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8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE STATE OF ARIZONA

10 CURTIS ACOSTA, SEAN)

11 ARCE, MAYA ARCE, MARIA)

12 FEDERICO BRUMMER,)

13 DOLORES CARRION,)

14 ALEXANDRO ESCAMILLA,)

15 JOSE GONZALEZ, NORMA)

16 GONZALEZ, LORENZO)

17 LOPEZ, JR., KORINA ELIZA)

18 LOPEZ, RENE F. MARTINEZ,)

19 SARA "SALLY" RUSK,)

20 and YOLANDA SOTELO,)

21 Plaintiffs,

22 v.

23 JOHN HUPPENTHAL,

24 Superintendent of Public

25 Instruction, et. al.,

26 Defendants.

No. CV 10 - 623 TUC AWT

**REPLY TO DEFENDANT'S RESPONSE
TO MOTION FOR SUMMARY JUDGMENT**

19 Plaintiffs, through their undersigned counsel, hereby reply to the response
20 submitted by Mr. Huppenthal to the pending motion for summary judgment.

21 At issue is the constitutional propriety of A.R.S. §15-112, a statute intended
22 to limit the dialogue and materials allowed in a public classroom. This statute
23 impermissibly restricts First Amendment freedoms of teachers and students. Nor
24 does it provide reasonable opportunity to know what is prohibited while imposing
25 severe career ending sanctions.

26 Plaintiffs respectfully request that their motion be granted.

27 Submitted this 8th day of July 2011.

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

1 the relief sought by his contention that they seek a constitutional right to dictate
2 their curriculum, text books and materials. Defendant’s Response, CD No. 57, pp.
3 2-9. Nor do plaintiffs argue that public school teachers’ or students’ instructional
4 speech requires boundless free speech protection. Rather, they seek that
5 constitutional protection necessary to preserve their right to use the words and
6 content needed to teach and learn about the history, culture and languages of
7 Latinos.¹

8 The fact that HB 2281 has an “unusual character [that] especially suggest[s]
9 careful consideration to determine whether [it is] obnoxious to the constitutional
10 provisions”, *Romer v. Evans*, 517 U.S. 620, 633 (1996) (citations omitted), is not
11 to be conflated with asking this Court to act as a “super school board” to overturn
12 a legitimate curriculum established by the State.² Here, plaintiffs ask the Court to
13 exercise its most crucial function, to check the representative branch where it
14 exceeds its legitimate exercise of power.

15 When, as has occurred here, the boundaries of sound discretion have been
16 breached, and the role of public education “to prepare pupils for citizenship in the
17 Republic” and to inculcate the civic values that are “indispensable to the practice
18 of self government in the community and the nation” is ignored, judicial
19 intervention is necessary and appropriate. *See, Bethel Sch. Dist. v. Fraser*, 478
20 U.S. 675, 681 (1986)(citations omitted). The fact that the government may

21
22 ¹ Upon passage of HB 2281, then Superintendent Horne stated, “I think it’s
23 overdue. The Department of Education will now have the authority to put a stop to the
24 extremely dysfunctional practices in Tucson Unified School District.” KVOA.com, “Bill
25 Passed That Would Ban Ethnic Studies for TUSD,” April 30, 2010,
26 <http://www.kvoa.com/news/bill-passed-that-would-ban-ethnic-studies-for-tusd/>. Mr.
27 Horne targeted the TUSD program because he “believes that the ethnic studies
28 program teaches Latino students that they are oppressed by white people and promotes
racial hatred.” The Washington Post, The Answer Sheet, “Arizona Strikes Again: Now
It’s Ethnic Studies,” [http://voices.washingtonpost.com/answer-sheet/history/arizona-
strikes-again-now-it-l.html](http://voices.washingtonpost.com/answer-sheet/history/arizona-strikes-again-now-it-l.html). Fed. R. Evid. 201(b) provides for judicial notice of Mr.
Horne’s public comments.

² HB 2281 is not a curriculum nor does it represent a pedagogy. It is a statute enacted by the legislature that is representative of a specific viewpoint.

1 determine the content of its own speech, does not provide a license to trample the
2 First Amendment rights of individuals, including those who work and study in the
3 classrooms of our public schools. It is in our schools that we as a nation impart our
4 fundamental notions of liberal democracy. It is here, in these classrooms, that we
5 invite and are open to debate and the free exchange of ideas.

6 **II. Defendant Huppenthal Fails To Recognize That The First**
7 **Amendment Shields The Words Spoken And Concepts Taught In**
8 **The Classroom That Are Part Of An Adopted Curriculum.**

8 Neither the Supreme Court nor the Ninth Circuit have “definitively resolved
9 whether and to what extent a teacher’s instructional speech is protected by the
10 First Amendment,” and this Court need not determine the extent of such
11 protection, but merely recognize that such exists in finding HB 2281
12 unconstitutionally void for vagueness. *California Teachers Assoc. v. State Board*
13 *of Ed.*, 271 F.3d, 1141, 1148 (9th Cir. 2001). Rather than engage in this type of
14 prescient exercise, it suffices to recognize that, at a minimum, teachers and
15 students have a right to engage in classroom and school speech that is allowed
16 within the boundaries of the adopted curriculum.

17 Speech inheres in the function of teaching. Words, whether spoken or
18 written are the stock-in-trade of the educational setting. Curriculum standards are
19 written broadly to define the basic content of the course. Lessons are not scripted
20 word-by-word for teachers or students but left open for each to choose their own
21 words. Regardless where the outer limits of a teacher’s or student’s First
22 Amendment rights lay, both must be free to use that most basic speech to teach
23 and learn the required material. *Cf. Morse v. Frederick*, 551 U.S. 393, 403
24 (2007)(“*First Amendment* rights, applied in light of the special characteristics of the
25 school environment, are available to teacher’s and students,” citing *Tinker v. Des*
26 *Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

27 The Ninth Circuit has noted that *Hazelwood Sch. Dist. v. Kuhlmeir*, 484
28 U.S. 260 (1988), supports the limited right to classroom speech in furtherance of

1 the course curriculum. In *Downs v. LAUSD*, the court recognized that where
2 “activities may fairly be characterized as a part of the school curriculum, whether
3 or not they occur in a traditional classroom setting,” the “educators’ authority in
4 this area enable[s] them to ‘assure that the participants learn whatever lessons the
5 activity is designed to teach, that readers or listeners are not exposed to
6 material that may be inappropriate for their level of maturity, and that the views of
7 the individual speaker are not erroneously attributed to the school.” 228 F.3d
8 1003, 1010 (9th Cir. 2000), quoting *Hazelwood*, 484 U.S. at 271. Thus, within the
9 educational setting, teachers and students have the right to communicate within
10 the curriculum in a manner that facilitates learning the intended lesson. However
11 limited this protection may be, it applies to the all public educational settings,
12 including the teaching of Mexican American studies.

13 Mr. Huppenthal’s contention that “ [w]hen the state is the speaker it can
14 decide the content of the message,” confuses state speech with teacher and
15 student speech and ignores the legitimate and necessary role of the First
16 Amendment in the public schools. State and local officials have the authority to
17 determine curriculum³ and in this instance the TUSD Governing Board exercised
18 that power.

19 There is no contention that Mexican American studies was created,
20 implemented or exists absent the consent of the Governing Board. To the
21 contrary, Mexican American studies was included in the school district’s Post-
22 Unitary Plan.⁴ Mexican American studies was approved by the Governing Board
23
24

25 ³ *But see, Epperson v. Arkansas*, 393 U.S. 97, 107 (1968), Stewart, J.,
26 concurring (“The State’s undoubted right to prescribe the curriculum for its public schools
27 does not carry the right to prohibit, on pain of criminal penalty, the teaching of a
28 scientific theory or doctrine where that prohibition is based upon reasons that violate the
First Amendment. It is much too late to argue that the State may impose upon the
teacher in its schools any conditions that it chooses, however restrictive they may be of
constitutional guarantees.”)

⁴ See Tucson Unified School District Post Unitary Plan, Ex. 2. pp. 31-33.

1 as authorized by A.R.S. § 15-341(A)(5).⁵

2 Plaintiffs do not dispute that the Governing Board engaged in state speech
3 by adopting the Mexican American studies program. Nor is there a dispute that HB
4 2281 represents state speech. But in this latter instance, HB 2281 does not
5 represent a curriculum or a modification of an adopted curriculum. This statute
6 applies to all “classes and courses” from kindergarten to the twelfth grade in every
7 school district and charter school and prohibits across the board the four items
8 specified. Where HB 2281 prohibits or restricts instructional communications by
9 teachers and students that actualize an approved curriculum, it must comport with
10 the mandates of the First Amendment and Due Process. *See Citizens United v.*
11 *F.E.C.*, 130 S. Ct. 876, 911 (2010) (“Where Congress finds that a problem exists,
12 we must give that finding due deference; but Congress may not choose an
13 unconstitutional remedy.”) A limitation to which HB 2281 fails to adhere.⁶

14 **III. The Prohibitions Included In A.R.S. § 15-112 Apply To The**
15 **Classroom Speech Of Teachers And Students.**

16 Mr. Huppenthal erroneously asserts, “the plain language of the statute does
17 not restrict teacher or student speech, either inside or outside of the classroom...”
18 CD No. 57, p. 7. To the contrary, the statute explicitly states that the prohibitions
19 listed in subsections 15-112(A)(1) through (4) apply to “classes” and thus
20 necessarily to teachers’ and students’ instructional speech. “A school

21
22 ⁵ The relevant portion of section 341 provides: “A. The governing board shall:...5.
23 Provide the curricula...as provided in sections 15-701 and 15-701.01.” A.R.S. § 15-701
24 and 15-701.01 require the State Board of Education to “[p]rescribe a minimum course of
25 study, as defined in section 15-101 and incorporating the academic standards adopted
26 by the State Board of Education...” “Course of study’ means a list of required and
27 optional subjects to be taught in the schools.” A.R.S. § 15-101(10). Thus, the statutory
28 scheme requires the local governing board to determine the curricula, which must
include the general academic standards and minimum list of required and optional
courses provided by the State Board of Education.

⁶ The defendant has not responded to the plaintiffs’ assertion that students’
classroom speech has First Amendment protection. CD No. 42, pp.8-9. Plaintiffs do not
contend that students’ First Amendment rights grant them the “right to control their
curriculum or to choose their texts.” CD No. 57, p.6.

1 district...shall not include in its program of instruction any courses or classes that
2 include any of the following:....” A.R.S.§15-112(A) (emphasis added). This statute
3 is not directed solely to the curricular decisions made by local governing boards.
4 It is also directed to the speech activities in the classroom.

5 Because this statute applies to all Arizona school districts and charter
6 schools, they must now attempt to educate teachers about the new restrictions
7 imposed by HB 2281. If a teacher is accused of “promot[ing] resentment toward a
8 race or class of people” by virtue of what he said during a classroom lesson, then
9 a violation of A.R.S. §15-112(A)(2) may be alleged. It makes no difference that the
10 finding of a violation would be entered against the school district and not against
11 the teacher individually. By its plain wording, HB 2281 effectively requires
12 teachers to discern what classroom speech might violate the statute, thus
13 undeniably chills teachers’ and students’ classroom speech. The prohibitions
14 contained in the statute can only be construed as applying to classroom speech.

15 It is also apparent that A.R.S. §15-112 does not operate like the usual
16 “curricular” decision made by school boards because it is not a curriculum, and
17 was not developed according to educational standards or adopted by a school
18 board. HB 2281 is the result of a successful legislative effort to eliminate one
19 program. Under normal circumstances, when a teachers acts beyond the district’s
20 prescribed curriculum, the teacher risks discipline or termination of employment.
21 See *e.g. Mayer v. Monroe Co. Comm. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir.
22 2007) (teacher terminated for stating personal opinion in classroom discussion of
23 current events.) In this case, the statute directs the punishment for prohibited
24 classroom speech at the school district. The punishment is a draconian 10% cut to
25 the district’s state funds and is intended to give the State Superintendent the
26 power to compel TUSD into shutting down the Mexican American Studies
27 program. Further, the punishment is nominally to the district, but the effect is to
28 reduce the quality of education provided to students, a harm that most other states

1 would not attempt to visit upon their citizens.⁷ Under these circumstances, the
2 Court should look beyond the fact that the statute formally directs punishment to
3 the school district and recognize the reality that the coercion is directed squarely
4 at teachers and students.

5 The efforts of Mr. Horne and Mr. Huppenthal to shut down the Mexican
6 American Studies program extended over a period of years. Their focus has
7 always been on the these classes and this group of teachers. In Mr. Horne's June
8 11, 2007, Open letter to the Citizens of Tucson, delivered in his official capacity as
9 Superintendent of Public Instruction, he urged the citizens of Tucson to close
10 down the Mexican American Studies program by pointing to allegations of
11 classroom conduct by teachers and students. Horne's Open Letter to the Citizens
12 of Tucson, Ex. 3, pursuant to Fed. R. Evid. 201(b), judicial notice is urged. In Mr.
13 Horne's finding, the allegations go beyond mere curricular materials and allege
14 very specific messages communicated by teachers. Ex. 1, pp. 4-10. Earlier this
15 year, Mr. Huppenthal commissioned an audit of TUSD's Mexican American
16 Studies program, which included numerous classroom visits. Classroom
17 observations made by the members of the audit team included observations of
18 teachers, students, as well as materials found on the shelves and walls.
19 Cambium Audit Report, issued by the Arizona Dept. of Education, June 15, 2011,
20 Ex. 4, Judicial notice pursuant to Fed. R. Evid 201(b) is requested.

21 In legislative history, Rep. Steve Montenegro, as a sponsor of HB 2281,
22 specifically referenced classroom speech in support of the bill:

23 You asked me, Rep. Youngwright, if they have the, if the school boards
24 have the ability to choose the curriculum and yes they do. But in this case,
25 there is evidence that has been recorded and we can see from textbooks,
from testimonies, from actual speeches or even lectures given inside

26
27 ⁷ Mr. Huppenthal states that A.R.S. § 15-112 "imposes no individual civil penalty
28 but merely a reduction in state aid." CD No. 57, p. 13 (emphasis added). Regardless of
whether the Arizona Superintendent of Public Instruction comprehends that withholding
10% of state aid is extremely detrimental to students, teachers and staff, the "mere"
reduction in state aid will do grave harm to TUSD and all who depend on it.

1 classrooms that show us that the due prudence is not being employed.
2 Floor comments from Rep. Steve Montenegro, Arizona House of Representatives
3 Forty-Ninth Legislature-Second Regular Session Active Calendar Committee of
4 the Whole #2, Thursday, March, 18, 2010,
5 https://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7138. Judicial
6 notice of the cited record pursuant to Fed. R. Evid. 201(b) is requested. The focus
7 of efforts by Mr. Horne, Mr. Huppenthal and legislators to shut down Mexican
8 American Studies has always been on the classrooms and the teachers. Mr.
9 Huppenthal's claim that HB 2281 does not restrict classroom speech rings hollow.

10 **IV. HB 2281 Is Not Sufficiently Clear To Allow A Person Of Ordinary
11 Intelligence A Reasonable Opportunity To Know What Is Prohibited.**

12 Because the statute encroaches upon First Amendment rights, the Court
13 must apply the vagueness analysis more strictly, requiring a greater degree of
14 specificity and clarity than would be necessary under ordinary due process
15 principles. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S.
16 489, 495 (1982). However, even if the statute does not affect plaintiffs' First
17 Amendment rights, the Court still must apply a stricter scrutiny because of the
18 significant effect on the plaintiffs of the ten per cent penalty to TUSD's budget
19 threatened by Supt. Huppenthal. CD No. 58-3, p.3. Where a challenged civil
20 statute allows imposition of penalties for prohibited conduct, courts apply the
21 stricter standard standard. See *Thompson v. Southwest Sch. Dist.*, 483 F.Supp.
22 1170, 1179 (W.D. Mo. 1980).

23 **A. Promoting the Overthrow of the United States Government.**

24 Mr. Huppenthal incorrectly argues that "[t]he Court in *Keyishian* was not
25 concerned with the phrase 'overthrow of the United States government.' CD No.
26 57, p.14, ll. 11-12. To the contrary, the Supreme Court invalidated for vagueness
27 where the statute at issue required termination of an employee "involved with the
28 distribution of written material 'containing or advocating, advising or teaching the

1 doctrine' of forceful overthrow, and who himself 'advocates, advises, teaches, or
2 embraces the duty, necessity or propriety of adopting the doctrine contained
3 therein.'" 385 U.S. 589, 600 (1967). There the Court did not need to look to the
4 dictionary definitions to strike down the enactment for vagueness. It was enough
5 that the law was uncertain as to whether, for example, a university librarian who
6 recommends the reading of materials such as the "histories of Marxist doctrine" or
7 "the background of the French, American, or Russian revolutions" might engage in
8 prohibited conduct. *Id.*, at 601. Although the law at issue in *Keyishian* added the
9 concept of advocating "the doctrine" of forceful overthrow, and HB 2281 does not
10 use the word "doctrine," the same vagueness concerns apply. A teacher may
11 reasonably fear that an official with the Department of Education could find that
12 the study of armed conflict in American history and of revolutionary doctrines
13 crosses an imperceptible line into "advocating the overthrow of the United States
14 government.

15 **B. Promote Resentment Toward a Race or Class of People.**

16 In this case, it is inevitable that many of Arizona's teachers will be required
17 to venture into some area of instruction that could be construed as "promoting"
18 feelings of "resentment" in students.⁸ "Resentment" is defined as "the feeling of
19 displeasure or indignation at some act, remark, person, etc., regarded as causing
20 injury or insult." (See definition from dictionary.com available at
21 <http://dictionary.reference.com/browse/resentment> (Last visited 6/30/11)). In the
22 context of the classroom, when does a teacher "encourage" "feelings of
23 displeasure" toward a race or class of people? If a teacher is particularly good at
24 bringing history alive for her students, is she more likely to be "encouraging"
25 subjective feelings of displeasure? By what standards, objective or subjective,
26 would such a determination be made?

27

28

⁸ As noted by the defendant, to "promote" means "to further or encourage the progress or existence of" or "to urge the adoption of." CD No. 57, p.13, fn. 7(citation omitted).

1 There are countless lessons that take place every day that result in students
2 feeling displeasure or indignation at some act, remark, or person, as there should
3 be. It is a natural response to feel “displeasure” or “indignation” when learning
4 much of American history. Slavery, brutality against Native Americans, Jim Crow
5 laws, lynching, separate but equal are all topics that should give rise to such
6 emotions. At what point would the Superintendent of Public Instruction, with the
7 unrestrained power of enforcement granted by HB 2281, decide that a teacher has
8 “encouraged,” and therefore “promoted” “displeasure” in students? The statute
9 offers no assistance.

10 **C. Designed Primarily for Pupils of a Particular Ethnic Group.**

11 Mr. Huppenthal does not address the plaintiffs’ argument that subsection
12 15-112(A)(3) does not make it clear whether “designed primarily for” pupils of a
13 particular race might mean “attended primarily by” students of a particular race.
14 However Mr. Huppenthal’s Finding expressly notes that the enrollment of more
15 than 90% Latino students supports the charge that the classes are designed
16 primarily for Latinos. Huppenthal Finding, p.2. Yet, in his Response, he states that
17 there is a “clear and understandable demarcation between courses “designed
18 primarily to study” a certain ethnic group and courses “designed primarily for”
19 students belonging to that group. CD No. 57, p18. Is the high percentage of Latino
20 students in Mexican American Studies classes because the classes are “designed
21 primarily to study” Mexican Americans? Or is it because they are “designed
22 primarily for” Mexican Americans? There is no “clear and understandable
23 demarcation” between the two.

24 **D. Advocate Ethnic Solidarity Instead of the Treatment of Pupils as**
25 **Individuals.**

26 According to Mr. Huppenthal, evidence that materials from Mexican
27 American Studies classes touch on “oppression” against Mexican Americans is
28 evidence that the classes violate subsection 15-112(A)(4). Huppenthal Finding,

1 p.2. Mr. Huppenthal's interpretation of subsection (A)(4) means that learning about
2 oppression necessarily precludes treating a student as an individual, or as "a
3 single human being, as distinguished from a group." See
4 <http://dictionary.reference.com/browse/individual> (last visited July 7, 2011). The
5 inherent ambiguity in the provision is demonstrated by Mr. Huppenthal's own
6 interpretation. The fact that students learn about oppression has nothing to do with
7 whether their teachers treat them "as a single human being."

8 **V. A.R.S. § 15-112 Is Vague And Invites Subjective And Arbitrary**
9 **Enforcement Of The Law.**

10 "Facial challenges to legislation have been permitted in the context of the
11 *First Amendment* when the legislation allegedly vests government officials with
12 unbridled discretion. The rationale is that 'every application of the statute creates
13 an impermissible risk of suppression of ideas.'" *Baby Tam v. City of Las Vegas*,
14 154 F.3d 1097, 1100 (9th Cir. 1998), citing *City Council of Los Angeles v.*
15 *Taxpayers for Vincent*, 466 U.S. 789, 798 n.15 (1984)(emphasis added); see also
16 *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) (Courts invalidate
17 ambiguous statutes to avoid subjective enforcement of the laws based on
18 "arbitrary and discriminatory enforcement" by government officers.)(citations
19 omitted.) Here it is clear, not only that HB 2281 invites discriminatory
20 enforcement, but that selective enforcement was the driving force behind HB 2281
21 and that it has already been discriminatorily enforced.⁹

22 The enforcement provisions of the statute grant unchecked discretion to the
23 Superintendent of Public Instruction. The relevant portion of subsection 112(B)
24 provides:

25 ⁹ As pointed out in Plaintiff's Motion for Summary Judgement, CD No. 47, p. 16,
26 former Superintendent of Public Instruction Horne has already engaged in
27 discriminatory enforcement by finding TUSD's Mexican American Studies program to be
28 in violation of the statute, while explicitly declining to prosecute alleged violations of two
other TUSD Ethnic Studies programs. His stated rationale, that the different treatment
rests on nothing more than the subjective complaints received by him, is further
evidence of discriminatory enforcement. See Plaintiffs Statement of Facts, CD No. 43-1,
p.2.

1 If the state board of education¹⁰ or the superintendent of public instruction
2 determines that a school district...is in violation of subsection A, the state
3 board of education or the superintendent of public instruction shall notify
4 the school district...that it is in violation of subsection A.

5 The Statute gives no criteria for the Superintendent's decision. Nor does it require
6 him to specify alleged violations or to provide the school district with any type of
7 notice at all, beyond a conclusory allegation of violation. Sixty days after providing
8 the notice, the Superintendent may "determine[] that the school district...has failed
9 to comply with subsection A" A.R.S. § 15-112(B). Again, the statute provides no
10 guidance and this determination is left wholly up to the Superintendent's
11 discretion. After directing the withholding of ten percent of the school district's
12 budget, only "[w]hen...the Superintendent...determines that the school district...is
13 in compliance with subsection A, the department of education shall restore" the
14 school district's funding. Id.

15 The arbitrary enforcement powers granted by the statute come to life in Mr.
16 Huppenthal's Findings against the MAS program. Not only does he fail to identify
17 any course or class in violation of subsection 112(A), but also, according to TUSD,
18 his lack of specificity makes "it impossible for TUSD to identify and remedy any
19 alleged violation." TUSD's June 22, 2011, Notice of Appeal, Defendant's
20 Statement of Facts, Ex. D., CD No. 58-4.

21 Mr. Huppenthal's arbitrary conduct in the face of an audit report finding the
22 Mexican American Studies program fully compliant with A.R.S. § 15-112(A)
23 provides compelling evidence of the unchecked and discriminatory nature of the
24 enforcement power granted by the statute. Mr. Huppenthal contracted with
25 Cambium Learning Group, Inc., an educational consulting firm, to perform a
26 comprehensive and independent audit of the Mexican American Studies program.
27 Cambium Report.¹¹ In its 120-page report, Cambium found, "[d]uring the

28 ¹⁰ In this case, the State Board of Education is a nominal party. CD No. 48.

¹¹ Although the Audit Report is dated May 2, 2011, presumably the date it was issued to the Superintendent of Public Instruction, the Superintendent did not release it

1 curriculum audit period, no observable evidence was present to indicate that any
2 classroom within [TUSD] is in direct violation of the law, A.R.S. 15-112(A). In most
3 cases, quite the opposite is true.” Cambium Report, p.50. It also confirmed that
4 Mexican American Studies students outperform their peers on standardized tests
5 and graduate at higher rates, as well as recommended that the classes be
6 retained as part of the core curriculum. Id., pp. 43, 47, 49-50,66-67. Mr.
7 Huppenthal ignored his expert firm’s audit findings and issued his own conclusion
8 that the Mexican American Studies program violates subsection 15-112(A).

9 The fact that HB 2281 was passed for the purposes of selectively enforcing
10 it as a means to silence the Mexican American Studies program, shines a glaring
11 spotlight on the invidious nature of HB 2281. Precisely because the First
12 Amendment is “premised on mistrust of governmental power,” it exists to stand
13 “against attempts to disfavor certain subjects or viewpoints.” *Citizens United*, 130
14 S.Ct. at 898. In this case, the statute encourages discriminatory enforcement by
15 its ambiguous wording, as well as by its limitless discretion vested in the
16 Superintendent to declare violations, with no discernible guidelines. The result is
17 an attempt to control content by selective enforcement against disfavored
18 speakers. “By taking the right to speak from some and giving it to others, the
19 Government deprives the disadvantaged person or class of the right to use
20 speech to strive to establish worth, standing, and respect for the speaker’s voice.”
21 Id., at 899.

22 In this case, the State goes far beyond merely promoting the idea that
23 “pupils should be taught to treat and value each other as individuals.” A.R.S. § 15-
24 111. Rather, it seeks to suppress a viewpoint that is not even counter to “valu[ing]
25 each other as individuals.” Id. There is nothing inherent in learning about Mexican
26 Americans, or about any other ethnic group, that is inimical to treating pupils as

27
28 to the public until he issued his Finding against TUSD on June 15, 2011. For that
reason, the Cambium Audit Report was not attached to the plaintiffs’ motion for
summary judgement, filed on June 2, 2011.

1 individuals. Since closing down the Mexican American Studies program would do
2 nothing to improve the treatment of students as individuals, the remedy is not
3 tailored to promote the stated goal of the statute. *Cf. Brown v. Entertainment*
4 *Merchants Assoc.*, 2011 Lexis 4802, 22 (2011) (“The State must identify an ‘actual
5 problem’ in need of solving,...and the curtailment of free speech must be actually
6 necessary to the solution.”)(citation omitted.)

7 By attempting to shut down the Mexican American Studies program and to
8 prohibit students from learning about literature, history, government and art from
9 the perspective of Mexican Americans, Arizona goes too far. See *e.g. Pico*, 457
10 U.S. at 872 (the local school board goes too far by removing books from the
11 school library “simply because they dislike the ideas contained in those books and
12 seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism,
13 religion, or other matters of opinion.”); *Epperson v. Arkansas*, 393 U.S. 97, 116,
14 Stewart, J., concurring, (“It is one thing for a State to determine that ‘the subject of
15 higher mathematics, or astronomy, or biology’ shall or shall not be included in its
16 public school curriculum. It is quite another thing for a State to make it a criminal
17 offense for a public school teacher so much as to mention the very existence of an
18 entire system of respected human thought.”) In this case, the unrestrained
19 discretion vested in the Superintendent creates an unconstitutional
20 level of vagueness with an impermissible risk of discriminatory and arbitrary
21 enforcement each time the Superintendent chooses to exercise his authority. For
22 that reason the Court should invalidate the statute.

23 **VI. HB 2281's Vagueness Chills Protected Speech.**

24 Statutes that are insufficiently clear will be struck down for vagueness to
25 avoid unnecessary chilling of protected First Amendment rights. *Foti*, 146 F.3d at
26 638, citing *Grayned v. City of Rockford*, 408 U.S. 104, 108(1972). “A statute that
27 chills speech can and must be invalidated where its facial invalidity has been
28 demonstrated.” *Citizens United v. FEC*, 130 S.Ct. 876, 896 (2010).

1 “When one must guess what conduct or utterance may lose him his
2 position, one necessarily will ‘steer far wider of the unlawful zone....’” *Keyishian*,
3 385 U.S. at 604 (citation omitted). “For ‘the threat of sanctions may deter...almost
4 as potently as the actual application of sanctions.’” *Id.*, (citation omitted). “The
5 danger of that chilling effect upon the exercise of vital *First Amendment* rights
6 must be guarded against by sensitive tools which clearly inform teachers what is
7 being proscribed.” *Id.* (citations omitted).

8 *Citizens United*, although not a case involving teacher speech, is instructive
9 for considering the facial invalidity of the election law at issue because “any other
10 course of decision would prolong the substantial, nationwide chilling effect” of the
11 statute. *Id.*, at 894. An important factor was the immediacy of the need for relief in
12 light of the short window available for political speech during a campaign. The
13 statute was used to ban speech and the election went on, without *Citizens United*
14 being allowed to engage in the desired political speech. *Id.* Similarly, this case
15 deals with the educational needs and rights of students to benefit from the best
16 that their teachers have to offer them. While adults argue the merits of this case in
17 court, the students’ education continues. If their teachers’ speech is chilled during
18 the pendency of this lawsuit, the students’ opportunity to benefit from the speech
19 is forever lost.

20 HB 2281 also chills students’ speech and their “undoubted freedom to
21 advocate unpopular and controversial views in schools and classrooms....” *Fraser*,
22 478 U.S. at 681; see also *Brown*, 2011 LEXIS 4802, 14 (the state does not have a
23 “free-floating power to restrict the ideas to which children may be exposed.”)
24 Under the statute, a teacher is obliged to silence students when they fear
25 something the student may say will cross the murky statutory line and “encourage”
26 “feelings of displeasure” toward a race or class of people. Here the chilling effects
27 of HB 2281 are ominous. The right of the state to determine a legitimate
28 curriculum does not mean that the state may declare an “educational mission” to

1 “suppress speech on political and social issues based on disagreement with the
2 viewpoint expressed.” *Morse*, 551 U.S. at 423, Alito, J., concurring. Such a
3 “mission” “strikes at the very heart of the First Amendment.” *Id.*

4 **VII. Subsections (E) And (F) Of A.R.S. § 15-112 Do Not Provide A**
5 **Narrowing Interpretation, And Render The Entire Statute More**
6 **Vague.**

7 Despite Mr. Huppenthal’s claim that the exceptions contained in §§15-
8 112(E) and (F) “clarify and narrow how broadly the statute can be applied,” those
9 subsections only serve to increase the statute’s ambiguity, and therefore, its
10 overbreadth and vagueness. See *Berger v. City of Seattle*, 569 F.3d 1029, 1047-
11 48 (9th Cir. 2009) (city’s proposed limiting interpretation would render the
12 ordinance vague.); CD No. 57, p. 20. Subsection F states,

13 Nothing in this section shall be construed to restrict or prohibit the
14 instruction of the holocaust, any other instance of genocide, or the
15 historical oppression of a particular group of people based on ethnicity,
16 race or class.

17 (emphasis added.) Although subsection (F) correctly recognizes that one cannot
18 teach American History without teaching about oppression, this exception further
19 clouds the issue of when it is allowable to teach about “oppression.”

20 Teaching about “oppression” is a favorite theme of Mr. Huppenthal and Mr.
21 Horne when castigating Mexican American Studies.¹² Mr. Huppenthal declared the
22 program to be in violation of subsection (A)(2), allegedly promoting resentment
23 toward a race or class of people, by having “materials repeatedly reference White
24 people as being ‘oppressors’ and ‘oppressing’ the Latino people.” Huppenthal
25 Finding, p.2. Mr. Horne is equally concerned with “oppression” in his Finding,
26 where he cites the textbook, “Pedagogy of the Oppressed,” by Paolo Freire as in
27 violation of the statute and opines that students “should not be taught that they are
28 oppressed.” Horne Finding, p.7.

12 Although the plaintiffs will later advance their claim that the statute is vague as applied, after the opportunity to conduct discovery, Mr. Huppenthal and Mr. Horne’s Findings against TUSD are illustrative of the facial overbreadth and vagueness of HB 2281 and serve as two separate agency findings both of which are contradicted by their own retained experts.

1 In examining his Finding, we do not know why Mr. Huppenthal finds the
2 topic of “oppression” to be in violation of subsection (A)(2), despite the existence
3 of the “exception” for teaching about “historical oppression” contained in
4 subsection (F). If he argues that teaching about “historical oppression” is
5 permitted, but teaching about “oppression” in general is prohibited, then he further
6 demonstrates the overbreadth and vagueness of the statute. Justice Black
7 recognized a similar dilemma where he observed, “Under this statute, as
8 construed by the Arkansas Supreme Court, a teacher cannot know whether he is
9 forbidden to mention Darwin’s theory at all or only free to discuss it as long as he
10 refrains from contending that is it true.” *Epperson v. Arkansas*, 393 U.S. 97, 112
11 (1968), Black, J., concurring. Teaching about history is inextricably bound with the
12 present and any attempt to distinguish between “oppression” as an historical
13 concept and the modern day consequences of that “oppression” must fail.¹³

14 The Supreme Court has cautioned against rewriting statutes to “conform to
15 constitutional requirements,” not only to avoid “a serious invasion of the legislative
16 domain,” but to not diminish the legislature’s “incentive to draft narrowly tailored
17 law in the first place.” *Stevens*, 130 S. Ct. 1592, (citation omitted.) In passing HB
18 2281, the Arizona Legislature showed little concern for drafting a narrowly tailored
19 law. This court should not encourage further irresponsible legislation by attempting
20 to rescue the statute from its constitutional infirmities. The “exceptions” of
21 subsections 112(E) and (F) render the statute more vague and the Court should
22 invalidate it.

23 **VIII. A.R.S. § 15-112 Prohibits A Substantial Amount Of Protected** 24 **Speech.**

25 In order to determine whether the prohibitions contained in HB 2281 would
26 reach a substantial amount of protected speech, the Court must first construe the

27 ¹³ The same argument renders the “exception” for “[c]ourses or classes that
28 include the discussion of controversial aspects of history” overbroad and vague. A.R.S.
§ 15-112 (E)(4). We do not know why Mr. Huppenthal alleges teaching about
“oppression” is prohibited, rather than permitted as a “discussion of controversial
aspects of history.”

1 statute. *U.S. v. Stevens*, 130 S. Ct. 1577, 1587 (2010). “[I]t is impossible to
2 determine whether a statute reaches too far without first knowing what a statute
3 covers.” *Id.*, (citation omitted.) Like the statute at issue in *Stevens*, HB 2281
4 creates prohibitions of “an alarming breadth.” *Id.*, 130 S. Ct. at 1588. In *Stevens*,
5 the Supreme Court construed a statute that purported to ban depictions of “animal
6 cruelty.” *Id.* However, the statute went far beyond merely banning depictions of
7 animal cruelty. It banned videos showing all types of animal deaths, whether cruel
8 or not. *Id.* In concluding that the statute was unconstitutionally overbroad, the Court
9 found that the presumptively impermissible applications of the statute far
10 outnumbered the few permissible ones. *Id.* at 1592.

11 To determine whether a statute reaches a substantial amount of protected
12 conduct,

13 a court shall evaluate the ambiguous, as well as the unambiguous scope of
14 the enactment. To this extent, the vagueness of a law affects overbreadth
15 analysis. The Supreme Court has long recognized that ambiguous
meanings cause citizens to ‘steer far wider’ of the unlawful zone...than if
the boundaries of the forbidden areas were clearly marked.

16 *Village of Hoffman Estates*, 455 U.S. at 495. (citations omitted).¹⁴

17 Although HB 2281 has always targeted TUSD’s Mexican American Studies
18 program, the ambiguous wording of the statute reaches far beyond. Many topics
19 of history and literature may “encourage” feelings of “displeasure” toward a
20 particular race or ethnic group. Racial and religious groups are disparaged in
21 many books commonly read by high school students, such as: *To Kill A*
22 *Mockingbird*, *The Bluest Eyes*, *The Canterbury Tales*, *Huck Finn*, *The Great*
23 *Gatsby*, *Othello*, and *The Scarlett Letter*. Other common books detail the evil of
24 discrimination and oppression: *The Diary of Anne Frank*, *Their Eyes Were*
25 *Watching God*, *Black Boy*, *Native Son*, *Farewell to Manzanar*, *Black Like Me*, and
26 *The Invisible Man*. Social studies classes teach many historical and current events

27
28 ¹⁴ Since ambiguities contained in the statute affect both the vagueness and
overbreadth arguments, plaintiffs will not repeat here those arguments asserted under
the vagueness analysis, but incorporate them by reference.

1 that may encourage feelings of displeasure toward a particular race or ethnic
2 group: The Spanish conquistadors in the New World, the Civil War, the Mexican-
3 American War, World Wars I and II, the Korean War, the Vietnam War, the wars in
4 Iraq and Afghanistan, colonization, the labor union movement, the civil rights
5 movement, slavery, Jim Crow, Brown v. Board of Education, Manifest Destiny,
6 immigration, the TEA party, and the Freedom Riders.¹⁵

7 Not only does HB 2281 reach a substantial amount of protected speech, but
8 the nature of the speech is also substantial. When our children's education is at
9 stake, overbroad laws that cause teachers to "steer far wider" of the unlawful zone
10 cannot be tolerated. See *Keyishian*, 385 U.S. at 604.

11 **IX. Subsections A, E, And F Are Not Severable.**

12 The parties agree that if the Court finds that part of A.R.S. s15-112 is
13 unconstitutional, it must look to legislative intent to determine whether those
14 subsections may be severed, or whether the entire statute must be struck. CD No.
15 57, p.21. Only where the valid and invalid parts are not "intimately connected" will
16 the act be upheld so far as valid. *State v. Watson*, 586 P.2d 1253, 1257 (1978).

17 Of the four subsections of 15-112(A), subsections (2), (3) and (4) all
18 express the legislature's intent to prohibit teaching about race and ethnicity. The
19 exclusions contained in subsections (E) and (F) also deal solely with teaching
20 about race and ethnicity. Those exclusions would not exist, but for the racial
21 context of subsections (A)(2), (3) and (4). Invalidating any one of them strikes a
22 blow to the legislature's intent to prohibit teaching about race and they cannot be
23 severed.

24 _____

25 ¹⁵ It appears that the purported exclusions contained in subsections 112(E) for
26 classes teaching the history of any ethnic group or that include the discussion of
27 controversial aspects of history and (F) for instruction on the historical oppression of a
28 particular ethnic group are insufficient to rescue any of the above from being prohibited
by the statute. Mr. Huppenthal and Mr. Horne examined the texts used by Mexican
American Studies and indicted them as teaching about Mexicans being oppressed by
white people and historical events, such as the Battle of the Alamo and the Mexican
American War, without ever mentioning the "exclusions." Horne Finding, pp.7-9;
Huppenthal Finding, p.2.

1 **X. Conclusion.**

2 Plaintiffs seek only that which the Constitution provides with respect to the
3 First Amendment and Due Process; the right to engage in speech within their
4 approved curriculum and to be free of the fear of the unknown, undisclosed
5 boundaries of what can and cannot be said in the public school setting by
6 educators or students. The challenges confronting public education demand the
7 ability to adopt new and innovative curriculums that can effectively reach students
8 and enhance their performance. Mexican American Studies is such a program.

9 Ours is a history filled with removing the shackles of orthodoxy that seeks to
10 deny fundamental rights to all who have the privilege to reside in our country.
11 Plaintiffs motion seeks limited but critical relief; a finding that HB 2281 fails to
12 comport with fundamental constitutional mandates.

13 Respectfully submitted this 8th day of July 2011.

14 s/Richard M. Martinez, Esq.
15 RICHARD M. MARTINEZ, ESQ.
16 Counsel for Plaintiffs
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21 **Certificate of Service**

22 I hereby certify that on July 8th 2011, I electronically transmitted the
23 foregoing document to the Clerk's Office using the CM/ECF System for filing and
24 transmittal of the instant motion via the Notice of Electronic Filing to the CM/ECF
25 registrants of record.

26 s/Richard M. Martinez, Esq.
27 Counsel for Plaintiffs
28