

# Nos. 13-15657, 13-15760

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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MAYA ARCE et al.,  
*Plaintiffs/Appellants/Cross-Appellees,*

v.

JOHN HUPPENTHAL et al.,  
*Defendants/Appellees/Cross-Appellants,*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA (NO. 4:10-CV-00623-AWT)

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**BRIEF OF THE NATIONAL EDUCATION ASSOCIATION  
AND ARIZONA EDUCATION ASSOCIATION  
AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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Alice O'Brien  
Jason Walta  
Kristen Hollar  
NATIONAL EDUCATION ASSOCIATION  
1201 16th Street, NW  
Washington, D.C. 20036  
Telephone: (202) 822-7035  
aobrien@nea.org  
jwalta@nea.org  
khollar@nea.org

*Counsel for the National Education  
Association*

Samantha Blevins  
ARIZONA EDUCATION  
ASSOCIATION  
345 East Palm Lane  
Phoenix, AZ 85004  
(602) 264-1774 Telephone  
(602) 240-6887 Facsimile  
samantha.blevins@arizonaea.org

*Counsel for the Arizona Education  
Association*

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### **STATEMENT REGARDING CONSENT TO FILE**

The National Education Association (NEA) and Arizona Education Association (AEA) submit this brief as *amici curiae* in support of plaintiffs-appellants Maya Arce, Sean Arce as her next best friend, Korina Eliza Lopez, and Lorenzo Lopez, Jr. as her next best friend. *Amici* file this brief with the consent of the parties pursuant to Rule 29 of the Federal Rules of Appellate Procedure.

*Amici* further certify, pursuant to Rule 29(c)(5), that no party's counsel authored this brief in whole or in part, nor did any party or party's counsel contribute money that was intended to fund preparing or submitting this brief. No person—other than the *amici curiae* and their members—contributed money that was intended to fund preparing or submitting this brief.



## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* state that neither NEA nor AEA is a publicly-held corporation, issues stock, or has a parent corporation. NEA is a non-profit labor organization under Section 501(c)(5) of the Internal Revenue Code. AEA is a non-profit business league under Section 501(c)(6) of the Internal Revenue Code.

**STATEMENT OF INTEREST OF *AMICI CURIAE***

NEA is a nationwide employee organization representing more than 3 million elementary and secondary teachers, higher education faculty, education support professionals, school administrators, retired educators, and students preparing to become educators. As expressed in its Resolutions B-14 through B-19, NEA supports educational practices that reduce discrimination and stereotyping and foster understanding and examination of latent assumptions and prejudices that might limit the educational growth of students. This policy extends to ethnic studies programs, and NEA wishes to offer its expertise on the pedagogical soundness and educational benefits of these programs.

AEA is a professional association representing elementary and secondary teachers, higher education faculty, education support professionals, school administrators, retired educators, and students preparing to become educators in over 164 school districts in Arizona, as well as in other Arizona public education institutions, colleges and other entities. As expressed in its Resolutions A-4, A-19(b) and (c), A-20(h), and B-5. AEA believes that a diverse society enriches all individuals, and the infusion of ethnic studies and ethnically diverse curriculum acknowledges the contributions of ethnic groups to our diverse American society and history. Further, AEA advocates

for the development of locally controlled diversity programs that accurately recount the contributions of all groups within the United States. As such, AEA wishes to offer its expertise on the pedagogical benefits of these programs.

## INTRODUCTION

The educational mission of our nation’s public schools is to instill in all students “the values on which our society rests,” *Ambach v. Norwich*, 441 U.S. 68, 76 (1979), and to provide those students with the skills and knowledge necessary to realize their full potential, *see Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972). As part of that mission, schools are tasked with promoting “cross-racial understanding” and helping “to break down racial stereotypes”—all with the goal of “better prepar[ing] students for an increasingly diverse workforce and society.” *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). Nothing less than the “nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (Powell, J., concurring) (citation and internal quotation marks omitted).

This case concerns one school district’s effort to carry out that mission by promoting a culturally-relevant approach to education that engages students in the learning process and better positions them to achieve academically. This case also concerns the state’s attempt to interfere with those worthy efforts, to stifle views it deems unorthodox, and to stigmatize and banish educational programs that have proven to be effective.

As organizations of educators who are committed to both the promise of public education and the success of students of all races and backgrounds, *amici curiae* NEA and AEA submit this brief in support of the plaintiffs-appellants to argue that the state’s challenged actions have no legitimate educational justification and therefore cannot survive under any standard of constitutional scrutiny.

### **ARGUMENT**

*Amici* agree with plaintiffs-appellants that ARIZ. REV. STAT. ANN. § 15-112 violates the Constitution as applied to the Mexican-American Studies Program (“MAS” or “Program”) adopted by the Tucson Unified School District (“TUSD”).<sup>1</sup> It is *amici*’s submission that the district court’s decision to uphold most of the statute’s application to MAS was in error because the court gave little or no consideration to the legitimate—indeed, compelling—educational objectives advanced by ethnic studies programs like MAS. By like token, the district court’s misapprehension of the purpose and value of ethnic studies programs led it to mistakenly conclude that the state has a legitimate interest in stifling such programs when, in reality, none exists.

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<sup>1</sup> The complete text of Ariz. Rev. Stat. Ann. § 15-112 is set forth in the addendum to the Opening Brief of Plaintiffs-Appellants May Arce et al., along with all of the other statutes and constitutional provisions that are relevant to this case.

The aim of this brief is to correct that misapprehension. In what follows, *amici* will recount some of the significant educational challenges that face minority students, such as the large population of Latino students that were served by MAS. Next, we will explain how the culturally relevant content and teaching methods of ethnic studies programs are meant to address and counteract some of the broad social and economic forces that lead to minorities' educational achievement gaps. Turning specifically to MAS, we demonstrate how that program utilized existing research on ethnic studies to raise student achievement. Finally, we discuss how the state's application of ARIZ. REV. STAT. ANN. § 15-112 to eliminate MAS was constitutionally flawed and served no legitimate education purpose.

**A. WHILE OUR NATION BECOMES MORE DIVERSE, MINORITY STUDENTS CONTINUE TO FACE PERSISTENT EDUCATIONAL ACHIEVEMENT GAPS THAT PREVENT THE REALIZATION OF THEIR FULL POTENTIAL AS CITIZENS**

Because of the changing demographics of American society, the ability of an individual to function in a racially and ethnically diverse environment is increasingly important. By 2025, the year in which children who are entering first grade this year will graduate from high school, over half of all children will be Black, Latino, American Indian, Native Hawaiian, or multiracial, and over 42% of the overall population will be descended from these historically

minority racial and ethnic groups.<sup>2</sup> By 2043, the U.S. Census Bureau projects that Whites will no longer be a majority of the population.<sup>3</sup> Latino students, now comprising just under a quarter of the U.S. student population, will make up an estimated 38% of that population by 2060—more than any other U.S. racial or ethnic group.<sup>4</sup> These demographic shifts reflect an ongoing trend in which the “country as a whole and the workforce in particular is becoming more, not less [racially] diverse.”<sup>5</sup>

Unfortunately, educational achievement gaps between white and minority students persist. These disparities have many causes, including broad social and economic forces over which teachers and school administrators have little control. In particular, even though American society is becoming more racially diverse, the nation’s public elementary and

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<sup>2</sup> U.S. Dep’t of Educ., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC MINORITIES 7 (July 2010); U.S. Census Bureau, *An Older and More Diverse Nation by Midcentury* (Aug. 14, 2008), available at <http://www.census.gov/newsroom/releases/archives/population/cb08-123.html>.

<sup>3</sup> U.S. Census Bureau, *U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now* (Dec. 12, 2012), available at <https://www.census.gov/newsroom/releases/archives/population/cb12-243.html>.

<sup>4</sup> *Id.*

<sup>5</sup> Julie F. Mead, *Conscious Use of Race As a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63, 134-35 (2002).

secondary schools remain highly segregated. Some of the most serious segregation affects Latino students.<sup>6</sup> Moreover, nearly nine times out of ten, segregated schools with high percentages of minority students are also high poverty schools.<sup>7</sup> Students in these high-poverty, minority-segregated schools often lack adequate access to the necessary components of a high-quality education, such as Advanced Placement courses, science labs, and gifted-and-talented programs.<sup>8</sup> Furthermore, although educational research has shown the critical importance of a stable, high-quality teaching force,<sup>9</sup> high-poverty,

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<sup>6</sup> Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* 12 (Jan. 2009) (noting that, among Latinos, “two of every five students attend intensely segregated schools”), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf>.

<sup>7</sup> Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* 16 (Jan. 2005), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality/orfield-why-segregation-matters-2005.pdf>.

<sup>8</sup> Linda Darling-Hammond, *Educational Quality and Equality: What It Will Take to Leave No Child Behind*, in ALL THINGS BEING EQUAL 39, 55-59 (Brian D. Smedley & Alan Jenkins eds., 2007); Nat'l Sci. Bd., SCIENCE AND ENGINEERING INDICATORS 2004 18, 46-47 (May 2004).

<sup>9</sup> Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1, 31-33 (2000).



minority-segregated schools are more likely to be associated with high rates of teacher turnover and fewer experienced teachers.<sup>10</sup>

The consequences of these trends are all too predictable. Students who attend high-poverty, minority-segregated primary and secondary schools have poorer educational outcomes and are often not as well equipped to enter institutions of higher education or the workforce. As a result, minority students are far more likely than White students to drop out of high school,<sup>11</sup> and they are far less likely to pursue higher education.<sup>12</sup>

High school dropouts suffer from enormous economic, social, and personal disadvantages. They earn, on average, more than \$10,000 less per

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<sup>10</sup> C. Kirabo Jackson, *Student Demographics, Teacher Sorting and Teacher Quality: Evidence from the End of School Desegregation*, 27 J. LAB. ECON. 213, 247-49 (2009).

<sup>11</sup> In 2010, the dropout rate was 15.1% for Latino students, as compared to 5.1% for White students. *See* U.S. Dep't of Educ., THE CONDITION OF EDUCATION 2012 240 (May 2012). *See also* Opening Br. of Pls.-Appellants Maya Arce et al. ("Arce Br.") at 6 (noting that "Mexican American students in TUSD have suffered historically from high dropout rates and lesser academic achievement relative to their white peers") (citing Excerpts of Record of Pls.-Appellants Maya Arce et al. ("ER") at 641).

<sup>12</sup> In 2008, about 44% of White 18 to 24-year-olds were enrolled in colleges and universities, as compared to just 26% of Hispanics in the same age cohort. *See* STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS, *supra* note 2, at 121.

year than high school graduates,<sup>13</sup> are nearly 50% more likely to be unemployed,<sup>14</sup> and make up over two thirds of the state prison population.<sup>15</sup>

Likewise, the failure for a large number of minority students to obtain a college education has lifelong effects on their ability to thrive in the community. The wage gap between college and high school graduates is at a historical peak.<sup>16</sup> Those with only a high school degree are less consistently employed than college graduates; they also receive a lower share of nonwage fringe benefits, including sick and vacation pay, employer-paid health

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<sup>13</sup> U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES 152 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0232.pdf>.

<sup>14</sup> U.S. Bureau of Labor Statistics, *Economic News Release: Employment Status of the Civilian Population 25 Years and Over by Educational Attainment* (Nov. 8, 2013), available at <http://www.bls.gov/news.release/empsit.t04.htm>.

<sup>15</sup> U.S. Dep't of Justice, Bureau of Justice Statistics Special Report, *Education and Correctional Populations* (Jan. 2003), available at <http://www.bjs.gov/content/pub/pdf/ecp.pdf>. See also Andrew Sum et al., *The Consequences of Dropping Out of High School: Joblessness and Jailing for High School Dropouts and the High Cost for Taxpayers* (Oct. 2009) (noting that nearly 1 of every 10 male high school dropouts aged 16-24 was incarcerated on a given day in 2006-07, which is more than three times the incarceration rate for male high school graduates of the same age cohort), available at [http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1022&context=clms\\_pub](http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1022&context=clms_pub).

<sup>16</sup> David Autor, *The Polarization of Job Opportunities in the U.S. Labor Market* 5 (April 2010), available at [http://www.americanprogress.org/issues/2010/04/pdf/job\\_polarization.pdf](http://www.americanprogress.org/issues/2010/04/pdf/job_polarization.pdf).

insurance, pension contributions, and safe and pleasant working conditions.<sup>17</sup> Those with only a high school education also report lower levels of satisfaction and feelings of accomplishment related to their work.<sup>18</sup>

To put the point plainly, the empirical evidence shows that inequitable opportunities for education at the elementary and secondary level have profound and lasting implications for minority students. And, given changing demographics, it is no exaggeration to say that if minority students fail academically, the nation will fail along with them.

**B. ETHNIC STUDIES PROGRAMS ARE PEDAGOGICALLY SOUND AND SERVE A CRUCIAL ROLE IN FOSTERING MINORITY ACADEMIC ACHIEVEMENT AND PROMOTING THE VALUES OF A DIVERSE SOCIETY**

Notwithstanding many of the educational obstacles we have just recounted, it is clear that strong student engagement can still be the key to improving academic performance among minority students.<sup>19</sup> There is, however, an extensive and growing body of research pointing to a cultural

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<sup>17</sup> *Id.*

<sup>18</sup> Sandy Baum et al., *Education Pays 2013: The Benefits of Higher Education for Individuals and Society* 21 (2013), available at <http://trends.collegeboard.org/sites/default/files/education-pays-2013-full-report.pdf>.

<sup>19</sup> U.S. Nat'l Research Council, *ENGAGING SCHOOLS: FOSTERING HIGH SCHOOL STUDENTS' MOTIVATION TO LEARN* 13 (2004).

disconnect between minority students' home and classroom lives as an important reason why minority students so often exhibit low levels of engagement. In examining this disconnect, educational research has exposed some of the deficiencies of traditional education—both in terms of curriculum and teaching—when it comes to serving needs of minority students.

Ethnic studies courses serve as an important part of the strategy for addressing cultural differences in the classroom, and for closing achievement gaps for minority students. Such programs are designed, both in *what* they teach and in *how* they teach it, to reengage students by helping them develop a positive sense of ethnic identity.

1. A vast body of literature shows that school curricula are still “culturally biased” in that they present a Eurocentric view of a variety of subjects, especially history, social studies, and art.<sup>20</sup> While this situation has improved and content related to African Americans, Latinos, and Native Americans has been added over the past few decades, curriculum audits show

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<sup>20</sup> See generally Christine E. Sleeter, Nat'l Educ. Ass'n, *The Academic and Social Value of Ethnic Studies* (2011), available at <http://www.nea.org/assets/docs/NBI-2010-3-value-of-ethnic-studies.pdf>; Derrick P. Alridge, *The Limits of Master Narratives in History Textbooks*, 108 TEACHERS COLL. REC. 662 (2006); Elavie Ndura, *ESL and Cultural Bias: An Analysis of Elementary Through High School Textbooks in the Western United States of America*, 17 J. LANG. CULTURE & CURRICULUM 143(2004).

that most contributions to academic subject matter are still made by European-Americans,<sup>21</sup> and European-American figures are still disproportionately the focus of textbook narratives.<sup>22</sup> Minority figures appear primarily as victims, or in overly-simplified or sanitized roles.<sup>23</sup> Controversial perspectives regarding periods such as Reconstruction or the Mexican-American War are glossed over, and ongoing racism and racial issues in American society may be ignored entirely.<sup>24</sup>

This “Euro-centric” curriculum, combined with everyday social messages and the low educational expectations often placed on minority students,<sup>25</sup> may cause minority children to perceive that they are disfavored or less valued compared to white children, and that education is not relevant

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<sup>21</sup> Geneva Gay, *CULTURALLY RESPONSIVE TEACHING: THEORY, RESEARCH, AND PRACTICE* 130-33 (2d ed. 2010).

<sup>22</sup> *See Sleeter, supra* note 20, at 2.

<sup>23</sup> Alridge, *supra* note 20, at 662-63.

<sup>24</sup> *See Sleeter, supra* note 20, at 2; Gay, *supra* note 18, at 130-33.

<sup>25</sup> *See, e.g., Gay, supra* note 20 at 147-53 (“Subtle racial stereotypes transmitted through films, television, videotapes, and other popular media can leave deep emotional and psychological scars on children of the targeted ethnic groups, and on others as well.”); Zachary W. Brewster & Sarah Nell Rusche, *Quantitative Evidence of the Continuing Significance of Race Tableside Racism in Full-Service Restaurants*, 43 *J. OF BLACK STUDIES* 359 (May 2012).

for them.<sup>26</sup> Child development researchers speak of these experiences and perceptions as impacting minority students' "ethnic identity"—a sense of "group-esteem" that children form through observations of the world around them and how they perceive that their group fits into the social order.<sup>27</sup> Whereas a positive, educationally-oriented sense of ethnic identity is correlated with higher achievement,<sup>28</sup> a negative sense of ethnic identity can have the opposite effect.<sup>29</sup>

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<sup>26</sup> Sabine E. French et al., *The Development of Ethnic Identity During Adolescence*, 42 DEVELOPMENTAL PSYCHOL. 1, 4 (Jan. 2006).

<sup>27</sup> *Id.*; Inna Altschul et al., *Racial-Ethnic Identity in Mid-Adolescence: Content and Change as Predictors of Academic Achievement*, 77 CHILD DEVELOPMENT 1155, (Oct. 2006) (studying 139 African American and Latino students over a period of two years, and finding that a strong sense of ethnic identity was predictive of students' Grade Point Averages). *See also* Adriana J. Umaña-Taylor & Mark A. Fine, *Examining Ethnic Identity Among Mexican-Origin Adolescents Living in the United States*, 26 HISPANIC J. OF BEHAVIORAL SCI. 36 (2004) (observing that "[i]dentity development is critical for individuals because it is during this process that they discover who they are and who they hope to become" and noting that the concept of ethnic identity "is especially relevant in heterogeneous societies" such as the United States).

<sup>28</sup> David B. Miller, *Promoting Resilience in Urban African American Adolescents: Racial Socialization and Identity as Protective Factors*, 23 SOCIAL WORK RES. 159 (1999).

<sup>29</sup> French, *supra* note 26, at 2; *see generally* Daniel G. Soloranzo & Dolores Delgado Bernal, *Examining Transformational Resistance Through A Critical Race and LatCrit Theory Framework: Chicana and Chicano Students in Urban Context*, 36 URBAN EDUC. 308 (2001).

Where students form a poor sense of ethnic identity that is disconnected from education, it is unsurprising that they become disengaged. And such disengagement can be fatal to the academic future of minority students, especially given that many of them already face disadvantaged backgrounds:

When students from advantaged backgrounds become disengaged, they may learn less than they could, but they usually get by or they get second chances. . . . In contrast, when students . . . in high-poverty, urban high schools become disengaged, they are less likely to graduate and consequently face severely limited opportunities . . . [including] unemployment, poverty, poor health, and involvement in the criminal justice system.<sup>30</sup>

2. Traditional approaches to teaching often exacerbate this problem by failing to account for differences in cultural norms between minority students' home and school lives. The importance of culture to learning cannot be overstated: the National Academy of Sciences recognizes that “[e]ven small differences in cultural knowledge have the potential to affect students’

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<sup>30</sup> U.S. Nat’l Research Council, *ENGAGING SCHOOLS*, *supra* note, 19, at 13. *See also* Carrie Furrer & Ellen Skinner, *Sense of Relatedness as a Factor in Children’s Academic Engagement and Performance*, 95 J. OF EDUC. PSYCHOL. 148, 148-49 (2003) (quantitative study finding that—even without considering whether they were disadvantaged—students who report higher feelings of connectedness or belonging show greater emotional and behavioral engagement in school and perform better academically).

learning.”<sup>31</sup> How we learn and our existing reserves of knowledge are "necessarily situated within socially organized systems of activity," and "the cultural practices that we engage in as we move across everyday, school, and professional contexts both shape and constitute our learning.”<sup>32</sup>

Because Euro-American culture is the dominant culture in our education system, minority students often experience different cultural norms in mainstream classes than those they experience at home. These differences may range from behavioral expectations and discipline practices to the use of reference points that are different from what minority students are accustomed to at home.<sup>33</sup> This increases the chance that minority students will miss the real point of a lesson, and may cause the teacher to perceive the student as less capable.<sup>34</sup>

3. By re-examining and re-orienting both *what* is taught and in *how* it is taught, ethnic studies courses attempt to address cultural differences in the

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<sup>31</sup> U.S. Nat’l Research Council & Nat’l Academy of Sciences, HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCES, AND SCHOOL 72 (John D. Bransford et al., eds. 2004).

<sup>32</sup> Na'ilah Suad Nasir et al., *Culture and Mathematics in School: Boundaries Between “Cultural” and “Domain” Knowledge in the Mathematics Classroom and Beyond*, 32 REV. OF RES. IN EDUC. 187, 201 (2008).

<sup>33</sup> *Id*; Nat’l Research Council, HOW PEOPLE LEARN, *supra* note 31, at 72.

<sup>34</sup> Nat’l Research Council, HOW PEOPLE LEARN, *supra* note 31, at 72.



classroom and close educational achievement gaps for minority students by engaging students through the development a positive sense of ethnic identity.

Whereas mainstream curricula may portray minorities as history's "victims," ethnic studies curricula tend to emphasize minority role models—activists, authors, and artists—who illustrate the ways in which members of the studied group have been an integral part of America's success story.<sup>35</sup> History books and other writings that present historical events from a variety of perspectives help to balance mainstream texts.

The teaching methods for ethnic studies courses are also designed to empower students to take charge of their own education. First, in deference to research on culture's impact on learning, teachers educate themselves on minority students' culture and take it into account in presenting class materials.<sup>36</sup> This includes a meaningful effort to learn about ways in which individual students' home lives may provide "funds of knowledge" to build

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<sup>35</sup> Jeffrey M. Duncan-Andrade & Ernest Morrell, *THE ART OF CRITICAL PEDAGOGY* 30 (2008).

<sup>36</sup> *Id.* at 9, 66; *see generally* Sudia Paloma McCaleb, *BUILDING COMMUNITIES OF LEARNERS* (1994).

upon at school, as well as attempts to engage parents and community members to determine what they can add to the educational process.<sup>37</sup>

Research demonstrates that building on minority students' home cultures and out-of-school knowledge in this way makes learning concepts more accessible—for example, a student's knowledge of Spanish may be helpful in teaching Greek and Latin vocabulary roots, or popular sports or games may be used to demonstrate principles of physics.<sup>38</sup> Just as importantly, however, it makes students feel more competent in tackling schoolwork.<sup>39</sup>

Second, the teaching methods of a typical ethnic studies course reject the traditional notion of teaching—that teachers are the owners of knowledge and students as passive and empty receptacles to be filled—in favor of a “critical” or “problem-posing” approach to teaching that emphasizes critical thinking and dialogue between teacher and student as a means of formulating

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<sup>37</sup> See generally Norma Gonzalez et al., FUNDS OF KNOWLEDGE: THEORIZING PRACTICES IN HOUSEHOLDS AND CLASSROOMS (2005).

<sup>38</sup> Carol D. Lee, *Re-Conceptualizing Achievement Gaps: Robust Teaching for All Our Students*, in NEA VISITING SCHOLARS SERIES VOL. 17 (Fall 2008) (describing scholarship on using cultural references to teach academic subjects, from the ecological practices of Native American populations to the physics of baseball).

<sup>39</sup> Nasir et al., *supra* note 32, at 215; Lee, *supra* note 38, at 5.

knowledge.<sup>40</sup> Critical approaches to teaching view students as active contributors to knowledge, at once respecting those contributions and conveying an expectation that students will actually succeed in formulating knowledge.<sup>41</sup> They ask students to examine presuppositions—their own and those of others or society at large—to be cognizant of social problems, and even to engage in action to address these issues.<sup>42</sup>

This approach is not new. Indeed, one scholar has noted that “[a]s early as 1899,” *amicus* NEA itself called for math instruction using this type of teaching methodology, stating that “[w]hile not wishing to undervalue models which are presented to the pupils ready-made. . . as a rule, the pupils gain more by constructing their own models, and that this can be done very easily in a sufficient number of theorems.”<sup>43</sup> Moreover, the Supreme Court recognized decades ago that public schools should not regard students “as closed-circuit recipients” of information, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969), and that “[t]he Nation's future depends upon leaders trained through wide exposure to that robust

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<sup>40</sup> Duncan-Andrade & Morrell, *supra* note 35, at 24, 55. *See generally* Gonzalez et al., *supra* note 37; McCaleb, *supra* note 36.

<sup>41</sup> *Id.*

<sup>42</sup> Duncan-Andrade & Morrell, *supra* note 35 at 20.

<sup>43</sup> Nasir et al., *supra* note 32, at 207.

exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection,” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (citations and quotation marks omitted).

4. Most importantly, the critical approaches to curriculum and teaching methods described above are used with at-risk youth for a very simple reason—they work. As one scholar has explained, these are frequently the methods used “[i]n the few places where there has been consistent success with urban students.”<sup>44</sup> That is because the critical approaches to curriculum and teaching methods that are central to ethnic studies programs endow students with a positive and education-affirming sense of identity and encourage them to view education as a means for overcoming obstacles in their own lives—a vehicle for success—rather than something that “belongs” to people who are not like them.<sup>45</sup> Once established, this attitude can be channeled into mainstream courses as well.

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<sup>44</sup> Duncan-Andrade & Morrell, *supra* note 35, at 8-9.

<sup>45</sup> Conrado Gómez & Margarita Jiménez-Silva, *Mexican American Studies: The Historical Legitimacy of an Educational Program*, 6 ASS’N OF MEXICAN-AM. EDUCATORS J. 15, 15 (2012) (“Culturally relevant pedagogy is a vehicle for collective empowerment of students as they experience academic success in the context of maintaining and/or educating their cultural competence and developing a critical. It also serves as a means of making learning more relevant to students who have traditionally been marginalized from the  
(continued . . .)

In 2011, *amicus* NEA surveyed existing research on the impact of ethnic studies. The research confirms that ethnic studies programs and their pedagogy are effective in closing achievement gaps.<sup>46</sup> Students who participate in ethnic studies courses show improved attitudes regarding race, better minority group esteem, increased cross-racial understanding, and even higher test scores in writing and critical thinking.<sup>47</sup>

These results do not simply hold for members of the group that is the subject of a particular course; there is a large body of research showing that ethnic studies courses benefit minority and non-minority students alike. For example, one significant study recently showed that teaching white children about historical racism against African Americans caused them to form more positive views of African Americans, value racial fairness, and engage in less stereotyping.<sup>48</sup> Another extensive study found that students who were exposed to a diverse environment, took part in ethnic studies courses, and mainstream curriculum by validating and affirming their culture and their contributions to the classroom context.”) (citations omitted).

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<sup>46</sup> Sleeter, *supra* note 20, at 8, 11, 14-15.

<sup>47</sup> *Id.*

<sup>48</sup> Julie M. Hughes, *Consequences of Learning About Historical Racism Among European American and African American Children*, 78 CHILD DEV. 1689, 1702(2007). See also Nida Denson & Michael J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 AM. EDUC. RES. J. 322, 325 (2009).

were encouraged to investigate racial and cultural differences were more apt than non-participants to exhibit positive attitudes about members of other ethnic groups and express optimistic attitudes about cross-group understanding and cooperation<sup>49</sup>

Rather than being designed for a particular ethnic group or fomenting racial resentment, then, ethnic studies programs have precisely the opposite aim and effect. Indeed, ethnic studies programs facilitate many of the core goals of public education: promoting democracy by preparing children for citizenship and voting, teaching cultural literacy, developing citizens' capacities for critical thinking and self-directed learning, and cultivating a workforce that can compete in the global marketplace.<sup>50</sup> Businesses and other stakeholders have recognized for some time that diversity and cross-racial understanding are sources of strength and creativity in American society and

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<sup>49</sup> Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 348-62 (2002).

<sup>50</sup> See, e.g., Joseph J. Ellis, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 154 (2001); John Mitchell (Chairman, Joint Committee of the City and County of Philadelphia), "Public Education," *THE WORKING MAN'S ADVOCATE* (March 6, 1830), cited in Lawrence A. Cremin, *THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION* 34-35 (New York: Bureau of Publications, Teachers College, Columbia University, 1951); Amy Gutman, *DEMOCRATIC EDUCATION* (1999); Lee, *supra* note 38, at 3.

in the American workplace,<sup>51</sup> and ethnic studies programs recognize that education is an appropriate vehicle for fostering these ideals.

**C. THE MAS PROGRAM WAS A PEDAGOGICALLY SOUND AND WELL-DESIGNED ETHNIC STUDIES PROGRAM**

The theoretical underpinnings of MAS were based on the very same principals outlined above. The Program used a triad of (1) culturally-relevant curricular materials, (2) critical pedagogy that emphasized the role of students as creators of knowledge, and (3) student-teacher-parent interaction that sought to understand individuals' home lives and cultural contributions.<sup>52</sup> This base was used to assist students in viewing cultural difference as a resource for developing academic proficiency, and education as a vehicle for addressing problems within their communities.<sup>53</sup> This engagement

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<sup>51</sup> See generally Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at 12-18, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); Karen A. Jehn et al., *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Workgroups*, 44 Admin. Sci. Q. 741 (1999); Frans Johansson, *Masters of the Multicultural*, 83 HARV. BUS. REV. 18, 18-19 (Oct. 2005).

<sup>52</sup> Augustine Romero et al., *A Barrio Pedagogy: Identity, Intellectualism, Activism, and Academic Achievement Through the Evolution of Critically Compassionate Intellectualism*, 12 RACE, ETHNICITY, AND EDUC. 217, 232 (2009).

<sup>53</sup> *Id.*; see also ER 2216 .

strengthened students' academic identity and served as a basis for increased achievement in all academic areas.<sup>54</sup>

As discussed above, there is nothing inherently controversial about this approach. On the contrary—the first element, culturally-relevant curriculum, is a central feature of ethnic studies courses. It represents a response to most mainstream curriculums' well-documented unbalanced treatment of minority-American cultures, and is supported by research on the formation of ethnic identity.<sup>55</sup>

The second element, teaching critically about the prevailing school curriculum and serving an integral role in the learning process, also has a long and established pedigree.<sup>56</sup> Indeed, these ideas are present in “Bloom’s Taxonomy,” a theoretical framework dating to the 1950’s which expresses

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<sup>54</sup> Romero et al., *supra* note 52, at 219; *see also* ER 197-203; 1854-79; 2241-48.

<sup>55</sup> *See supra* notes 20 to 30, and accompanying text; *see also* ER 2285 (“instruction [in MAS courses] was found to be research-based, founded upon Arizona State Standards and highly effective”); *id.* at 2272 (describing one classroom observation where the teacher shared with auditors that “we encourage our students to engage in [self-reflection] for the purpose of developing a strong cultural identity and sense of self, which according to the educational literature. . . positions students on a trajectory towards student achievement.”); *id.* at 2276 (observing that “use of integral research-based instructional practices. . . has the potential to result in further academic adeptness that may transfer into other academic settings.”).

<sup>56</sup> *See, e.g.*, Nasir et al., *supra* note 32, at 207.



general goals for the educational process and views the act of analyzing, criticizing, and formulating new knowledge as higher learning functions.<sup>57</sup>

According to Bloom's Taxonomy, there are three types of learning: cognitive, affective, and psychomotor.<sup>58</sup> While these are complex concepts, they essentially refer to memorization, understanding, and application.<sup>59</sup>

Bloom's Taxonomy posited that effective learning requires utilizing each type of learning, with the goal of producing a student that has a deep understanding of the meaning of that knowledge and the ability to think critically and apply knowledge in a variety of contexts.<sup>60</sup>

The third element, student-teacher-parent interaction, is supported by both old and new research on using community resources to both support and inform the learning process.<sup>61</sup> Additionally, where MAS courses encouraged community involvement or activism as part of their coursework, they strongly implicate Bloom's idea of application.<sup>62</sup>

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<sup>57</sup> See generally Benjamin S. Bloom et al., TAXONOMY OF EDUCATIONAL OBJECTIVES (1956).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> McCaleb, *supra* note 36; Gonzalez, *supra* note 37.

<sup>62</sup> Bloom, *supra* note 57.

An extensive audit commissioned by the Arizona Department of Education confirmed that the MAS program worked as designed. The audit, known as the Cambium Report, was commissioned by Superintendent Huppenthal to determine MAS's compliance with ARIZ. REV. STAT. ANN. § 15-112 and took place over a period of two months in the spring of 2011.<sup>63</sup> It was based on "data and document collection" including a review of "State Standards. . .[,] Tucson Unified School District Standards, curriculum materials. . .[,] summative student data, school data, and professional development artifacts."<sup>64</sup> The auditors also conducted "onsite school and classroom visitations, observations, and focus group interviews, with an assortment of stakeholders allowing for a wide array of voices."<sup>65</sup>

Like other ethnic studies programs based on the same principles, MAS was effective in closing the achievement gap among students who took part in its courses. *See* Arce Br. at 7 ("By bolstering engagement and promoting higher order thinking, MAS provided significant academic benefits to students, substantially improving their state test scores and graduation rates.") (citing

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<sup>63</sup> ER 2197-2320.

<sup>64</sup> *Id.* at 2201.

<sup>65</sup> *Id.* The Report notes at several points that classroom observations were "random" and that teachers were often surprised to see the auditors but willingly submitted to the observations. *See, e.g., id.* at 2270, 2274, 2289.

ER 197-203, 1854-79, 2247). Contrary to the State's assertions, Cambium auditors found "no evidence" that "any" of the Program's courses violated Ariz. Rev. Stat. § 15-112. Rather, classroom observations showed that students discussed "various viewpoints" in class without being "coaxed or encouraged" toward one particular viewpoint.<sup>66</sup> MAS teachers had "excellent rapport" with students, who were clearly "engaged" in the courses and "felt free to question and freely express their ideas."<sup>67</sup> There was "no evidence... to indicate that instruction within [MAS] classes advocate[d] ethnic solidarity;" rather, it was "proven to treat students as individuals."<sup>68</sup> To the extent that any "questionable" curricular materials were on MAS reading lists, the auditors found no evidence that they were being used in the classroom.<sup>69</sup>

The Cambium auditors also noted the deep level of understanding that MAS students exhibited regarding classroom topics. For example, they stated that "[m]any research-based practices that promote enhanced critical thinking and high-order comprehension of difficult topics [are] in place and used on a

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<sup>66</sup> *Id.* at 2283

<sup>67</sup> *Id.* at 2294, 2281. For research discussing the impact of teacher-student rapport on student achievement, *see* Furrer & Skinner, *supra* note 30.

<sup>68</sup> ER 2262.

<sup>69</sup> *Id.* at 2232-33.

daily basis,”<sup>70</sup> and student discussions were “saturated with critical thinking and well-thought-out responses from students.”<sup>71</sup> All of these comments suggest that students—many of whom had previously struggled in school—had developed understanding beyond rote knowledge, as well as the ability to think critically and apply knowledge. In other words, the program’s methods successfully integrated Bloom’s goals for effective learning.<sup>72</sup>

Teachers noted that MAS “courses helped students feel *more* a part of the United States because they recognize that all ethnicities contributed to the building of our country.”<sup>73</sup> Parents “overwhelmingly [thought] very highly of the [MAS] program as a whole,” and reported that their children used the concept “*En Lak’Ech*”—a concept taught in MAS courses which is similar to the Golden Rule<sup>74</sup>—to settle disputes.<sup>75</sup> Students reported that the program

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<sup>70</sup> *Id.* at 2247. *See also id.* at 2265.

<sup>71</sup> *Id.* at 2286. *See also id.* at 2280 (Describing how “[s]ophisticated thinking was predominant throughout” observation of high school class); *id.* at 2285 (Remarking that MAS History teacher “was very focused on the students’ thinking profoundly on the subject” at hand); *id.* at 2289-90 (Noting that each MAS Government course observed “exhibited high levels of analytical thinking”).

<sup>72</sup> *See supra* notes 57-62, and accompanying text.

<sup>73</sup> ER 2303 (emphasis in original).

<sup>74</sup> *See* Luis Valdez, LUIS VALDEZ EARLY WORKS: ACTOS, BERNABE AND PENSAMIENTO SERPENTINO 174 (1990); ER 2277.

kindled their interest in education, helped them think of their ethnic identity as positive, and made them feel more confident and engaged at school.<sup>76</sup>

Finally, according to both the Cambium Report and an empirical analysis commissioned by the Special Master for TUSD's ongoing desegregation case, MAS students exhibited increased test scores over students who were not involved in the program.<sup>77</sup>

In sum, MAS exemplified sound educational practices. The program was firmly rooted in sound pedagogical theory geared toward engaging students in the educational process and improving their academic achievement.

Likewise, MAS was carried out in a manner that was entirely consistent with these goals. As a result, the program worked as expected by raising student achievement.

**D. THE STATE'S APPLICATION OF ARIZ. REV. STAT. ANN. § 15-112 TO THE MAS PROGRAM IS NOT JUSTIFIED BY ANY LEGITIMATE PEDAGOGICAL CONCERNS**

The plaintiffs-appellants ably explain the various reasons why the state's application of ARIZ. REV. STAT. ANN. § 15-112 to MAS should be subject to

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<sup>75</sup> ER 2304.

<sup>76</sup> *Id.* at 2305-06.

<sup>77</sup> *Id.* at 197-216, 2241-48.

“strict scrutiny”—a standard the state cannot pretend to meet.<sup>78</sup> But, even if the state’s actions were to be judged according to a more lenient standard, it is nevertheless clear that plaintiffs-appellants should have the opportunity to prove at trial that the state’s actions were unconstitutional because—at a very minimum—they were not “reasonably related to legitimate pedagogical concerns.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

The first indication that the state’s enactment and enforcement of the ethnic studies were motivated by something *other* than legitimate pedagogical concerns comes from the extensive record of thinly-veiled racial animus that accompanied the different versions of legislation that ultimately became ARIZ. REV. STAT. ANN. § 15-112. As the plaintiffs-appellants detail in their brief, proponents of the various bills asserted that MAS and its Latino students were “anti-American,” “seditio[us],” and engaged in “racial warfare.” Arce Br. at 9-11 (citations omitted). One went so far as to declare that MAS students should “[a]dopt American values” or else “go back to th[e] culture” they came from. *Id.* at 10 (citation omitted).

Another indication that the state’s lack of any legitimate educational objective comes from slipshod the manner in which it purported to apply ARIZ.

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<sup>78</sup> See Arce Br. at 28-38.

REV. STAT. ANN. § 15-112. At the outset, then-Superintendent Horne declared that MAS violated the statute *before* the statute had gone into effect and *without* conducting any kind of formal investigation. Next, Horne’s successor, Huppenthal,<sup>79</sup> sought to bolster Horne’s conclusion by commissioning an investigative audit of MAS; yet, when the auditors found in their report that “[n]o observable evidence exists” that MAS violated ARIZ. REV. STAT. ANN. § 15-112 (ER 2248), Huppenthal rejected the report’s findings on the ostensible ground that the auditors’ extensive review of the curriculum materials and classroom observations were inadequate. Then, without gathering any additional curriculum material and without conducting *any* classroom observations whatsoever, Huppenthal issued his own finding that MAS violated ARIZ. REV. STAT. ANN. § 15-112. None of these enforcement actions is explicable as a good-faith effort to advance legitimate pedagogical concerns; rather, they reflect the same visceral antipathy toward the worthy educational objectives of ethnic studies programs that appears to have motivated the legislature in passing ARIZ. REV. STAT. ANN. § 15-112. *See Board of Educ. v. Pico*, 457 U.S. 853, 875 (1982) (noting that “procedures [that are] highly irregular

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<sup>79</sup> As plaintiff-appellants note in their brief, Huppenthal campaigned for the position of Superintendent on a promise to “Stop La Raza.” Arce Br. at 13 (quoting ER 2169).

and ad hoc” are the “antithesis” of what “might tend to allay suspicions regarding [illegitimate] motivations”).

The final indication that the state’s actions lack any legitimate justification is the fundamental hollowness of the rationale proffered to support ARIZ. REV. STAT. ANN. § 15-112’s application to MAS. According to the state’s briefing below, the statute was applied to MAS in order to “prohibit[] courses that ‘promote racism.’” *Acosta v. Huppenthal*, No. 4:10-CV-00623-AWT, 2013 WL 871892, \*8 (D. Ariz. Mar. 8, 2013) (citation omitted). Discouraging racism is, of course, a legitimate—likely compelling—educational objective. But, the state’s attempt to tar MAS with accusations of racism is unfounded and, indeed, directly contradicted by the only proper investigation made of the MAS curriculum and teaching practices. As the authors of the Cambriun report found:

No observable evidence exists that instruction [MAS] promotes resentment towards a race or class of people. *The auditors observed the opposite*, as students are taught to be accepting of multiple ethnicities of people. . . . Additionally, all ethnicities are welcomed into the program and these very students of multiple backgrounds are being inspired and taught in the same manner as Mexican American students. *All evidence points to peace as the essence for program teachings*. Resentment does not exist in the context of these courses.

ER 2253 (emphases added) (quoted in Arce Br. at 15).



Nothing the state has put forward suggests that its actions were motivated by legitimate, education-related concerns. At the very least, plaintiffs are entitled to prove this to the satisfaction of a jury or other fact finder and thereby prevail on their constitutional challenge.

### CONCLUSION

The State's actions in this case, if upheld, would give states nearly unlimited discretion in banning courses for reasons no more compelling than fear, favoritism, or lack of understanding. Such a rule would threaten all ethnic studies programs, blunting one of the few effective tools that educators now have for addressing achievement gaps and undermining efforts to meet the challenges of a changing public school student body and take advantage of the benefits of diversity. As the State can cite no legitimate pedagogical reason for bringing about this result, *amici curiae* NEA and AEA respectfully join the plaintiffs-appellants in requesting that this Court reverse the decision below.

Respectfully submitted,

/s/Alice O'Brien

Alice O'Brien

Jason Walta

Kristen Hollar

NATIONAL EDUCATION ASSOCIATION

1201 16th Street, NW

Washington, D.C. 20001

Telephone: (202) 822-7035

aobrien@nea.org

jwalta@nea.org  
khollar@nea.org

Samantha Blevins  
ARIZONA EDUCATION ASSOCIATION  
345 East Palm Lane  
Phoenix, AZ 85004  
(602) 264-1774 Telephone  
(602) 240-6887 Facsimile  
samantha.blevins@arizonaaea.org

*Counsel for Amici Curiae  
National Education Association and  
Arizona Education Association*

### **CERTIFICATE OF COMPLIANCE**

I, Jason Walta, counsel for amicus, certify pursuant to Federal Rule of Appellate Procedure 29(d) and Ninth Circuit Rule 32-1 that the attached amicus brief is proportionally spaced, has a type face of 14 points or more, and contains 6,715 words.

/s/ Jason Walta  
Jason Walta  
NATIONAL EDUCATION ASSOCIATION  
1201 16th Street, NW  
Washington, D.C. 20036  
(202) 822-7035

Date: November 25, 2013

**CERTIFICATE OF SERVICE**

I certify that on November 25, 2013, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Jason Walta  
Jason Walta  
NATIONAL EDUCATION ASSOCIATION  
1201 16th Street, NW  
Washington, D.C. 20036  
(202) 822-7035