

1 P. Bruce Converse (#005868)  
2 Timothy W. Overton (#025669)  
3 **DICKINSON WRIGHT PLLC**  
4 1850 N. Central Avenue, Suite 1400  
5 Phoenix, Arizona 85004-4568  
6 [bconverse@dickinsonwright.com](mailto:bconverse@dickinsonwright.com)  
7 [toverton@dickinsonwright.com](mailto:toverton@dickinsonwright.com)  
8 [courtdocs@dickinsonwright.com](mailto:courtdocs@dickinsonwright.com)  
9 Phone: (602) 285-5000  
10 Fax: (844) 670-6009

11 Robert S. Ross (#023430)  
12 Samuel E. Brown (#027474)  
13 **TUCSON UNIFIED SCHOOL DISTRICT**  
14 **LEGAL DEPARTMENT**  
15 1010 East Tenth Street  
16 Tucson, Arizona 85719  
17 [Robert.Ross@tusd1.org](mailto:Robert.Ross@tusd1.org)  
18 [Samuel.Brown@tusd1.org](mailto:Samuel.Brown@tusd1.org)  
19 Phone: (520) 225-6040  
20 *Attorneys for defendant*  
21 *Tucson Unified School District No. 1*

22  
23 **IN THE UNITED STATES DISTRICT COURT**  
24 **FOR THE DISTRICT OF ARIZONA**

25 Roy and Josie Fisher, et al.,  
26 Plaintiffs,  
v.  
Tucson Unified School District No. 1, et al.,  
Defendants.  
Maria Mendoza, et al.,  
Plaintiffs,  
v.  
Tucson Unified School District No. 1, et al.,  
Defendants.

4:74-cv-0090-DCB  
(Lead Case)

4:74-cv-0204 TUC DCB  
(Consolidated Case)

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28 **RESPONSE IN OPPOSITION TO MENDOZA PLAINTIFFS' NOTICE**  
29 **CONCERNING DIVESTITURE (ECF 2548)**  
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**Introduction**

Tucson Unified School District No. 1 (the “District”) hereby responds in opposition to the Mendoza Plaintiffs’ “Notice Concerning the Divestiture of this Court’s Jurisdiction to Rule on the TUSD Supplemental Petition for Unitary Status” (ECF 2548). The Mendoza Plaintiffs, who give “notice” of “their understanding” that divestiture has automatically occurred (*id.*), have not affirmatively requested action by the Court. The District responds to the Notice to explain why divestiture has not occurred, in case the Court considers taking action based on the Notice. Contrary to the Mendoza Plaintiffs’ assertion, the District’s pending Ninth Circuit appeal does *not* divest this Court of its ability and obligation to rule further on the District’s Supplemental Petition for Unitary Status. Where, as here, the district court has a continuing supervisory role over a party’s conduct, it is Ninth Circuit law that an appeal does not divest the court of its ability to continue to act.

**Background**

The District filed its Supplemental Petition for Unitary Status (ECF 2461) in December 2019, and it was fully briefed by March 2020. The Supplemental Petition asks this Court to recognize that the District is in unitary status and to dissolve the long-standing structural injunction in this case. Both the Special Master and the Department of Justice have encouraged the Court to find unitary status and terminate judicial supervision. [ECF 2469; ECF 2475.]

Over the summer of 2020, the Court issued 10 orders that, in one way or another, imposed additional duties and requirements for supervision on the District, now and into the future, including through 2023 and 2024. [ECF 2471; ECF 2474; ECF 2482; ECF

1 2483; ECF 2485; ECF 2486; ECF 2488; ECF 2492; ECF 2497; ECF 2502.] The District  
2 has appealed those 10 orders to the Ninth Circuit. [ECF 2503.]

3 In recent years, both groups of plaintiffs have made repeated attempts to stay this  
4 Court's consideration of unitary status as the case winds to a close, while at the same time  
5 attempting to thwart any appellate review of the Court's continuing exercise of  
6 jurisdiction. After the District appealed in October 2018 (ECF 2138) from the Court's  
7 September 6, 2018, order on unitary status (ECF 2123), the Mendoza Plaintiffs moved  
8 this Court in 2019 for a stay based on the same divestiture theory (ECF 2186). The Court  
9 denied the motion to stay as moot, recognizing that "[t]he District appealed the Court's  
10 September 6, 2018, denial of a blanket finding of unitary status, but nevertheless  
11 continued to comply with the Court's directives and filed Notices of Compliance by the  
12 December 2018 deadline, including requests for unitary status as to those USP programs."  
13 [ECF 2213 at 2-3, 20 (footnote omitted).] Last summer, the Fisher Plaintiffs moved for a  
14 stay and again raised "the divestiture rule" in light of the same appeal (ECF 2478), but  
15 the Court denied the Fisher Plaintiffs' motion for a stay (ECF 2527). Now, even as the  
16 Mendoza Plaintiffs seek to block this Court from taking further action on unitary status  
17 based the Court's purported lack of jurisdiction, they have moved to block the Ninth  
18 Circuit from considering the District's appeal because of the court of appeals' purported  
19 lack of jurisdiction. [No. 20-16486, ECF 10-1, Mendoza Pls.' Mot. to Dismiss Appeal.]  
20 Apparently, the Mendoza Plaintiffs would deny the District the ability to seek judicial  
21 relief *anywhere*.

## Argument

**The Court has not been divested of jurisdiction because divestiture does not occur when, as here, the district court has the role of supervising conduct.**

The Mendoza Plaintiffs’ argument about divestiture of jurisdiction is meritless given the nature of the structural injunction in this case and this Court’s continuing supervisory role. The Ninth Circuit has long held that the general rule of divestiture “is not a creature of statute and is not absolute in character,” and it has recognized that where the district court is supervising a continuing course of conduct, the rule should not—and does not—apply. *See Hoffman ex rel. N.L.R.B. v. Beer Drivers’ Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976). This is such a case.

Specifically, the Ninth Circuit held in *Hoffman* that, “where the court supervises a continuing course of conduct and where as new facts develop, additional supervisory action by the court is required, an appeal from the supervisory order does not divest the district court of jurisdiction to continue its supervision, even though in the course of that supervision the court *acts upon or modifies the order from which the appeal is taken.*” *Id.* (emphasis added). *See also Meinhold v. U.S. Dep’t of Def.*, 34 F.3d 1469, 1480 n.14 (9th Cir. 1994) (holding that the district court retained jurisdiction to expand an injunction, despite a pending appeal of the injunction, where the court was serving a supervisory role); Fed. R. Civ. P. 62(d) (“While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction . . .”).

*Hoffman* is controlling. Divestiture does not apply here because, under the USP, this Court supervises the parties’ continuing course of conduct. As in *Hoffman*, the Court

1 retains jurisdiction to act on or modify the USP, the underlying injunction, and the Court's  
2 other orders as new information arises.

3       Indeed, courts adjudicating desegregation cases regularly hold that the case may  
4 proceed, and the district court may continue its role of supervising the parties' conduct,  
5 despite pending appeals of certain orders. For example, the Eighth Circuit—relying on  
6 the Ninth Circuit's decision in *Hoffman*—held that appeals of orders in a desegregation  
7 case did not divest the district court of jurisdiction to supervise (and issue additional  
8 orders related to) the school district's vocational education program. *Bd. of Educ. of St.*  
9 *Louis v. Missouri*, 936 F.2d 993, 995-96 (8th Cir. 1991). As the court explained, "To  
10 conclude otherwise would only further delay achievement of the goal of providing a  
11 quality integrated vocational education system to [the school district's] students." *Id.* at  
12 996. *See also Plaquemines Par. Comm'n Council v. United States ex rel. Mitchell*, 416  
13 F.2d 952, 954 (5th Cir. 1969) ("The district court did not lose jurisdiction of the parties  
14 merely because an appeal was pending from the desegregation order."); *United States v.*  
15 *Louisiana*, No. CIV. A. 80-3300, 1990 WL 58143, at \*1 (E.D. La. May 3, 1990) (holding  
16 that the court retained jurisdiction notwithstanding interlocutory appeals of injunctive  
17 orders because "the Court retains continuing jurisdiction until either the defendants are  
18 judicially found to be 'operating the system of public higher education on a unitary basis'  
19 or the United States agrees . . . to dismiss the action").

20       Consistent with these holdings, Supreme Court precedent is clear that "a  
21 continuing decree of injunction directed to events to come is subject *always* to adaption  
22 as events may shape the need," regardless of whether the trial court explicitly retains the  
23 power to modify the injunction. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).  
24 Citing *Swift*, the Ninth Circuit has routinely enforced trial courts' "inherent power to  
25

1 adapt an injunction to meet the needs of a new day.” *Atlas Scraper & Eng’g Co. v.*  
2 *Pursche*, 357 F.2d 296, 298 (9th Cir. 1966) (citing *Swift*, 286 U.S. 106). Here, the Court  
3 retains jurisdiction over the structural injunction through “its inherent power to adapt [the]  
4 injunction to meet the needs of a new day.”

5 In contrast, the Mendoza Plaintiffs cite inapposite authority that did not involve  
6 continued supervisory action. In *United States v. Vroman*, 997 F.2d 627 (9th Cir. 1993)  
7 (per curiam), the defendant was sentenced to time in prison and a subsequent term of  
8 probation for criminal tax violations. He immediately appealed his conviction and  
9 sentence, and then, while the appeal was pending, moved in the district court to terminate  
10 probation and then for reconsideration. In a brief per curiam opinion, the Ninth Circuit  
11 vacated the district court’s judgment denying the motion for reconsideration because the  
12 motion was filed after the appeal of the same sentence of probation. *Id.* at 627. The other  
13 case cited by the Mendoza Plaintiffs, *Watchtower Bible & Tract Society of New York,*  
14 *Inc., v. Colombani*, 712 F.3d 6, 11 (1st Cir. 2013), did not involve divestiture; the court  
15 merely held that the order dismissing certain defendants was not appealable because it  
16 “plainly did not resolve all claims against all parties.” *Id.* at 10-11.

17 In their divestiture argument last year, the Mendoza Plaintiffs relied on *McClatchy*  
18 *Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731 (9th Cir. 1982),  
19 but in *McClatchy*, the Ninth Circuit distinguished *Hoffman* because *McClatchy* did *not*  
20 involve an order requiring supervisory action. *McClatchy*, 686 F.2d at 735 (“Here the  
21 appeal came from the district court’s confirmation of the arbitration award, and not from  
22 a contempt order (or other supervisory action) that was issued to force compliance with  
23 that earlier confirmation.”).

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**Conclusion**

Because the *Hoffman* exception to divestiture applies, the Court should reject the Mendoza Plaintiffs’ suggestion that the Court lacks jurisdiction in any respect.

Dated this 28th day of October, 2020.

Respectfully submitted,

/s/ P. Bruce Converse

P. Bruce Converse

Timothy W. Overton

**DICKINSON WRIGHT, PLLC**

1850 N. Central Avenue, Suite 1400

Phoenix, Arizona 85004-4568

*Attorneys for Tucson Unified School*

*District No. 1*

**CERTIFICATE OF SERVICE**

1 I hereby certify that on the 28th day of October, 2020, I electronically transmitted  
2 the attached foregoing document to the Clerk’s Office using the CM/ECF System for filing  
3 and transmittal of a Notice of Electronic filing to all CM/ECF registrants.  
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5 /s/ P. Bruce Converse  
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