No. 18-16983

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROY FISHER, et al.,
Plaintiffs ï Appellants,

and

MARIA MENDOZA, et al.,
Plaintiffs ï Appellants,

v.

TUCSON UNIFIED SCHOOL DISTRICT,
Defendant ï Appellee.

Appeal from the United States District Court
for the District of Arizona
District Court Case No. CV-74-00090-DCB

OPENING BRIEF OF PLAINTIFFS - APPELLANTS

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CORPORATE DISCLOSURE STATE ENT

No corporate disclosure by the Fisher Plaintiffs is required under Federal Rules of Appellate Procedure, Rule 26.1.

Dated: October 25, 2019

Rubin Salter, Jr.
SALTER LAW OFFICE

By: /s/
Rubin Salter

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URISDICTION AND TI ELINESS

Fisher Plaintiffs or Cross Appellants brought suit against the Tucson Unified School District #1 asserting claims of discrimination under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. The District Court has federal question jurisdiction under 28 U.S.C. § 1331. As detailed below, this Appellate Court has jurisdiction over plaintiffs' appeal from the lower court's September 6, 2018 Unitary Status Order, ER001, under 28 U.S.C. § 1292(a)(1) because that order modified or actually dissolved portions of the Unitary Status Plan ("USP"), which is the consent decree, prescribing what the defendant school district must do to attain unitary status.

A T U S O H E
D P USP C D
A U U S C

Under the plain language of 28 U.S.C. § 1292(a)(1) Court orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court" are appealable. 28 USC § 1292(a)(1). The District Court's Unitary Status Order granted unitary status as to certain provisions of the USP and thereby modified or actually dissolved certain portions of that plan. *See* Unitary Status Order at ER001 ("It is ORDERED that…unitary status is GRANTED IN PART AND DENIED IN PART." (emphasis in original)).

The USP is a consent decree. *Fisher v. Tucson Unified Sch. Dist.*, 588 Fed.

App'x 608, 609 (9th Cir. 2014). As the Ninth Circuit Court of Appeals has held, orders modifying consent decrees should be reviewed under *Carson*." *United States v. El Dorado Co., Cal.*, 704 F.3d 1261, 1264 (9th Cir. 2013); *see also Carson v. American Brands, Inc.*, 450 U.S. 79, 84-86 (1981), and this Court's order dismissing the defendant school district's appeal, Order 7/29/19, Court of Appeals Dkt. No. 18-16926, Doc. 17, at 2. Under the *Carson* test, this honored Appellate Court should look to whether the Unitary Status Order (1) has the "practical effect" of "granting or denying", modifying, or dissolving injunctive relief, (2) would cause the appealing parties "serious, perhaps irreparable consequence," and (3) can be effectively changed only by immediate appeal. *Salazar v. District of Columbia*, 671 F.3d 1258, 1261 (D.C. Cir. 2012) (*citing Carson*, 450 U.S. at 83-84).

First, the Unitary Status Order had the practical effect of modifying or actually dissolving those portions of the consent decree, the USP, for which partial unitary status was granted. *Freeman v. Pitts*, 503 U.S. 467, 491 (1992) (a grant of partial unitary status is a "return [of] control to the school system in those areas where [unitary status] has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree"); *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1143-44 (9th Cir. 2011).

Second, the Unitary Status Order has caused the appealing parties "serious, perhaps irreparable consequence" because it has improperly and prematurely ended

judicial oversight over portions of the USP based on an erroneous application of controlling law and greatly curtails the District Court's ability to fashion further remedies in the future to ensure full implementation of the USP. Unitary Status Order, ER001:9-14 (stating that awarding partial unitary status furthers "the goal of returning TUSD to the control of local authorities… the Court finds it is important… for the District and the community to focus on the work that remains under the USP"); *Freeman,* 503 U.S. at 491 (Courts "may return control to the school system in those areas where… [unitary status is awarded], limiting further judicial supervision to operations that are not yet in full compliance with the court decree.").[1]

Finally, there is no other mechanism through which the plaintiffs Fisher may challenge the Unitary Status Order's grant of partial unitary status, and the order therefore can effectively be challenged or changed only by immediate appeal. Accordingly, the Unitary Status Order meets the *Carson* test, and therefore is appealable under 28 U.S.C. § 1292(a)(1).

[1] The District Court stated that it was retaining jurisdiction over all provisions of the USP "for the purpose of enforcement", Unitary Status Order at ER001:4-5, to avoid TUSD desegregation progress "return[ing] to unsatisfactory levels". However, *see also Morgan v. Burke*, 926 F.2d 86, 91 (1st Cir. 1991) (describing as "modest and limited" a court's retention of jurisdiction following compliance with a consent decree).

B F Plaintiffs' Notice A T F

Under FRAP 4(a)(1)(B)(i), a party may file a notice of appeal within sixty days when the United States is a party. The United States had previously intervened as a plaintiff in the District Court. The Fisher Plaintiffs' filed a notice of cross-appeal on October 10, 2018[2], ER002, which was timely as it was filed within 60 days of the District Court's September 6, 2018 Unitary Status Order.

ISSUES PRESENTED FOR RE IE

(1) Did the District Court err in granting partial unitary status to TUSD given that it had expressly found, at ER0015:1-4, "that the School District has not yet demonstrated to the public, including African-American and Hispanic parents and students, its good-faith commitment to the whole of the USP and to those provisions of the law and the Constitution that predicated judicial intervention"?

(2) Did the District Court err in granting unitary status as to the transportation provisions of the USP because it thereby not only removed from court supervision an area of TUSD's operations that is inextricably intertwined with other provisions for which unitary status was not granted and is therefore essential to accomplish full and satisfactory compliance with other

areas of the USP that, it ruled, TUSD remains obligated to address?

(3) Did the District Court err in granting unitary status as to certain student assignment provisions of the USP even though it also, in implicit contradiction of its unitary status order, required TUSD to engage in additional activities (compliance plans) to actually comply with those very same provisions?

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[2] It may be noteworthy that TUSD had filed a notice of appeal on October 4, 2018, yet the Ninth Circuit Court of Appeals dismissed the TUSD appeal (No. 18-16926) on July 29, 2019, and ordered the cross-appeals, now appeals, to proceed. Order 7/29/19, Court of Appeals Dkt. No. 18-16926, Doc. 17.

STATE ENT OF THE CASE

I. NATURE OF THE CASE

This is a school desegregation case initiated in 1974 by separate filings on behalf of a class of African-American students (the Fisher Plaintiffs) and a class of Mexican-American students (the Mendoza Plaintiffs) against Tucson, Arizona, Unified School District No. 1 ("TUSD" or "the District")[3] and consolidated for all purposes in 1975. In 1976, the United States intervened as a plaintiff. The procedural history of this case is quite substantial. However, only those portions pertinent to the appeal are presented here. Because many facts relevant to the issues submitted for review relate to that procedural history, Fisher Plaintiffs combine below their discussion of the course of the proceedings and their statement of facts.

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[3] The comparable class of African-American students and their parents, guardians, etc. has been referred to below, in prior appeal, and is referred to herein as the "Fisher Plaintiffs." See *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131 (9th Cir. 2011). The class of "Mexican-American or Hispano-American students or students with Spanish surnames and their parents, guardians," etc. was referred to below and is referred to herein as the "Mendoza Plaintiffs." *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1341 (9th Cir. 1980) ("*Mendoza* Appeal 1"). That class also has been understood by the parties and the lower court, and often is referred to in the record, as comprised of TUSD's "Latino" or "Hispanic" students.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

A Proceedings Prior to This Court's 2011 Opinion and O

Fisher Plaintiffs, for the sake of judicial economy and to avoid redundancy, respectfully adopt both the Procedural History and Statement of Facts of the Mendoza Plaintiffs (including the Mendoza Opening Brief Excerpts of Record) as follows. The Fisher/Mendoza consolidated case was tried in 1977. After trial, the court rendered findings of facts and conclusions of law, whereby it held that injunctive relief against TUSD was warranted, stating: "considering the past segregative acts [of TUSD] as found by the Court and the seriousness thereof, a willingness to continue such acts must be inferred, and an injunction must issue to prevent any further reoccurrence of such constitutional violations." Order 6/5/1978, Findings of Fact and Conclusions of Law, Doc. 345, at ¶ 61. Thereafter, the parties entered into a Settlement Agreement that included a desegregation plan. The plan and the Settlement Agreement were approved by the court in August, 1978. *Mendoza* Appeal 1, 623 F.2d at 1343.

TUSD operated under the Settlement Agreement for more than 25 years. Then, in 2004, the lower court stated its intention to issue an order directing TUSD to show cause why it had not attained unitary status. Thereafter, in January 2005, the District filed a Petition for Unitary Status and Termination of Court Oversight which was opposed. The District Court granted the Petition.

However, even though it found that TUSD had "failed to act in good faith in its ongoing operation of the District [TUSD] under the Settlement Agreement" and notwithstanding that it had questions as to whether TUSD had eliminated vestiges of racial discrimination to the extent practicable, the lower court, nonetheless, held that TUSD would "attain unitary status upon the adoption of a Post-Unitary Plan…." Order 4/24/2008, ER0660:26-27, ER0661:26. Both the Fisher and the Mendoza Plaintiffs appealed the court's order.

B This Court's 2011 Opinion and O

On appeal, this Court concluded that the "district court's own findings [were] fatal to its determination that the School District h[ad] achieved unitary status." *Fisher*, 652 F.3d at 1141. Accordingly, it reversed, remanded, and wrote the following:

> We… order [the District Court] to maintain its jurisdiction until it is satisfied that the School District has met its burden by *demonstrating* – not merely promising – its 'good-faith compliance…with the [Settlement Agreement] over a reasonable period of time.' The court must also be convinced that the District has eliminated 'the vestiges of past discrimination…to the extent practicable' with respect to all of the *Green* factors.
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> *Id*. at 1142-44 (citations omitted; emphasis in original).

The Court also stated that the District Court retained discretion to order partial withdrawal of its supervision over the school district. *Id*. at 1144. It then provided direction concerning the factors the lower court should consider in making

such a determination. Citing the Supreme Court's decision in *Freeman*, 503 U.S. at 491, this Court wrote: "The court's 'sound discretion' should be informed by these factors:

> [W]hether there has been full and satisfactory compliance with the [Settlement Agreement] in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the [Agreement] in other facets of the school system; and whether the [S]chool [D]istrict has demonstrated, to the public and to the parents and students of the once disfavored race[s and ethnicities], its good-faith commitment to the whole of the [Agreement] and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance."
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> *Fisher*, 652 F.3d. at 1144-45.

C P U S D C S A S P U S P

Upon remand, the District Court appointed a Special Master to develop a plan, the USP, to "bring the District into unitary status" and to oversee implementation of that Plan. 1/6/12 Order, ER0589:24-ER0590:2. The Court further directed that the USP include "[s]pecific substantive programs and provisions to be implemented by TUSD to address all outstanding *Green* factors[4] and ancillary factors as recognized in the 1978 Stipulation of Settlement and any subsequent court orders" and a "proposed timeline leading to unitary status after three full school years from adoption of the USP, subject to annual extensions by the Court for reason of unattained compliance by the District with the USP." *Id*. at ER0592:17-19, ER0593:20-22.

[4] Thereafter, in its order adopting the USP, the District Court again ruled that no *Green* factor was to be omitted from the USP, first noting that the "parties' own stipulated plan to attain unitary status addressed all the *Green* factors," and then holding that the "*Green* factors addressed in the proposed USP are *interrelated and interdependent* [emphasis added to original] forming a comprehensive plan such that partial withdrawal of judicial oversight as to any *Green* factor is inappropriate." Order 2/6/13, ER0557:5-7, 12-15. Further, it held that "supervision may not be partially withdrawn for any *Green* factor because the District failed to demonstrate to the public and to the parties and students of the once disfavored races and ethnicities its good faith commitment to the whole of the 1987 Stipulation and to those provisions of the law and the Constitution that were the predicate for judicial intervention." *Id*. at ER0558:7-11.

Over the course of many months, the parties and the Special Master formulated the USP. The court ruled on objections to limited portions of the USP, and then approved and adopted the Plan in February 2013. 2/6/13 Order, ER0548- 587.

With respect to termination of judicial oversight, the USP provides: "The Parties may move, separately or jointly, for a declaration of partial unitary status at any time. A motion for the determination of complete unitary status shall not be filed prior to the end of the 2016-17 school year." USP, Section XI.A.2, at ER0546.[5]

U S P

In March 2017, TUSD filed a motion seeking partial unitary status. Doc. 1993. The Fisher and Mendoza Plaintiffs opposed the motion in its entirety; the United States opposed an award of unitary status as to certain provisions of the USP as premature. Docs. 2014, 2016, 2017. In May 2017, the court, without considering the merits of the motion, denied it as moot, stating that "deciding whether to grant partial unitary status would be an ineffective use of Court resources so close in time to when the question regarding attainment of unitary status in total is scheduled to commence." Order 5/17/17 at ER0458:25-ER0459:1.

[5] The referenced USP is a version of the original USP approved by the court (Doc. 1450) with a number of typographical errors corrected; it does not differ substantively from the original USP.

It then directed the parties and the Special Master to "develop the timeline and deadlines for filing the Special Master's Report and Recommendation regarding the status for attainment of unitary status in TUSD." *Id*. at ER0459:13-15.

Thereafter, the court provided clarification of its May 17 order, ER0452-54, as follows:

> It seemed to go without saying that TUSD, which bears the burden of showing it has attained unitary status, must move this Court to end its oversight of the USP. What the Court envisioned when it asked for a briefing schedule for the SY [school year] 2016-2017 status report regarding unitary status was something akin to the annual reports, which are initiated by TUSD and followed by the Special Master's Annual Report, with similar opportunities for objections from the parties. In light of the fast approaching October 1st deadline [set by the USP] for TUSD's SY 2016-2017 annual report, the Court calls for the 'Reporting' required for each USP component to include an analysis of the status for attaining unitary status.
>
> Order 5/25/18 at ER0453:12-21 (citations and footnote omitted).

In July, 2017 the Special Master filed his summary of the parties' further agreements concerning process and timeline to comply with the District Court's May 2017 orders. ER0448-51. In response, the Court issued a further order of clarification: "[i]t is this Court's intent that the District's 2016-17 annual report shall be a full accounting for each provision in the USP of its status in relation to attaining unitary status. The Special Master's annual report will mirror this requirement." Order 7/19/17 at ER0447:7-9. The court again set forth its expectations with respect to the District and Special Master annual reports when it ruled that objections to the Special Master's Annual Report for the 2015-16 school year would be addressed in the context of the court's consideration of the forthcoming 2016-17 annual reports. Order 8/15/17, ER0443-45. It wrote:

> Because the USP, functioning as a Consent Decree, is the litmus test for attaining unitary status, the District's SY 2016-17 AR [Annual Report], followed by the SMAR [Special Master's Annual Report], will be the starting point for a comprehensive review of the USP to determine what components, if any, have been fully and successfully implemented. The Court intends for this review to result in roadmaps, including time-lines, for attaining unitary status for any USP component which has not been fully and successfully implemented. *Id*. at ER0444:9-15.

On September 1, 2017, TUSD filed its Annual Report for the 2016-17 school year. Doc. 2057-1. On October 1, 2017, it filed its Analysis of Compliance with Unitary Status Plan ("Compliance Analysis"). Doc. 2075.

At that time of those filings, pending before the District Court were the Special Master's Report and Recommendation and the Mendoza Plaintiffs' objections to the plan the District had prepared relating to goals for and implementation of those sections of the USP covering advanced learning experiences ("ALEs"). On October 24, 2017, the court issued an order adopting many of the Special Master's recommendations. It therefore struck the ALE section in the District's then recently filed Compliance Analysis and directed TUSD to file a revised section within 60 days. Order 10/24/17 at ER0442:4-10. Following the entry of a further court order, Order 12/29/17 at ER0418-20 relating to the timing and content of that section, TUSD filed its revised analysis of its compliance with USP provisions relating to ALEs on February 1, 2018. Docs. 2092, 2092-1.

In December 2017, the court also revised the briefing schedule for the Special Master's annual report and clarified the process under which the Special Master was to prepare the roadmaps (which the court then identified as Completion Plans) that the Special Master recommended TUSD follow in order to implement those USP provisions as to which he had concluded more work was required to attain unitary status. All parties, including the District, were provided the opportunity to comment on and object to the proposed Completion Plans. Order 12/19/17, ER0421-23.

The Special Master filed his 2016-17 Annual Report, ER0159-309, on

February 27, 2018. This was followed in May 2018 by Special Master replies to the parties' comments and objections, including revisions to some of the proposed Completion Plans in response to those comments and objections. ER0310-58, ER0359-412.

On September 6, 2018, the District Court issued its order (the Unitary Status Order) granting in part and denying in part unitary status. Order 9/6/18, ER0001-153. The District Court specifically granted partial unitary status with respect to the following USP sections: (1) Section II, Student Assignment, except for the magnet school program; (2) Section III, Transportation, with the exception of transportation for the magnet school program and Advanced Learning Experiences ("ALEs") provided for in Section V of the USP; (3) Section IV, Administrative and Certificated Staff, except for subsections A (teacher and administrator diversity), F.1 (staff retention and attrition), and I.3 ("Grow Your Own Programs"); (4) Section V, Quality of Education, excluding subsections A (student access to and support in ALEs), C (dual language programs), E.1.b.a.i-ii (culturally relevant courses, including multicultural courses), E.7-8 (African American and Latino student support services), and F (maintaining inclusive school environments); (5) Section VII, Family and Community Engagement, except for school-site services and data tracking capabilities; (6) Section VIII, Extracurricular Activities, except for documentation that there are no disparities between racially concentrated and integrated schools, and with respect to the use of extracurricular activities to

facilitate positive interracial interactions; (7) Section IX, Facilities and Technology, except with respect to the facilities condition index (FCI) and technology condition index (TCI) mandated by the USP, and subsections B.1.iv and B.4 (teacher proficiency in using technology to facilitate student learning); and

8) Section IX, Accountability and Transparency, except for professional development and subsection X.B (the budget). Id. at ER0149-51.

TUSD appealed, and the class plaintiffs cross appealed from the Unitary Status Order. On July 29, 2019, this Court dismissed the TUSD appeal for lack of jurisdiction. Order 7/29/19, Court of Appeals Dkt. No. 18-16926, Doc. 17.

STANDARD OF RE IE

The District Court's legal conclusions are reviewed *de novo*. *Fisher*, 652 F.3d at 1136. Its findings of fact are reviewed for clear error under Federal Rule of Civil Procedure 52(a)(6). *Id*. (citing *Robinson v. Shelby Co. Bd. of Educ*., 566,

F.3d 642, 647 (6th Cir. 2009) (clear error standard for review of unitary status determination)). "'Rule 52(a) 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.'" *Id*. (citing *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (quoting *Bose Corp. v. Consumers Union of U.S., Inc*., 466 U.S. 485, 501 (1984)).

SU AR OF ARGU ENT

The Unitary Status Order must be reversed because the District Court erred as a matter of law in multiple ways.

First, notwithstanding the clear requirement that a school district must demonstrate a good faith commitment to the entirety of a desegregation plan before partial unitary status can be awarded and the District Court's own express finding that TUSD "has not demonstrated…its good-faith commitment to the whole of the USP and to those provisions of the law and the Constitution that predicated judicial intervention", ER0015:1-4, it erroneously awarded unitary status with respect to certain USP programs based on its finding that the District had demonstrated a good faith commitment to the "whole" of only those particular programs.

Secondly, the District Court also erred by prematurely awarding partial unitary status as to the transportation portions of the District's operations that are not only essential to achieve a full remedy, and full USP implementation, yet are inextricably intertwined with other portions of the District's operations that the court ruled were not yet in compliance with the USP, whereby such a premature return of control of the transportation portions of the District's operations may effectively cause or contribute to non-compliance by the District in those areas.

Finally, the court also erred by contradiction in awarding unitary status in areas where it also actually ordered additional remedial action by TUSD to comply with the USP. Obviously, the fact that additional remedial steps were needed in the court's estimation for compliance to be obtained clearly shows or establishes that TUSD was not yet in full and satisfactory compliance with those USP provisions, and that the award of unitary status as to those areas therefore was improper.

POINT I

THE DISTRICT COURT ERRED IN GRANTING UNITAR STATUS AS TO CERTAIN USP PRO ISIONS BECAUSE IT NOT ONL E PRESSL FOUND THAT TUSD "HAS NOT YET DEMONSTRATED A GOOD-FAITH COMMITMENT TO THE WHOLE OF THE USP" ET BECAUSE UNDER UNITED STATES SUPRE E COURT AUTHORIT IN *FREEMAN* SUCH GOOD-FAITH CO IT ENT IS ACTUALL RE UIRED BEFORE A SCHOOL DISTRICT UNDER DESEGRATION RELATED ORDERS B A FEDERAL COURT A BE GRANTED UNITAR STATUS OR PARTIAL UNITAR STATUS

The United States District Court erred in granting Unitary Status as to certain USP provisions or Partial Unitary Status because it not only had expressly found that TUSD "has not yet demonstrated…[a] good faith commitment to the whole of the USP", yet because under United States Supreme Court authority in *Freeman* such a good faith commitment is actually required *before* a school district under desegregation related orders by a federal Court may be granted Unitary Status or Partial Unitary Status.

As suggested by the *Mendoza* Plaintiffs/Cross Appellants in their Opening Brief at p. 18, it is telling that the District Court recites in the Unitary Status Order itself that it is well-established that a "school district under a desegregation order, [such as the USP,] is obligated to demonstrate a good-faith commitment to the whole

[6] It is especially noteworthy that the argument in Point I applies to every section and subsection of the USP for which the District Court awarded TUSD partial unitary status. *See* Unitary Status Order at ER0149:13-151:25.

of the court's decrees and to the applicable provisions of the law and the Constitution." Unitary Status Order at ER001:14-19 (*quoting* USP, Section I.C.1, ER0491, (*citing Freeman,* 503 U.S. at 491-92; *Bd. of Educ. Oklahoma City Public Sch. v. Dowell*, 498 U.S. 237, 248-50 (1991)).

Moreover, under the United States Supreme Court's decision in *Freeman v. Pitts* the required showing of a "good-faith commitment to the whole" of the consent decree applies ***equally*** to both partial grants of unitary status as well as plenary grants of unitary status. *Freeman*, 503 U.S. at 491. Such was initially recognized by the District Court itself in the case at bar, as this legal principle was recited at the outset of the lower Court's Unitary Status Order. *See id.* at ER0011:14-20 (*quoting Fisher,* 652 F.3d at 1141 (*quoting Freeman*, 503 U.S. at 491)).[7]

[7] "The requirement that the school district show its good-faith commitment to the entirety of a desegregation plan" is directed at providing "parents, students, and the public [] assurance against further injuries or stigma[.]" *Freeman*, 503 U.S. at 498. The good-faith requirement "reduces the possibility that a school system's compliance is but a temporary constitutional ritual." *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987).

In fact, the specific language of the Unitary Status Order simply states that "the School District has not yet demonstrated to the public, including African-American and Hispanic parents and students, its good-faith commitment to the whole of the USP and to those provisions of the law and the Constitution that predicated judicial intervention." Unitary Status Order at ER015:1-4.

Since the District Court failed to apply the correct legal standard in its assessment of whether TUSD was entitled to an award ofpartial unitary status, this Court should reverse the District Court's order granting partial unitary status in its entirety. The court's ruling manifests a misunderstanding or misapplication of this Court's directive that the District Court is to "maintain jurisdiction until it is satisfied that the School District has met its burden by *demonstrating* -- not merely promising -- its 'good-faith compliance'… with the [Settlement Agreement] over a reasonable period of time." *Fisher*, 652 F.3d at 1143-4 (citing *Freeman*, 503 U.S. at 498).

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[8] As the Mendoza Plaintiffs have pointed out in briefing, "the requirement that the school district show its good-faith commitment to the entirety of a desegregation plan" is directed at providing "parents, students, and the public [] assurance against further injuries or stigma[.]" *Freeman*, 503 U.S. at 498. The good-faith requirement "reduces the possibility that a school system's compliance is but a temporary constitutional ritual." *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987).

POINT II

THE DISTRICT COURT ERRED IN ENDING SUPER ISION OF THE DISTRICT'S USP TRANSPORTATION OBLIGATIONS E CEPT AS THOSE RELATE TO AGNET PROGRA S AND ACCESS TO AD ANCED LEARNING E PERIENCES BECAUSE TUSD'S TRANSPORTATION OBLIGATIONS ARE *INEXTRICABLY INTERTWINED* ITH OTHER USP PRO ISIONS FOR HICH TUSD AS NOT GRANTED PARTIAL UNITAR STATUS

The District Court erred in ending supervision of the District's USP Transportation obligations except as those related to Magnet Programs and access to advanced learning experiences because TUSD's Transportation obligations are *inextricably intertwined* with other USP provisions for which TUSD was not granted partial unitary status.

It has "long [been] recognized that the *Green*[9] factors may be related or interdependent. In fact, almost 20 years ago the 4th Circuit of Appeals in *Belk v. Charlotte-Mecklenburg Bd. of Educ.* specifically recognized that a school district's transportation obligation may be inextricably intertwined with other *Green* factors. *Id.*, 233 F.3d 232, 263-64 (4th Cir. 2000). This federal decision came about just eight (8) years after the United States Supreme Court had actually held that two or more *Green* factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well." *Freeman*, 503 U. S. at 497.

Accordingly, when this Court remanded the case to the District Court, even as it stated that it was for the District Court to decide whether partial withdrawal of court supervision was warranted in any area of TUSD's operations, it also expressly stated that the court's analysis should include determination of "whether retention of judicial control is necessary or practicable to achieve compliance with [the USP] in other facets of the school system…." *Fisher*, 652 F.3d at 1144. In the Unitary Status Order, the District Court discussed the *Green* factors and explicitly stated that the provisions of the USP addressing these factors are "interconnected or interrelated." Unitary Status Order at ER0008:5-13, ER0007:28-8:1. It then stated that "[t]he interconnectivity of the various programs called for under the USP makes it awkward, but not impossible, to grant partial unitary status on elements that may have been achieved in one section but not another of the USP." *Id*. at ER0013:7-9.

[9] The *Green* factors include all facets of a school system's operations inclusive of student assignments, faculty, staff, transportation, extra-curricular activities, and facilities. *Board of Educ. Oklahoma City Public Sch. v. Dowell*, 498 U.S. 237, 250 (1991) (quoting *Green v. Co. Sch. Bd. of New Kent Co., Va*., 391 U.S. 430, 435 (1968)).

The court attempted to overcome the awkwardness it had identified by parsing sections of the USP dealing with a single facet of school operations (in particular, transportation) so as to grant unitary status with respect to certain of TUSD's obligations as to that activity even as it retained jurisdiction over other of its obligations in that same area.

Unfortunately, as well intentioned as this approach may have been[10], it has resulted in removing from the court's supervision areas of TUSD's operations that are essential to accomplish full and satisfactory compliance with areas of the USP that TUSD remains obligated to address.

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[10] The District Court explained that its "[h]esitancy to grant unitary status [because of the interconnectedness of USP provisions] in part is offset by the goal of returning TUSD to the control of local authorities and to enable the public to hold them accountable." *Id.* at ER0013:9-11.

The District Court granted unitary status with respect to Section III of the USP, relating to transportation, but stated that it was "retaining jurisdiction for the purpose of considering unitary status for the Magnet Programs and Advanced Learning Experiences (ALE) Programs." *Id*. at ER0149:20-22. However, additional areas of TUSD's transportation operations are essential to accomplish full and complete implementation of provisions of the USP that the school district remains obligated to address.

Significantly, in the Unitary Status Order, the court found: "Transportation is critical to attaining the USP's goals." *Id*. at ER0037:5. This echoes language from the USP, which states in the very first sentence in the section on transportation: "The District shall utilize transportation services as a critical component of the integration of its schools." USP, Section III.A.1, ER0500.

Given the centrality of transportation to implementation of the District's obligations under the USP and the District Court's own findings and directives, it actually erred under applicable federal law in *Belk* and *Freeman* in withdrawing court supervision over the transportation component of the USP, excepting only the extent to which transportation is intertwined with TUSD's obligations relating to the Magnet Programs and Advanced Learning Experiences.

POINT III

THE DISTRICT COURT ERRED IN GRANTING UNITAR STATUS AS TO ALL STUDENT ASSIGN ENT PRO ISIONS OF THE USP E CEPT FOR AGNET PROGRA S GI EN THAT IT ALSO RE UIRED TUSD TO ENGAGE IN ADDITIONAL ACTI ITIES CO PLETION PLANS TO BRING THE DISTRICT INTO ACTUAL CO PLIANCE ITH THOSE ER SA E PRO ISIONS

The District Court erred in granting Unitary Status as to all student assignment provisions of the USP except for Magnet programs given that it also required TUSD to engage in additional activities (completion plans) to bring the school district into actual compliance with those very same provisions.

More than 25 years ago, the Supreme Court established in *Freeman v. Pitts* the test for determining when a school district may be awarded partial unitary status. Among other factors, the court must determine "whether there has been full and satisfactory compliance with the decree in those aspects of the [school] system where supervision is to be withdrawn…." *Freeman,* 503 U.S. at 491. Accordingly, when this Court remanded this case for further proceedings in 2011, it wrote:

> We leave it to the district court to decide whether partial withdrawal is warranted in this case. The court's 'sound discretion' should be informed by these factors: 'whether there has been full and satisfactory compliance with the [Settlement Agreement, that is, the USP] in those aspects of the system where supervision is to be withdrawn ….' *Fisher,* 652 F.3d at 1144.

Regrettably, notwithstanding the clear law in *Freeman* and this Court's explicit 2011 directive, the District Court withdrew supervision from aspects

of the school system as to which it appropriately (yet in clear contradiction of its partial unitary status award) found that further action was still needed to bring TUSD into full and satisfactory compliance with the applicable provisions of the USP. In particular, it granted unitary status with respect to USP, Section II, Student Assignment, except for the Magnet Program (USP, Section II.E, ER0495-96). Unitary Status Order at ER0149:15-16. However, in recognition of the further work left to be done to achieve *full and satisfactory compliance* with the student assignment section of the USP, the District Court also directed the District to file a 3-Year Plus Integration Plan for its magnet schools, "including individual non-magnet integration plans, if any are practicable…." *Id*. at ER0149:17-18. Yet, the court simultaneously ruled that "unitary status is attained", *id*. at ER0149:13-14, for the portions of the Student Assignment section of the USP relating to the District's obligation to further the integration of its non-magnet schools (the vast majority of the schools in the District). (TUSD has 13 magnet and 69 non-magnet regular schools.) Such conduct by the District Court was legally erroneous under both applicable federal law in *Freeman*, as well as the 9th Circuit's directive in *Fisher*. *Supra*.

Based upon the foregoing facts and legal argument, the lower Court's partial unitary status award as to student assignments should be overturned as well.

CONCLUSION

For the foregoing reasons set forth above, this Court should reverse the District Court's grant of partial unitary status to TUSD and remand the case for further proceedings. Additionally, it is especially troubling that while the lower Court took note of Fisher Plaintiffs' pragmatic position that the granting of Partial Unitary Status may actually cause TUSD to lose focus on the areas for which it was granted, and cause the overall desegregation situation to return to unsatisfactory levels, ER013: 27-28 and ER014: 1, it failed to fully appreciate the actual truth of the matter asserted.

Order dated 5 Sept. 2018 at pp. 13-14.

Dated: October 25, 2019

Respectfully submitted,

Rubin Salter, Jr.
SALTER LAW OFFICE

By: /s/
Rubin Salter

STATE ENT OF RELATED CASES

Fisher Plaintiffs state that they are aware of one related case pending in the Ninth Circuit, Case No. 18-16982, which originated from the same United States District Court for the District of Arizona Case No. CV 74-00090-DCB, and has been combined with this case on the Court's docket.

Dated: October 25, 2019

Rubin Salter, Jr.
SALTER LAW OFFICE

By: /s/
Rubin Salter

CERTIFICATE OF CO PLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 32(a)(5) and Ninth Circuit Rule 32-1 that the attached Brief of Appellants The Fisher Plaintiffs is proportionately spaced and has a typeface of 14 points.

I further certify that pursuant to Federal Rules of Appellate Procedure 32(a)(7) the attached Brief of Appellants The Fisher Plaintiffs meets the volume limitation of 14,000 words (being 6,596 words in length, not including those portions of the Brief exempted by Rule 32(a)(7)(B)(iii)).

Dated: October 25, 2019

Rubin Salter, Jr.
SALTER LAW OFFICE

By: /s/
Rubin Salter

CERTIFICATE OF SER ICE

I hereby certify that on October 25, 2019, I caused to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit a true and correct copy of the attached Brief of Appellants The Fisher Plaintiffs by using the appellate CM/ECF system. All participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that all participants in the case were registered for CM/ECF use.

Dated: October 25, 2019

Rubin Salter, Jr.
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By: /s/
Rubin Salter