November 7, 2014
3:30 PM – 4:45 PM

Session 406: The Legal Struggle over Ethnic Studies

This panel will discuss the legal challenge in Arizona over A.R.S. § 15-112 which was used to terminate Tucson Unified School District's (TUSD) Mexican American Studies (MAS) Program. A.R.S § 15-112 prohibits courses or classes that "1. [p]romote the overthrow of the United States government... 2. [p]romote resentment toward a race or class of people; 3. [a]re designed for pupils of a particular ethnic group; [or] 4. [a]dvocate ethnic solidarity instead of treatment of pupils as individuals." Enforcement of this statute led to the elimination of the highly successful Mexican American Studies (MAS) courses program in the Tucson Unified School District (TUSD) as well as the removal of books illuminating Mexican American history and perspectives from TUSD classrooms. At stake in this litigation is the constitutionality of statutes such as this that give power to state officials which may threaten or chill the teaching of ethnic studies, including Asian American studies. This panel will likely be of interest to attorneys and law students who are interested in First Amendment, Equal Protection, Substantive Due Process, education law, civil rights, amicus practice, and ethnic studies. The case is Arce v. Huppenthal, which is currently before the Ninth Circuit of the United States Court of Appeals.

Program Chair & Moderator:
Robert S. Chang, *Professor of Law, Executive Director*, Korematsu Center, Seattle University School of Law

Speakers:
Anjana Malhotra, *Associate Professor of Law*, SUNY Buffalo Law School
Richard M. Martinez, *Attorney*, Law Office of Richard M. Martinez

NAPABA Annual Convention
Scottsdale, Arizona
November 7, 2014

CLE Materials for the Legal Struggle over Ethnic Studies

Contents:

Background – Arizona's H.B. 2281 and Arce v. Huppenthal, Nos. 13-15657 & 13-15760 (9th Cir., filed April 5, 2013)

In 2010, the Arizona state legislature enacted H.B. 2281, now codified as A.R.S. §§ 15-111 & 112. H.B. 2281 prohibits Arizona school districts and charter schools from including in their programs of instruction any courses or classes that: "(1) promote the overthrow of the United States government[;] (2) promote resentment toward a race or class of people[;] (3) are designed primarily for pupils of a particular ethnic group[; or] (4) advocate ethnic solidarity instead of the treatment of pupils as individuals." A.R.S. § 15-112(A). Enforcement of the statute against the Mexican American Studies Program (MAS) at the Tucson Unified School District (TUSD) led to MAS's termination.

On October 18, 2010, ten teachers and the director of TUSD's MAS program challenged the constitutionality of H.B. 2281 in federal district court, seeking declaratory and injunctive relief. The complaint was amended on April 12, 2011, to add two TUSD students, Maya Arce and Korina Lopez. Nicholas A. Dominguez, another TUSD student, and his mother, Margarita Elena Dominguez, intervened on Dec. 31, 2011. While awaiting disposition of cross-motions for summary judgment, Nicholas graduated from high school, rendering their claim for declaratory

and injunctive relief moot. During the course of the appeal, Korina Lopez graduated from high school, also rendering her claim for declaratory and injunctive relief moot.

On January 10, 2012, the district court dismissed the teachers and the director of the program based on lack of Article III standing; dismissed Plaintiffs' freedom of association claim; and denied Plaintiffs' first motion for a preliminary injunction, finding that they did not face irreparable harm.

On Oct. 21, 2011, Plaintiffs sought partial summary judgment on their overbreadth and vagueness claims, but did not move for summary judgment on their viewpoint discrimination, equal protection, or substantive due process claims. Defendants cross-moved for summary judgment on Plaintiffs' First Amendment and vagueness claims.

On March 19, 2012, Judge Tashima, sitting by designation, heard oral argument on the cross-motions for summary judgment. On March 8, 2013, the district court denied Plaintiffs' summary judgment motion except as to A.R.S. § 15-112(A)(3) (prohibiting courses that "are designed primarily for pupils of a particular ethnic group"), which it held was facially overbroad. It held, though, that (A)(3) was severable, and granted Defendants summary judgment on Plaintiffs' First Amendment and vagueness claims. The court also granted summary judgment, *sua sponte*, on Plaintiffs' remaining claims, including their equal protection claim. This case is now on appeal before the Ninth Circuit. Briefing is complete and at the time these CLE materials were submitted, oral argument had yet to be set.

In addition to briefs submitted by the parties, seven amicus briefs were filed in the Ninth Circuit. One brief was filed by the Pacific Legal Foundation in support of neither party. Six amicus briefs were filed supporting the students' appeal from individuals and organizations from across the country, including: (1) Authors of Books Banned from TUSD; (2) National Education

Association and Arizona Education Association; (3) Freedom to Read Foundation, American Library Association, American Booksellers Foundation for Free Expression, Asian/Pacific American Librarians Association, Black Caucus of the American Library Association, Comic Book Legal Defense Fund, National Association for Ethnic Studies, National Coalition against Censorship, National Council of Teachers of English, and REFORMA; (4) Chief Justice Earl Warren Institute on Law and Social Policy and the Anti-Defamation League; (5) 48 Public School Teachers; and (6) LatCrit, Inc.

The briefs may be found here: http://www.law.seattleu.edu/centers-and-institutes/korematsu-center/arizona-ethnic-studies-case.

H.B. 2281

Be it enacted by the Legislature of the State of Arizona:
Section 1. Title 15, chapter 1, article 1, Arizona Revised Statutes, is amended by adding sections 15-111 and 15-112, to read:

15-111.Declaration of policy
THE LEGISLATURE FINDS AND DECLARES THAT PUBLIC SCHOOL PUPILS SHOULD BE TAUGHT TO TREAT AND VALUE EACH OTHER AS INDIVIDUALS AND NOT BE TAUGHT TO RESENT OR HATE OTHER RACES OR CLASSES OF PEOPLE.

15-112. Prohibited courses and classes; enforcement
A. A SCHOOL DISTRICT OR CHARTER SCHOOL IN THIS STATE SHALL NOT INCLUDE IN ITS PROGRAM OF INSTRUCTION ANY COURSES OR CLASSES THAT INCLUDE ANY OF THE FOLLOWING:
1. PROMOTE THE OVERTHROW OF THE UNITED STATES GOVERNMENT.
2. PROMOTE RESENTMENT TOWARD A RACE OR CLASS OF PEOPLE.
3. ARE DESIGNED PRIMARILY FOR PUPILS OF A PARTICULAR ETHNIC GROUP.
4. ADVOCATE ETHNIC SOLIDARITY INSTEAD OF THE TREATMENT OF PUPILS AS INDIVIDUALS.
B. IF THE STATE BOARD OF EDUCATION OR THE SUPERINTENDENT OF PUBLIC INSTRUCTION DETERMINES THAT A SCHOOL DISTRICT OR CHARTER SCHOOL IS IN VIOLATION OF SUBSECTION A, THE STATE BOARD OF EDUCATION OR THE SUPERINTENDENT OF PUBLIC INSTRUCTION SHALL NOTIFY THE SCHOOL DISTRICT OR CHARTER SCHOOL THAT IT IS IN VIOLATION OF SUBSECTION A. IF THE STATE BOARD OF EDUCATION OR THE SUPERINTENDENT OF PUBLIC INSTRUCTION DETERMINES THAT THE SCHOOL DISTRICT OR CHARTER SCHOOL HAS FAILED TO COMPLY WITH SUBSECTION A WITHIN SIXTY DAYS AFTER A NOTICE HAS BEEN ISSUED PURSUANT TO THIS SUBSECTION, THE STATE BOARD OF EDUCATION OR THE SUPERINTENDENT OF PUBLIC INSTRUCTION MAY DIRECT THE DEPARTMENT OF EDUCATION TO WITHHOLD UP TO TEN PER CENT OF THE MONTHLY APPORTIONMENT OF STATE AID THAT WOULD OTHERWISE BE DUE THE SCHOOL DISTRICT OR CHARTER SCHOOL. THE DEPARTMENT OF EDUCATION SHALL ADJUST THE SCHOOL DISTRICT OR CHARTER SCHOOL'S APPORTIONMENT ACCORDINGLY. WHEN THE STATE BOARD OF

EDUCATION OR THE SUPERINTENDENT OF PUBLIC INSTRUCTION DETERMINES THAT THE SCHOOL DISTRICT OR CHARTER SCHOOL IS IN COMPLIANCE WITH SUBSECTION A, THE DEPARTMENT OF EDUCATION SHALL RESTORE THE FULL AMOUNT OF STATE AID PAYMENTS TO THE SCHOOL DISTRICT OR CHARTER SCHOOL.

C. THE DEPARTMENT OF EDUCATION SHALL PAY FOR ALL EXPENSES OF A HEARING CONDUCTED PURSUANT TO THIS SECTION.

D. ACTIONS TAKEN UNDER THIS SECTION ARE SUBJECT TO APPEAL PURSUANT TO TITLE 41, CHAPTER 6, ARTICLE 10.

E. THIS SECTION SHALL NOT BE CONSTRUED TO RESTRICT OR PROHIBIT:

1. COURSES OR CLASSES FOR NATIVE AMERICAN PUPILS THAT ARE REQUIRED TO COMPLY WITH FEDERAL LAW.

2. THE GROUPING OF PUPILS ACCORDING TO ACADEMIC PERFORMANCE, INCLUDING CAPABILITY IN THE ENGLISH LANGUAGE, THAT MAY RESULT IN A DISPARATE IMPACT BY ETHNICITY.

3. COURSES OR CLASSES THAT INCLUDE THE HISTORY OF ANY ETHNIC GROUP AND THAT ARE OPEN TO ALL STUDENTS, UNLESS THE COURSE OR CLASS VIOLATES SUBSECTION A.

4. COURSES OR CLASSES THAT INCLUDE THE DISCUSSION OF CONTROVERSIAL ASPECTS OF HISTORY.

F. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO RESTRICT OR PROHIBIT THE INSTRUCTION OF THE HOLOCAUST, ANY OTHER INSTANCE OF GENOCIDE, OR THE HISTORICAL OPPRESSION OF A PARTICULAR GROUP OF PEOPLE BASED ON ETHNICITY, RACE, OR CLASS.

Constitutional Concerns

Restrictions on curriculum may implicate constitutional concerns based on (1) substantive due process, (2) establishment clause, (3) free speech, (4) vagueness, (5) overbreadth, and (6) equal protection.

(1) Substantive Due Process

Two cases from the early 1900s involved state laws that were passed in response to fears about the effect immigrants were having in those states. In 1919, the Nebraska legislature passed a statute that placed restrictions on the teaching of certain foreign languages and forbid the teaching of subjects in a foreign language. In 1922, an Oregon initiative was passed that was designed to eliminate parochial schools by requiring compulsory attendance of public schools. In each instance, the U.S. Supreme Court decided that both laws were unconstitutional, grounding their decisions in substantive due process. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 410 (1925).

(2) Establishment Clause

The leading establishment clause case is *Epperson v. Arkansas*, 393 U.S. 97 (1968), which involved a restriction on the teaching of evolution in Arkansas public schools. The battle over the teaching of creationism in public schools will typically raise an establishment clause issue.

(3) Free Speech

The First Amendment applies to decisions to remove materials from the curriculum. The First Amendment protects "students' right to receive information and ideas" in the context of the school curriculum. *Johnson v. Stuart*, 702 F.2d 193, 195 (9th Cir. 1983); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1028-29 (9th Cir. 1998). Many Supreme Court decisions and rulings of this Court have recognized "certain constitutional limits upon the power of a State to control even the curriculum and the classroom." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 861 (1982); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (striking down statute prohibiting teaching of foreign languages in public and private schools); *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968) (striking down law banning teaching of evolution in public schools and universities); *Monteiro*, 158 F.3d at 1027-29 (discussing constitutional limits on power of state to control curriculum).

The reasons motivating the restriction must be examined. As the Supreme Court has noted, ''[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right.'' *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994); *see also Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000) (state university may require students to pay a student activity fund so long as it does not engage in viewpoint

discrimination in distributing the money). In addition, the Supreme Court held that the restriction must serve a legitimate pedagogical interest. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

(4) Vagueness

As a general matter, a statute is impermissibly vague under the Due Process Clause of the Fifth Amendment when it "fails to provide a reasonable opportunity to know what conduct is prohibited, *or* is so indefinite as to allow arbitrary and discriminatory enforcement." *United States v. Mincoff*, 574 F.3d 1186, 1201 (9th Cir. 2009) (internal quotations omitted) (emphasis added. A statute's risk of arbitrary or discriminatory enforcement, a separate, independent basis, and "the more important aspect of vagueness doctrine." *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (citation omitted). *Cf. City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (anti-loitering statute vague because it "affords too much discretion to the police and too little notice to citizens who wish to use the public streets").

In the context of a statute that grant enforcement authority to state officials, if enforcement decisions turn on constituent complaints or whether the program is "controversial," there is a "real risk" of arbitrary and discriminatory enforcement because the such complaints may reflect complainants' biases. *See United States v. Lanning*, 723 F.3d 476, 483 (4th Cir. 2013) (discussing "real risk" of arbitrary and discriminatory enforcement where "citizen complaints" drive enforcement, because complaints may reflect complainants' biases); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1072) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

(5) Overbreadth

A statute restricting curriculum may be challenged as overbroad. The threat of enforcement of an overbroad law deters individuals from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. *United States v. Williams*, 553 U.S. 285, 292 (2008). A law is unconstitutionally overbroad when it punishes a substantial amount of protected free speech, unless a limiting construction can narrow it sufficiently to remove the threat to constitutionally protected expression. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003).

The concern with overbroad laws is that they will chill constitutionally protected speech. Teachers subject to a restriction that generally describes proscribed curricular content may stay far away from anything that might be deemed to violate the restriction. The Ninth Circuit has recently emphasized that the First Amendment protects the speech of teachers. *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014) (holding the First Amendment protects the speech of teachers while on the job in the scope of their duties). The court stated:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Id. at 411 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967));

(6) Equal Protection

A statute that limits the teaching of ethnic studies may be challenged under the equal protection clause. If the statute singles out certain protected groups for different treatment, or if the statute was enacted or enforced based on discriminatory intent, then strict scrutiny would apply. If the statute is neutral on its face, ascertaining discriminatory intent will will involve the application of the Arlington Heights factors – (a) disparate impact; (b) sequence of events

leading to the challenged law and its enforcement; and (c) departures from normal procedures – to determine if, under the totality of evidence, discriminatory animus was a motivating factor behind the law or its enforcement. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977).

In addition, a statute that restricts the teaching of ethnic studies may be challenged as restructuring the political process in a discriminatory manner. The Supreme Court in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969), applied strict scrutiny to government decisions to restructure the political process by imposing uniquely onerous impediments for remedying racial discrimination; these decisions had "the serious risk, if not purpose, of causing specific injuries on account of race." *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight For Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1633 (2014). In both the *Seattle* and *Hunter* cases, local government attempted toremedy discrimination only to face referenda that both eliminated the remedy and removed the locality's authority to remedy similar discrimination in the future. *Schuette*, 134 S. Ct. at 1631-33 (describing *Hunter* & *Seattle*). The decision to remove local control over a program designed to remedy past discrimination that triggers strict scrutiny under the "political process" Equal Protection doctrine.

Even if the statute or restriction is not subject to strict scrutiny, it may still be challenged under rational basis review. A decision punishing or disfavoring a politically unpopular or "controversial" group may not further a legitimate state interest, even under rational basis review. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635 (1996); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973).