

1 LOIS D. THOMPSON, Cal. Bar No. 093245 (Admitted Pro Hac Vice)
lthompson@proskauer.com
2 JENNIFER L. ROCHE, Cal. Bar No. 254538 (Admitted Pro Hac Vice)
jroche@proskauer.com
3 PROSKAUER ROSE LLP
2029 Century Park East, 24th Floor
4 Los Angeles, California 90067-3010
Telephone: (310) 557-2900
5 Facsimile: (310) 557-2193

6 JUAN RODRIGUEZ, Cal. Bar No. 282081 (Admitted Pro Hac Vice)
jrodriguez@maldef.org
7 THOMAS A. SAENZ, Cal. Bar No. 159430 (Admitted Pro Hac Vice)
tsaenz@maldef.org
8 MEXICAN AMERICAN LEGAL DEFENSE AND
EDUCATIONAL FUND (MALDEF)
9 634 S. Spring St.
11th Floor
10 Telephone: (213) 629-2512 ext. 121
Facsimile: (213) 629-0266

11 Attorneys for Mendoza Plaintiffs
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13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

15 Roy and Josie Fisher, et al.,
16 Plaintiffs,
17 v.
18 United States of America,
19 Plaintiff-Intervenors,
20 v.
21 Anita Lohr, et al.,
22 Defendants,
23 Sidney L. Sutton, et al.,
24 Defendant-Intervenors,

Case No. 4:74-CV-00090-DCB

**MENDOZA PLAINTIFFS' RESPONSE
TO TUSD NOTICE OF FILING OF ALE
POLICY MANUAL (DOC. 2267) AND
OBJECTION TO THE DISTRICT'S
REQUEST THAT IT BE AWARDED
PARTIAL UNITARY STATUS WITH
RESPECT TO SECTION V.A OF THE
USP**

Hon. David C. Bury

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1 Maria Mendoza, et al.,

Case No. CV 74-204 TUC DCB

2 Plaintiffs,

3 United States of America,

4 Plaintiff-Intervenor,

5 v.

6 Tucson United School District No. One, et
al.,

7 Defendants.

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10 Pursuant to this Court's Orders of September 6, 2018 ("9/6/18 Order") (Doc. 2123),
11 July 26, 2019 (Doc. 2243), and September 6, 2019 (Doc. 2271), Mendoza Plaintiffs submit
12 this Response to TUSD's Notice of Filing of ALE Policy Manual and the District's
13 accompanying request that it be awarded unitary status with respect to Section V.A of the
14 USP. Mendoza Plaintiffs respectfully request that the Court consider together with this
15 Response their Response to the TUSD Outreach and Recruitment Addendum which the
16 District filed along with its 3-Year PIP (as Doc. 2270-5) because that Addendum also
17 includes ALEs and the District's obligations as they relate to implementation of Section V,
18 A of the USP.
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21 **Argument**

22 ***The ALE Policy Manual, Inclusive of the Progress Report on Advanced Learning***
23 ***Experiences, Fails to Comply with the Court's 9/6/18 Order***

24 The 9/6/18 Order provided explicit direction as to what should be included in the
25 ALE Policy Manual that the Court ordered the District to prepare. Unfortunately, much of
26 that direction appears not to have been followed. Mendoza Plaintiffs present illustrative
27 examples below.
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1 AP courses, including the AP curriculum offered at UHS....” (9/6/18 Order, Doc. 2123 at
2 74:15-21) and even reiterated its directive when it stated that the ALE Policy Manual
3 “affords the District the opportunity to answer unanswered questions noted by the
4 Court...such as: whether the Pre-AP program is an effective pipeline versus Self-contained
5 GATE programs for AP programs” (*id.* at 97:16-19) no comparison is reported in either
6 the Policy Manual or the Progress Report and, therefore, and more importantly, no learning
7 is provided as to whether the District’s Pre-AP courses as currently constituted are an
8 effective pipeline to AP courses. Instead, the Progress Report offers only the following
9 statements unsupported by any study, data, or citations: “Both the pre-AP program and the
10 self-contained GATE program prepare students for future participation in AP and other
11 advanced courses by providing a rigorous curriculum.” (ALE Progress Report, Doc. 2267-
12 2 at 87.) In response to the Court’s related question asking if “tutoring would improve the
13 effectiveness of this [pre-AP course] pipeline” (9/6/18 Order, Doc. 2123 at 97:19-20),
14 TUSD simply states: “The District provides tutoring to improve learning and achievement,
15 including in ways that help prepare students for future participation in advanced
16 courses....[T]he District now requires all tutors to be certified teachers, and it continues to
17 build its tutoring programs to support students in all ALEs, including in preparation for
18 and during AP courses.” (ALE Progress Report, Doc. 2267-1 at 87.)

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23 Failure to Provide an Answer to the Question of Whether
24 Dual Credit Courses May Entirely Replace AP Classes at a
25 District High School

26 The Court additionally asked the District to address its question about “whether
27 Dual Credit (HS-CC) programs may entirely replace AP programs in a high school”
28

1 (9/6/18 Order, Doc. 2123, at 97:21-22) in the Policy Manual. Rather than provide an
2 analysis of whether such an approach is sound educationally, the Policy Manual simply
3 says: “[I]n certain circumstances based on a carefully considered analysis and an
4 appropriate approval process, a school can opt to choose dual credit courses for their
5 students, rather than AP courses.” (ALE Policy Manual, Doc. 2267-1 at 20.) Absent from
6 the Policy Manual is any statement of the factors that will be considered by the District in
7 making its analysis or what the “appropriate” approval process is. This same language,
8 again without further detail, is repeated in the ALE Progress Report (Doc. 2267-2 at 79.)
9 The Report also presents a fuller discussion of the benefit of dual credit courses (which is
10 why they are expressly included in the USP) (*id.* at 78-79) but never answers the Court’s
11 question about whether dual credit courses should be permitted to replace AP programs in
12 a high school.¹

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16 Other Areas in Which TUSD Appears Not to Have Complied with
the Court’s Order

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18 Automatic Enrollment

19 The Court directed the District to consider with specific reference to GATE
20 enrollment whether automatic enrollment (with an opt-out provision) of all qualified
21 students would be a “practicable strategy for increasing enrollment numbers for African-
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¹ According to the chart on page 50 of the ALE Progress Report, Santa Rita now offers one AP course (as compared to the other high schools in the District which range from a low of 9 (Catalina) to a high of 24 (UHS)). The progress report also says that “if Santa Rita students prefer to take additional AP courses instead of dual credit courses, they may do so by attending another high school within the District.” (Doc. 2267-2 at 32.) It is unclear if what is meant by this statement is that the student interested in more AP courses is expected to transfer to another high school or travel to another high school during the school day to attend the AP course(s). If the latter, Mendoza Plaintiffs question whether such an approach is actually practicable and note that nothing is said about whether the student is to provide her/his own transportation or whether the District will do so.

1 American and Latino students in ALE's that require test scores for eligibility." (*Id.* at
2 59:18-20.)² Mendoza Plaintiffs have not seen discussion of this strategy in the District's
3 filings³ and therefore conclude that it has not yet acted on this directive as it relates to
4 GATE.

5 Stipends

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7 The ALE Policy Manual recites that the District provides stipends to improve the
8 recruitment and retention of gifted endorsed GATE teachers and sets forth the amount of
9 those stipends (Doc. 2267-1 at 14-15). However, neither the manual nor the ALE Progress
10 Report appears to indicate that the District followed the Court's directive to "appraise the
11 effectiveness of the incentive program" that in its 10/24/17 Order the Court had directed be
12 put in place and "revise it up or down and estimate, based on its cost, whether it is
13 effective for addressing the need for certified GATE teachers." (9/6/18 Order, Doc. 2123 at
14 65:17-20.)
15

16 Expansion of Cholla IB tutoring model

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18 In response to the Court's directive that in the ALE Policy Manual the District
19 determine "whether the most effective tutoring programs are teacher-based like the IB and
20 UHS programs" (*id.* at 97:22-23), the policy manual says only: "The District now requires
21 all tutors in the District's formal tutoring programs to be certified teachers, making the
22 District's tutoring programs teacher-based." (ALE Progress Report, Doc. 2267-2 at 88; *see*
23

24
25 ² Mendoza Plaintiffs understand that this approach already is used at UHS. (ALE Policy
26 Manual, Doc. 2267-1 at 29.)

27 ³ The District's August 30, 2019 filings were quite voluminous and the same topics are
28 often covered in more than one document. Because they have had only a relatively short
time to review them, it is possible the Mendoza Plaintiffs have missed something in those
filings. If so, they apologize for any such oversights.

1 *also id.* at 47-48.) Mendoza Plaintiffs have long supported adoption of a policy that
2 tutoring be provided by qualified, certified, teachers; however, they also note that the
3 District's response (and policy) do not meet the Court's directive. What distinguishes the
4 tutoring in the IB program is that the tutoring is provided by the actual IB course teachers,
5 not separately engaged teachers who are asked to serve only as tutors. (*See*, this Court's
6 discussion of the Special Master's discussion of the IB tutoring effort and his
7 recommendation that "[t]his model might be explored for AP tutoring" quoted in the
8 9/6/18 Order, Doc. 2123 at 78:23-26.) There is no indication in either the ALE Policy
9 Manual or in the ALE Progress Report that the District considered adopting the IB model
10 elsewhere.⁴ Indeed, notwithstanding some contradictory and/or nonresponsive language in
11 the ALE Policy Manual and ALE Progress Report, as this Court noted in its recent Budget
12 Order, the District apparently has concluded that it is "unable to expand the in-house
13 model used at Cholla.... Instead, the District has been forced to use private companies to
14 provide tutoring services." (9/10/19 Order, Doc. 2272, at 6:20-28.) To remove all
15 ambiguity, Mendoza Plaintiffs respectfully request that the District be asked to clarify the
16 ALE Policy Manual and ALE Progress Report to specifically address what tutoring is
17 provided to its ALE students, particularly those in AP classes, and by whom.

Expansion of Dual Language ALEs

25 ⁴ There is a statement in the Policy Manual that "AP Tutoring in math and/or English
26 language arts (ELA) skills is provided by AP teachers" (Doc. 2267-1 at 24) but it is
27 unclear if such tutoring applies to all AP courses or only a subset of them. Although there
28 is extensive discussion of UHS in both the Policy Manual and the Progress Report (*see*,
e.g. ALE Policy Manual at 30-32), Mendoza Plaintiffs did not see any reference to tutoring
of UHS students during the school year; however, they suspect this may be an oversight in
the materials prepared for Court submission – or that they simply missed it.

1 The Court directed the District to “include plans and effective strategies, if any, for
2 increasing dual language ALEs in the ALE Policy Manual, including how to offset the
3 impact of dual language ALEs on access to ALEs for non-Spanish speaking African-
4 American and Latino students.” (*Id.* at 89:15-18.) The District has not adequately
5 addressed the first part of the Court’s directive and seems to have presented a response to
6 the second part that is not responsive to the Court’s concerns.
7

8 The District addresses this topic in the ALE Progress Report. There, rather than set
9 out plans it has to increase the number of dual language ALEs⁵, it says that “[d]ual
10 language GATE may expand to other sites should the program need enrollment space”
11 (ALE Progress Report, Doc. 2267-1 at 9) but fails to set forth any process or criteria (that
12 is, a policy) that it will follow to identify an appropriate location. As to the second part of
13 the Court’s directive: the ALE Progress Report says that Hollinger offers “pullout GATE
14 for those qualified students who begin at the school after 3rd grade and cannot participate
15 in dual language GATE because they do not have grade-level proficiency in Spanish.” (*Id.*
16 at 13.) Mendoza Plaintiffs understand this to be a reference to a program that is offered to
17 Hollinger students who have not qualified for the dual language self-contained program
18 either because they did not have test scores high enough to qualify for attendance in a self-
19 contained GATE program or because they could not demonstrate sufficient Spanish
20 proficiency to participate in the TWDL program but whose test scores were high enough
21 for them to qualify for inclusion in the pullout GATE program. This does not seem to
22 answer the Court’s concern about whether sufficient self-contained GATE program
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27 ⁵ In fact, the number of sites offering dual language ALEs has declined, with the District’s
28 decision to combine the previously existing program at Pistor Middle School with the
program at Hollinger. (*See* ALE Progress Report, Doc. 2267-1 at 22-23.)

1 opportunities are available to non-Spanish speaking African American and Latino students
2 since they are not eligible for participation in the self-contained GATE dual language
3 program. (*See*, 9/6/18 Order, Doc. 2123 at 56:5-17.)

4 UHS

5 The Court ordered the District to identify whether there are any pipeline issues
6 impeding UHS enrollment of African American and Latino students, and if so, to address
7 such issues in the ALE Policy Manual (*id.* at 86:20-21), having observed that the District’s
8 “assessment regarding the effectiveness of the Pre-AP program to prepare students for the
9 AP program [that it had directed be conducted earlier in its Order (Doc. 2123 at 74:15-21)]
10 may answer this question.” (*Id.* at 86:1-2.) However, as noted above (at page 2), the
11 District failed to undertake this assessment and does not address pipeline issues in its ALE
12 Policy Manual. In the ALE Progress Report it says only that it did not “discover any
13 pipeline issues specific to the Tucson Unified that affect potential UHS students” (Doc.
14 2267-2 at 66) but says nothing about the relative success in AP courses and at UHS of
15 students who took Pre-AP courses as opposed to students who had been enrolled in self-
16 contained GATE, and seems to have misunderstood the Court’s meaning in referring to
17 “pipelines” since the report then references efforts to educate various constituencies about
18 UHS (*id.* at 66-67) rather than address the issue of relative preparation of in-coming or
19 potential students.
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24 In its discussion of the relative number of white, Latino, and African American
25 students enrolled at UHS, the Court wrote: “Of concern to the Court is the number of
26 White students recruited from outside the District, and here the record is silent. Given
27 White student enrollment at UHS is double in-District norms, the Court suspects that ‘a
28

1 significant number' of the UHS students being enrolled from outside TUSD may be White.
2 If true, the Court finds that the District should consider the practicality of implementing in-
3 District preferences for the more racially diverse in-District students, who are on the
4 borderline of qualifying for enrollment at UHS.” (9/6/18 Order, Doc. 2123, at 85:13-19;
5 see also *id.* at 87:2-5 (“The District shall develop in-District enrollment preferences, if
6 determined to be practicable strategies for promoting integration at UHS. Recruitment
7 strategies determined to be effective to increase enrollment shall be reflected in the ALE
8 Policy Manual.”))

9
10 So far as Mendoza Plaintiffs can determine, the District has not assessed the relative
11 number of in-District and out-of-District white students currently attending UHS and has
12 not considered the practicality of implementing in-District preferences for African
13 American and Latino students who are on the borderline of qualifying for enrollment.
14 They have found no discussion of this issue in either the ALE Policy Manual or the ALE
15 Progress Report.
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18 On the subject of targeted recruitment, the Court refers to certain strategies
19 employed both to recruit and retain African American students and finds that “[t]here is no
20 similar evidence referenced in the record regarding targeted recruitment for Latino
21 students.” (*Id.* at 85:20-86:3.) So far as Mendoza Plaintiffs can determine, UHS had yet to
22 adopt comparable strategies to target recruitment of Latino students. Further, in response
23 to the Court’s directive that it “develop a remedial strategy for Latino attrition” (*id.* at
24 86:27-28), the District points to four actions it is taking that apply to all students (ALE
25 Progress Report, Doc. 2267-2 at 74-75) but fails to identify remedial strategies specifically
26 focused on the retention of Latino students.
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1 ***The ALE Progress Report Does Not Permit Meaningful Assessment***
2 ***of the District’s Success in Ensuring that African American and***
3 ***Latino Students Have Equal Access to the District’s ALEs Even as Certain***
4 ***Data in that Report Establish that the District has yet to Effectively***
5 ***Implement the ALE Section of the USP***

6 The USP is clear that the purpose of its section on Access to and Support in
7 Advanced Learning Experiences is “to ensure that African American and Latino students
8 have equal access to the District’s Advanced Learning Experiences. (USP, Section V, A,
9 1.) However, its ALE Progress Report does not contain information sufficient to permit a
10 finding that that goal has been attained. While there are a number of deficiencies in the
11 Report, the following are of particular note:

12 Although some of the charts and other data in the Progress Report do provide
13 comparative information about white, African American, and Latino students, not all do.
14 (See, e.g., graphs on page 4 of Doc. 2267-2 as well as chart titled “Pre-AP Honors
15 Enrollment by Year and Ethnicity”, *id.* at 38.) It therefore is difficult to assess the extent
16 to which progress has been made in closing what the Mendoza Plaintiffs previously have
17 referred to as the participation gap. (See discussion in this Court’s earlier order on ALEs,
18 10/24/17 Order, Doc. 2084, at 15:4-13; *see also, id.* at 9:16-22.)⁶

19 This Court has “held that it would apply a ‘not less than’ 15% rule of thumb red-
20 flag for when discrimination may exist in a particular ALE program.” (9/6/18 Order, Doc.
21 2123, at 49:5-6, citing Doc. 2084.) While the Mendoza Plaintiffs have never been
22 advocates of the “Not Less Than 15% “Rule” they cannot but note the absence of any

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26 ⁶ It may be that the District will provide this and other missing information discussed
27 herein when it files its 2018-19 Annual Report. However, it is requesting an award of
28 unitary status based on the ALE Progress Report (and other documents on file with the
 court, none of which address conditions during the 2018-19 school year). (Notice of Filing:
 ALE Policy Manual, Doc. 2267, at 3: 7-11.)

1 discussion of what application of that “rule” would show for African American and Latino
2 enrollment in ALEs in school year 2018-19 particularly for those ALEs that the Court
3 called out for particular comment in its 9/6/18 Order. (*See in particular* Doc. 2123 at
4 51:15 – 54:20.)

5
6 Although the ALE Progress Report lacks information sufficient to permit a full
7 assessment of TUSD’s progress in implementing the ALE Section of the USP, certain of
8 the information it does contain reveals that the District still has substantial work to do.

9
10 For example, the District cites as evidence of progress the fact that “[t]he
11 percentage of Hispanic students enrolled in Advanced Placement classes as compared with
12 the total percentage of students of all ethnicities increased from 42 percent in SY 12-13 to
13 46 percent in SY 18-19.” (ALE Progress Report, Doc. 2267-2, at 52.) What the District
14 omits, however, is that the percentage of Hispanic students enrolled in its high schools also
15 increased between 2012-13 and 2018-19 and that that rate of increase (based on the
16 enrollment numbers available on the District’s website) was greater than the increase in the
17 relative percentage of Hispanic students taking AP courses.⁷

18
19 Further, the chart titled Number and Percentage of Students with One or More
20 Qualifying AP Scores on an AP Exam (*id.* at 55) indicates that the District has barely
21 budged the needle when it comes to closing the gap in percentage of students with
22 qualifying scores between Latino students and white students (and then only because the
23 total percentage of white students with qualifying scores dropped, not because the total
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26 ⁷ According to the Mendoza Plaintiffs’ calculations, the total Hispanic high school
27 enrollment increased by 10.6% while the percentage of students enrolled in AP courses
28 (which Mendoza Plaintiffs assume was limited to high school students) increased by 9.5%.
While this spread is not enormous, it suggests an increase rather than a decrease in the
“participation gap.”

1 percentage of Latino students with qualifying scores increased). That chart shows that in
2 spring 2015, 58% of Latino students and 75% of white students had qualifying AP scores
3 as compared to 58% of Latino students and 74% of white students in spring 2019. More
4 troubling, it reports that the total number of African American students who achieved one
5 or more qualifying AP scores declined between spring 2015 and 2019, as did the
6 percentage of African Americans who took the tests (from 52% in 2015 to 43% in 2019).
7 Another chart on that same page of the ALE Progress Report similarly reports a decline in
8 the number and percentage of AP exams taken by African American students on which
9 those students achieved a score of 3 or above (71 down to 61; 51% down to 41% between
10 2015 and 2019). (*Id.* at 55.) While the number of exams on which Latino students achieved
11 a score of 3 or above increased during that period, as did the percentage of Latino students
12 taking the exams who achieved this level of success (624 to 941 and 51% to 55%), the gap
13 as compared with white students increased (difference of 17% given a white student
14 success rate of 68% to difference of 18% given a white student success rate of 73%).
15 (Mendoza Plaintiffs do not intend to suggest that this difference, taken by itself, is
16 dispositive. It simply is yet another indication that the District continues to have work to
17 do especially given the magnitude of the difference between the success rates of its white
18 and its Latino students in 2019.)⁸

23 The data relating to African American and Latino students' success rates in
24 completing participation in AP courses suggests that the District is not yet doing enough to
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26 ⁸ In this regard, Mendoza Plaintiffs specifically note that this Court has stated that
27 participation in an ALE "includes completion, defined as the number of students passing
28 ALE courses and number of students taking and passing requisite certification tests
necessary for African American and Latino students to secure the benefit of participating
in ALE programs." (10/27/17 Order, Doc. 2084, at 17:18-21.)

1 prepare and support these students. In particular, the reported results suggest that the
2 District should expand its AP Summer Boot Camp and more actively target participation
3 by African American students interested in enrolling in AP courses. According to the ALE
4 Progress Report, the District enrolled a total of only 105 students, of whom only six were
5 African American, in its 2018 AP Summer Boot Camp. (*Id.* at 54.)
6

7 Variations in participation in ALEs among schools suggests that the District has not
8 yet succeeded in “developing school-wide cultures where academic excellence is valued
9 and celebrated” (9/6/18 Order, Doc. 2123 at 77:2-3, quoting Doc. 2084 at 18.) For
10 example, the chart setting out 2018-19 Pre-AP Advanced Participation 6th-8th Grade – 40th
11 Day shows that 7% of the Latino students at Booth-Fickett participate in such courses as
12 compared to 69% at Rose. (Doc. 2276-2 at 39.)
13

14 **Conclusion**

15 For the reasons set forth above and in the separately filed response to TUSD’s
16 Outreach and Recruitment Addendum for Magnet and ALE Programs, Mendoza Plaintiffs
17 respectfully request the Court to hold that the District has failed to comply with its 9/6/18
18 Order relating to USP Section V, A and deny the District’s request that it be granted partial
19 unitary status with respect to Section V, A of the USP.⁹ In an excess of caution, Mendoza
20 Plaintiffs respectfully invite the Court’s attention to their earlier objections to such requests
21 by the District and to their Motion to Stay (Doc. 2186), expressly incorporate herein the
22 arguments set forth in those pleadings, and also note this Court’s statement when it denied
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27 ⁹ In expressly addressing the District’s recent submission with respect to Section V,A of
28 the USP, Mendoza Plaintiffs do not intend to waive, and hereby retain, their claim that the
District has not yet attained unitary status with respect to any portion of the USP.

1 that Motion that it will not again reach the question of unitary status until after the
2 District's Executive Summary filing and the proceedings relating thereto.
3

4 Dated: September 20, 2019
5

6 MALDEF
7 JUAN RODRIGUEZ
8 THOMAS A. SAENZ

9 /s/ Juan Rodriguez
10 Attorney for Mendoza Plaintiffs

11 PROSKAUER ROSE LLP
12 LOIS D. THOMPSON
13 JENNIFER L. ROCHE

14 /s/ Lois D. Thompson
15 Attorney for Mendoza Plaintiffs
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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2019, I electronically submitted the foregoing **MENDOZA PLAINTIFFS' RESPONSE TO TUSD NOTICE OF FILING OF ALE POLICY MANUAL AND OBJECTION TO THE DISTRICT'S REQUEST THAT IT BE AWARDED PARTIAL UNITARY STATUS WITH RESPECT TO SECTION V.A OF THE USP** to the Office of the Clerk of the United States District Court for the District of Arizona for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

P. Bruce Converse
bconverse@dickinsonwright.com

Timothy W. Overton
toverton@dickinsonwright.com

Samuel Brown
samuel.brown@tusd1.org

Robert S. Ross
Robert.Ross@tusd1.org

Rubin Salter, Jr.
rsjr@aol.com

Kristian H. Salter
kristian.salter@azbar.org

James Eichner
james.eichner@usdoj.gov

Shaheena Simons
shaheena.simons@usdoj.gov

Peter Beauchamp
peter.beauchamp@usdoj.gov

Special Master Dr. Willis D. Hawley
wdh@umd.edu

/s/ Juan Rodriguez

Dated: September 20, 2019