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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Roy and Josie Fisher, et al.,
Plaintiffs,

and

Maria Mendoza, et al.,
Plaintiffs,

v.

Tucson Unified School District No. One, et al.,
Defendants.

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

***FISHER PLAINTIFFS’ OBJECTION
TO SPECIAL MASTER’S REPORT
& RECOMMENDATIONS RE:
DEFENDANT TUSD #1’S
SUPPLEMENTAL PETITION FOR
UNITARY STATUS/REQUEST TO
STAY DISTRICT COURT’S DECISION
ON UNITARY STATUS DUE TO LACK
OF JURISDICTION & COVID 19
OUTBREAK AFFECTING LEGITIMACY***

(Assigned to: ***HON. DAVID C. BURY***)

(Oral Argument Requested)

COMES NOW Plaintiffs *Fisher*, by and through counsel undersigned, and pursuant to the District Court’s recent Order, respectfully submitting their objection to the Special Master’s Final Report and Recommendations (hereinafter “SMFRR”) in this matter related to Defendant Tucson Unified District #1’s Supplemental Petition for Unitary Status and Plaintiff’s Request to Stay District Court’s Decision on Unitary Status Due to Lack of Jurisdiction and/or COVID 19 Outbreak Affecting Legitimacy of Court’s Decision as follows, and including the *Fisher*’s overall basis for objecting to both the SMFRR and the District’s improper supplemental quest for Unitary Status as being the *ongoing disparate Quality of Education experienced by African American students in general throughout the District*, as well as five (5) areas of concern related to the

1 Court's forthcoming decision on the issue of Unitary Status: 1) whether the District Court may
2 presently lack jurisdiction to actually decide the issue of Unitary Status at this time under
3 applicable federal law given the contemporaneous Ninth Circuit appeal related to Defendant
4 District #1's earlier request for Unitary Status and the District Court's Order Partially Granting
5 and Partially Denying same, 2) the Academic Achievement Gap has not sufficiently diminished as
6 to the African American students evidencing the District's ongoing lack of good faith, 3) the
7 Discipline Gap as to African American Students is still 1.5 times greater than other racial/ethnic
8 groups reflecting ongoing racial discrimination which is not only totally unacceptable, yet causes
9 in its wake a myriad of other problems related to the Academic Achievement of African American
10 Students, 4) the COVID 19 outbreak prevented a measurable final quarter for the 2019-2020
11 academic year for the Special Master's assessment, equitably requiring a delay as to the District
12 Court's determination of the issue of Unitary Status, especially given that without an appropriate
13 final quarter to include in the review of the Completion Plans ordered by the Court, together with
14 the likely regression of African American Students' progress during the COVID 19 outbreak (and
15 lack of appropriate Summer Academic Tutoring Programs during and due to the COVID 19
16 outbreak), the SMFRR and the District Court's consideration of Defendant TUSD #1's
17 Supplemental Petition for Unitary Status lack legitimacy given that there presently is insufficient
18 time or data to determine whether the Completion Plans ordered by the Court have been fully and
19 successfully implemented, and 5) the Special Master's use of a former TUSD #1 Statistician
20 throughout the SMFRR inherently violates the District Court's recent Order in which it stated that
21 the Court did not want "a battle of the experts" in its determination of the issue of Unitary Status.

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26 *Fisher* Plaintiffs' Objection to the Special Master's Final Report and Recommendations in
27 this matter is supported by the attached Memorandum of Points and Authorities, the separately
28 filed Appendix of Exhibits, and the Court record.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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3 Although for over forty (40) years the District Court has supervised the
4 Stipulated Decree originally entered into by the parties in 1978 following Judge
5 Frey’s original finding of racial discrimination in this case¹, the most serious task of
6 *grave* constitutional magnitude or ultimate inquiry before the Court remains in its
7 determination of the issue of Unitary Status, by which it must assure that
8 constitutional violator TUSD #1 has *both*: 1) complied in *good faith* with the
9 desegregation decree since it was entered², and 2) eliminated the vestiges of past
10 discrimination to the extent practicable.³
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15 The District Court’s decision as to whether Unitary Status should be awarded
16 to Defendant TUSD #1 is truly the *last hope* for the *Fishers*. In other words, the
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19 ¹ It is especially noteworthy that although Defendant District in briefing has
20 repeatedly referred to perceived limitations related to Judge Frey’s findings, the parties
21 actually subsequently agreed as part of the Stipulated Decree or Consent Decree itself that
22 the Consent Decree entered into by the parties would take precedence in all future matters
in this case and that Judge Frey’s original findings would *not* be determinative. *Stipulation
of Settlement* (Docket #393, Para. 17) dated 8/11/78.

23 ² For the purposes of Plaintiffs Fishers’ Objection to the Special Master’s Final
24 Report and Recommendation, the District Court had previously held in a published opinion
25 that the Court believed that the elimination of the Academic Achievement gap between the
26 African American and Hispanic/Mexican American students with other white students was
an important tool in determining the actual good faith of the District in implementing the
Consent Decree in this case. In *Fisher v. U.S.*, 549 F.Supp.2d. 1132, 1164
(D.Ariz.2008).

27 ³ See *Fisher v. TUSD* at 652 F.3d 1131, 1132-33 (9th Cir. 2011) *citing*
28 *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) (alterations in the original) (quoting
Freeman v. Pitts, 503 U.S. 467, 492 (1992) (quoting *Bd. of Ed. of Okla. City Public
Schs. v. Dowell*, 498 U.S. 237, 249-50 (1991)).

1 hopes and dreams of the *Fishers* and all African American Students within the
2 Tucson Unified School District for that matter, rise and fall with this Court's
3 decision.

4
5 It is important to note for historical purposes that Plaintiffs *Fisher* originally
6 filed the present lawsuit regarding both the Quality of Education and Student
7 Assignment of African American Students within the District. Now approximately
8 forty-three (43) years and \$2 billion dollars later, Plaintiffs *Fisher* are convinced that
9 the Quality of Education for African American Students has not made significant
10 improvement. In sharp contrast to the Special Master's prefatory assessment that
11 Academic Achievement is highly related to the poverty level of students and whether
12 they receive free or reduced lunch⁴, it is Plaintiffs' *Fisher's* strongly held belief that
13 the teachers assigned to particular schools within the District can make a difference
14 in the overall Academic Achievement of African American Students. However,
15 these two inextricably intertwined areas of concern remain highly problematic and
16 unresolved.⁵

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23 ⁴ See Special Master's Report and Recommendations dated 5/19/20 at. pp. 18-19,
and Addendum A, Examining the Achievement Gap.

24 ⁵ For example, the assignment of new teachers to racially concentrated schools
25 has been an ongoing problem, resulting in African American Students being
26 subjected to inexperienced teachers lowering the Quality of Education because they
27 not only lack the overall educational maturity and pedagogy of a Master Teacher,
28 yet also may have been *part* of the problem as to the ongoing Discipline Gap or
disparate treatment of African American Students with regard to the administration
and imposition of Student Discipline at TUSD #1 schools due to the fact that new

1 Sadly, Plaintiffs *Fisher* must herein honestly express, with regard to their
2 ongoing honorable quest for mandated improvement in the Quality of Education
3 received by African American Students, their heartfelt concerns, questions and
4 trepidation as to the Special Master's possibly tilted academia favored view or
5 overall fairness as to the implementation of the Unitary Status Plan, in that it is
6 somewhat apparent from the language of the SMFRR that somehow, during his
7 tenure the Special Master, Dr. Hawley may have become more concerned with what
8 is good educationally for the School District as a whole, rather than what may be in
9 the best interests of African American or Mexican American Students who not only
10 still seek, yet profoundly deserve, a far better Quality of Education.⁶

11 Plaintiffs *Fisher* respectfully submit, for the purposes of especially

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17 _____ teachers may not have developed an appropriate understanding of what discipline
18 measures actually work and those which do not work with contemporaneous young
19 people, resulting in possibly a zero tolerance attitude and the errant disciplining of
20 students who may not be of their own racial background nor that of the disciplining
21 school administrator. Moreover, given the limited academic experience of new
22 teachers and the fact that they are being assigned for the most part to racially
23 concentrated schools, African American Students are deprived of being taught by
24 highly qualified teachers in the first instance, leading to not only a lower Quality of
25 Education, yet a reduction in their actual Academic Achievement. This injustice is
26 only magnified by the fact that the District has failed to materially comply with the Unified
27 Status Plan with regard to the "Home Grown Teachers" requirement.

28 ⁶ With great respect to the Special Master's apparent concern for the Quality
of Education as whole within the Tucson Unified School District making it possible
for all boats to rise upon the *Sea of Educational Opportunity*, it is, after all, the
African American and the Hispanic American Students who were and have been the
actual victims of ongoing racial discrimination and disparate treatment in the field
of education.

1 undergirding their Opposition to the SMFRR, that radically improving the Quality
2 of Education is exactly where the emphasis of the present case should be —on
3 minority students benefitting from improvements in their particular Quality of
4 Education – rather than the District itself as a whole benefitting from general
5 improvements in the Quality of Education as a whole. It’s about time that White or
6 Anglo American Students benefit from better programs for Minority Students or
7 children, rather than the Minority Students merely observing or hoping against hope
8 that ‘all boats rise as the result of the higher tide’ of academic programs aimed at
9 primarily benefitting Non-Minority Students? Tragically, due to the ongoing
10 disparate treatment of African American Students, as well as other Minority Students
11 with regard to the Quality of Education, for the most part, Minority Students have
12 not been allowed to even tie their boats up at the dock to possibly benefit from a
13 rising tide, or have actually been pulled under the water or rising tide by the less than
14 satisfactory or deplorable Quality of Education they have consistently endured,
15 drastically shortening their boat’s mooring to the dock.
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22 With regard to Plaintiffs *Fishers* areas of concerns, and in opposition to the
23 SMFRR, they may be properly summarized under the following issue specific
24 questions:
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- 26 1) Whether the District Court presently has jurisdiction to rule upon
27 the Defendant TUSD#1’s Supplemental Petition for Unitary Status
28 under the divesture rule given that the District Court’s earlier or
2019 Partial Granting and Partial Denial of TUSD #1’s 2018

1 Petition for Unitary Status is currently pending before the Ninth
2 Circuit Court of Appeals, with Oral Argument currently set for a
3 date certain?

4 2) Whether in contrast to the SMFRR and Defendant TUSD #1's
5 representations otherwise, the actual Academic Achievement Gap
6 may not have sufficiently diminished as to the African American
7 students, whereby Unitary Status should be presently denied,
8 because evidence supporting an ongoing substantial Achievement
9 Gap exemplifies the District's lack of ongoing good faith in
10 implementing the Unitary Status Plan?

11 3) Whether in contrast to the SMFRR and Defendant TUSD #1's
12 representations otherwise, the actual Discipline Gap as to African
13 American Students is nonetheless 1.5 greater than other
14 racial/ethnic groups and reflects ongoing racial discrimination
15 which is not only totally unacceptable, yet which has also caused a
16 myriad of other problems related to the Academic Achievement of
17 African American Students, including, but not limited to: a) a
18 higher number of detentions for African American Students and
19 longer actual periods of time in detention for African American
20 Students than White or Anglo American students; and b) African
21 American Students having to be instructed while in in-school
22 detention by questionably qualified or categorically unqualified
23 teachers?

24 4) Whether the COVID 19 outbreak and the resultant closing of all
25 TUSD#1 schools for the 4th quarter of the academic year (preventing
26 a measurable final quarter of the school year for academic
27 achievement assessment purposes) equitably requires the Special
28 Master to reconsider his present Report and Recommendations as
 well as a necessary delay in the District Court's determination of the
 issue of Unitary Status, especially given that without an appropriate
 final quarter to include in the review of the Completion Plans
 ordered by the Court, together with the likely regression of African
 American Students' progress during the COVID 19 outbreak due to
 limited on-line computer access (and the lack of appropriate
 Summer Academic Tutoring Programs during said outbreak), the
 present SMFRR may lack actual legitimacy given that there was
 insufficient time or data to determine whether the Completion Plans

1 ordered by the District Court have been fully and successfully
2 implemented; and

- 3 5) Whether the Special Master’s use of a former TUSD #1 Statistician
4 throughout the SMFRR inherently violates the District Court’s
5 recent Order in which it stated that the Court did *not* want “a battle
6 of the experts” in its determination of the issue of Unitary Status.

7 In addition to the foregoing concerns raised in opposition to the SMFRR and
8 the District Court’s consideration of TUSD #1’s Supplemental Petition for Unitary
9 Status, Plaintiffs *Fisher* would like to set the record straight with regard to the
10 District Court’s misperception about Plaintiffs *Fisher*’s lack of confidence as to the
11 Black or African American Student Studies Department (hereafter “AASSD”),
12 which has been viewed by the Court as being an irreplaceable part of the
13 implementation of the Unitary Status Plan for African American Students, yet has
14 (in actuality) become a draconian anchor around the necks of the students it was
15 intended to serve. This essential truth as to the literal “dead weight” the AASSD
16 had become was actually *mutually* agreed upon by the parties in their collaborative
17 monthly and quarterly meetings with Defendant TUSD #1.⁷ *Infra*.

23 ⁷ Although the District Court may *not* have been aware of Plaintiffs *Fisher*’s
24 extraordinary and highly *delicate* efforts in attempting to quietly work with Defendant
25 TUSD#1 with regard to renovating the Black or African American Students Department
26 which sadly had allegedly become a stale quagmire of TUSD#1 employees more concerned
27 with maintaining their jobs or the status quo, rather than to truly continue its original great
28 work of assisting African American Students in obtaining a higher Quality of Education
and overall improved Academic Achievement, the attached preliminary exhibits entitled
“*Fisher Plaintiffs’ Executive Summary of the African-American Student Services
Department and It’s Future*” and “*TUSD #1’s Plan for Restructuring the African
American Student Services Department (AASSD)*” attached as *Fisher* Plaintiffs’ Exhibit #1
and Exhibit #2 to their separately filed Appendix of Exhibits, respectively, may provide a

1 Therefore, with the Court's permission, Plaintiffs *Fisher* shall endeavor to
2 give a relevant procedural and substantive history as to the referenced issues
3 presented in the Special Master's Final Review and Recommendations, and *Fisher*
4 Plaintiff's Objections thereto.
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6 II.

7 RELEVANT PROCEDURAL & SUBSTANTIVE HISTORY

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9 It is somewhat ironic that Plaintiffs' *Fisher* are filing the present Opposition
10 to the Special Master's Final Report and Recommendations or "SMFRR" related to
11 Defendant TUSD #1's 2019 Supplemental Petition for Unitary Status, and that the
12 District should have filed its Supplemental Request following the Ninth Circuit
13 Court of Appeals' dismissal of Defendant's appeal of the United States District
14 Court's Order Partially Granting and Partially Denying its 2018 Petition for Unitary
15 Status. In essence, Defendant TUSD #1 is attempting to do an "end run" around
16 both the District Court's decision to partially deny Unitary Status, as well as the
17 Ninth Circuit Court of Appeals for which jurisdiction as to the issue of Unitary Status
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25 primer to the Court, explaining Plaintiffs *Fisher's* actual ongoing dissatisfaction and
26 dismay with the AASSD. It is noteworthy that the Defendant TUSD #1's general counsel
27 in the present lawsuit has the Duty of Candor under ER 3.3, and should therefore correct
28 its prior mistake or misrepresentation in Defendant's pleadings suggesting that Plaintiffs
Fisher were totally supportive of the present AASSD. In truth, as part of the parties'
collaborative efforts to renew the department, Plaintiffs merely agreed to such support for
one (1) academic year in the hopes of bringing about the necessary changes, which efforts
regrettably stalled after Dr. Benson/Trayben Corporation were subsequently retained by
the District, making sixty-eight (68) recommendations as to much needed changes in the
AASSD, yet with the District merely approving only eight (8), of the recommended
changes, which sadly, have never actually being accomplished by the District.

1 is presently vested.

2 The District's Supplemental Petition is based on a purported procedural
3 history of the present racial discrimination case, and has as its premise that the
4 District has both acted in good faith in implementing the provisions of the Unitary
5 Status Plan (USP) and that it has been effective in addressing the provisions of the
6 USP as well. In reference to that history, the District argues that no vestiges of "the
7 dual system that once characterized the District now remain." The SMFRR reflects
8 in large part an agreement with the District with these assertions in its apparent
9 partial recommendation for the Unitary Status requested in different categories for
10 which the District was either previously denied Unitary Status or granted only Partial
11 Unitary Status. However, the *Fishers* disagree with the District's contentions
12 because although many schools within the District are now considered integrated,
13 the academic achievement gap between White and African American students still
14 exists and the disproportionate discipline of African American Students continues.

15 An overview of the Special Master's Final Review and Recommendation or
16 "SMFRR" by Plaintiffs *Fisher* suggests that while there may be some areas of
17 agreement, for the most part, the *Fishers* respectfully emphasize that contrary to the
18 Special Master's SMFRR, the ongoing importance of reducing both the Academic
19 Achievement and Discipline gaps, which Defendant District has implicitly admitted
20 exist, must be emphasized and accomplished for the benefit of the African American
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1 Students within the District.

2 Additionally, for the purposes of supporting *Fisher* Plaintiffs' Objections to
3 the Special Masters' Final Report and Recommendations, the *Fishers* submit their
4 controverting evidence supporting the ongoing troubling existence of both
5 substantial Academic Achievement and Discipline Gaps for African American
6 Students, as well as important factual considerations supporting Petitioner's Request
7 for Stay of the District Court's Decision on Unitary Status due to COVID 19
8 Outbreak.
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12 *Fisher* Plaintiffs respectfully submit their overview of the SMFRR, their
13 Controverting Evidence supporting the highly troubling and ongoing African
14 American Student Academic Achievement and Discipline Gaps, and material
15 information related to the COVID 19 Outbreak and Governor Ducey's Order closing
16 all Arizona schools affecting the legitimacy of the Special Master's Final Report and
17 Recommendations as follows.
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21 **A. OVERVIEW OF THE SPECIAL MASTER'S FINAL REPORT &**
22 **RECOMMENDATION**

23 **1. Magnet School Candidates**

24 The Fishers agree with the Special Master that the school improvement plans
25 are simply lists of things the District will do. The general proposals contain
26 numerous strategies that might or might not be implemented, but there are no
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1 timelines, measurable goals or evaluation instruments. This is not out of the
2 ordinary. Since the implementation of the USP, the District has followed this pattern
3 of saying they would do things, but not addressing how they would determine the
4 success of the programs and strategies they implement. Not putting in the thought
5 and effort to analyze and assess the benefit of these programs and strategies does *not*
6 show good faith. Good Faith would include attention to the success of a program.
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9 **2. Achievement Gap Analysis**

10 The Special Master states that since “schools have a limited impact on student
11 test scores, achievement gap should be measured by taking into account the
12 percentage of students of each race who receive free and reduced meals.” This
13 statement not only boggles the mind, but also contradicts current research on the
14 achievement gap. In an analysis of the achievement gap between Anglo students
15 and Black students, Erick A. Hanushek, (What Matters for Student Achievement,
16 2016), states that “qualitative difference among teachers have large impacts on the
17 growth in student achievement and a top teacher can in one year produce an added
18 gain from students of one full year’s worth of learning compared to students
19 suffering under a very ineffective teacher.”⁸
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24 In a meeting with the *Fisher* Plaintiffs in the Spring of 2019, Dr. Trujillo stated
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26 ⁸ Erick A. Hanushek, What Matters for Student Achievement, Education Next,
27 Spring 2016/Vol. 16, No. 2.
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1 that African American students come to school at a deficit and the gap is evident in
2 3rd grade; however, in spite of repeated requests by the Plaintiffs, the District has
3 refused to create an Improvement Plan to address these deficits. They list the
4 Reading Recovery Program as a step in addressing that issue, but they have been
5 unwilling to use desegregation funds to implement the program across the District
6 or at minimum where it is most needed.
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9 It should also be especially noted that not all African Students are on Free or
10 Reduced Lunch, so the idea that to get accurate data you must compare students of
11 comparable socio-economic levels is faulty. The Special Master and the District are
12 looking for rationales to excuse the continued achievement gap.
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15 **3. Recommendations Regarding Potential Magnets and Planning**
16 **for Transportation and Integration**

17 The Fishers agree with the requirement that actionable plans for school
18 improvement must be developed and overseen by a special panel and an external
19 consultant. The Fishers disagree that only the Special Master should be consulted.
20 The Plaintiffs should also be consulted in the selection of this person.
21

22 **4. Support for Beginning (First and Second year) Teachers**
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24 “In September 2019, the Court directed the District to employ mitigating
25 conditions”. One of these factors is smaller class size. “However, the District does
26 not budget for implementing mitigating conditions and relies on principals to find
27 the necessary funds.” The Fisher Plaintiffs request that the District be required or
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1 ordered to utilize desegregation dollars to reduce class size. Without implementation
2 of budgetary provisions to inculcate mitigating circumstances, unitary status for this
3 provision should not be granted.
4

5 **5. Diversity of Teachers and Administrators at school Sites and**
6 **Grow Your Own Programs.**
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8 The Special Master acknowledged that “the District fell far short of meeting
9 the goals of the original teacher diversity plan. The District has not yet developed a
10 strategic plan for recruiting African American teachers and has repeated the “Hit and
11 Miss” approach of annual visits to Historically Black Colleges, without recruiting
12 *any* teachers, whatsoever. To employ the same method for decades with no success
13 is a clear indication that the District is just going through the motions to recruit and
14 hire African American teachers. Consequently, the *Fishers* object to unitary status
15 for school level teacher diversity.
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19 **6. Grow Your Own Program**
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21 The District reports that there has been a significant increase in the number of
22 African American and Latino applicants for the Leadership Prep Academy.
23 However, a number of those selected do not have the credentials necessary to hold
24 a principal position or an assistant principal position. If the sincere aim is to develop
25 future administrators, the criteria for inclusion in the Leadership Prep Academy
26 should be possession of a current administrative certificate or enrollment in an
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1 administrator certification program. Otherwise, the District is training employees
2 for positions they do not qualify for and the District can truthfully say that there were
3 *no* qualified minority applicants. The Fishers agree with the Mendozas that the
4 Director of Talent Acquisition should “proactively review files on potential
5 administrators among the District’s teachers and lower level administrators”. Just
6 putting programs in place does not warrant unitary status. An actual increase in the
7 numbers of African American administrators needs to occur first.
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10 The Fishers are also concerned that administrative numbers of African
11 American administrators is being skewed by the hiring of District level
12 administrators who have limited impact on what happens on a day to day basis to
13 African American students. The focus should be on hiring building level African
14 American administrators. These are the administrators who directly impact the
15 education of African American students.
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18 **7. ALE Policy Manual**

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20 By way of background, the District with the Special Masters sanction
21 increased the number of self-contained GATE programs by creating GATE cluster
22 schools, i.e. Roberts-Naylor. At the time of this decision the *Fishers* expressed
23 opposition to just labeling a program a GATE Program with no entry qualifications,
24 GATE teachers or GATE curriculum. This makes it appear that the number of
25 African American students in GATE programs has increased, but these are really *not*
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1 GATE programs. The teachers aren't GATE certified and the curriculum is not the
2 prescribed GATE curriculum.

3 The *Fishers* agree with the *Mendoza* plaintiffs that the District did not
4 undertake a study ***ordered by the Court*** about whether Pre-AP programs promote
5 success in AP classes. The District cites a study by the Special Master that Pre-AP
6 classes have only a small effect on success in AP tests. At issue is what the District
7 defines as Pre-AP. The College Board has five Pre-AP classes (Algebra, Biology,
8 English, World History and Visual and Performing Arts) with a curriculum that is
9 designed to prepare students for AP classes and college. To be legitimate Pre-AP
10 classes, the teachers must participate in training by the College Board and follow the
11 prescribed curriculum. Again, as with the Cluster GATE Programs, just naming a
12 program or class something doesn't make it a legitimate Pre-AP or GATE Program.
13 The *Fishers* disagree with the recommendation for the District to receive partial
14 unitary status for all ALE Programs because the recommendation is based on
15 creations of "pseudo" GATE Programs that do not identify GATE students and do
16 not teach the GATE curriculum and "pseudo" Pre-AP Classes.

23 **8. Inclusive School Environments and Cultures of Civility**

24 The District, along with the Special Master, conducted a study to determine
25 how students of different races feel they are treated and concluded that there were
26 small differences among students of different races. This conclusion is contradicted
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1 by the report compiled by Trayben and Associates in 2018. The basis for the data
2 or information Trayben and Associates found included students in four separate
3 focus groups from six high schools, with both current students and alumni. These
4 students shared that schools are not as inclusive as they might be in school-wide
5 activities and programs and that in terms of disciplinary treatments they are treated
6 the “same way at school as they are on the streets.” This is, of course, a consequence
7 of broader societal patterns of racial stereotyping; however schools, specifically
8 TUSD, should disrupt these patterns, so that students are not burdened by them
9 (Trayben, 2018). TUSD has received millions of dollars over the last 40 years to
10 correct these issues. The *Fisher* Plaintiffs agree with the *Mendozas* that the District
11 should not be awarded partial unitary status for Inclusiveness.
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16 **9. Culturally Relevant Courses**

17 The *Fishers* disagree that the District should receive partial unitary status for
18 CRC, CRP and Multicultural Curriculum. Again, according to the Trayben Study
19 African American themed courses were not widely advertised and some students
20 graduated in 2016 with no knowledge of the classes. Additionally, two alumni stated
21 that “those courses are generally regarded as “easy” courses without the same rigor
22 as other courses. One student purposely avoided the classes with her counselor’s
23 agreement, because they were not college prep classes.
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10. Reorganization of Student Services Department

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2 The *Fishers* submitted a proposal for the reorganization of the African
3 American Student Services Department in June, 2018. *Supra*. However, the District
4 did not agree with the Plan and promised to submit a different proposal. The *Fishers*
5 continue to emphasize that there is a need for the Department to be overhauled or
6 reorganized in order that it may deliver direct services to African American students
7 who are not achieving at grade level. We disagree with the Special Master’s premise
8 that these direct services are duplicated in other areas. Having these employees
9 working directly with African American students meets the crucial need for African
10 American students to have adult African Americans working with and for them.
11 Research shows that “Most results show that when Black teachers teach black
12 students, black students achieve more than when taught by white teachers” (Andy
13 Porter, University of Pennsylvania, 2020)⁹. Since the small number of African
14 American teachers makes this impossible, the need for the African American
15 Services Department is intensified.

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22 The Special Master’s plan calls for eight (8) program specialists in different
23 domains. These all overlap with other District programs and with the exception of
24 the Attendance and Retention Program deliver no direct services to students who are

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27 ⁹ Andy Porter, Rethinking the Achievement Gap, Penn GSE,
28 <http://www.gse.upenn.edu/news/rethinking-ahcievevementgap>

1 not progressing academically. In sharp contrast, the *Fisher* proposal balances
2 program direct services to students with direct support to schools. The goal is to
3 have a program that works directly with students in need of services such as tutoring
4 and collaborate with other programs to insure that African American Students
5 receive all appropriate District services. The *Fisher* proposal briefly described or
6 presented below calls for a Director, Program Coordinator, Administrative
7 Assistant, and Program Specialists in the areas of Attendance, Discipline Monitoring
8 and Dropout Attendance, and Academic Tutors in Language Arts, Math, Reading
9 and Writing with a focus on K-5 students, and includes the following duties and
10 responsibilities.
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15 **Fisher Proposal for AASD w/ Duties and Responsibilities of Personnel**¹⁰

- 16 1. Director – Monitor growth of students with benchmarks to monitor growth,
17 monitor discipline and communicate with parents.
- 18 2. Program Coordinator – Work with teachers and schools to plan targeted
19 interventions and supervise specialists.
- 20 3. Administrative Assistant
- 21 4. Attendance Specialist – Monitor student attendance and create attendance
22 plans for students with attendance issues.

22 ¹⁰ It should be noted that with regard to the foregoing list of operative personnel
23 positions in the re-vamped or reorganized African American Student Service
24 Department, that everyone, including tutors, must have at a minimum, bachelors
25 degrees in education. In fact, with regard to their particular field of tutorial endeavor
26 or education, there should be tutors with math degrees, language or writing degrees,
27 and reading degrees in order to assist African American Students improve not only
28 in their particular subject of needed expertise, education and counsel, yet for their
overall Quality of Education.

- 1 5. Discipline Specialist – Monitor discipline and advocate for students at
suspension hearings.
- 2 6. Dropout Prevention Specialist – Coordinate with Attendance Specialist to
3 monitor attendance and target potential dropouts.
- 4 7. Work with students and teachers on language, math, reading and writing
5 improvement.

6 **11. ELL Action Plan for Dropout Prevention**

7
8 The *Fisher* Plaintiffs disagree with the Special Masters proposal that students
9 from Africa or whose parents are from Africa should not be included in the USP.
10 As stated before, the *Fishers* believe that Students of African Descent are subject to
11 the same biases and prejudices as students of American Heritage are subjected to.
12

13 Additionally, in September 2019, we addressed the issue that these students
14 do not receive ELL Services in the form of dual language classes and their parents
15 do not receive information in their native languages. The District operates multiple
16 dual-language programs for Spanish speakers, but has not addressed the needs of
17 these students. The Fishers have previously requested information on English
18 Language instruction for African students. These Students of African Descent are
19 forgotten students, and until they receive appropriate services, the District should
20 not be awarded partial unitary status.
21
22

23 **12. Student Discipline**

24
25 The Special Master’s concern with discipline seems to be improperly focused
26 on classroom discipline alone. However, while classroom teachers may refer
27
28

1 students for discipline, they do not suspend students. The previously referenced
2 disproportionate discipline numbers are due to administrative actions. The District
3 repeatedly lists a variety of programs put in place to address this disparity in
4 discipline for African American students. These include Targeted Restorative
5 Practices, Positive Behavioral Interventions and Supports (PBIS) and Discipline
6 Review Committees and Discipline Teams. However, according to its own data,
7 discipline for African American students is still disproportionate. Multiple examples
8 underscore this conclusion, supported or readily admitted by the District through its
9 own data and in-house studies.
10
11
12

13 In 2012-13, African American enrollment was 8%. However, in-school
14 suspensions were nearly two (2) times the enrollment percentage, or 15%.
15 Additionally, short term out of school suspensions were almost more than twice the
16 African American Student enrollment, or 15%, while long term suspensions were
17 12%, or one and one half (or 1.5) times the African American Student enrollment.
18
19

20 The data for 2017-18 shows absolutely no improvement and some worsening.
21 For the 2017-18 academic year, the African American Student enrollment in
22 TUSD#1 was 9%. At that time, in school discipline was 15%, short term
23 suspensions were at 16% and long term suspensions were 20%, or more than twice
24 the African American Student enrollment.
25
26

27 The District lists corrective measures at schools as an effort to improve
28

1 discipline. In 2018-2019 eight schools were placed on Supportive Action Plans. At
2 the time, the *Fisher* Plaintiffs requested a list of those schools and the data causing
3 them to be placed on such Plans, yet never received it. There is no evidence of what
4 actions the District actually took and what the results were. To this day, *Fisher*
5 Plaintiffs are not entirely sure what schools were placed on Supportive Action Plans
6 and whether the discipline issues were ever corrected.
7
8

9 When one looks at the percentage of African American suspensions and the
10 percentage of African American students in the District, there is no justification for
11 this statement. The SMFRR filing has also not included the number of students
12 placed in in-school suspension. Fisher Plaintiffs totally disagree with the District's
13 contention that there appears to be no evidence of discipline related discrimination
14 or a Discipline Gap in TUSD. Numbers do not lie. Obviously, such a suggested
15 random sampling does not explain the high disparities between the actual number of
16 African American Students and those disciplined.
17
18
19

20 **13. Student Assignment and Transportation**

21 While *Fisher* Plaintiffs had previously objected to the award of Unitary Status
22 as to both Student Assignment and Transportation, they hereby re-raise their
23 objection to the granting of Unitary Status as to both Student Assignment and
24 Transportation as they relate to the Magnet School Program.
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28

1 **B. PLAINTIFFS FISHER'S EVIDENCE IN CONTRAVENTION OF THE**
2 **SPECIAL MASTER'S FINAL REPORT & RECOMMENDATION.**

3 In addition to the foregoing Overview related to the Special Master's Final Report
4 and Recommendation, Plaintiffs *Fisher* hereby respectfully submit the following additional
5 evidence in objection to and contravention of the Special Master's R & R with regard both
6 the Academic Achievement and Discipline Gaps presently experienced by African
7 American Students.
8

9 With regard to the Academic Achievement Gap experienced by African American
10 Students, it is especially noteworthy that Section V of the Unitary Status Plan actually
11 requires that Defendant Tucson Unified School District #1 work towards improving the
12 Quality of Education and closing the Academic Achievement Gap. Section V states in
13 relevant part:
14

15 **“V. QUALITY OF EDUCATION**

16 **A. Access to and Support in Advanced Learning Experiences**

17
18 1. Overview. The purpose of this section ***shall be to improve the***
19 ***academic achievement of African American and Latino students in***
20 ***the District...***¹¹

21 Subsection E of the Quality of Education Section of the Unitary Status Plan
22 actually states with even greater specificity that “[t]he objective of this Section is to
23 improve the academic achievement and educational outcomes of the District’s
24 African American and Latino students, including ELL students, using strategies to
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¹¹ See 2013 Unitary Status Plan at p. 27. Document 1450, Bates No. 000188.

1 seek to close the achievement gap and eliminate the racial and ethnic disparities for
2 these students in academic achievement...”¹²

3 Moreover, notwithstanding the Special Master’s attempts to minimalize or de-
4 emphasize the importance and depth of the Academic Achievement Gap experienced
5 by African American Students, it is most important to note that Defendant District
6 conducted its own “5 Year Achievement Gap Analysis” and came to the conclusion
7 that the Academic Achievement Gap exists *independent* of a student’s economic
8 status or participation in free lunch programs finding as follows:
9

10
11
12 “African American and Hispanic students who came from middle or wealthier
13 class families (Non-FRL group) exhibited an achievement gap by 4th grade when
14 compared to White students in the same grouping and the gap persisted to the 8th
15 grade.”¹³

16
17 As to the ongoing Student Discipline Gap, it is remarkable that the District in
18 its pleadings should cavalierly admit¹⁴ to the fact that African American Students
19 are actually disciplined 1.5 times as much as their Anglo American counterparts, yet
20 that somehow, simply because African American Students in TUSD #1 are not
21
22

23
24 _____
¹² See 2013 Unitary Status Plan at p. 32. Document 1450, Bates No. 000193.

25
26 ¹³ See Fisher Plaintiffs separately filed Appendix of Exhibits, Plaintiffs’ Exhibit #3,
The 5 Year Achievement Gap Analysis in Tucson Unified School District, by Dr. Frietas at
p. 18.

27
28 ¹⁴ It is noteworthy that the District’s admissions as to the existence of the Discipline
Gap for African American Students may actually be considered as an Admission by a Party
Opponent or non-hearsay under Rule 801 of the Federal Rules of Evidence.

1 disciplined three (3) times as much or longer than their Anglo American
2 counterparts, and merely suffer disparate treatment in the area of student discipline
3 at an alarming rate of 1.5 to 2 times greater than white students, that such blatant
4 racial discrimination in education is somehow less oppressive and may be tolerated.
5 Subsection VI of the Unitary Status Plan, Subsection A definitively states as to an
6 overview of the USP concerning student discipline as follows:
7
8

9 “The Parties acknowledge that the administration of student discipline can
10 result in unlawful discrimination when students are *disproportionately*
11 *impacted or treated differently by virtue of their race* or ethnicity.”¹⁵
12

13 **C. COVID 19 VIRUS AND CLOSING OF ARIZONA SCHOOLS**

14 On March 30, 2020, Arizona Governor Doug Ducey ordered the closing of all
15 Arizona schools due to the COVID 19 Outbreak. As the result, the Tucson Unified
16 School District lost fifty-three (53) days, or basically the 4th academic quarter of the
17 year. Sadly, although the District attempted to successfully complete the school
18 year remotely or on-line, it is understood that a substantial percentage of minority
19 students attending TUSD #1 Schools were actually unable to complete the school
20 year due to the fact that they had limited to no access to completing their coursework
21 online. As the result, the Governing Board of TUSD#1 decided on April 7, 2020
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23
24
25

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27
28 ¹⁵ See also Plaintiffs *Fisher’s* Exhibit #4, Plaintiffs’ Separately Filed Appendix of Exhibits.

1 that students could use their grades earned in the third quarter before schools were
2 closed, as their grades for the 4th quarter. Essentially, due to the COVID 19
3 Outbreak, all academic data, and hence data related to District Court ordered
4 Completion Plans may be less than reliable, suggesting that an additional school
5 term or academic quarter may be required for legitimate analysis and findings by
6 both the Special Master in its Report and Recommendation, and the U.S. District
7 Court in deciding the issue of Unitary Status.
8
9

10 **III.**

11 **LEGAL ARGUMENT**

12 **A. JURISDICTIONAL ISSUE:**

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14
15 It is highly questionable whether or not the District Court presently has
16 jurisdiction to even consider the Defendant TUSD #1's Supplemental Motion for
17 Unitary Status given the fact that the same basic issue related to the TUSD's 2018
18 petition for Unitary Status, and the District Court's partial granting and denial of is
19 presently on appeal before the 9th Circuit, with briefing already completed and Oral
20 argument set in July of 2020.
21

22
23 "As a general rule, the filing of a notice of appeal divests a district court of
24 jurisdiction over those aspects of the case involved in the appeal." *Stein v. Wood*,
25 127 F.3d 1187, 1189 (9th Cir. 1997). The divestiture rule is a rule of judicial
26 economy designed to avoid "the confusion and waste of time that might flow from
27
28

1 putting the same issues before two courts at the same time.” *Id.* (citations omitted).
2 See also *Townley v. Miller*, 693 F.3d 1041, 1042 (9th Cir. 2012) (amended order)
3 [concluding the filing of notices of appeal from order granting preliminary
4 injunction divested district court of jurisdiction]. Although the Ninth Circuit Court
5 of Appeals has recognized exceptions to the divestiture rule, the exceptions are
6 generally limited to allowing or permitting the district court to correct clerical errors
7 or clarify its judgment, to supervise the status quo in a case during the pendency of
8 an appeal, or to aid in execution of a judgment. See *Stein*, 127 F.3d at 1189 (citations
9 omitted). In other words, while an appeal from a final judgment is pending, such as
10 the District Court’s decision as to TUSD’s 2018 request for Unitary Status, the
11 district court generally lacks jurisdiction to adjudicate matters on appeal.
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14
15

16 While the TUSD#1 may argue that the pending Ninth Circuit appeal of the
17 District Court’s earlier decision as to its 2018 request for Unitary Status is akin to a
18 decision as to partial summary judgment, a collateral order or an interlocutory order,
19 such is not the case.
20

21 First of all, despite the fact that it is recognized that during the pendency of
22 an appeal from a judgment under Fed. R. Civ. P. 54(b), the district court generally
23 retains jurisdiction to proceed with remaining claims of other defendants, see *Beltz*
24 *Travel Serv., Inc. v. Int’l Air Transp. Ass’n*, 620 F.2d 1360, 1367 (9th Cir. 1980)
25 [during appeal from order granting partial summary judgment to certain defendants,
26
27
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1 district court retained jurisdiction to proceed with claims against remaining
2 defendants], there are no other defendants in the present racial discrimination case.

3
4 Secondly, though it is understood that while an appeal from a collateral order
5 is pending, the district court generally retains jurisdiction to proceed with the
6 underlying action, *see Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th
7 Cir. 1990) [while appeal from order denying motion to compel arbitration was
8 pending, district court retained jurisdiction to proceed with merits of action); see also
9 Fed. R. Civ. P. 23(f) (“An appeal [from a class certification order] does not stay
10 proceedings in the district court unless the district judge or the court of appeals so
11 orders.”), the district court’s order on appeal is not a collateral order, yet an order
12 related to a final judgment as to the pen-ultimate issue in the case at bar.
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14
15

16 Finally, while it is true that if an appeal from an interlocutory order is pending,
17 the district court retains jurisdiction to continue with other stages of the case, *see*
18 *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982), the District
19 Court’s order granting in part and denying in part Defendant TUSD#1’s 2019 request
20 for Unitary Status may not be considered interlocutory in nature, especially given
21 the fact that as previously discussed, the attainment of Unitary Status is essentially
22 a *final* judgment in the present case.
23
24
25

26 In the case at bar, it is highly questionable whether the District Court has
27 jurisdiction to entertain TUSD #1’s Supplemental Petition for Unitary Status at this
28

1 time given the Divesture Rule because under this general rule, the filing of a notice
2 of appeal actually divests a district court of jurisdiction over those aspects of the case
3 involved in the appeal.” *Stein v. Wood*, supra. The divestiture rule is also a rule of
4 judicial economy designed to avoid “the confusion and waste of time that might flow
5 from putting the same issues before two courts at the same time.” *Id.* Here, it is
6 submitted, that the since the issue of unitary status is presently on appeal to the Ninth
7 Circuit Court of Appeals, the District Court has been divested of jurisdiction to
8 review TUSD #1’s Supplemental Petition related to the very same issue. *Id.*
9 Further, as a rule of judicial economy designed to avoid unnecessary confusion and
10 waste of time related to putting the same issues before two courts simultaneously, it
11 may be suggested that the Divesture Rule interposes necessary limitations on District
12 Courts from proceeding with additional work on issues currently pending before the
13 Circuit Court in their respective region. Finally, since orders related to the issue of
14 unitary status in racial discrimination/desegregation cases may be generally
15 considered a final order or the pen-ultimate decision or determination to be made
16 such cases, the issue of unitary status may not be considered to be collateral or
17 interlocutory in nature, thereby precluding ongoing jurisdiction of the issue in the
18 District Court.

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26 Based upon the foregoing facts and legal argument, it is highly questionable
27 whether or not the United States District Court presently has jurisdiction to consider
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1 the Special Master's Final Report and Recommendation or the Defendant TUSD
2 #1's Supplemental Petition for Unitary Status given the fact that the same issue
3 related to the TUSD's 2018 Petition for Unitary Status, and the District Court's
4 partial granting and denial of same, is presently on appeal before the Ninth Circuit
5 Court of Appeals, with briefing already completed and Oral argument currently set
6 in July of 2020.
7
8

9
10 **B. THE LEGAL STANDARD FOR UNITARY STATUS DOES NOT**
11 **SUPPORT AN AWARD OF UNITARY STATUS AT THIS TIME.**
12

13 Contrary to both the Special Master's Final Review and Recommendations
14 (SMFRR) and Defendant TUSD#1's Supplemental Petition for Unitary Status, applicable
15 law in the area of school racial discrimination and desegregation cases militates against the
16 Special Master's recommendations, especially as to the ongoing disparate treatment of
17 African American Students with regard to the Quality of Education they receive in the
18 Tucson Unified School District #1, and in the areas of both Academic Achievement and
19 Student Discipline.
20
21

22 Under applicable federal law, in order to obtain a declaration of unitary status, a
23 School District must show that it has: (1) fully and satisfactorily complied with the Court's
24 decrees for a reasonable period of time, (2) eliminated the vestiges of prior de jure
25 discrimination to the extent practicable, and (3) demonstrated a good-faith commitment to
26 the whole of the Court's decrees and to those provisions of the law and the Constitution
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1 that were the predicate for judicial intervention in the first instance. See *Missouri v.*
2 *Jenkins*, 515 U.S. 70, 87-89 (1995); *Freeman v. Pitts*, 503 U.S. 467, 491-92, 498 (1992);
3 *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 248-50 (1991).

4 Therefore, in order to obtain unitary status, a School District must actually show
5 both its “affirmative commitment to comply in good faith with the *entirety* of a
6 desegregation plan,” and that it has not “acted in bad faith or engaged in further acts of
7 discrimination since the desegregation plan went into effect.” *Freeman*, 503 U.S. at 499.
8 See also *NAACP v. Duval Cnty. Sch.*, 273 F.3d 960, 974 (11th Cir. 2001) (“To be entitled
9 to unitary status, not only must a school system eliminate the vestiges of de jure segregation
10 to the extent practicable, but ‘local authorities [must] have in good faith fully and
11 satisfactorily complied with, and shown a commitment to, the desegregation plan.’”
12 [quoting *Dowell*, 498 U.S. at 249-50 (1991)].¹⁶ To the contrary, the District’s good faith
13 compliance with the requirements of the USP is a critical basis on which its Supplemental
14 Petition for unitary status must be assessed. See *Jenkins*, 515 U.S. at 87-89; *Freeman*, 503
15 U.S. at 491-92, 498; *Dowell*, 498 U.S. at 248-505. This is true not only because good faith
16 compliance with all of the Court’s orders is a requirement for unitary status, but also
17 because the USP was specifically designed to eliminate the vestiges of prior de jure
18 discrimination to the extent practicable; therefore, compliance with the USP is required to
19 eliminate those vestiges.
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¹⁶ As the Plaintiff Intervenor the United States has suggested, Defendant District is therefore incorrect in arguing in its Supplemental Petition that “[a]s a matter of law, good faith in the context of this case is not whether the District has done all it can to comply with the decree or even all it can to promote integration.” Supplemental Petition at 84, ECF No. 2406 (emphasis in original).

1 Furthermore, the Supreme Court has identified six areas, commonly known as the
2 “*Green* factors,” that must be addressed as part of the determination of whether a school
3 district has fulfilled its desegregation duties and eliminated vestiges of the prior dual
4 system to the extent practicable: (1) student assignment, (2) faculty, (3) staff, (4)
5 transportation, (5) extracurricular activities, and (6) facilities. *Green*, 391 U.S. at 435; see
6 Manning 244 F.3d at 942 (“For a district court to determine whether the vestiges of
7 discrimination have been eliminated to the extent practicable, it must examine . . . the so-
8 called *Green* factors”). The Supreme Court also has approved consideration of other
9 indicia, such as “the quality of education being offered to the [different racial]
10 populations,” and student discipline, as important factors for determining whether a district
11 has fulfilled its desegregation obligations. *Freeman*, 503 U.S. at 492-93; see *Lee v. Etowah*
12 *Cnty. Bd. of Educ.*, 963 F.2d 1416, 1426 (11th Cir. 1992). Thus, the broad range of non-
13 *Green* factors encompassed by the USP must be evaluated in determining whether the
14 District has fulfilled its desegregation obligations.

15 Moreover, it is both instructive, as well as the “law of the case” under the Ninth
16 Circuit’s 2011 decision in *Fisher v. Tucson Unified School* that it is impermissible to
17 make unitary status contingent on promises of future action. *Id.*, 653 F.3d 1131, 1140
18 (2011).

19 Finally, it is noteworthy that the USP itself provides that, “[t]he Court shall maintain
20 jurisdiction over this case until the District complies in good faith with all of its obligations
21 under this Order and all Orders of the Court entered in this matter and has eliminated the
22 vestiges of its past segregation to the extent practicable.” USP § XI(A).

1 In the present case, in order for Defendant TUSD #1 to obtain a declaration of
2 unitary status it must show that it has: (1) fully and satisfactorily complied with the District
3 Court's decrees for a reasonable period of time, (2) eliminated the vestiges of prior de jure
4 discrimination to the extent practicable, and (3) demonstrated a good-faith commitment to
5 the whole of the Court's decrees and to those provisions of the law and the Constitution
6 that were the predicate for judicial intervention in the first instance. See *Missouri v.*
7 *Jenkins*, 515 U.S. 70, 87-89 (1995); *Freeman v. Pitts*, 503 U.S. 467, 491-92, 498 (1992);
8 *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 248-50 (1991). It
9 must actually show both its "affirmative commitment to comply in good faith with the
10 *entirety* of a desegregation plan," and that it has not "acted in bad faith or engaged in further
11 acts of discrimination since the desegregation plan went into effect." *Freeman*, 503 U.S.
12 at 499. In fact, the District's good faith compliance with all of the requirements of the
13 USP is a critical basis on which its Supplemental Petition for unitary status must be
14 assessed. See *Jenkins*, 515 U.S. at 87-89; *Freeman*, 503 U.S. at 491-92, 498; *Dowell*, 498
15 U.S. at 248-505. Moreover, as the Supreme Court has identified six areas, commonly
16 known as the "*Green* factors," and has also approved consideration of other indicia, such
17 as "the quality of education being offered to the [different racial] populations," and student
18 discipline, as important factors for determining whether a district has fulfilled its
19 desegregation obligations, *Freeman*, 503 U.S. at 492-93; see *Lee v. Etowah Cnty. Bd. of*
20 *Educ.*, 963 F.2d 1416, 1426 (11th Cir. 1992), it is more than highly arguable that the
21 District has not adequately met its required showing under the law, given the fact that the
22 ongoing problems related to the Quality of Education, Academic Achievement and Student
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1 Discipline persist. Contrary to the Special Master’s Final Report and Recommendation,
2 under the “law of the case” established by the Ninth Circuit’s 2011 decision in *Fisher v.*
3 *Tucson Unified School* it is not permissible to make unitary status contingent on promises
4 of future action. *Id.*, 653 F.3d 1131, 1140 (2011).

5
6 In fact, it would appear that the mandatory language of the Unitary Status Plan
7 applies, providing that, “[t]he Court shall maintain jurisdiction over this case until the
8 District complies in good faith with all of its obligations under this Order and all Orders of
9 the Court entered in this matter and has eliminated the vestiges of its past segregation to
10 the extent practicable.” USP § XI(A). Since the District has failed to eliminate vestiges of
11 past segregation as evidenced by the persistent lack of improvement in the Quality of
12 Education for African American Students, as well as by the continuing Academic
13 Achievement and Discipline Gaps herein described, the accuracy of the Special Master’s
14 Report and Recommendation remains in question, and the District Court should therefore
15 deny Defendant TUSD #1’s Supplemental Petition for Unitary Status.
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19 IV.

20 CONCLUSION

21
22 The Special Master has submitted his Report and Recommendations as to
23 Defendant TUSD #1’s Supplemental Petition for Unitary Status. *Fisher* Plaintiffs
24 respectfully object to much of his conclusions and recommendations regarding
25 awarding unitary status or partial unitary status, especially with regard to the issues
26 of Quality of Education, Academic Achievement and Student Discipline.
27
28

1 While the Plaintiffs respectfully submit that jurisdiction may currently reside
2 in the Ninth Circuit Court of Appeals, and respectfully request that the District Court
3 stay its decision due to the COVID 19 Outbreak as both the Special Master’s Report
4 and Recommendation and the District Court’s related decision as to unitary status,
5 as each may lack legitimacy without additional evidence from an additional
6 academic quarter, the *Fishers* would hope that the District Court, in recognizing that
7 this Court’s decision may further the ongoing hopes and dreams of African
8 American Students, may consider very highly the achievement gap and the disparity
9 and disproportionality in student discipline that not only currently exist, yet are
10 manifest throughout TUSD #1, as tools to determine whether the District has
11 obtained Unitary Status in those areas. They are uncontested facts of ongoing racial
12 disparity which the District has openly admitted and are likewise *admissible* for the
13 District Court’s consideration and determination as admissions by party opponents
14 under the Federal Rules of Evidence. *Supra*.

20 Although *Fisher* Plaintiffs readily admit with regard to one (1) of these
21 categories of disparate treatment that “[t]he achievement gap is unlikely to be totally
22 eliminated by school reform”, the federal District Court should not let “education
23 off the hook.” It has been appropriately recognized that “some education reforms,
24 especially those that provide greater opportunities to learn, do reduce the gap. High-
25 quality preschool, effective teachers in every classroom, a challenging curriculum
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1 of enriched classes—all have been shown to have demonstrable effects on students’
2 academic performance and all have the potential to reduce the achievement gap.”¹⁷

3
4 Why has not the Special Master, or Defendant District for that matter, properly
5 addressed the foregoing issues of Quality of Education, Academic Achievement and
6 Student Discipline? Perhaps, it is because each has failed to properly recognize, the
7 importance of not only treating students of all racial backgrounds equally, yet
8 providing them with not only the best learning environments possible, which must
9 include not only the best teachers, yet fairness in the administration of student
10 discipline and justice. As previously referenced in an analysis of the achievement
11 gap between Anglo students and Black students, Erick A. Hanushek, (What Matters
12 for Student Achievement, 2016), states that “qualitative difference among teachers
13 have large impacts on the growth in student achievement and a top teacher can in
14 one year produce an added gain from students of one full year’s worth of learning
15 compared to students suffering under a very ineffective teacher.
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20 It is Plaintiff Fishers’ sincere request, that the District Court may continue to
21 assure that constitutional violator TUSD #1 has *both*: 1) complied in *good faith* with
22 the desegregation decree since it was entered, and 2) eliminated the vestiges of past
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26 ¹⁷ Andy Porter, Rethinking the Achievement Gap, Penn GSE,
27 <http://www.gse.upenn.edu/news/rethinking-ahcievementgap>

1 discrimination to the extent practicable, including and especially in the areas of
2 Quality of Education, Academic Achievement and Student Discipline.

3 **RESPECTFULLY SUBMITTED** this 16th day of June 2020.
4

5
6 */s/ Rubin Salter, Jr.*

7 RUBIN SALTER, JR., ESQ.

8 ATTORNEY FOR PLAINTIFFS FISHER
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CERTIFICATE OF SERVICE

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I hereby certify that on June 16, 2020, I electronically submitted the foregoing **FISHER PLAINTIFFS' OPPOSITION TO THE SPECIAL MASTER'S FINAL REPORT AND RECOMMENDATIONS AND REQUEST TO STAY DISTRICT COURT'S DECISION ON UNITARY STATUS DUE TO LACK OF JURISDICTION & COVID 19 OUTBREAK AFFECTING LEGITIMACY** to the Office of the Clerk of the United States District Court for the District of Arizona for filing and transmittal of a Notice of Electronic Filing to the following CM/ECT registrants:

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