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5 IN THE UNITED STATES DISTRICT COURT

6 FOR THE DISTRICT OF ARIZONA

7 CURTIS ACOSTA, SEAN)
8 ARCE, MAYA ARCE, MARIA)
9 FEDERICO BRUMMER,)
10 DOLORES CARRION,)
11 ALEXANDRO ESCAMILLA,)
12 JOSE GONZALEZ, NORMA)
13 GONZALEZ, LORENZO)
14 LOPEZ, JR., KORINA ELIZA)
15 LOPEZ, RENE F. MARTINEZ,)
16 SARA "SALLY" RUSK,)
17 and YOLANDA SOTELO,)

18 Plaintiffs,

19 v.

20 JOHN HUPPENTHAL,
21 Superintendent of Public
22 Instruction, in his Official
23 Capacity, et. al.,

24 Defendants.

No. CV 10 - 623 TUC AWT

**RESPONSE IN OPPOSITION TO
MOTION TO DISMISS, CD No. 59**

25 Plaintiffs, by and through their counsel undersigned, hereby respond in
26 opposition to the pending motion to dismiss, CD. No. 59. Therein, Mr. Huppenthal
27 seeks dismissal pursuant to the provisions of Rule 12(b)(1) and (6), F.R.C.P. Neither
28 Rule provides a basis for dismissal of this case.

29 Plaintiffs are all proper individuals to assert the constitutional claims identified
30 in their second amended complaint. CD No. 53. They are comprised of two students
31 and eleven public school educators. Both students attend Tucson Unified School
32 District ("TUSD") high schools. Ten of the educators teach classes for the Mexican
33 American Studies Department ("MAS"), a TUSD-adopted curriculum. Sean Arce is the
34 MAS director. All of the educator plaintiffs are certified, meet the requirements of the

1 Arizona Department of Education (“ADE”), and are subject to ADE scrutiny.

2 Plaintiffs as a group have been forced to live under the limitations created by
3 HB 2281. Their rights as citizens of the United States of America have been
4 diminished. They no longer enjoy the same rights under the First Amendment that
5 other similarly situated individuals do. Their ability to teach and learn about the history,
6 culture, and language of Latinos has been circumscribed by State-imposed limitations;
7 what they teach or learn about Latinos must not offend the State of Arizona. No other
8 group, be it racial, ethnic or religious, is subject to this type of State-imposed scrutiny.
9 The line between what is permitted and that which offends is unknown. HB 2281 is
10 devoid of any definitions. Enforcement is left to the subjective interpretation of State
11 officials who have either been elected or appointed to their position.

12 HB 2281 is a statute that separates citizens on the basis of their history and
13 religion. It expressly provides for the teaching of the Holocaust while implicitly denying
14 Latinos to read, hear, discuss, or debate the atrocities Latinos have suffered as a
15 group. This law also denies Latinos, and all students of TUSD, the opportunity to learn
16 about their contributions to our nation, the struggles endured, and the price that has
17 been paid to enjoy the promises of our nation, preserve freedom, and provide
18 leadership at all levels.

19 HB 2281 is a muzzle placed firmly on the mouths of classroom teachers that
20 deafens students and places State-imposed blinders on the public schools of Arizona.
21 The history of HB 2281 and subsequent enforcement diminishes the rights of every
22 Latino. It is a Latino-specific law aimed at one target—TUSD’s MAS program.

23 Accordingly, for the reasons more fully set forth in the accompanying
24 memorandum of points and authorities, the plaintiffs respectfully urge denial of
25 defendant’s motion to dismiss.

26 Respectfully submitted this 1st day of August 2010.

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

1 **Memorandum of Points and Authorities**

2 **I. Preliminary Statement**

3 On December 31, 2010, Latinos in Arizona entered a new era, one that
4 returned them to their prior status as second-class citizens in the United States of
5 America. On that date, HB 2281 became effective.

6 The events that led to the enactment of HB 2281 are no secret. They are a
7 matter of public record. *Intri-Plex Tech Inc. v. Crest Group Inc.*, 499 F.3d 1048,
8 1052 (9th Cir. 2007). While Tom Horne was the Superintendent of Public
9 Instruction, he did all he could to impose his will on TUSD to “shut down” the MAS
10 program. See, Horne Finding, Ex. B to Second Amended Complaint, (“SAC”) CD
11 No. 53; and Mr. Horne’s Open Letter to the Citizens of Tucson, Ex. 1 hereto. Upon
12 passage of HB 2281, then Superintendent Horne stated, “I think it’s overdue. The
13 Department of Education will now have the authority to put a stop to the extremely
14 dysfunctional practices in Tucson Unified School District.” KVOA.com, “Bill Passed
15 That Would Ban Ethnic Studies for TUSD,” April 30, 2010,
16 <http://www.kvoa.com/news/bill-passed-that-would-ban-ethnic-studies-for-tusd/>. Mr.
17 Horne targeted the TUSD program because he “believes that the ethnic studies
18 program teaches Latino students that they are oppressed by white people and
19 promotes racial hatred.” The Washington Post, The Answer Sheet, “Arizona
20 Strikes Again: Now It’s Ethnic Studies,” [http://voices.washingtonpost.com/answer-](http://voices.washingtonpost.com/answer-sheet/history/arizona-strikes-again-now-it-l-.html)
21 [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
22 judicial notice of Mr. Horne’s public comments.

23 Obviously concerned that he would be denied his opportunity to impose his
24 sanction on TUSD’s MAS program, Mr. Horne signed his Finding a day before HB
25 2281 became effective, a Finding that was based entirely on pre-enactment
26 allegations during his final days as Superintendent of Public Instruction. This
27 Finding remains in effect, has not been voided, and represents an enforcement
28 action of HB 2281 by the State of Arizona.

1 In June of this year, Mr. Huppenthal released his own Finding concerning
2 TUSD's MAS program, reaching the same conclusion as his predecessor, Mr.
3 Horne, that HB 2281 was violated. His Finding ignored the on-site audit conducted
4 at Mr. Huppenthal's request by his own team of experts, Cambium. See Ex. C, Part
5 1-4 to Reply. CD No. 75. (The Cambium Audit Report is also a public record and
6 properly considered by the court as a part of record in this motion.) The
7 Huppenthal HB 2281 Finding is contradicted by the Cambium Audit, which found
8 no statutory violation. Additionally, it is noteworthy that not a single classroom
9 incident is cited by Mr. Huppenthal.

10 Irrespective of the paucity of evidence offered by Mr. Huppenthal, he, like
11 Mr. Horne, explicitly orders that steps be taken to come within compliance or
12 thereafter 10% of state funding will be withheld. This sanction will cost TUSD 1 to 3
13 million dollars a month. SAC, ¶¶ 16-17. See also Answer file by Horne, CD No. 11,
14 admitting sanction. Without identifying what has to be changed, Mr. Huppenthal
15 has inflicted his injury upon the plaintiffs. Their program, teaching, words, and
16 opportunity to learn has been altered subject to a draconian penalty—sanctions
17 that, irrespective of the final choice, injure each of the plaintiffs. Moreover, the
18 plaintiffs remain under the cloud of HB 2281 to refrain from saying or doing
19 anything that hints of “Hispanic nationalism and unity in the face of assimilation and
20 oppression.” Huppenthal Finding at p. 3. The very existence of the MAS program is
21 at risk, endangering plaintiffs employment and class opportunities.

22 Mr. Huppenthal's position that HB 2281 does not reach, impact, or limit the
23 Free Speech of plaintiffs is as absurd as his suggestion that HB 2281 and the
24 subsequently issued violation findings do not impose cognizable constitutional
25 injuries upon the plaintiffs. HB 2281 is not a State-mandated curriculum, but a
26 limitation on a locally-approved curriculum that does what was intended by
27 effectively reaching students and improving their ability to be successful in school.

28 Plaintiffs assert that HB 2281 is void for vagueness, both facially and as

1 applied, and that it impermissibly chills First Amendment interests, including
2 impairing the right of students to hear a protected communication. HB 2281 also
3 denies Latinos equal protection and substantive due process.

4 HB 2281 is the law in Arizona. Its requirements and sanctions are real, not
5 speculative. For Latinos, their rights under the Constitution have been
6 impermissibly altered.

7 **II. Standard of Review**

8 **A. 12(b)(1)**

9 Plaintiffs have the burden of establishing standing. *See, e.g., Kokkonen v.*
10 *Guardian of Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “For purposes of ruling
11 on a motion to dismiss for want of standing, both the trial and reviewing courts
12 must accept as true all material allegations of the complaint, and must construe the
13 complaint in favor of the complaining party.” *Takhar v. Kessler*, 76 F.3d 995, 1000
14 (9th Cir.1996) (internal citations and quotation marks omitted). As stated in *Lujan v.*
15 *Defenders of Wildlife*, “[a]t the pleading stage, general factual allegations of injury
16 resulting from the defendant's conduct may suffice, for on a motion to dismiss we
17 presum[e] that general allegations embrace those specific facts that are necessary
18 to support the claim”. 504 U.S. 555, 561 (1992) (internal quotation marks and
19 citation omitted).

20 **B. 12(b)(6)**

21 A 12(b)(6) motion to dismiss is appropriate only if plaintiffs have failed to
22 provide fair notice of their claims, and their factual allegations, accepted as true,
23 are implausible or no more than mere speculation. *Ashcroft v. Iqbal*, 19 S.Ct. 1937,
24 1951 (2009).

25 **C. Only One Plaintiff Need Establish Standing**

26 When there are multiple plaintiffs, only one plaintiff is required to
27 demonstrate standing. *Carey v. Population Services Int’l*, 431 U.S. 678, 682
28 (1977); *Construction Indus. Ass’n of Sonoma County v. City of Petaluma*, 522 F.2d

1 897, 903 (9th Cir. 1975). Once the court determines that one plaintiff has standing,
2 it need not decide the standing of the others. *Leonard v. Clark*, 12 F.3d 885, 888
3 (9th Cir. 1992).

4 **III. Plaintiffs’ Satisfy The Standing Requirements of Article III**

5 A plaintiff establishes standing when:

- 6 1. she has suffered an actual or imminent injury that is
7 concrete and particularized;
- 8 2. the injury is fairly traceable to the challenged action of the
9 defendants; and
- 10 3. the injury will likely be avoided or redressed by a decision in favor of
11 the plaintiff.¹

12 The equitable jurisdiction of the federal courts is both preventive and
13 corrective.² The Supreme Court of the United States has repeatedly held that
14 “[o]ne does not have to await the consummation of threatened injury to obtain
15 preventive relief. If the injury is certainly impending that is enough.” *Babbitt v.*
16 *United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (emphasis added),
17 quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). As the Supreme
18 Court proceeded to explain in *Babbitt*:

19 When contesting the constitutionality of a criminal statute,
20 it is **not** necessary that the plaintiff first expose himself to
21 actual arrest or prosecution to be entitled to challenge the
22 statute that he claims deters the exercise of his constitutional
23 rights. When the Plaintiff has alleged an intention to engage
24 in a course of conduct arguably affected with the constitutional
25 interest, but prescribed by a statute, and there exists **a credible**
26 **threat** of prosecution thereunder, he should **not** be required to

23 ¹ See, e.g., *Stormans, Inc., v. Selecky*, 586 F. 3d. 1109, 1119 (9th Cir. 2009) (pharmacy
24 and two pharmacists had Article III standing to challenge a state law requiring pharmacists to
25 dispense all lawful medications, including the “Plan B,” pill, although they had not been
26 threatened with enforcement of the law). The Ninth Circuit noted in *Graham v. FEMA*, 149 F.3d
27 997, 1003 (9th Cir. 1998), that the applicable burden of proof in establishing standing is
28 “likelihood,” not certainty: “Plaintiffs need not demonstrate that there is a ‘guarantee’ that their
injuries will be redressed by a favorable decision...plaintiffs must show only that a favorable
decision is likely to redress [their injuries], not that a favorable decision will inevitably redress
[their injuries]”) (emphasis added).

² See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925) (“[p]revention of
impending injury by unlawful action is a well-recognized function of courts of equity”).

1 await and undergo a criminal prosecution as the sole means of
2 seeking relief.

3 262 U. S. at 298. (internal citations and quotation marks omitted; emphasis
4 added). Although *Babbitt* involved a pre-enforcement challenge to a criminal
5 statute, the Ninth Circuit has applied this principle to cases contesting the
6 constitutionality of civil statutes imposing monetary fines.³

7 Justice Scalia has summarized Article III standing requirements in the
8 context of a challenge to a threatened—but indisputably unactualized—injury in the
9 case of *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007):

10 Our analysis must begin with the recognition that, where
11 threatened action by government is concerned, we do not
12 require a plaintiff to expose himself to liability before
13 bringing suit to challenge the basis for the
14 threat—constitutionality of a law threatened to be enforced.
15 The plaintiff's own action (or inaction) in failing to violate
16 the law eliminates the imminent threat of prosecution, but
17 nonetheless does not eliminate Article III jurisdiction. For
18 example, in *Terrace v. Thompson*, 263 U.S. 197, (1923),
19 the State threatened the plaintiff with forfeiture of his farm,
20 fines, and penalties if he entered into a lease with an alien
21 in violation of the State's anti-alien land law. Given this
22 **genuine threat of enforcement**, we did **not** require, as a
23 prerequisite to testing the validity of the law in a suit for
24 injunction, that the plaintiff bet the farm, so to speak, by
25 taking the violative action. *Id.*, at 216. Likewise, in *Steffel*
26 *v. Thompson*, 415 U.S. 45 (1974), we did not require the
27 plaintiff to proceed to distribute handbills and risk actual
28 prosecution before he could seek a declaratory judgment
 regarding the constitutionality of a state statute prohibiting
 such distribution. *Id.*, at 458-460. As then-Justice
 Rehnquist put it in his concurrence, “the declaratory
 judgment procedure is an alternative to pursuit of the
 arguably illegal activity.” *Id.*, at 480. In each of these
 cases, the plaintiff had eliminated the imminent threat of
 harm by simply **not** doing what he claimed the right to do
 (enter into a lease, or distribute handbills at the shopping
 center). That did **not** preclude subject-matter jurisdiction
 because the threat-eliminating behavior was effectively
 coerced. The dilemma posed by that coercion—putting the
 challenger to the choice between abandoning his rights or
 risking prosecution—is “a dilemma that it was the very

27 ³ See, e.g., *Bland v. Fessler*, 88 F.3d 729, 737 n. 11 (9th Cir. 1996) (“[a]lthough Bland
28 and other ADAD users in California do not face criminal penalties, they do face grave
 consequences for violations of the civil statute, including civil fines and private suits for
 damages” [emphasis added]).

1 purpose of the Declaratory Judgment Act to ameliorate.”
2 *Abbott Laboratories v. Gardner*, 387 U.S. 36, 152(1967).

3 (Internal citations omitted; emphasis added.) *Babbitt* and *MedImmune* establish
4 that a party seeking prospective equitable relief in the form of either a declaratory
5 judgment or an injunction need only establish a “credible” or “genuine” threat of
6 enforcement in order to satisfy Article III standing requirements.

7 In accordance with these Supreme Court opinions, the Ninth Circuit has
8 concluded that a plaintiff who challenges a law before it is enforced can establish
9 the requisite “credible threat” of enforcement by demonstrating “that the state
10 [defendant] intends either to enforce a statute or to encourage local law
11 enforcement agencies to do so.” *Culinary Workers Union, Local 226 v. Del Papa*,
12 200 F.3d 614, 618 (9th Cir. 1999) (emphasis in original). As the Ninth Circuit has
13 repeatedly stated, “[w]e are not troubled by the pre-enforcement nature of this suit.
14 The State has not suggested that the newly enacted law will not be enforced, and
15 we see no reason to assume otherwise.” *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155
16 (9th Cir. 2000), quoting *Virginia v. American Booksellers Ass’n, Inc.*, 484 U.S. 383,
17 386 (1988).

18 As the Supreme Court observed in *Pierce v. Society of Sisters*, see *supra*
19 footnote 2, in affirming a preliminary injunction entered in a pre-enforcement
20 challenge to an Oregon state statute:

21 The suits were not premature. The injury to appellees was
22 present and very real, not a mere possibility in the remote
23 future. If no relief had been possible prior to the effective
24 date of the act, the injury would have become irreparable.

25 When, as here, the challenged statute risks chilling the exercise of First
26 Amendment rights, rigid standing requirements are dispensed with. *Human Life of*
27 *Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010) (citing *Cal. Pro-*
28 *Life, Inc. v. Getman*, (CPLC-I), 328 F.3d 1088, 1094 (9th Cir. 2003)). Self-
29 censorship is a harm that can be realized without prosecution. *Ibid.* (citing *Virginia*
30 *v. Am. Booksellers Ass’n*, 484 U.S. 383, 393 (1988)). See also, *Dombrowski v.*

1 *Pfister*, 380 U.S. 479, 486 (1965).

2 Additionally, when the challenged law or regulation creates an impediment
3 that restricts the First Amendment rights of access to information for students, an
4 actual injury occurs when there is a speaker who is willing to convey the
5 information. *Johnson v. Stuart*, 702 F.3d 193, 195 (9th Cir. 1983), (citing *Virginia*
6 *State Board of Pharmacy . Virginia Citizens Consumer Council*, 425 U.S. 748, 756-
7 57 (1976)). Protection is afforded to the communication, to its source and to its
8 recipients. *Ibid.* at 756.⁴

9 **IV. Plaintiffs' Constitutional Claims**

10 Similar to the plaintiffs in *Stormans, Inc. v. Selecky*, 586 F.3d at 1124, relief
11 is sought from a law that plaintiffs believe violates their First and Fourteenth
12 Amendment rights. Therein, the Ninth Circuit affirmed that the plaintiffs had
13 standing to challenge the newly imposed mandate, even though no enforcement
14 action was pending against them, stating:

15 The individual pharmacists, Mesler and Thelen, also
16 enjoy standing to sue under the Free Exercise Clause.
17 The injuries suffered by Mesler and Thelen are “concrete
18 and particularized” and “actual or imminent, not
19 conjectural or hypothetical.” Mesler alleges that, without
20 the court's injunction, she expects to be fired because her
21 religious convictions prohibit her from dispensing Plan B
22 and her employer has told her that it will not be able to
23 accommodate her. Thelen alleges she was forced to
24 leave her former job (after her pharmacy was unable to
25 hire a second pharmacist) to work at a pharmacy that
26 accommodates her religious belief by ensuring that there
27 is always another pharmacist on duty. Thelen has taken a
28 job farther away from her house for less pay because her
religious beliefs did not allow her to dispense Plan B.

While indirect, there is a causal connection between the
new rules and Mesler's threatened termination. Though it
does not suffice if the injury complained of is the result of

⁴ Defendant's reliance on *Scott v. Pasadena Unified School District*, 306 F.3d 646 (9th
Cir. 2002) is misplaced. See, *Parents Involved In Community Schools v. Seattle School District*
No. 1, 551 U.S. 701 (2007). The same is true of *Clark*, *supra.*, and *Stuart*, *supra.* Both are
distinguishable and inapplicable. There has been no waiver of constitutional rights in *Acosta*
and the plaintiffs have suffered harm. Defendant also ignores the student's standing in *Stuart*.

1 the independent action of some third party not before the
2 court, that does not exclude injury produced by
3 determinative or coercive effect upon the action of
4 someone else. The new rules require a pharmacy to
5 deliver medication in a timely manner—an act for which
6 pharmacies generally depend upon their pharmacists. If
7 certain pharmacists believe they cannot deliver certain
8 medications and their employer is unable to
9 accommodate this moral or religious belief, the pharmacy
10 may not employ in the first place—and may terminate—the
11 objecting pharmacists. Thus, if the new rules had not
12 been passed, Mesler would not expect to lose her job and
13 Thelen would not have been forced to find a new job.
14 Furthermore, a favorable decision likely will redress the
15 alleged injuries. If the new rules are invalidated, Mesler
16 and Thelen will not be limited to employment only at
17 pharmacies able to accommodate their religious views.

18 **V. A.R.S. §15-112 Is Unconstitutionally Vague As Applied To TUSD And To**
19 **The Plaintiffs**

20 “It is a basic principle of due process that an enactment is void for
21 vagueness if its prohibitions are not clearly defined.”⁵ *Grayned v. City of Rockford*,
22 408 U.S.104, 108 (1972). A statute must be sufficiently clear so as to allow
23 persons of “ordinary intelligence a reasonable opportunity to know what is
24 prohibited.” *Ibid.*; see *U.S. v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996). A statute
25 may be void for vagueness if it does any one of the following:

26 “because either it (1) fails to give a ‘person of ordinary intelligence a
27 reasonable opportunity to know what is prohibited;’ (2) ‘impermissibly
28 delegates basic policy matters to policemen, judges, and juries for resolution
on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary
and discriminatory application;’ or (3) ‘abut(s) upon sensitive areas of basic
First Amendment freedoms, operating to inhibit the exercise of (those)
freedoms.”

29 *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011), citing *Grayned*, 408
30 U.S. 104, 108 (1972); see also, *Wunsch*, 84 F.3d at 1119. In this case, Mr.
31 Huppenthal’s and Mr. Horne’s application of A.R.S. §15-112 is vague in all three
32 respects.

33 Where a law implicates First Amendment rights, a “more demanding”

34 ⁵ Plaintiffs’ motion for summary judgment provides the parties’ complete briefing on the
35 facial challenge and is incorporated here by reference.

1 standard of scrutiny applies. *Hunt*, 638 F.3d at 712, (citing *Holder v. Humanitarian*
2 *Law Project*, 130 S.Ct. 2705, 2724 (2010)). In the classroom, teachers have the
3 right to speak within the prescribed curriculum and in order to “assure that the
4 participants learn whatever lessons the activity is designed to teach, that readers
5 or listeners are not exposed to material that may be inappropriate for their level of
6 maturity, and that the views of the individual speaker are not erroneously attributed
7 to the school.” *Downs v. LAUSD*, 228 F.3d 1003, 1010 (9th Cir. 2000), (quoting
8 *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 271 (1988)). Further, “[i]t can hardly be
9 argued that either students or teachers shed their constitutional rights to freedom
10 of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Sch. Dist.*,
11 393 U.S. 503, 506 (1969).

12 **A. Superintendents’ Huppenthal and Horne’s Enforcement of HB**
13 **2281 Is Arbitrary and Discriminatory**

14 Vagueness may invalidate a statute if it “is so standardless that it authorizes
15 or encourages seriously discriminatory enforcement.” *Holder*, 130 S.Ct. at 2718;
16 *see also, City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). This occurs when
17 “[s]tatutory language of such a standardless sweep allows policemen, prosecutors,
18 and juries to pursue their personal predilections.” *Smith v. Goguen*, 415 U.S. 566,
19 575 (1974) (emphasis added). HB 2281's lack of standards allows the incumbent
20 Superintendent to target a program designed to enhance the academic
21 achievement of Latino students and to “pursue [his] personal predilections.” *Ibid*.

22 The alleged violations of A.R.S. §15-112(A), subsection 112(B), provide the
23 following enforcement mechanism:

24 B. If the state board of education or the superintendent of public instruction
25 determines that a school district or charter school is in violation of subsection
26 A, the state board of education or the superintendent of public instruction
27 shall notify the school district or charter school that it is in violation of
28 subsection A. If the state board of education or the superintendent of public
instruction determines that the school district or charter school has failed to
comply with subsection A within sixty days after a notice has been issued
pursuant to this subsection, the state board of education or the
superintendent of public instruction may direct the department of education
to **withhold up to ten per cent of the monthly apportionment of state aid**

1 that would otherwise be due the school district or charter school. When the
2 state board of education or the superintendent of public instruction
3 determines that the school district...is in compliance with subsection A, the
department of education shall restore the full amount of state aid payments
to the school district or charter school.

4 (Emphasis added.) Thus, neither subsection 112(B) nor any other subsection
5 gives definitions, guidance, or standards as to how the superintendent should
6 determine whether the MAS program is in violation, thereby allowing him to impose
7 a penalty that would be catastrophic to all students and employees in the district.
8 Subsection 112(B) is equally deficient, lacking any standards to guide the
9 superintendent's determination as to how and when sufficient change has occurred
10 to be in compliance.⁶

11 Since its effective date on December 31, 2010, A.R.S. §15-112 has been
12 applied twice, both times in a discriminatory and subjective manner. Mr. Horne
13 found MAS in violation of the statute. He also opined that two other TUSD Ethnic
14 Studies programs were in violation, but decided to apply the statute only to MAS.
15 Horne Finding, p.2.

16 Mr. Huppenthal, once in office, commissioned the Cambium Audit, but then
17 promptly jettisoned the 120-page report which concluded not only that MAS
18 provides the "effective use of curriculum to support student achievement" and
19 recommended the courses remain as core courses and be "expanded and made
20 available to more students," but also that there was "no observable evidence" that
21 any classroom was in violation of §15-112(A). Audit, p.42, 50, 66-67.

22 Ignoring the audit, Mr. Huppenthal kept his campaign pledge to "stop La
23 Raza" no matter what the facts revealed. He then cites a few random quotes from
24 some "reviewed materials" and a few cites to TUSD's website to support his
25 Finding that MAS violates HB 2281, and that, in the absence of changes that
26 satisfy him, millions of dollars will be withheld. See Huppenthal Finding.

27
28 ⁶ In Arizona a school district's funding, or "state aid," as it is referred to in the statute,
is distributed through the Department of Education. See, A.R.S. §15-901 et seq.

1 Mr. Huppenthal’s conduct and his Finding expose the extent to which the
2 statute’s lack of standards permit him to conjure up violations from a few random
3 textbook quotes. Mr. Huppenthal’s Finding does not identify the “reviewed
4 materials” and does not specify the nature of the offending materials beyond the
5 vague statement that white people are referenced as “oppressors” and “the
6 importance of building Hispanic nationalism” is emphasized. Mr. Huppenthal also
7 fails to specify where, when, how, and in what context these “materials” were used
8 with students or whether these materials were ever used with students at all. More
9 importantly, the Finding provides no insight as to how the few words violate the
10 statute. Finally, the Finding provides no guidance as to what TUSD must do to
11 bring MAS into compliance.

12 In his Finding as to violations of each of the three subsections (A)(2), (3) and
13 (4), Mr. Huppenthal expressly notes the concept of oppression. Yet, there is no
14 mention of Subsection 112(E) and (F), which contain exceptions to the prohibitions
15 for courses that include the instruction of “the historical oppression of a particular
16 group of people based on ethnicity, race, or class” and “discussion of controversial
17 aspects of history.” Mr. Huppenthal concludes that, in MAS, learning about
18 oppression is prohibited by the statute while the same statute gives him authority to
19 so declare without ever explaining why he reaches this conclusion, despite the
20 exceptions which expressly allow learning about oppression.

21 HB 2281 is not vague in the sense that MAS must conform to an “imprecise
22 but comprehensible normative standard, but rather in the sense that no standard of
23 conduct is specified at all.” *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).
24 “Such a provision has no core.” *Smith v. Goguen*, 415 U.S. 566, 578 (1974). In
25 *Smith*, the Supreme Court struck down a statute that subjected to criminal liability
26 anyone who publicly “treats contemptuously the flag of the United States.” *Ibid.* at
27 568-69. The Court focused on the fact that the statute imposed liability “under a
28 standard so indefinite that police, court, and jury were free to react to nothing more

1 than their own preferences for treatment of the flag.” Ibid. at 578.

2 The same deficit applies to HB 2281. There are other classrooms in TUSD
3 where students learn about the oppression of racial and ethnic minorities in the
4 United States and the word “oppression” is used. How does a superintendent of
5 public instruction decide which programs to shut down and which to allow to
6 remain? In Mr. Horne’s case, he decided to shut down the program about which he
7 received complaints. Horne Finding, p.2. The Supreme Court has found that “[t]his
8 absence of any ascertainable standard for inclusion and exclusion is precisely what
9 offends the Due Process Clause. The deficiency is particularly objectionable in
10 view of the unfettered latitude thereby accorded law enforcement officials and triers
11 of fact.” Ibid.

12 Mr. Huppenthal provides a lesson in why a statute that is “so standardless
13 that it authorizes or encourages seriously discriminatory enforcement” violates the
14 plaintiffs’ rights to due process. See *Holder*, 130 S.Ct. at 2718. Here, students and
15 their education are held hostage to the orthodoxy of whomever the officeholder
16 may be.

17 **1. HB 2281 Provides No Notice As To What Constitutes A**
18 **Violation**

19 Mr. Huppenthal’s Finding demonstrates how HB 2281 fails to provide notice
20 sufficient to inform the plaintiffs precisely what conduct the statute prohibits.
21 Statutes that are insufficiently clear will be struck down for vagueness to avoid
22 unnecessary chilling of protected First Amendment rights. *Foti v. City of Menlo*
23 *Park*, 146 F.3d 629, 638, citing *Grayned*, 408 U.S. 104, 108 (1972). “When one
24 must guess what conduct or utterance may lose him his position, one necessarily
25 will ‘steer far wider of the unlawful zone....’” *Keyishian v. Board of Regents*, 385
26 U.S. 589, 604 (1967). “The danger of that chilling effect upon the exercise of vital
27 *First Amendment* rights must be guarded against by sensitive tools which clearly
28 inform teachers what is being proscribed.” *Ibid*.

1 **2. The Huppenthal Finding Does Not Provide A Reasonable**
2 **Opportunity To Know What Constitutes Conduct That**
3 **Promotes Resentment Toward A Race Or Class Of People**

4 To sustain his finding of a violation of subsection 112(A)(2), Mr. Huppenthal
5 claims to rely on materials containing content “which are clear violations of
6 Subsection A(2).” Huppenthal Finding, p.2 (emphasis added). The Finding
7 further states that “[e]xamples of such content include:

8 Reviewed materials repeatedly reference white people as being ‘oppressors’
9 and ‘oppressing’ the Latino people.
10 Reviewed materials present only one perspective of historical events, that of
11 the Latino people being persecuted, oppressed, and subjugated by the
12 ‘hegemony’—or white America.”

13 Huppenthal Finding, p.2. Mr. Huppenthal does not identify the materials or books
14 containing the “oppression” language, nor does he identify when, how, or if the
15 materials were used in class. Most importantly, nowhere does Mr. Huppenthal
16 attempt to describe how the use of materials with references to “oppression” have
17 actually resulted in the promotion of resentment toward a race or class of people,
18 i.e. how these materials constitute “clear violations” of the statute. Ibid. The
19 Finding’s implication is that Mr. Huppenthal believes that teaching about
20 “oppression” necessarily promotes resentment and is prohibited by the statute. But
21 this interpretation is clouded in view of subsection 112(F)’s exception for the
22 instruction of “the historical oppression” of a particular ethnic group and by Mr.
23 Huppenthal’s silence on the applicability of the exception to the cited material. The
24 Finding fails to provide notice as to specifically what is prohibited and what is
25 allowed.

26 Moreover, Mr. Huppenthal’s application of subsection 112(A)(2) and his
27 failure to apply the exceptions contained in subsections 112(E) and (F) directly
28 contradicts his earlier arguments urged in response to the plaintiffs’ facial
 challenge for vagueness. See, Defendant Superintendent’s Response to Plaintiff’s
 Motion for Summary Judgment, CD No.57, p.20. There he stated that the
 exceptions were included “to clarify and narrow how broadly the statute can be

1 applied” and that many of the plaintiffs’ concerns are “wholly undermined by the
2 narrowing provisions of subsections (E) and (F).” Ibid. In light of his Finding, it
3 appears that subsections (E) and (F) do not “[undermine]” plaintiffs’ concerns at all,
4 but have bolstered them.

5 In his brief, Mr. Huppenthal also argues that subsection (E) “makes clear”
6 that no district can be penalized for implementing courses that include
7 controversial aspects of history. Ibid. Furthermore, he claims that subsection (F)
8 “makes clear” that the statute should be “construed narrowly so” that the instruction
9 of the historical oppression of a particular group of people “is not prohibited by the
10 restrictive language of subsection (A).” Ibid. (emphasis in original). If these
11 arguments Mr. Huppenthal has advanced to this Court are true, then why has he
12 penalized TUSD based on materials that present “historical events” in the context
13 of the oppression of Mexican-Americans? Huppenthal Finding, p.2. The only thing
14 that is clear from Mr. Huppenthal’s Finding is that the statute’s “exceptions” not
15 only do not serve to narrow the statute’s application, but that they serve no function
16 at all.

17 **3. The Huppenthal Finding Does Not Provide Reasonable** 18 **Opportunity To Know What Conduct Or How Such Conduct** **Advocates Ethnic Solidarity**

19 To support the alleged violation of subsection 112(A)(4), Mr. Huppenthal
20 relies on the same evidence offered to support a violation of subsection 112(A)(2),
21 as well as the following:

22 “Reviewed curriculum and materials repeatedly emphasize the importance of
23 building Hispanic nationalism and unity in the face of assimilation and
oppression.”

24 Huppenthal Finding, p.2. Mr. Huppenthal does not identify the materials or books
25 at issue. Nor does he identify when, how, or if the materials were used in class or
26 in what context. Did the materials discuss the concept of building Hispanic
27 nationalism urged by an historical figure? Did the materials concern the historical
28 roots of the Chicano movement and its advocacy of pride in one’s Mexican-

1 American heritage? Is the “unity” that is urged by the materials a call to improve
2 the situation of Mexican-Americans? Mr. Huppenthal fails to put the alleged
3 violation in any sort of context to understand how the materials allegedly offend the
4 statute.

5 Most importantly, nowhere does Mr. Huppenthal attempt to describe how the
6 use of materials with references to “oppression” and “Hispanic nationalism and
7 unity” have actually resulted in not treating pupils as individuals. There is nothing
8 about the concept of “building Hispanic nationalism and unity” that is inimical to
9 treating students as individuals. In fact, the concept is entirely irrelevant to the
10 issue of how teachers treat their pupils. Further, Mr. Huppenthal’s failure to apply,
11 or even mention, the statutory exceptions gives no narrowing construction to the
12 statute to save it from unconstitutional vagueness.

13 **B. The HB 2281 Findings Chill Plaintiffs’ Exercise Of Free Speech**

14 The chilling effect of HB 2281 on plaintiffs’ free speech rights is evident.
15 Quite simply, the threat of withholding ten percent of TUSD’s state funding puts
16 their jobs at risk. “When one must guess what conduct or utterance may lose him
17 his position, one necessarily will ‘steer far wider of the unlawful zone....”
18 *Keyishian*, 385 U.S. at 604 (1967). “For ‘the threat of sanctions may deter...almost
19 as potently as the actual application of sanctions.” Ibid.

20 The Finding puts the plaintiffs in an untenable position. It appears to
21 mandate that they must not teach anything that has anything to do with oppression,
22 past or present. But American history cannot be taught without teaching about
23 oppression. This is clearly a case where teachers must “steer far wider of the
24 unlawful zone.” Ibid. “The danger of that chilling effect upon the exercise of vital
25 *First Amendment* rights must be guarded against by sensitive tools which clearly
26 inform teachers what is being proscribed.” Ibid. But Mr. Huppenthal’s Finding
27 provides no assistance to know what is being proscribed.

28 The Huppenthal Finding also chills students’ speech and their “undoubted

1 freedom to advocate unpopular and controversial views in schools and
2 classrooms....” *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986). Under the
3 statute, a teacher is now obliged to silence students when they fear something the
4 student may say will cross the murky statutory line and “encourage” “feelings of
5 displeasure” toward a race or class of people. Here, the chilling effects of the
6 Finding are ominous. The right of the state to determine a legitimate curriculum
7 does not mean that Mr. Huppenthal may declare an “educational mission” to
8 “suppress speech on political and social issues based on disagreement with the
9 viewpoint expressed.” *Morse v. Frederick*, 551 U.S. 393, 423 (2007), Alito, J.,
10 concurring. Such a “mission” “strikes at the very heart of the First Amendment.”
11 *Ibid.*

12 **VI. Superintendents Huppenthal And Horne Have Violated Plaintiffs’ Right 13 To Equal Protection Of The Law**

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

19 **A. Superintendent Huppenthal And Horne’s Actions Finding MAS In 20 Violation Of A.R.S. §15-112(A) Are Motivated By Discriminatory 21 Intent Against Latinos**

22 Mr. Huppenthal and Mr. Horne’s efforts over several years to eliminate MAS,
23 culminating in their findings of violations of HB 2281, display the discriminatory
24 intent or purpose that is required to show a violation of the Equal Protection
25 Clause. See, *Village of Arlington Hts. v. Metro. Housing Dev. Corp.*, 429 U.S. 252,
26 265 (1977). They have specifically attacked and questioned the very idea of
27 teaching Mexican-American history, literature, and culture, and explicitly
28 condemned the goal of creating a curriculum designed to enhance the academic
success of Latino students, who represent 90% of MAS students. In the face of

1 data which shows that those majority-Latino students in MAS have closed the
2 achievement gap with their counterparts along with an independent audit praising
3 the program and recommending its expansion, Mr. Huppenthal mandated
4 unidentified changes to the program, which still include complete elimination.

5 To prove a discriminatory purpose, “[t]he historical background of the
6 decision is one evidentiary source, particularly if it reveals a series of official
7 actions taken for invidious purposes.” *Arlington Hts.*, 429 U.S. at 267. Also, where
8 evidence establishes that the law is applied “so exclusively against a particular
9 class of persons,” a denial of Equal protection results. *Yick Wo v. Hopkins*, 118
10 U.S. 356, 373 (1886). Both are satisfied here.

11 **1. Superintendent Huppenthal And Horne’s Course Of Actions**
12 **Specifically Target And Discriminate Against Latinos, And**
Against The Study Of Their History And Culture

13 The conduct of Mr. Huppenthal and Mr. Horne, their official Findings of
14 violations, and the historical background of their decisions “reveal a series of
15 official actions” taken for the sole purpose of discriminating against Mexican
16 Americans.⁷ *Ibid.* at 267. In 2007, in his official capacity as Superintendent of
17 Public Instruction, Mr. Horne issued a call to citizens of Tucson to end MAS
18 classes. Horne’s Open Letter to the Citizens of Tucson, (“Open Letter”). In support,
19 he accused MAS of advocating “a kind of destructive ethnic chauvinism” and
20 pointed to the fact that “[t]he very name ‘Raza’ is translated as ‘the race,’” to him, a
21 negative connotation of the term. Open Letter, p.2. He complained that Tucson
22 High students participate in MEChA, a Chicano youth organization, as an
23 extracurricular activity and disapprovingly noted that he observed a Tucson High
24

25 ⁷ The defendant erroneously argues that by replacing the Horne Finding with his own,
26 the Horne Finding is superseded and irrelevant. See Defendant’s Answer to Second Amended
27 Complaint, CD No. 55, ¶18. That may be an accurate statement with regard to the state
28 administrative proceeding, pursuant to the statute, between Mr. Huppenthal and TUSD. But,
in this lawsuit for equitable relief from violations of the plaintiffs’ Constitutional rights, the Horne
Finding is and always will be unconstitutional government action. The Horne Finding is
squarely at issue in this action.

1 librarian wearing a shirt with the MEChA insignia. Ibid., p.3. According to Mr.
2 Horne, the Mexican-American history textbooks “Occupied America” and “The
3 Mexican American Heritage” are inappropriate for students in MAS classes.

4 When the citizens of Tucson chose not to take up Mr. Horne’s call to
5 eliminate MAS, he drafted the legislation that was eventually introduced and
6 passed as HB 2281. Horne Finding, p.1. In their 2010 campaigns, both Mr.
7 Huppenthal and Mr. Horne manipulated anti Mexican-American sentiment in
8 Arizona to their advantages by making the eradication of MAS part of their
9 campaign platforms. In an obvious display of racial bias, Mr. Huppenthal ran
10 television and radio advertisements in which an announcer stated that, “He is one
11 of us,” followed by a pledge that he will “stop La Raza.” Mr. Horne also seized the
12 opportunity to cast the Mexican-American experience as outside of the American
13 experience in a campaign video that opened with the mischaracterization, “On May
14 11, Tom Horne’s bill to end Tucson’s anti-American Ethnic Studies program in
15 Arizona was signed into law.”⁸

16 With the unchecked discretion vested in the Superintendent of Public
17 Instruction by HB 2281, both Huppenthal and Horne specifically targeted TUSD’s
18 MAS program and no others. Most telling is Mr. Horne’s statement that he singled
19 out MAS for enforcement action pursuant to A.R.S. §15-112(B), despite his claim
20 that two other programs in TUSD’s Ethnic Studies Department were also in
21 violation of HB 2281.⁹ Horne Finding, p.2. He claimed to base his decision to
22 exclusively target MAS on the fact that he had received some complaints about it.
23 Ibid.

25 ⁸See, Tom Horne’s Attorney General campaign website at
26 http://www.electtomehorne.com/tom_tv.htm, video titled “The U.N. and liberals want to stop
Tom Horne’s fight against taxpayer funded ethnic studies.” (Last accessed July 14, 2011.)

27 ⁹ TUSD’s Ethnic Studies Department consists of four programs: Mexican-American
28 Studies, African-American Studies, Native American Studies, and Pan-Asian American
Studies.

1 The unusual timing of Mr. Horne’s Finding demonstrates his intent to
2 discriminate against learning about Mexican-Americans. In *Arlington Hts.*, the
3 Supreme Court advised that “[d]epartures from the normal procedural sequence []
4 might afford evidence that improper purposes are playing a role.” 429 U.S. at 267
5 (1977). Mr. Horne dated his Finding December 30, 2010, one day before A.R.S.
6 §15-112 took effect, and then issued it just hours before his term as
7 Superintendent of Public Instruction ended and he was sworn in as the Arizona
8 Attorney General. He offered no explanation as to how MAS could have violated a
9 statute that had not been in effect when the MAS classes had been conducted.
10 Rather than wait until classes had actually occurred under the new statute and
11 allow the new Superintendent, Mr. Huppenthal, to make the determination whether
12 to investigate the possibility of any violation, Mr. Horne engaged in an unusual last-
13 minute rush to find MAS in violation. In his subsequent Finding, Mr. Huppenthal
14 admits that the procedural irregularity of Mr. Horne’s Finding, issued when TUSD
15 was not in session, required him to “determine if, in fact, TUSD was in violation of
16 the statute post January 1, 2011.” Huppenthal Finding, p.1.

17 Mr. Huppenthal continued the unusual character of the enforcement efforts
18 against MAS serves as further evidence of “a series of official actions taken for
19 invidious purposes.” *Arlington Hts.*, 429 U.S. at 267 (1977). Shortly after taking
20 office, Mr. Huppenthal contracted with Cambium Learning Group, Inc., to perform
21 an independent audit of MAS. The three purposes of the audit were:

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

25 Audit, p.4. The audit included an extensive review of the curriculum and materials,
26 site visits, classroom observations, and many interviews with administrators,
27 teachers, parents, students, and community members. *Ibid.* at 12-18. On May 2,
28 2011, after nearly two months of work, Cambium issued its 120-page

1 comprehensive Audit report to Mr. Huppenthal. Rather than immediately release
2 the Audit report to the public, Mr. Huppenthal waited for six weeks before releasing
3 the report, along with his Finding of violations, on June 15, 2011.

4 The Cambium Audit confirms the success of MAS in all three aspects of its
5 evaluation. Audit, pp.18-63. First, the “programs are designed to improve student
6 achievement based on the audit team’s findings of valuable unit and lesson design,
7 engaging instructional practices, and collection inquiry strategies through values of
8 diversity and intercultural proficiency.” *Ibid.* at 68. Second, statistically valid
9 measurements demonstrate improved student achievement and “closing the
10 achievement gap.” *Ibid.* Third, the audit team observed no evidence that MAS
11 violated A.R.S. §15-112(A)(1), (2), (3) and (4). *Ibid.* In summary:

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

19 *Ibid.* at 63. Cambium also recommended that TUSD “[m]aintain Mexican American
20 Studies courses as part of core curriculum for high school courses” in “U.S.
21 History, American Government and Literature.” *Ibid.* at 64-67.

22 Mr. Huppenthal’s next action provides some of the starkest evidence of bias.
23 After receiving the 120-page audit report, which represents two months of the
24 Cambium team’s work, including hours of classroom observation, hours of
25 materials review, and a multitude of personal interviews, Mr. Huppenthal waited
26 another six weeks before dismissing the Cambium Audit and issuing his own three-
27 page Finding, declaring MAS in violation of HB 2281.
28

1 Mr. Huppenthal's decision to ignore the Cambium Audit, which was designed
2 to provide him with the facts necessary to make his determination, exposes the
3 reality that nothing would prevent him from carrying out his campaign pledge to
4 "stop La Raza." Courts have found a racially discriminatory purpose where "factors
5 usually considered important by the [government] decisionmaker strongly favor a
6 decision contrary to the one reached." *Arlington Hts.*, 429 U.S. at 267 (1977);
7 *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) (invidious racial
8 discrimination found where re-zoning for a low-income housing development in a
9 white neighborhood was denied and city planning directors testified there was no
10 reason "from a zoning standpoint" why the parcel should not be re-zoned to match
11 the surrounding zoning classification.) Amazingly, in his Finding, Mr. Huppenthal
12 barely acknowledged the existence of the Audit and never mentioned its lengthy
13 and overall positive conclusions.

14 Another important factor to an educational decisionmaker that would strongly
15 favor a decision contrary to Mr. Huppenthal's Finding is the data regarding the
16 program's effectiveness. In this regard, the evidence proves the overwhelming
17 success of the program. The primarily at-risk Latino students who participate in
18 MAS consistently demonstrate levels of academic achievement significantly higher
19 than their peers who do not take MAS classes, and score higher than national
20 averages. As the highest-ranking education official in the state and one who
21 professes to believe that education policy must be driven by "practices and policies
22 that have been demonstrated to work effectively," Mr. Huppenthal's persistence in
23 denigrating the MAS without ever acknowledging its successes raises the
24 suspicion of invidious motive. Message from Superintendent Huppenthal on the
25 Arizona Department of Education website,
26 <http://www.ade.az.gov/administration/superintendent/welcome.asp>, (last accessed
27 July 15, 2011.)

28 Even more stunning than Mr. Huppenthal's decision to ignore the

1 voluminous data and conclusions of the Audit is the dearth of evidence he musters
2 to purportedly support his fundamentally flawed finding that MAS violates HB 2281.
3 With regard to subsection 112(A)(2), which prohibits classes or courses that
4 promote resentment toward a race or class of people, the Finding merely cites to
5 “materials” that “reference white people as being ‘oppressors’ and ‘oppressing’
6 Latino people and “materials” that “present only one perspective of historical
7 events, that of Latino people being persecuted oppressed and subjugated by the
8 ‘hegemony’—or white America.” Huppenthal Finding, p.2. Mr. Huppenthal fails to
9 identify the specific materials from which these quotes were taken, the context in
10 which the texts use them, or when, where, how, and if the materials were used in
11 class.

12 The surreality culminates in Mr. Huppenthal’s conclusion that with the few
13 words quoted above, found in unidentified “materials,” without any evidence as to
14 their use, Arizona law gives him the unilateral and wholly unrestricted discretion to
15 withhold \$1 to \$3 million per month in school district funding from the more than
16 50,000 students in TUSD.

17 The absurdity of this “Through the Looking-Glass” experience continues in
18 the next section, finding an alleged violation of subsection 112(A)(3) for having
19 classes that “are designed primarily for pupils of a particular ethnic race.” By the
20 statute’s twisted logic, Mr. Huppenthal contends the following goals for TUSD
21 students cross the line drawn by the Arizona Legislature: “The [Mexican American
22 Studies] Model shows the focus to be academic achievement for Latino Students”
23 and the “[w]ebsite clearly states the Department was ‘formed to specifically
24 enhance the academic success of Latino students although it can benefit all
25 students....” Huppenthal Finding, p.2.

26 In any other state, the enhanced “academic success of Latino students”
27 would be seen not only as a positive, but also a crucial educational goal. Yet, Mr.
28 Huppenthal pounces on the language to justify withholding more than \$1 million

1 per month in order to bully TUSD into eliminating MAS. Accordingly, these
2 aspirations for Latino students cannot be tolerated and HB 2281 stands to prevent
3 TUSD from promoting achievement by Latino students through the vehicle of
4 learning about Mexican-Americans. Mr. Huppenthal's unabashed actions to
5 prevent TUSD from addressing the educational needs of its Latino students
6 through its successful curriculum, which utilizes the Mexican-American experience,
7 is completely devoid of any legitimate purpose.

8 This mass of evidence suffices to establish an Equal Protection violation, but
9 there is more. The Horne Finding is rife with examples of his intent to discriminate
10 against Mexican-Americans.¹⁰ In his Finding, Mr. Horne recycles much of the stale
11 material cited in his Open Letter, issued three and one half years earlier.

12 Foremost is his inescapable implication that books that present history from
13 a Mexican-American perspective should be banned.¹¹ As evidence of a violation of
14 §15-112, Mr. Horne finds it is "certainly strange to find a textbook in an American
15 public school taking the Mexican side of the battle at the Alamo." Horne Finding,
16 p.7. In a display of hubris, Mr. Horne disputes a textbook's contextualization of an
17 early Chicano leader's statement, "kill the gringo," as meaning "to end white control
18 over Mexicans," with the naked assertion that the book's interpretation "contradicts
19 [the speaker's] clear language." Ibid. Mr. Horne also quotes the following

21 ¹⁰ Mr. Huppenthal's Finding tracks the same and similar passages in the Horne Finding
22 that reached the same conclusion. Horne Finding, p.3.

23 ¹¹ Mr. Horne's Finding reveals an element of duplicity where he states his oft-repeated,
24 See e.g. Open Letter, p.1, interpretation of the "philosophy which underlay the statute: People
25 are individuals, not exemplars of racial groups. What is important about people is what they
26 know, what they can do, their ability to appreciate beauty, their character, and not what race
27 into which they are born." Horne Finding, p.1. However, when describing his own heritage,
28 Mr. Horne wrote that, as a Jew, the "long cultural tradition in Judaism of valuing scholarship"
directly benefitted his family, in that his "father's knowledge of history" enabled his family to
escape the Holocaust. Jewish News of Greater Phoenix, 6/9/06, Vol. 58, No. 37,
<http://www.jewishaz.com/issues/printstory.mv?060609+elected>. Mr. Horne's sincere
understanding of the value of his own culture and the importance of that culture to successive
generations contrasts with the invidious nature of his attempts to prevent Latino students from
learning about the same types of values and significance of their culture.

1 statement from another textbook that refers to the more current phenomenon of
2 Mexican migration to the American Southwest: “Apparently the U.S. is having as
3 little success as Mexico had when they tried to keep the North Americans out of
4 Texas in 1830.” Ibid. Rather than ponder a thought-provoking observation, as
5 intended by the author, Mr. Horne laments the fact that “books paid for by the
6 American taxpayers used in American public schools are gloating over the difficulty
7 we are having in controlling the border.” Ibid. at 7-8. Oddly, the statute’s
8 exclusions for instruction of “the historical oppression of a particular group of
9 people based on ethnicity, race, or class” and “courses that include the history of
10 any ethnic group” never merit a mention from either Mr. Huppenthal or Mr. Horne.
11 A.R.S. §15-112(E)(3) and (F).

12 With the vast power granted him by A.R.S. §15-112, Mr. Horne ordered that
13 TUSD had sixty days “to eliminate the Mexican American Studies courses....” Ibid.
14 at 10. Mr. Horne’s Finding provided TUSD with no clues as to how to bring the
15 program into compliance. Mr. Horne had no interest in assisting TUSD to alter the
16 classes. His mission was to fulfill his promise to “end Tucson’s anti-American
17 Ethnic Studies program.”

18 Mr. Huppenthal and Mr. Horne’s conduct in pursuit of their mission to
19 eliminate MAS courses and wipe out classes designed to enhance the academic
20 success of Latino students displays their invidious intent to discriminate against
21 Mexican-Americans.

22 **2. SUPERINTENDENTS HUPPENTHAL AND HORNE HAVE** 23 **APPLIED HB 2281 EXCLUSIVELY AGAINST TEACHING** 24 **AND LEARNING ABOUT MEXICAN-AMERICANS**

25 Mr. Huppenthal and Mr. Horne have both embraced the specific objective of
26 shutting down TUSD’s MAS program well before they issued their Findings.
27 Moreover, Mr. Horne stated his belief that three of TUSD’s Ethnic Studies
28 Department programs are in violation of A.R.S. §15-112(A), but that he chose to
enforce the law only against MAS. Horne Finding, p.1. Mr. Huppenthal ignored the

1 Audit report concluding that MAS not only conformed to the statute, but that the
2 program should be expanded to reach more students. This is a clear case of a law
3 administered “so exclusively against a particular class of persons as to warrant and
4 require the conclusion, that whatever may have been the intent of the ordinances
5 as adopted, they are applied...with a mind so unequal and oppressive as to amount
6 to a practical denial” of Equal Protection. *Yick Wo*, 118 U.S. at 372 (1886).

7 It makes no difference that MAS is the first and only victim of HB 2281. The
8 program and the Latino students in it were always intended to be the targets. The
9 lack of a “consistent pattern of official race discrimination” is not a barrier to an
10 Equal Protection claim. See *Arlington Hts.* 429 U.S. at 266 (1977), fn.14. “A single
11 invidiously discriminatory governmental act...would not necessarily be immunized
12 by the absence of such discrimination in the making of other comparable decisions.
13 *Ibid.*, citing *City of Richmond v. United States*, 422 U.S. 358, 378 (1975)
14 (annexation taken for the purpose of discriminating against African-Americans has
15 no legitimacy under the Constitution). Mr. Huppenthal and Mr. Horne’s actions
16 taken exclusively against a program designed to advance the academic
17 performance of Latino students and their desire to unravel the substantial gains
18 made by those students is “unexplainable on grounds other than race.” *Arlington*
19 *Hts.*, 429 U.S. at 266 (1977).

20 Taken together, Mr. Huppenthal and Mr. Horne’s actions exclusively
21 targeting MAS, drafting and promoting HB 2281, applying the statute against MAS
22 based on the thinnest of evidence and in the face of overwhelming evidence to the
23 contrary, and setting aside the conclusions of the independent Audit prove that
24 they acted with the requisite discriminatory purpose.

25 **B. Mr. Huppenthal And Mr. Horne’s Targeting Of MAS Constitutes**
26 **An Ethnic Classification**

27 Even if the Court finds that Mr. Huppenthal and Mr. Horne did not act with
28 the requisite motive to discriminate, their actions constitute an ethnic classification.

1 Their target has always been MAS and the elimination of a program that improves
2 the condition of its students, 90% of whom are Latinos. That they specifically seek
3 elimination of the study of Mexican-American history, literature, and culture further
4 reveals the intent to promote the denial of Mexican-American identity and culture.

5 In their Findings, they describe in racial terms what they do not like about the
6 classes. They object to students learning that Mexican-Americans have suffered
7 oppression. Huppenthal Finding, p.2; Horne Finding, p.7. They explicitly target
8 Latino students by objecting to the program's goal of "increas[ing] academic
9 achievement for Latino students." Huppenthal Finding p.2; Horne Finding p.3.
10 These actions explicitly based on ethnic criteria constitute an ethnic classification.
11 See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (racial classification found where a
12 judge denied custody to a mother because of her interracial marriage.)

13 This is a case where the government actors take exception to teaching
14 primarily Latino students about Latinos in a meaningful way.¹² More importantly,
15 they take exception to teaching Latino students about Mexican-Americans from the
16 perspective of Mexican-Americans.¹³ This necessarily implicates Mr. Huppenthal
17 and Mr. Horne's judgment that learning about Mexican-Americans from the
18 perspective of Mexican-Americans is harmful to Latino students. "The Constitution
19 cannot control such prejudices but neither can it tolerate them. Private biases may
20 be outside the reach of the law, but the law cannot, directly or indirectly, give them
21 effect." *Ibid.* at 433.

22
23 ¹² For example, Mr. Huppenthal and Mr. Horne are satisfied with the state standards in
24 social studies for high school students that touch minimally on the history of various ethnic
25 groups in American history. But they object to primarily Latino students learning about the role
of Mexican-Americans in our society at a deeper level of understanding.

26 ¹³ Their unfounded fear is that Latino students who learn about Mexican-Americans from
27 the perspective of Mexican-Americans, and who learn to think critically about those
28 experiences and how that history is manifested today will necessarily be bigoted against white
people. To the contrary, the overwhelming data and anecdotal evidence regarding Ethnic
Studies programs in general, and the Cambium Audit in particular, reveals that Ethnic Studies
and TUSD's MAS courses are beneficial in many ways for students of all races.

1 **C. THE ELIMINATION OF MAS IS NOT NARROWLY TAILORED TO**
2 **FURTHER THE STATE’S INTEREST IN TREATING PUPILS AS**
3 **INDIVIDUALS AND NOT TEACHING THEM TO HATE OTHER**
4 **RACES OR CLASSES OF PEOPLE**

5 The result of finding either an ethnic classification or an ethnically
6 discriminatory purpose is that Mr. Huppenthal must prove that his action is
7 narrowly tailored to further a compelling governmental interest. *Grutter v. Bollinger*,
8 539 U.S. 306 (2003). The defendant cannot meet this strict scrutiny test.

9 The stated purpose behind the statute drafted by Mr. Horne is “that public
10 schools pupils should be taught to treat and value each other as individuals and
11 not be taught to hate other races or classes of people.” A.R.S. §15-111. Although
12 the interests identified are logical, it has not been demonstrated that Arizona
13 schools have problems with treating pupils as individuals or teaching them to hate
14 other races or classes of people. But, assuming that these interests rise to the
15 level of compelling, the elimination of MAS does nothing to advance them.

16 Mr. Huppenthal has visited an MAS classroom and never reported that
17 students were taught to hate or that they were not treated as individuals. There is
18 no credible, relevant evidence that MAS students are not treated as individuals and
19 are taught to hate other people. Although the plaintiff teachers’ testimony at trial
20 will prove that they treat their students as individuals and that they do not teach
21 them to hate anyone, the most compelling evidence for the purposes of this motion
22 is found in the Cambium Audit report.

23 “No observable evidence exists that instruction within the Mexican American
24 Studies Department promotes resentment towards a race or class of people.
25 The auditors observed the opposite, as students are taught to be accepting
26 of multiple ethnicities of people. [Mexican American Studies Department]
27 teachers are teaching Cesar Chavez alongside Martin Luther King, Jr. and
28 Gandhi, all as peaceful protesters who sacrificed for people and ideas they
 believed in. Additionally, all ethnicities are welcomed into the program and
 these very students of multiple backgrounds are being inspired and taught in
 the same manner as Mexican American students. All evidence points to
 peace as the essence for program teachings. Resentment does not exist in
 the context of these courses.”

Audit, p.55.

1 The Cambium Audit report proves that MAS classes further the State’s
2 interest in treating pupils as individuals and not teaching them to hate others. In
3 this respect, Mr. Huppenthal and Mr. Horne’s mission to shut down MAS is a
4 paradox. The program they so revile actually supports the same interests that they
5 claim to promote.

6 The defendant cannot prove that the elimination of MAS is narrowly tailored
7 to promote treating pupils as individuals and not teaching them to hate others.

8 **IV. A.R.S. §15-112 Violates The Plaintiffs’ Right To Equal Protection**

9 **A. A.R.S. §15-112 Constitutes An Ethnic Classification**

10 HB 2281 prohibits classes “designed primarily for students of a particular
11 ethnic group.” A.R.S. §15-112(A)(3). TUSD’s Ethnic Studies programs, including
12 MAS, are designed primarily for students of particular ethnic and racial groups in
13 order to more precisely and effectively target the achievement gaps suffered by
14 many of those ethnic and racial minority students. Therefore, as an attack on
15 efforts to improve the performance of ethnic minority students, the statute creates
16 an ethnic classification. Subsection (A)(4) prohibits classes that “[a]dvocate ethnic
17 solidarity instead of the treatment of pupils as individuals” in the misguided belief
18 that learning about ethnicity negates one’s ability to interact with others on an
19 individual level. This subsection, too, creates an ethnic classification. This is true
20 despite the fact that the law does not explicitly single out learning about Mexican-
21 Americans. Even though a “law on its face treats Negro and white, Jew and gentile
22 in an identical manner, [where] the reality is that the law’s impact falls on the
23 minority,” an ethnic classification is found. See, *Hunter v. Erickson*, 393 U.S. 385,
24 391 (1969); see also, *Ho by Ho*, 147 F.3d 854, 863 (9th Cir. 1998) (“Misuse of race
25 by government for over three centuries in America must make any new
26 governmental use of race stand suspect and in pressing need of justification.”)

27 The ethnic classification scheme is further exposed by an exception to the
28 prohibitions contained in §15-112(A). §15-112(F) provides:

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

3 In subsection F, the legislature creates an ethnic and religious classification that
4 permits teaching about the particular religious and ethnic groups targeted by the
5 holocaust, thus making them favored by the statute. This explicit determination that
6 the experiences of some ethnic and religious groups may be validly taught, while
7 others may not, creates a constitutionally impermissible classification.

8 **B. HB 2281 Is Not Narrowly Tailored To Further The State's Interest
9 In Treating Pupils As Individuals And Not Teaching Them To Hate
Other Races Or Classes Of People**

10 Mr. Huppenthal must prove that HB 2281 is narrowly tailored to further a
11 compelling governmental interest. *Grutter*, 539 U.S. 306 (2003). The defendant
12 cannot meet this strict scrutiny test.

13 The statute's purpose is described as teaching public school students to
14 "treat and value each other as individuals and not be taught to hate other races or
15 classes of people." A.R.S. §15-111. Assuming that this is a compelling state
16 interest, the provisions of the statute are not narrowly tailored to achieve it.

17 Subsection 112(A)(3), which prohibits courses or classes designed primarily
18 for pupils of a particular ethnic group, is not only not narrowly tailored, but has no
19 relationship to treating pupils as individuals. Courses designed for pupils of a
20 particular ethnic group are designed to remedy problems in student achievement.
21 In the case of MAS, issues of race and its role in history and society is the vehicle
22 by which the curriculum brings cultural relevancy to its academic subjects. But
23 learning about and discussing race does not mean that students are not treated as
24 individuals. Discussions about race occur every day and those who engage in
25 those discussions do not *ipso facto* fail to treat others as individuals.

26 **C. HB 2281 Is Not Rationally Related To The Purpose Of Treating
27 Students As Individuals**

28 For all of the same reasons argued in support of the violation of the plaintiffs'

1 Substantive Due Process rights, HB 2281 does not further the State's interests in
2 treating pupils as individuals and not teaching them to hate other races or classes
3 of people.

4 **D. A.R.S. §15-112 Discriminates On An Ethnic Basis Against The**
5 **Plaintiffs' Right To Engage In The Political Process**

6 HB 2281 violates the Equal Protection Clause because it targets a program
7 designed to benefit Latino students and impermissibly reallocates the authority to
8 provide students with MAS classes from the TUSD Governing Board to the Arizona
9 Legislature in a manner that puts "special burdens" on Latinos' ability to benefit
10 from the program. See, *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v.*
11 *Seattle Sch. Dist.*, 458 U.S. 457 (1982).

12 Under the Fourteenth Amendment's "political process" theory, a law deprives
13 a minority group of equal protection of the laws when it:

14 (1) has a racial focus, targeting a goal or program that 'inures primarily to the
15 benefit of the minority'; and (2) works a reallocation of political power or
reordering of the decisionmaking process that places 'special burdens' on a
minority group's ability to achieve its goals through that process.

16 *Coalition to Defend Affirmative Action v. Regents of the Univ. of Michigan*, 2011
17 U.S. App. LEXIS 13405, 24 (6th Cir. 2011), citing *Washington v. Seattle Sch. Dist.*,
18 458 U.S. 457, 470 (1982); *Hunter*, 393 U.S. at 391 (1969).

19 The defendant concedes the ethnic focus in that TUSD's MAS program was
20 "formed to specifically enhance the academic success of Latino students."

21 Huppenthal Finding, p.2. The program was borne out of the community's long-
22 standing desire to provide TUSD's Latino students with a curriculum that would
23 engage them with the material, resulting in the reversal of many negative
24 educational trends that affect Latinos. The defendant also concedes that HB 2281
25 targets this program that benefits primarily Latino students. Horne Finding, p.1.

26 The impermissible reallocation of decision making worked by HB 2281 is
27 much like that in *Seattle*, where the school district devised a magnet school
28 program with busing to integrate the schools. When local efforts to reverse the

1 program were unsuccessful, opponents successfully promoted a state-wide
2 initiative prohibiting assigning students to schools other than their closest
3 neighborhood schools. Under the new scheme, minority groups that wished to
4 implement the busing plan would no longer be able to do so by convincing the local
5 school board, but would have to mount a state-wide campaign to overturn the
6 initiative. The Supreme Court found the unconstitutional vice of the initiative was
7 that it “placed *burdens* on the implementation of educational policies designed to
8 deal with race on the local level” by “treating educational matters involving racial
9 criteria differently from other educational matters.” *Seattle*, 458 U.S. 457, 469
10 (1982), quoting *Hunt*, 638 F.3d 703, 719 (2011) (emphasis in original).

11 HB 2281 is equally flawed. The TUSD Governing Board has the primary
12 responsibility for the function of its schools, including the authority and
13 responsibility to set the curricula. A.R.S. §15-341(A)(5); see, *Savage v. Glendale*
14 *H.S. Union Sch. Dist.*, 343 F.3d 1036, 1044-48 (9th Cir. 2003) (discussing the
15 decentralized nature of Arizona public schools, placing primary responsibility with
16 the local governing boards). In response to the community, TUSD created MAS.
17 When Mr. Horne failed in his efforts to convince Tucson citizens to lobby the
18 Governing Board to shut down the program, he drafted and successfully promoted
19 the passage of HB 2281. The statute removed the Governing Board’s authority to
20 act affirmatively in a curricular matter involving ethnic criteria, but left intact all of
21 the Board’s authority to deal with all other types of curricular matters. Like
22 supporters of the Seattle integration plan, supporters of MAS must not only
23 convince the Governing Board to implement the program, as supporters of any
24 other type of educational program must do. Rather, HB 2281 puts a special burden
25 on those who seek programs to address the achievement gap generally suffered
26 by Latino and other minority students by “lodging decisionmaking authority over the
27 question at a new and remote level of government.” *Seattle*, 458 U.S. 457, 483
28 (1982). They now must clear a much higher hurdle and convince the Arizona

1 Legislature to overturn HB 2281.

2 It makes no difference that the State has the power to set curricula. It has
3 delegated that power to the local governing boards. The issue here is not whether
4 the State has the “authority to intervene in the affairs of local school boards; it is,
5 rather, whether the State has exercised that authority in a manner consistent with
6 the *Equal Protection Clause*.” *Seattle*, 458 U.S. 457, 476 (1982). “In a most direct
7 sense, this implicates the judiciary’s special role in safeguarding the interests of
8 those groups that are ‘relegated to such a position of political powerlessness as to
9 command extraordinary protection from the majoritarian political process.’” *Ibid.* at
10 486 (citation omitted). Here, the majority of the Arizona Legislature has exercised
11 its considerable power to impermissibly deny Latinos the ability to advocate for a
12 program that benefits their community. This Court should require that Arizona
13 extend equal protection of the laws to all of its citizens and strike down HB 2281.

14 **VII. Superintendent Huppenthal’s Finding And HB 2281 Violate**
15 **Plaintiffs’ Right to Free Speech**

16 Arizona law delegates the right and duty to determine school curricula to the
17 school district governing boards. A curriculum designated by the school district
18 constitutes “government speech.” The school district must exercise this discretion
19 within the bounds of the First Amendment. Once the governing board designates
20 the curriculum, the First Amendment grants teachers and students the right to
21 contribute to the content of that speech, in order to communicate the prescribed
22 curriculum.

23 TUSD adopted a legitimate curriculum through MAS. On the other hand, HB
24 2281 is an exceptional piece of legislation that goes beyond a legitimate exercise
25 of power and does not create a curriculum in any sense of the word. Rather, HB
26 2281 is motivated by the desire to invidiously discriminate against TUSD’s efforts
27 to enhance students’ academic achievement through the vehicle of learning about
28 Mexican-American history, literature, and culture from the perspective of Mexican-

1 Americans. Mr. Huppenthal and the State's endorsement of this type of
2 discriminatory viewpoint suppresses the plaintiffs' rights of free speech and must
3 be invalidated.

4 Public education plays a vital role to "prepare pupils for citizenship in the
5 Republic...[and to] inculcate the habits and manners of civility as values in
6 themselves conducive to happiness and as indispensable to the practice of self-
7 government in the community and the nation." *Fraser*, 478 U.S. 675, 681 (1986).
8 In the pursuit of this goal, students must develop the intellect and the ability to
9 freely question and evaluate the world around them. But, "[t]he process of
10 educating our youth for citizenship in public schools is not confined to books, the
11 curriculum, and the civics class; schools must teach by example the shared values
12 of a civilized social order." *Ibid.* at 683. In this case, Mr. Huppenthal and the State's
13 political leaders have gone beyond making legitimate curricular decisions, entered
14 into the realm of censorship, book-banning, and stifling of critical thinking, and
15 represent the worst possible example of civic democracy for students. It is for this
16 reason that the First Amendment's protection of freedom of speech is "essential to
17 safeguard the fundamental values of speech and inquiry and of belief." *Epperson v.*
18 *Arkansas*, 393 U.S. 97, 104 (1968).

19 "First Amendment rights, applied in light of the special characteristics of the
20 school environment, are available to teachers and students," *Morse v. Frederick*,
21 551 U.S. 393, 403 (2007), *citing Tinker*, 393 U.S. 503, 506 (1969), and students
22 have "[t]he undoubted freedom to advocate unpopular and controversial views in
23 schools and classrooms...." *Fraser*, 478 U.S. 675, 681 (1986). It is the contours of
24 those rights in the classroom that is at issue here. Neither the Supreme Court nor
25 the Ninth Circuit has "definitively resolved whether and to what extent a teacher's
26 instructional speech is protected by the First Amendment." *California Teachers*
27 *Assoc. v. State Board of Ed.*, 271 F.3d 1141, 1148 (9th Cir. 2001). But at a
28 minimum, teachers and students have a right to engage in classroom and school

1 speech that is within the boundaries of the adopted curriculum. See, *Epperson*,
2 393 U.S. 104, 105 (1968) (recognizing “the freedom of teachers to teach and of
3 students to learn”); *Bd. of Ed., Island Trees Union Free Sch. v. Pico*, 457 U.S. 853,
4 867 (1982) (“the Constitution protects the right to receive information and ideas.”)

5 The Ninth Circuit has noted that *Hazelwood*, 484 U.S. 260 (1988), supports
6 the limited right to classroom speech in furtherance of the course curriculum. In
7 *Downs v. LAUSD*, the court recognized that where “activities may fairly be
8 characterized as a part of the school curriculum, whether or not they occur in a
9 traditional classroom setting,” the “educators’ authority in this area enable[s] them
10 to ‘assure that the participants learn whatever lessons the activity is designed to
11 teach, that readers or listeners are not exposed to material that may be
12 inappropriate for their level of maturity, and that the views of the individual speaker
13 are not erroneously attributed to the school.” 228 F.3d 1003, 1010 (2000), quoting
14 *Hazelwood*, 484 U.S. 260, 271 (1988). Thus, within the educational setting,
15 teachers and students have the right to communicate within the curriculum in a
16 manner that facilitates learning the intended lesson.

17 The MAS curriculum has been adopted by the TUSD Governing Board.
18 Arizona law specifically delegates authority and directs school district governing
19 boards to determine the curricula of its programs. The relevant portion of section
20 341 provides: “A. The governing board shall:...5. Provide the curricula...as provided
21 in sections 15-701 and 15-701.01.” A.R.S. § 15-701 and 15-701.01 require the
22 State Board of Education to “[p]rescribe a minimum course of study, as defined in
23 section 15-101 and incorporating the academic standards adopted by the State
24 Board of Education...” “Course of study’ means a list of required and optional
25 subjects to be taught in the schools.” A.R.S. § 15-101(10). Thus, the statutory
26 scheme requires the local governing board to determine the curricula, which must
27 include the general academic standards and minimum list of required and optional
28 courses provided by the State Board of Education. A.R.S. §15-341. Thus, the

1 plaintiffs' First Amendment rights in this context are those that further teaching and
2 learning within the prescribed MAS curriculum.

3 This protected speech is unlike the government speech at issue in
4 *Downs*. In that case, the Ninth Circuit determined that the message of school-
5 sponsored bulletin boards was under the control of the school and was
6 "government speech." *Downs*, 228 F.3d 1003 (2000). The school district and the
7 school, through its principal, dictated the message to be communicated on the
8 boards. *Ibid*. The school was in control of materials on the boards and within its
9 rights to remove items inconsistent with its message. *Ibid*. Therefore, the teacher
10 "had no *First Amendment* right to dictate or contribute to the content of that
11 speech." *Downs*, 228 F.3d 1003,1009 (2000) (emphasis added).

12 But "government speech" in the form of a bulletin board is qualitatively
13 different from "government speech" in the form of a prescribed curriculum. The
14 curriculum dictates general content, but individual teachers are responsible for
15 communicating that content in unique and creative ways. School districts do not
16 provide teachers with scripts to communicate lessons. During any given school
17 day in TUSD, thousands of teachers simultaneously engage in classroom speech
18 to communicate the curriculum. School principals do not, cannot, and should not
19 desire to control every word a teacher says in the classroom, in the way that the
20 school in *Downs* desired and was able to control the message conveyed by the
21 bulletin boards. While a teacher has no right to "contribute" to a school-sponsored
22 bulletin board, a teacher possesses not only a right, but also an obligation to
23 "contribute" to the curriculum in a classroom. Only if the district determines that the
24 teacher has stepped outside of the prescribed curriculum does that right cease.
25 The plaintiffs here do not assert a First Amendment right to dictate the curriculum
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1 adopted by TUSD, but rather to contribute to it.¹⁴

2 Along with the broad discretion of the States and school boards to manage
3 school affairs comes the limitation that such discretion “must be exercised in a
4 manner that comports with the transcendent imperatives of the First Amendment.”
5 *Pico*, 457 U.S. 853, 864 (1982) (school board may not remove books from school
6 library on the basis of partisan or political disapproval); see also, *Meyer v.*
7 *Nebraska*, 262 U.S. 390 (1923) (state may not forbid teaching foreign language in
8 public and private schools); *Epperson*, 393 U.S. 97 (1968) (state may not prohibit
9 the teaching of evolution). Courts should not intervene in school affairs unless
10 conflicts arise that “directly and sharply implicate basic constitutional values.” *Ibid.*
11 at 104.

12 HB 2281 was designed to shut down one program in one school district. In
13 finding that MAS is in violation of HB 2281, Mr. Huppenthal joins the Legislature in
14 acting far beyond legitimate government discretion in curricular matters.¹⁵ HB 2281
15 is not a curriculum. A curriculum is “a course of study in one subject at a school or
16 college.” Dictionary.com, <http://dictionary.reference.com/browse/curriculum> (last
17 referenced July 20, 2011.) HB 2281 does not attempt to describe a “course of
18 study.”

19 To the contrary, the history and context of this law reveal that it was not
20 motivated by legitimate curricular concerns, but rather by invidious viewpoint
21 discrimination. *Cf. City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804
22

23 ¹⁴ Neither the Supreme Court nor the Ninth Circuit have applied the restrictions on the
24 Free Speech rights of public employees, recognized by the Supreme Court in *Garcetti v.*
25 *Ceballos*, to public school teachers. 547 U.S. 410, 425 (2006) (The Court does not decide
whether “the analysis we conduct today would apply in the same manner to a case involving
speech related to scholarship or teaching.”)

26 ¹⁵ One commentator has remarked, “Education is not criticized or challenged on legal
27 grounds because it has a message but, rather, because the government has exceeded its
28 authority—in effect, that what the government is doing with its educational institutions is *not*
educating.” “The Many Faces of Government Speech,” Randall P. Bezanson and William G.
Buss, 86 *Iowa L.Rev.* 1377, 1421 (2001).

1 (1984) (“[S]ome purported interests—such as a desire to suppress support for a
2 minority party or an unpopular cause, or to exclude the expression of certain points
3 of view from the marketplace of ideas...are...plainly illegitimate.”). Mr. Huppenthal,
4 Mr. Horne, and other politicians created, passed, and implemented HB 2281 solely
5 because they do not like the Mexican-American perspective presented by the
6 curriculum authorized by TUSD.

7 In *Morse*, the Supreme Court rejected the claim that the First Amendment
8 allows the suppression of speech based on this type of viewpoint discrimination. In
9 that case, both the school district and the United States urged the broad argument
10 “that the First Amendment permits public school officials to censor any student
11 speech that interferes with a school’s ‘educational mission.’” 551 U.S. 393, 423
12 (2007), Alito, J. concurring. Under that theory, for example, a school that defined its
13 mission as solidarity with soldiers could have tried to ban the black armbands worn
14 in *Tinker*, or a school with an educational mission to promote world peace could
15 have sought to ban buttons expressing support for the troops. *Ibid.* Or, in this case,
16 lawmakers with an educational mission to treat and value pupils as individuals
17 could seek to ban discussions of the legacy of oppression in the United States in
18 the context of learning about Mexican-Americans from the perspective of Mexican-
19 Americans. See A.R.S. §15-111. Justice Alito further declared that the
20 “‘educational mission’” argument would give public school authorities a license to
21 suppress speech on political and social views based on disagreement with the
22 viewpoint expressed. The argument, therefore, strikes at the very heart of the First
23 Amendment.” *Ibid.*

24 HB 2281 ostensibly seeks to value students as individuals. In reality, it gives
25 life to politicians’ efforts to drive out a curriculum that teaches about Mexican-
26 Americans. It does not represent a “curriculum.” Rather, it represents an
27 “educational mission” that is beyond the State’s authority to set curriculum and
28 impermissibly burdens teachers’ and students’ speech, speech which is otherwise

1 properly within the district-approved MAS curriculum.

2 In their 2010 campaigns, Mr. Huppenthal and Mr. Horne gained politically by
3 figuratively “whipping this pony.” Their open and obvious attempt to drive out a
4 particular viewpoint within the realm of history and political theory violates
5 American principles of legitimate government. To allow the government to regulate
6 education in this awkward and aggressively viewpoint-discriminatory manner would
7 insulate all purported curricular decisions, regardless of their invidious nature, from
8 First Amendment protection or control. This is not the law under our Constitution
9 and should not be the law. The issue before the Court is not whether the
10 Constitution applies, but whether the Constitution has been violated.

11 Viewpoint discrimination is especially harmful where it distorts the nature of
12 important institutions. In *Ark. Ed. Television Comm. v. Forbes*, the Supreme Court
13 recognized that “candidate debates are of exceptional significance in the electoral
14 process.” 523 U.S. 666, 675 (1998). Therefore, to allow a public television station
15 to exclude a political candidate from a televised debate on the basis of viewpoint
16 discrimination would present the “inevitability of skewing the electoral dialogue.”
17 *Ibid.* at 676. Likewise, in *LSC v. Velazquez*, the government violated the First
18 Amendment by funding legal representation, but imposing viewpoint-based
19 restrictions on the lawyers, prohibiting them from making certain arguments on
20 behalf of their clients. The Court explained that such restrictions “distort[] the legal
21 system by altering the traditional role of the attorneys.” 531 U.S. 533, 534 (2001).

22 In this case, HB 2281 and Mr. Huppenthal’s discrimination against the
23 viewpoint communicated by the MAS curriculum distort the role of education.
24 Rather than “safeguard the fundamental values of speech and inquiry and of
25 belief,” *Epperson*, 393 U.S. 97, 104 (1968), and rather than “teach by example the
26 shared values of a civilized social order,” *Fraser*, 478 U.S. 675, 683 (1986), Mr.
27 Huppenthal gives the students a remarkable lesson. He teaches them a first-hand
28 lesson in government oppression.

1 This is not a case of determining the authority of a school or school district to
2 engage in its day-to-day operations. A principal has the authority to withhold
3 publication of a student newspaper story that is potentially defamatory and an
4 invasion of family privacy, *Hazelwood*, 484 U.S. 260 (1988), or to take down a
5 teacher’s materials on a bulletin board that do not comport with the school-
6 sponsored message. *Downs*, 228 F.3d 1003 (2000). Likewise, a student may be
7 disciplined for a sexually provocative speech at a mandatory school program,
8 *Fraser*, 478 U.S. 675 (1986), or for displaying a banner at a school-sanctioned
9 event that appears to promote illegal drug use. *Morse*, 551 U.S. 393 (2007). Even
10 in light of the dissenting opinions, none of these cases present a scenario of
11 unfettered government authority.

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

20 **VIII. Elimination of MAS Violates Plaintiff’s Substantive Right to Due**
21 **Process**

22 In this case, HB 2281 unreasonably infringes upon the student and parent
23 plaintiffs’ rights to choose an educational program that has been demonstrated to
24 be of particular value to them as Latino students, and is offered by the school
25 district. Education has been recognized as a liberty interest, although not afforded
26 heightened protection as a fundamental right. Ethnic studies programs in general,
27 and TUSD’s MAS program in particular, have been proven to be of particular
28 benefit to enhance the academic achievement of Latino students. Elimination of

1 MAS does not rationally further any legitimate state interest.

2 The Fourteenth Amendment provides, “No State shall...deprive any person
3 of life, liberty, or property, without due process of law.” As a liberty interest, the law
4 affords constitutional protections to personal decisions relating to...education.”
5 *Casey*, 505 U.S. 833, 851 (1992); *see also Meyer*, 262 U.S. 390, 399 (1923)
6 (Liberty interest encompasses right of individual “to acquire useful knowledge.”) In
7 this case, the student plaintiffs and their parents have the right to choose a
8 program, offered by TUSD, that has been proven to be of special benefit to Latino
9 students.

10 School districts have long struggled with disparity of achievement between
11 different ethnic groups. In the case of Latinos, national statistics demonstrate that
12 they drop out of high school at a higher rate than the average, and matriculate to
13 college at a lower rate. TUSD statistics for dropout and college matriculation rates
14 among Latino students mirror this troubling national trend. Additionally, Latinos
15 tend to score lower than student averages on the standardized AIMS test. In the
16 context of the desegregation case against TUSD, district officials and
17 community members struggled to find creative solutions to these types of
18 intractable problems. As a result of this process, MAS was created to specifically
19 target Latino students and reduce the risk of dropping out and underachieving.
20 Most of these students are also identified as coming from low-income or very low-
21 income households. One troubling trend identified with these students is that many
22 did not find the subject-matter of their studies relevant to their lives. Moreover, they
23 felt little connection with their teachers. This combination helped to fuel the lower
24 achievement rates on the part of Latinos. To address these problems, MAS seeks
25 to grab the attention of these students, create enthusiasm for learning, and instill
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1 the value of their education in all of their courses of study¹⁶. It also serves to help
2 students understand how their education will not only improve their own lives, but
3 give them a vital role in improving the lives of others and their community in
4 general. The “hook” to grab these students is the curriculum from a Mexican-
5 American perspective that provides Latino students with an opportunity to examine
6 history, government, and literature in a manner that is culturally relevant to their
7 lives. Another key component of the program is making the students feel that their
8 teachers genuinely care about them, their education, and their futures. Once
9 engaged, students are encouraged to achieve to their highest potential. Data
10 shows that the MAS has been an unqualified success in lowering dropout rates,
11 increasing college matriculation rates, and closing the achievement gap in
12 standardized test scores in its students, something that few other programs
13 demonstrate. The student and parent plaintiffs’ choice to participate in this type of
14 beneficial and innovative program is a valid exercise of their liberty interests.

15 Under the substantive due process analysis, Mr. Huppenthal has the burden
16 to prove that his action to terminate MAS is rationally related to a legitimate state
17 interest that justifies intruding into the educational decisions of parents and their
18 children. See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (where a law burdens a
19 fundamental right..., we will uphold the legislative classification so long as it bears
20 a rational relation to some legitimate end.) In this case, there is no legitimate state
21 interest. HB 2281 is borne out of an invidious attempt to deny Mexican-American
22 identity and culture. Much like the Colorado law prohibiting anti-discrimination laws
23 protecting homosexuals, HB 2281 is “inexplicable by anything but animus toward
24 the class it affects.” *Ibid.* at 632.

25 Mr. Huppenthal, after spending over \$100,000 on an independent audit,

27 ¹⁶This is demonstrated by data showing that MAS students close the achievement gap
28 in all three AIMS subjects (reading, writing, and math), despite the fact that MAS does not offer
math classes.

1 promptly disregarded the results, results which endorsed MAS, and issued a
2 finding of violation on the vaguest of evidence, pointing to a few random quotes
3 from unidentified materials. The most damning piece of evidence is Mr.
4 Huppenthal's clear message that classes that seek to improve the academic
5 performance of Latinos must not be allowed to survive.

6 Further, Mr. Huppenthal's campaign pledge to "stop La Raza" and Mr.
7 Horne's campaign video characterizing the MAS as "anti-American" demonstrate
8 this animus toward Mexican-Americans and their culture. Mr. Horne shamelessly
9 identifies a librarian wearing a MEChA insignia on her shirt as a cause for concern.
10 The motivation for shutting down the MAS is inexplicable on any ground other than
11 bigotry and a desire to deny Mexican-American identity and culture.

12 Arizona's current political climate is hostile to Mexican-Americans. Should
13 the State be successful in its efforts to eliminate the program, the stigma to
14 students of MAS as well as to Mexican-Americans in general would be inevitable,
15 as was the stigma that attached to the Texas law criminalizing homosexual
16 conduct in *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). There is no legitimate
17 state interest that can justify this type of intrusion into the students' lives and
18 educational choices.

19 This case is similar to *Meyer v. Nebraska*, where the Supreme Court
20 invalidated a state law prohibiting students younger than eighth grade from
21 learning in a language other than English. 262 U.S. 390 (1923). Specifically, the
22 Court held that the state's desire "to foster a homogenous people with American
23 ideals" went beyond the State's legitimate authority and conflicted with the right to
24 conduct classes in a language other than English. *Ibid.* at 402. Likewise, any
25 attempt by the State of Arizona to shut down the MAS in the interest of fostering a
26 homogenous people with American ideals is also an illegitimate interest.

27 A.R.S. §15-111 declares as policy that "public school pupils should be taught
28 to treat and value each other as individuals and not be taught to resent or hate

1 other races or classes of people.” As educational policy, treating others as
2 individuals voices a vague and obscure interest. But even assuming this states a
3 legitimate state interest, shutting down MAS does nothing to further it.

4 According to the Cambium report, there was no indication that MAS classes
5 promoted hate or resentment, or in any way failed to treat students as individuals.
6 To the contrary, auditors observed that “teachers collectively are building nurturing
7 relationships with students,” that “a culture of respect exists,” and that “students
8 from many ethnicities are physically sitting in Mexican American Studies
9 Department classes and are learning that different perspectives are valuable, that
10 Americans come from many backgrounds, and that being an American means that
11 all people are accepted.” Cambium rept., p.63 (emphasis added).

12 This evidence demonstrates that eliminating MAS will fail to further the
13 state’s interest in treating students as individuals. In actuality, by eliminating a
14 program that teaches students that “being an American means that all people are
15 accepted,” the State will damage it’s own purported interest. HB 2281 is not
16 rationally related to a legitimate state purpose and must be struck down.

17 **IX. Plaintiffs’ Claims Are Not Subject To 12(b)(6) Dismissal**

18 Plaintiffs’ second amended complaint provides a detailed factual basis for
19 the claims asserted therein. Notice of the claims asserted is undisputedly provided.
20 Mr. Horne and then Mr. Huppenthal filed answers to plaintiffs complaints without
21 the need for any further elucidation of the facts or constitutional claims asserted.

22 Defendant’s motion reflects a challenge to the propriety of plaintiffs’ standing
23 to challenge HB 2281. To suggest that the facts underlying plaintiffs challenge are
24 unknown is inaccurate. The history behind HB 2281, the subsequent enforcement
25 actions and plaintiffs’ interest are identified with the requisite level of specificity to
26 provide defendant notice of what claims are made and why.

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28 //

1 **X. Abstention Is Not Appropriate Or Required**

2 The district court has federal question jurisdiction in this matter as provided
3 28 U.S.C. § 1331, which provides original jurisdiction of all civil actions arising under
4 the Constitution, laws or treaties of the United States. When, as here, abstention is
5 requested under the *Burford* doctrine, it must be established that (1) the state has
6 chosen to concentrate suits challenging the actions of the agency involved in a
7 particular court, (2) the federal issues cannot be separated easily from complex
8 state law issues with respect to which state courts might have special competence,
9 and (3) federal review might disrupt state efforts to establish a coherent policy.
10 *United States v. Morros*, 268 F.3d 695, 705 (9th Cir. 2001).

11 In this case, abstention is not required or appropriate. The claims before this
12 court are distinct, premised on multiple federal Constitutional challenges not
13 present in the administrative TUSD appeal, and involve separate parties with
14 distinct interests.

15 In the administrative appeal there are no complex state law issues present
16 for which the state courts have a special competence. Just the opposite is true in
17 this matter. The claims asserted by plaintiffs are complex federal Constitutional law
18 issues for which the state administrative proceeding is ill equipped to adjudicate in
19 a competent manner.

20 Nor is there any disruption to any effort to establish a coherent state policy
21 by proceeding with adjudication of the *Acosta* case. Moreover, the administrative
22 proceeding is **not** binding but merely advisory. Mr. Huppenthal is free to enforce
23 HB 2281 and impose the 10% sanction irrespective of the ALJ report and
24 recommendation. Mr. Huppenthal is also well aware that his action is subject to
25 review under an abuse of discretion standard that heavily favors sustaining his final
26 decision.

27 Abstention is not appropriate, the state administrative proceeding is not an
28 adequate or comparable vehicle for a complete, prompt and competent resolution

1 of the issues present in the instant matter.

2 **XI. Conclusion**

3 The United States Supreme Court stated in *Virginia v. American Booksellers*
4 *Ass'n, Inc.*:¹⁷

5 To bring a cause of action in federal court requires that
6 plaintiffs establish at an irreducible minimum an injury in
7 fact; that is, there must be some threatened or actual
8 injury resulting from the putatively illegal action. . . . That
9 requirement is met here, as the law is aimed directly at
10 plaintiffs, who, if their interpretation of the statute is
11 correct, will have to take significant and costly compliance
12 measures....

13 (Internal citations and quotation marks omitted; emphasis added.)¹⁸ Because HB
14 2281 prohibits broad undefined conduct, it requires plaintiffs to engage in a never
15 ending guessing game as to what they can teach or reciprocally learn. They have
16 standing to challenge HB 2281's legality before they are further injured by it;
17 prevention is preferable to correction.

18 Enforcement of HB 2281 has commenced. Those with the power to do
19 irreparable harm have engaged in a course of conduct that will leave plaintiffs
20 undeniably injured. Mr. Huppenthal, like Mr. Horne, has demonstrated a
21 commitment to enforce and defend HB 2281; there exists an undeniable requisite
22 "credible threat" of enforcement.¹⁹ Under these circumstances, plaintiffs are victims
23 of HB 2281 and as the Ninth Circuit concluded in *Bland v. Fessler*²⁰,

24 ¹⁷ 484 U.S. 383, 392.

25 ¹⁸ See also, *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d
26 501, 508 (9th Cir. 1991) ("However, even if [the plaintiffs] had not already been charged with
27 violating the challenged provisions, the individual appellees would have standing. The
28 challenged statute . . . is regulatory and proscriptive in nature and the penalty for
noncompliance is high. Moreover, the individual appellees fall within the class of persons
whose conduct the statute proscribes").

¹⁹ See, e.g., *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 618 (9th
Cir. 1999)(plaintiff can establish standing by demonstrating "that the state [defendant] intends
either to enforce a statute or to encourage local law enforcement agencies to do so").

²⁰ 88 F.3d 729, 737 (9th Cir. 1996).

1 Bland chose to obey both the civil and utilities statutes
2 and to bring a declaratory action challenging their
3 constitutionality, rather than to violate the law, await an
4 enforcement action against him, and raise the statutes'
5 constitutionality as a defense. Bland's decision was
6 altogether reasonable and demonstrates a commendable
7 respect for the rule of law. Under the circumstances of
8 this case, Bland should be allowed to test the law.

9 Based on these facts, plaintiffs have standing to challenge the constitutionality of
10 HB 2281.²¹ Plaintiffs have demonstrated that they have standing as the educators
11 who teach MAS and the students desire to enroll in TUSD's MAS course offerings.
12 The claims made are those for which relief can and customarily is provided when
13 the requisite showing is made. Defendant's motion fails to demonstrate any factual
14 circumstance or binding authority that warrants dismissal. Denial is urged and
15 respectfully requested.

16 Respectfully submitted this 1st day of August 2011.

17 s/Richard M. Martinez, Esq.
18 Richard M. Martinez, Esq.
19 **Counsel for Plaintiff**

20 **Certification of Service**

21 I hereby certify that on August 1, 2011, I electronically transmitted the
22 foregoing document to the Clerk of Court using the CM/ECF System for filing and
23 transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

24 s/Richard M. Martinez, Esq.
25 Richard M. Martinez, Esq.

26 ²¹ See: *Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73, 75 (4th Cir. 1991)
27 ("Public policy should encourage a person aggrieved by laws he considers unconstitutional to
28 seek a declaratory judgment against the arm of the state entrusted with the state's
enforcement power, all the while complying with the challenged law, rather than to deliberately
break the law and take his chances in the ensuing suit or prosecution").