

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, Superintendent for Public Instruction, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Arizona, Judge
A. Wallace Tashima (Case No. CV-10-623-TUC-AWT)

**BRIEF OF AUTHORS RODOLFO ACUÑA, BILL BIGELOW,
RICHARD DELGADO, AND JEAN STEFANCIC AS AMICI CURIAE IN
SUPPORT OF APPELLANTS**

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INTERESTS OF AMICI CURIAE¹

Amici curiae Rodolfo Acuña, Bill Bigelow, Richard Delgado, and Jean Stefancic are authors and editors of three of the seven books physically removed from Mexican American Studies (MAS) program classrooms in the Tucson Unified School District (TUSD) in Tucson, Arizona.

Dr. Rodolfo Acuña is a leading professor and historian of Chicana/o studies at California State University Northridge. He is the author of 20 books, 32 academic articles and book chapters, and nearly 200 opinion pieces. A three-time winner of the Gustavus Myers Award for outstanding book on race relations in North America, Acuña is also a recipient of the National Hispanic Institute Lifetime Achievement Award and the National Association of Chicana and Chicano Studies Distinguished Scholar Award.

Bill Bigelow taught high school in Portland, Oregon for almost 30 years. He is the curriculum editor of the education reform journal, *Rethinking Schools*, and the author or co-editor of numerous books on teaching and learning used as textbooks in classrooms across the country. He is co-director of the Zinn

¹ All parties have consented to the filing of this amici curiae brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, or their counsel made a monetary contribution to the preparation or submission of this brief.

Education Project, which provides resources on teaching history to teachers throughout the United States.

Richard Delgado is a professor and the John J. Sparkman Chair of Law at the University of Alabama School of Law. Author of over 150 journal articles and more than 25 books, Delgado's work has been praised and reviewed in the *New York Times*, *Washington Post*, *Wall Street Journal*, *The New Republic*, and *The Nation*. His books have won eight national book prizes, including six Gustavus Myers Awards for outstanding book on human rights in North America, the American Library Association's Outstanding Academic Book, and a Pulitzer Prize nomination.

Jean Stefancic is a professor and Clement Research Affiliate at the University of Alabama School of Law. Her writing, which focuses on law reform, social change, and legal scholarship, includes over 40 articles and 12 books, some co-authored with Richard Delgado. Stefancic previously spent ten years at the University of Colorado Law School where she was affiliated with the Latino/a Research and Policy Center and served on the advisory committee of the Center of the American West.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Arizona's finding that the Mexican American Studies (MAS) program in the Tucson Unified School District (TUSD) promoted racial resentment, in violation of Arizona Revised Statute § 15-112, has far-reaching consequences. This brief focuses on one such consequence: following the State's decision, at least seven books that the State deemed "racist propaganda" were physically removed from TUSD MAS classrooms. These books, several of which were authored by amici, include: *Critical Race Theory: An Introduction*, by Richard Delgado and Jean Stefancic; *Occupied America*, by Rodolfo Acuña; *Rethinking Columbus: The Next 500 Years*, edited by Bill Bigelow and Bob Peterson; *Message to Aztlán: Selected Writings of Rodolfo "Corky" Gonzales*, edited by Antonio Esquibel; *Chicano!: The History of the Mexican American Civil Rights Movement*, by F. Arturo Rosales; and *500 Años del Pueblo Chicano (500 Years of Chicano History) in Pictures*, edited by Elizabeth Martínez.²

² On October 22, 2013, a sharply divided TUSD Governing Board approved the use of these books as supplemental materials by a vote of three to two. See Tucson Unified Sch. Dist. Governing Bd., Agenda for Regular Bd. Meeting (Oct. 22, 2013), available at <http://www.tusd.k12.az.us/contents/govboard/actions/10-22-13R.pdf>; Alexis Huicochea, *TUSD's Revised Book Policy Draws State Concern*, Ariz. Daily Star, Oct. 24, 2013, available at http://azstarnet.com/news/local/education/tusd-s-revised-book-policy-draws-state-concern/article_1c78100b-5bac-5ece-aaf8-6ca93a2a2d0c.html. The State nevertheless has not altered its finding that TUSD's MAS program violates A.R.S. § 15-112.

The First Amendment protects every author's ability to characterize and comment on controversial subjects and events. Indeed, our democracy is founded on the idea that free discussion tends to produce the best policies and civic solutions. By banning books from public school classrooms, the State has sent a speech-chilling message to academic authors: stop writing about socially pressing topics.

Amici's books and others like them are vital to public discourse and debate, both in society at large and in the classroom. They are particularly vital in connection with low-income and otherwise underprivileged students. Research shows that many students of color and low income struggle academically when they cannot identify with course materials. It is well documented that "mainstream" textbooks primarily present material from the perspective of white, middle-class Americans. By featuring some of the long overlooked voices of non-white Americans, amici's books present a vibrant, more detailed picture of American history, culture, and society.

The State distorts what these books say and the propositions for which they stand. The State lifts words, sentences, and passages out of context in order to characterize these works as racist propaganda. Yet read in context, amici's works and others included in the MAS curriculum are anything but such propaganda. These books are essential tools for engaging students, conveying academic content,

and encouraging critical thinking. In any event, the First Amendment protects all viewpoints.

Using amici's books and others, the MAS program and ethnic studies programs across the country have helped students who struggle the most. For students in these programs, test scores, graduation rates, and college attendance rates all improve, and not just for students of color and low income.

Arizona's public schools have a long, documented history of failure in educating Mexican-American youth in particular. The issue in this case is not about who is to blame for that failure; it concerns one solution to that problem. The MAS program began to change this narrative of failure. Amici urge the Court to reverse the portion of the district court's decision in this case granting summary judgment to defendants-appellees.

ARGUMENT

I. PROTECTING AUTHORS' FREEDOM OF EXPRESSION IS ESSENTIAL TO PROTECT FREE THOUGHT AND OPEN EXCHANGE OF IDEAS

A. Amici's And Other Authors' Books Used In The MAS Curriculum Promote Racial And Educational Equality

The record in this case is replete with out-of-context fragments, excerpts, and intentionally omitted text through the use of ellipses from the books used in the MAS curriculum. To make the case that these books are either unsuitable for children or, worse yet, designed to foment ethnic division, the State has cherry-

picked and isolated quotations in order to characterize the books as “racist propaganda.” ER 2191.

The State, for example, contends that *Rethinking Columbus* fosters racial resentment based on two sentences that articulate Native Americans’ frustration:

<p>Rethinking Columbus: The Next 500 Years, Interview with Suzan Shown Harjo, p.12</p>	<p>“As Native American peoples in this red quarter of Mother Earth, we have no reason to celebrate an invasion that caused the demise of so many of our people and is still causing destruction today. The Europeans stole our land and killed our people.”</p>
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ER 1080.

And the State distorts historical speeches in *Message to Aztlán* and introductory text in *500 Years of Chicano History in Pictures* by omitting sentences and sometimes whole paragraphs:

<p>Message to AZTLAN – Rodolfo Corky Gonzales</p>	<p>“We demand that from kindergarten through college, Spanish be the first language and the textbooks be rewritten to emphasize the heritage and the contributions of the Mexican American or Indio-Hispano in the building of the Southwest... We demand that not only the land which is our ancestral right, be given back to these pueblos, but also restitution for mineral, natural resources , grazing and timber used.” Pg 32-34</p>
	<p>“The great white father is theirs, not ours; he belongs to that side of the Mississippi River. He was a cheater, and the new book on the bookkeeping system of George Washington proves that he gained 30 pounds while his soldiers were freezing at Valley Forge... Then evaluate that this part of Mexico, Aztlan, was taken in an aggressive war of expansionism even worse than the war in Vietnam.” Pg 37</p>

<p>500 Years of Chicano History in Pictures – edited by Elizabeth Martinez p. iii</p>	<p>“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.”</p>
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ER 1081-1082.

Indeed, TUSD even determined that William Shakespeare’s *The Tempest*—which discusses race and colonialism—could not be used in MAS classes. See Jeff

Biggers, *Who's Afraid of "The Tempest"?*, Salon (Jan. 13, 2012).³ The banning of *The Tempest* demonstrates that almost any text, when taken out of context, can be characterized as supporting an improper purpose. Here, however, the banned books helped to serve important pedagogical objectives—engaging students, encouraging critical thinking, and promoting leadership skills.

1. Critical Race Theory: An Introduction, by Richard Delgado and Jean Stefancic

In *Critical Race Theory*, professors Delgado and Stefancic offer a concise introduction to the field of critical race theory. As the amici authors explain: “The critical race theory (CRT) movement is a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power.” Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* 3 (2d ed. 2012). While “[t]he movement considers many of the same issues” as conventional civil rights, it “places them in a broader perspective that includes economics, history, context, group- and self-interest, and even feelings and the unconscious.” *Id.* This movement stems, in part, from an awareness that “[p]eople of different races have radically different experiences as they go through life.” *Id.* at 47. Critical race theory seeks to change that. *See id.* at 7.

³ http://www.salon.com/2012/01/13/whos_afraid_of_the_tempest/.

The State miscomprehends *Critical Race Theory*. It criticizes amici for stating that “[r]acism is ordinary, not aberrational.” ER 1068 (quoting Delgado & Stefancic, *supra*, at 7). But the notion that racism is “the common, everyday experience of most people of color in this country” is not even rhetoric, it is a well-supported reality. Delgado & Stefancic, *supra*, at 7; *id.* at 11-12 (“Studies show that blacks and Latinos who seek loans, apartments, or jobs are much more apt than similarly qualified whites to suffer rejections, often for vague or spurious reasons. . . . People of color lead shorter lives, receive worse medical care, complete fewer years of school, and occupy more menial jobs than do whites.”).

The State nonetheless insists that schools should eschew critical discussions of race and simply teach students “that this *is* the land of opportunity, and that if they work hard they can achieve their goals.” ER 2189 (emphasis in original). The State also abridges Delgado’s and Stefancic’s introductory explanation of critical race theory in favor of a focus only on the movement’s “activist dimension.” *E.g.*, ER 1068, 2191. But what the State fails to mention is that the “activism” of critical race theory simply (1) acknowledges that racism is a continuing problem and (2) works to change that. Delgado & Stefancic, *supra*, at 7 (“[C]ritical race theory contains an activist dimension. It tries not only to understand our social situation but to change it; it sets out not only to ascertain how

society organizes itself along racial lines and hierarchies but to transform it for the better.”).

Moreover, the State misleadingly quotes language from MAS course materials and attributes it to Delgado without explaining its source:

Vocabulary List # 2: Inequality of Language Theory. Richard Delgado - The Official English Movement and/ or English Only Movement are sending messages, both symbolic and real, to minority groups that their language is unofficial, devalued, even illegal in certain settings. English-only laws contract the circle of who is afforded full citizenship rights. If you are white, English speaking and your ancestors came from the right region of the world, all the equality amendments and civil rights statutes apply to you. If you are of a different hue or origin and/ or prefer to speak a language other than English, you cannot insist on equal treatment or equal protection of the law.

ER 1078. The so-called “Inequality of Language Theory” cited by the State and relied on by the Administrative Law Judge is not found in *Critical Race Theory*.

ER 1144, ¶ 180. Rather, the cited language comes from a fictional character named Rodrigo whom Delgado invented in a series of articles first published in the 1990s. See Richard Delgado, *Rodrigo’s Bookbag: Brimelow, Bork, Herrnstein, Murray, and D’Souza—Recent Conservative Thought and the End of Equality*, 50 Stan. L. Rev. 1929, 1954-1955 (1998). More specifically, it comes from a conversation about various mechanisms of inequality that takes place between Rodrigo and two other fictional characters.⁴ Through dialogue, the characters

⁴ “‘Well, yes,’ Rodrigo said. ‘I call the final mechanism inequality of language. The Official English movement is sending messages, both symbolic and (Footnote continues on next page.)

explain English-only laws and discuss their impact on speakers of other languages.

Id. Thus, this particular alleged example of “racist propaganda” is in fact a multi-faceted, scholarly discussion about the intersection of race and linguistics.

Indeed, if anything, Delgado’s views on English-only laws proved correct. The Supreme Court of Arizona struck down Arizona’s English-only amendment in *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998). There, the state supreme court explained that “the American tradition of tolerance ‘recognizes a critical difference between

(Footnote continued from previous page.)

real, to minority groups that their language is unofficial, devalued, even illegal in certain settings. In certain states, you must speak English to vote, get a job, or take a civil service examination.’

‘Juan Perea describes one case where such laws contributed to a person’s death,’ Giannina noted. ‘He called it “Death by English.”’

‘Very appropriate. Like the other measures, English-only laws contract the circle of who is afforded full citizenship rights. If you are white, English speaking, and your ancestors came from the right region of the world, all the equality amendments and civil rights statutes apply to you.’

‘The person who needs them least,’ I observed sardonically.

‘And if you’re of a different hue or origin or prefer to speak a different language, you can’t insist on equal treatment. You can only be as obsequious as possible and try to convince the surrounding society you’re worthy of their company. Defy assimilation, hold on to your language, and you’ll have few defenders. All the laws will be arrayed against you.’

‘How do you suppose the English Only people rationalize that?’ Giannina mused. . . .

‘It sounds strange,’ I said. ‘But in a warped way it makes sense. If your only reference point is English speaking ability, then forcing those who speak another language to conform to English-only laws will look like equality to you. You take persons who are outside that circle and move them inside. There, everyone’s equal. Nice and neat. Outside, they’re not full persons. Inside, they are. So you’re really doing them a tremendous favor.’” Delgado, *supra*, at 1954-1955.

encouraging the use of English and repressing the use of other languages.” *Id.* at 991 (quoting *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 923 (9th Cir. 1995)). Nothing is divisive about urging tolerance for the speaking of diverse languages, nor is speaking them calculated to produce racial resentment. Numerous studies in fact show that multilingualism is an asset in the job market, the world, and to the human personality. *E.g.*, Peeter Mehisto & David Marsh, *Approaching the Economic, Cognitive and Health Benefits of Bilingualism: Fuel for CLIL*, in *Content and Foreign Language Integrated Learning: Contributions to Multilingualism in European Contexts* (Ruiz de Zarobe et al. eds., 2011).

2. *Occupied America, by Rodolfo Acuña*

Occupied America is a comprehensive history of the Americas stretching from pre-Mayan times to present day. *See* Rodolfo Acuña, *Occupied America: A History of Chicanos* (7th ed. 2011). This highly regarded text was first published more than 40 years ago. *Id.* at xv. Its success stems from its presentation—unlike mainstream Eurocentric history texts—of historical facts, documents, and narratives from Chicana/o perspectives. *See id.* at xvii-xviii. “The object” of the text is for students “to understand the historical process,” to “question the process,” and to ask “[w]hat is behind the story.” *Id.* at xvi.

The State criticizes *Occupied America* for its historical discussion of Chicana/o civil rights activist José Angel Gutiérrez. *E.g.*, ER 2189. Gutiérrez was

a founding member of both the Mexican American Youth Organization (MAYO) in 1967 and La Raza Unida Party in 1969. Acuña, *supra*, at 290. Among other things, Gutiérrez “protested inequality, poverty, and police brutality throughout Texas.” *Id.* at 306. At the age of 24, Gutiérrez “gave vent to his anger with the gringo establishment at a press conference.” *Id.* In a now well-known speech, he “called upon Chicanos to ‘Kill the gringo.’” *Id.* *Occupied America* explains that Gutiérrez “meant that the white rule of Mexicans should end . . . not literally killing the white people.” *Id.* The State, however, dismisses Acuña’s explanation of Gutiérrez’s speech, arguing that “[t]he textbook’s translation of what Gutiérrez meant contradicts his clear language.” ER 2189. In reality, *Occupied America* provides further context for Gutiérrez’s statement, using a Chicana/o lens to explain historical Texan culture: “Gutiérrez was a product of Texas culture—a Confederate state with a tradition of southern racism and historical exclusion of Mexican Americans.” Acuña, *supra*, at 306.

3. *Rethinking Columbus: The Next 500 Years, Edited by Bill Bigelow & Bob Peterson*

Rethinking Columbus is a collection of interviews, poetry, analysis, and stories compiled to teach students about the impact of Columbus’s arrival in the Americas from native perspectives. *Rethinking Columbus: The Next 500 Years* (Bill Bigelow & Bob Peterson eds., 2d ed. 1998). The editors explain: “Both the words and images of the Columbus myth,” as traditionally told, “implicitly tell

children that it is acceptable for one group of heavily-armed, white people from a ‘civilized’ country to claim and control the lands of distant non-white *others*.” *Id.* at 10 (emphasis in original). In contrast, *Rethinking Columbus* “encourage[s] a deeper understanding of the European invasion’s consequences” while “honor[ing] the rich legacy of resistance to the injustices it created.” *Id.* at 11.

Nonetheless, the State maintains that *Rethinking Columbus* fosters racial resentment. As evidence, the State cites a single quotation from an interview with Suzan Shown Harjo—the first interview in the book. ER 1080. Shown Harjo, who is Cheyenne and Creek, is an indigenous peoples’ rights advocate. When asked why she does not focus on the “positive aspects of [Columbus’s] legacy,” Shown Harjo articulates her personal view:

"As Native American peoples in this red quarter of Mother Earth, we have no reason to celebrate an invasion that caused the demise of so many of our people and is still causing destruction today. The Europeans stole our land and killed our people."

ER 1080 (quoting Bigelow & Peterson, *supra*, at 12). The State quotes these two sentences (which by themselves hardly justify banning a book), while ignoring the larger context of the interview. *See id.*

Shown Harjo explains: “For people who are in survival mode, it’s very difficult to look at the positive aspects of death and destruction, especially when it is carried through to our present.” Bigelow & Peterson, *supra*, at 12. The “truth”

about Columbus, she says, is that his “story is a very complex history.” *Id.* at 13. “Too often, this history is posed as romantic myth, and the uncomfortable facts about Columbus are eliminated.” *Id.* “Explaining the unpleasant truths about Columbus,” Shown Harjo explains, gives the Columbus story “more dimension” and “makes it easier for kids in school to accept not only Columbus but other things.” *Id.* *Rethinking Columbus* allows students to consider these “unpleasant truths” and, in so doing, to engage with complex historical concepts.

4. *Pedagogy of the Oppressed, by Paulo Freire*

Brazilian educator and philosopher Paulo Freire first published *Pedagogy of the Oppressed* in 1970. Paulo Freire, *Pedagogy of the Oppressed* 9 (Myra Bergman Ramos trans., 30th anniversary ed. 2008). More than 30 years later, this seminal work has sold over 750,000 copies worldwide. “[T]he underlying message” of *Pedagogy of the Oppressed*, its publisher notes, is that “[a] new underclass has been created, and it is everyone’s responsibility to react thoughtfully and positively to the situation.” *Id.* As MAS instructors taught their students, “the essence of th[is] book is about humanity—about creating stronger humanity, greater humanity.” Precious Knowledge at 32:17-32:55 (Dos Vatos Productions 2011). Freire defines oppression as dehumanization, which he recognizes “as an historical reality.” Freire, *supra*, at 43. “The struggle for humanization” is the struggle “for the emancipation of labor, for the overcoming of

alienation, [and] for the affirmation of men and women as persons.” *Id.* at 44. In Freire’s mind, “the great humanistic and historical task of the oppressed [is] to liberate themselves and their oppressors as well.” *Id.*

The State repeatedly draws attention to the words “oppressed” and “oppression.” *E.g.*, ER 1071-1072, 2195. But the State never explains how those words make Freire’s work one that fosters racial resentment. *See* ER 1071-1072, 2195. To the contrary, throughout *Pedagogy of the Oppressed*, Freire focuses on the importance of “[c]ritical and liberating dialogue.” Freire, *supra*, at 65. In context, Freire’s work is about dialogue—not resentment, not violence, and not hate. *See id.* When Freire writes of “liberation” and “revolution,” he writes of people engaging with one another through dialogue to foster understanding, equality, and representative government. *See id.* at 65-66.

5. *Message to Aztlán: Selected Writings of Rodolfo “Corky” Gonzales, Edited by Antonio Esquibel*

Rodolfo “Corky” Gonzales was one of the most important and controversial figures in the Chicano Movement. *See* *Message to Aztlán: Selected Writings of Rodolfo “Corky” Gonzales* xv (2001). *Message to Aztlán* collects some of his speeches, plays, poetry, and correspondence from the 1960s and 1970s for study and reflection. These works are a product of their times. As Gonzales himself points out in the book’s preface, he wrote the pieces “during the height of the Chicano Movement.” *Id.* at ix. These pieces “capture [his] ideas, thoughts, and

feelings during that era.” *Id.* at ix-x. They are, in short, period pieces. Indeed, as the book’s editor’s note explains, “in retrospect much of [Gonzales’s] work and thinking seems politically outmoded, rhetorically excessive, and even naïve.” *Id.* at xvi. But “Gonzales’[s] comprehension of growing structural inequality in America—and especially its impacts on the outlook of inner-city minority youth—is perhaps as relevant and compelling today as when he first came forward, over thirty years ago.” *Id.*

The State focuses only on Gonzales’s rhetoric, as though the book expressly encourages students to adopt his historical views today. *E.g.*, ER 1069-1070, 1081. It does not. Rather, by presenting Gonzales’s work in historical context, *Message to Aztlán* helps students understand an important but often overlooked period in American history. Gonzales’s writings are widely read, studied, and analyzed in history and ethnic studies courses around the nation. Far from encouraging racial resentment, they foster thoughtful analysis, insight, and cross-cultural understanding.

6. *Chicano!: The History of the Mexican American Civil Rights Movement, by F. Arturo Rosales*

Chicano! presents a comprehensive history of the Mexican American civil rights movement. F. Arturo Rosales, *Chicano!: The History of the Mexican American Civil Rights Movement* (2d rev. ed. 1997). “Mexican Americans and other minorities in this country—‘new immigrants’ (eastern and southern

Europeans), Native Americans, Puerto Ricans and women—have . . . had to struggle to obtain the lofty ideals of equality that were so eloquently put forth by the Constitution’s framers.” *Id.* at xx-xxi. *Chicano!* explores “the conditions that led to the inequality of Mexican Americans” and the ways in which “Mexican Americans have joined in the struggle” for equality. *Id.* at xxi. The State appears to suggest that because *Chicano!* focuses on one historical ethnic movement and discusses “racial animosity” in historical context, it therefore must promote racial resentment. *See, e.g.*, ER 1071. But empirical research shows that teaching about racism and challenges to it actually *reduces* racism among students. *See* Christine E. Sleeter, National Education Association, *The Academic and Social Value of Ethnic Studies: A Research Review* 16 (2011).⁵

7. *500 Años del Pueblo Chicano (500 Years of Chicano History) in Pictures, Edited by Elizabeth Martínez*

500 Years of Chicano History in Pictures presents powerful visuals of American history from seldom-seen Chicana/o perspectives. *See* *500 Años del Pueblo Chicano (500 Years of Chicano History) in Pictures* (Elizabeth Martínez ed., 1991). These photographs and illustrations, accompanied by text in Spanish and English, bring history to life for students and invite them to engage with the subjects’ historical perspectives. *See id.* The State attacks the book’s introduction

⁵ <http://www.nea.org/assets/docs/NBI-2010-3-value-of-ethnic-studies.pdf>.

and its perspective on colonization, violence, and immigration. For example, the State draws attention to the book's characterization of "Columbus's arrival and its lies" and "the Bicentennial celebration of the 1776 American Revolution and its lies" by selectively quoting Martínez's introduction:

"This book is published now in response to the Quin-centennial celebration of Columbus's arrival and its lies...the Bicentennial celebration of the 1776 American Revolution and its lies...we offer a book that tells the real story of La Raza and other truths so long denied." Pg.i

ER 1068. The State fails to mention that Martínez explicitly defines these lies: "[F]ive centuries ago our homeland was not 'discovered' by Columbus. Westerners did not bring 'civilization' to our ancestors, as we are told. Europe did not introduce so-called savages to 'freedom' and 'democracy.'" Martínez, *supra*, at i. While the book encourages re-evaluation of Columbus's arrival in the Americas and its consequences, it also celebrates the story of Chicana/os' progress "and all of humanity's great stories of struggle." *Id.* But the State once again dismisses frank discussions of racism in historical or present day contexts, assuming contrary to evidence that it is better for students not to study such things.

B. The First Amendment Protects All Viewpoints Including Amici's

The State's assessment of amici's books sets dangerous precedent, particularly if implicitly sustained by this Court. Amici's books, and others like them, are essential to the free trade in ideas at the heart of American civic and

political discourse. *See Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“The vitality of civil and political institutions in our society depends on free discussion.”) They introduce students to viewpoints seldom considered inside school walls. *See, e.g., Bigelow & Peterson, supra*, at 11 (providing “a forum for native people to tell some of their side of the [Columbus] encounter”). These books are not propaganda, nor are they un-American. The First Amendment reflects the understanding that the best ideas not only survive, but thrive when a society is free to voice and consider a multitude of viewpoints. *See, e.g., Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market”); John Milton, *Areopagitica* 174-175 (1819) (“Let [Truth] and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter?”). “The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if” enlightenment was to prevail over ignorance. *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943). That amici and other authors re-examine conventional teachings is far from reason to keep their books out of students’ hands.

This Court has recognized that the First Amendment safeguards an author’s ability to write about controversial subjects and events. *Partington v. Bugliosi*, 56

F.3d 1147, 1154 (9th Cir. 1995). Such protection guarantees authors freedom to examine “ambiguities and disputed facts” from their “personal perspective” and, in so doing, to invite their readers to do the same. *Id.*; see also *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991) (the First Amendment allows “an author the interpretive license that is necessary when relying upon ambiguous sources”); *Moldea v. New York Times Co.*, 22 F.3d 310, 315 (D.C. Cir. 1994) (the First Amendment requires latitude for interpretation “when a writer is evaluating or giving an account of inherently ambiguous materials or subject matter”). This includes amici and other authors who write from racial and ethnic perspectives—often relying on their own experiences or from perspectives that may not always reflect the mainstream.

The First Amendment does not dissolve at the schoolhouse door. Rather, “the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.” *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982). States cannot declare books “unsuitable” for public consumption simply because they challenge conventional wisdom. And “State[s] may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.” *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Removing amici’s books from Arizona classrooms does just that. Not

only does it limit the information immediately available to Arizona students, it also may deter authors from communicating future information to anyone at all. Already, as a result of the State's actions, writers included in *Rethinking Columbus* report that their professional reputations have been tarnished. Fear of the personal and professional consequences of public censorship can lead authors "to write with more restrained pens," *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting), or to avoid controversial subjects like race altogether. Such caution serves neither our schools nor our democratic model of governance: it undermines free discussion and hinders the development and flow of new ideas. Arizona may not sanitize its curricula by censoring amici's and others' viewpoints.

II. BOOKS ARE VITAL TO ETHNIC STUDIES PROGRAMS LIKE MAS, WHICH INSPIRE STUDENTS, EXPOSE THEM TO NEW IDEAS, AND FOSTER CRITICAL THINKING

A. Ethnic Studies Programs Use Amici's Books And Others Like Them To Motivate And Engage Students

Ethnic studies programs—like the MAS course of study in Tucson—aim to fill a gap in the American education system, and authors are crucial to achieving that goal. "Ethnic studies seeks to recover and reconstruct the histories of those Americans whom history has neglected; to identify and credit their contributions to the making of U.S. society and culture" and to "achieve comparable educational outcomes for all" students. Evelyn Hu-DeHart, *The History, Development, and Future of Ethnic Studies*, 75 Phi Delta Kappan 50, 51-52 (1993). In furtherance of

these goals, ethnic studies curricula “focus[] on the central roles that race and ethnicity play in the construction of American history, culture, and society.” *Id.* at 52. Books—like amici’s—that discuss race and ethnicity in historical context are therefore essential to teaching ethnic studies.

Amici’s books and those of other authors used in the MAS curriculum are necessary to the success of ethnic studies programs. More than 40 years after the ethnic studies movement first began, mainstream curricula and textbooks continue to present primarily Eurocentric worldviews. Sleeter, *supra*, at 1-3. Recent studies show that in conventional K-12 textbooks, whites routinely “receive the most attention,” “appear in the widest variety of roles,” and “dominat[e] story lines and lists of accomplishments.” *Id.* at 2. “[M]inority groups,” on the other hand, “appear only in relationship to white society. Blacks serve as slaves, Indians appear fighting soldiers, Chicanos boycott fruit growers, and Chinese immigrants construct railroads.” Stuart J. Foster, *The Struggle for American Identity: Treatment of Ethnic Groups in United States History Textbooks*, 28 *History of Educ.* 251, 271 (1999). These structural narratives “underscore the conviction that the experiences of ethnic groups are only important in so far as they contribute to the larger story of an American history dominated by white society.” *Id.*

Moreover, traditional textbooks fail to address ongoing issues such as racism, immigration, and poverty in meaningful ways. With regard to race,

“[t]exts say little to nothing about contemporary race relations, racism, or racial issues.” Sleeter, *supra*, at 2 (citing Richard L. Hughes, *A Hint of Whiteness: History Textbooks and Social Construction of Race in the Wake of the Sixties*, Soc. Studies, Sept.-Oct. 2007, at 201-207). If anything, texts offer a “sanitiz[ed]” story of race and racism in America: “we used to have slavery, now we do not; lynchings used to occur, now they do not; schools used to be segregated, now they are not.” *Id.*; Foster, *supra*, at 269. But this simplified narrative excludes “any serious discussion of the intense struggle for equality from the perspective of the oppressed,” the people long treated as inferior who challenged our nation to change. Foster, *supra*, at 269. The topic of immigration fares no better in traditional textbooks. Studies show that “[i]mmigration is represented as a distinct historical period that happened mainly in the Northeast, rather than as an ongoing phenomenon.” Sleeter, *supra*, at 2 (citing Diane Vecchio, *Immigrant and Ethnic History in the United States Survey*, *History Teacher*, Aug. 2004, at 494-500). The reality is that more than 10 million people immigrated to the United States between 2000 and 2009 alone, three-quarters of them from Asia or Latin America. Department of Homeland Sec., Office of Immigration Statistics, 2011 Yearbook of Immigration Statistics 10 (2012).⁶ Likewise, while some textbooks acknowledge

⁶ http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

that poverty has played a role in the American story, “[w]hat is strikingly absent . . . is any discussion of how people come to be poor” or “why individuals from minority populations are disproportionately poor.” Foster, *supra*, at 268.

These exclusions and omissions do nothing to prevent poor educational outcomes, particularly for students of color and low-income students. As textbooks and curricula continue to eschew their experiences and perspectives, students of color tend to “disengage from academic learning.” Sleeter, *supra*, at vii. This is in part because “they view the Eurocentric curriculum as remote from their daily experiences with racism, poverty, and struggle.” James A. Banks, *Cultural Diversity and Education: Foundations, Curriculum, and Teaching* 208 (5th ed. 2006); Donna Y. Ford & J. John Harris III, *A Framework for Infusing Multicultural Curriculum into Gifted Education*, *Roeper Rev.*, Sept. 2000, at 4 (“[L]ack of educational relevance can decrease student motivation and interest in school.”). Several studies, including one by the National Research Council and the Institute of Medicine, recognize that for students to engage with learning, curricula must be “relevant to adolescents’ experiences, cultures, and long-term goals.” National Research Council & Inst. of Med., *Comm. on Increasing High Sch. Students’ Engagement and Motivation to Learn, Engaging Schools: Fostering High School Students’ Motivation to Learn* 3 (2003); Sleeter, *supra*, at 9 (reporting research concluding “that literature with which racial and ethnic minority students

can identify engages them in the process of reading and writing”); Ford & Harris, *supra*, at 4 (study of black students in grades 6 through 9 found that 87 percent reported feeling “more interested in school when we learn about Black people”). Traditional curricula using traditional books “fail to help students of color and low-income students develop a sense of empowerment and efficacy or the motivation to learn.” Banks, *supra*, at 208.

But unlike traditional textbooks, amici’s books are relevant to the experiences and cultures of students of color and low income. Read in context, these books lead students to a more complete and therefore more accurate understanding of American history, culture, and society—one that includes Americans of color and other historically marginalized groups.

B. Ethnic Studies Curricula Correlate With Student Success

Education experts around the country have found that ethnic studies courses correlate positively with increased student engagement, higher test scores, and improved graduation and college attendance rates. *See, e.g.,* Sleeter, *supra* (reviewing research on benefits of ethnic studies curricula). Research shows that ethnic studies curricula, “when designed to help students grapple with multiple perspectives, produce[] higher levels of thinking.” *Id.* at 19. Moreover, lessons that teach “about racism and successful challenges to it improve racial attitudes among [w]hite children, allowing them to see how racism affects everybody and

offering them a vision for addressing it.” *Id.* at 16 (citing Julie M. Hughes et al., *Consequences of Learning About Historical Racism Among European American and African American Children*, 78 *Child Development* 1689 (2007)). Amici’s books and others like them are crucial to such lessons: they not only discuss racism in a realistic way but also offer insight from the people who have experienced it and pushed back.

The State turns the problem of racism on its head. Contrary to research, the State argues that the statute under which MAS was eliminated is reasonably related to reducing racism in schools. ER 15-16. The opposite is true. Ethnic studies programs not only reduce racism, they also improve educational outcomes for students of all racial, ethnic, and socioeconomic backgrounds.

Without ethnic studies courses, students of color across the nation score lower on standardized tests, graduate high school less often, and attend college less frequently than their white peers. Tucson is no exception. In fact, high school graduation rates for African American, Latino and Native American students in TUSD are ten percent lower than those of whites. TUSD Stats: Graduation Rate, <http://tusdstats.tusd1.org/paweb/aggD/graduation/gradrate.aspx> (last visited Nov. 25, 2013). African American, Latino and Native American students also fall well below their white peers in reading, writing, and math proficiency. TUSD Stats: School-Level AIMS Results With Configurable Ethnic Breakdowns,

http://tusdstats.tusd1.org/planning/profiles/aims/aimseth_front.asp (last visited Nov. 25, 2013).

Ethnic studies curricula, including the MAS program, have a successful track record of changing this pattern. Independent researchers found that MAS courses teaching amici's books and others like them were "academically effective for all students, not just those of Latino heritage," and that MAS had a notable impact on improving graduation rates in schools with the lowest historical graduation rates in TUSD. Anna Ochoa O'Leary et al., *Assault on Ethnic Studies, in Arizona Firestorm: Global Immigration Realities, National Media, and Provincial Politics* 97, 107 (Otto Santa Ana & Celeste González de Bustamante eds., 2012). Statistically significant evidence also showed that MAS students from the lowest income schools in TUSD graduated at "substantially higher" rates than non-MAS students from those same schools. *Id.*

Amici's books and others included in the MAS curricula were a critical part of the program's success. For example, drawing on Paulo Freire's *Pedagogy of the Oppressed*, MAS instructors taught students how to "read the *world*" as opposed to just reading "the *word*." Precious Knowledge, *supra*, at 14:14-15:25. That is, the MAS program encouraged students to think critically about information presented to them, taking context and alternative viewpoints into account. For instance, *Occupied America* suggests that one factor underlying historical racism against

Mexican Americans in Texas was that “Texans had never come to grips with the fact that Mexicans had won at the Alamo.” Acuña, *supra*, at 306. The State criticizes this explanation: “It is certainly strange to find a textbook in an American public school taking the Mexican side of the battle at the Alamo.” ER 2189. In a sense, the State is correct—it *is* “strange” to find a textbook in American classrooms that examines historical events from the perspectives of non-whites. But studying these perspectives benefits students, which is precisely why Amici’s books are so important. *See* Sleeter, *supra*, at 19.

Another result of the MAS program was that MAS students re-engaged with school both inside and outside of MAS classrooms. The O’Leary study showed that TUSD students who took MAS courses in literature, history, American government, and art made gains not only in standardized reading and writing tests, but also in math, even though TUSD offered no MAS math courses. O’Leary et al., *supra*, at 107. This suggests that taking a MAS or other ethnic studies course can “change a student’s attitude toward school” and “translate into academic success in other areas of study.” *Id.* Amici’s books are essential to setting that change in motion. Removing them from MAS classrooms only makes it harder for struggling students to turn their education around.

CONCLUSION

For the foregoing reasons, the grant of summary judgment in favor of the defendants-appellees should be reversed.

Respectfully submitted,

s/ Brian R. Matsui

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**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF
APPELLATE PROCEDURE 32(a)**

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it is 6,662 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Dated: November 25, 2013

s/ Brian R. Matsui

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/ Brian R. Matsui