No. 18-16983

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROY FISHER, ET AL.,

Plaintiffs-Appellants,

and

MARIA MENDOZA, ET AL.,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA,

Intervenor-Plaintiff,

v.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona
No. 4:74-cv-00204-DCB
Hon. David C. Bury, Presiding

ANSWERING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), defendant-appellee Tucson Unified School District No. 1 states that it is a political subdivision of the State of Arizona.

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INTRODUCTION

What is left on appeal in this 45-year-old school-desegregation case are remnant cross-appeals raising phantom grievances. This Court's motions panel dismissed the appeal by defendant Tucson Unified School District No. 1 (the "School District") of the district court's refusal to grant full unitary status and dissolve the structural injunction governing the School District. That left cross-appeals by the Mendoza and Fisher Plaintiffs of the court's grant of "partial unitary status" in certain areas where the court found that the School District had fully complied with its Unitary Status Plan. But Plaintiffs do *not* argue on cross-appeal that the court erred in finding that the School District had satisfied the Unitary Status Plan in those areas.

Instead, Plaintiffs argue only that the court should not have withdrawn its continued jurisdiction and supervision over those areas because they are intertwined in some respect with other areas in which the court has not yet granted partial unitary status. *But the court hasn't* done that. Instead, to assuage precisely those concerns, the court expressly reaffirmed its continuing jurisdiction to "enforce every term of the USP, whether or not partial unitary status has been awarded," and has specified that all of the plan's reporting requirements and approval procedures will remain in place despite the grant of partial unitary

status. (1-ER.13:27-14:10.)[1] Nothing has changed on the ground warranting Plaintiffs' continued pursuit of their cross-appeals.

Beyond the district court's unchallenged findings that the School District has fully satisfied the Unitary Status Plan in the pertinent areas, this Court may and should affirm the court's order granting partial unitary status on the basis of a key cross-issue: the district court found, after a 1977 trial—the only trial in this case—that the only remaining vestige of pre-1951 *de jure* segregation was student attendance at nine schools, and that vestige was eliminated by 1983. What Plaintiffs complain of in their cross-appeals has nothing to do with any constitutional violations, and their cross-appeals should be rejected.

STATEMENT OF JURISDICTION

The district court entered its unitary status order giving rise to this appeal on September 6, 2018. (1-ER.1.) The School District filed a timely notice of appeal on October 4, 2018 (1-SER.1), but a motions panel of the Court dismissed that appeal, No. 18-16926, on July 29, 2019, for lack of jurisdiction (Fisher ER.159-61). The Mendoza Plaintiffs filed a timely notice of cross-appeal on October 5, 2018 (1-ER.153), and the Fisher Plaintiffs filed a timely notice of cross-appeal on October 10, 2018 (Fisher ER.153). The district court had jurisdiction, under 28 U.S.C. § 1331, of

[1] All references are to the Mendoza Plaintiffs' Excerpts of Record, unless otherwise noted.

this action alleging a violation of the Fourteenth Amendment and 42 U.S.C. § 1983.

Plaintiffs contend that this Court has jurisdiction of these cross-appeals under 28 U.S.C. § 1292(a)(1) because the district court's order modified or dissolved portions of an injunction, i.e., the court's Unitary Status Plan. The court's order is not appealable under *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), as Plaintiffs argue, however, because (a) in substance and practical effect, the district court's order did not modify or dissolve any injunctive relief and did not withdraw any court supervision of the School District; and (b) the order would and could not cause Plaintiffs any "serious, perhaps irreparable consequence." *Id.* at 83-84.

STATEMENT OF THE ISSUES PRESENTED

1. Plaintiffs cross-appeal the district court's grant of partial unitary status as to certain areas because they contend the court should not withdraw its supervision over those areas until it has found unitary status with respect to other areas. But the district court has expressly retained jurisdiction, supervision, and compliance procedures as to the areas where it has found partial unitary status. Did the district court abuse its discretion in recognizing partial unitary status?

2. The district court found in 1978 that the only then-remaining vestige of pre-1951 *de jure* segregation concerned attendance by African-American students at nine schools, and it determined in 2008 that that

vestige had been eliminated by 1983. Plaintiffs have not shown that any of the issues they raise in their cross-appeals are causally related to any constitutional violations. Should the Court affirm the district court's order on this alternative basis?

STATEMENT OF THE CASE

A. Tucson and the School District

Tucson, Arizona, long known as the "Old Pueblo," was founded by the Spanish in 1775, and, as of the 2010 census, its population is over 40 percent Hispanic. It has a Hispanic mayor, a Hispanic City Manager, and Hispanic members of the City Council. Tucson Unified School District No. 1 is the largest school district in Tucson. It has a Hispanic Superintendent (and prior Superintendent), four (of six) Hispanic or African-American Regional Assistant Superintendents, a Hispanic member of its Governing Board (and prior Hispanic Board Presidents), a Hispanic Senior Director of Desegregation, and an African-American former Senior Director of Desegregation who now serves as School District legal counsel.[2]

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[2] This Court should take judicial notice of these generally known or accurately and readily determined facts under Fed. R. Evid. 201(b)(1)-(2). *See, e.g.*, Pima County, *Tucson Census and Employment Data*, https://webcms.pima.gov/cms/One.aspx?portalId=169&pageId=161143 (last visited Jan. 28, 2020); City of Tucson, *Mayor & Council and City Manager*, https://www.tucsonaz.gov/city-government (last visited Jan. 28, 2020); TUSD, *Governing Board*, http://govboard.tusd1.org/ (last visited Jan. 28, 2020); TUSD, *Central Leadership and Department*

The School District never operated a dual school system with respect to Hispanic and white students. But before 1951, Arizona law required segregation of African-American elementary school children from students of other races and ethnicities. As a result, before 1951, the School District operated a single all-African-American elementary school, as required at the time by Arizona statute.

But even before *Brown v. Board of Education*, 347 U.S. 483 (1954), the School District's superintendent led an effort to change this. (5-SER.1040, ¶¶ 12, 14-15.) As a result of this effort, in 1951, the state statute mandating such segregation was changed, and the law permitted *but no longer required* segregation of African-American elementary school students from others. (5-SER.1040, ¶ 16.) The School District immediately integrated, closing its one all-African-American school and

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Directory, http://tusd1.org/Departments (last visited Jan. 28, 2020); Encyclopedia Britannica, *Tucson*, https://www.britannica.com/place/Tucson (last visited Jan. 28, 2020). In fact, Judge Frey made similar findings in 1978:

> Mexican-Americans have always been a political force and influence in Tucson and in Pima County. They have served on the City Council, the County Board of Supervisors, the School Board of the District, the school boards of other districts in the City area, as State Senators and members of the State House of Representatives, Superior Court Judges and recently Ambassador Raul Castro, who served as an elected County Attorney and Superior Court Judge, was Governor of the State.

(5-SER.1035, ¶ 33.)

assigning African-American students to neighborhood schools without regard to race. (5-SER.1040, ¶ 16.)

B. Judge Frey's 1978 findings as to the limited vestiges of *de jure* segregation

In 1974, two lawsuits (*Mendoza* and *Fisher*) were filed in the district court, claiming that the School District was still intentionally discriminating against African-American and Hispanic students. District Judge William C. Frey, who then presided over the case, conducted an extensive evidentiary trial in 1977 and the following year issued a comprehensive ruling, finding facts and reaching conclusions of law. (5-SER.997-1221.) That was the *only* trial in this action.

Judge Frey found that the School District's effort to integrate in 1951 was commendable and met the legal standard that three years later was set out in *Brown*. Indeed, throughout the 1950s, the School District was nationally recognized as in the vanguard of the effort to eliminate *de jure* segregation and, more broadly, to reduce all forms of discrimination against all racial and ethnic groups.

Judge Frey also found that the School District was not currently (in 1978) engaged in any racial or ethnic discrimination against either African-American or Hispanic students. However, as summarized here, Judge Frey did find that some elements of the School District's conduct in the 1950s and 1960s had violated constitutional prohibitions against discrimination:

- When the School District dismantled the segregated system in 1951, its assignment of African-American students to other geographically close neighborhood schools resulted in too many of such students at heavily Hispanic schools.
- During the 1950s and 1960s, some elementary-school construction and siting decisions were made with segregative intent, resulting in higher concentrations of Hispanic students in some schools.
- During the 1960s, some decisions to relieve individual school overcrowding were made with segregative intent, resulting in Hispanic students being assigned and transported to schools with high Hispanic concentrations, and Anglo students being assigned and transported to schools with lower Hispanic concentrations, despite the availability of closer, more-integrative alternatives.

(5-SER.1042-43, 1092-94, 1117, 1124-25, 1138-40; *see generally* 5-SER.997-1221.)

Judge Frey carefully limited his findings of violations. First, he found that the School District had *never* operated "a Mexican-American/Anglo dual school system." (5-SER.1219, ¶ 49.) He noted that while, by the time of *Brown* in 1954, "the District was in compliance with

its mandate insofar as Blacks were concerned …, it now appears that all effects of the dual system which existed in 1950-51, were not effectively eradicated, notwithstanding considerable progress and attenuation." (5-SER.1117-18, ¶ 52; *see also* 5-SER.1220, ¶ 56 (finding that "most parts of the dual Black/non-Black school system were dismantled in 1951-52, and … most later decisions were made using neutral policy considerations").)

Judge Frey found that the remaining vestiges of segregation were primarily limited to elementary schools. He found that "[t]he District has never operated a de jure segregated or dual system with respect to high schools." (5-SER.1191, ¶ 16.) He also found "no evidence presented from which it can rationally or reasonably be inferred that … there is a current condition of segregation in any high school in the District resulting from intentionally segregative State or District action." (5-SER.1192, ¶ 19.) Moreover, Judge Frey found that "[t]here is no dual junior high school system within the District, even though Spring [Junior High School] retains effects from former segregation as to Black students." (5-SER.1187, ¶ 44.) Aside from Spring, Judge Frey found, "a conclusion or inference that the District has operated or is operating a dual or segregated junior high school system with respect to either Black students, Mexican-American students, or both, is not warranted by the evidence." (5-SER.1184, ¶ 39.) "Except for Spring, no reasonable inference could be drawn that the imbalances present in the junior high schools at the time

of trial resulted from segregative intent or acts on the part of the District." (5-SER.1182, ¶ 31.)

Finally, Judge Frey made it clear that most of the effects of the *de jure* violations had attenuated by the time of the trial—now 43 years ago—and that the then-current racial balance in most schools in the District was *not* the result of those *de jure* violations:

> In summary of this section on segregation and desegregation within and/or by the District, a reasonable conclusion to be drawn is that the District is not operating a de jure segregated system, notwithstanding some segregative intent and actions. The District made a commendable and valiant effort to desegregate the dual or de jure system as to Blacks, at the time and under the circumstances, including the state of the law then existing. Viewed 25 years later under different circumstances, including a whole new array of legal decisions, it was inadequate. However, most of the effect from the earlier segregation of Black students, has attenuated during the past 25 years. As stated elsewhere in these findings, it appears that some effect may remain, as evidenced by the relatively large number of Black students remaining in the area of Spring, Roosevelt and University Heights.

(5-SER.1068, ¶ 9.)

In the final analysis, the *only* vestige of the prior discrimination that Judge Frey found continued to exist as of the time of trial was in the racial and ethnic makeup of students at nine schools in the District, five of which now no longer exist as active schools: "Some effects of past intentional segregative acts by the District remain at these schools:

Spring Junior High, Safford Junior High, University Heights, Roosevelt, Manzo, Jefferson Park, Cragin, Tully and Brichta." (SER.1221, ¶ 59.)[3]

Aside from student-assignment issues, Judge Frey expressly applied the Supreme Court's standards in *Green v. County School Board*, 391 U.S. 430 (1968), and its itemization of the factors to examine, and found no vestiges of the prior dual school system remaining in any of the other *Green* factors: transportation, faculty and staff assignment, transportation, extracurricular activities, or facilities. Judge Frey expressly found that the disparity in academic achievement was *not* caused by prior School District conduct. (5-SER.1165-66.)

Pursuant to the court's direction, the parties met and agreed on the terms of a remedial desegregation decree that was entered by a stipulation of settlement in 1978. Among other provisions, that stipulation specified targets for enrollment at the nine schools. (4-SER.970-73.)

C. The district court's 2008 conclusion that the School District had eliminated the vestiges of *de jure* segregation found by Judge Frey

In 2008, the district court found that the School District had, within the first five years after the 1978 stipulation of settlement, eliminated all of the vestiges of segregation found by Judge Frey. As the court had

[3] Of the nine schools, the only ones that currently remain open are Safford K-8 (formerly Safford Junior High School), Manzo Elementary School, Cragin Elementary School, and Tully Elementary Magnet School.

previously acknowledged, "Judge Frey made very limited, specific findings regarding student assignments and the existence of any vestiges of *de jure* segregation remaining in the district." (4-SER.938:14-16.) In its order on unitary status, the court found that the School District had complied with the requirements of Judge Frey's remedial decree:

- "[T]o the extent practicable the student ratios established by the desegregation plans were met and maintained over a five-year period of time."
- "[T]he Court finds that the student assignments required under the Settlement Agreement were attained."
- "The Court finds that the ethnic and race ratios required under the Settlement Agreement desegregation plans were implemented and maintained for 5 years, and eliminated to the extent practicable the vestiges of de jure segregation."

(3-ER.610, 618-19.) The court also found good-faith compliance with the remedial decree in the first five years: "TUSD made a good faith effort to implement the program changes expressly required under the terms of the Settlement Agreement for the first few years …." (3-ER.660.)

The court, however, declined to find that the School District had continued to comply in good faith with the remedial decree based on conduct *after* vestiges had been eliminated and *after* the School District

had complied with the remedial decree for five years: "Specifically, the Defendant failed to *monitor, track, review and analyze* the ongoing effectiveness of its programmatic changes to achieve desegregation to the extent practicable or 'at least' not exacerbate the racial imbalances that exist in the District." (3-ER.608 (emphasis added).) In lieu of finding continued good faith after the first five years, the court ordered the School District to comply with a "post-unitary plan" and, with that, held that the School District had achieved unitary status. (3-ER.661-63.)

D. *Fisher* and the post-*Fisher* injunction

On appeal from the district court's unitary status order, this Court reversed, holding that the district court's failure to find good-faith compliance precluded a determination of unitary status and the termination of judicial supervision. *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1143-44 (9th Cir. 2011).

On remand, the district court appointed a Special Master who was tasked with developing a plan to achieve unitary status and monitoring compliance with that plan. (3-ER.588.) The School District objected to the plan ultimately developed:

> The District has agreed to most of the obligations and provisions of the Draft USP, but does not acknowledge or admit that vestiges of the segregated system remain in the District. Furthermore, the District does not acknowledge or agree that the obligations it is undertaking pursuant to the Draft USP are necessary or required to achieve unitary status.

(3-SER.744:13-18; see also the School District's Final Objections at 3-SER.689-742.) The district court entered the Unitary Status Plan ("USP") as an order, *over the School District's objections*, in February 2013, and later revised it in November 2014 to correct typographical errors. (ECF No. 1450, *revised*, 3-ECF.486.) In its USP order, the court provided that the District was not permitted to seek unitary status again until after the conclusion of the 2016-2017 school year. (3-ECF.546.)

E. The district court's grant of partial unitary status

Shortly before the end of the 2016-2017 school year, the district court ordered the School District to prepare and file an assessment of its compliance with the Unitary Status Plan, and it ordered the Special Master to file a report and recommendation on compliance and unitary status. (3-ER.452.) The School District filed its assessment on October 1, 2017. (1-SER.6.) The Special Master filed his report and recommendation on February 27, 2018. (2-ER.159.) In that report, he recommended partial unitary status in certain areas of the Unitary Status Plan, and he listed specific steps for unitary status in the remaining areas.

On September 6, 2018, in the order challenged in these cross-appeals, the district court ruled on the Special Master's report and the objections to it. In that order, the court granted partial unitary status in certain areas, and it directed the School District to undertake a series of tasks, some within 90 days and others by September 1, 2019. (1-ER.1.)

Extensive proceedings continue in the district court pursuant to the September 2018 order.

F. The appeal and cross-appeals

The School District appealed from the denial of full unitary status, and the Mendoza Plaintiffs and Fisher Plaintiffs each filed a cross-appeal. On the Mendoza Plaintiffs' motion, this Court's motions panel dismissed the School District's appeal, which would have challenged the denial of full unitary status. The panel's order cursorily stated only that "Appellees' motion to dismiss No. 18-16926 for lack of jurisdiction is granted," followed by citations to 28 U.S.C. § 1292(a)(1) and *Carson v. American Brands, Inc.*, 450 U.S. 79, 84-86 (1981). (Fisher ER.160-60(a).) The motions panel also ordered briefing of the cross-appeals. (Fisher ER.160(a).)

SUMMARY OF ARGUMENT

Plaintiffs have not established that the district court abused its discretion by recognizing the School District's partial unitary status in certain areas, particularly the transportation and school-assignment areas identified by Plaintiffs. First, while Plaintiffs complain that the district court failed to find that the School District had a good-faith commitment to compliance with all of the Unitary Status Plan—as opposed to with the sections of the plan for which the court found partial unitary status—any such failure is immaterial, because the court did not

withdraw its jurisdiction or supervision over *any* of the School District's operations, even where it recognized partial unitary status.

As to the transportation area, Plaintiffs fail to identify any aspect over which the district court withdrew its supervision. To the contrary, the district court retained jurisdiction and required the District to take *additional* actions as to the very non-magnet programs for which the court found partial unitary status. Plaintiffs cannot identify exactly what their grievance is.

As to the student-assignment area, Plaintiffs do not complain of any operations for which the district court found partial unitary status, i.e., student assignment outside of magnet programs. Again, Plaintiffs complain about the label "partial unitary status," even though the district court required the School District to undertake additional efforts to identify any practicable options for improving integration at non-magnet schools. There is simply no substance to the cross-appeals.

Finally, this Court may and should affirm the court's order granting partial unitary status on the basis of a key cross-issue: Judge Frey's findings after the 1977 trial that the only then-remaining vestiges of *de jure* segregation were in student attendance at nine schools, and the district court's 2008 finding that such vestiges had been eliminated by 1983. Plaintiffs' complaints in their cross-appeals have nothing to do with any constitutional violations, and the Court should reject their cross-appeals.

ARGUMENT

I. Plaintiffs fail to establish that the district court erred in granting partial unitary status because the court retained jurisdiction and supervision over those same areas.

In challenging the district court's recognition of the School District's partial unitary status in certain areas—principally, transportation and student assignment—Plaintiffs do not argue that the court made erroneous findings of fact about the School District's compliance with the Unitary Status Plan *in those areas*. The court explained that it was "grant[ing] unitary status in part only to provisions of the USP where it is confident there has been full and satisfactory compliance with the express terms of the USP." (1-ER.14:27-15:1.) Plaintiffs do not dispute that finding of "full and satisfactory compliance" in those areas. Instead, Plaintiffs argue only that the court should not have relinquished its jurisdiction over those areas because the School District did not demonstrate its good-faith commitment to compliance with the Unitary Status Plan "as a whole"—that is, in *other* areas—or because the areas of partial unitary status are intertwined with those other areas. But the district court has not relinquished its jurisdiction or supervision over *any* areas, including those in which it recognized partial unitary status. As a result, Plaintiffs cannot show that the court committed clear error with respect to its factual findings or, on de novo review, any error in its legal conclusions.

A. Plaintiffs' cross-appeal arguments depend entirely on a relinquishment of jurisdiction and supervision that did not occur.

Plaintiffs' arguments about either the School District's good-faith commitment to the Unitary Status Plan as a whole (Point I) or about the recognition of partial unitary status for Transportation (Point II) and Student Assignment (Point III) all depend on whether the district court relinquished jurisdiction or supervision over the areas of operation in which the court found partial unitary status. *That did not happen.* In granting partial unitary status, the court recognized 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." (1-ER.13:7-9 (emphasis added).) The court acknowledged, "The Plaintiffs are concerned, as expressed by the Fishers, 'that granting partial unitary status could cause the District to lose focus in these areas and allow the situation to return to unsatisfactory levels.'" (1-ER.13:27-14:1 (quoting Fisher Resp., ECF No. 2100 at 2).)

To assuage that concern, the district court did not relinquish its jurisdiction or withdraw its effective supervision *even where it had granted partial unitary status.* Rather, in a passage Plaintiffs do not quote, the district court assured them that nothing had really changed: "The Plaintiffs and the Special Master are not … without recourse where the Court has awarded unitary status in part, should future problems,

foreseen or unforeseen, arise." (1-ER.14:1-3.) The court listed the reporting, supervisory, and enforcement mechanisms that remained in place even where the court had granted partial unitary status:

- "The District shall continue to report annually on all USP provisions." (1-ER.14:9-10.)
- "Data reporting requirements remain in place unless removed by the Special Master by recommendation, with opportunity for Plaintiffs to be heard and approval by the Court." (1-ER.14:7-9.)
- "The Notice and Request for Approval (NARA) provisions of the USP § X.C will continue to apply in full without exception to any award of partial unitary status." (1-ER.14:5-7.)
- "The Court expressly retains jurisdiction to enforce every term of the USP, whether or not partial unitary status has been awarded or not." (1-ER.14:3-5.)

The continued applicability of the NARA provisions illustrates the district court's retention of supervision even over areas of partial unitary status. Those provisions require the School District to provide the Special Master (with copies to the other parties) with notice and seek approval of certain actions regarding (a) changes to the School District's "assignment of students," (b) changes to "its physical plant," (c) "the closing or opening

of magnet schools or programs," and "(d) attendance boundary changes." (USP § X.C, 3-ER.544.) The School District must submit, with each request for approval, "a Desegregation Impact Analysis, ('DIA'), that will assess the impact of the requested action on the District's obligation to desegregate and shall specifically address how the proposed change will impact the District's obligations under this Order." (USP § X.C, 3-ER.544.) This is, by no means, a "modest and limited" retention of jurisdiction. (Mendoza Opening Br. 3 n.1 (quoting *Morgan v. Burke*, 926 F.2d 86, 91 (1st Cir. 1991)); Fisher Opening Br. 3 n.1 (same).)

The district court explained that its recognition of partial unitary status was *not* a relinquishment of authority or dissolution of any injunction, but instead a means of public reporting on the School District's progress toward full compliance with all of the requirements of the Unitary Status Plan. The court stated, "More importantly, the Court finds it is important for the community to understand the progress made by the District pursuant to the USP and for the District and the community to focus on the work that remains under the USP." (1-ER.13:11-14.) The court then admonished that its retention of *full* jurisdiction was real and *not* in name only. The court acknowledged this Court's recognition in the prior opinion in this case that, "'[t]o be sure, district courts possess ample discretion to fashion equitable relief in school desegregation cases, to tailor that relief as progress is made, and to cede full control to local authorities at the earliest appropriate time.'"

(1-ER.13:15-18 (quoting *Fisher*, 652 F.3d at 1142).) But the court denied that, by granting partial unitary status, it was ceding "full control" over anything: "This Court will not, however, 'abdicate its responsibility [*in part or in whole*] to retain jurisdiction until [the District] has demonstrated good faith and eliminated the vestiges of past discrimination to the extent practicable.'" (1-ER.13:18-21 (quoting *Fisher*, 652 F.3d at 1143) (brackets by court; emphasis added).)

B. Plaintiffs' three arguments are extraneous to the findings of partial unitary status and do not establish any error in those findings.

1. The district court properly recognized partial unitary status based on the School District's good-faith commitment as to those areas.

Plaintiffs complain generally that the district court granted partial unitary status with respect to certain aspects of the Unitary Status Plan, without finding the School District's good-faith commitment to the entirety of the Unitary Status Plan. Apart from the label "partial unitary status," it is not apparent what difference this makes to the real world of the School District's operations or the court's supervision of them. At the very least, any error in the court's verbiage constituted harmless error that does not require reversal of its order.

After reviewing the School District's compliance with the numerous provisions of the Unitary Status Plan, the court carefully distinguished between those areas in which the School District had completely satisfied

the plan's requirements and those areas where the court believed the School District had to take specific additional steps. The court held, "As to those parts of the USP where the Court awards unitary status, the Court finds that the District has acted in good faith to fully and satisfactorily comply with the USP program, eliminated the related vestiges of the prior *de jure* segregation to the extent practicable for that program, and demonstrated a good-faith commitment to the whole of the USP program where unitary status is awarded." (1-ER.148:19-24.) The court explained that, as to these programs, the court was "confident judicial oversite [*sic*] is no longer necessary" and "that the District is committed to a future course of action as to these USP programs that will give full respect to the equal protection guarantees of the Constitution and guarantee parents, students, and the public assurance against any further injuries or stigma." (1-ER.148:24-149:2.)

The court did not, however, conclude that the School District lacked good faith in all other areas. It explained that, "in several parts of the USP where it does not award unitary status, there is *minimal work remaining* to attain full program compliance." (1-ER.149:3-4 (emphasis added).) Moreover, the court explained, "[i]n *every instance* where unitary status is denied, the Court has identified what remains to be done to comply with the USP, and the Court believes that unitary status *may be attained within approximately one year*." (1-ER.149:4-7 (emphasis added).)

Plaintiffs argue that, even as to grants of partial unitary status, the School District "is obligated to demonstrate a good-faith commitment to the whole of the court's decrees." (Mendoza Opening Br. 18 (quotation omitted); Fisher Opening Br. 19-20 (same).) Plaintiffs point to the passage where the court commented that it "does not grant unitary status in full because it finds 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." (1-ER.15:1-4.) It is not clear what the court meant by this, as the court did not explain in what way the School District had failed to demonstrate its "good-faith commitment" to the entirety of the Unitary Status Plan.

Indeed, Plaintiffs fail to identify any other passage in the 151-page order that identified any lack of "good-faith commitment" by the School District. To support their position, Plaintiffs cite a single comment in that order (related to USP § X, Accountability and Transparency, under the subsection regarding "Budget"), but, even there, the court *did not find* a lack of good-faith commitment. Rather, the court acknowledged the School District's "good faith efforts" but found a failure to "comply with agreed to USP transparency and accountability requirements, i.e., the budget review and comment processes." (1-ER.146:21-24.) In discussing the implementation of the "budget-comment and review process," the

court acknowledged the Special Master's complaint that, for FYE June 2017, the School District "made major changes involving millions of dollars in mid-year to the Budget without submitting these proposals to the agreed-upon reallocation process." (1-ER.146:15-18 (quoting ECF No. 2111 at 44).) The court stated:

> Unitary status cannot be attained in respect to the District's good faith efforts to be transparent and accountable to TUSD students and the community in its allocation of millions of dollars if it cannot at a minimum comply with agreed to USP transparency and accountability requirements, i.e., the budget review and comment processes.

(1-ER.146:21-24.) As a consequence, the court retained jurisdiction over that provision "for another year" and ruled that the School District "may seek unitary status again following the next budget cycle." (1-ER.146:24-147:2.)

Plaintiffs equate that failure to comply with one aspect of a budget-review process with failure to demonstrate "commitment to the whole of the USP." (Mendoza Opening Br. 19; Fisher Opening Br. 21.) But Plaintiffs cite no case law holding that such narrow failures to comply defeat good faith as a whole. Good-faith commitment to the whole of the Unitary Status Plan does not and cannot mean perfect performance of every one of the plan's several hundred elements. Plaintiffs cite *Freeman v. Pitts*, 503 U.S. 467 (1992), but, in the cited passage, the Supreme Court stated only that "[w]hen a school district has not demonstrated good faith under a comprehensive plan to remedy ongoing violations, we have

without hesitation approved comprehensive and continued district court supervision." *Id.* at 499. This does not require proof of a good-faith commitment to every individual piece of a plan before partial unitary status is granted as to any other provision. Moreover, as explained above, the district court in this case "continued district court supervision" as to *all* aspects of the Unitary Status Plan, even where the court granted partial unitary status.

In fact, "good faith compliance with the whole" is not an absolute prerequisite for any grant of partial unitary status. It is only one "factor to be considered in deciding whether or not jurisdiction could be relinquished." *Id.* at 498. Again, the district court did not relinquish jurisdiction at all. Beyond that, a district court does not lose all discretion to grant partial unitary status as to one provision of a complex structural injunction merely because it finds a failure to demonstrate a good-faith commitment to another, completely unrelated provision. Neither the Supreme Court in *Freeman*, nor this Court in *Fisher*, nor the district court in the unitary status order so held.

The district court was well within its discretion in looking to good-faith compliance with court orders in the specific areas where partial unitary status was granted, particularly given the breadth of the Unitary Status Plan in this case. Other courts have done the same. *See Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist.*, No. 4:82cv00866 BSM, 2011 WL 1935332, at *10-22 (E.D. Ark. May 19, 2011) (granting partial

unitary status under *Freeman* in eight of nine areas of district operations based on findings the district had complied with the orders in those areas in good faith), *aff'd in relevant part and rev'd in part*, *Little Rock Sch. Dist. v. Arkansas,* 664 F.3d 738, 747 (8th Cir. 2011). Indeed, in *Little Rock*, the Eighth Circuit recognized that it had previously found partial unitary status for one district program while denying such status for another program because the district had not shown good faith in establishing that particular program. 664 F.3d at 748-49.[4]

The Supreme Court in *Freeman* established both the authority of a federal court to find a school district partially in unitary status, and the importance of doing so in light of the ultimate goal of returning supervision to local authorities. The Court held that a "federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control." 503 U.S. at 489. "Partial relinquishment of judicial control, where justified by the facts of the case, can be an important and significant step in fulfilling the district

[4] *See also Banks v. St. James Par. Sch. Bd.*, No. 2:65-cv-16173, 2017 WL 2554472, at *11 (E.D. La. Jan. 30, 2017) ("finding that, *in the area of transportation*, the District has … demonstrated a good faith commitment to the whole of the Court's orders, and is, therefore, entitled to a declaration of partial unitary status" (emphasis added)); *Moore v. Tangipahoa Par. Sch. Bd.*, No. CV 65-15556, 2017 WL 3116483 (E.D. La. July 21, 2017) (addressing good-faith compliance only with facilities-specific orders), *reconsideration denied*, 2017 WL 6540948 (E.D. La. Dec. 20, 2017), *aff'd*, 921 F.3d 545 (5th Cir. 2019).

court's duty to return the operations and control of schools to local authorities." *Id.* Thus, "[i]n determining whether a school board has acted in good faith, a court should not dwell on isolated discrepancies, but rather should consider whether the school board's policies form a consistent pattern of lawful conduct directed at eliminating earlier violations." *Manning ex rel. Manning v. Sch. Bd.*, 244 F.3d 927, 946 (11th Cir. 2001) (quotation omitted).

In this case, the district court did not withdraw its jurisdiction and supervision over any portion of the Unitary Status Plan, much less the entirety of it. To the extent it found any lack of good-faith commitment to the Unitary Status Plan, it was *expressly* not as to the portions of the plan to which it attached the label of "partial unitary status." Since it did not relinquish its jurisdiction or terminate its supervision, it did not commit any error, harmless or otherwise.

2. Plaintiffs fail to identify any detriment they will suffer as a result of the court's grant of partial unitary status as to transportation.

Plaintiffs fail to identify any prejudice they will experience as a result of the district court's grant of partial unitary status with respect to transportation issues. The district court granted partial unitary status for "USP § III, Transportation, with the Court retaining jurisdiction for the purpose of considering unitary status for the Magnet Programs and Advanced Learning Experiences (ALE) Programs." (1-ER.149:20-22.) The

court explained its ruling in its order. (1-ER.34-38.) The court recognized that the Special Master concluded that "the District has demonstrated satisfactory compliance with USP § III, Transportation." (1-ER.34:17-18.)

Plaintiffs' argument on appeal is that the court erred by granting partial unitary status as to transportation in areas other than the magnet and ALE programs because this is an example of "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." (Mendoza Opening Br. 22; *see also id.* at 23 (similar); Fisher Opening Br. 24 (same).) But Plaintiffs fail to identify any such "area" over which the court withdrew its "supervision."

In fact, Plaintiffs do the opposite: they identify areas where the court *retained jurisdiction* and *required additional actions* even as to non-magnet and non-ALE programs. (Mendoza Opening Br. 23-24; Fisher Opening Br. 25.) They explain—as a basis for their appeal—that the court "directed" the School District to include, in the 3-Year PIP: CMP (Comprehensive Magnet Plan) for *non-magnet* schools, on a "school-by-school basis," "the non-magnet strategies, if any, that would improve integration at that school and adopt school specific integration plans." (1-ER.31:21-26.) The court further ordered that "[t]he District shall include a transportation plan in the 3-Year PIP: CMP, considering it as a budget item and a criterion for assessing the strength or weakness of potential candidates for future designations as magnet *or Integrated*

schools." (1-ER.32:19-21 (emphasis added).) The court specifically retained jurisdiction over USP § III, Transportation for purposes of "assessing unitary status subsequent to the filing by the District of the 3-Year PIP: CMP." (1-ER.33:1-3.)

Thus, it is simply not true to say, as Plaintiffs assert, that "the court withdrew its supervision over so much of the USP as relates to transportation except as such transportation involves Magnet Programs and Advanced Learning Experiences." (Mendoza Opening Br. 24; *see* Fisher Opening Br. 25.) Rather, the court stated that it "retains jurisdiction over the USP § III, Transportation, *to the extent relevant to the questions of unitary status remaining*." (1-ER.38:1-2 (emphasis added).)

In fact, Plaintiffs never identify what they are complaining about with respect to transportation programs over which the court supposedly withdrew its jurisdiction and supervision. The district court listed the Unitary Status Plan's requirements as to transportation and then acknowledged that "[t]here are *no challenges to the Special Master's conclusion that the District is doing these things*." (1-ER.35:11-22 (emphasis added).) The court recognized that the only "challenge" was the Mendoza Plaintiffs' demand for "actual ridership data and user surveys," not just student eligibility for ridership, to show whether the District "is using transportation as a critical component of its integration plan." (1-ER.35:22-24.) But the court found that the School District "is

tracking ridership based on student enrollment/attendance criteria that track the USP integration goals. Therefore, the reported [eligibility] data is meaningful to establish whether the District is using transportation to promote integration." (1-ER.36:21-24.) The court rejected the Mendoza Plaintiffs' request for further data and studies because it found "that the District is sufficiently tracking transportation data": "Although not required by the USP, the District … tracks district-wide data on transportation availability disaggregated by program and by race and ethnicity." (1-ER.37:18-21.)

Plaintiffs argue that the court found that the School District "has not even tracked the race of students using express busses," and then jump to the assertion that "the court withdrew its supervision over so much of the USP as included TUSD's use of express shuttle busses to further the integration of its non-magnet schools and that related to its directive to the District to provide further data relating to the ridership of those busses." (Mendoza Opening Br. 25.) That would come as a surprise to the district court. The cited portion of its order does not say that. (1-ER.149:20-23.) Indeed, the court ordered that "[i]f the District is financing the Express Busses, pursuant to the USP, the District must establish that the busses are being used in efforts to integrate its schools or improve student achievement." (1-ER.30 n.17.) The court found "that the past three years of operations under the USP provides sufficient data and information for the District to develop sustainable *future*

transportation plans to support ongoing and future integration and student achieve programs planned for the District." (1-ER.37:22-25 (emphasis added).)[5] Again, the district court has not backed away from supervision of transportation in any meaningful sense.

3. Plaintiffs fail to identify any detriment they will suffer as a result of the court's grant of partial unitary status as to student assignment.

Plaintiffs' "Point III" concerns the Student Assignment provisions of the Unitary Status Plan, but Plaintiffs do not complain there about any student-assignment areas for which the district court found partial unitary status. (Mendoza Opening Br. 26-29; Fisher Opening Br. 26-28.) The district court granted partial unitary status for "USP § II, Student Assignment, *except for the Magnet Program*." (1-ER.149:15-16 (emphasis added).) With respect to the Magnet Program, the court held that unitary status would be "reconsidered as follows: [¶] § II.E: The District shall file

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[5] Plaintiffs focus on the court's discussion of express busses. (1-ER.30:5-20.) It bears noting that of the two express busses, one moved 20 students and the other moved five students. The court noted that the bus that moved 20 students moved them from two Racially Concentrated high schools to a school that was neither Integrated nor Racially Concentrated, and "[i]t is undisputed that these 20 students made Sabino High School [the receiving school] more integrated." (1-ER.30:7-11.) The court's concerns were that the express shuttle that moved *five* elementary-school students did so in a way for which "the logic … is not apparent, without explanation." (1-ER.30:12-19.) It was in this context that the court acknowledged the Mendoza Plaintiffs' complaint that "the District has not even tracked the race of students using the express busses." (1-ER.30:19-20.)

the 3-Year Plus Integration Plan, including individual school non-magnet integration plans, if any are practicable, and the Outreach and Recruitment Addendum, by: September 1, 2019." (1-ER.149:16-19.)

The School District's compliance with the Student Assignment section of the Unitary Status Plan is discussed in a 20-page section of the court's order. (1-ER.15-34.) "The USP required the District to develop and implement a coordinated process of student assignment" so that "'[s]tudents of all racial and ethnic backgrounds shall have the opportunity to attend an integrated school.'" (1-ER.15:10-13 (quoting USP § II.A.1, 3-ER.493).) The School District's process was required to "incorporat[e] as appropriate four strategies for assigning students to schools: attendance boundaries; pairing and clustering of schools; magnet schools and programs, and open enrollment." (1-ER.15:12-15.) The court noted that "[t]he Special Master recommends that unitary status be granted with respect to these districtwide integration efforts …, except for magnet schools." (1-ER.15:15-17.)

The district court explained its focus on magnet schools. It reasoned that Arizona poses greater "'challenges'" for integrating schools because "'state policy not only strongly supports charter schools but essentially incentivizes suburban schools to recruit students from more diverse Districts like TUSD.'" (1-ER.17:4-6 (quoting Special Master Annual Report, 2-ER.166).) Magnet schools, the court stated, were "primary tools" for convincing students to overcome the greater "time"

required in "getting from home to a school beyond students' 'neighborhood schools,'" and they also "'have the potential of bringing new families to the District.'" (1-ER.17:7-12 (quoting Special Master Annual Report, 2-ER.166-67).)

The court did not grant unitary status with respect to the magnet schools because, although the District had recently "developed a walk-through protocol (WTP) for assessing the effectiveness of magnet schools," the Special Master suggested that "unitary status not be ordered until the District demonstrates effective use of these processes and procedures over time." (1-ER.18:20-25.) The Special Master also recommended that the district court wait "until the District can demonstrate its commitment to future identification and implementation of new magnet schools." (1-ER.18:26-28.) The court required the School District to "review the existing criteria and standards and propose modifications to address the inadequacy of the A & B AzMerit grades and to be used in the future to determine magnet status," and "procedures for creating new magnet programs and procedures for terminating future non-compliant magnet programs." (1-ER.26:3-6.) The district court's order is dedicated to what the School District must accomplish with respect to the selection, location, thematic focus, quality, and grading of its magnet schools under the Comprehensive Magnet Plan. (1-ER.19-31.)

Again, the district court has not relinquished its jurisdiction over or withdrawn its supervision of non-magnet schools and programs. The

district court recognized that "the Magnet Program may be the most effective and primary integration strategy," but that "integration can be promoted at non-magnet schools." (1-ER.31:11-21.) Because "the natural consequence of identifying TUSD schools that are potential future magnet schools is the identification of schools that are not," the court required the School District's 3-Year PIP: CMP to identify, on a school-by-school basis, "viable non-magnet strategies …, if any, that would improve integration at that school and adopt school specific integration plans." (1-ER.31:21-26.) The court rejected "the Plaintiffs' objection that the court should not award unitary status, not even in part," because "viable options for integration are limited, with all the variables and options being known," and, for schools that may always be "Racially Concentrated or never Integrated," the court required them to include, in the 3-Year PIP: CMP, "individual plans to improve integration, where practicable, and focus on academic achievement." (1-ER.32:1-14.)

Plaintiffs' objection on appeal is that the district court should not have granted even partial unitary status as to student assignment, but it is again impossible to identify what difference that label makes. Plaintiffs identify transportation as an issue, but, with respect to student assignment, the court recognized that it "retains jurisdiction over USP §§ II.I, Outreach and Recruitment, and III, Transportation, with its jurisdiction over these sections of the USP limited in context to assessing unitary status subsequent to the filing by the District of the 3-Year PIP:

CMP"—which includes the integration strategies for non-magnet schools. (1-ER.33:1-3; *see* 1-ER.34:12-14 ("The District shall file the 3-Year PIP: CMP by the end of this school year, including *non-magnet integration plans for individual schools where practicable*, with the Outreach and Recruitment Addendum Attached." (emphasis added)).)

At root, Plaintiffs' argument is merely the unsupported assertion that "[t]he District Court's directive with respect to the preparation of integration plans for TUSD's non-magnet schools demonstrates that the court erred in granting unitary status" with respect to the Student Assignment section of the Unitary Status Plan in *any* respect. (Mendoza Opening Br. 28-29; *see* Fisher Opening Br. 27.) But the fact that the court instructed the School District to identify any non-magnet strategies that might be "viable" or practicable" does not mean that unitary status had not been achieved for those schools, i.e., that the non-magnet schools displayed "vestiges" of segregation or that the School District had not already showed a good-faith commitment to the Unitary Status Plan as to those schools. Moreover, given the continued reporting and other obligations with respect to those non-magnet schools, it is difficult to understand how the label of "partial unitary status" prejudices Plaintiffs or makes any difference in the real world.

II. Plaintiffs' cross-appeals should be rejected because the transportation and student-assignment issues cannot be causally related to any *de jure* discrimination.

This Court may and should affirm the district court's grant of partial unitary status on the alternative ground that, in light of Judge Frey's rulings after the only trial in this case, Plaintiffs cannot show that any of the problems they (or the district court) perceive in the School District's student assignments, transportation, or other areas raised in the cross-appeals are causally related to the unconstitutional segregation that gave rise to this litigation. "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). "This court has the power and obligation to affirm correct decisions, even though the lower court may have relied upon an incorrect basis," and "may affirm on any ground squarely presented on the record." *James v. Reese*, 546 F.2d 325, 327 (9th Cir. 1976).

In 1991, the Supreme Court noted that court control of school districts was "intended as a temporary measure" and set out the requirements for termination of a desegregation injunction. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991). The Court held that a desegregation injunction should be dissolved when (a) the vestiges of past discrimination by the school district have been eliminated to the extent practicable, and (b) the school board has complied in good faith with the

desegregation decree. *Id.* at 249-50. In considering whether the vestiges of *de jure* segregation have been eliminated as far as practicable, the court should consider the factors set forth in *Green v. County School Board*, 391 U.S. 430 (1968). *Id.* at 250. The following year, in *Freeman v. Pitts*, the Court reiterated that court supervision of a school district must be a temporary measure and that a supervising court has a dual purpose: "to remedy the violation and, in addition, to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." 503 U.S. at 489. This is because "local autonomy of school districts is a vital national tradition," and "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system." *Id.* at 490.

Justice Scalia noted in his concurrence in *Freeman* that "we must resolve—if not today, then soon—what is to be done in the vast majority of other districts, where, though our cases continue to profess that judicial oversight of school operations is a temporary expedient, democratic processes remain suspended, with no prospect of restoration, 38 years after *Brown*" and "[a]lmost a quarter century" after *Green*. *Id.* at 500-01 (Scalia, J., concurring). More than 27 years after *Freeman*, those words bear far greater urgency.

A. The only vestiges of *de jure* segregation were eliminated by 1983.

As explained above, *see supra* pp. 12-16, the only findings of *de jure* violations in this case are those that were set forth in Judge Frey's findings after a full evidentiary trial on the merits in January 1977. (5-SER.997-1221.) Judge Frey made it clear that most of the effects of the *de jur*e violations had attenuated by the time of the trial, and that the then-current racial and ethnic makeup of most schools in the School District was not the result of those *de jure* violations. He found that the only vestige remaining at the time of trial—26 years after the School District voluntarily ended segregation—was in student enrollment at nine schools that he found had higher minority enrollment than would have occurred in the absence of the constitutional violations. Judge Frey made that determination after systematically and carefully analyzing what few vestiges remained in 1977 as a result of the *de jure* violations he found, based on the factors that the Supreme Court had adopted 10 years earlier in *Green*. In 2008, the district court found that the student-assignment vestiges found by Judge Frey had been eliminated to the extent practicable in the five years following the entry of the remedial injunction in 1978. (3-ER.611:24-612:8.)

Regardless of whatever concerns about contemporary conditions may motivate Plaintiffs' cross-appeals, the Supreme Court held in *Freeman* that "[t]he vestiges of segregation that are the concern of the

law in a school case may be subtle and intangible but nonetheless they must be so real that they have *a causal link* to the *de jure* violation being remedied." *Freeman*, 503 U.S. at 496 (emphasis added). The only "vestiges" to be considered are those caused by the specific, original constitutional violation. For example, in *Missouri v. Jenkins*, 515 U.S. 70 (1995), the Supreme Court held that an order aimed at a desegregation "interdistrict goal" was not a proper remedy in a case where the only constitutional violations had been *intra*district. *Id.* at 89-90. The Court reasoned that "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Id.* at 89 (internal quotation marks omitted).

A causal link between the original violation and any current disparity must be found before a school district can be held responsible for eliminating any specific alleged vestige. "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors." *Freeman*, 503 U.S. at 494. For example, in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), the school district had adopted a race-neutral student-assignment plan to remedy racial segregation, but so-called "white flight" subsequently disrupted the racial balance of schools. The Supreme Court held that the district could not be

required to readjust student assignment procedures again to combat the *new* racial imbalance: "[H]aving once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Spangler*, 427 U.S. at 436-37; *see also N.A.A.C.P., Jacksonville Branch v. Duval County Schs.*, 273 F.3d 960, 974 (11th Cir. 2001) ("[The school district] is not responsible for the segregative effects of external forces over which it has no control.").

Judge Frey found *no* vestiges of the prior discrimination in the other *Green*-factor areas, including in transportation—which Plaintiffs raise in their cross-appeals—as well as in teacher and staff assignment, facilities, or extracurricular activities. If there were any disparities in those areas today, they could not be causally linked to the prior constitutional violations.[6]

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[6] The 1978 stipulation of settlement provided that, "in seeking enforcement of or relief in any federal court from the terms of *this stipulation*, no party may rely upon prior findings and conclusions in this case to *interpret* the terms of this stipulation or to determine the rights and obligations of the parties *thereunder*." (4-SER.991:31-992:4 (emphases added).) Contrary to what Plaintiffs likely will argue, this provision does not preclude the district court or this Court from looking to Judge Frey's 1978 findings and conclusions to determine that termination of supervision was appropriate as of, if not long before, the district court's September 2018 order. By its terms, the provision applies only to "this [1978] stipulation," and, under the canon of *espressio unius est exclusio alterius*, other stipulations or orders are presumptively

B. As of September 2018, the District had long since met the good-faith compliance standard.

The district court found in this case that the School District had shown a good-faith commitment with respect to the areas for which the court granted partial unitary status, and there is no basis for challenging the School District's good faith in any respect. "[T]he purpose of the good-faith finding is to ensure that a school board has accepted racial equality and will abstain from intentional discrimination in the future." *Manning*, 244 F.3d at 946 n.33. "A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new *de jure* violation, and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future." *Freeman*, 503 U.S. at 498.

In fact, some courts have granted unitary status (or partial unitary status) based on a finding that the district is not likely to return to discriminatory practices, without specifically using the words "good

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excluded. *See Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005); *Hardware Mut. Ins. Co. v. Dunwoody*, 194 F.2d 666, 668 (9th Cir. 1952) (applying canon to contracts). Indeed, the prior sentence in the 1978 provision recognizes that the parties "shall retain all rights and remedies … in seeking enforcement or relief from this *and any subsequent stipulations and orders*" (4-SER.991:26-31 (emphasis added)), and "[t]he force of the maxim is strengthened where a thing is provided in one part … and omitted in another." *Exp. Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1474 (9th Cir. 1995). The clause at issue omitted the term "and any subsequent stipulations and orders"; that omission must be interpreted as intentional.

faith" at all. *See, e.g.*, *Liddell v. Special Sch. Dist.*, 149 F.3d 862, 868-69 (8th Cir. 1998) (finding district had achieved partial unitary status where "there is no showing in the record that the [district] is likely to return to its former ways with respect to the county vocational education schools").

The good-faith requirement was independently satisfied by September 2018 (and long before) because there was no risk that this School District, with its Hispanic and African-American leaders, in its city and community, could return to a system of *de jure* segregation. (*See supra* p. 10.) Having served as the pioneer school district in Arizona for desegregating schools in 1951, there was virtually no risk that the School District would return to *de jure* segregation following its decision to desegregate, and that previously infinitesimal risk is even lower today. Not a single member of the School District's Governing Board was even alive during the time the District operated a state-mandated *de jure* segregated system.

The School District sufficiently eliminated the vestiges of the specific constitutional violations found by Judge Frey and met the good-faith compliance requirement by September 2018 (and years before that). On this basis, the district court's determination of partial unitary status in certain areas of operation must be affirmed.

C. The provisions of the current Unitary Status Plan do not control this issue.

The consequences of Judge Frey's trial findings cannot be avoided by Plaintiffs' characterizing the Unitary Status Plan as "a consent decree" (Mendoza Opening Br. 1; Fisher Opening Br. 1) or by the district court's comment that "the USP, functioning as a Consent Decree, is the litmus test for attaining unitary status" (ER.443-45). The current Unitary Status Plan is *not* a "consent decree."

This Circuit has identified three nonexclusive circumstances under which a party can appeal from and continue to contest an alleged "consent order": "(1) where there was no actual consent; (2) where the district court lacked subject matter jurisdiction to enter the judgment; and (3) where a party intended to preserve its right of appeal or specifically preserves its right to appeal." *Hoa Hong Van v. Barnhart*, 483 F.3d 600, 610 n.5 (9th Cir. 2007) (internal citations and quotation marks omitted). The first and the third circumstances apply here and independently mandate that the Unitary Status Plan not be given the effect of a consent order.

1. It is beyond dispute that the School District "intended to preserve its right of appeal or specifically preserve[d] its right to appeal." *Id.* The Court must look to the record to determine whether a party preserved, or intended to preserve, its right to appeal an alleged consent order. *See, e.g.*, *U.A. Local 342 Apprenticeship & Training Tr. v. Babcock*

& Wilcox Constr. Co., 396 F.3d 1056, 1058 (9th Cir. 2005) (finding appellate jurisdiction "because it is clear that Babcock 'intended to preserve its right of appeal'"). The record here makes clear that such preservation, or least intent of preservation, occurred.

The School District explicitly objected to, and reserved its right to continue to object to, the substantive basis for the Unitary Status Plan, the appropriateness of its being entered at all, and other specific portions of the plan. These objections and reservations of rights were timely made on the record and contemporaneous with the parties' joint submission of the stipulated language that became the Unitary Status Plan. (4-SER.849:26-850:3 ("The Parties, by filing the Draft USP and accompanying legal memoranda today, are not waiving any objections they may have to the Draft USP or to further changes and proposals that may be made, and reserve the right to raise any such objections in future briefing.").)

The School District concurrently filed a Legal Memorandum of Objections in which it stated that, even though it had participated in negotiating the *language* in the jointly submitted draft, the School District "does not acknowledge or admit that vestiges of the segregated system remain in the District" and "does not acknowledge or agree that the obligations it is undertaking pursuant to the Draft USP are necessary or required to achieve unitary status." (3-SER.744:12-17.) The School District also set forth detailed objections to various of the obligations set

forth in the draft Unitary Status Plan (3-SER.743-67), and it additionally filed additional and final objections to the Unitary Status Plan (3-SER.689-705). These objections all predated the court's entry of the Unitary Status Plan, were never withdrawn, and remained operative and on the record as of the entry of that order and through today.

2. It is independently improper to apply the Unitary Status Plan as a consent order because there was not—*and could be no*—actual consent. Actual consent is lacking where the circumstances surrounding the alleged "consent" indicated that the party now objecting did not intend to consent *substantively* to entry of the order or judgment. *See, e.g.*, *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 680 n.2 (9th Cir. 2009) ("[I]t is readily apparent that Plaintiffs did not give their 'actual consent' to the entry of judgment on the merits against them; rather, they executed the stipulation so that they would have a final judgment to appeal.").

As in *Wal-Mart Stores*, it is clear from the record here that the School District did not consent substantively to entry of the Unitary Status Plan. The School District — ordered by the court to work with the Special Master to create a negotiated plan — stipulated to some (but not all) of the language used in the Unitary Status Plan (i.e., the form of the plan). But, as described above, the School District explicitly objected to, and reserved its right to continue to object to, the substantive basis for the Unitary Status Plan, the appropriateness of its being entered at all,

and other specific portions of the plan. These objections show that the School District did not give "actual consent."

In fact, the School District *could not*, through the Unitary Status Plan, consent to court supervision beyond that legally required to remedy the specific constitutional violations found by Judge Frey in 1978. Specifically, the members of the School District's Governing Board at the time the Unitary Status Plan was entered could not, by agreeing to a "consent decree," bind themselves and their successors in restraint of the power of their offices. A school board member "may not agree to restrict his freedom of action in the exercise of his powers, and an agreement which interferes with his unbiased discharge of his duty to the public, in the exercise of his office, is against public policy and unenforceable." *Sch. Dist. No. 69 v. Altherr*, 458 P.2d 537, 542 (Ariz. Ct. App. 1969) (citations omitted), *disapproved in part on other grounds by Bd. of Trustees v. Wildermuth*, 492 P.2d 420 (Ariz. Ct. App. 1972). In Arizona, "the school board is considered a noncontinuous body, organized each year. In other words, [a school district has] a 'new' school board each year." *Id.* at 542-43. An agreement that purports to bind a future school board in the exercise of its powers is, likewise, against public policy and unenforceable. *Id.*

Along similar lines, Arizona courts have noted that school boards cannot, absent specific legislative authority, delegate to another their "power to manage and control the affairs of the district." *Godbey v.*

Roosevelt Sch. Dist. No. 66, 638 P.2d 235, 241 (Ariz. Ct. App. 1981); *see also Bd. of Educ. v. Scottsdale Educ. Ass'n*, 498 P.2d 578, 585 (Ariz. Ct. App. 1972) ("[W]here, as in Arizona, the power to manage and control the affairs of the school district lies exclusively with the board of trustees, except where that power has been by specific legislation granted to someone else, the Board may not delegate that authority without specific legislative authorization."), *vacated on other grounds,* 509 P.2d 612 (Ariz. 1973).

The U.S. Supreme Court has admonished that "'federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation. If [a federal consent decree is] not limited to reasonable and necessary implementations of federal law,' it may 'improperly deprive future officials of their designated legislative and executive powers.'" *Horne v. Flores*, 557 U.S. 433, 450 (2009) (internal citation omitted). Under *Horne*, parties cannot, via a consent decree, agree to extend a district court's jurisdiction beyond its authority to oversee the remedy of the *specific* constitutional violations at issue. *United States v. Bd. of Educ.*, 663 F. Supp. 2d 649, 656-57 (N.D. Ill. 2009) (applying *Horne*).

The Unitary Status Plan unquestionably cedes the power to manage and control the affairs of the School District to the district court. Because the Governing Board could not, under Arizona law, voluntarily agree to such court supervision beyond that mandated by law, the

Unitary Status Plan is unenforceable as a consent decree and as a "contractual" basis for requiring the School District to remain under court supervision beyond the point when supervision would otherwise end under desegregation case law. The Unitary Status Plan could not, by "consent," extend judicial supervision over the School District to "remedy" issues not tied to the specific, limited constitutional violations Judge Frey found.

CONCLUSION

The Court should reject as meritless the cross-appeals of the Mendoza Plaintiffs and Fisher Plaintiffs.

DATED this 28th day of January, 2020.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Tucson Unified School District No. 1 states that there are no related cases pending before this Court.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because it contains 10,990 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Century Schoolbook.

DATED this 28th day of January, 2020.

s/ Bennett Evan Cooper