Nos. 22-16478, 22-16479 x 22-16480

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROY FISHER, ET AL.,

Plaintiffs–Appellants,

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
Nos. 4:74-cv-00090-DCB & 4:74-cv-00204-DCB
Hon. David C. Bury, Presiding

TUCSON UNIFIED SCHOOL DISTRICT NO. 1'S ANSWERING BRIEF

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DISCLOSURE STATEMENT

Pursuant to FRAP 26.1(a), Tucson Unified School District No. 1 states that it is a political subdivision of the State of Arizona.

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GLOSSARY

AASSD	African American Students Services Department
ALE	Advanced Learning Experiences
CRCCP	Culturally Relevant Curriculum Completion Plan
CRPPLP	Culturally Relevant Pedagogy Professional Learning Plan
DAEP	District Alternative Education Program
DIA	Desegregation Impact Analysis
ELL	English Language Learners
EBAS	Evidence Based Accountability System
FACE	Family and Community Engagement
FEC	Family Engagement Coordinator
FRC	Family Resource Center
GYOP	Grow-Your-Own Program
MASSD	Mexican American Student Services Department
PIA	Performance Impact Analysis
PLP	Professional Learning Plan
PUSRAP	Post Unitary Status Reporting and Accountability Plan
TUSD	Tucson Unified School District No. 1
USP	Unitary Status Plan

INTRODUCTION

This school-desegregation case has lasted almost fifty years, even though Tucson Unified School District No. 1 (the "District") fought for the right to desegregate three years before *Brown v. Board of Education*, and the district court found that all vestiges of segregation had been eliminated by 1983. Yet the litigation continued for decades, as the debate over the "good faith" of a district led by Hispanic and African American administrators became a vehicle for efforts to eliminate economic and social disparities that had no roots in de jure segregation. At long last, the district court found that the District had achieved unitary status, entered final judgment, and terminated judicial supervision. Yet Plaintiffs still will not let it go, even though they cannot identify erroneous legal conclusions or clearly erroneous factual findings by the district court. This Court should affirm the district court's judgment and bring this litigation to a long-overdue conclusion.

STATEMENT OF THE CASE

A. The District voluntarily integrates before *Brown*.

Before 1951, Arizona law required segregation of African American elementary-school children. As required by statute, the District operated a single all-African American elementary school before 1951. The District never segregated its high schools: students of all races and ethnicities attended the same high school. (3-SER-547, ¶ 10.)

But even before *Brown v. Board of Education*, 347 U.S. 483 (1954), the District's superintendent led an effort to change Arizona law. (3-SER-585, ¶¶ 12, 14–15.) As a result, in 1951, the statute was amended to merely *permit* segregation of African American elementary-school students. (*Id.* ¶ 16.) The District immediately and voluntarily integrated, closing its one all-African American school and assigning all students to neighborhood schools without regard to race. (*Id.* ¶ 16.)

B. Judge Frey finds limited vestiges of segregation in 1978.

Twenty-three years later, in 1974, two lawsuits (*Mendoza* and *Fisher*) were filed in the district court, claiming discrimination against African American and Hispanic students. District Judge William C. Frey held an extensive bench trial in 1977 and issued comprehensive findings of facts and conclusions of law the following year. (3-SER-542.)

Judge Frey found that the District's effort to integrate in 1951 was commendable and met the standard that had been set out three years later in *Brown*. Indeed, throughout the 1950s, the District was nationally recognized as in the vanguard of the effort to eliminate de jure segregation and reduce all discrimination against racial and ethnic groups. (3-SER-586–87, ¶¶ 21–27; 3-SER-592, ¶ 54.)

Judge Frey also found that the District was no longer engaged in any racial or ethnic discrimination against African American or Hispanic students. But Judge Frey did find that some elements of the District's

conduct in the 1950s and 1960s had violated constitutional prohibitions against discrimination:

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

(3-SER-587–88, ¶ 30; 3-SER-638, ¶¶ 34, 37; 3-SER-639, ¶ 40; 3-SER-662, ¶ 50; 3-SER-669–70, ¶¶ 11–14; 3-SER-683–85, ¶¶ 29–30.)

Judge Frey carefully limited his findings regarding the District's operations. First, he found that the District had *never* operated "a Mexican-American/Anglo dual school system." (3-SER-764, ¶ 49.) Second, he found 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." (3-SER-765, ¶ 56.) By the time of *Brown* in 1954, "the District was in compliance with its mandate insofar as Blacks were concerned." (3-SER-662–63, ¶ 52.) But under the standards announced fourteen years later in *Green v. County School Board*, 391 U.S. 430 (1968), "the District was under an affirmative duty to go beyond just neutral policy considerations in order to erase *all* effects of the past statutory segregation." (3-SER-765, ¶ 56.)

Judge Frey found that "[t]he District has never operated a de jure segregated or dual system with respect to high schools." (3-SER-736, ¶ 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." (3-SER-737, ¶ 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." (3-SER-731–32, ¶ 44.) Aside from Spring, Judge Frey found that any "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." (3-SER-729, ¶ 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." (3-SER-727, ¶ 31.)

Most importantly, Judge Frey found that most effects of the de jure segregation had attenuated by the time of the 1977 trial—now forty-six years ago—and the then-current racial balance in most District schools was *not* the result of those de jure violations. As Judge Frey summarized, "most of the effect from the earlier segregation of Black students, has attenuated during the past 25 years…. [I]t 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." (3-SER-613, ¶ 9.) Judge Frey found that the *only* vestige of the prior segregation that existed as of the 1977 trial was in the racial and ethnic makeup of students at seven elementary schools and two middle schools in the District: "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." (3-SER-766, ¶ 59.) Only four of those nine schools remain open.

Judge Frey expressly applied the Supreme Court's standards in *Green*, including its itemization of the *Green* factors. Aside from the student-assignment issues, Judge Frey found no vestiges of the prior dual school system remaining in any of the other factors: faculty and staff assignment, transportation, extracurricular activities, or facilities. Judge

Frey expressly found that the disparity in academic achievement—which is not a *Green* factor—was *not* caused by District conduct. (3-SER-710–12, ¶¶ 44–52.)

Judge Frey entered a remedial desegregation decree in 1978. Among other provisions, that decree specified enrollment targets at the nine schools with a remaining vestige of discrimination, lasting for a five-year period following entry of the decree. (2-SER-521.)

C. The district court finds in 2008 that the District had eliminated by 1983 all vestiges of de jure segregation found by Judge Frey.

In 2008, the district court found that, within the first five years after the 1978 decree, the District had eliminated all vestiges of segregation. Indeed, as the court acknowledged in 2006, "Judge Frey made very limited, specific findings regarding student assignments and the existence of any vestiges of *de jure* segregation remaining in the district." (2-SER-491.) In its 2008 order on unitary status, the court found that the District had complied with the requirements of the original 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-711; 3-ER-713; 3-ER-719–20.) 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-761.)

But instead of terminating supervision based on those findings, the district court focused on conduct that occurred *after* the District had complied with the original 1978 decree for the duration of the five-year plan and achieved the student-enrollment changes specified by that decree—that is, the court focused on conduct that was *not* constitutionally required: "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-709.) Thus, the district court focused on the wrong conduct in the wrong time period and, given its erroneous focus, could not find "good faith." The court consequently ordered the District to comply with a "post-unitary plan" and, with that, held that the District had achieved unitary status. (3-ER-763–64.)

On appeal, this Court reversed, holding that the district court's refusal to find good-faith compliance precluded a determination of unitary status and termination of supervision. *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1143–44 (9th Cir. 2011). No one pointed out to the Court that the district court had erroneously relied on the wrong conduct in the wrong time period.

D. The district court adopts the "Unitary Status Plan."

On remand, the district court appointed a special master (retired and now-deceased University of Maryland professor Willis D. Hawley) to develop and monitor compliance with a "plan" to achieve unitary status (the "Unitary Status Plan" or "USP"). (3-ER-693; 3-ER-695–96.) The resulting plan, as adopted by the district court, essentially sought to redesign the District around a set of comprehensive social-engineering and educational goals that were not causally related to any vestiges of the dual school system, which had ended over sixty years earlier. The USP contained hundreds of individual requirements, and it mandated development and compliance with further "Action Plans" (and "Completion Plans" also subsequently ordered by the district court). Together, these constituted a complex scheme with thousands of mandates, by which the court regulated almost every aspect of District operations. The district court ordered the District to comply with the USP, over the District's objection, in February 2013. (3-SER-363.)

The District objected that it "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." (22-SER-5873; *see* District's Final Objections, 22-SER-5818–33.)

E. The District seeks acknowledgment of unitary status and termination of court supervision.

The USP provided that the District could seek unitary status again only after the conclusion of the 2016–2017 school year. (3-ER-687.) Shortly before the end of that school year, the district court ordered the District to prepare and file an assessment of its compliance with the USP, and it ordered the special master to file a report and recommendation on compliance and unitary status. (ECF 2025.) The District filed its assessment in October 2017. (18-SER-4597; 18-SER-4678; 18-SER-4688; 19-SER-4786; 19-SER-5098; 20-SER-5145; 20-SER-5201; 20-SER-5225; 20-SER-5249.) The court ordered a revision to one section of that assessment (ECF 2084), which the District filed in February 2018 (16-SER-4148).

Later that month, the special master filed his report and recommendation, in which he recommended partial unitary status in certain areas of the USP and listed specific steps for unitary status in the remaining areas. (16-SER-3997–98.) The District objected to the

recommendation to the extent that it did not recommend immediate termination of supervision, because the District had long since achieved unitary status under applicable case law governing termination of court supervision. (15-SER-3936 through 16-SER-3996.)

In a September 2018 order (the "2018 Order"), the district court granted partial unitary status, overruled the District's objection, and directed the District to undertake a comprehensive series of tasks, some within ninety days and others within one year. (1-ER-77 *et seq*.) Many of these tasks were extensions or entirely new requirements not included in the original USP.

The District appealed this order under 28 U.S.C. § 1292(a)(1) as a refusal to dissolve an s injunction. But this Court dismissed the appeal, stating only that "Appellees' motion to dismiss No. 18-16926 for lack of jurisdiction is granted." (No. 18-16982, ECF No. 14, at 2–3.)

The District filed its notices of compliance as to the ninety-day tasks in December 2018,[1] and as to the balance of the tasks in August 2019.[2] In April 2019, the court ordered the District to file, by December 2019, an executive summary of its programs under the USP. (3-ER-0598.) The District complied with that order. (7-SER-1589.)

[1] 15-SER-3703; 15-SER-3664; 14-SER-3654; 14-SER-3615; 14-SER-3603; 14-SER-3575; 14-SER-3519.

[2] 13-SER-3329; 13-SER-3275; 13-SER-3248; 12-SER-2964; 12-SER-2958; 11-SER-2709; 11-SER-2539; 9-SER-2176.

F. The district court finds that the District has achieved unitary status.

In April 2021, after the District complied with an additional round of orders issued in June and July 2020, the district court entered a comprehensive order reviewing the District's compliance with the USP and found that the District had attained unitary status (1-ER-21–76.) In determining that the District had attained unitary status, the district court found that

- the District had "moved forward with deliberate speed" and acted in "good faith to comply with the USP" over the past six years; and
- for over six years, the District had "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."

(1-ER-24–25.)

The court ordered the District to develop and comply with a post-unitary plan to guide the transition back to local control of the District. (1-ER-76.) Among other things, the plan was to include "benchmark events" scheduled to occur in the future, ensure practices of transparency and accountability, and continue to release annual reports after unitary status. (*Id.*)

The District revised the post-unitary plan twice in the following year in response to further orders from the district court. In April 2022, the court approved the post-unitary plan, renamed the Post Unitary

Status Reporting and Accountability Plan ("PUSRAP"), subject to a number of additional revisions. (2-ER-246; 2-ER-252.) The court adopted dozens of new compliance measures for (among other things) budget narrative form requirements, posting information on the District's webpage, and creating Performance Impact Analysis ("PIA") forms to assess the impact of changes to USP-required substantive programs. (2-ER-250.) The District complied.

On July 20, 2022, forty-four years after trial and the finding of a single then-remaining vestige of segregation that ended in 1951, the district court issued its final order in which it confirmed its findings as to unitary status, approved measures for transition of control back to local authorities, relinquished "supervision, control, and authority over the District," ordered that "full control and authority are returned to the District and its duly elected Governing Board," and closed the case. (1-ER-3; 1-ER-20.)

SUMMARY OF ARGUMENT

The Court should affirm the district court's long-overdue closure of this case, whether based on the broad sweep of its fifty-year history of court rulings or the detailed facts recently found by the district court in ultimately recognizing that the District had attained unitary status.

Under the Supreme Court's two-part test for school-desegregation cases, judicial supervision must end and control must be returned to local authorities when the vestiges of past de jure discrimination have been

eliminated and the school district demonstrates its good-faith commitment to avoiding any return to discriminatory practices. Neither the Supreme Court, this Court, nor district courts in this circuit have ever recognized the propriety of imposing post-unitary probationary supervision.

The first prong has been long satisfied: after the only trial in this case, the district court found in *1978* that the only remaining vestige of pre-1951 desegregation was attendance patterns at nine schools, and the court later found in 2008 that even that vestige had been eliminated by 1986, after the conclusion of the five years following the 1978 decree. The district court more recently reexamined whether vestiges remained, and reaffirmed on the basis of copious evidence that they did not.

Similarly, the district court properly concluded on the basis of abundant evidence that the District had long demonstrated its good-faith commitment to its constitutional obligations. The District had successfully campaigned to change state segregation statutes before *Brown*, and then it voluntarily desegregated in 1951. Following this Court's 2011 remand, the District worked hard to comply with the thousands of individual mandates in the district court's structural injunction—the Unitary Status Plan—and the district court concluded that the District had amply demonstrated its good faith. That does not mean the District has become a perfect school system capable of remediating all of society's ills, but then that is *not* the goal of school-

desegregation decrees. In Plaintiffs' effort to continue this litigation long past its expiration date, they have misapprehended both the District's legal obligations and the USP's requirements. This Court should reject those arguments, affirm the district court's final judgment, and allow the District to expend *all* of its efforts on educating its students.

Argument

I. The Court should affirm the district court's judgment.

After nearly fifty years, the district court brought this litigation to an end, and this Court should affirm the district court's entry of final judgment. It is well established that federal-court control of a school district in a desegregation case is "a temporary measure." *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991). A district court must terminate supervision of a school district when the district court finds that (a) the vestiges of past de jure segregation 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.

The district court made both required factual findings. (ECF 2572, 2650.) Accordingly, this Court must affirm unless one of these findings was "clearly erroneous." *See, e.g.*, *Huhmann v. Fed. Express Corp.*, 874 F.3d 1102, 1106 (9th Cir. 2017) (findings after bench trial). Under this highly deferential standard, a finding by the district court is clearly erroneous only when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm

conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quotation omitted).

Plaintiffs have ignored this standard of review, rearguing their contentions to this Court as if to the district court. Not once in their opening brief do Plaintiffs assert that the district court's factual findings were "clearly erroneous," or argue that the district court lacked sufficient evidence supporting its findings on vestiges and good faith. This alone requires affirmance of the decision below.

In fact, the record contains overwhelming evidence supporting the district court's findings that the vestiges of the pre-1951 segregation have been eliminated and that the District has embraced in good faith its constitutional obligation not to segregate students. The abundance of evidence is further confirmed by the fact that the United States, an intervenor in this litigation, has not objected to the district court's determinations, appealed from the court's judgment, or submitted a brief in support of Plaintiffs' appeal. This brief reviews the key evidence in the record supporting the district court's factual findings.

II. The Court should affirm the district court's findings that all vestiges of the pre-1951 segregation school system have been eliminated to the extent practicable.

A. Plaintiffs fundamentally misunderstand the law regarding the elimination of vestiges of the prior segregation.

Underlying the entire Opening Brief is the mistaken assertion that, to obtain termination of court supervision, a school district must eliminate *all* disparities among races and achieve racial parity. But no such thing is required by the Constitution or the USP.

First, there is no constitutional requirement for the District to fully integrate or to achieve specific, arbitrary levels of integration. *See, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995) (district court's consideration of whether school district had reached its "maximum potential" and integrated "to the maximum degree possible" was "clearly … not the appropriate test to be applied"); *N.A.A.C.P., Jacksonville Branch v. Duval County Sch.*, 273 F.3d 960, 973 (11th Cir. 2001) ("The Supreme Court has made quite clear, however, that the Constitution does not require a school board to eliminate the vestiges of past discrimination 'to the maximum extent practicable.'"); *Keyes v. Congress of Hispanic Educators*, 902 F. Supp. 1274, 1281–82 (D. Colo. 1995) ("The constitutional authority of the federal courts is limited to compelling the elimination of negative effects of *de jure* discrimination; it does not include the power to posit any particular affirmative achievements.").

Second, a school district is not obligated to target all *areas* of racial disparities. Courts determining unitary status look only at disparities that are *causally connected* to the prior de jure segregation, and not those that are caused by external factors. Specific vestiges "must be so real that they have a *causal link* to the *de jure* violation being remedied." *Freeman v. Pitts*, 503 U.S. 467, 496 (1992) (emphasis added). In *Freeman*, the Supreme Court held that it was "beyond the authority and beyond the practical ability of the federal courts to try to counteract … continuous and massive demographic shifts" that were "not caused by the policies of the school district," and that "[t]o attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated." *Id.* at 494–95. The Court warned, "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." *Id.* at 494.

Freeman followed the Supreme Court's application of the causal-link requirement in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), where the Court recognized that judicial supervision was appropriate to remedy only vestiges of prior de jure segregation, not any and all social ills that may have arisen *after* the elimination of the vestiges of that segregation. In *Spangler*, 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 school district could not be required to readjust student assignment procedures to combat the new racial imbalance created by residential resegregation: "[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." *Id.* at 436–37.

The Supreme Court again emphasized this causality requirement in *Jenkins*, when it rejected a remedy aimed to cure broader ills than the constitutional violation as not a "proper response by the District Court," because "external factors [that] are not the result of segregation … do not figure in the remedial calculus." 515 U.S. at 89–90, 102 (internal citation omitted); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 23 (1971) ("Our objective in dealing with the issues presented by [desegregation] cases … does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."). Lower courts have repeatedly followed these principles. *See, e.g.*, *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1353 (11th Cir. 2005) (holding that district court "would exceed its authority by requiring the [district] to

adopt attendance zones in order to counteract racial imbalances caused by demographic forces rather than by prior *de jure* segregation"); *Monteilh v. St. Landry Par. Sch. Bd.*, 848 F.2d 625, 632 (5th Cir. 1988) ("The school board's constitutional duty is to cure the continuing effects of the dual school system, not to achieve an ideal racial balance." (quotation omitted)).

These decisions reflect the "well-settled principle" that "federal-court decrees must directly address and relate to the constitutional violation itself." *Milliken v. Bradley*, 433 U.S. 267, 281–82 (1977). "Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation …." *Id.* at 282.

Where—as here, and as in *Freeman* and *Spangler*—the racial imbalance has been at least temporarily corrected after the abandonment of de jure segregation, it can be asserted with a degree of confidence that the past segregation no longer plays a proximate role. *See Freeman*, 503 U.S. at 503 (Scalia, J., concurring).

B. Plaintiffs have not challenged the district court's 1978 and 2008 findings as to the elimination of the vestiges of pre-1951 segregation.

Forty-five years ago, after the only trial, the district court carefully and conscientiously reviewed the factors set out in *Green* to assess the

extent to which any vestiges of the pre-1951 de jure segregation remained in 1978. The Supreme Court in *Green* identified specific areas for examination to determine if vestiges had been eliminated: student assignment, faculty and staff assignment, transportation, extracurricular activities, and facilities. 391 U.S. at 435.

After a searching analysis, the district court found that only one vestige of the pre-1951 segregation remained: higher than expected minority student population assignment at nine schools. (3-SER-766, ¶ 59.) The court directed the parties to fashion a remedy to eliminate that remaining vestige. The parties did so, and the court entered its original desegregation decree later that year. (2-SER-521.) In 2008, the district court found that the student-assignment vestiges identified by Judge Frey had been eliminated to the extent practicable in the five years following the entry of the 1978 decree, and that the District had acted in good faith during that time. (3-ER-712.)

Plaintiffs have not asserted that either of these two court findings, in 1978 and 2008, was clearly erroneous or otherwise improper. This alone requires the Court to affirm the district court's finding that all vestiges of the pre-1951 segregation have been eliminated to the extent practicable. *See, e.g.*, *Freeman*, 503 U.S. at 494; *Spangler*, 427 U.S. at 436–37.

In its 2011 opinion in this case, this Court noted the district court's "concerns" about disparities in other areas and held that the court could

not find unitary status until it found the District had eliminated vestiges to the extent practicable "with regard to all of the *Green* factors." *Fisher*, 652 F.3d at 1141, 1144. But this Court was not advised that the district court, through Judge Frey, had *already* found that vestiges had been eliminated in all *Green* areas other than student assignment in nine schools. That finding should have limited the district court's vestiges analysis to begin with. Judge Frey's factual findings were not briefed to the Court, and the proceedings ignored the teaching of *Spangler* and *Freeman*: a school district may not be required to battle reemerging disparities once true vestiges of the prior de jure segregation have been eliminated.

C. The extraordinary passage of time since the District voluntarily desegregated is sufficient to affirm the district court's finding that no vestiges of pre-1951 segregation remain.

The passage of more than seventy years since the District voluntarily desegregated shifts the presumption, providing sufficient basis for determining that conditions today are not causally linked to segregation before 1951. Plaintiffs point to no evidence linking current conditions to the pre-1951 segregation. This alone requires affirmance of the decision below.

In 1992, the Supreme Court noted in *Freeman* that, "with the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish." 503 U.S.

at 491. The Court explained, "As the *de jure* violation becomes more remote in time and … demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system." *Id.* at 496.

More recently, lower federal courts have emphasized the passage of time in school-desegregation cases. "Passage of time since the original violation makes it less likely that the necessary causal link will be found to exist between the original constitutional violation and any alleged racial imbalances that remain." *Hart v. Cmty. Sch. Bd.*, 536 F. Supp. 2d 274, 281 (E.D.N.Y. 2008). As one court noted in terms that could apply as well to the District, "no student presently enrolled in the [district] has ever attended a school practicing *de jure* segregation…. [T]he passage of time during the implementation of a desegregation order constitutes significant evidence that the remaining deficits are not the result of prior discrimination." *Berry v. Sch. Dist.*, 195 F. Supp. 2d 971, 994, *order clarified*, 206 F. Supp. 2d 899 (W.D. Mich. 2002). A student who started kindergarten in 1951, the last year the District had segregated schools, would now be seventy-seven years old.

The emphasis in *Freeman* and its progeny on the passage of time reflects the Supreme Court's continuing concern that court supervision must be a temporary measure serving dual purposes: "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." *Freeman*, 503 U.S. at 489. As the Court reasoned, "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 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* [*I*]" and "[a]lmost a quarter century" after *Green*. *Id.* at 500–01 (Scalia, J., concurring). More than thirty years after *Freeman*, those words bear far greater urgency.

Following *Freeman*, several circuits have "underscore[d] that the phrase 'to the extent practicable' implies a reasonable limit on the duration of that federal supervision. Indeed, to extend federal court supervision indefinitely is neither practicable, desirable, nor proper." *Coal. to Save Our Child. v. State Bd. of Educ.*, 90 F.3d 752, 760 (3d Cir. 1996); *accord Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 318 (4th Cir. 2001) (same); *Manning ex rel. Manning v. Sch. Bd.*, 244 F.3d 927, 943 n.29 (11th Cir. 2001) (same) ("The phrase 'to the extent practicable' is not meaningless surplusage.").

Specifically as to causation, Justice Scalia warned in his concurrence in *Freeman*, "At some time, we must acknowledge that it has

become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools. We are close to that time." 503 U.S. at 506 (Scalia, J., concurring). He explained:

> Since a multitude of private factors has shaped school systems in the years after abandonment of *de jure* segregation—normal migration, population growth …, "white flight" from the inner cities, increases in the costs of new facilities—the percentage of the current makeup of school systems attributable to the prior, government-enforced discrimination has diminished with each passing year, to the point where it cannot realistically be assumed to be a significant factor.

Id. Another thirty years later, any causal links to de jure segregation that may have once existed necessarily have become attenuated to the point of irrelevance.

Plaintiffs did not provide any evidence to the district court of the required causal link between any current disparities and the prior de jure segregation, and they do not identify any such evidence in their Opening Brief. Plaintiffs even acknowledge that the burden is theirs (Opening Br. 57), but they throw their hands up and claim they lack sufficient data "to know whether these discrepancies are caused by external factors." (*Id.* at 56–57.) In other words, they *admit* that they have failed to meet their burden.

D. The district court's more recent reexamination and finding (again) that vestiges have been eliminated are supported by abundant evidence and are not clearly erroneous.

Despite the District's objection that no reexamination of vestiges was appropriate in light of the district court's prior findings, the court reexamined whether vestiges of the pre-1951 segregation remained, in a series of orders beginning in September 2018 and culminating in its order terminating supervision and closing the case in July 2022. The court again found that all vestiges of the prior segregation had been eliminated. (*E.g.*, ECF 2637; 1-ER-77–228; 1-ER-21–76; 1-ER-3–20.)

In its April 2021 order (1-ER-21–76), the court comprehensively reviewed all of the *Green* and related factors, citing to substantial evidence in each area that supported the court's decision that no vestiges of the prior segregation remained. This evidence included, among other sources, the District's comprehensive annual reports, assessments and notices of compliance, and other filings describing initiatives undertaken pursuant to the Unitary Status Plan, and data showing progress in various areas where there were participation or outcome disparities among racial or ethnic groups. In particular, the court cited to evidence of District efforts that showed that any disparities had been reduced or eliminated to the extent practicable, in paragraphs 27, 31, 33, 34, 35–44 (EBAS), 48–68 (student assignment), 69–85 (administrative and certificated staff), 86 (transportation), 87 (extracurricular activities); 88

(facilities), 89–103 (Advanced Learning Experiences); 104–11 (student achievement), and 111–26 (discipline). The court found that there are no racial imbalances in transportation, extracurricular activities, and facilities. (1-ER-53–54, ¶ 88. The court noted that the passage of time (and other factors outside the District's control, such as residential patterns, state-mandated open enrollment, and publicly funded charter schools) reduced any causal link between prior segregation and any current racial imbalances in student enrollment, certificated faculty and staff, ALE, and discipline. (1-ER-53–54, ¶ 87.) Because the District fully and satisfactorily complied with the USP, the court found that any vestiges have been eliminated to the extent practicable.

The district court's extensive orders clearly demonstrate that overwhelming evidence supports the factual finding that any remaining vestiges of the pre-1951 segregation have been eliminated. That finding is therefore not clearly erroneous and should be affirmed.

E. Plaintiffs' arguments regarding academic achievement are misplaced.

Plaintiffs also argue at length that the District is not unitary because it did not "[c]los[e] the [a]chievement [g]ap." (Opening Br. 27.) But closing the achievement gap—an unfortunate phenomenon found in many school districts throughout the country, including those that were never segregated—is not a prerequisite for unitary status. In fact, the

achievement gap in the District is less than state and national averages. (*See* 7-SER-1616–17.)

Plaintiffs' arguments about the achievement gap and quality of education are misplaced for several reasons. First and foremost, academic achievement and quality of education are not *Green* factors. *See Green*, 391 U.S. at 435. This means the burden is on *Plaintiffs* to show that any disparities in these areas are causally connected to the prior de jure segregation. *See, e.g.*, *Coal. to Save Our Child.*, 90 F.3d at 776–77; *People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073, 1076–77 (7th Cir. 2001). Indeed, "[m]ost courts of appeals confronting [the] issue … have declined to consider the achievement gap as a vestige of discrimination or as evidence of current discrimination." *Belk*, 269 F.3d at 330 (collecting cases from Second, Third, Fourth, and Seventh Circuits); *see also People Who Care*, 246 F.3d at 1076–77 (plaintiffs made no effort "to partition, however crudely, the lag in achievement that is due to the school board's past illegalities and the lag that is due to other factors," such as "poverty, parents' education and employment, family size, parental attitudes and behavior, prenatal, neonatal, and child health care, peer-group pressures, and ethnic culture").

Plaintiffs cite *United States v. City of Yonkers*, 197 F.3d 41 (2d Cir. 1999), for the proposition that courts have considered quality of education in the unitary-status analysis. But in *Yonkers*, the Second Circuit (1) noted that quality of education is not a *Green* factor, (2) expressly did

not decide whether quality of education disparities can be a vestige of segregation, and (3) *put the burden on the party advocating for continued supervision to prove a causal link for any disparities in quality of education*. *Id.* at 52 ("Plaintiffs have failed to show the causal link between *de jure* segregation and the purported vestige."). *Yonkers* thus confirms that *Plaintiffs must show* a causal link between any academic achievement/quality of education disparities and the prior de jure segregation.

Plaintiffs provided no evidence of a causal link to the district court, and they do not identify any such evidence in their Opening Brief. Without such a showing, academic achievement and quality of education cannot be a basis for reversing the district court's finding.

Second, regardless of who bears the burden, there is no evidence of the required causal link. Judge Frey specifically reviewed the evidence on academic achievement in 1978, and he found that the gap was not the result of discriminatory conduct by the District. (3-SER-710–11.) More recently, the district court acknowledged in 2020 that it is "nationally recognized that [the] achievement gap is generally attributed to factors other than racial discrimination." (1-SER-283.) Courts have similarly recognized that it is "illogical" and "improbable" to conclude that alleged quality-of-education issues such as disparate enrollment in ALEs is a vestige of segregation. *See, e.g.*, *People Who Care*, 246 F.3d at 1077 (concluding that lower rate of minority enrollment was not the result of

segregation years ago because the "schools are desegregated" and "the advanced courses are open to any student").

Third, the USP did not obligate the District to *close* the achievement gap or to create racial parity in all areas of academic participation. Plaintiffs quote USP § V and misrepresent that it "requires" the School District "to close the achievement gap and eliminate racial and ethnic disparities …." (Opening Br. 28–29.) Actually, USP § V stated that the "objective" of § V was "to improve" African American and Latino academic achievement, "using strategies to *seek to* close the achievement gap and eliminate the racial and ethnic disparities …." (2-SER-395 (emphasis added).) The USP stated an *aspirational goal* and listed strategies that the District was required to and did implement, but it did *require* the District to actually close the achievement gap. Nor can the District *force* students to enroll in advanced courses.

Finally, equal racial outcomes or specific levels of achievement are also not required by the Constitution. *See, e.g.*, *Jenkins*, 515 U.S. at 101; *N.A.A.C.P., Jacksonville Branch*, 273 F.3d at 973; *Keyes*, 902 F. Supp. at 1281–82. As the Court noted in *Jenkins*, "numerous external factors beyond the control of the [school district] and the State [will] affect minority student achievement…. Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the [school district] will be able to operate on its own." 515 U.S. at 102 (citations omitted).

III. Substantial evidence supports the district court's finding that the District has embraced its constitutional obligations to avoid segregation in good faith.

It is difficult to understand how anyone could reasonably doubt the District's good faith. The District led the fight to integrate in 1951, three years before the Supreme Court imposed any obligation to do so. Moreover, no one could reasonably perceive that the District, its leaders, or the Tucson community would ever permit a return to de jure segregation. The District's enrollment is majority Hispanic; Tucson's mayor is Hispanic. Three of the five District Governing Board members are Hispanic, one is African American, and one is South Asian; the immediate past president of the Governing Board is Hispanic. The current and prior Superintendents are Hispanic; four of the assistant superintendents are Hispanic, two are African American (including the Assistant Superintendent of Equity, Diversity and Inclusiveness), and two are white; the chief financial officer and chief human capital officer are Hispanic.[3] Given this, there is not the slightest risk that the District

[3] 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.*, U.S. Census Bureau, *QuickFacts, Tucson city, Arizona*, https://www.census.gov/quickfacts/tucsoncityarizona (last visited May 10, 2023); TUSD, *Governing Board*, http://govboard.tusd1.org/ (last visited Apr. 17, 2021); TUSD, *Directory of District Leadership and Departments*, http://tusd1.org/Departments (last visited May 10, 2023); Encyclopedia Britannica, *Tucson*, www.britannica.com/place/Tucson (last visited May 10, 2023). In fact, Judge Frey made similar findings in 1978. (3-SER-580, ¶ 33.)

would slip back into the de jure segregation that it voluntarily abandoned three years before *Brown*.

A. Plaintiffs have misapprehended the meaning of the good-faith test.

Under the good-faith test, the district court found that the District's record of compliance since the USP was entered in 2013 established that it had in good faith embraced its constitutional duty to avoid, and would not return to, the de jure segregation required by state statute before 1951. Overwhelming evidence supports this finding.

1. The district court need find only that the District displayed a pattern of compliance, not that it achieved perfection.

"[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. The test does not require perfect compliance. *E.g., Berry*, 195 F. Supp. 2d at 991 ("[P]erfect compliance with the court's remedial orders is not required for a constitutional violator to be released from judicial oversight."); *Jenkins v. Sch. Dist.*, 2003 WL 27385936, at *11 (explaining that the question is "whether the school district's record throughout the litigation demonstrates that the school district has accepted the principle of racial equality").

In considering whether this standard has been met, "[t]he focus is on the school board's *pattern* of conduct, and not isolated events," because

"[f]ocusing on isolated aberrations blurs a court's long-term vision." *Manning*, 244 F.3d at 946 n.33 ("[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 to eliminating earlier violations.'"). The Supreme Court has emphasized that the good-faith prong requires courts to focus on the district's record over time: a school district "demonstrat[es] its good-faith commitment" when its "policies form a consistent *pattern* of lawful conduct directed to eliminating earlier violations." *Freeman*, 503 U.S. at 491 (emphasis added). In fact, some courts have granted unitary status (or partial unitary status) based on a finding that a district was not "likely to return to its former ways," without using the words "good faith" at all. *E.g.*, *Liddell v. Special Sch. Dist.*, 149 F. 3d 862, 868–69 (8th Cir. 1998).

2. The good-faith test pertains to remedying the *past* constitutional violation. It does not apply to ongoing efforts to cure new social issues.

Plaintiffs suggest that judicial supervision cannot be lifted until the District shows "good faith" by achieving thousands of ambitious social policy goals under the USP, which have no connection to the former de jure segregation, and which exceed constitutional requirements. (*See* Opening Br. 14–44.) That is not the right standard.

In *Spangler*, the Supreme Court held expressly that the "good faith" test did not require a school district, having already remedied past

segregation, to continue to remedy new conditions (there, "white flight") that arose after the elimination of the vestiges of that segregation. 427 U.S. at 435. The trial court had held that conduct occurring after the vestiges were eliminated *had not been in good faith*, but the Supreme Court reversed. *Id.* at 437. As *Spangler* teaches, the district was not required to readjust student-assignment procedures to combat the newly created racial imbalance. *Id.* at 436–37.

Fifteen years later, the Supreme Court affirmed this position in *Dowell*, where it reversed the Tenth Circuit's decision to continue supervision after a finding of unitary status and the elimination of the vestiges of de jure segregation. 498 U.S. at 247. The Court confirmed that desegregation decrees may not operate in perpetuity, and it stressed that the decrees were "intended as a temporary measure to remedy *past* discrimination." *Id.* Acknowledging that the original finding of de jure segregation was entered in 1961 and resolved in 1977, the Court explained that a district cannot be held to "court authorization for the promulgation of policies and rules" after the original violation has been rectified. *Id.* at 250–51. Thus, courts should simply determine whether a school district has complied in good faith *until* the vestiges of the de jure violation are eliminated. *See id.* at 247.

B. The Court should affirm the decision below based on the district court's finding that the District met the good-faith test before 1983.

Again, Judge Frey found only a single remaining vestige of the pre-1951 segregation: student enrollment at nine schools. (3-SER-662–63, ¶¶ 52, 56, 59.) The district court later found that this solitary vestige had been eliminated by 1983, and that the District had acted in good faith to implement the decree until the remaining vestige had been eliminated. (2-SER-505, 507; 3-ER-712.) The court's findings as to student ethnic and race ratios are quoted at pp. 6–7 above.

Spangler and *Dowell* teach that no conduct *after* 1983 should figure into the good-faith assessment. Thus, the district court's subsequent focus on the District's use of state-provided funding in the years after the vestiges were eliminated, and its asserted failure to track the efficacy of programs implemented (which led to the court's refusal to find "good faith" in 2008), was misplaced under *Spangler* and *Dowell*.

Plaintiffs' Opening Brief assigns no error to the district court's findings that the District met the good-faith test based on its conduct from 1978 to 1983, when the court expressly found that the remaining vestiges had been eliminated. Instead, Plaintiffs rest solely on accusations of a lack of good faith *after* 2013. Accordingly, this, without more, requires affirmance of the factual finding below that the District has met the good-faith element of the test for terminating supervision.

C. In any event, overwhelming evidence supports the district court's finding that the District demonstrated good faith in implementing the USP from 2013 through 2022.

Regardless of the District's earlier good faith, this Court should affirm the district court's recent findings that the District implemented and complied with the USP in good faith from 2013 through 2021. In its 2018 Order granting partial unitary status, the district court set out various tasks and plans needed to complete implementation of the USP. After watching the District operate for over six years under the USP, and after over a thousand filings by the parties and orders, the court entered its 2021 Order, in which it comprehensively reviewed the District's conduct under the USP, and the progress made in each substantive area of the USP. (1-ER-21–76.) Based on this review, the district court concluded:

> 2. The District has acted in good faith to comply with the USP over the past six years, which is a reasonable period of time to establish a lasting commitment to the USP and the Constitution, rather than merely being a temporary constitutional ritual by the District's board.
>
> 3. For over six years, the District has 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, and where contingencies for compliance remain, they do not call into question

> the District's commitment to the whole of the USP or to the Constitution.

(1-ER-23–24.) The court directed the District to correct certain outstanding issues and prepare a post-unitary plan to transition oversight and accountability from the court back to the District's Governing Board and the public. The district court subsequently approved the plan and final outstanding tasks, reaffirmed its earlier findings, terminated supervision, and transferred authority back to the District's Governing Board in its 2022 Order. (1-ER-19–20.)

Overwhelming evidence supports the court's findings that the District had met the good faith standard set out in *Green, Freeman, Dowell*, and *Jenkins*. The District's record demonstrates acceptance of racial equality, policies that form a "pattern of lawful conduct," and a commitment not to revert to the former dual school system. *E.g.*, *Freeman*, 503 U.S. at 491. Indeed, the evidence supports the district court's findings in each area of the USP.

1. USP § II (Student Assignment)

The district court cited abundant evidence in its 2018 Order regarding Student Assignment:

- the special master reported that the District employed "district-wide integration efforts" warranting a granting of unitary status as to § II for districtwide integration,

including outreach to families on the benefits of integrated education (1-ER-92);

- the District reduced racial concentration at magnet schools and integration was "trending up" (*id.*);
- the District increased the number of integrated schools in the district and substantially increased the number of students attending integrated schools (1-ER-9292–93); and
- the District had been "the only recipient in Arizona of the Magnet Schools Of America Award" for the last three years (1-ER-223).

The court required the District to revise its comprehensive magnet plan, develop an integration plan for magnets (with the subsequent result that all but one magnet became integrated) and to develop integration plans for all racially concentrated schools. (1-ER-225, ¶ 1; 1-ER-34, ¶ 34(a).) After the District filed notices of compliance, the court reviewed and approved these remaining tasks, as set out in various orders. (1-SER-259–76; 1-SER-211–19; 2-ER-421–38; 2-ER-386–412; 1-ER-34, 39-42, 44–45, ¶¶ 34(a), 46, 51, 60–61.)

2. USP § III (Transportation)

The district court cited abundant evidence in its 2018 Order regarding Transportation:

- the special master reported that the District had "satisfactor[ily] complied with USP § III" (1-ER-110);
- the District "sufficient[ly] track[ed]" ridership based on student enrollment/attendance criteria that "track USP goals" (1-ER-113);
- although *not required* by the USP, the District also tracks districtwide data on transportation availability disaggregated by program and by race and ethnicity (*id.*; 22-SER-5735–38); and
- there was no "racial disparity resulting from past *de jure* segregation in transportation" and praised the District for providing commute times "limited to approximately twenty minutes" for students in racially concentrated neighborhoods. (1-ER-52–53, ¶ 86.)

The 2021 Order required the District to file an updated Transportation Plan to take account of revisions to the magnet and ALE plans (as those revisions might impact transportation). (1-ER-52–53.) The District filed the Revised Transportation Plan in April 2021 (ECF 2573, Ex. C), and the court found that the District "fully complied" (1-SER-12).

3. USP § IV (Staff)

Evidence cited by the district court in its 2018 Order includes District efforts to reduce attrition, increase diversity, support new teachers, and reduce placement of new teachers at struggling or racially concentrated schools. The diversity efforts include the District's Teacher Diversity Plan, an "ambitious and commendable undertaking by the District," as well as "Grow-Your-Own" programs ("GYOPs") to recruit and prepare minority teachers. (1-ER-115–16.)

The district court directed specific further efforts and reporting in these areas. The District filed notices detailing its compliance with these directives. (*See* 14-SER-3520; 14-SER-3604–05.) The 2021 Order found that the District complied with all remaining requirements under USP § IV, explaining that the District's subsequent filings showed that it (1) developed and implemented diversity plans for both teachers and administrators; (2) hired a Diversity Recruitment Director; (3) identified and recruited in-house transfers to meet that need; and (4) offset the negative impact of placing less experienced teachers at Racially Concentrated and underperforming schools. (1-ER-49, ¶ 73; 1-ER-52, ¶¶ 82–84.)

4. USP § V (Quality of Education)

The district court cited abundant evidence in its 2018 Order regarding Student Assignment:

- the District expanded ALE programs by adding ALE students who were previously on waiting lists, and piloted programs for detection (1-ER-144–45);[4]
- the District received "national recognition for the increase in the number of AP courses offered … with the number of African-American and Latino students who enrolled in AP classes stabilizing at about 1,700 students" (1-ER-155–56);
- a District college preparatory school was found to be one of the "best high schools in America," containing a "divers[e]" student body (with a population of 35% Latino students, and an increase in Latino students by 18% and African American students by 20% in SY2016–17) (1-ER-156, 158, 160);
- the District displayed a steady increase in ELL students participating in ALEs (1-ER-163);
- the District "exhibited a strong commitment to an [Exceptional Education] program that safeguards against disproportionate and possibly discriminatory placement of minority students …." (1-ER-179); and

[4] The court reaffirmed its correct earlier determination that the "not less than" 15% Rule—providing a metric for participation through an inflexible percentage requirement—*cannot* be a predicate to unitary status under § V. (1-ER-129.)

- the District had been a "vanguard in implementing culturally relevant courses to close the achievement gap … [and] staunchly advocated for courses containing culturally relevant curriculum (1-ER-192).

The court set out additional tasks for the District in a number of the § V areas. (1-ER-226, ¶ 4.) The District filed a series of notices detailing its compliance and making additions and changes as directed by the district court, all of which were subsequently approved by the district court in the following orders:

Student Engagement and Support	1-ER-77–228; 2-SER-329–43; 2-SER-304–07; 2-SER-293–98; 2-SER-308–28; 3-ER-574–81; 1-SER-179–201; 1-SER-153–78; 1-SER-119–52
Advanced Learning Experiences	1-SER-234–90; 1-SER-96–112; 1-SER-50–90
Two-Way Dual Language	ECF 2295; 1-SER-220–31
Culturally Relevant Curriculum and Pedagogy	1-SER-119–52; 1-SER-50–90

In its 2021 Order, the district court found that (1) "most of the USP strategies being implemented by the District target African American and Latino students and are designed to improve academic achievement"; and (2) the District "has implemented every suggested strategy for increasing access to GATE." (1-ER-55–56, 58–59, ¶¶ 95, 105.) The court required two additional revisions to the ALE Policy Manual; the District

complied in April 2021. (ECF 2573 at 2.) The court fully approved the ALE Policy Manual in July 2021. (1-SER-12, 19.)

5. USP § VI (Discipline)

The district court cited abundant evidence in its 2021 Order regarding Discipline:

- the District complied with USP provisions, adopting "two comprehensive school-wide approaches to classroom management": "Restorative Practices and Positive Behavior Intervention and Supports" (1-ER-61, ¶ 115);
- there is no disparity in discipline between Hispanic and White students (1-ER-60, ¶ 12);
- the overall trend is a "reduction in the difference of discipline rates between African American and White students" (1-ER-62, ¶ 117);
- it is undisputed that "'compared to national averages in other school districts, African American students receive less disciplinary measures in TUSD." (1-ER-62, ¶ 120); and
- professional learning related to behavior management is provided by "qualified persons in each field," with "buy-in" from staff (1-ER-63, ¶ 125).

Accordingly, the district court properly found that the District complied with USP § VI.

6. USP § VII (Family and Community Engagement)

The district court cited abundant evidence in its 2018 Order regarding Family and Community Engagement:

- the District expanded the reach of its Family Resource Centers ("FRCs"), providing computer access, translation services, and information on USP services (1-ER-209);
- the District hired and properly implemented a Family Engagement Coordinator ("FEC") (*id.*); and
- the District maintained support services through the African American Students Services Department and Mexican American Student Services Department ("AASSD" and "MASSD") (*id.*).

The court ordered the District to update its FACE Action Plan, to include a districtwide strategy for family and community engagement at school sites (rather than FRCs) and an effective data monitoring program for the same. (1-ER-226–27, ¶ 6.) The District complied and filed two additional revisions. (*See* 14-SER-3618; 13-SER-3176; ECF 2386.) In subsequent orders, the district court approved the tasks (1-ER-598–617; 2-SER-329–43; 2-SER-308–29; 2-SER-293–98; 3-ER-574–81) and noted full unitary status in this area (1-ER-34).

7. USP § VIII (Extracurricular Activities)

As noted in the 2018 Order, the District improved its data-collection approach for extracurricular activities by making it more comprehensive, but the improvement made it difficult to compare year-to-year data. (1-ER-213.) The court ordered the submission of a plan to allow data comparisons and show a lack of disparities between Racially Concentrated and Integrated Schools. (1-ER-227, ¶ 7.) Neither the court nor the special master found any other fault under USP § VIII. (1-ER-213.) The District submitted its notice of compliance (12-ER-3252), and the court noted that there were no objections to the entry of unitary status as to extracurricular activities (1-ER-53, ¶ 87).

8. USP § IX (Facilities and Technology)

The district court cited abundant evidence in its 2018 Order regarding Facilities and Technology:

- the Special Master found "no evidence" that Racially Concentrated schools have lower scores measuring adequacy of facilities as set forth in the Facilities Condition Index;
- an Implementation Committee of experienced educators visited District schools and issued closely aligned findings related to the Facilities Condition Index; and

- the District prioritized and invested in technology for Racially Concentrated schools.

(1-ER-215.) The court directed an update and recalculation of Facility Index and Technology Index scores according to a specified formula, and development of a Professional Learning Plan to ensure teacher proficiency in using technology. (1-ER-227, ¶ 9.) The District filed notices of its compliance with these directives (15-SER-3664–702; 14-SER-3467–87; 13-SER-3124–71; 12-SER-2658–963), and the court approved these notices (2-SER-329–43; 2-SER-308–28; 1-SER-202–07; 1-SER-179–201; 1-SER-153–78).

As the court summarized in the 2021 Order, "there is no evidence that Racially Concentrated schools have lower FCI scores than non-racially concentrated schools." (1-ER-53–54, ¶ 88.) Specifically, the court found that "every school" has (1) "the same type of wireless access points, installed to the same minimum density standards"; (2) "equipment of the same type and with the same capacity connecting the school to the main District internet connection," and (3) the same "availability of internet access." (1-ER-53–54, ¶ 88 (cleaned up).) The court noted that "[t]here are no objections to the entry of unitary status for facilities," and "[t]here are no racial imbalances in facilities, including technology infrastructure." (*Id.* (cleaned up).)

9. USP § X (Accountability and Transparency)

Evidence cited by the district court in its 2018 Order included that the special master found that (a) "over the last two years, the District has done a very good job on the development of EBAS,"[5] which is the "cornerstone to effective evidence-based decision making" (1-ER-217 (quoting SY2016–17 SMAR Report, ECF 2096)); and (b) "the District has undertaken new and more productive strategies for professional development" (1-ER-220 at 144).

The court directed the District to take *additional* time to monitor the continued "district-wide school-site" implementation of EBAS for USP sub-requirements under §§ V and VI. (1-ER-218, 227, ¶ 10.) Moreover, noting issues within the budget allocation process, the court invited the District to apply for unitary status as to the "Budget" provision of § X in the following school year.

The District complied. In the 2021 Order, the court found that the District has "shown EBAS is being effectively used … district-wide [and] school-site." (1-ER-39, ¶ 44.) The court directed the District to develop a post-unitary plan to guide transition from judicial oversight to Governing Board and community accountability, which would also serve to address the Transparency and budget requirements under USP § X. (1-ER-39,

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[5] EBAS is a data-management program used to track, among other things, student demographics, academic and behavioral data, success of programs, and at-risk students. (1-ER-216.)

¶ 45; 1-ER-71, ¶ 25.) The District developed and filed the post-unitary plan, which was subsequently approved by the court. (1-ER-4.)

* * *

The district court adhered to the proper legal standard by reviewing the District's record of compliance and finding that the District acted in good faith in its overall implementation of the entire USP. The court properly granted the District unitary status.

D. Plaintiffs' arguments misunderstand both the USP and the District's good-faith obligations.

Plaintiffs argue that the various orders during the course of judicial supervision requiring changes to plans and directing additional tasks somehow preclude the district court from finding that the District acted in good faith. (Opening Br. 14–44.) But each of Plaintiffs' contentions fails. There is no constitutional requirement that the District achieve unitary status in one fell swoop or avoid being ordered to comply with additional tasks. *See Riddick ex rel. Riddick v. Sch. Bd.*, 627 F. Supp. 814, 825 (E.D. Va. 1984) ("Plaintiffs' criticisms … amount to no more than a claim that the Board failed to meet a standard of near-perfection" and [do not] "lead to the conclusion … that the Board was in fact acting with an intent to discriminate …."). The USP, along with the Action and Completion Plans, collectively contain thousands of individual requirements reaching into almost every area of District operations. It is unsurprising that the court granted partial unitary status while ordering

compliance with additional tasks, and, in some cases, modified requirements.

Every time the court ordered additional compliance, there were changed circumstances, events outside of the District's control, or the need for clarification due to the USP's complex administrative and social goals. None of Plaintiffs' arguments establish that the District lacked good faith or was at risk of returning to segregation.

1. Data and Budgeting (USP § X)

Contrary to Plaintiffs' contention (Opening Br. 15–16), the District effectively used EBAS under § X. The district court simply ordered the District to "develop a Post-unitary Status Plan for AASSD and MASSD,"[6] departments using EBAS, "for the *post-unitary status* delivery of student support services to African-American and Latino students." (1-ER-197.) By its very nature, this was a plan for operating these departments in *post-unitary* circumstances; good-faith compliance with the USP cannot hinge on it. Moreover, there is ample evidence that EBAS was "used effectively." (*E.g.*, 1-ER-217 (quoting SY2016–17 SMAR Report, 16-SER-3997); 1-ER-39, ¶ 44 (showing effective use of EBAS).)

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[6] Plaintiffs have not articulated *which* "Family and Community Engagement programs" are at issue, but Plaintiffs presumably refer to the "effective use" of the EBAS data related to the minority-student associations. (ECF 2168 at 2–3.)

Plaintiffs' vague mention of the "budgetary process" under USP § X fares no better. (Opening Br. 16–17.) Each year during the implementation of the USP (from 2013 to 2022), the District prepared detailed budgets for its expenditures of funds budgeted for desegregation purposes under Ariz. Rev. Stat. § 15-910(G). The budgets were submitted to the district court for approval; Plaintiffs were given the opportunity to object, and the court resolved those objections and approved the budget.[7]

Complying with the court's order, the District prepared its post-unitary plan to guide the transition back to supervision by the Governing Board and the public, including budget issues. This does not establish a lack of compliance or good faith. Rather, the post-unitary plan establishes compliance with the USP goals of accountability and transparency, particularly as the District transitioned out of judicial supervision. The District fully complied, and the court found that all budgetary form changes were sufficient. (2-ER-257, 259, 265; 1-ER-5.)

2. Discipline (USP § VII)

Plaintiffs erroneously claim that the district court's decision should be reversed as to discipline. First, Plaintiffs argue that the District sought "termination" of the District Alternative Education Program ("DAEP"), a program aimed at reducing out-of-school suspensions for minority students by allowing students facing suspension to serve their

[7] Nonexhaustive examples of budget filings and approvals appear in the Appendix under USP § X.

consequence in a classroom, taught by a fully certified DAEP teacher. (Opening Br. 18–19.)

This argument is based on incorrect information. The District has *never* terminated DAEP. (ECF 2624 at 1.) Instead, because of the COVID-19 pandemic and severe teacher shortage, a plan was *proposed* at the outset of the 2021–2022 school year to assign *a few* DAEP teachers to students who needed to be quarantined due to COVID-19 exposures (the "Covid Mitigation Program"). (ECF 2624 at 11; ECF 2631 at 3.) (Of course, most, if not all, school districts faced severe staffing restraints since the pandemic's onset.) But the Covid Mitigation Program was a temporary emergency measure that was *never implemented*. (ECF 2624 at 12.) Instead, DAEP's teaching model, facilities, referral model, and operational logistics continued seamlessly when the District resumed in-person instruction during and after the pandemic. (*Id.* at 4–5.) The District provided the court with enrollment data establishing that, when in-person instruction resumed, students continued to enroll in DAEP with the same frequency. (ECF 2631 at 16, Ex. C.)

After reviewing the evidence, including the parties' affidavits, the court found "no evidence that DAEP is being terminated" and simply ordered the District to maintain DAEP *until* it prepared a "Performance Impact Analysis (PIA) for DAEP changes." (2-ER-283.) The District did so. (ECF 2644 *passim*, Attachs. 8–9.) Plaintiffs have not shown any lack of good faith, nor have they disagreed with the District's data showing

that (a) overall discipline is low compared to national averages, (b) there is no disparity in discipline between Hispanic and white students, and (c) the remaining disparity in discipline between African American and white students has dropped dramatically since the inception of the USP and is far lower than national averages, including for most school districts that were never segregated.

3. Student Assignment (USP § II)

Section II of the USP has a simple requirement: students shall have "the *opportunity*" to attend an integrated school. (USP § II(A)(1).) Although § II requires four strategies in student assignment—attendance boundaries, pairing and clustering of schools, magnet schools, and open enrollment—all of the strategies aim to afford students the *opportunity* to attend an integrated school. (*Id.*) Plaintiffs' arguments as to § II conflate an "opportunity" to attend an integrated school with demanding adherence to precise statistical metrics satisfied only if certain students *decide to* attend an integrated school. (Opening Br. 21–26.)

The 2018 Order directed the District to "demonstrate its commitment to … new magnet schools." (1-ER-20.) This simple directive does not establish bad faith or noncompliance on the part of the District. In fact, responding to the court's order, the District demonstrated its dedication to promoting and improving magnet schools. (9-SER-2176–10-SER-2537 (3-Year PIP); 1-ER-44–47, ¶¶ 60–67 (detailing the District's

"design" and "implement[ation]" of magnet-related plans, including the 3-Year PIP, that, "according to research and best practices will **promote integration** … [and] ensure[] the integrity of magnet programs").) Stated simply, Plaintiffs' contention falls flat in light of the record and the 2021 Order.

Likewise, the District consistently invested in the integration of nonmagnet schools. As the district court acknowledged in the 2021 Order, the District complied with the set *nonmagnet integration priorities*, including "Action Plans for every nonmagnet school," and the development of "Integration Improvement Action Plans" for "high potential nonmagnet schools" and "improving integration at *nonmagnet* schools." (1-ER-41, ¶ 51; 1-ER-45, ¶ 61.) The District prepared and filed (1) *Nonmagnet* Integration Improvement Actions Plans for nine nonmagnet schools with a "high probability of being integrated," and (2) Academic Improvement Action Plans prioritizing academic improvement at 17 *nonmagnet* schools. (3-ER-396, 407.) Plaintiffs' contrary suggestion does not match the record. (Opening Br. 24.)

Moreover, integration is required to the extent "*practicable*" and does not require specific or rigid ratios. *Manning*, 244 F.3d at 941; *see United States v. Meriwether County*, 171 F.3d 1333, 1339 (11th Cir. 1999) ("The law does not make a school district a prisoner based on factors, such as demographic tendencies, that are beyond its control."); *Hull v. Quitman Cnty. Bd. of Educ.,* 1 F.3d 1450, 1454 (5th Cir. 1993) ("The

Court need not employ "'awkward,' 'inconvenient,' or 'even bizarre' measures … to achieve racially balanced school assignments 'in the late phases of carrying out a decree, when the imbalance is attributable neither to the prior *de jure* system nor to a later violation by the school district but rather to independent demographic forces.'"). After attaining unitary status, the court allowed the District to use a 25-percentage-point (rather than 15-point) metric to measure variance between any ethnic or racial group compared to the district average for a given grade level, noting that the District has the discretion under the USP to choose another definition suggested by the special master. (1-ER-46, ¶ 64; 2-ER-387.) The District contains almost 80% minority students. (2-ER-410.) Nothing in the Constitution or the USP requires a specific metric for measuring integration, and Plaintiffs point to no such requirement.

4. ALE

Plaintiffs cite the fact that the District was "directed … to file an updated ALE Policy Manual." (Opening Br. 29.) The revised ALE Manual is not indicative of bad faith or noncompliance. Indeed, the District complied with this directive in August 2019 and produced additional revisions in April 2021. (11-SER-2540; ECF 2573 at 2.) The court approved the appendix, alignment plan, and ALE Policy Manual in full in July 2021. (1-SER-19.)

5. Dual Language

Similarly, Plaintiffs mention that the court retained temporary jurisdiction in 2018 and ordered a "Dual Language Action Plan" for the expansion of the dual-language program. (Opening Br. 30.) The District complied in August 2019 (13-SER-3330), and the court approved the plan in the 2021 Order, noting that the "dual language (TWDL) program … ensure[d] the dual language educational program is academically challenging." (1-ER-35, ¶ 34(d); 1-ER-58, ¶ 105.)

6. Student Engagement and Support

Plaintiffs' passing reference to the District's filing an ELL Dropout Prevention Plan is likewise unavailing. (Opening Br. 30.) As explained in the 2018 Order, the special master reported that the "District's graduation rates are relatively high and would be envied by any other district serving such a diverse student body." (1-ER-180.) The court also acknowledged that the "parties have *already met* to identify a practicable graduation rate for ELL students," and the District's "success … in preventing dropouts" needed only the additional focus on ELL students. (1-ER-181.) Again, the District complied in August 2019 (13-SER-3238), and the court approved the ELL Dropout Prevention Plan in October 2019 (ECF 2363).

Additionally, the 2018 Order instructed the District to produce two additional filings relating to culturally relevant pedagogy: the Culturally Relevant Curriculum Completion Plan ("CRCCP") and a Culturally

Relevant Pedagogy Professional Learning Plan ("CRPPLP"). The court, however, *praised* the District for its work in implementing culturally relevant pedagogy, referred to the District as a "vanguard in implementing culturally relevant courses," and found that the District had a "long history of good-faith efforts to implement culturally relevant curriculum." (*Id.* at 116.) The District filed both the CRCCP and CRPPLP in August 2019 (13-SER-3275), and the court approved these plans in August 2020 (1-SER-151).

7. Inclusive School Environments

Plaintiffs raise a new argument on appeal but, contrary to their contention, there is no need to review "referral, evaluation, placement policies, and disaggregated enrollment data to *remedy* any classroom assignment … that resulted in racial or ethnic segregation of students." (Opening Br. 32.) Even if Plaintiffs had made this argument in opposition to the petition for unitary status, there is *no* evidence suggesting *any* disparity in classroom assignment that "resulted in racial or ethnic segregation of students." Moreover, there are no USP provisions addressing classroom assignments within a school, as this was simply not an issue.

Finally, the text of USP § V(F)(1)–(3) has nothing to do with classroom assignments, and instead addresses the District's responsibility related to "Inclusive School Environments" and requiring the adoption of certain discrete policies relating to culture and climate.

As to "Inclusive School Environments," the court ordered that the District provide a Completion Plan, including a Professional Learning Plan that includes "strategies aimed at creating cultures of civility" and a study of students' sense of inclusiveness. (1-ER-199–200.) The District initially complied in December 2018 (ECF 2156) and supplemented that compliance in July 2019 (ECF 2232) and October 2019 (ECF 2328; 14-SER-3576), and the court approved this plan in July 2020 (ECF 2497).

8. Minority Teachers and Staff (USP § IV)

Plaintiffs misinterpret USP § IV, which requires only that the District "*seek* to enhance" staff diversity through implementing certain recruitment, hiring, interview, employment support, and retention policies. *See* USP § IV(A)–(F), (I). There was norequirement that the District hire precise numbers of minority teachers and staff.

In fact, the District reported that the District's Hispanic teacher attrition rate is consistently lower than the attrition rate for white teachers (and is substantially lower than the national average for minority teachers), and the African American attrition rate is substantially below the national average. (14-SER-3524.)

As Plaintiffs point out, the court required the District to file an additional Teacher Diversity Plan and notice of compliance as to centralization of the hiring process for placing beginning teachers at Racially Concentrated or underachieving schools. (1-ER-225–26, ¶ 3; Opening Br 37.) The District did so in December 2018, establishing that

23 of the 28 Racially Concentrated schools *do not* have a first-year teacher at the school. (14-SER-3604–05; 14-SER-3520.) The court found that the District complied. (1-ER-49, ¶ 73; 1-ER-52, ¶¶ 82–84.)

9. Transportation to magnet schools rather than all schools (USP § III)

Plaintiffs incorrectly suggest that the District "narrowed" the transportation to magnet schools or failed to "provide transportation for all schools and programs." (Opening Br. 39.) First, Plaintiffs did not make this contention in opposition to the petition for unitary status, and they should not be heard to make it for the first time on appeal. Second, the District's transportation plan and programs were to provide transportation (a) to magnet students, (b) to students enrolling out-of-neighborhood in a school at which they improved diversity, and (c) to support extracurricular activities. This plan was reported by the District, set out in its formal Transportation Plan, and approved by the district court. Plaintiffs' Opening Brief does not cite to the record or *any* instance in which the District allegedly "failed" to provide transportation to magnet schools or, for that matter, *any* program.

10. Family and Community Engagement (USP § IV)

The Court should easily dismiss Plaintiffs' contention as to USP § IV that there is an alleged "lack of data tracking and establishing interconnectivity" between FACE and the AASSD and MASSD. (Opening Br. 43.) The supplemental Revised AASSD and MASSD Operating Plans

submitted by the District in August 2019 establish the requisite "interconnectivity" and connected use of EBAS. (12-SER-2906–57.) Indeed, the plans detail countless examples of the requisite "interconnectivity" between FACE, AASSD, and MASSD:

- seven MASSD program goals regarding "intersection" with the work performed by FACE (12-SER-2924);
- eight MASSD program positions to be trained by the FACE Director on FACE and other District departments (12-SER-2929);
- four AASSD program specialists to provide parent engagement or advocacy (12-SER-2911); and
- an AASSDD staff member to coordinate family support services between the FACE Department and AASSD, related to "events and workshops at school and the family centers" (12-SER-2911).

The Executive Summary (7-SER-1597) specifically demonstrates the interconnectivity and use of EBAS. Moreover, the 2021 Order found that the District had shown "monthly collaboration" related to AASSD, MASSD, and other departments in connection with EBAS. (1-ER-37, ¶ 40.)

IV. The district court properly terminated supervision upon finding unitary status because no post-unitary supervision is required.

Plaintiffs erroneously argue that "legal precedent … requires" the district court to impose a three-year post-unitary period of court supervision, namely, the so-called "*Youngblood*" procedure, based on *Youngblood v. Board of Public Instruction*, 448 F.2d 770, 771 (5th Cir. 1971). (Opening Br. 51–53.) But a probationary period has been imposed in only the Fifth and Eleventh Circuits, and never by the Supreme Court, this Court, any district court in this circuit, or the majority of the circuits. This Court expressly rejected the notion of post-unitary supervision in *Spangler v. Pasadena City Board of Education*, 611 F.2d 1239 (9th Cir. 1979). The Court held that a district that had established a unitary system and represented it would continue such efforts[8] *could not* remain under court supervision; the Court overruled the district court's decision to continue to supervise the district, and it remanded with instructions to terminate the case. *Id.* at 1241–42. Consistent with *Spangler*, courts in this circuit have, without exception, terminated court supervision upon a finding of unitary status. *See United States v. Bakersfield City Sch. Dist.*, 2011 WL 121638, at *5 (E.D. Cal. Jan. 12, 2011) (declaring district unitary, terminating consent decree, and dismissing case); *S.F.*

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[8] The 1979 decision in *Spangler* predated the Supreme Court's clarifications in *Dowell* and *Freeman* about the unitary-status test, and thus the test itself was not addressed with the precision of later decisions. However, the *results* of a unitary finding remain the same.

NAACP v. S.F. Unified Sch. Dist., 413 F. Supp. 2d 1051, 1065–68, 1072 (N.D. Cal. 2005) (based on finding of unitary status, denying joint request for continued supervision); *see also Castro v. High Sch. Dist. 210*, 2008 WL 324229, at *1 (D. Ariz. Feb. 4, 2008) (retaining oversight only to monitor completion of new school, and vacating all orders and dismissing case on notice of completion).

Other circuits have taken similar positions. As one aptly noted, "the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities. Thus, when a court finds that discrimination has been eliminated … from school operations, it must abdicate its supervisory role, in recognition that the local autonomy of school districts is a vital national tradition." *Morgan v. Nucci*, 831 F.2d 313, 318 (1st Cir. 1987) (cleaned up); *see, e.g.*, *People Who Care*, 246 F.3d at 1075–78 (reversing implementation of probationary period because "[t]he purpose of a school desegregation decree is to eliminate the consequences of segregation," and "[w]hen they have been eliminated the decree has done its job and should be lifted"); *Riddick ex rel. Riddick v. Sch. Bd.*, 784 F.2d 521, 535 (4th Cir. 1986) ("[O]nce the goal of a unitary school system is achieved, the district court's role ends."); *Robinson v. Shelby Cnty. Bd. of Educ.*, 566 F.3d 642, 657 (6th Cir. 2009) (reversing partial denial of unitary status and remanding with instructions to grant full unitary status, dissolve all outstanding orders, and dismiss case).

The Supreme Court has never imposed any post-unitary supervision requirement. To the contrary, it has held that "[r]eturning schools to the control of local authorities *at the earliest practicable date* is essential …." *Freeman*, 503 U.S. at 490 (emphasis added). Indeed, in *Dowell*, the Court *rejected* a ruling that would have maintained court supervision after the district was determined to be unitary. 498 U.S. at 249–50.

Here, the district court properly found that the District has achieved unitary status, and the proper result of that determination was termination of the case. In light of the law in this circuit and the majority rule nationally, Plaintiffs have not shown that the district court erred by terminating the case.

CONCLUSION

The Court should affirm the district court's orders granting the District unitary status, terminating judicial supervision, and closing the case.

DATED this 10th day of May, 2023.

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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 13,288 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook.

DATED this 10th day of May, 2023.

s/ Bennett Evan Cooper