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**POLITICS**

# A Judge Is About To Rule Whether Banning Mexican-American Studies Is Constitutional

Arizona Republicans accused teachers of stoking racial discord. But the law they passed in response may violate the Constitution.

By Roque Planas

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A lawyer for the state of Arizona repeatedly asked Sean Arce, the former director of Tucson's Mexican-American studies program, who the "oppressors" are.

TUCSON, Ariz. — When Sean Arce, former director of Tucson's banned Mexican-American studies program, took the witness stand in June, the state attorney's line of questioning betrayed a clear agenda: She wanted to get Arce to describe white people as "oppressors."

Despite repeated prodding, Arce offered a more subtle explanation of his views. “If you look at the disparities that exist within our society, if you look at prison rates — if we look at a number of indicators, you see that there is, in fact, a dominant society and a subordinate society and you see that folks are marginalized,” the high school social studies teacher testified. “I am speaking of systems of racism and systems of oppression.”

The 47-year-old educator was testifying on the fourth day of a trial that concluded last month — and that will soon decide whether Republican state officials violated students’ constitutional rights when they torpedoed Tucson’s unique ethnic studies program in 2012.

Arce and a group of likeminded teachers in the Tucson Unified School District banded together in the 1990s to create a Mexican-American studies program that aimed to narrow the wide achievement gap between white students and the Hispanic students who constitute the district’s majority.

“Their self-esteem was really low,” Curtis Acosta, another former teacher, testified of his Hispanic students. “We wanted to work on that self-image while giving them an academic foundation.”

Some of the programs’ teaching methods were commonsense. They taught books by Hispanic authors that students were rarely exposed to otherwise, and they studied overlooked episodes of Latino history in the United States.

Other methods were less conventional. The teachers believed that mending their students’ fractured relationship with school meant boosting their confidence and helping them find inspiration in their culture, which the traditional curriculum had largely ignored. Some teachers began class with the “unity clap” — a nod to the United Farm Workers movement — or recited “In Lak’ Kech,” a bilingual poem inspired by Mayan teachings, in unison. The curriculum often homed in on the most contentious issues that students in the largely Hispanic district were facing, like illegal immigration and racial inequality. At its peak, the program served 1,200 students, from kindergarten through high school.

Arizona’s Republican-dominated legislature, however, viewed the classes as an example of thinly veiled left-wing indoctrination that used discussions about “oppression” to breed resentment against whites.

In 2010, the legislature passed a four-part law forbidding any public school classes designed for a specific ethnicity or promoting “the overthrow of the United States government,” “resentment toward a race or class of people,” or “ethnic solidarity” instead of “the treatment of pupils as individuals.” Then-state Superintendent of Public Instruction Tom Horne and then-State Sen. John Huppenthal, both Republicans, crafted the bill to outlaw the Mexican-American studies classes specifically.

In 2011, Huppenthal took Horne’s place as state superintendent of public instruction and issued an order finding Tucson’s program in violation of the law he’d helped pass the prior

year. To avoid losing state funding, the Tucson school board voted 4-1 to dismantle the classes in January 2012.

Students and parents in the district filed a lawsuit to overturn the state's restrictions, accusing Arizona officials of passing and implementing the law with the goal of discriminating against Hispanics. The lawsuit argues that the ethnic studies law violates the 14th Amendment's guarantee to equal protection before the law and students' First Amendment right to receive information freely.

While Arizona Republicans accused the teachers of indoctrinating students, the state's defense of its ethnic studies law was also largely ideological. Rob Ellman, one of the lawyers representing Arizona, accused the teachers of using "inflammatory materials" to "portray America as a racist society" — and argued that it was well within lawmakers' purview to ban such a program.

"If you characterize the relationship as Hispanics being oppressed and whites being oppressors, I think that's of grave concern to any policymaker," Huppenthal said.

One thing is clear: When U.S. District Court Judge A. Wallace Tashima rules on the case some time in the coming weeks, he will set a precedent for how far legislators are allowed to go when pushing their political views into the classroom.

## **Nixing Talk of "Oppression"**

The argument that the Mexican-American studies program taught students to despise whites formed the crux of Arizona's defense during the two-week bench trial, leading to the contentious line of questioning about who Arce thinks the "oppressors" are.

It was a bizarre interaction. People of Hispanic heritage can belong to any racial group, and Arce's daughter Maya Arce, a 19-year-old university student who also appeared as a witness against the state's ban, is both Mexican-American and light-skinned. The state seemed to be arguing that Arce would devote his professional life to sowing resentment against a group of people that might include his own immediate family.

Acosta testified that maligning white people would offend him personally because he is himself biracial, and loves his Anglo mother. Sally Rusk — one of the program's former teachers, who watched the trial from the audience — is a white woman with no Hispanic ancestry.

Lacking direct evidence that the teachers railed against whites in the classroom, the state of Arizona then sought to prove that the curriculum itself was overtly racist and politically biased.

Huppenthal testified that discussions of "oppression" have no place in classrooms if they delve too far into the subject of the privileged place of white Americans or the marginalized

place of Hispanics in the United States. Doing so, he argued, would only undermine students' ability to succeed in life.

"The idea that you have oppression taking place in society, I thought that was a dominant idea of the classes," Huppenthal testified. "I thought that was an unhealthy idea."

Yet the program's outcomes appeared to show that teachers were successfully narrowing the achievement gap. Students who took the elective classes graduated at higher rates and scored higher on state tests than their peers, according to studies led by University of Arizona education professor Nolan Cabrera, who testified as an expert witness during trial. They even performed better on math tests, a subject the Mexican-American studies program didn't cover at all. This unforeseen result may indicate that students' attitudes toward education improved overall because of the program, Cabrera said.

The state's defense made clear that officials' criticism of the Mexican-American studies program hinged more on ideology than pedagogy.

Horne, Huppenthal's predecessor as head of Arizona schools, first launched the state's battle against ethnic studies in 2006, after civil rights leader Dolores Huerta said "Republicans hate Latinos" in a speech at a Tucson high school while referring to the toxic immigration debate. Horne testified that he had crafted the 2010 law to ban all ethnic studies from the state, based on his personal belief that they fostered separatism.

"Philosophically, I disagreed with dividing students up by race," Horne said on the stand.

And the officials who spearheaded the passage of the ethnic studies law both testified that they had never witnessed a single class. Horne based his assessment largely on complaints from two Tucson teachers outside the program — Jon Ward and Hector Ayala — who accused the Mexican-American studies teachers of politicizing the classroom, using racially charged language and making white students feel out of place. (Neither Ward nor Ayala testified at trial.)

Horne said on the stand that he'd made a point of not visiting the classes, arguing that teachers would mask their alleged racial and political agendas in the presence of a state official. Instead, he said he offered to videotape the classes at the expense of the state. The school district declined.

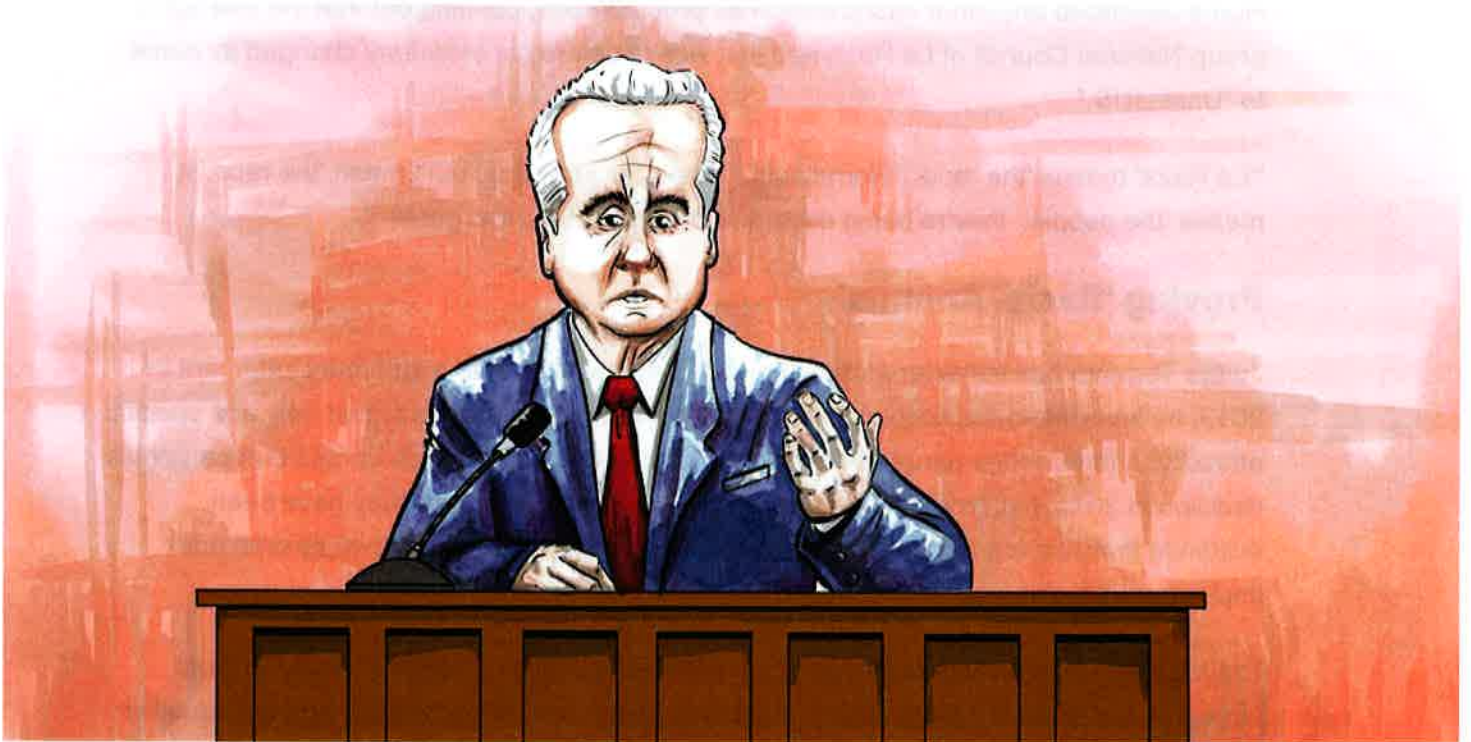
Huppenthal met with students in Acosta's high school Latino literature class for a discussion once in the spring of 2010, when he was serving as a state senator. On the witness stand, Huppenthal described Acosta as an effective teacher, admired by his students. He also praised Acosta's well-groomed appearance and neatly pressed shirt.

But Huppenthal testified that he walked away from the visit concerned about the poster of Argentine revolutionary Ernesto "Che" Guevara on Acosta's classroom wall. (Acosta said he put it up at the request of a student.) And Huppenthal said he was disturbed when one of the program's administrators described Benjamin Franklin as a "racist." In 2011, he

signed the order finding the Tucson classes in violation of the ethnic studies law he helped pass the year before.

Arizona's attorneys often focused on passages from the program's textbooks they viewed as inflammatory, emphasizing Brazilian educator Paulo Freire's *Pedagogy of the Oppressed*. They described Freire as a Marxist, intimating that such writings were unsuitable for a classroom — despite the fact that the book is widely studied in American universities. The Tucson school board approved it for classroom use in 2013, after the Mexican-American studies program was dismantled, without complaint from the state.

Huppenthal said he viewed the book as emblematic of an “oppressor-versus-oppressed” framework that would teach Hispanics to resent white people. When a plaintiffs’ lawyer asked him to describe the parts of the book he found troubling, Huppenthal told the court: “Well, it’s hard to get past the name.”



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Former Superintendent of Public Instruction John Huppenthal testified that he opposed what he viewed as an “oppressed-versus-oppressor framework” that would undermine Hispanic student achievement.

Horne echoed that sentiment in disputing the educational value of Rodolfo Acuña's classic Chicano history, *Occupied America*. “The mere title shows what kind of propaganda it is,” he said. “I read it and I was shocked by it.”

The state often objected to specific terms in course texts as well, like “Aztlán,” a Mexica word used to describe the area known today as the U.S. Southwest. Horne testified that he suspected the term implied a desire to reconquer that territory on behalf of Mexico. “They keep referring to the ‘artificial’ borders, which are the borders of the United States,” Horne said.

Former Republican officials fixated in particular on the term “la raza,” which was once part of the curriculum’s title. The Spanish word can literally be translated as “the race” or “the breed.” But Mexican-Americans in the Southwest use “la raza” to refer to the mixed-race people of Mexico and Central America, a usage Mexican philosopher José Vasconcelos coined in the years after the Mexican revolution. He envisioned a “cosmic race” — “la raza cósmica” — would emerge from the racial mixing of European, indigenous and other peoples in Mexico. Chicano activists adopted the term during the civil rights era to describe Mexican-Americans living in the United States.

When Acosta tried to explain on the stand that the teachers used the term “la raza” as roughly equivalent to “Latino” or “Hispanic,” Arizona’s lawyers objected, arguing he wasn’t qualified to give expert linguistic testimony. Judge Tashima sustained the objection.

But both Huppenthal and Horne testified at length that they viewed the term “la raza” as a racist affront to whites. Huppenthal stood by his 2010 campaign vow to “stop la raza.” Horne described any other interpretation as preposterous, pointing out that the civil rights group National Council of La Raza had just weeks before his testimony changed its name to “UnidosUS.”

“‘La Raza’ means ‘the race,’” Horne said. “When they say it doesn’t mean ‘the race,’ it means ‘the people,’ they’re being deceptive. The people is the ‘gente.’”

## **Proving ‘Racial Animus’**

Judge Tashima has considered the ethnic studies law before. In a summary judgment in 2013, he invalidated the section of Arizona’s law forbidding classes aimed only at a specific ethnicity. A three-judge panel of the 9th U.S. Circuit Court of Appeals upheld that part of his decision in 2014, but ordered Tashima to hold a trial because there may have been evidence that Arizona officials discriminated against Hispanics when they passed and implemented the law.

Proving that elected officials passed a law with racist intent — “racial animus,” in legal jargon — is difficult in a world where politicians rarely use ethnic epithets and are sensitive to allegations of racism. But Huppenthal gave the students’ lawyers an unusual gift in this case: When he was up for re-election as the head of the Arizona Department of Education in 2014, local media discovered that Huppenthal had made a string of racially charged and often offensive blog comments over the last four years.

Using the names “Thucydides” and “Falcon9,” Huppenthal had called for the end of all Spanish-language media — except for some words on Mexican restaurant menus — and compared the Mexican-American studies teachers to the Ku Klux Klan. He cried at a press conference after the local media exposed him, saying he “renounced and repudiated” his insulting commentary. The incident played a role in the failure of his re-election bid.

But on the stand this year, Huppenthal recanted his apology, arguing that the comments he’d made were racially neutral, if indelicately phrased. Rather than showing racial animus,

he said, his comments reflected a desire to help Mexican-American students excel in school by learning fluent English.

Huppenthal emphasized that he grew up in majority-Hispanic south Tucson and retains Latino friends from those years. He testified that after losing his re-election bid, he dedicated his time to teaching math to Hispanic students.

Horne, for his part, described his life as a “crusade against racism,” saying that he’d attended Martin Luther King Jr.’s “I Have a Dream” speech in person and that he reads Mexican history books in Spanish in his free time.

But the students’ lawyers don’t have to show that Horne or Huppenthal are raging racists to clear the legal bar for proving racial animus. The U.S. Supreme Court set the legal standard for proving racial animus in *Arlington Heights vs. Metropolitan Housing Corporation*, a 1977 ruling that found it’s enough to show that officials’ actions disproportionately affected a specific group, fit into a larger pattern of targeting that group, and that officials took unusual measures to get the law passed.

So far, Arizona’s ethnic studies law has only shut down the Mexican-American studies program in Tucson — though Horne testified that he hoped his law would eventually ban all ethnic studies classes from public schools.

The plaintiffs’ lawyers appeared to have less success in convincing Tashima that the law was part of a broader legislative trend that targeted mostly Hispanics. The lawyers pointed out that Arizona’s ethnic studies law was passed the same year as S.B. 1070, the state’s immigration crackdown that the Supreme Court later gutted. But Tashima sought to keep the trial focused on educational issues, rather than immigration laws.

The question of whether Republican officials strayed from normal procedures in banning the Mexican-American studies classes was less cut and dry. Lawyers for the state argued that nothing about the legislative process was unusual. Horne had written a law with the hope of banning ethnic studies across Arizona, submitted it to the Republican-majority legislature, and lawmakers voted to pass it.

But lawyers for the students noted that Arizona already had a law on the books restricting partisan materials in classes. If state officials objected to the books in Tucson’s classrooms, they could have lodged complaints without banning the program altogether. “They passed, enacted and enforced a law they didn’t need,” argued Steven Reiss, one of six lawyers representing the students, on the last day of trial.

Even if the students’ challenge is successful, it’s unclear whether the prohibited curriculum will resurface in Tucson. Some of the teachers who started the program have since left the district. Others lost their jobs, went on to teach different subjects, or tried to salvage the work they started by joining a “Culturally Relevant Curriculum” program that Tucson created to replace Mexican-American studies.

But in the wake of the nearly decade-long battle over the unique Tucson program, ethnic studies courses have spread across the United States, largely as a response to the controversy in Arizona. Several districts in California implemented elective ethnic studies classes — including the state’s largest ones in Los Angeles and San Francisco — and the California legislature voted to create a model course so all schools can have access. Individual schools in Texas are adopting Mexican-American studies courses inspired by the Tucson curriculum, with the blessing (but not funding) of the State Board of Education. Indiana passed a state law in May requiring public schools to offer elective ethnic studies classes once a year.

The Tucson school board dismissed Arce in 2012 after shuttering the program he directed. He now works in Azusa, California, where he teaches classes similar to the ones Arizona banned. Officials in California have sought Arce’s input for its model ethnic studies course. Other educators routinely ask him to share the material from the defunct Tucson courses so they can replicate it.

“That’s probably the most lasting thing from this whole legal struggle — people have become aware of this issue. We’ve formed all these relationships. People see real promise,” Arce told HuffPost after the trial. “It happened as a direct result of what transpired in Arizona.”

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