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Brief of Amicus Curiae Latina and Latino Critical Legal Theory, Inc. Supporting Plaintiffs-Appellants Urging Reversal

Counsel for Amici Curiae

Nos. 13-15657, 13-15760

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAYA ARCE, et al.,

Plaintiffs-Appellants,

v.

JOHN HUPPENTHAL, et al.

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona at Tucson
No. 4:10-CV-00623-AWT

BRIEF OF *AMICUS CURIAE* LATINA AND LATINO CRITICAL LEGAL THEORY, INC. SUPPORTING PLAINTIFFS-APPELLANTS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Latina and Latino Critical Legal Theory, Inc. states that it is a non-profit organization, it has no parent companies, and it has not issued shares of stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Amicus curiae Latina and Latino Critical Legal Theory, Inc. ("LatCrit") respectfully submits this brief in support of Plaintiffs-Appellants.[1]

STATEMENT OF INTEREST

LatCrit is a non-profit corporation whose purpose is developing, promoting, and disseminating critical legal scholarship centering on the Latina/o experience, and facilitating the work of legal and interdisciplinary scholars, public interest lawyers, and non-governmental organizations dedicated to eliminating subordination and promoting justice. To accomplish these goals, LatCrit:

(a) organizes conferences, workshops, symposia and similar programs;

(b) fosters diverse, interdisciplinary, transcultural and international participation and perspectives;

(c) promotes original research, field work and data collection;

(d) publishes and promotes scholarship; and

(e) conducts and collaborates in law reform projects and litigation.

One of LatCrit's fundamental goals is developing and supporting the next generation of diverse scholars, professionals, and other leaders. Such

[1] LatCrit submits this brief with the consent of the parties pursuant to Federal Rule of Appellate Procedure 29.

leaders can only emerge from educational programs that—like the Mexican American Studies ("MAS") courses at Tucson Unified School District ("TUSD")—demand that students engage in critical and rigorous thinking, and understand multiple perspectives. LatCrit takes seriously its obligation to help build a pipeline of educated, critically minded Latina/o students, who will serve their communities through their work in the private sector, government, non-profits, and higher education.

RULE 29(c)(5) STATEMENT

Pursuant to Fed. R. App. P. 29(c)(5), LatCrit states that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund the preparation or submission of this brief; and (3) no person other than LatCrit, its members, or its counsel contributed money intended to fund preparation or submission of this brief.

BACKGROUND

I. THE MEXICAN AMERICAN STUDIES PROGRAM RESPONDED TO ARIZONA'S HISTORY OF DISCRIMINATION.

A. History of Discrimination in Arizona.

Arizona has a long history of discriminating against Mexican-American students. The first Mexican-American desegregation case was *Romo v. Laird*, No. 21617, Maricopa County Superior Court (1925). In

Romo, the Superior Court granted plaintiff's request to enroll his Mexican-American children in the Tenth Street School (which allowed only white children and had higher quality teachers) rather than the Eighth Street School for Mexican-American students. Laura K. Muñoz, *Separate But Equal? A Case Study of* Romo v. Laird *and Mexican American Education*, 15 OAH MAGAZINE OF HISTORY 28, 28-35 (2001).

Despite this early advance, Arizona continued to segregate Mexican-American students for decades. *See Gonzales v. Sheely*, 96 F. Supp. 1004, 1007 (D. Ariz. 1951) (holding that segregating Mexican-American children in separate buildings with inferior facilities was discriminatory and illegal, depriving children of constitutional rights of due process and equal protection). The *Gonzales* court reasoned that segregation of Spanish-speaking children retarded their English language skills, fostered antagonism between children, and suggested inferiority where none existed. *Id.*

In recent years, the battleground over Mexican-American education in Arizona has shifted to include bilingual education lawsuits. In 2000, a federal district court held that Arizona had not provided adequate funding and administration to support English Language Learner ("ELL") programs. *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1239 (D. Ariz. 2000) (holding that state's failure to adequately fund ELL programs violated federal law).

Arizona failed to remedy these violations. *Flores v. Arizona*, 160 F. Supp. 2d 1043, 1044-46 (D. Ariz. 2000) (describing the political context of Arizona's continuing inaction); *Flores v. Arizona*, 405 F. Supp. 2d 1112, 1120-21 (D. Ariz. 2005) (granting sanctions motion for Arizona's six-year failure to provide adequate ELL funding); *see also* OSCAR JIMENEZ-CASTELLANOS ET AL., ENGLISH LANGUAGE LEARNERS: WHAT'S AT STAKE FOR ARIZONA? 15 (March 2013), *available at* http://arizonaindicators.org/sites/default/files/content/publications/ELL_stake.pdf ("[F]unding and instructional practices implemented post *Flores v. Arizona* continue to be inadequate….").

B. The Mexican American Studies Program.

Arizona's pattern of discrimination extends to TUSD, as found in a 1974 lawsuit brought by African-American and Mexican-American students, which established intentional segregation and unconstitutional discrimination on the basis of race and national origin. *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1134, 1137 (9th Cir. 2011). As a result, TUSD has operated under a federal court desegregation decree since 1978. *Id.* at 1138 (reinstating jurisdiction based on district court conclusion that despite the passage of thirty-odd years, TUSD failed to demonstrate good faith compliance or to eliminate the "vestiges of *de jure* segregation").

TUSD created the MAS program in 1998 to address the long history of racial segregation, racism, and significant race-based achievement issues disproportionately experienced by Latina/o students in TUSD. ER 1851. MAS courses were individually designed by the instructors,[2] and they spanned numerous disciplines, with courses in history, government, English, literature, and art from Mexican-American/Latina/o[3] perspectives, and aimed to address dropout and push-out problems, excessive grade failure rates, disproportionate disciplinary issues, attendance issues, poor rates of graduation, and poor matriculation in post-secondary institutions. ER 2160-61.

Courses within the MAS program welcomed all TUSD students, and attracted primarily Latina/o students due to the group's proportion of the district's general student population. ER 2203 (recognizing that "[b]ased on the prevailing percentage of Hispanic students enrolled within TUSD, … Hispanic students would ... demonstrate a larger representation as compared to other ethnicities"); ER 2157-59 (describing student populations in various

[2] Instructors did not need approval from the MAS director for their courses or pedagogy, and the courses were taught in different ways. ER 609.

[3] "Mexican-American" refers to people who claim both U.S. citizenship/residency and Mexican heritage. Enid Trucios-Haynes, *Why "Race Matters:" LatCrit Theory and Latina/o Identity*, 12 LA RAZA L.J. 1, 2 n.3. In some cases, the source materials cited in this brief use the broader terms "Hispanic" and "Latina/o."

TUSD middle and high schools as ranging from 49 to 94 percent Mexican American); ER 2202 (noting that sixty percent of the TUSD student population in 2011 was Hispanic).

C. Ethnic Studies Programs Enhance Academic Identity and Achievement.

Social science research consistently has shown that ethnic studies programs promote overall student success and respect and understanding among races. ER 1913 (noting that "[b]oth students of color and White students have been found to benefit academically as well as socially from ethnic studies" and "ethnic studies play[] an important role in building a truly inclusive multicultural democracy and system of education"). By focusing on education that incorporates a student's home/community environment, students are more likely to engage in the academic environment. *See generally* Curtis Acosta & Asiya Mir, *Empowering Young People to be Critical Thinkers: The Mexican American Studies Program in Tucson*, ANNENBERG INSTITUTE FOR SCHOOL REFORM, VOICES IN URBAN EDUCATION (Summer 2012).

When students of color engage with scholarship about, and by, racial minorities, research has shown distinct increases in academic achievement. *Id.*

Furthermore, identification with historical struggle and inequity does not disempower. *Id.* (containing a first-hand account of student development, empowerment, and achievement based on participation in MAS classes). Instead, research has shown that familiarity with struggle and oppression actually improves academic motivation. ER 1902.

Ethnic studies courses are especially important for individuals who are neither "white" nor "black." Historically, the United States has been constrained by a bipolar construction of race; focusing on the black/white paradigm silences other groups and leaves them without recognition. Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997), *reprinted in* 10 LA RAZA L.J. 133 (1998). Many of these "other" groups had to fight for basic recognition, such as inclusion on the U.S. Census. Stephanie M. Wildman, *Reflections on Whiteness and Latina/o Critical Theory*, 2 HARV. LATINO L. REV. 307, 310 (Fall 1997).

Research based on other ethnic studies programs demonstrates these programs also improve academic performance. ER 878-82. For instance, black students with higher levels of awareness of race and racism and higher regard for their own personal ethnic identity are more likely to graduate from high school and attend college. ER 1901.

Data show a similar trend for students who took MAS classes. ER 1852-79 (analyzing comparative passing rates for MAS students and non-MAS students for the 2007 to 2010 academic years and finding more improvement in standardized scores in math, reading, and writing for students who took even one MAS class); ER 204 (finding by University of Arizona researchers of "a consistent, significant, positive relationship between MAS program participation and student academic performance"); ER 2198-2320 (finding, in an audit report requested by the State, a "positive measurable difference between [MAS students] and [non-MAS students]" with respect to standardized scores and graduation rate).

Ethnic studies courses emphasize a critical analytical approach to existing knowledge and scholarship. By design, they challenge settled expectations regarding the factual understanding of the subject matter being analyzed, illuminate how those facts would be understood by those with different viewpoints, and invite students to develop their own perspectives. Through such critical analytical approaches, ethnic studies courses cultivate socially engaged individuals.

D. Ethnic Studies Programs like the MAS Courses Are an Early Part of an Education Pipeline for Historically Disadvantaged Groups.

Ethnic studies programs do more than just improve academic performance. These programs are the beginning of a pipeline to opportunities that simply are not available to students who do not graduate from high school, let alone those without a college or professional degree.

Ethnic studies programs also enhance the legal profession and its membership by fostering inclusion and cultural competency, skills that are indispensable for effective lawyering. *ABA Mission and Goals*, AM. BAR ASS'N ("ABA"), http://www.americanbar.org/utility/about_the_aba/aba-mission-goals.html [hereinafter *ABA Mission Statement*]. Indeed, the Arizona State Bar Association has recognized the need for an educational pipeline that leads diverse populations into professions like the law. *See Diversity Pipeline Project*, STATE BAR OF ARIZ., http://www.azbar.org/aboutus/missionandgoals/diversity/diversitypipelineproject.

The MAS courses directly contributed to the ABA's goal of eliminating bias and enhancing diversity by "[p]romot[ing] full and equal participation in the association, our profession, and the justice system by all persons." *ABA Mission Statement*. The MAS courses focused on students who faced challenging social and socioeconomic circumstances in their

personal lives and inspired them to reach aspirational goals. Acosta & Mir, *Empowering Young People*, at 17; ER 1875.

When school curricula do not mirror the personal or cultural experiences of these students, they feel marginalized. Acosta & Mir, *Empowering Young People*, at 17. The MAS courses dispelled the resulting environment of "distrust, cynicism, and disengagement." *Id.* Accordingly, students reported that they saw the MAS program produce positive changes in their peers, and that they felt empowered and inspired following their participation. *Id.* at 18. MAS instructors also reported that the program appeared to "[liberate] students from the role of submissiveness, passivity, and domestication that is so often the result of status quo educational experiences." *Id.* at 21.

Ultimately, ethnic studies programs like the MAS program prepare students for more than higher education. They shape students into socially engaged individuals who are knowledgeable about their state's racialized history and empowered to cultivate a racially integrated future. The analytical rigor instilled by the MAS program provided for superior academic outcomes and developed in its students the skills necessary to recognize and traverse paths that will lead them to meaningful roles in society, including the legal profession.

ARGUMENT

II. THE STATE OF ARIZONA VIOLATED THE EQUAL PROTECTION GUARANTEES OF THE 14TH AMENDMENT.

The State of Arizona violated the Equal Protection clause of the U.S. Constitution through enacting and enforcing A.R.S. §15-112. The legislative history of House Bill 2281 ("H.B. 2281," codified as A.R.S. §15-112) demonstrates that intentional bias against Mexican Americans underlay both the statute and the State's selective enforcement against MAS courses. The State's conduct also imposed a unique burden on a protected class by eliminating a reform program specifically aimed at benefiting that class.

A. Mexican Americans are a Protected Class.

The Constitution requires states to provide equal protection to all people in the nation. U.S. Const. amend XIV §1 ("nor shall any state… deny to any person within its jurisdiction the equal protection of its laws"). All similarly situated persons must be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). When a state law classifies by race, the law is subject to strict judicial scrutiny because such classifications "are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (explaining that such laws "are subjected to strict

scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest").

Like other Hispanic or Latina/o people, Mexican Americans constitute a protected class that may suffer discrimination based on class membership. *Hernandez v. Texas*, 347 U.S. 475, 478 (1954) (extending constitutional equal protection to Mexican Americans because "[w]hen the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated"). Because the Mexican-American students in the MAS program represent a protected class, this Court should review State actions impacting this class under strict scrutiny.

B. The State of Arizona Acted with Invidious and Discriminatory Intent against a Protected Class.

To survive summary judgment in an action alleging equal protection violations, plaintiffs need only show a genuine issue of fact regarding the State's discriminatory intent. *See Pac. Shores Props. LLC v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013). Plaintiffs may demonstrate this intent with "direct or circumstantial evidence." *Id.* (citing the multi-factor inquiry in *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 266 (1977)). "When a plaintiff opts to rely on the *Arlington Heights* factors to demonstrate discriminatory intent through direct or circumstantial evidence, the plaintiff need provide very little such evidence ... to raise a genuine issue of fact ... ; any indication of discriminatory motive ... may suffice to raise a question that can only be resolved by a fact-finder." *Pac. Shores*, 730 F.3d at 1159 (internal citation and quotations omitted).

Here, plaintiffs have demonstrated that intent. Although A.R.S. §15-112 was enacted and applicable statewide, the record shows that Arizona officials used the statute to target those of Hispanic heritage by eliminating courses designed to improve their, and only their, education. The Arizona Legislature adopted H.B. 2281in the context of racially charged rhetoric that produced other legislation targeting Hispanics. For instance, the Arizona Legislature also passed Senate Bill 1070 in 2010 (the "Support Our Law

Enforcement and Safe Neighborhoods Act"), which many call the "show me your papers" bill.[4] Pls.-Appellants' Opening Br. at 32-33. *See also* H.B. 2779, 48th Leg., 1st Reg. Sess. (Ariz. 2007) (imposing severe penalties against employers who know (or should know) they hired "unauthorized aliens").

The legislative history for H.B. 2281 reflects this racially charged context. *See, e.g.*, Hearing on H.B. 2281 Before S. Educ. Accountability & Reform Comm., 49th Leg., 2nd Reg. Session (Ariz. 2010), at 2:11-3:22. Representative Steve Montenegro, bill sponsor, testified that H.B. 2281 would prevent teaching courses designed for students based on "the race they belong to or the ethnicity they belong to," and identified the MAS program at TUSD as one specific reason for passing H.B. 2281. *Id.* at 2:12-14.[5]

At the time, Arizona Superintendent of Public Instruction Tom Horne was especially vocal about needing a law to dismantle MAS, which he had long viewed as a "program that should be terminated." ER 1054-58. During his campaign for Arizona Attorney General, Horne explicitly advertised that he singled out TUSD's MAS program and touted its

[4] The U.S. Supreme Court subsequently struck down several provisions of this bill. *Arizona v. United States*, 132 S.Ct. 2492 (2012).
[5] Rep. Montenegro described MAS throughout his testimony, referring to the courses as "La Raza Studies" ("Race Studies").

wholesale elimination. ER 1802 ("[I]n Raza Studies they taught the kids that the country is dominated by a white racist, imperialist power structure that is out to oppress them. … [I]t's a dysfunctional education and I fought hard to get the legislature to … pass a law so that I can put a stop to it.").

During his time as Attorney General, Horne's rhetoric connected this effort to border security, "illegal" immigration, and a conspiracy theory that Mexicans are reclaiming the American Southwest.[6] Superintendent John Huppenthal also appears to subscribe to Horne's conspiracy theories. ER 802-05 (repeatedly referring to a "battle" between the philosophers who "created almost a perfect system of governance" and the "tidal wave" that is "suffocating" and "threatening" this system by disparaging U.S. founding fathers).[7] *See* Francis Joseph Mootz III & Leticia M. Saucedo, *The*

[6] Horne's voice is just one of many in the inflammatory rhetoric of the "reconquista," a theory that Mexicans are in the process of reclaiming land in the American Southwest lost to the United States in the 19th Century. Theorists include Patrick Buchanan in THE DEATH OF THE WEST: HOW DYING POPULATIONS AND IMMIGRANT INVASIONS IMPERIL OUR COUNTRY AND CIVILIZATION (2002) and other "nativist" writers identified by the Southern Poverty Law Center. *See* Sonia Scherr, *Arizona Debate Unleashes New 'Reconquista' Accusations*, S. POVERTY LAW CTR. (May 5, 2010), http://www.splcenter.org/blog/index.php?s=reconquista.

[7] ER 803 (explaining the philosophy and approach used when collectively targeting the courses within the MAS program: "[W]hen Queen Boudica encountered the Romans in England, she just attacked. And boy, was it one heck of a charge. It was the full glory and everything, and she got slaughtered. She outnumbered the Romans five to one, and they completely killed everybody.").

"Ethical" Surplus of the War on Illegal Immigration, Iowa Journal on Gender, Race and Justice (forthcoming 2012), University of California at Davis Legal Studies Research Paper No. 291, 18, *available at* SSRN: http://ssrn.com/abstract=2042688.

The legislative record also demonstrates that Arizona legislators intentionally mischaracterized the MAS courses and students as "anti-American," and the teachings as "sedition" because "they advocate the elimination of borders and the takeover of the Southwest United States." Hearing on S.B. 1108 Before the H. Appropriations Comm., 00:16:45-17:00, 48th Leg., 2nd Reg. Sess. (Ariz. 2008) (quoting Representative Russell Pearce's characterization of the MAS program's teachings during hearings on S.B. 1108, a precursor to H.B. 2281).

Finally, Arizona's enforcement of A.R.S. §15-112 demonstrates the law's purpose to dismantle the courses within the MAS program at TUSD. Superintendent Huppenthal even disregarded the state consultant's careful audit of the wide range of courses within the MAS program and the conclusion that "no observable evidence was present to indicate that any classroom within Tucson Unified School District is in direct violation of the law, A.R.S. 15-112(A). In most cases, quite the opposite is true." ER 2198-

2201, 2248, 2253 ("All evidence points to peace as the essence for program teachings. Resentment does not exist in the context of these courses.").

Invidious, class-based legislation is unconstitutional and must be struck down. *See Plyler v. Doe*, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."). The record raises numerous, and genuine, issues of fact regarding invidious and intentionally discriminatory actions by Horne, his successor superintendent John Huppenthal, and other relevant State actors. Those facts are sufficient to support the conclusion that Arizona discriminated against a protected class in violation of the Equal Protection Clause of the Fourteenth Amendment.

C. Even if A.R.S. §15-112 is Facially Neutral, the State Violated Equal Protection when it Applied the Law in a Discriminatory Way.

The State's enactment and enforcement of A.R.S. §15-112 is particularly harmful because the overall goal of the varied courses within the MAS program was to elevate, educate and protect a historically discriminated-against population. The Supreme Court has held that state laws that undermine corrective federal programs violate the Constitution. For example, when Virginia officials closed public schools rather than desegregate them per federal court order, the Supreme Court found that even

if the state had a legitimate nonracial reason "to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." *Griffin v. Cnty. Sch. Bd. of Prince Cnty.*, 377 U.S. 218, 231 (1964). *See also Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430, 441-42 (1968) (holding that a voluntary "freedom-of-school" school desegregation plan that resulted in continued segregated schools more than a decade after *Brown v. Board* violated the Constitution).

A.R.S. §15-112 dismantles a wide range of courses that effectively countered prior discrimination, similarly violating the Equal Protection Clause. TUSD developed the MAS courses in direct response to historical discrimination in Tucson and the desegregation lawsuits against the district. *See supra* Section I.B. As part of its desegregation effort, TUSD launched MAS to address the absence of Mexican-American perspectives in the high school curriculum, an absence that the district concluded was further imperiling "at-risk" Mexican-American students. *See* MARÍA "CUCA" ROBLEDO MONTECEL, INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION, TUSD EXTERNAL AUDIT OF THE BILINGUAL EDUCATION AND HISPANIC STUDIES DEPARTMENT 200 (1998), *available at* http://www.tusd1.org/contents/depart/mexicanam/documents/IDRAReport1

998.pdf. As described above, *supra* Section I.C, the MAS courses collectively and significantly benefited students in the program—90 percent of them Hispanic—by substantially improving state test scores and graduation rates. ER 197-203, 1854-79, 2247.

MAS courses were a key component of the district's effort to meet the federally mandated goals under the desegregation order. *See Fisher v. United States*, 549 F. Supp. 2d 1132, 1161 (D. Ariz. 2008) (noting in 2004 that the purpose of MAS and other courses in TUSD's ethnic studies offerings is "increasing academic achievement for minority students and working to eliminate the over-representation of minority students in drop out, absenteeism, suspension, and expulsion rates") (internal citations and quotations omitted); ER 25-26 (recognizing the MAS program as a component of TUSD's desegregation consent decree); ER 1988-92, 1995-98 (MAS formally adopted as part of TUSD's desegregation consent decree in 2009).

The U.S. Supreme Court holdings in *Griffin* and *Green* also establish that a facially neutral statute can still be unconstitutional when it impacts members of a protected class in an unequal manner. As the *Griffin* Court explained, "Virginia law, as here applied, unquestionably treats the school children of Prince Edward differently from the way it treats the school

children of all other Virginia counties." 377 U.S. at 230. Even if viewed as facially neutral, Arizona's selective enforcement of A.R.S. §15-112 against the MAS courses raises a genuine issue of fact regarding disparate impact.

D. The District Court's Holding Improperly Resolved Disputed Issues of Material Fact Against the Plaintiffs.

The facts on the record are sufficient to create a disputed issue of material fact regarding a *prima facie* equal protection violation, which is all that is required to defeat summary judgment. *Supra* Sections II.B and II.C. Yet the district court chose to rule on a motion for summary judgment that the plaintiffs did not make, improperly extrapolating arguments plaintiffs *might* have made for summary judgment on their equal protection claims based on arguments plaintiffs made in seeking a preliminary injunction. ER 7-8; *S. Or. Barter Fair v. Jackson Cnty., Or.*, 372 F.3d 1128, 1136 (9th Cir. 2004) (finding that preliminary injunction decisions "must often be made hastily and on less than a full record") (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). The district court's *sua sponte* decision denied plaintiffs the opportunity to come forward with evidence from which a rational fact finder could find an equal protection violation.

The court's error was especially grave because it pointed to facts on the record that would *support* an equal protection violation, but then

construed those facts in the manner most favorable to the defendants, rather than the plaintiffs, as Rule 56 requires. ER 28-30 (remarking on, but choosing to ignore, the evidence of discriminatory intent in A.R.S. §15-112). A.R.S §15-112 has harmed and continues to unconstitutionally harm Mexican-American students in TUSD. By adopting this statute, Arizona disadvantaged these students through the forced dismantling of a program that has been a success story for a protected class. This is an error that this Court has both the power and the duty to correct. *See Loving v. Virginia*, 388 U.S. 1, 2 (1967) (striking down Virginia's anti-miscegenation statute as inconsistent with the Fourteenth Amendment's Equal Protection Clause).

III. THE STATE OF ARIZONA VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS.

The district court's errors, and recent case law, require reversal. The district court erred by reviewing Defendants' actions under too lenient a standard, failing to analyze the statute on the basis of viewpoint-discrimination, and failing to consider that the vague and overbroad provisions of A.R.S. §15-112 chill protected speech of both students and teachers.

A. The District Court Erred in Applying a Deferential Standard of Review to the State's Factual Findings and to the State's Actions.

The district court erred in failing to review the factual record developed during administrative proceedings *de novo*. In particular, "[h]istorical questions of fact (such as credibility determinations or ordinary weighing of conflicting evidence) are reviewed for clear error, while *constitutional* questions of fact (such as whether certain restrictions create a 'severe burden' on an individual's First Amendment rights) are reviewed *de novo*." *Planned Parenthood of the Columbia/Willamette, Inc. (Planned Parenthood) v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1070 (9th Cir. 2002) (emphasis added).

Under circumstances similar to those present here, courts have undertaken *de novo* review of the factual findings. For example, in *American Civil Liberties Union (ACLU) of Florida v. Miami-Dade County School Board*, the Eleventh Circuit reviewed the removal of previously approved material from a school library. 557 F.3d 1177, 1189-90 (2009). The court analyzed the school board's motivation *de novo* because the board's "motive in removing [the book] is a constitutional fact, a crucial fact that determines the core issue of whether that removal violates the First

Amendment." *Id.* at 1205. The Court then extensively analyzed the factual record. *Id.* at 1207-27.

Here, as in *Planned Parenthood* and *ACLU of Florida*, the situation presents constitutional questions of fact. Defendants' motive and purported justifications for shutting down the MAS program are central factual issues that touch squarely on the First Amendment constitutional questions at issue here. Accordingly, Defendants' motivation must be analyzed *de novo* by this court, and the district court's reliance on findings of fact from the administrative proceedings is not entitled to any deference. *See, e.g.*, ER 18 (relying on the findings of the Administrative Law Judge ("ALJ") to find no First Amendment violation). This is especially true where even the district court expressed concerns about the quality and validity of the ALJ's findings. ER 405 ("the ALJ report ... is to me quite vague" and "the complete opposite of the Cambium report"); ER 406 ("You know, anybody could look at [the ALJ findings] and come to ... lots of different kinds of conclusions.").

B. The District Court Erred in Reviewing the State's Actions under the Deferential *Hazelwood* Standard.

Given a choice between three different legal standards from three different Circuits, the district court, without analysis, picked the one most

deferential to the school board. ER 13-14. Choosing to follow *Virgil v. School Board of Columbia County*, 862 F.2d 1517 (11th Cir. 1989), the district court applied the lenient review set forth in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1998). *See* ER 12 ("[L]imitations on curriculum should be upheld so long as they are reasonably related to legitimate pedagogical concerns.").

Hazelwood is inapposite here because student *speech* in a school-sponsored *expressive* activity is not at issue. *Hazelwood*'s holding is clearly stated: "[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of *student speech* in school-sponsored *expressive* activities so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 273 (1988) (emphasis added). In other words, *Hazelwood* involved (1) student speech (2) in a school-sponsored expressive activity that "members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271. School-sponsored expressive activity is not the concern here, and student speech is only indirectly at issue.[8]

[8] Defendants' actions have, however, created a chilling effect upon student speech by using student course work as evidence of illegality. *See* Pls.-Appellants' Opening Br. at 5-6. For that, *Hazelwood* is also not the appropriate standard under which to analyze that impact because the chilled speech is personal rather than part of a school-sponsored expressive activity.

Instead, the concern here is that Defendants violated the student plaintiffs' right to *receive* information. The right to receive information is central to a line of cases starting with *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853, 866 (1982) ("[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."). On that point, this Court has cited favorably to *Pratt v. Independent School District No. 831*, 670 F.2d 771 (8th Cir. 1982), for the proposition that "[w]hat is at stake is the right to receive information and to be exposed to controversial ideas—[which is] a fundamental First Amendment right." *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1029 n.8 (9th Cir. 1998). Indeed, this Circuit has expressed hostility to the notion that students are incapable of thinking critically about challenging material.

> First, the fact that a student is required to read a book does not mean that he is being asked to agree with what is in it ....

Accordingly, the impact on student speech should be analyzed in light of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). *See Hazelwood*, 484 U.S. at 270-71 (distinguishing *Tinker* on the basis that *Tinker* "addresses educators' ability to silence a student's personal expression that happens to occur on the school premises," whereas *Hazelwood* "concerns educators' authority over school-sponsored ... expressive activities that ... the public might reasonably perceive to bear the imprimatur of the school"). In other words, actions by the district that chill protected student speech may not be justified as "reasonably related to legitimate pedagogical concerns."

> Second, it is important for young people to learn about the past—and to discover both the good and the bad in our history. Third, if all books with messages that might be deemed harmful were removed, the number of 'acceptable' works might be highly limited.

Id. at 1031.

Although *Monteiro* left open the question now before the Court,[9] *Pratt* squarely addresses the issue here because it concerned the removal of previously approved materials from the classroom in violation of the students' First Amendment right to receive information. In particular, *Pratt* also involved a school board decision with insufficient factual basis, a school board review that appeared targeted rather than part of a systematic process, and a sequence of events that indicated an inappropriate ideological motive. *Pratt*, 670 F.2d at 778 (affirming reinstatement of films banned from the curriculum by the school board).

Per *Pratt*, "the proper framework for analysis here" is to analyze whether the purpose of the restriction on speech is "to suppress an ideological or religious viewpoint with which the local authorities disagreed." *Id.* at 776. Given the factual similarities between *Pratt* and this

[9] "Because ours is not a case in which a school board has decided on the basis of its own evaluations to remove literary materials, we need not now decide the question resolved by the Eighth Circuit." *Monteiro*, 158 F.3d at 1029.

case, application of the *Pratt* standard will produce a substantially different and more legally supportable outcome. Because the circumstances here align closely with those present in *Pratt*, this Court should remand to the district court to apply the standard set out in *Pratt*.

C. Sections 15-112(A)(1), (2) and (4) are Viewpoint-Discriminatory.

"The government may not regulate use based on hostility—or favoritism— towards the underlying message expressed." *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992). "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). "When the government targets not subject matter, but *particular views* taken by the speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* (emphasis added). "Viewpoint discrimination is thus an egregious form of content discrimination." *Id.*

Section (A)(4) prohibits "advocating ethnic solidarity," which fits within the Supreme Court's definition of a "viewpoint." This section would be content-discriminatory but viewpoint-neutral if it forbade *all* discussion of ethnic solidarity, whether positive or negative. *R.A.V.*, 505 U.S. at 391 (finding a statute that targeted speech regarding "race, color, creed, religion

or gender" to be facially content-discriminatory). However, section (A)(4) prohibits only *advocating* for "ethnic solidarity." As the district court noted, to "advocate" is "to plead in favor of." ER 17. Therefore, this section permits classes that plead *against* "ethnic solidarity" but forbids classes that plead *in favor of* solidarity.

It is this aspect—permitting a negative viewpoint on a topic but forbidding a positive one—that the Supreme Court has found to be impermissible viewpoint discrimination. *See, e.g.*, *R.A.V.*, 505 U.S. at 391-92 (1992) (invalidating a statute that prohibited *negative* speech about "race, color, creed, religion or gender" where *positive* speech on that topic was still allowed).[10] Section (A)(4) violates the First Amendment's ban on viewpoint discrimination.

Sections (A)(1) and (A)(2) of A.R.S. §15-112 raise the same issue as (A)(4). Section (A)(2) prohibits classes that "promote resentment toward a race or class of people" and section (A)(1) prohibits classes that "promote

[10] The qualifying phrase "instead of the treatment of pupils as individuals" exacerbates the viewpoint-discrimination. By using the phrase "instead of," the statute suggests that "the treatment of pupils as individuals" is a viewpoint contrary to "ethnic solidarity." Yet "ethnic solidarity" and "treatment of pupils as individuals" are not opposing views on the same topic. (Indeed, treating them as opposites further demonstrates the Arizona Legislature's mischaracterization of the ethnic studies programs and its invidious motive.) Even if they were opposites, forcing a choice between them would constitute illegal viewpoint discrimination.

the overthrow of the United States government."[11] However laudable these purposes may be, these sections prohibit speech that purportedly creates a state of mind (*i.e.*, "promote resentment") while permitting oppositional speech on these specific topics. These sections are therefore viewpoint-discriminatory. Indeed, the language of section (A)(2) is substantively indistinguishable from the language of a Minnesota statute struck down by the Supreme Court as viewpoint-discriminatory. *Compare* (A)(2) (prohibiting classes that "*promote resentment* toward a *race* or class of people") (emphasis added), *with R.A.V.*, 505 U.S. at 380 (invalidating a statute criminalizing speech that "*arouses* anger, alarm or *resentment* in others on the basis of *race*, color, creed, religion or gender") (emphasis added).

Accordingly, this Court should invalidate sections 15-112(A)(1), (2) and (4) because they violate the First Amendment's ban on viewpoint discrimination.

[11] Some might advocate for a narrow construction of the phrase "the overthrow of the United States government" to include only unprotected speech (*e.g.*, fighting words and obscenity). *See, e.g.*, *R.A.V.*, 505 U.S. at 381 ("[W]e accept the Minnesota Supreme Court's authoritative statement that the ordinance reaches only those expressions that constitute 'fighting words.'"). Section (A)(1) is not so limited on its face, and certainly not in its application to the MAS program. Even if section (A)(4) were narrowly construed, there is nothing to suggest that the MAS curriculum is unprotected speech.

D. A.R.S. §15-112 Is Also Impermissibly Vague, Overbroad, and Chills Both Teacher and Student Speech.

1. The District Court Erred by Failing to Consider the Chilling Effect of A.R.S. §15-112 on Protected Teacher and Student Speech.

The district court erroneously refused to consider the impact of A.R.S. §15-112 on chilling teacher speech. Instead, it found that the teachers had "no protected right to speak *as teachers*, either within or outside of the curriculum in the classroom." ER 43 (emphasis in original) (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)). This Court, however, recently held that *Garcetti* "does not apply to teaching and writing on academic matters by teachers employed by the state." *Demers v. Austin*, 729 F.3d 1011, 1014 (9th Cir. 2013). Instead, the First Amendment protects a teacher's speech and activities ***pursuant to his official duties*** according to the test in *Pickering v. Board of Education*, 391 U.S. 563 (1968). *Demers*, 729 F.3d at 1014. In particular, a teacher's teaching and writing is protected if (1) it addresses matters of public concern, and (2) the employee's interest outweighs the state's interest, as an employer, in promoting the efficiency of the public services it performs through its employees. *Id.*at 1020-21 (reversing dismissal because Demers, though acting pursuant to his official duties, was addressing a matter of public concern).

Demers mandates that this Court consider the impact of overly broad legislation on this protected speech. The MAS program teachers, while acting pursuant to their official duties, were addressing matters of public concern: namely, the long history of racism, including school segregation, and significant race-based achievement issues disproportionately experienced by Latina/o students in TUSD. For the reasons discussed previously, *supra* Section II.B, the teachers' important interest in their students' academic achievement and future success and in promoting a pipeline of qualified, future Latina/o leaders outweighs the invidiously motivated justifications offered by the State when it forced all of the MAS courses to shut down. The district court erred in refusing to consider the impact on teachers' protected speech when ruling that A.R.S. §15-112 is not overbroad.

The district court similarly erred in evaluating the chill on student speech. The district court rejected plaintiffs' overbreadth challenges because there was no *direct* ban on student expression. *See, e.g.*, ER 11 n.7 ("That student work was used to explain the nature of what was taught in the challenge courses *does not mean that student work is proscribed by the statute*.") (emphasis added). What the district court did not address is that the students were punished for speaking because their speech was used to

deny them access to the MAS program. *See* Pls.-Appellants' Opening Br. at 5-6. This reasoning is insidious because any school board could indirectly punish student speech rather than prohibit it outright. Indeed, by this logic, the Des Moines school district would have acted constitutionally if, in response to the Tinkers' black armbands, it canceled all classes regarding the Vietnam War. *See Tinker*, 393 U.S. at 514 (finding that suspension of students who wore black armbands violated their First Amendment rights).

2. A.R.S. §15-112(A)(1) Is Impermissibly Vague and Overbroad.

Section (A)(1) is impermissibly vague. Indeed, the Supreme Court ruled that nearly identical statutory language was unconstitutional. In *Keyishian v. Board of Regents of University of State of New York*, the Supreme Court ruled that a statute requiring the termination of teachers for "seditious" conduct was unconstitutionally vague, overbroad, and chilling of protected speech. 385 U.S. 589 (1967). The statute at issue defined "sedition" as "criminal anarchy," which was further defined as "the doctrine that organized government should be overthrown by force or violence ... or by any unlawful means." *Id.* at 598-99. "Sedition" also encompassed a teacher who "advocates, advises or teaches the doctrine." In other words, the statute required the removal of a teacher that "advocates" overthrowing

the organized government "by force or violence ... or by any unlawful means."

The Supreme Court found that this language was "wholly lacking in 'terms susceptible of objective measurement.'" *Id.* at 604.

> The teacher cannot know the extent, if any, to which a 'seditious' utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. *The crucial consideration is that no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts*.

Id. at 600 (emphasis added).

Section (A)(1) uses very similar language to the statute invalidated in *Keyishian*. Section (A)(1) affects speech that "promote[s] the overthrow of the United States government" whereas the *Keyishian* statute addressed speech that "advocates" that "organized government should be overthrown by force or violence, ... or by any unlawful means." The verbs "promote" and "advocate" are comparable, and indeed "promote" applies more broadly than does "advocate." *See* ER 17 ("in this way, 'to promote' is broader than 'to advocate'").

Similarly, the phrase "the overthrow of the United States government" is comparable to, and yet broader than, the phrase "the organized government should be overthrown by force or violence ... or by any unlawful

means" because it includes activity that is peaceful and lawful, such as nonviolent protest. Accordingly, section (A)(1) sweeps up *substantially more* protected speech than the statute in *Keyishian*, and supplies *substantially fewer* markers to guide a teacher or school administrator.

The Supreme Court took special note of the chilling effect of this type of language upon teachers' speech. "The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient in terrorem mechanism."[12] *Keyishian*, 385 U.S. at 601. "The danger of the chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed." *Id.* at 604.

For the reasons outlined above, section (A)(1) is unconstitutionally vague and overbroad, and has an unconstitutional chilling effect on protected speech.

CONCLUSION

This Court should affirm the district court's ruling that A.R.S. 15-112(A)(3) is overbroad, but should otherwise reverse and remand to the

[12] The "plan" at issue in *Keyishian* involved a combination of statutory provisions and regulations that collectively determined whether a teacher could be hired or fired. 385 U.S. at 592.

district court for further proceedings consistent with the correct legal standards.

DATED this 25th day of November, 2013

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit rule 32-1, the attached Brief of Amicus Curiae Latina And Latino Critical Legal Theory, Inc. is proportionally spaced, has a typeface of 14 points or more and contains 6,934 words, including both text and footnotes, and excluding this Certificate of Compliance, the Table of Contents, the Table of Authorities, the Statement of Related Cases, and the Certificate of Service.

s/ Theodore J. Angelis
Theodore J. Angelis

CERTIFICATE OF SERVICE

I hereby certify that I arranged for the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 25, 2013. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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Theodore J. Angelis