

RICHARD M. MARTINEZ, SBA No. 7763

307 South Convent Avenue

Tucson, Arizona 85701

(520) 327-4797 phone

(520) 320-9090 fax

richard@richardmartinezlaw.com

Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CURTIS ACOSTA, *et. al.*,

Plaintiffs,

v.

JOHN HUPPENTHAL,
Superintendent of Public
Instruction, in his Official
Capacity, *et. al.*,

Defendants.

No. CV 10 - 623 TUC AWT

**RESPONSE IN OPPOSITION TO
MOTION TO DISMISS, Ct. Doc. No. 88**

Plaintiffs, by and through their counsel undersigned, hereby respond in opposition to the pending motion to dismiss.¹ Superintendent Huppenthal seeks dismissal pursuant to the provisions of Rule 12(b)(1) and (6), F.R.C.P. Neither Rule provides a basis for dismissal of this case.

The plaintiffs are all proper individuals to assert the constitutional claims identified in their third amended complaint.² They are two students and eleven public school educators. Both students attend Tucson Unified School District ("TUSD") schools. Ten of the educators teach classes for the Mexican American Studies Department ("MAS"), a TUSD-adopted curriculum. Sean Arce is the MAS director. All of the educator plaintiffs are certified, meet the requirements of the Arizona Department of Education ("ADE"), and are subject to ADE scrutiny.

Plaintiffs as a group have been forced to live under the limitations and scrutiny created by HB 2281.³ Their rights as citizens of the United States of America have

¹ Ct. Doc. No. 88.

² Ct. Doc. No. 84, hereinafter, "TAC."

³ A.R.S. §§ 15-111 & 112.

1 been diminished. They no longer enjoy the same rights under the First and the
2 Fourteenth Amendments that other similarly situated individuals do. Their ability to
3 teach or learn about the history, culture, and language of Latinos has been
4 circumscribed by State-imposed limitations; what they teach or learn about Latinos
5 must not offend the State of Arizona. Arizona does not subject any other racial, ethnic
6 or religious group to this type of State-imposed scrutiny. The line between what is
7 permissible and that which offends is unknown. HB 2281 is devoid of any definitions.
8 Enforcement is left to the subjective interpretation of State officials who have either
9 been elected or appointed to their position.

10 HB 2281 is a statute that provides for differential treatment on the basis of race,
11 ethnicity and religion. It expressly provides for the teaching of the Holocaust while
12 implicitly denying Latinos the opportunity to read, hear, discuss, or debate the
13 atrocities Latinos have suffered as a group.⁴ This law also denies Latinos, and all
14 students of TUSD, the opportunity to learn about Latinos' contributions to our nation,
15 the struggles endured and the price that has been paid to enjoy the promises of our
16 nation.

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

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

25 Respectfully submitted this 11th day of October 2011.

26 s/Richard M. Martinez, Esq.

27
28

⁴ See A.R.S §15-112(F).

Memorandum of Points and Authorities

I. Preliminary Statement

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

The events that led to the enactment of HB 2281 are no secret. They are a matter of public record.⁵ While Tom Horne was the Superintendent of Public Instruction, he did all he could to impose his will on TUSD to “shut down” the MAS program.⁶ Upon passage of HB 2281, then Superintendent Horne stated, “I think it’s overdue. The Department of Education will now have the authority to put a stop to the extremely dysfunctional practices in Tucson Unified School District.”⁷ Superintendent Horne targeted the TUSD program because he “believes that the ethnic studies program teaches Latino students that they are oppressed by white people and promotes racial hatred.”⁸

Unwilling to be denied the opportunity to impose the sanction provided in HB 2281 on TUSD’s MAS program, Superintendent Horne signed his Finding a day before HB 2281 became effective, a Finding that was based entirely on pre-enactment allegations and drafted during Mr. Horne’s final days as Superintendent of Public Instruction.⁹ This Finding remains in effect, has not been withdrawn or voided, and represents an enforcement action of HB 2281 by the State of Arizona.

In June of this year, Superintendent Huppenthal released his own Finding concerning TUSD’s MAS program, reaching the same conclusion as Superintendent

⁵ *Intri-Plex Tech Inc. v. Crest Group Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007).

⁶ See Horne Finding, Ex. B to Third Amended Complaint, (“TAC”) Ct. Doc. No. 84; and Superintendent Horne’s Open Letter to the Citizens of Tucson, Ct. Doc. No. 53, Ex. 1.

⁷ KVOA.com, “Bill Passed That Would Ban Ethnic Studies for TUSD,” April 30, 2010, <http://www.kvoa.com/news/bill-passed-that-would-ban-ethnic-studies-for-tusd/>.

⁸ The Washington Post, The Answer Sheet, “Arizona Strikes Again: Now It’s Ethnic Studies,” <http://voices.washingtonpost.com/answer-sheet/history/arizona-strikes-again-now-it-l.html>. See also, Mr. Horne’s Attorney General website, <http://www.azag.gov/>, where he prominently continues to promote his Finding and anti-MAS campaign. Fed. R. Evid. 201(b) provides for judicial notice of Superintendent Horne’s public comments.

⁹ Mr. Horne is the current Attorney General for the State of Arizona.

1 Horne, that HB 2281 was violated.¹⁰ Superintendent Huppenthal's Finding ignored the
2 on-site audit conducted at his request by his own retained team of experts, Cambium
3 Learning, Inc.¹¹ The Cambium Audit, which found no evidence of a statutory violation,
4 directly contradicts the Horne and Huppenthal Findings.¹² Additionally, it is noteworthy
5 that, in his Finding, Superintendent Huppenthal does not cite a single classroom
6 incident.

7 Irrespective of the paucity of evidence offered by Superintendent Huppenthal,
8 like Superintendent Horne, he explicitly orders that steps be taken to come into
9 compliance or thereafter 10 per cent of state funding will be withheld. This sanction will
10 cost TUSD one to three million dollars per month.¹³ By issuing his own Finding and not
11 identifying what must be changed, Superintendent Huppenthal has inflicted his injury
12 upon the plaintiffs. Their program, teaching, words, and the opportunity to learn has
13 been substantially altered subject to a draconian penalty—sanctions that, irrespective
14 of the final choice, injures each of the plaintiffs. Moreover, the plaintiffs remain under
15 the cloud of HB 2281 to refrain from saying or doing anything that hints of “Hispanic
16 nationalism and unity in the face of assimilation and oppression.”¹⁴ The very existence
17 of the MAS program is at risk, endangering plaintiffs employment and educational
18 opportunities.

19 Superintendent Huppenthal's position that HB 2281 does not reach, impact, or
20 limit the Free Speech of plaintiffs is as absurd as his suggestion that HB 2281 and the
21 subsequently issued Findings of violations do not impose cognizable constitutional
22 injuries upon the plaintiffs.¹⁵ HB 2281 is not a State-mandated curriculum, but a
23 limitation on a locally-approved curriculum that fulfills its purpose by effectively
24 reaching students and improving their ability to be successful in school.

25 ¹⁰ TAC, Exhibit B, Ct. Doc. No. 84.

26 ¹¹ Ct. Doc. Nos. 84-01, 85, 86 and 87.

27 ¹² *Ibid.*

28 ¹³ TAC, ¶¶ 16-17.

¹⁴ TAC, Exhibit C, Huppenthal Finding at p. 3; Ct. Doc. No. 84.

¹⁵ Ct. Doc. No. 88; See also, Ct. Doc. No. Xx, p. x.(Contending that HB 2281 does not impact or limit teacher or student speech in any way.)

1 The plaintiffs assert that HB 2281 is void for vagueness, both facially and as
 2 applied, and that it impermissibly chills First Amendment interests, including impairing
 3 the right of students to hear a protected communication. HB 2281 also denies Latinos
 4 equal protection and substantive due process.¹⁶

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

8 **II. Standard of Review**

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

10 Plaintiffs have the burden of establishing standing.¹⁷ “For purposes of ruling on
 11 a motion to dismiss for want of standing, both the trial and reviewing courts must
 12 accept as true all material allegations of the complaint, and must construe the
 13 complaint in favor of the complaining party.”¹⁸ “Each element [of standing] must be
 14 supported in the same way as any other matter on which the plaintiff bears the burden
 15 of proof, *i.e.*, with the manner and degree of evidence required at successive stages
 16 of the litigation.”¹⁹ At this pleading stage, “general factual allegations of injury resulting
 17 from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that
 18 general allegations embrace those specific facts that are necessary to support the
 19 claim.”²⁰ “The threshold question of whether the plaintiffs [have] standing (and the court
 20 has jurisdiction) is distinct from the merits of [their] claim. Rather ‘the jurisdictional
 21 question of standing precedes, and does not require, analysis of the merits.’²¹

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

23 In determining whether the plaintiffs fail to state a claim for which relief may be
 24 granted pursuant to Fed. R. Civ. Pro. 12(b)(6), the Court must determine whether,

25 ¹⁶ See TAC ¶¶ 113-131, Ct. Doc. No. 84.

26 ¹⁷ See e.g., *Kokkonen v. Guardian of Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

27 ¹⁸ *Takhar v. Kessler*, 76 F.3d 995, 1000 (9th Cir.1996) (internal citations and quotation
 marks omitted).

28 ¹⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)(citations omitted).

²⁰ *Ibid.*

²¹ *Maya v. Centex Corp.*, 2011 U.S. App. LEXIS 19344, 13 (9th Cir. 2011).

1 “accepting the facts as stated by the nonmoving party from the record and drawing all
2 inferences in its favor,” it is “beyond doubt that the plaintiff[s] can prove no set of facts
3 in support of [their] claim.”²²

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
11 of the plaintiff.²³

12 Where one of the plaintiffs satisfies the standing requirements, “the Court need not
13 consider the standing of the other plaintiffs.”²⁴

14 The equitable jurisdiction of the federal courts is both preventive and corrective.²⁵

15 The Supreme Court of the United States has repeatedly held that “[o]ne does **not**
16 have to await the consummation of threatened injury to obtain preventive relief. If the
17 injury is certainly impending that is enough.”²⁶

18 Superintendent Huppenthal misconstrues the nature of the plaintiffs’ Third
19 Amended Complaint by attacking only the plaintiffs’ standing to assert violations of their
20 First Amendment rights. However, the Complaint also alleges violations of the plaintiffs’

21 ²² *Everest & Jennings v. Am. Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994).

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

²⁴ *Carey v. Population Services Int’l*, 431 U.S. 678, 682 (1977); *Planned Parenthood of
Idaho v. Wasden*, 376 F.3d 908, 918 (9th Cir 2004) (citations omitted); *Leonard v. Clark*, 12
F.3d 885, 888 (9th Cir. 1992).

²⁵ 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”).

²⁶ *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (emphasis
added), quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

1 rights to Equal Protection and Substantive Due Process, as well as that HB 2281 is
2 unconstitutionally vague and overbroad.²⁷

3 Furthermore, Superintendent Huppenthal mischaracterizes the plaintiffs' facial
4 claims as "pre-enforcement," and therefore subject to the special standing
5 requirements set out by *Lopez v. Candaele*.²⁸ This assumption ignores Superintendent
6 Horne's Finding against MAS, setting in motion the enforcement proceedings on
7 December 30, 2010, the ensuing curriculum audit by Cambium Learning, Inc. and
8 Superintendent Huppenthal's own Finding issued on June 15, 2011. Both of these
9 Findings are still pending.²⁹ The administrative hearing on the enforcement of the
10 Huppenthal Finding commenced on August 19, 2011, with the testimony scheduled to
11 conclude on October 17th. The administrative law judge's recommendation will be
12 essentially meaningless, as Superintendent Huppenthal has complete discretion to
13 accept, deny or modify it.³⁰

14 Superintendent Huppenthal's reliance on *Younger v. Harris*³¹ and *Johnson v.*
15 *Stuart*³² is misplaced. *Johnson* involved a statute prohibiting the use of any textbook
16 "which speaks slightingly of the founders of the republic."³³ In that case, the plaintiff
17 teachers had no standing because no teacher had been charged with violation of the
18 statute, denied permission to use any book or even threatened with such
19 enforcement.³⁴ Similarly, in *Younger*, teachers not under prosecution had no standing
20 to challenge a law that criminalized teaching communism. Prosecution of those
21 particular *Younger* plaintiffs was not even "remotely possible."³⁵ The imminence of

22
23 ²⁷ TAC ¶¶ 113-131.

²⁸ 630 F.3d 775, 786 (9th Cir 2010). Ct. Doc. No. 88, p.7.

24 ²⁹ Superintendent Huppenthal now claims, through pleadings filed in this action, that his
25 Finding supersedes the Finding issued by Superintendent Horne. Ct. Doc. No. 88, p.4. Yet,
26 aside from assertions made in this action, he has not officially issued any such statement
27 through the Arizona Department of Education. The Horne Finding is still in force and applicable
28 to the MAS program.

³⁰ See A.R.S §41-1092.08(B).

³¹ 401 U.S. 37 (1971).

³² 702 F.2d 193 (9th Cir. 1983).

³³ 702 F.2d at 194.

³⁴ 702 F.2d at 194-95.

³⁵ 401 U.S. at 41-42.

1 injury shown in this case is in stark contrast to that of *Johnson and Younger*. The
2 coercion felt by the plaintiffs as a result of the enforcement of HB 2281 is much more
3 real and substantial than a mere “subjective chill.” Their program, livelihoods and
4 constitutional rights are at stake. Further, Superintendent Huppenthal remains silent
5 regarding the fact that he has introduced numerous examples of lessons written and/or
6 used by some of the plaintiffs in the administrative hearing against TUSD.³⁶
7 Superintendent Huppenthal’s characterization of the plaintiffs’ claims as “pre-
8 enforcement” is without foundation, contrary to his own course of conduct and devoid
9 of the candor owed this court.

10 **A. The Students Have Standing.**

11 The two student plaintiffs, Korina Lopez and Maya Arce, have standing despite
12 the fact that they will not be eligible to enroll in MAS classes until the fall of 2012 and
13 2013, respectively.³⁷ The Supreme Court has upheld standing for parents challenging
14 a race-based admission policy where they alleged that their elementary and middle
15 school-aged children may be “denied admission to the high school of their choice when
16 they apply to those schools in the future.”³⁸ The Court rejected the defendants’
17 contention that the fact that the students were not yet eligible to apply for high school
18 admission eliminated the imminence of their injuries and rendered them too
19 speculative.³⁹ The likelihood that they would be subjected to the allegedly
20 discriminatory procedure at some point in the future was sufficient for standing.

21 Similarly, the fact that Ms. Lopez and Ms. Arce are not yet eligible to take MAS
22 classes does not defeat standing. The administrative enforcement action is moving
23 inexorably toward a final decision by Superintendent Huppenthal. He has made clear
24 his determination to eliminate the program. The injury is imminent and particularized

26 ³⁶ Superintendent Huppenthal’s managing agents have also testified that TUSD’s MAS
27 program is not salvageable, that TUSD would have to create an entirely new program.

28 ³⁷ Both have stated their intentions to register for MAS classes as soon as they are
eligible. TAC ¶¶ 69, 71.

³⁸ *Parents Involved in Comm. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 718 (2007).

³⁹ *Ibid.*

1 to the students.⁴⁰

2 As to the requirements that the injury “fairly can be traced to the challenged
3 action” and “is likely to be redressed by a favorable decision,” the plaintiffs’ burden
4 requires “no more than a showing that there is a ‘substantial likelihood’ that the relief
5 requested will redress the injury claimed....”⁴¹ In evaluating the pleadings, the Court
6 must “make a judgment as to whether the causal relation is **probable enough** to allow
7 standing.”⁴² Here there is no doubt that the injury to the MAS program is directly
8 traceable to the passage of HB 2281 and to the enforcement actions by
9 Superintendents Huppenthal and Horne. Eliminating MAS has always been the stated
10 goal of the legislation and of Superintendents Huppenthal and Horne. This causal
11 relationship is “probable enough” to confer standing.⁴³ Moreover, it is substantially likely
12 that a ruling by this Court that HB 2281 and/or its application by Superintendent
13 Huppenthal is unconstitutional, will avoid elimination of the MAS program and avoid the
14 injury claimed by the plaintiffs.

15 *Johnson* supports the students’ standing in this action.⁴⁴ There, the students
16 claimed that a state statute that banned textbooks that “speak... slightingly of the
17 founders of the republic or of those who preserved the union or which belittles or
18 undervalues their work” violated their First Amendment right of free access to
19 information.⁴⁵ The Ninth Circuit found that “[a]s persons who would have received the
20 information except for its alleged suppression by the state, the students were directly
21 injured if a constitutional violation occurred.”⁴⁶ Superintendent Huppenthal’s attempt
22 to restrict information provided to the students through MAS classes injures the
23 plaintiffs in the same manner.

25 ⁴⁰ *Cf. Johnson*, 702 F.2d at 196 (students’ claim of restricted access to information is
26 an injury “peculiar to...a distinct group of which they are a part.”)

26 ⁴¹ *Ibid.*

27 ⁴² *Ibid.* (emphasis added).

27 ⁴³ *Ibid.*

27 ⁴⁴ *Ibid.*

28 ⁴⁵ 702 F.2d at 195.

28 ⁴⁶ *Ibid.*

1 The student plaintiffs' intent to take MAS classes as soon as they are eligible is
 2 also sufficient to confer standing.⁴⁷ "It is well established that intent may be relevant to
 3 standing in an Equal Protection challenge."⁴⁸ ***At the pleading stage, the Court must***
 4 ***accept this allegation as true.***⁴⁹ In *Gratz*, the Supreme Court upheld an individual's
 5 standing to challenge a race-based college admissions policy on the basis that he
 6 intended to apply for admission as a transfer student.⁵⁰ The Court found it immaterial
 7 that he did not actually apply, reasoning that "the 'injury in fact' in an equal protection
 8 case of this variety is the denial of equal treatment resulting from the imposition of the
 9 barrier, not the ultimate inability to obtain the benefit."⁵¹ Likewise, the injury to Ms.
 10 Lopez and Ms. Arce is the denial of equal treatment and freedom of speech resulting
 11 from HB 2281 and its enforcement by Superintendents Huppenthal and Horne.

12 **B. The Plaintiff Teachers And Director Have Standing.**

13 The educator plaintiffs have standing to assert their claim that HB 2281 denies
 14 them their rights to Equal Protection under the political process theory.⁵² The *Hunter*
 15 and *Seattle* cases "yield a simple but central principle:" A state may not "allocate...
 16 governmental power nonneutrally, by explicitly using the ***racial*** nature of a decision to
 17 determine the decisionmaking process."⁵³ HB 2281 violates the Equal Protection
 18 Clause because it selectively restructures the political process to lodge
 19 "decisionmaking authority over the question at a new and remote level of
 20 government."⁵⁴ State action of this kind, "places ***special*** burdens on racial minorities
 21 within the governmental process and makes it "more difficult for certain racial and
 22 religious minorities [than for other members of the community] to achieve legislation

23 ⁴⁷ TAC ¶¶ 69, 71.

24 ⁴⁸ *Gratz v. Hamacher*, 539 U.S. 244, 260 (2003).

25 ⁴⁹ *Takhar*, 76 F.3d at 1000.

26 ⁵⁰ 539 U.S. at 260-61.

27 ⁵¹ 539 U.S. at 262.

28 ⁵² See *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982).

⁵³ *Seattle*, 458 U.S. at 469-70.

⁵⁴ 458 U.S. at 483. Rather than merely influencing the TUSD Governing Board to create programs considered to be in their interests, members of the Latino community must now ***additionally*** convince the entire Arizona legislature and Governor to abrogate HB 2281.

1 that is in their interest.”⁵⁵

2 That is precisely the situation here. The MAS program was created at the urging
3 of the community to address and combat declining trends for Latino students with
4 regard to drop out rates, grade failure rates, excessive discipline, poor attendance,
5 poor graduation rates and poor matriculation rates to post-secondary institutions.⁵⁶ For
6 the same reasons, the MAS program is required by the Federal District Court pursuant
7 to the Post-Unitary School Desegregation Plan.⁵⁷ Data shows that the MAS program
8 has been successful in these efforts.⁵⁸ By requiring Latinos to surmount the additional
9 hurdle of legislative repeal of HB 2281 in order to “achieve legislation that is in their
10 interest,” HB 2281 creates an actual injury for the plaintiffs and is particularized to them
11 as members of TUSD’s Latino community. The causal relationship between HB 2281
12 and these injuries is self-evident and there is substantial likelihood that a favorable
13 decision by the Court will eliminate the barrier faced by the plaintiffs in the political
14 process.

15 1. MAS Director Sean Arce Has Standing.

16 Plaintiff Sean Arce is the director of the MAS program. If MAS is eliminated as
17 a result of Superintendent Huppenthal’s enforcement action, his position, and therefore
18 his employment with TUSD, will be eliminated as well. It is well established that a
19 plaintiff “suffers an injury *in fact* sufficient for Article III standing purposes from the
20 impact of the statute on his practice of his profession.”⁵⁹ The imminence of an injury is
21 an “elastic concept” with the objective of ensuring that the injury is not too speculative
22 and that the injury is “*certainly* impending.”⁶⁰ Superintendent Huppenthal’s pending
23 enforcement of HB 2281 makes the elimination of MAS and Mr. Arce’s termination
24

25 ⁵⁵ 458 U.S. at 470, quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring).

26 ⁵⁶ TAC ¶73.

27 ⁵⁷ TAC ¶79.

28 ⁵⁸ TAC ¶78.

⁵⁹ *Planned Parenthood of Idaho*, 376 F.3d at 918, fn.5: see also *Carroll v. Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003), citing *Allen v. Wright*, 468 U.S. 737, 755 (1984) (denial of equal treatment in violation of the right to Equal Protection is enough to confer standing.)

⁶⁰ *Lujan*, 504 U.S. at 564, n.2.

1 “certainly impending.”

2 Contrary to Superintendent Huppenthal’s contention, Mr. Arce’s claim does not
3 rely “upon a chain of speculative contingencies.”⁶¹ Superintendent Huppenthal’s litany
4 of potential outcomes of the enforcement proceeding is counter to the political and
5 practical realities created by HB 2281. Revision of the curriculum “to ensure
6 compliance with the statute” is impossible because the statute does not require the
7 Superintendent to inform TUSD what changes he believes would cure any alleged
8 violations and he has not done so.⁶² From his Finding, it appears that Mr. Huppenthal
9 believes the statute requires the elimination of teaching about the concept of
10 “oppression,” and therefore of racism.⁶³ If his view of the statute is correct, then nothing
11 short of elimination would satisfy the requirements of HB 2281. Superintendent
12 Huppenthal’s suggestion that TUSD might accept the 10 per cent cut in funding to
13 allow MAS to continue defies reality.⁶⁴ The 10 per cent penalty is designed to not only
14 make it practically impossible for TUSD to accept the penalty, but to create an
15 acrimonious climate, eroding support for the MAS program and for efforts to vindicate
16 the Governing Board’s right to develop a such a program that it believes to be in the
17 best interests of its students.

18 Likewise, TUSD’s failure in its administrative appeal is guaranteed by the
19 procedure created by HB 2281. Despite the proceeding before an administrative law
20 judge, Superintendent Huppenthal is vested with complete discretion to make the final
21 agency decision.⁶⁵ If the TUSD Governing Board appeals his decision, the superior
22 court must “affirm the agency action unless...[it] is not supported by substantial
23 evidence, is contrary to the law, is arbitrary and capricious or is an abuse of
24
25

26 ⁶¹ Ct. Doc. No. 88, p.10.

27 ⁶² *Ibid.*

28 ⁶³ Ct. Doc. No. 84, Ex. D., p. 2.

⁶⁴ Ct. Doc. No. 88, p. 10.

⁶⁵ See, A.R.S. §41-1092.08(B).

1 discretion.”⁶⁶ The legislature predetermined the outcome against TUSD and the injury
2 to Mr. Arce is indeed imminent.

3 **2. The Plaintiff Teachers Have Standing.**

4 Superintendents Huppenthal and Horne’s Findings and enforcement actions
5 have created doubt about the continued viability of MAS classes. Because MAS
6 classes count as core credits in English, history and government, students are
7 understandably apprehensive about taking classes that could be declared ineligible
8 toward graduation requirements. As a result of this uncertainty, enrollment in MAS
9 classes has dropped 46 per cent from the spring semester of 2011 to the fall semester
10 of 2011, from 1,155 students to 628 students enrolled.⁶⁷ The number of course
11 sections offered has dropped 56 percent, from 43 to 24.⁶⁸ These reductions, as well as
12 the prospect of elimination of MAS classes creates an imminent threat of harm to the
13 teachers.

14 Superintendent Huppenthal erroneously implies that because the statutory
15 penalty applies only to TUSD, HB 2281 does not restrict the speech or activities of
16 MAS teachers or students.”⁶⁹ While it is true that the statutory remedy for violations is
17 a reduction of funds to the school district, those violations are found as a result of
18 classroom activity, resulting in a powerful coercive effect. Thus, the statute not only
19 restricts teacher and student speech, but discriminates against the plaintiffs on the
20 basis of race and ethnicity, abridges the students’ right to education without a rational
21 basis and violates their First and Fourteenth Amendment rights by being overbroad
22 and vague.

24 ⁶⁶ *Anderson v. Ariz. Game & Fish Dept.*, 226 Ariz. 39 (Ct. App. 2010), citing A.R.S. §12-
25 910(E); see also *Brodesky v. City of Phoenix*, 183 Ariz. 92, 94-95 (Ct. App. 1995) (court would
decide “only whether [the] administrative action was illegal, arbitrary, capricious, or an abuse
of discretion.”)

26 ⁶⁷ Declaration of Sean Arce, attached as Ex. A. See, *Table Bluff Reservation (Wiyot*
27 *Tribe) v. Philip Morris Inc.*, 256 F.3d 879, 882 (9th Cir. 2001)(in assessing standing, the court
may consider “the complaint and any other particularized allegations of fact in affidavits or
amendments to the complaint.”)

28 ⁶⁸ See Arce Declaration ¶¶ 6-8.

⁶⁹ Ct. Doc. No. 88, p.3.

1 HB 2281 explicitly states that the prohibitions listed in subsections 15-112(A)(1)
 2 through (4) apply to “classes” and thus necessarily to teachers’ and students’
 3 instructional speech. “A school district...shall not include in its program of instruction
 4 any courses or classes that include any of the following:....”⁷⁰ This statute is not
 5 directed solely to the curricular decisions made by local governing boards. It is also
 6 directed to the speech activities in the classroom. If a teacher is accused of
 7 “promot[ing] resentment toward a race or class of people” by virtue of what she said
 8 during a classroom lesson, then a violation of A.R.S. §15-112(A)(2) may be alleged.
 9 It makes no difference that the finding of a violation would be entered against the
 10 school district and not against the teacher individually. By its plain wording, HB 2281
 11 effectively requires teachers to discern what classroom speech might violate the
 12 statute, this undeniably chills teachers’ and students’ classroom speech.⁷¹

13 As an example, at the administrative hearing against TUSD on August 19, 2011,
 14 Superintendent Huppenthal introduced an email between the plaintiff Sara Rusk and
 15 Salomon Baldenegro, a long-time Tucson civil rights activist.⁷² In the email, Ms. Rusk
 16 referenced an attached essay by Mr. Baldenegro and stated her intention of using the
 17 essay in one of her MAS history classes. Superintendent Huppenthal introduced the
 18 email and essay as evidence of a violation of A.R.S. §15-112(A).

19 Also on August 19, Superintendent Huppenthal introduced into evidence a
 20

21 ⁷⁰ A.R.S. §15-112(A) (emphasis added).

22 ⁷¹ In legislative history, Rep. Steve Montenegro, as a sponsor of HB 2281, specifically
 23 referenced classroom speech in support of the bill:

24 You asked me, Rep. Youngwright, if they have the, if the school boards
 25 have the ability to choose the curriculum and yes they do. But in this case,
 26 there is evidence that has been recorded and we can see from textbooks,
 27 from testimonies, from actual speeches or **even lectures given inside**
 28 **classrooms** that show us that the due prudence is not being employed.

26 Floor comments from Rep. Steve Montenegro, Arizona House of Representatives Forty-Ninth
 27 Legislature-Second Regular Session Active Calendar Committee of the Whole #2, Thursday,
 28 March, 18, 2010, https://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7138.
 Judicial notice of the cited record pursuant to Fed. R. Evid. 201(b) is requested.

⁷² A copy of the email admitted as an exhibit in the administrative hearing is attached
 hereto as a part of Ex. B.

1 photograph of student art work posted by Ms. Rusk on the wall outside of her
2 classroom.⁷³ The student drew an image representing the Arizona flag with a swastika
3 on it. In the past Ms. Rusk freely posted examples of student work outside of her
4 classroom as part of the educational process of stimulating student thought, inquiry
5 and conversation.⁷⁴ Since learning that Superintendent Huppenthal used a photograph
6 of one of her students' work that she posted for display in order to prove a violation of
7 HB 2281, Ms. Rusk has refrained from posting some student work that she would have
8 posted before the enforcement of HB 2281.⁷⁵ Further, Superintendent Huppenthal's
9 use of a teacher e-mail and photograph of student work to prove that the MAS program
10 is in violation of HB 2281 contradicts his contention that the plaintiffs raise "merely an
11 assertion of 'subjective chill.'"⁷⁶ To the contrary, Superintendent Huppenthal's
12 enforcement action has created precisely the type of chilling and intimidation that HB
13 2281 was designed to create in the MAS teachers and administrators. This chilling,
14 as well as targeting, confers standing upon the plaintiffs.⁷⁷

15 Within the context of the plaintiffs' claim for violation of the right to Equal
16 Protection, the requisite "injury in fact" is the denial of equal treatment and it is not
17 necessary to show a monetary loss.⁷⁸ Regardless, plaintiffs have sufficiently alleged
18 the imminence of actual injury to the practice of their profession.⁷⁹ Although it is
19 possible that in the event that the MAS program is eliminated, the teachers could be
20 reassigned to teach other classes, it is more likely that they would be terminated. By
21 challenging the State of Arizona in this action and standing up for their constitutional
22

23 ⁷³ A copy of the photograph admitted into the administrative hearing is attached hereto as
24 a part of Exhibit C.

⁷⁴ Declaration of Sara Rusk, attached hereto as Ex. C.

⁷⁵ *Ibid.*

25 ⁷⁶ HB 2281 has become the litmus test that every MAS teacher and student must pass
26 without knowing what words, reading, writing or image offends the State.

27 ⁷⁷ See, *Minnesota Concerned Citizens for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997)
(when government action is challenged "by a party who is a target or object of the action,"
there is little question that the action has caused injury.), citing *Lujan*, 504 U.S. at 561-62.

⁷⁸ See *Gratz*, 539 U.S. at 262.

28 ⁷⁹ See *Lopez*, 630 F.3d at 785 (standing met by "demonstrating a realistic danger of
sustaining a direct injury as a result of the statute's operation or enforcement.")

1 rights, speaking out on behalf of MAS and criticizing the actions and failures to act of
2 TUSD, the teachers have risked political unpopularity with the TUSD administration
3 and Governing Board. Because Arizona law prohibits “employment retention priority
4 for teachers based on tenure or seniority,” they are especially vulnerable to termination
5 as a means of retribution if the MAS program is eliminated.⁸⁰

6 The fact that the potential termination of the plaintiffs’ employment is a decision
7 to be made by TUSD and not directly by Superintendent Huppenthal, does not negate
8 the causal connection to HB 2281 and its enforcement. Though “it does not suffice if
9 the injury complained of is ‘the result of independent action of some third party not
10 before the court,’ that does not exclude injury produced by determinative or coercive
11 effect upon the action of someone else.”⁸¹ For that reason, pharmacists who were likely
12 to be terminated by their employer because their religious beliefs allegedly prevented
13 them from delivering certain medications, as required by new state regulations,
14 satisfied the causal connection requirement in their action to strike down the
15 regulations.⁸² If the new rules had not been passed, the pharmacists’ jobs with their
16 present employers would not have been at stake.⁸³ The injury was actual and imminent
17 despite the possibility of their finding new employers who could accommodate their
18 religious beliefs by having an additional pharmacist on duty to dispense the requested
19 medication.⁸⁴

20 Similarly, the fact that the teachers might possibly be retained to teach other
21 classes does not negate the injury to them by prohibiting them from teaching MAS
22 classes. Further, any future termination because of the reduction or elimination of MAS
23 classes would be causally connected to Superintendent Huppenthal and Horne’s
24 actions and not the result of a purely independent decision by TUSD. HB 2281 and
25 Superintendents Huppenthal and Horne have produced a determinative or coercive

26 ⁸⁰ A.R.S. §15-502(H).

27 ⁸¹ *Stormans*, 586 F.3d at 1112.

28 ⁸² *Ibid.*

⁸³ 586 F.3d at 1121-22.

⁸⁴ *Ibid.*

1 effect on TUSD sufficient to confer standing.

2 **IV. Abstention Is Not Appropriate Or Required**

3 The district court has federal question jurisdiction in this matter as provided by
4 28 U.S.C. § 1331, which provides original jurisdiction of all civil actions rising under the
5 Constitution, laws or treaties of the United States. “Because the federal courts’
6 obligation to adjudicate claims within their jurisdiction is ‘virtually unflagging,’ abstention
7 is permissible only in a few ‘carefully defined’ situations with set requirements.”⁸⁵
8 Superintendent Huppenthal’s contention that the Court should take advantage of the
9 “extraordinary and narrow exception to the duty of the District Court to adjudicate a
10 controversy properly before it” cannot withstand scrutiny.⁸⁶ “Given that admonition, it is
11 critical to examine the scope of that ‘extraordinary and narrow exception’ with care,
12 rather than applying it as a convenient way of avoiding state law questions.”⁸⁷

13 *Burford v. Sun Oil*,⁸⁸ allows federal district courts to “decline to rule on an
14 essentially local issue arising out of a complicated state regulatory scheme.”⁸⁹
15 However, abstention is not required whenever there exists such a complex state
16 process “or even in all cases where there is a ‘potential for conflict’ with state law or
17 policy.”⁹⁰ Pursuant to the *Burford* doctrine, abstention may be proper where it is
18 established that (1) the state has chosen to concentrate suits challenging the actions
19 of the agency involved in a particular court, (2) the federal issues cannot be separated
20 easily from complex state law issues with respect to which state courts might have
21 special competence, and (3) federal review might disrupt state efforts to establish a
22 coherent policy.⁹¹

24 ⁸⁵ *U.S. v. Morros*, 268 F. 3d 695, 703 (9th Cir. 2001) (citations omitted).

25 ⁸⁶ *Hawthorne Savings F.S.B. v. Reliance Ins. Co. of Ill.*, 421 F.3d 835, 845 (9th Cir.
2005), citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996), quoting *Colo. River*
Water Conserv. Dist. v. U.S. 424 U.S. 800, 813 (1976).

26 ⁸⁷ *Ibid.*

27 ⁸⁸ 319 U.S. 315 (1943).

27 ⁸⁹ *Morros*, 268 F.3d at 705.

28 ⁹⁰ *City of Tucson v. U.S. West*, 284 F.3d 1128, 1133 (9th Cir 2002), citing *New Orleans*
Pub. Serv. Inc. v. Council for New Orleans, 491 U.S. 350, 362 (1989).

⁹¹ *Morros*, 268 F.3d at 705.

1 In this case, abstention is neither required nor appropriate. The plaintiffs cannot
2 join as parties to TUSD's administrative appeal. Here the plaintiffs assert distinct claims,
3 including violations of their individual rights to Equal Protection, Free Speech and
4 Substantive Due Process. Governmental entities do not possess such rights, so they
5 cannot be asserted by TUSD in its administrative appeal.

6 Arizona has not created the any type of "complicated state regulatory scheme"
7 for which the state courts have a special competence necessary for *Burford*
8 abstention.⁹² In *Burford*, the Supreme Court found abstention appropriate because
9 Texas devised a general regulatory system for the conservation of oil and gas with all
10 appeals required to be taken exclusively in the state district court in Travis County.⁹³
11 Texas deemed this scheme necessary to prevent the "interminable confusion" that
12 would result if rulings by the state commission on the vast number of oil and gas wells,
13 "could be collaterally attacked in the various courts and counties of the state."⁹⁴
14 However, HB 2281 provides no complex state regulatory scheme and does not
15 concentrate suits challenging state action in a particular court.⁹⁵

16 The claims asserted by the plaintiffs are complex federal Constitutional law issues
17 for which the state administrative proceeding is ill equipped to adjudicate in a competent
18 manner and which Superintendent Huppenthal is free to disregard. Nor is there any
19 disruption to any effort to establish a coherent state policy by proceeding with
20 adjudication of the this case. Moreover, the administrative proceeding is **not** binding but
21 merely advisory. Mr. Huppenthal is free to enforce HB 2281 and impose the 10 per cent
22 sanction irrespective of the report and recommendation of the administrative law judge.
23 Mr. Huppenthal is also well aware that his action is subject to review under an abuse
24 of discretion standard that heavily favors sustaining his final decision.

25
26 ⁹² *Ibid.*

⁹³ 319 U.S. at 326.

⁹⁴ 319 U.S. at 327.

⁹⁵ See also, *Morros*, 268 F.3d at 705 (abstention improper where no evidence that
28 "Nevada courts are working partners with the State Engineer in the business of creating a
regulatory system for the issuance of water permits.").

1 Abstention is the exception and not the rule, and is not appropriate in this case
2 where the state administrative proceeding is not an adequate or comparable vehicle for
3 a complete, prompt and competent resolution of the distinct issues raised here.⁹⁶

4 **V. The First Amendment Protects The Teachers' Right To Teach And**
5 **Students' Right To Learn Within The MAS Curriculum Approved By TUSD.**

6 When all of the facts alleged by the plaintiffs are taken as true and construed in
7 the light most favorable to them, it is clear that Superintendent Huppenthal fails to carry
8 his burden to prove "beyond doubt" that there are no set of facts that would entitle the
9 plaintiffs to relief for their claims that HB 2281 and the actions of Superintendents
10 Huppenthal and Horne have denied them their rights to Freedom of Speech.⁹⁷ Contrary
11 to Superintendent Huppenthal's assertion, the plaintiffs do not contend they have a First
12 Amendment right to dictate curriculum and textbooks.⁹⁸ Rather, the First Amendment
13 guarantees the students the right to receive information and ideas and the educators
14 the right to speak *within the curriculum* approved by the TUSD Governing Board.

15 The MAS curriculum has been adopted by the TUSD Governing Board. Arizona
16 law specifically delegates authority and directs school district governing boards to
17 determine the curricula of its programs.⁹⁹ Additionally, the TUSD Governing Board
18 implemented the MAS curriculum in fulfillment of its obligations under the Post-Unitary
19 Status Plan ordered by the District Court in *Fisher v. TUSD*, D.C. No. 4:74-cv-00090-
20 DCB.¹⁰⁰ Thus, the plaintiffs' First Amendment rights in this context are those that further
21 teaching and learning within the prescribed MAS curriculum.

22 "First Amendment rights, applied in light of the special characteristics of the
23
24

25 ⁹⁶ *City of Tucson*, 284 F.3d at 1132.

26 ⁹⁷ *Everest & Jennings*, 23 F.3d at 228.

27 ⁹⁸ Ct. Doc. No. 88, p.13-16.

28 ⁹⁹ A.R.S. §15-341.

¹⁰⁰ The Ninth Circuit recently reversed the District Court's finding that unitary status has been achieved and remanded the case for continuing District Court oversight. *Fisher v. TUSD*, 2011 U.S. App. LEXIS 14688.

1 school environment, are available to teachers and students.¹⁰¹ It can hardly be argued
 2 that either students or teachers shed their constitutional rights to freedom of speech or
 3 expression at the schoolhouse gate.”¹⁰² The Supreme Court “ha[s] not failed to apply
 4 the First Amendment’s mandate in our education system where essential to safeguard
 5 the fundamental values of freedom of speech and inquiry and of belief.”¹⁰³ Along with
 6 the broad discretion of the States and school boards to manage school affairs comes
 7 the limitation that such discretion “must be exercised in a manner that comports with the
 8 transcendent imperatives of the First Amendment.”¹⁰⁴ Although state and local boards
 9 may enforce regulations “reasonably related to pedagogical concerns,”¹⁰⁵ they must
 10 discharge their “important, delicate, and highly discretionary functions” within the limits
 11 and constraints of the First Amendment.¹⁰⁶ “Because First Amendment freedoms need
 12 breathing space to survive, [the] government may regulate in the area only with narrow
 13 specificity.”¹⁰⁷

14 Public education plays a vital role to “prepare pupils for citizenship in the
 15 Republic. . . [and to] inculcate the habits and manners of civility as values in themselves
 16 conducive to happiness and as indispensable to the practice of self-government in the
 17

19 ¹⁰¹ Neither the Supreme Court nor the Ninth Circuit have applied the restrictions on the
 20 Free Speech rights of public employees, recognized by the Supreme Court in *Garcetti v.*
 21 *Ceballos*, to public school teachers’ speech within the curriculum. 547 U.S. 410, 425 (2006).
 22 (The Court does not decide whether “the analysis we conduct today would apply in the same
 23 manner to a case involving speech related to scholarship or teaching.”); cf. *Johnson v. Poway*
 24 *Unified Sch. Dist.*, 2011 U.S. App. LEXIS 18882 (9th Cir. 2011)(no First Amendment violation
 25 where teacher ordered not to preach his personal views on God to students in classroom.)

¹⁰² *Tinker v. DesMoines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹⁰³ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

¹⁰⁴ *Bd. Of Educ. Island Trees v. Pico*, 457 U.S. 853, 864 (1982) (school board may not
 24 remove books from school library on the basis of partisan or political disapproval); see also,
 25 *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state may not forbid teaching foreign language in
 26 public and private schools); *Epperson*, 393 U.S. 97 (1968) (state may not prohibit the teaching
 27 of evolution).

¹⁰⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 434 U.S. 260, 273 (1988); see also *California*
 26 *Teachers Assoc. v. State Board of Ed.*, 271 F.3d 1141, 1149 (9th Cir. 2001).

¹⁰⁶ *Pico*, 457 U.S. at 865; see also, *Citizens United v. F.E.C.*, 130 S.Ct. 876, 911
 27 (2010)(“Where Congress finds that a problem exists, we must give that finding due deference;
 28 but Congress may not choose an unconstitutional remedy.”)

¹⁰⁷ *Keyishian v. Bd. of Regents of the Univ. of the St. of N.Y.*, 385 U.S. 589, 605 (1967),
 28 citing *N.A.A.C.P. v. Button*, 371 U.S. 432-433 (1963).

1 community and the nation.”¹⁰⁸ In pursuit of these goals, students must develop the
2 intellect and the ability to freely question and evaluate the world around them. For this
3 reason, “[t]he process of educating our youth for citizenship in public schools is not
4 confined to books, the curriculum, and the civics class; schools must teach by example
5 the shared values of a civilized social order.”¹⁰⁹ In this case, Superintendent Huppenthal
6 and the State’s political leaders have gone beyond making legitimate curricular
7 decisions, entered into the realm of censorship, book-banning, and stifling of critical
8 thinking which represents the worst possible example of civic democracy for students.

9 Neither the Supreme Court nor the Ninth Circuit has “definitively resolved whether
10 and to what extent a teacher’s instructional speech is protected by the First
11 Amendment.”¹¹⁰ However, the Ninth Circuit has noted that *Hazelwood* supports the
12 limited right to classroom speech in furtherance of the course curriculum. In *Downs v.*
13 *LAUSD*, the court recognized that where “activities may fairly be characterized as a part
14 of the school curriculum, whether or not they occur in a traditional classroom setting,”
15 the “educators’ authority in this area enable[s] them to ‘assure that the participants learn
16 whatever lessons the activity is designed to teach....”¹¹¹ Thus, in the educational setting,
17 teachers and students have the right to communicate within the curriculum in a manner
18 that facilitates learning the intended lesson.¹¹²

19 Beyond protecting the rights of a teacher to express ideas, the First Amendment
20

21
22 ¹⁰⁸ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

¹⁰⁹ *Ibid.* at 683.

¹¹⁰ *Cal. Teachers Assoc.*, 271 F.3d at 1148.

¹¹¹ 228 F.3d 1003, 1010 (2000), quoting *Hazelwood*, 484 U.S. 260, 271 (1988).

¹¹² A teacher’s instructional speech entitled to First Amendment protection is not to be
24 confused with the governing board’s curricular speech. A.R.S. §15-341(A) delegates the
25 authority to develop public school curricula to local governing boards. The curriculum is “a case
26 of the government itself speaking,” in this case, TUSD. See, *Downs*, 228 F.3d at 1011. See
27 also, *Epperson*, 393 U.S. at 105 (1968)(recognizing “the freedom of teachers to teach and of
28 students to learn”); *Pico*, 457 U.S. at 867 (“the Constitution protects the right to receive
information and ideas.”) HB 2281, on the other hand, is not a curriculum. A curriculum is “a
course of study in one subject at a school or college.” Dictionary.com,
<http://dictionary.reference.com/browse/curriculum> (last accessed July 20, 2011.). HB 2281
does not describe a “course of study.” Rather it is an attempt to shut down one program
in one school district.

1 also protects the students' right to receive information and ideas.¹¹³

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

13 A popular Government, without popular information, or the means of
14 acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both.
15 Knowledge will forever govern ignorance, and a people who mean to be
16 their own Governors must arm themselves with the power which
17 knowledge gives.¹¹⁴

18 It is axiomatic that "[i]n our system, students may not be regarded as closed-circuit
19 recipients of only that which the State chooses to communicate. . . [S]chool officials
20 cannot suppress 'expressions of feeling' with which they do not wish to contend."¹¹⁵

21 The history and context of HB 2281 reveal that it was not motivated by legitimate
22 curricular concerns, but rather by invidious viewpoint discrimination.¹¹⁶ Superintendents
23 Huppenthal and Horne and other politicians created, passed, and implemented HB
24 2281 solely because they do not like the Mexican-American perspective presented by
25 the curriculum authorized by TUSD.

26 In *Morse v. Frederick*, the Supreme Court rejected the claim that the First
27 Amendment allows the suppression of speech based on this type of viewpoint
28 discrimination.¹¹⁷ In that case, both the school district and the United States urged the
broad argument "that the First Amendment permits public school officials to censor any

¹¹³ *Pico*, 457 U.S. at 867, citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

¹¹⁴ 9 Writings of James Madison 103 (G. Hunt ed. 1901), *Pico*, 457 U.S. at 867
(emphasis in original).

¹¹⁵ *Tinker*, 393 U.S. at 511.

¹¹⁶ Cf. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[S]ome
purported interests—such as a desire to suppress support for a minority party or an unpopular
cause, or to exclude the expression of certain points of view from the marketplace of
ideas...are...plainly illegitimate.")

¹¹⁷ 551 U.S. 393 (2007).

1 student speech that interferes with a school’s ‘educational mission.’”¹¹⁸ Under that
 2 theory, for example, a school that defined its mission as solidarity with soldiers could
 3 have tried to ban the black armbands worn in *Tinker*, or a school with an educational
 4 mission to promote world peace could have sought to ban buttons expressing support
 5 for the troops.¹¹⁹ Or, in this case, lawmakers with an educational mission to treat and
 6 value pupils as individuals could seek to ban discussions of the legacy of oppression
 7 in the United States in the context of learning about Mexican-Americans from the
 8 perspective of Mexican-Americans.¹²⁰ Justice Alito further declared that the
 9 “‘educational mission’” argument would give public school authorities a license to
 10 suppress speech on political and social views based on disagreement with the
 11 viewpoint expressed.¹²¹ The argument, therefore, strikes at the very heart of the First
 12 Amendment.”¹²²

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

19 While “public education is committed to the control of state and local authorities,
 20 . . . [t]he vigilant protection of constitutional freedoms is nowhere more vital than in the
 21 community of American schools.”¹²³ “Teachers and students must always remain free
 22 to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise
 23 our civilization will stagnate and die.”¹²⁴ These principles affirm the First Amendment

24
 25 ¹¹⁸ 551 U.S. at 423, Alito, J. concurring.

¹¹⁹ *Ibid.*

¹²⁰ See A.R.S. §15-111.

¹²¹ 551 U.S. at 423.

¹²² *Ibid.*

¹²³ *Epperson*, 393 U.S. at 104, citing *Shelton v. Tucker*, 364 U.S. 479, 481 (1960).

¹²⁴ *Keyishian*, 385 U.S. at 603, citing *Sweezy v. State v. State of New Hampshire*, 354
 28 U.S. 234, 250 (1957); see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213
 (1975) (“minors are entitled to a significant measure of First Amendment protection,” citing

1 rights of teachers to teachers to teach within the prescribed curriculum and of student
 2 to receive information. The defendant's motion to dismiss the plaintiffs' First
 3 Amendment claims should be denied.

4 **VI. Conclusion**

5 The United States Supreme Court stated in *Virginia v. American Booksellers*
 6 *Ass'n, Inc.*:

7 To bring a cause of action in federal court requires that
 8 plaintiffs establish at an irreducible minimum an injury in fact;
 9 that is, there must be some threatened or actual injury
 10 resulting from the putatively illegal action. . . . That
 11 requirement is met here, **as the law is aimed directly at**
 12 **plaintiffs**, who, if their interpretation of the statute is correct,
 13 will have to take significant and costly compliance
 14 measures....¹²⁵

15 Because HB 2281 prohibits broad undefined conduct, it requires plaintiffs to engage in
 16 a never ending guessing game as to what they can teach or reciprocally learn. They
 17 have standing to challenge the legality of HB 2281 before they are further injured by
 18 it; prevention is preferable to correction.

19 Enforcement of HB 2281 has commenced. Those with the power to do irreparable
 20 harm have engaged in a course of conduct that will leave plaintiffs undeniably injured.
 21 Superintendent Huppenthal, like Superintendent Horne, has demonstrated a
 22 commitment to enforce and defend HB 2281; there exists an undeniable requisite
 23 "credible threat" of enforcement.¹²⁶ Under these circumstances, plaintiffs are victims of
 24 HB 2281 and as the Ninth Circuit concluded in *Bland v. Fessler*;

25 Bland chose to obey both the civil and utilities statutes and to

26 *Tinker*, 393 U.S. 503, "and only in relatively narrow and well-defined circumstances may
 27 government bar public dissemination of protected materials to them.")

28 ¹²⁵ 484 U.S. 383, 392 (1988)(Internal citations and quotation marks omitted; emphasis
 added); See also, *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501.
 508 (9th Cir. 1991) ("However, even if [the plaintiffs] had not already been charged with
 violating the challenged provisions, the individual appellees would have standing. The
 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").

¹²⁶ 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").

1 bring a declaratory action challenging their constitutionality,
2 rather than to violate the law, await an enforcement action
3 against him, and raise the statutes' constitutionality as a
4 defense. Bland's decision was altogether reasonable and
demonstrates a commendable respect for the rule of law.
Under the circumstances of this case, Bland should be
allowed to test the law.¹²⁷

5 Based on these facts, plaintiffs have standing to challenge the constitutionality of HB
6 2281.¹²⁸ Plaintiffs have demonstrated that they have standing as the educators who
7 teach MAS and the students desire to enroll in TUSD's MAS course offerings. The
8 claims made are those for which relief can and customarily is provided when the
9 requisite showing is made. Defendant's motion fails to demonstrate any factual
10 circumstance or binding authority that warrants dismissal. Denial is urged and
11 respectfully requested.

12 Respectfully submitted this 11th day of October 2011.

13 s/Richard M. Martinez, Esq.
14 Richard M. Martinez, Esq.
Counsel for Plaintiffs

15 **Certification of Service**

16 I hereby certify that on October 11, 2011, I electronically transmitted the foregoing
17 document to the Clerk of Court using the CM/ECF System for filing and transmittal of
18 a Notice of Electronic Filing to the CM/ECF registrants on record.

19 s/Richard M. Martinez, Esq.
20 Richard M. Martinez, Esq.

21
22
23
24
25
26 _____
¹²⁷ 88 F.3d 729, 737 (9th Cir. 1996).

27 ¹²⁸ See: *Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73, 75 (4th Cir. 1991)
28 ("Public policy should encourage a person aggrieved by laws he considers unconstitutional to 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").