TAC at ¶ 85. A new school year has
15 started since the initial complaint herein. Plaintiffs acknowledge that they are all still
16 currently employed by TUSD. TAC ¶¶ 3, 4, 6-11, 13-15. TUSD’s recent appeal from
17 the Superintendent’s notice of violation also belies the claim that enforcement of the
18 statute will result in “immediate” elimination of the Mexican-American Studies
19 program and concomitant loss of the plaintiffs’ employment. Ex. A.

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

21 Two plaintiff students (children of the plaintiff teachers) have also joined in this
22 suit. Maya Arce is an eighth grader (a seventh grader when the initial complaint filed)
23 attending middle school at the Safford K-8 Magnet School who hopes to attend the
24 Tucson High Magnet school if and when she is promoted to the Ninth Grade. TAC at
25 ¶ 5. She alleges that if and when she is admitted to the Tucson High Magnet School
26 she wishes to “register for all Mexican-American Studies course offerings in English-
27 Latino Literature, American History- Mexican-American Perspectives and American
28 Government – Social Justice Education Project.” TAC at ¶ 5. She acknowledges that

1 these courses are only “currently available to Junior and Senior students” and that,
2 therefore, she is not presently eligible to enroll in any of them. *Id.*

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

11 **II. LEGAL ARGUMENTS**

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

13 “The burden of establishing Article III standing remains at all times with the
14 party invoking federal jurisdiction.” *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d
15 646, 654 (9th Cir. 2002). “[T]hose who seek to invoke the jurisdiction of the federal
16 courts must satisfy the threshold requirements imposed by Article III of the
17 Constitution by alleging an actual case or controversy.” *City of Los Angeles v. Lyons*,
18 461 U.S. 95, 101 (1983).

19 [T]he irreducible constitutional minimum of standing contains three
20 elements: (1) the plaintiff must have suffered a concrete and
21 particularized “injury in fact,” which is neither speculative nor
22 conjectural; (2) there must be a causal connection between the injury
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.”

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

24 “Abstract injury is not enough” to satisfy federal standing requirements; rather,
25 “[i]t must be alleged that the plaintiff ‘has sustained or is immediately in danger of
26 sustaining some direct injury.’” *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) (quoting
27 *Massachusetts v. Melon*, 262 U.S. 447, 488 (1923)). Moreover, the “injury” alleged
28 must be an invasion of a legally protected interest that is concrete and particularized

1 (*i.e.*, the injury must affect the plaintiff in a personal and individual way) and actual or
2 imminent as opposed to conjectural or hypothetical. *Lujan*, 504 U.S. at 560-61.

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

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

21 *Id.* at 786. The third factor is dispositive of the standing issue because
22 “inapplicability” of the statute to the plaintiffs “weighs against both the plaintiffs’
23 claims that they intend to violate the law, and also their claims that the government
24 intends to enforce the law against them.” *Id.* at 786. Thus, “[t]he mere existence of a
25 statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a
26 case or controversy within the meaning of Article III.” *Scott v. Pasadena Unified Sch.*
27 *Dist.*, 306 F.3d 646 (9th Cir. 2002). *See also Leonard v. Clark*, 12 F.3d 885, 888-889
28 (9th Cir. 1994) (firefighters had no standing to challenge provision of collective
bargaining agreement where the restriction “by its plain language [applied] only to the
Union and not to its individual members.”).

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

12 In so doing, *Johnson* relied heavily on the precedent set by the Supreme Court
13 in *Younger v. Harris*, 401 U.S. 37, 41-42 (1971). In *Younger*, multiple plaintiffs
14 challenged a California law that criminalized teaching communism. The Supreme
15 Court concluded that three of the plaintiffs, who had not alleged that they had ever
16 been “threatened with prosecution, that a prosecution is likely, or even that a
17 prosecution is remotely possible,” but merely that they felt “inhibited” in advocating
18 political ideas or in teaching about communism, did not have standing to challenge the
19 constitutionality of the law. *Id.* at 41-42.

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

23 Section 15-112, by its terms, does not apply to restrict teacher or student speech
24 either in or out of the classroom. To the contrary, the statute plainly applies only to a

25 ² In *Johnson*, the Court upheld the students-plaintiffs’ standing “[a]s persons
26 who would have received the information except for its alleged suppression by the
27 state.” 702 F.2d at 195. Unlike the plaintiff students in *Johnson*, however, none of the
28 plaintiff students here are eligible to enroll in any Mexican American studies course or
to “receive the information” provided in those courses regardless of whether HB 2281
may have an impact on those courses at some point in the future.

1 “school district or charter school” and prohibits such districts or charter schools from
 2 implementing certain “program[s] of instruction.” The statute does not impose any
 3 civil penalties³ or criminal liability⁴ upon teachers or students. Rather, the only
 4 sanction which might result from a violation is the temporary reduction in state aid
 5 allocated to the district.⁵ Ariz. Rev. Stat. § 15-112(B). Accordingly, plaintiffs’
 6 allegation in the Third Amended Complaint that the passage and enforcement of Ariz.
 7 Rev. Stat. § 15-112 “has chilled [their] use of” curriculum materials, including
 8 “textbooks, material, posters, content, and the name of the Mexican-American Studies
 9 Department,” is merely an assertion of “subjective chill” similar to that which was
 10 rejected as a basis for standing in *Johnson and Younger*. TAC at ¶ 84.

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

13 In addition to their “subjective chill,” plaintiffs also speculate that enforcement
 14 of the statute will “result in the immediate termination of the Mexican-American
 15 Studies Department and the employment of the adult plaintiffs.” TAC at ¶ 85. They
 16 acknowledge, however, that they are still currently employed by TUSD. TAC ¶¶ 3-11,
 17 13-15.

18 Contrary to the plaintiffs’ allegation, elimination of the Mexican-American
 19 Studies program is not a *fait accompli*. Even though the program has been determined
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21 ³ Compare with *California Teachers Ass’n v. Davis*, 64 F. Supp. 2d 945 (C.D.
 22 Cal. 1999), where teachers were held to have standing only because the statute
 23 imposed direct civil penalties upon any teacher who violated it by teaching in a
 language other than English.

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

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

1 to violate HB 2281, TUSD may respond to the notice of violation in any number of
2 ways only one of which would be to eliminate the program altogether. First, the
3 district could choose to revise the curriculum to ensure compliance with the statute. In
4 that event, the program would remain in place and the teacher plaintiffs would suffer
5 no loss of employment. Second, the district could choose to accept the 10% reduction
6 in state aid and leave the program in place without revision. Again, if this were the
7 course taken, the plaintiffs would presumably remain in their posts. Next, the statute
8 provides for an administrative appeal process whereby a district found to be in
9 violation may administratively appeal the notice of violation at the Superintendent's
10 expense. Ariz. Rev. Stat. § 15-112(B). Indeed, TUSD has already availed itself of this
11 remedy by filing a notice of appeal. TUSD's effort to challenge the Superintendent's
12 determination belies the claim that plaintiffs will suffer an "immediate" loss of
13 employment if not permitted to proceed with the present suit. Again, if TUSD's
14 appeal is successful, the program will remain in place and plaintiffs will remain
15 employed.⁶ Finally, it is also possible that the program could be eliminated, but even
16 that would not necessarily mean that the teachers would not remain employed, but
17 teaching other classes. In short, plaintiffs' alleged "loss of employment" is entirely
18 dependent upon speculation about "contingent future events," which is insufficient to
19 establish standing. *See Nelson v. King County*, 895 F.2d 1248, 1252 (9th Cir. 1990)
20 ("Both the Supreme Court and our circuit have repeatedly found a lack of standing
21 where the litigant's claim relies upon a chain of speculative contingencies.").

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25 ⁶ Even if TUSD chose to eliminate the program or to discipline or terminate any
26 of the plaintiff teachers, such injuries could not be remedied against the
27 Superintendent in this suit. The Superintendent of Public Instruction has no power to
28 hire, fire, or discipline teachers or students. That is within the exclusive prerogative of
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
teachers' positions in the district.

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

3 Standing for the two student plaintiffs is even more tenuous than it is for their
4 teacher parents. Ms. Arce is a middle school student who hopes to attend Tucson High
5 Magnet School and hopes to eventually enroll in courses offered to junior and senior
6 high school students once she does. She acknowledges, however, that she is not
7 currently enrolled in such courses and will not be eligible to enroll in those courses for
8 at least two years and only assuming she is able to matriculate to the Tucson High
9 Magnet School as she hopes to do. Ms. Lopez attends the high school, but is only in
10 10th grade. Because Mexican-American studies courses at the school are only offered
11 to juniors and seniors, she is not currently enrolled or eligible to register for any
12 Mexican-American studies course offered at TUSD, either. Clearly, these two
13 students have suffered no actual injury from being deprived of enrolling in courses
14 they are not otherwise eligible to take. This would be so even assuming the courses
15 were directly impacted by the passage and enforcement of § 15-112 (as noted above,
16 however, there is no such direct impact). Accordingly, like their teacher/parents,
17 these two students do not have standing to challenge the constitutionality of § 15-112
18 on its face or as applied to the Mexican-American Studies program at TUSD. *See*
19 *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 658 (9th Cir. 2002) (To establish
20 standing for prospective relief, student-plaintiffs must be “ready and able” to apply for
21 and participate in school program).

22 **B. In Light of TUSD’s Administrative Appeal, This Court Should**
23 **Abstain From Ruling on the Merits of Plaintiffs’ Claims.**

24 Abstention by a federal court may be especially appropriate where, as here,
25 identical issues will likely be resolved in state administrative proceedings presently
26 pending. “Whether it is labeled ‘comity,’ ‘federalism,’ or some other term,’ the policy
27 objective behind . . . abstention is to ‘avoid unnecessary conflict between state and
28 federal governments.’” *United States v. Morros*, 268 F.3d 695, 707 (9th Cir. 2001).
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).

3 Section 15-112 provides for an administrative hearing of any notice of violation
4 issued pursuant to the statute and TUSD has chosen to exhaust its administrative
5 remedies in that regard. Notably, many of the arguments regarding vagueness are
6 asserted as a basis for the administrative appeal and if TUSD's appeal is successful,
7 plaintiffs' claims that they have been harmed by the passage and enforcement of HB
8 2281 will be moot. The existence of parallel state proceedings also carries the risk that
9 inconsistent judgments will be rendered on these issues in the separate federal and
10 state proceedings. Finally, in evaluating plaintiffs' void for vagueness claims under
11 the United States Constitution, this Court should consider any narrowing interpretation
12 of the challenged state law by state courts before declaring its facial invalidity. *Cal.*
13 *Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1147 (9th Cir. 2001) (A statute
14 should not be declared facially unconstitutional if it is "readily susceptible to a
15 narrowing construction by the state courts."). HB 2281 is a recently-enacted piece of
16 legislation and TUSD's administrative appeal will present the first opportunity for
17 interpretation of the law by Arizona courts. Abstention will allow time for the state
18 court to interpret the law and any narrowing construction of the law by the state court
19 will necessarily impact its analysis in this parallel federal suit.

20 Thus, abstention by this Court in ruling on these constitutional questions is
21 especially appropriate in light of the district's notice of appeal. Accordingly,
22 defendant moves to dismiss the plaintiffs' suit on prudential grounds as well.

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1 is not limited to the 9th and 6th Circuits, but extends to every Circuit that has ruled on
2 the issue.⁸

3 The rationale supporting this rule is readily apparent. “Government employers,
4 like private employers, need a significant degree of control over their employees’
5 words and actions; without it, there would be little chance for the efficient provision of
6 public services.” *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). “[W]hen the state
7 is the speaker it can decide the content of its message,” and the Supreme Court “has
8 stated that the curriculum of public schools is a fully protected form of state speech.”
9 *Griswold v. Driscoll*, 625 F. Supp. 2d 49, 54 (D. Mass. 2009) (citing *Rosenberger v.*
10 *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)) (emphasis added).
11 Indeed, as the Ninth Circuit recognized in *Downs v. Los Angeles Sch. Dist.*, 228 F.3d
12 1003, 1015 (9th Cir. 2000), if teachers were permitted to compel government speech
13 by dictating the form and content of classroom curriculum and materials, they “would
14 be able to do to the government what the government could not do to [the teacher]:
15 compel it to embrace a viewpoint.”

16 [T]he school system does not ‘regulate’ teachers’ speech as much as it
17 hires that speech. Expression is a teacher’s stock in trade, the
18 commodity she sells to her employer in exchange for a salary. A teacher
19 hired to lead a social-studies class can’t use it as a platform for a

20 ⁸ *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (“[N]o
21 court has found that teachers’ First Amendment rights extend to choosing their own
22 curriculum or classroom management techniques in contravention of school policy or
23 dictates.”); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 371 (4th Cir.
24 1998) (“In the case of a public school, in our opinion, it is far better public policy,
25 absent a valid statutory directive on the subject, that the makeup of curriculum be
26 entrusted to the local school authorities.”); *Kirkland v. Northside Ind. Sch. Dist.*, 890
27 F.2d 794, 795 (5th Cir. 1989) (“The first amendment has never required school
28 districts to abdicate control over public school curricula to the unfettered discretion of
individual teachers.”); *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted
Village Sch. Dist.*, 624 F.3d 332, 334 (6th Cir. 2010) (“[T]he right to free speech
protected by the First Amendment does not extend to in-class curricular speech of
teachers in primary and secondary schools made ‘pursuant to’ their official duties.”);
Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477 (7th Cir. 2007) (“The
Constitution does not entitle teachers to present personal views to captive audiences
against the instructions of elected officials.”); *Lacks v. Ferguson Reorganized Sch.
Dist.*, 147 F.3d 718 (8th Cir. 1998) (holding teacher had no First Amendment right to
choose play with profane content as a part of drama class curriculum).

1 revisionist perspective that Benedict Arnold wasn't really a traitor, when
2 the approved program calls him one.

3 *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007)
4 (emphasis added).

5 Any other rule would result in chaos, particularly the rule propounded by
6 plaintiffs. If plaintiffs were correct (which they are not) that individual teachers have a
7 protected right to determine curriculum and choose texts, then theoretically, students
8 in the same grade, at the same school, but with different instructors, could advance to
9 the next grade without sharing a common knowledge base. Each class of students
10 from kindergarten through twelfth grade would be educated based upon the
11 preferences of their particular teacher rather than based upon the decisions of elected
12 officials, who must justify their curricular and pedagogical choices to the public at
13 large.

14 (b) *Students, like their teachers, have no right to control their
15 curriculum or to choose their texts.*

16 Similarly, students do not have a constitutional right to learn whatever they
17 want to learn in public schools. In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260,
18 266 (1988), the United States Supreme Court held that, while students, like their
19 teachers, have limited free speech rights in the classroom, they have no right to control
20 the content of curriculum pursuant to their "right to receive information." The school,
21 state, or district's choice to include or exclude a particular text, play, or subject from
22 study in its schools does not implicate a student's First Amendment rights. See
23 *Seyfried v. Walton*, 668 F.2d 214, 216 (3d Cir. 1981). Rather, "[t]he selection of
24 course curriculum [is] a process which courts have traditionally left to the expertise of
25 educators." *Id.* Thus, "a student has no First Amendment right to study a particular
26 aspect or period of history in his or her senior history course." *Id.* In other words, the
27 Constitution does not compel "teachers, parents, and elected school officials to
28 surrender control of the American public school system to public school students."

1 *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) (quoting *Tinker v. Des*
2 *Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969) (J. Blackmun, dissenting).

3 In sum, based on the overwhelming precedent from the Supreme Court and
4 almost every circuit in the country, it is clear that these plaintiff teachers and students
5 have not articulated a protected First Amendment right to teach a Mexican American
6 studies course or to control the selection of curriculum and texts used in any such
7 course. Accordingly, Count Two of the Third Amended Complaint should be
8 dismissed.

9 2. Plaintiffs' Vague Allegation That They Were "Confronted" Does
10 Not Support a Freedom of Association Claim.

11 Count Three asserts a "freedom of association" claim. TAC at ¶¶ 120-22. The
12 only allegation that may remotely support this count asserts that "Plaintiffs believe that
13 House Bill 2281 is the product of racial bias aimed specifically at Hispanics, is
14 unlawful, results in impermissible deprivations of rights guaranteed by the United
15 States Constitution, have voiced their opinions of such in the work place and publicly
16 and been confronted for expressing such beliefs." TAC at ¶ 111. Plaintiffs do not
17 explain where they were "confronted" for expressing their opinions on HB 2281 or
18 which, if any, of the defendants "confronted" them about their "opinions" and do not
19 otherwise assert that they have been formally disciplined, prosecuted, or otherwise
20 penalized for their expression of opinions regarding HB 2281. A general reference to
21 having been "confronted" for expressing opinions is not sufficient to state a claim for
22 relief under § 1983. "[T]he pleading standard Rule 8 announces does not require
23 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-
24 unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)
25 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[A] plaintiff's
26 obligation to provide the grounds of his entitle[ment] to relief requires more than
27 labels and conclusions, and a formulaic recitation of the elements of a cause of action
28 will not do." *Twombly*, 550 U.S. at 555 (internal quotation marks omitted).
Accordingly, Count Three of the Third Amended Complaint should also be dismissed.

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CONCLUSION

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

DATED this 19th day of September, 2011.

BURCH & CRACCHIOLO, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 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:

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