Nos. 10-15124, 10-15375, 10-15407

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROY FISHER, *et al.*, and MARIA MENDOZA, *et al.*,

Plaintiffs-Appellants/
Cross Appellees

v.

TUCSON UNIFIED SCHOOL DISTRICT,

Defendant-Appellee/
Cross Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS PLAINTIFF-INTERVENOR IN RESPONSE TO THIS COURT'S INVITATION

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This brief is submitted in response to this Court's order of April 18, 2011, inviting the United States to file a brief expressing its views in these consolidated appeals.

ISSUE PRESENTED FOR REVIEW

Whether the district court erred in granting the defendant school district's petition for a declaration of unitary status and releasing the district from federal judicial supervision.

STATEMENT OF FACTS AND OF THE CASE

This school desegregation case, filed in May 1974, will soon reach its 37th year. The case had its beginnings when the National Association for the Advancement of Colored People (NAACP) filed a lawsuit on behalf of the African-American students of Tucson School District Number One[1] (TUSD or the District), charging that the District was segregating and otherwise engaging in unconstitutional discrimination against black elementary and junior high school students. See *Mendoza* v. *United States*, 623 F.2d 1338, 1341 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981); see also *Fisher* v. *Lohr*, CIV 74-90-TUC-WCF (D. Ariz.). Later the same year, the Mexican American Legal Defense & Educational Fund (MALDEF) filed suit charging the District with segregation and various acts of discrimination against Mexican-American elementary, junior high, and high school students. See *ibid.* In 1975, Fisher and Mendoza were certified as class representatives for these two groups of students, and the cases were consolidated for trial and disposition. *Ibid.* In 1976, the United States was permitted to intervene as a plaintiff in the consolidated actions. *Ibid.*

The cases went to trial in January 1977, and in June 1978, the district court issued an order ruling that the District had previously acted with segregative intent,

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[1] Now the Tucson Unified School District.

that the past effects of such actions remained in a number of District schools, and that the District must remedy such effects. See *Mendoza*, 623 F.2d at 1341. On August 11, 1978, the district court approved the District's proposed desegregation plan, and on August 31, 1978, approved the Settlement Agreement (Agreement). *Id.* at 1343. The Agreement contains 26 paragraphs, "each of which required the District to undertake a specific task, implement a specific program or adopt a specific policy." Doc. 1119 at 5.[2] The details of the Agreement are summarized in the district court's February 7, 2006, Order. See Doc. 1119 at 5-8.

In October 2003, the case was assigned to the Honorable David C. Bury. Doc. 1004. In April 2004, Judge Bury *sua sponte* issued an order directing the parties to show cause why the court's jurisdiction should not be terminated. Doc. 1028. In response to that order, in January 2005, the District filed a Petition for Unitary Status along with a statement of facts. Doc. 1056; Doc. 1059. In early February 2005, the United States filed a short response to that petition, indicating that "absent credible evidence to the contrary," the United States had "no substantive objection" to the District's petition. Doc. 1064. The other parties commenced discovery "for the purpose of enabling the Plaintiffs to respond to the Petition for Unitary Status." See Doc. 1119 at 2.

[2] "Doc." refers to the document number as entered in the district court.

The district court subsequently issued a series of orders intended to clarify various aspects of the unitary status proceeding.

1. February 7, 2006, Order

In February 2006, the court issued an order defining the scope of the unitary status proceeding. See generally Doc. 1119. In that order, the court concluded that the entirety of the Settlement Agreement, "together with the factors set forth by the Supreme Court in *Green* [v. *County School Board*, 391 U.S. 430 (1968)], constituted the marching orders for the school system over the past 27 years." Doc. 1119 at 16-18. The court stated that it would evaluate the District's actions in light of the *Green* factors and would "apply the *Dowell/Freeman* legal standard for determining whether or not to terminate the desegregation decree in this case," examining, "1) whether the school district has complied in good faith with the decree since it was entered; [and] 2) whether the vestiges of the *de jure* discrimination have been eliminated 'to the extent practicable.'" Doc. 1119 at 16-17, 18. The court concluded that it would examine the District's good faith compliance "within the context of *all* the provisions agreed to by the parties for the desegregation of TUSD, which * * * were aimed at desegregating the schools and at securing equal access to equal resources for minority students." Doc. 1119 at 18 (emphasis added).

2. August 21, 2007, Order

In August 2007, the court issued a second order, directing the District to file a "comprehensive report to support this Court finding that any vestiges of *de jure* segregation related to student assignments * * * have been eliminated to the extent practicable." Doc. 1239 at 2. In that order, the court also declared that it "intend[ed] to close this case and return the TUSD schools to the state because oversight and control will be more effective placed in the hands of the public with the political system at its disposal to address any future issues." Doc. 1239 at 23-24. However, before that could happen, the court found that the District needed to "present * * * an exit plan to the Court to establish Defendants' good faith commitment to the future operation of the school system in compliance with the constitutional principles that were the predicate for the Court's intervention in this case," noting that "[a]s of now, the record is devoid of any specific policies, decisions, or proposed courses of action that extend into the future." Doc. 1239 at 22-24. The court therefore held that it intended that TUSD develop "post-unitary provisions * * * which can be monitored by the community for compliance and with recourse for non-compliance to be addressed by the School Board." Doc. 1239 at 23. The court held that it would "approve the transparency of the post-unitary provisions to ensure that the community at large has access to all the

information necessary to oversee TUSD's compliance with them." Doc. 1239 at 23.

3. April 24, 2008, Order

In April 2008, the court issued an order finding, "[a]fter full disclosure and briefing," that "the Defendant failed to act in good faith in its ongoing operation of the District under the Settlement Agreement." Doc. 1270 at 3. Specifically, the court found that TUSD had "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." Doc. 1270 at 3. At the end of this order, the court nevertheless granted the District's Petition for Unitary Status, "pending the acceptance by this Court of Defendant's Post-Unitary Plan." Doc. 1270 at 58.

The court began its discussion by finding that a report filed by the TUSD in response to the court's August 2007 order "reflects that to the extent practicable the student ratios established by the desegregation plans were met and maintained over a five-year period of time," and "accept[ed] the Defendant's position that the demographic changes in the District have resulted in re-segregating its schools." Doc. 1270 at 5, 7. However, the court noted that the District's "responsibility for desegregation did not end in five years," and that "[t]he continued operation of the district pursuant to the Settlement Agreement bound Defendants to affirmatively

combat segregation" pursuant to its terms.[3] Doc. 1270 at 7. The court observed that "[u]ntil unitary status is attained, the District is committed to desegregation of the district to the extent practicable, and 'at the very least,' the District has a duty to not exacerbate racial imbalances caused by these demographic changes." Doc. 1270 at 8.

Citing the Supreme Court's decision in *Freeman* v. *Pitts*, 503 U.S. 467 (1992), the court further held that, regardless of the root of the racial imbalance, before it could relinquish control over student assignment, "it must make a specific finding that judicial control over student attendance was not necessary nor practicable to achieve compliance with the desegregation order in other facets of the school system." Doc. 1270 at 11-12 (citing *Freeman*, 503 U.S. at 496, 498-499). The court held that it must also "consider whether the school district had shown its good-faith commitment to the entirety of the desegregation plan," noting that this commitment was an "affirmative" one, and that a demonstration of good faith was necessary "so that parents, students, and the public have assurance

[3] Paragraph 22 of the Settlement Agreement specified that in 1983, after five years of operation under the Settlement Agreement and the student assignment plans, TUSD could file a motion with the Court to dissolve the Settlement Agreement. Doc. 1119 at 7. However, the District did not move to dissolve the Agreement until it filed its Petition for Unitary Status in 2005, and continued to operate under the Agreement until the time of the district court's 2008 order. See Doc. 1270 at 2; TUSD Second Brief on Cross Appeal 10.

against further injuries or stigma." Doc. 1270 at 11, 14. The court then turned to a discussion of the District's various efforts under the Settlement Agreement.

a. Student Assignment And Equal Education

The court concluded that the District's student assignment programs, practices and procedures "have had no net effect on the demographic segregation in the district," Doc. 1270 at 16, and that regardless of how the statistics were analyzed, TUSD's "lack of good faith is proven by the simple fact that [its] expert reports [on school assignments] were only secured by the Defendant to belatedly support its Petition for Unitary Status." Doc. 1270 at 19. The court concluded that TUSD had "fail[ed] to present any evidence that over the past 27 years it monitored and reviewed the effectiveness of its race and ethnic sensitive school boundaries, magnet programs, and open enrollment," and that it could thus not find that "TUSD has acted affirmatively to address demographic re-segregation to the best of its abilities." Doc. 1270 at 19-20. Indeed, the court found that the District had made student transfers out of one middle school "in direct contradiction of the goals of desegregation and equality for all students to educational opportunities." Doc. 1270 at 20.

Turning to the District's magnet school and open enrollment programs, the court noted that the ability of such programs to offset demographic segregation "depends on equal access to curriculum, especially gifted and talented education,

advanced placement, and special education, because student achievement is critical to accessing the system." Doc. 1270 at 21. The court found, however, that despite the fact that issues with such curriculum access were repeatedly brought to its attention, "over the past 27 years the Defendant has failed to comprehensively assess its GATE, Advanced Placement, or Special Education programs with an eye for determining over or under-representation by minority students to identify and rectify any access problems." Doc. 1270 at 20-25, 26-27.

The court concluded that, overall, the District had "failed to make the most basic inquiries necessary to assess the ongoing effectiveness of its student assignment plans, policies, and programs." Doc. 1270 at 27. On the contrary, the court found that "TUSD has ignored evidence and refused to answer questions concerning the effectiveness of these programs." Doc. 1270 at 27. The court thus found that the District had both "failed to make a good faith effort to combat the demographic changes in the district to the extent practicable," and, indeed, had "*exacerbated* the inequities of these racial imbalances" by failing to assess program effectiveness so that it could use its resources to secure equal access to educational opportunity for minority students. Doc. 1270 at 27 (emphasis added).

b. Faculty And Staff Assignments

The court noted that the Settlement Agreement required the District to both restructure teacher assignments to prevent a disproportionate concentration of

black teachers at any given school, and required the District to address the question of under-representation of minority teachers by establishing procedures for hiring, placement, and promotion. Doc. 1270 at 27-29. The court found that while concentration of black teachers was no longer a problem, underrepresentation remained an issue; the court cited statistics showing that the percentage of black teachers had declined in elementary, middle, and high schools. Doc. 1270 at 29-30. The court concluded that "[p]erhaps this lack of progress exists after 27 years because Defendant failed to comply with the requirement in the Settlement Agreement * * * to regularly review recruitment, hiring, and promotion policies to ensure the absence of any discrimination or inequities." Doc. 1270 at 30-31.

The court further found that although the Agreement also required the District to develop procedures to ensure that schools were not racially identifiable solely as the result of faculty and staff assignments, "[a]pproximately half of the Hispanic faculty worked at 14 predomina[nt]ly Hispanic schools"; the court held that "[t]hese numbers warrant a close look, which TUSD has not taken." Doc. 1270 at 31-32.

Finally, the court observed that TUSD had "failed to respond" to "legitimate and important" concerns that had been raised over staff cuts affecting predominantly minority schools. Doc. 1270 at 33.

c. Suspension And Expulsion

The court observed that Paragraph 13 of the Settlement Agreement required "ongoing monitoring and review" of the District's policies regarding suspensions and expulsions. Doc. 1270 at 37. However, the court found that, except for one review in 1993, "the District has not undertaken a comprehensive analysis of suspension and expulsion data by ethnicity and race." Doc. 1270 at 37. The court noted that, "[o]nly recently, in 2004, * * * has defendant charged a responsible party to '[work] to eliminate the over-representation of minority students in drop out, absenteeism, suspension, and expulsion rates.'" Doc. 1270 at 37.

d. Programmatic Recommendations To Assist In Quality Education Of Black Students

Paragraph 14 of the Settlement Agreement required the District to implement various programmatic recommendations to assist the education of black students. See Doc. 1270 at 40. The court found that many of these recommendations were carried out through the African American Studies Department (AASD), which initially provided counseling, advocacy, mentorship, and other services for black students, but by 2004 was serving the entire student body. See Doc. 1270 at 41-47.

Noting the Fisher plaintiffs' complaint that TUSD had left unspent millions of dollars of desegregation money that could be used for such programs, the district court turned to the question whether the District had exercised in good faith

its discretion not to use these funds. Doc. 1270 at 48-49. The court found that for the first "five or so years of the Settlement Agreement," the District implemented the Programmatic Recommendations in accordance with its terms; but that the "sheer magnitude in the number of minority students" now made it "improbable that the limited AASD staff" could effectively provide required services. Doc. 1270 at 49. The court concluded that the "answer is 'no' to the AASD Director's 1995 question, 'Has real time and attention truly been given to how the AASD can best be utilized?'" Doc. 1270 at 49 (citation omitted).

e. Program Effectiveness

Finally, the court turned to an examination of student achievement, including racial achievement gaps and English Language Learner achievement, finding that such measurements are "relevant to TUSD's good faith commitment to the entirety of the Settlement Agreement." Doc. 1270 at 52. The court found that except for an analysis conducted in 1982, "Defendant failed to review student achievement as a measurement for program effectiveness." Doc. 1270 at 55. The court observed that the review of achievement data the District had gathered in support of its Petition for Unitary Status "has been equally important over the past 27 years," and held that "ongoing review of program effectiveness is the only way to ensure that * * * program changes address demographic segregation and the quality of education for minority students." Doc. 1270 at 55.

f. Conclusion

After examining each of these areas, the district court found that "[w]hile 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, it failed to act in good faith in its ongoing operation of the District under the Settlement Agreement," specifically with respect to monitoring the effectiveness of its programmatic changes. Doc. 1270 at 55-56. The court held that "[e]ven if the data presented by the Defendant were more persuasive, the Defendant's lack of good faith is established by the District's failure to monitor the effectiveness of its ongoing operations to meet these goals." Doc. 1270 at 56.

The court then concluded that to "guard the public against future injuries," it had to achieve two equally important goals: "first, to ensure that future operation of the District improves the quality of education for all students by equalizing access, furthering diversity and giving effect to every child's right to an equal educational opportunity," and, "second, to return this governmental entity to the control of local authorities at the earliest practicable date and to restore true accountability to this public educational system." Doc. 1270 at 56. The court held that "successful desegregation will exist when the School Board is accountable to the public for its operation of the District in compliance with the above principles of equality," and that, "[i]n other words, TUSD will attain unitary status upon the

adoption of a Post-Unitary Plan that ensures transparency and accountability to the public regarding the operation of a non-discriminatory school system." Doc. 1270 at 56-57.

The court found that the District had presented "a promising post-unitary plan, which appears in large part to ensure that the District's future operations will adhere to the constitutional principles at issue in this case," but stated that the District should work with the private plaintiffs to increase the plan's public accountability. Doc. 1270 at 57-58. The court stated that it was "committed to a Post-Unitary Plan that can be monitored by the public, without the assistance of experts, the judiciary, or even counsel," and that the "parties should review the Post-Unitary Plan as proposed to determine how to present it with greater specificity regarding the goals of each proposed program, including program benchmarks, and measurements of effectiveness and success for each proposed program, including data collection and reporting formats for each proposed program." Doc. 1270 at 57.

The court ordered that the parties "meet and confer regarding changes or additions to the Post-Unitary Plan to improve its transparency and accountability, and * * * solicit public comment," and held that "[o]nce the Post-Unitary Plan is adopted by the TUSD Board, the Court shall grant the Petition for Unitary Status." Doc. 1270 at 58. The court then wrote, "**IT IS ORDERED** that the Petition for

Unitary Status and Termination of Court Oversight (document 1056) is GRANTED, pending the acceptance by this Court of Defendant's Post-Unitary Plan." Doc. 1270 at 58.

4. December 18, 2009, Order

On December 18, 2009, the court issued a final judgment "approv[ing] the Post-Unitary Status Plan adopted by the District's Governing Board on July 30, 2009." Doc. 1299 at 2.

In approving the plan, the court noted that it "does share some concerns with Plaintiffs * * * involv[ing] the *Green* factors at issue in this case and expressly addressed in the Consent Decree." Doc. 1299 at 13. Namely, the court pointed to the "seriousness of the disparities that exist in the district between the racial and ethnic makeup of the students and the faculty," and recognized that the Governing Board had rejected some proposed remedies as "as being discriminatory against nonminority candidates." Doc. 1299 at 13. However, the court held that it was "not prepared to resolve the legal aspects of including affirmative action measures in the Post-Unitary Status Plan." Doc. 1299 at 13. Instead, the court found that "in the event the measures agreed to by the parties to address faculty diversity are unsuccessful, the data and evidence compiled pursuant to the Plan will enable the District to reconsider whether the affirmative action measures recommended by the Committee are necessary and supportable under the law." Doc. 1299 at 13-14.

The court also found that the public would be afforded "adequate information to monitor the effectiveness of the Plan in improving faculty diversity and to participate in any public hearings held by the Governing Board to resolve any dispute over the statistical goals for staff diversity." Doc. 1299 at 14.

Beyond the issues with faculty diversity, the court held that it also agreed with the Fisher plaintiffs that the Plan did not provide adequate transparency with regard to accounting for desegregation funding received and disbursed by the District. Doc. 1299 at 18. The court held that this concern could be resolved with the addition of a "data collection and reporting format," which "must be such that the public will be informed regarding any desegregation/integration money received by the District and provide a money-trail showing how it is disbursed by the District in respect to the programs associated with the Plan." Doc. 1299 at 18.

With those remarks, the court approved the Post-Unitary Plan and stated that "this case is closed and all federal juridical oversight of the operation of the Tucson Unified School District is ended." Doc. 1299 at 19.

SUMMARY OF ARGUMENT

The district court's actions in terminating this case are without precedent. Governing Supreme Court decisions regarding the termination of desegregation consent decrees require that before judicial oversight be relinquished, a school district show that it has "complied in good faith with the desegregation decree

since it was entered," and eliminated "vestiges of past discrimination * * * to the extent practicable." See *Board of Educ.* v. *Dowell*, 498 U.S. 237, 250 (1991). This showing must be made not only with regard to student assignment, but also with regard to faculty, staff, transportation, extracurricular activities, and facilities. *Green* v. *County Sch. Bd.*, 391 U.S. 430, 435 (1968).

Here, despite finding that TUSD had neither acted in good faith nor fulfilled the terms of the Settlement Agreement with regard to student assignment, faculty and staff, suspensions and expulsions, programmatic recommendations, or program effectiveness, the district court nevertheless declared that the District had achieved unitary status and closed the case. It did so after taking the novel and legally unsupportable step of issuing a conditional order requiring the District to develop a "Post-Unitary Plan" intended to remedy the identified deficiencies; a plan which would be subject only to public oversight. Given its findings, the district court should have instead retained at least partial jurisdiction over this matter, until the deficiencies identified in its orders and addressed through the Post-Unitary Plan had been cured.

Because the district court's decision fails to properly comport with either settled law or procedure governing termination of desegregation decrees, its decision should be vacated, and this case remanded for further proceedings.

ARGUMENT

THE DISTRICT COURT'S DECISION GRANTING UNITARY STATUS AND RELINQUISHING OVERSIGHT IS INCONSISTENT WITH THE SUPREME COURT'S DECISIONS IN *GREEN*, *DOWELL*, AND *FREEMAN*

The district court's approach in this case cannot be reconciled with the settled Supreme Court precedents governing the termination of school desegregation consent decrees, *Green* v. *County School Board*, 391 U.S. 430 (1968), *Board of Education* v. *Dowell*, 498 U.S. 237 (1991), and *Freeman* v. *Pitts*, 503 U.S. 467 (1992). Review of those precedents reveals two clear principles: first, that before unitary status can be declared, a school board must have "complied in good faith with the desegregation decree since it was entered"; and second, that before terminating its jurisdiction, the district court must find that "the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." See *Dowell*, 498 U.S. at 250. While the district court in this case purported to analyze both of those questions in reaching its decision that TUSD had achieved unitary status, its factual findings – or lack thereof – simply cannot be reconciled with the conclusion it reached.

The Supreme Court first began to announce these principles in its 1968 decision in *Green* v. *County School Board*. In *Green*, the Court reviewed the question whether a school board's adoption of a "freedom of choice" plan, standing alone, satisfied its responsibility to achieve a system of admitting students

to public school on a nonracial basis, and could support a grant of unitary status. See 391 U.S. at 439-440. Concluding that it could not, the Court emphasized that the pattern of separate schooling to which its *Brown* decisions were addressed extended "not just to the composition of student bodies," but "to every facet of school operations – faculty, staff, transportation, extracurricular activities and facilities." *Id.* at 435. The Court held that school boards were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated *root and branch*." *Id.* at 437-438 (emphasis added).

The Court's subsequent decisions in *Dowell* and *Freeman* both reaffirmed and added to its decision in *Green*. In *Dowell*, the Court set forth the two-part analysis noted above, holding that in evaluating whether to terminate its jurisdiction over a desegregation decree, "[t]he District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable." 498 U.S. at 249-250. The Court reiterated that, in addressing the second question, a district court should "look not only at student assignments, but 'to every facet of school operations – faculty, staff, transportation, extra-curricular activities and facilities.'" *Id.* at 250 (quoting *Green*, 391 U.S. at 435).

In *Freeman*, the Court emphasized yet again that the "*Green* factors are a measure of the racial identifiability of schools in a system that is not in compliance with *Brown*," and underlined that it had "instructed the District Courts to fashion remedies that address *all these components* of elementary and secondary school systems." 503 U.S. at 486 (emphasis added). The decision also indicates that factors other than the *Green* factors are properly considered within a unitary status determination. The Court held, for instance, that it was an "appropriate exercise of its discretion" for the district court to "inquire whether other elements [of a unitary system] ought to be identified," and to examine quality of education as one such element. See *id.* at 492.

The *Freeman* decision made clear that while the question to terminate an injunction need not be all or nothing, and courts "have the authority to relinquish supervision and control of school districts in incremental stages," lower courts should nonetheless be mindful that "the *Green* factors may be related or interdependent," and that "a continuing violation in one area may need to be addressed by remedies in another." *Id.* at 490, 497.

The Court's decision in *Freeman* also emphasized the centrality of the good-faith analysis to a district court's decision whether to withdraw its supervision. The Court held that "[a]mong the factors which must inform the sound discretion of the court in ordering * * * withdrawal are * * * whether the school district has

demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance." *Freeman*, 503 U.S. at 491. It emphasized that in making this analysis, "a [district] court should give particular attention to the school system's record of compliance," because a "school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a *consistent pattern* of lawful conduct directed to eliminating earlier violations." *Ibid.* (emphasis added).

Nowhere in the Supreme Court's decisions are the requirements set forth in *Green*, *Dowell*, and *Freeman* described as anything other than prerequisites to a declaration of unitary status. See *Freeman*, 503 U.S. at 498 ("*The requirement* that the school district show its good-faith commitment to the entirety of a desegregation plan so that parents, students, and the public have assurance against further injuries or stigma also *should be a subject for more specific findings*.") (emphasis added); *Dowell*, 498 U.S. at 250 ("*In considering* whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but 'to every facet of school operations – faculty, staff, transportation, extra-curricular activities and facilities.'") (emphasis added) (citation omitted); cf. *Swann* v. *Charlotte-*

Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971) ("[E]xisting policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities [are] among *the most important indicia* of a segregated system.") (emphasis added). And, of course, this must be so, for "[a] school district which has been released from an injunction imposing a desegregation plan no longer requires court authorization for the promulgation of policies and rules regulating matters such as assignment of students and the like," and, so long as it does not violate the Equal Protection Clause, is not bound to follow through on the promises it has previously made. *Dowell*, 498 U.S. at 250.

In light of these precedents, the factual findings contained in the district court's orders simply fail to support its legal conclusion. Far from finding the type of good-faith compliance and elimination of vestiges of segregation that the Court has commanded must precede termination of a desegregation decree, the district court found TUSD's performance lacking with regard to several key aspects of the Settlement Agreement, including the *Green* factors mentioned in its decisions: faculty, staff, and student assignment.

Among other things, the court found that TUSD had failed to make "the most basic inquiries necessary to assess the ongoing effectiveness of its student assignment plans"; had "exacerbated the inequities" of District racial imbalances through its "failure to assess program effectiveness"; had "failed to respond" to

"legitimate and important" concerns about staff cuts at minority schools; had "failed to comply" with the Settlement Agreement's requirement that it regularly review recruitment, hiring, and promotion in order to "guard against discrimination or inequities"; had never "undertaken a comprehensive analysis of suspension and expulsion data by ethnicity and race"; had not given "time and attention" to how the African American Studies Department could aid the quality education of minority students; and had failed to review program effectiveness in order to ensure quality education for minority students. Doc. 1270 at 27, 30, 33, 37, 49.

The district court's findings do not address whether the District had demonstrated either success or good-faith compliance in remedying the results of segregation with regard to transportation and extracurricular activities, both of which are *Green* factors, and have been raised as issues in this case. See Doc. 1119 at 23 (noting that the independent citizen's committee created by the Settlement Agreement had raised concerns regarding illogical transportation routes); Doc. 1299 at 6 (noting that the Post-Unitary Plan "addresses marketing and transportation *necessary for the student assignment program to address desegregation and integration*") (emphasis added); Doc. 1119 at 10-11 (rejecting District's request to have extracurricular offerings declared outside of the scope of the unitary status proceedings).

Yet, despite its unequivocal conclusion that TUSD had "failed to act in good faith in its ongoing operation of the District under the Settlement Agreement," and that the District's "after-the-fact gathered data and anecdotal evidence" was "less than persuasive regarding [its] position that its ongoing operations maintained a nondiscriminatory school system to the extent practicable for 27 years," the district court nevertheless determined that it would grant the District unitary status upon its approval and receipt of a "post-unitary status plan," which the "public" would monitor from then on. See Doc. 1270 at 55-57; see also *id.* at 57 ("This Court is committed to a Post-Unitary Plan that can be monitored by the public, without the assistance of experts, the judiciary, or even counsel."). The stated purpose of such a plan was to "ensure that the District's *future operations* will adhere to the constitutional principles at issue in this case." See Doc. 1270 at 57 (emphasis added).

Support for this novel judgment can be found in neither this Court's nor the Supreme Court's precedents. Nowhere does the Supreme Court advocate that judicial oversight of a school district be relinquished before a district has actually been found to "adhere * * * to constitutional principles." Rather, as the Court stated in *Freeman*, "[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." 503 U.S. at

499 (emphasis added); see also *United States* v. *Washington*, 573 F.3d 701, 710 (9th Cir. 2009) ("*Board of Education of Oklahoma City Public Schools* v. *Dowell* * * * held that a district court *must consider* whether the purpose of the decree has been substantially achieved.") (emphasis added).

The district court's error in this case is only magnified by the lingering hesitation it expressed as it terminated its jurisdiction. In its December 2009 Order, the court articulated both continuing "concerns * * * involv[ing] the *Green* factors at issue in this case" – namely "serious[] disparities" in the area of faculty diversity – and also expressed its opinion that the Plan as written did not provide adequate transparency regarding the desegregation funds received by the district. Doc. 1299 at 13, 18. Yet, the court nevertheless terminated its oversight of this case, declaring that the "public" would now monitor the effectiveness of the plan. Doc. 1299 at 18.

Under the factual circumstances it described, the court's decision to grant unitary status and relinquish jurisdiction was, at best, premature.[4] As the Court stated in *Green*, the "obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation"; and, "whatever plan is adopted[,] * * * *the court should retain jurisdiction until it is*

[4] We take no position on the question whether the Post-Unitary Plan, with judicial oversight, is or could be an appropriate remedy in this case.

clear that state-imposed segregation has been completely removed." 391 U.S. at 439 (emphasis added).

The district court did not do that here. In its readiness to terminate its oversight of this matter, the court replaced the judiciary's necessary role in achieving desegregation with a hope that public oversight would accomplish the goals of the desegregation process. Such a decision cannot stand.

CONCLUSION

For the reasons stated above, the district court's decision should be vacated, and this case remanded for further proceedings.

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases to the three consolidated appeals currently before the Court, Nos. 10-15124, 10-15375, and 10-15407.

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Date: May 2, 2011

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the 7,000 word limit set by this Court in its April 18, 2011, Order. The brief was prepared using Microsoft Office Word 2007 and contains 5,752 words of proportionally spaced text. The typeface is Times New Roman, 14-point font.

s/ Holly A. Thomas
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Date: April 29, 2011

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2011, I electronically filed a true and correct copy of the foregoing BRIEF FOR THE UNITED STATES AS PLAINTIFF-INTERVENOR IN RESPONSE TO THIS COURT'S INVITATION with the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on April 29, 2011, I served a copy of the foregoing document on the following parties or their counsel of record by First Class Mail:

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