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Brief of Freedom to Read Foundation, et al. as Amici Curiae in Support of Plaintiffs-Appellants and Supporting Reversal

Counsel for Amici Curiae

Case No. 13-15657, 13-15760

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAYA ARCE, *et al.*,
Plaintiffs-Appellants Cross-Appellees,
v.
JOHN HUPPENTHAL, Superintendent of Public Instruction, *et al.*,
Defendants-Appellees Cross-Appellants.

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

BRIEF OF FREEDOM TO READ FOUNDATION, AMERICAN LIBRARY ASSOCIATION, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ASIAN/PACIFIC AMERICAN LIBRARIANS ASSOCIATION, BLACK CAUCUS OF THE AMERICAN LIBRARY ASSOCIATION, COMIC BOOK LEGAL DEFENSE FUND, NATIONAL ASSOCIATION FOR ETHNIC STUDIES, NATIONAL COALITION AGAINST CENSORSHIP, NATIONAL COUNCIL OF TEACHERS OF ENGLISH, AND REFORMA AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SUPPORTING REVERSAL

David A. Handzo
Julie M. Carpenter
Elizabeth C. Bullock
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
Tel.: (202) 639-6085
Fax: (202) 661-4853

Email: dhandzo@jenner.com
jcarpenter@jenner.com
ebullock@jenner.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the Freedom to Read Foundation is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the American Library Association is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the Asian/Pacific American Librarians Association is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the Black Caucus of the American Library Association is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the American Booksellers Foundation for Free Expression is a non-profit organization

that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the Comic Book Legal Defense Fund is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the National Association For Ethnic Studies is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the National Coalition Against Censorship is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

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Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), REFORMA: the National Association to Promote Library and Information

Services to Latinos and the Spanish-Speaking is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

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STATEMENT OF INTEREST

The Freedom to Read Foundation is an organization established by the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.[1]

The American Library Association (ALA) is the oldest and largest library association in the world providing advocacy, information, and resources to librarians and library users. It actively defends the right of library users to read, seek information, and speak freely as guaranteed by the First Amendment.

The Asian/Pacific American Librarians Association is an ALA affiliate supporting and promoting library services to the Asian American and Pacific Islander communities and advances the leadership roles of members through informed dialogue and forums.

[1] Pursuant to Fed. R. App. P. 29(c)(5), Amici state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than Amici, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

The Black Caucus of the American Library Association advocates and promotes improvement of library services to the nation's African American community.

The American Booksellers Foundation for Free Expression (ABFFE) informs and educates booksellers and the public about the dangers of censorship and promotes the free expression of ideas, particularly freedom in the choice of reading materials.

The Comic Book Legal Defense Fund (CBLDF) is dedicated to defending the First Amendment rights of comic book readers, publishers, retailers, librarians and educators.

The National Association For Ethnic Studies (NAES) is the preeminent Ethnic Studies organization in the United States. It supports the First Amendment rights to access, and freedom to read and speak about, the issues raised in ethnic studies materials.

The National Coalition Against Censorship is an alliance of more than 50 national organizations promoting free expression. A signature program, the Youth Free Expression Project, defends young people's right of access to information and their right to question, learn, and think for themselves.

The National Council of Teachers of English (NCTE) is devoted to improving education in English and the English language arts. It seeks to ensure

students' rights to read and to learn, and to promote professional growth for teachers.

REFORMA: the National Association to Promote Library and Information Services to Latinos and the Spanish-Speaking, promotes the development of library collections to include Spanish-language and Latino-oriented materials and to develop library services and professionals that meet Latino communities' needs.

Amici are all deeply concerned about the effect of Arizona's legislation on the First Amendment rights of its student-citizens. By prohibiting certain categories of classroom materials and by eliminating the Tucson Unified School District's Mexican-American Studies (MAS) program, the State of Arizona is infringing on students' First Amendment rights to access books and classroom instruction.

In accordance with Fed. R. App. P. 29(a), all parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The First Amendment protects the rights of students to access and receive information in the classroom. These rights ensure that America's youths are exposed to the diversity of ideas necessary to ensure an educated citizenry who can effectively participate in our democracy. Arizona Revised Statute § 15-112 threatens these rights. For partisan and political reasons, the statute was aimed at and launched to dismantle Tucson's MAS program. Moreover, the statute is so broad that Arizona teachers and school districts must skirt a wide swath of protected instruction and material to avoid the possibility of serious penalties. Thus, the statute will chill a substantial amount of instruction that is beyond the purported purpose of the statute.

This banning of books and courses from the classroom – both by direct application and by chilling effect – violates the First Amendment rights of students.

ARGUMENT

I. SECTION 15-112 VIOLATES THE FIRST AMENDMENT BECAUSE IT FURTHERS POLITICAL AND PARTISAN INTERESTS, NOT LEGITIMATE PEDAGOGICAL PURPOSES.

A. Students Have a First Amendment Right To Receive Information in Schools.

Schools play a foundational role in shaping our society. "'[T]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny ....'" *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (quoting *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (opinion of Frankfurter, J.)). As part of a public school's obligation to shape and promote democracy, it must expose students to a range of ideas. "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal quotation marks omitted) (alteration in original). Based on these principles, courts, including the district court below, have repeatedly recognized that students have a First Amendment right to receive information. *See Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n.5 (9th Cir. 1998).

Students have the right "to receive a broad range of information so that they can freely form their own thoughts: '[m]ore importantly, the right to receive ideas

is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.'" *Id.* (quoting *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion)) (alterations in original). The "scrupulous protection of Constitutional freedoms of the individual," and the student in particular, is necessary because schools "are educating the young for citizenship." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969); *accord Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

This right necessarily constrains State authority to censor curriculum, education materials, and classroom instruction. To be sure, States and school boards have significant discretion in matters related to the education of students. *See, e.g.*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). But this discretion is not boundless; it "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Edwards*, 482 U.S. at 583 (quoting *Pico*, 457 U.S. at 864 (plurality opinion)) (quotation mark omitted). For example, States may not for religious reasons either require schools to teach creationism or prohibit the instruction of evolution. *Id.* at 594; *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968). Similarly, States may not dictate curriculum in

a manner that violates students' right to receive information. *Monteiro*, 158 F.3d at 1027 n.5.

B. A State May Not Withdraw Students' Access to Curriculum Materials for Narrowly Partisan or Political Reasons.

Under this framework, the First Amendment restrains a State from removing curriculum materials for narrowly partisan or political reasons. In *Pico*, 457 U.S. at 870 (plurality opinion), the Supreme Court plurality held that while a school district "rightly possesses significant discretion to determine the content of their school libraries[,] ... that discretion may not be exercised in a narrowly partisan or political manner" to restrict students' access to information. The three dissenters "cheerfully concede[d]" that principle. *Id*. at 907 (Rehnquist, J., dissenting). Thus, a majority of the Court agreed that removing books for partisan or political reasons will be unconstitutional where the removal occurs to deny students "access to ideas with which [the school officials] disagreed."[2] *Id*. at 871; *accord Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 581 (6th Cir. 1976) (privilege of access to books in library "is not subject to being withdrawn by succeeding school boards whose members might desire to 'winnow' the library for books the content of which occasioned their displeasure or disapproval").

[2] Justifications for removing the books in *Pico* included that they were "anti-American" and "offensive to Americans in general," *Pico*, 457 U.S. at 873 – sentiments remarkably similar to those raised in Arizona. *See, e.g.*, ER 1055 ("It is certainly strange to find a textbook in an American public school taking the Mexican side of the battle at the Alamo.").

Although *Pico* arose in the context of school libraries, its reasoning cannot be cabined solely to the removal of books from libraries. This Court has held that *Pico*'s principles "are also relevant in the context of a school curriculum." *Monteiro*, 158 F.3d at 1027 n.5. Thus, although States and school districts have latitude to shape curriculum, they may not ban books from classroom instruction or eliminate courses merely because politicians disagree with the ideas expressed in some of the books.

Strong justifications support applying *Pico* beyond the context of school libraries. The harm from injecting partisan and political ideology into classroom curricula can be every bit as serious as the long-recognized harm caused by removing books from the library. *Id.* at 1029 n.8 (discussing with approval *Pratt v. Independent School District No. 831*, 670 F.2d 771, 779 (8th Cir. 1982)). Students who lose access to materials and courses suffer harm because they are denied the enrichment that comes from reading a book or poem and then discussing that material as part of a broader lesson. Thus, the First Amendment harms flowing from censorship of the curriculum are real and identifiable.

Other circuits have also recognized that the First Amendment constrains States and school boards from tampering with curricula by removing materials

from instruction for political reasons.[3] Students have a right "to be free from official conduct [regarding curriculum] that [is] intended to suppress the ideas expressed" in the materials removed from classroom instruction. *Pratt*, 670 F.2d at 776; *see also, e.g.*, *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980) ("[A]cademic freedom at the secondary school level precludes a local board from imposing 'a pall of orthodoxy' on the offerings of the classroom, which might ... impair permanently the student's ability to investigate matters that arise in the natural course of intellectual inquiry." (quoting *Keyishian*, 385 U.S. at 602)).

Despite *Monteiro*'s embrace of *Pico*, the district court improperly held that *Pico* "does not apply directly" to the case at bar. ER 11. It held that *Hazelwood* – not *Pico* – provided the proper framework for analysis. ER 14. In *Hazelwood*, the Court held that school officials could exercise "editorial control" over the content of the journalism class's school paper – which the Court characterized as "part of the school curriculum" – "so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 271, 273.

[3] Some cases since *Pico* have upheld States' selection of curriculum materials; they are distinguishable because none involved the banning of books, materials, and courses from the curriculum for political reasons. *See Griswold v. Driscoll*, 616 F.3d 53, 55, 58-60 (1st Cir. 2010) (*Pico* did not apply to revisions to curriculum guide that did not ban use of other materials); *Chiras v. Miller*, 432 F.3d 606, 615-17 (5th Cir. 2005) (State selection of preferred textbooks did not violate students' First Amendment rights); *Virgil v. Sch. Bd. of Columbia Cnty.*, 862 F.2d 1517, 1523 n.8 (11th Cir. 1989) (declining to decide standard when curriculum materials are removed due to "opposition to the ideas contained in the disputed materials").

But *Pico* and *Hazelwood* are not mutually exclusive. Properly read, these two cases articulate a consistent view of State discretion over schools, including curriculum. Although States have significant curricular discretion, it must be "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. *Pico* illustrates one instance where such legitimate concern is lacking: where materials are removed from a school library not for pedagogical reasons, but due to partisan or political disapproval of, and an intent to suppress, the ideas expressed in those materials. *See Pico*, 457 U.S. at 870-72. Similarly, if books (or entire courses) are removed from school curricula for narrowly partisan or political reasons, the State's action violates the students' First Amendment rights.

Nor can the state rely on the government speech doctrine to justify an unfettered right to remove materials. The broad discretion to shape curriculum does not include the power to indulge partisan or political motivations. Accordingly, the district court properly held that the government speech doctrine has no application in this case.

C. The Tucson MAS Program Was Targeted by State Authorities Based on Partisan and Political Motivations.

Applying *Pico* to § 15-112, it is clear that both the enactment of the statute and the determination that MAS (but not other ethnic studies programs) violated the statute were "narrowly partisan or political" decisions by officials who had

long sought removal of the MAS program, and who had even campaigned on a promise to remove it.

1. *Section 15-112 Was Enacted Based on Animus Toward the MAS Program and Mexican Immigrants.*

There is strong evidence that the statute itself was motivated by political animus toward the MAS program specifically and toward Mexicans and Mexican-Americans more generally. Started to address a federal desegregation order, the MAS program had significantly closed the achievement gap for Latino students who took MAS classes. ER 197-204, 1964-2016. However, in 2006, Tucson High Magnet School hosted invited guest Delores Huerta, co-founder of the United Farm Workers of America, to address the student body. During her remarks, she commented that "Republicans hate Latinos." ER 1054. In response, then-Superintendent Tom Horne invited another speaker to "refute" Ms. Huerta's statements. *Id.* During that presentation, at which no questions were allowed, a group of students silently walked out in protest. ER 1055.

Horne's response was to write an "Open Letter to the Citizens of Tucson" calling for the termination of the MAS program. ER 1053. Demonstrating that politics – not academic content – was at issue, Horne praised the "polite[]" behavior exhibited by "teenage Republicans," but criticized the "rudeness" of protesting students. ER 1055. In Horne's view, this "rudeness" was due to the

MAS program and teachers, who Horne was concerned were "left-leaning" and "progressive[]." ER 1055, 1057.

Importantly, these criticisms arose in the context of a broader political debate in Arizona about immigration – particularly from Mexico. While it was considering outlawing courses "designed" for one ethnic group, the Arizona legislature was also enacting other anti-immigration laws that were then challenged in federal court. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011), *aff'g sub nom. Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009). Indeed, the legislative history of § 15-112 reflects the view that MAS is part of Mexico's plan "to take over the southwest United States."[4] Other testimony opposed the MAS program because "I absolutely deplore people who come from another country and do not want anything to do with the culture, the language, or anything that has to do with our government ...."[5] Finally, the two officials – Superintendents Horne and Huppenthal – whose findings have required the elimination of the MAS program both vigorously pursued the legislation while

[4] Hearing of H. Comm. on Appropriations, 48th Leg., 2d Reg. Sess., at 37:09-37:22 (Ariz. Apr. 16, 2008), http://azleg.granicus.com/MediaPlayer.php?view_id=7&clip_id=3485&meta_id=60106.

[5] *Id.* at 21:12-21:24.

announcing their political opposition to the MAS program. Indeed, Huppenthal *campaigned for office* on a pledge that he would "[S]top La Raza."[6] ER 1288.

2. Superintendents Horne and Huppenthal Eliminated the MAS Program for Political Reasons.

Once § 15-112 was enacted, Horne and his immediate successor, Superintendent Huppenthal, wasted no time in targeting and dismantling the MAS program. In fact, Horne issued his findings the day *before* the statute even became effective, noting, in passing, that several other ethnic studies programs in Arizona might also violate the statute, but confining his findings to the MAS program. ER 28. As the district court explained,

> Superintendent Horne issued his Finding of Violation on his last day in office, December 30, 2010. His Finding went into effect January 1, 2011, the same day that § 15-112 went into effect. The timing of the Finding underscores Horne's determination to do away with the MAS program, and it also means that Horne necessarily applied the statute retroactively, without any effort to show that the problematic materials were in use at the time of the Finding.

ER 27 (citation omitted). Indeed, Horne's findings essentially parroted the same political concerns expressed in his "Open Letter" almost three years earlier. *Compare* ER 2183-92 *with* ER 1053-58.

Meanwhile, as chair of the Senate education committee, Senator Huppenthal worked to pass the bill while pledging in his political campaign for Superintendent to eliminate MAS. *See* ER 1256-57. After winning the Superintendent spot,

[6] "La Raza" is used to refer to the MAS program. *See* ER 1287.

(replacing Tom Horne), he initially commissioned an independent, third-party audit of the entire MAS curriculum. *See* ER 1092. But when the auditors found "no observable evidence was present to suggest that any classroom within Tucson Unified School District is in direct violation of the law A.R.S. 15-112(A)," ER 2251, Huppenthal looked for another opinion. Preferring his own expertise, he conducted his own personal review and identified specific classroom materials that he concluded violated the statute. *See* ER 1092-94, 1098-1104.

These circumstances demonstrate that the statute and Huppenthal's findings were motivated by a narrow political and partisan interest in denying access to materials with which the decisionmakers disagreed. As applied to the MAS program, Arizona Revised Statute § 15-112 violates the First Amendment rights of the plaintiffs because it removed the students' access to the MAS curriculum materials for narrowly partisan and political reasons. *See Pico*, 457 U.S. at 870-71.[7]

[7] Should the Court conclude that this significant record includes disputed facts, it should, at the very least, consider remanding the case for further development of these factual issues.

II. SECTION 15-112 IS OVERBROAD BECAUSE IT WILL CHILL SUBSTANTIAL MATERIALS STUDENTS HAVE A FIRST AMENDMENT RIGHT TO RECEIVE.

Even if § 15-112 were passed for a legitimate pedagogical purpose, the statute is nevertheless unconstitutional because it is overbroad and will chill substantial instruction that would not violate its purpose.

A. A Statute Restricting Materials or Curriculum Is Unconstitutionally Overbroad if it Chills Substantial Instruction Beyond the Purpose of the Law.

The district court properly recognized that § 15-112 is unconstitutional if it chills substantial instruction that does not further the statute's purpose. *See* ER 15-16. "In a facial challenge to a law's validity under the First Amendment, the law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (en banc) (quoting *United States v. Stevens*, 449 U.S. 460, 473 (2010)) (internal quotation marks omitted), *cert. denied*, 132 S. Ct. 1566 (2012).

"The overbreadth doctrine exists 'out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech ....'" *Id.* (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). In the specific context of education, this means that although a State may limit materials and curricula where its "actions are reasonably related to legitimate pedagogical

concerns," *Hazelwood*, 484 U.S. at 273, that control goes too far where the threat of enforcement results in schools excluding other materials that do not raise those pedagogical concerns. And where the chilled instruction is "substantial," the law must be held to be unconstitutional. *See Stevens*, 559 U.S. at 473.

The asserted purpose of § 15-112 is to ensure that students are "taught to treat and value each other as individuals" and not be "taught to resent or hate other races or classes of people." Ariz. Rev. Stat. § 15-111. Amici certainly agree that this is a legitimate pedagogical purpose, and that the State can reasonably decide that Arizona schools should inculcate tolerance, respect, and understanding – not hatred and resentment. But because students have a First Amendment right to receive information and access materials in the classroom, *see Monteiro*, 158 F.3d at 1027 n.5, § 15-112 must be held to be unconstitutional if the breadth of the statute causes teachers or schools to discard or avoid substantial material that would not run afoul of the state's interest in teaching students "to treat and value each other as individuals," Ariz. Rev. Stat. § 15-111.

B. Severe Sanctions, Like Those Here, Establish Substantial Overbreadth.

When evaluating overbreadth, the severity of the sanction is a significant factor in evaluating whether the statute will chill substantial protected speech. The possibility of a "substantial number of realistic applications in contravention of the First Amendment" is sufficient to overturn a statute, and "the penalty to be

imposed is relevant in determining whether demonstrable overbreadth is substantial." *Massachusetts v. Oakes*, 491 U.S. 576, 595-96 (1989) (quotation marks omitted). This is so because when a law is overbroad, the threat of severe penalties will cause many individuals to "choose not to speak because of uncertainty whether his claim of privilege might prevail if challenged." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977).

Here, the entire school district risks up to ten percent of its State funding for a single violation. Ariz. Rev. Stat. § 15-112(B). And it was designed that way. Horne emphasized that the statute's financial penalties were sufficiently severe to frighten schools into compliance: "In my eight years as superintendent of schools, I've never seen a district not come into compliance when faced with a severe financial penalty." *Horne: Tucson District Violates Ethnic Studies Ban*, MyFoxPhoenix.com, (Jan. 3, 2011), http://www.myfoxphoenix.com/story/18140282/horne-tucson-district-violates-ethnic-studties-ban.

The penalty applies to an entire district, not just to the school or program with the offending material. And since schools generally allocate funds well in advance of the school year (to hire teachers, acquire books and materials, etc.), the district-wide penalty threatens the special chaos inherent in re-balancing multiple budgets that have already been committed or spent. In this era of falling tax

revenues and state budget constraints, responsible educators are unlikely to risk even a remote possibility of such a significant financial hit.

This severe penalty will chill educators from choosing a significant amount of protected material which would not violate the statute, and which students have a First Amendment right to receive. Instead, "rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, [they] will choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119 (citation omitted). Where, as here, the marketplace at issue is the classroom, which "is peculiarly the 'marketplace of ideas,'" *Keyishian*, 385 U.S. at 603, this chill has a wide reach.[8]

C. The Statute Is Overbroad Because Educators Cannot Know What Materials Are Allowed and Which Are Forbidden.

To ensure that "public school pupils should be taught to treat and value each other as individuals and not be taught to resent or hate other races or classes of people" the statute lists four categories of content which may not be "included" in

[8] The 60-day period before financial freezing begins does not mitigate the threat. Teachers cannot re-vamp an entire curriculum in mid-course, especially for classes required by the State. Additionally, as the MAS program demonstrated, books deemed offensive will be physically removed from the classroom (boxed up and locked away), *see* ER 1164-67, with no money to purchase replacements. Given the risk to continuity of teaching, the risk of losing significant monies, and the risk of losing actual materials with no replacements, teachers will be forced to choose – and students will only receive – materials that raise no risk of loss.

the program of instruction. Ariz. Rev. Stat. §§ 15-111, 15-112(A). Yet these forbidden categories encompass materials far beyond the stated purpose of the statute. Moreover, although the statute speaks of "courses or classes," both Superintendent Huppenthal and the Administrative Law Judge named specific books, poems, and classroom materials in finding a violation. *See* ER 1092-94, 1098-1104, 1132-42.[9] Thus, observers can only conclude that the use of a single book or poem can render the "course or class" illegal. As applied, then, the statute will inevitably chill educators from presenting a wide range of serious literature and history relating to topics such as revolution, oppression, and racism.

1. *Section 15-112(A)(1) – Promoting "the overthrow of the United States government"*

The first category prohibits material promoting the overthrow of the government. This is not the first attempt to restrict such materials. Indeed, the Supreme Court has invalidated a similar state statute which prohibited teachers from advising, teaching, or advocating the forceful overthrow of the government. *Keyishian*, 385 U.S. at 599-602. While the Court accepted that the State had a legitimate interest "in protecting its education system from subversion," *id.* at 602,

[9] When evaluating the overbreadth of a statute, a court must consider the State's own implementation and interpretation of the statute. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992); *see also Comite de Jornaleros*, 657 F.3d at 946.

the law was nonetheless unconstitutional because teachers could not know what sort of conduct was prohibited.

> Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy? It is no answer to say that the statute would not be applied in such a case. ... 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 599.

Here, despite the fact that "promote" and "advocate" are essentially synonymous, the District Court held that "promote" was not overbroad because it must mean "actively presenting material in a biased, political, and emotionally charged manner." ER 18. This gloss is wholly missing from the statute, but even accepting it, the statute is no less vague or overbroad. Indeed, this gloss may make the statute even broader, since the prohibition now seems to turns on the *style* of the teaching or whether the material at issue has an emotional component.

Suppose, for example, that a teacher assigned students to read an essay by Henry David Thoreau, who advocated the right to revolt against the government. Thoreau wrote:

> All men recognize the right of revolution; that is, the right to refuse allegiance to and to resist the government, when its tyranny or its inefficiency are great and unendurable. ... [W]hen a sixth of the population of a nation which has undertaken to be the refuge of liberty

> are slaves, and a whole country is unjustly overrun and conquered by a foreign army, and subjected to military law, I think that it is not too soon for honest men to rebel and revolutionize. What makes this duty the more urgent is that fact, that the country so overrun is not our own, but ours is the invading army.

Henry David Thoreau, *Resistance to Civil Government* (1849), *reprinted in* Henry D. Thoreau Essays 145, 149 (Jeffery S. Cramer ed., 2013). Certainly this work – which urges not just a right but an actual *duty* to revolt against the government in certain circumstances – can be understood to "promote" the overthrow of government. Can a teacher use this text at all? Does the use depend on whether the teacher "actively" presents the material in an "emotionally charged" manner? If the material itself is emotionally charged, as Thoreau's call to arms certainly is, and the teacher asks the students to consider it in connection with current American political life, is it possible to avoid the conclusion that the teacher is "promoting" the overthrow of government by presenting the views of another American who promoted that end?

Or suppose the curriculum involves George Orwell's *1984*, a dystopian novel that warns of the threats posed by a totalitarian government propped up by surveillance and censorship. If the teacher asked students to compose essays comparing Orwell's Big Brother to the current U.S. National Security Administration using documents released by Edward Snowden, would such a project risk being deemed one that promotes the overthrow of the U.S.

government? Would that conclusion depend on whether the teacher is deemed to have displayed "bias" by bringing up the current political example of the NSA to illuminate the theme and lessons of the novel?

Just as the statute in *Keyishian* violated the Constitution because teachers could not tell when the line had been crossed between non-seditious and seditious, so too § 15-112(A)(1) creates an uncertain and wide no-man's land where teachers cannot know what characteristics will separate either permitted materials or means of teaching those materials from those which are prohibited. American history and literature are filled with stories of the valiant, as well as the quisling, acting in rebellion against the government. The threat that teaching a novel or poem with rebellious sentiment might be deemed to promote the overthrow of the U.S. government is nearly certain to chill a broad range of instruction which students have a First Amendment right to receive, especially in light of the significant penalty to be paid for guessing wrong.

2. Section 15-112(A)(2) – Promoting "resentment toward a race or class of people"

The district court applied the same analysis it applied to (A)(1) to uphold (A)(2). For the reasons discussed above, this decision is flawed. Nor is it consistent with the way the State actually applied the provision. Indeed, Huppenthal concluded the MAS program violated this provision, in part, because particular class materials "repeatedly reference white people as being 'oppressors'

and 'oppressing' the Latino people," or "present only one perspective of historical events, that of the Latino people being persecuted." ER 1093. Huppenthal identified this passage from *American History from Chicano/a Perspectives* as an example of text that promotes resentment toward a race or class of people:

> Within [*sic*] the exception of genocide, one of the worst crimes committed by the European invaders against indigenous peoples was the destruction of nearly all their culture, thought [*sic*] beliefs, traditions, and language. This atrocity has left the majority of the hemisphere's indigenous population in disarray and confusion as to their true identity.

ER 1098.

If this relatively straightforward passage justifies a finding that the curriculum using that passage violates § 15-112(A)(2), it is hard to see how teachers could present materials describing racism, slavery, imperialism or genocide without risking a similar finding. Thus, they will avoid serious and substantial works that explore these themes, such as Joseph Conrad's *Heart of Darkness*, which tells the story of imperialism and racism in Africa. *The Diary of Anne Frank* poses a risk since it presents the holocaust from only one perspective. Including any of these books in a course which invites students to actually engage with the materials could easily be found to "[p]romote resentment toward a race or class of people," Ariz. Rev. Stat. § 15-112(A)(2), particularly when compared with the text found so offensive by Huppenthal. And this is so even though these materials can be (and usually are) used to spark discussions that promote tolerance

among students who use them to explore the harms caused by political and racial hatred and resentment.[10]

The specter of the serious financial and political consequences of violating the statute, combined with the uncertainty regarding which materials may be found improper, will lead Arizona's responsible teachers to avoid materials that raise themes of racism, imperialism, or genocide. Thus the statute will smother materials and courses requiring students to wrestle with these issues, despite the fact that the State has asserted no interest in censoring such materials.

3. Section 15-112(A)(3) – "Are designed primarily for pupils of a particular ethnic group"

The district court properly held this provision to be overbroad. It did so because the provision did not advance the pedagogical interest underlying the statute, but it "threaten[ed] to chill the teaching of legitimate and objective ethnic studies courses." *See* ER 19. The Court of Appeals should uphold this portion of the District Court's decision because, like the others, this provision threatens to substantially chill the use of books and literature well beyond those that further the interests of the statute.

[10] This Court has also identified books which are claimed to "portray Caucasians in a derogatory fashion" and which could therefore be seen to promote resentment of Caucasians, such as Toni Morrison's *Song of Solomon* and Mark Mathabane's *Kaffir Boy*, for example. *Monteiro*, 158 F.3d at 1030 & n.11. Under § 15-112, those works would likely be avoided for fear of violating the statute.

Superintendent Huppenthal criticized materials in the MAS curriculum that "address the reader as being of Latino or Hispanic origin and thus a part of an oppressed people." ER 1093. For example, he found violations in text that read, "The process of dehumanization since the arrival of the White Nation (not a pejorative term) has stripped away our true identity." ER 1102. But if addressing a reader as one of a kindred group disqualifies a book, then teachers will avoid Maya Angelou's autobiography which contains graphic and painful descriptions of her experiences, as a child in the American South, of rape, hate, and racism: "My race groaned. It was our people falling. It was another lynching, yet another Black man hanging on a tree. One more woman ambushed and raped." Maya Angelou, *I Know Why the Caged Bird Sings* 131 (Random House 1997) (1969). And students will not be allowed to engage in class with Amy Tan's *The Joy Luck Club*, which dissects the relationships and conflicts between Chinese immigrant mothers and their American-raised daughters. Because this provision, like the others, sweeps far too broadly for First Amendment purposes, the district court properly invalidated it.

4. Section 15-112(A)(4) – Advocating "ethnic solidarity instead of the treatment of pupils as individuals."

The last section of the statute, prohibiting courses that "advocate" ethic solidarity, is also overbroad. Conceding that this provision "would not survive" scrutiny if it simply proscribed courses that "taught ethnic solidarity," the district

court nevertheless held that the "instead of the treatment of pupils as individuals" language saved the provision by making it reasonably related to "legitimate pedagogical concerns." ER 21.

Again, the State's interpretation of the provision undercuts this analysis. Huppenthal and the ALJ found the MAS program violated the provision because some classes in that program included particular books that were perceived as being too focused on "ethnic solidarity." Yet they paid no regard to whether the class also advocated for individual treatment of persons. Thus, the limiting language does not cure the overbreadth the district court recognized. For example, Superintendent Huppenthal cited the following as an exemplar of text that violates the statute: "Since then Raza resistance has never died and that is the message of this book. ... We saw that the enemy wasn't simply the gringo but a system that dictated how U.S. society should be organized. Capitalismo, imperialism, socialism ... racism." ER 1103 (alterations in original).

But if permitted works can address ethnic identity only if they advocate individualism "instead of" ethnic identity, then teachers will necessarily avoid books that present ethnic identity because of the risk that they will trigger the penalties. Thus, a teacher would likely believe that the *Autobiography of Malcolm X* is prohibited since there, the author wrote, "I reflected many, many times to myself upon how the American Negro has been entirely brainwashed from ever

seeing or thinking of himself, as he should, as a part of the nonwhite peoples of the world." Malcom X, *The Autobiography of Malcom X As Told To Alex Haley* 352 (Random House 1999) (1964). Similarly, Chinua Achebe's *Things Fall Apart* is praised for telling the story of colonialism from the perspective of Africans. Yet it is critical of the destruction of tribal culture that occurred after Europeans occupied Africa. Is that book prohibited if it does not advocate the treatment of people as individuals *instead of* ethnic solidarity?

Even assigning Martin Luther King, Jr.'s "Letter from a Birmingham Jail" could risk sanction since Dr. King expresses frustration at the inaction of moderate whites:

> I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Counciler or the Ku Klux Klanner, but the white moderate, who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says: "I agree with you in the goal you seek, but I cannot agree with your methods of direct action"; who paternalistically believes he can set the timetable for another man's freedom ....

Martin Luther King, Jr., Letter From a Birmingham Jail (Apr. 16, 1963), *available at* http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

Do these materials discussed above "advocate ethnic solidarity" instead of individualism because they reflect that strength can come from such solidarity? If not, how would a teacher distinguish them from the materials Huppenthal found

violated the provision? Because teachers will not be able to tell what materials and curriculum will be sufficiently individualistic and which focus too much on "ethnic solidarity," they are likely to avoid materials altogether that relate to ethnic solidarity, thus accomplishing the very end that the District Court noted would be unconstitutional.

The point, of course, is not that Dr. King – or any of the other authors discussed above – actually *did* advocate for ethnic solidarity, promote resentment against a race, promote the overthrow of the government, or write primarily for a specific ethnic group. The point is that these books illuminate both the strengths of solidarity and the weaknesses of insularity and separation. Yet in light of materials Arizona has declared forbidden under the statute, teachers cannot know what materials risk a similar finding, and they will therefore avoid materials raising these themes at all. They will be forced to teach about the civil rights movement, Jim Crow, the revolutionary war, slavery, colonization, and Manifest Destiny while trying to avoid the risk that a single book or poem addressing the ethnic and racial history bound up in our country's history could be quoted out of context and declared in violation of the law.[11]

[11] Nor would a State's assurance that it would not use the statute unreasonably remedy the overbreadth. This Court must "not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480.

D. The Narrowing Provisions Cannot Save the Statute from this Overbreadth.

Although subsections (E) and (F) of the statute appear designed to narrow the scope of the law, they neither narrow its scope nor alleviate its chill. Both the text and application of the statute demonstrate that even instruction that appears to fall within the language of these narrowing clauses can violate the statute.

First, subsection (E)(3) is a circular provision that states that "[c]ourses or classes that include the history of any ethnic group and that are open to all students" are not restricted "*unless the course or class violates subsection A.*" Ariz. Rev. Stat. § 15-112(E)(3) (emphasis added). In other words, anything that would be illegal under subsection (A) is still illegal under subsection (E)(3). This savings provision saves nothing. If material used in a class could fall within one of the forbidden subject areas, the fact that the class includes ethnic history and is open to all students is entirely irrelevant and provides no safe harbor.

Similarly, while the statute purports not to reach "[c]ourses or classes that include the discussion of controversial aspects of history," *id.* § 15-112(E)(4), or "the historical oppression of a particular group of people," *id.* § 15-112(F), the statute clearly *does* reach those courses since nothing in the saving clause provides a safe harbor for teaching those subjects if the materials or classes are found to

violate subsection (A).[12] And it is clear that the context of a class will not "save" particular materials. To the contrary, the Administrative Law Judge found, and Superintendent Huppenthal adopted the conclusion, that as to the materials at issue, there was "*no way to use the materials* without being in violation of the law." ER 1146 (emphasis added). In other words, under the State's interpretation, the context in which a book is taught is irrelevant for purposes of § 15-112. In short, the exceptions provisions of the statute provide no "exceptions" at all. *Cf. Stevens*, 559 U.S. at 479 (holding that exceptions clause did not save overbroad statute because "[t]here is simply no adequate reading of the exceptions clause that results in the statute's banning only the depictions the Government would like to ban").

Thus, the exceptions will not alleviate teachers' legitimate fear. They create no safe harbor that will allow teachers to use materials in the classroom that address the forbidden issues, without fear of incurring the significant penalties.

Under § 15-112, classroom instruction and students' access to information on topics that the State has asserted no legitimate pedagogical interest in restricting will be substantially restricted. Students' exposure to important but painful parts of history, the voices of the oppressed, and the writings of controversial figures will be squeezed out of the classroom – even if these subjects are discussed in a

[12] Indeed, one of the reasons the MAS program was found to violate the statute was that a book spoke of oppression from the perspective of the oppressed group. ER 1090.

manner that *does* teach students "to treat and value each other as individuals" and not "to resent or hate other races or classes of people," Ariz. Rev. Stat. § 15-111. The statute must be ruled unconstitutionally overbroad.

CONCLUSION

For the foregoing reasons, Arizona Revised Statute § 15-112 violates the First Amendment.

Respectfully Submitted,

s/ David A Handzo
David A. Handzo
Julie M. Carpenter
Elizabeth C. Bullock
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6,985 words, constituting less than or equal to one-half of the maximum length authorized by the rules for a party's principal briefing, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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s/ David A Handzo
David A. Handzo
Attorney for Amici
November 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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.

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s/ David A Handzo
David A. Handzo
Attorney for Amici
November 25, 2013