FOURTEENTH AMENDMENT — SCHOOL DESEGREGATION — NINTH CIRCUIT REQUIRES CONTINUED FEDERAL OVERSIGHT OF SCHOOL DISTRICT. — *Fisher v. Tucson Unified School District*, 652 F.3d 1131 (9th Cir. 2011).

Since the 1960s, federal district courts have been charged with the responsibility of overseeing public school desegregation throughout the country.[1] Although racial disparities persist in student bodies, quality of facilities, faculty, and other areas, district courts have terminated federal oversight of many school districts through determinations that the districts have achieved "unitary" status.[2] Recently, in *Fisher v. Tucson Unified School District*,[3] the Ninth Circuit held that a district court had improperly terminated its jurisdiction after making factual findings that the school district had failed to comply with its desegregation agreement and had not eliminated the vestiges of past discrimination.[4] While the court of appeals reached the correct result, it could have benefited the system of federal oversight by expressly discouraging sua sponte orders that expedite oversight termination, like the one entered by the district court judge in *Fisher*. Combined with a relaxed "unitary" standard and an increasing public apathy toward racial disparities in education, such orders endanger the future of the desegregation process.

In 1974, Roy Fisher and Maria Mendoza each sued the Tucson, Arizona, school system, on behalf of black and Latino students, for "intentional segregation and unconstitutional discrimination on the basis of race and national origin."[5] Four years later the district court determined "that the Tucson Unified School District had acted with segregative intent in the past and had failed its obligation to rectify the effects of its past actions."[6] In response, the parties submitted a settlement agreement that would establish federal court oversight of the district.[7] The court approved the settlement agreement, and the school

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[1] *See* Brian J. Daugherity & Charles C. Bolton, *Introduction*, *in* WITH ALL DELIBERATE SPEED vii, x–xi (Brian J. Daugherity & Charles C. Bolton eds., 2008).

[2] In *Freeman v. Pitts*, 503 U.S. 467 (1992), the Supreme Court conceded that "the term 'unitary' does not have fixed meaning or content" and "is not a precise concept." *Id.* at 487. However, broadly speaking, "[c]ourts have used the terms 'dual' to denote a school system which has engaged in intentional segregation of students by race, and 'unitary' to describe a school system which has been brought into compliance with the command of the Constitution." Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 246 (1991).

[3] 652 F.3d 1131 (9th Cir. 2011).

[4] *Id.* at 1141–43.

[5] *Id.* at 1134.

[6] *Id.* at 1137 (footnote omitted) (citing Mendoza v. Tucson Sch. Dist. No. 1, 623 F.2d 1338, 1341 (9th Cir. 1980)).

[7] *Id.*

district remained under federal jurisdiction until the district court terminated supervision over thirty years later.[8]

Under the settlement agreement, the school district agreed to "implement its proposed desegregation plans in a number of specified schools, cooperate with parents to develop and examine future student assignment policies at several additional schools, and eliminate discrimination in faculty assignments, employee training, and in policies on bilingual education, testing, and discipline."[9] The agreement also required the school district to file annual reports tracking the progress of its desegregation efforts, and to refrain from "engaging 'in any acts or policies which deprive any student of equal protection of the law' based on race or ethnicity."[10] The school district could move for the court to dissolve the agreement after at least "five full school years of operation under its terms."[11]

In 2004, the district court issued a "sua sponte order directing the parties to show cause why the court should not declare the School District unitary and terminate its jurisdiction."[12] In response, the school district filed a Petition for Unitary Status and moved for dissolution of the agreement and termination of federal oversight of its operations.[13] The school district claimed it had complied in good faith with the settlement agreement and had "eliminated the vestiges of discrimination to the extent practicable," as required by law.[14] The Mendoza plaintiffs objected, and both sides "marshaled thousands of pages of evidence in support of their conflicting positions."[15]

After reviewing the evidence and hearing the parties' arguments, the district court made the preliminary determination, in an August 2007 order, that it could not "make the requisite finding[s]" that the school district had either complied with the settlement agreement in good faith or that it had eliminated the vestiges of de jure segregation to the extent practicable,[16] and it required the school district to compile a comprehensive report on its compliance efforts with regard to student assignments.[17] Upon receiving and reviewing the report, the court noted the district's early progress on student assignments, but found that the school district had more recently failed to examine the

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[8] *See id.* at 1137, 1141.
[9] *Id.* at 1137.
[10] *Id.*
[11] *Id.* (quoting trial court record) (internal quotation mark omitted).
[12] *Id.*
[13] *Id.* at 1138.
[14] *Id.*
[15] *Id.*
[16] Fisher v. United States, Nos. CV 74-90-TUC-DCB, CV 74-204-TUC-DCB, 2007 WL 2410351, at *4 (D. Ariz. Aug. 21, 2007).
[17] *Id.* at *7.

effectiveness of its efforts relating to several of the other relevant factors.[18] Nevertheless, the court expressed its intention to declare that the school district had achieved unitary status and to terminate its oversight once the parties developed and adopted a satisfactory post-unitary plan.[19] The district court explained it wanted to "return [the District] 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."[20] The report demonstrated the elimination of the remnants of segregation, the court held, while future compliance with "post-unitary provisions" would be sufficient to indicate good faith.[21] Accordingly, within a year the school district adopted a post-unitary plan.[22] In a final hearing, although the court reviewed the school district's history of noncompliance with the original settlement agreement and expressed "concerns" about the post-unitary plan, it ultimately approved the plan, deemed the district unitary, and ended "all federal juridical oversight."[23]

The Ninth Circuit reversed and remanded.[24] Writing for the panel, Judge Thomas[25] first explained what is required for school districts to achieve unitary status. Based on applicable Supreme Court precedent, school districts bear the burden of demonstrating that they have met two "mandatory prerequisites": 1) good faith compliance with the desegregation decree "since it was entered," and 2) elimination of "the vestiges of past discrimination . . . to the extent practicable."[26] The second prerequisite, Judge Thomas explained, is determined by examining a set of factors the Supreme Court first described in *Green v. County School Board*,[27] which incorporates essentially "every facet of school operations."[28]

Because unitary status is a finding of fact, the Ninth Circuit reviewed the district court's determination for clear error.[29] Pointing to

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18 Fisher v. United States, 549 F. Supp. 2d 1132, 1166 (D. Ariz. 2008).

19 *Id.* at 1167–77.

20 *Fisher*, 2007 WL 2410351, at *14.

21 *Id.* at *13–14.

22 *Fisher*, 652 F.3d at 1141.

23 *Id.* (quoting trial court record) (internal quotation marks omitted).

24 *Id.* at 1143–45.

25 Judge Thomas was joined by Judge Betty Fletcher and District Judge Gertner of the District of Massachusetts, sitting by designation.

26 *Id.* at 1141 (omission in original) (quoting Missouri v. Jenkins, 515 U.S. 70, 89 (1995)) (internal quotation marks omitted).

27 391 U.S. 430 (1968).

28 *Fisher*, 652 F.3d at 1135–36 (quoting Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 250 (1991)) (internal quotation mark omitted). The factors include assignments of students to schools, "faculty, staff, transportation, extra-curricular activities and facilities." *Id.* (quoting *Dowell*, 498 U.S. at 250).

29 *Id.* at 1136.

the district court's findings that the school district did not have a history of good faith compliance with the original settlement and had failed to address several of the *Green* factors, Judge Thomas declared that "[t]he district court's decision to declare the School District unitary on the basis of these findings cannot be reconciled with Supreme Court precedent."[30] Specifically, the Ninth Circuit rejected the suggestion that good faith compliance with post-unitary provisions could cure the absence of past compliance and serve as the basis for the termination of federal jurisdiction.[31] Judge Thomas also called attention to the district court's own stated concerns about whether the effects of de jure discrimination had been eliminated: he noted the court's finding that the district had "failed to make the most basic inquiries" on issues such as staff cuts at minority schools, racial patterns in disciplinary action, and general program effectiveness.[32] Thus, the Ninth Circuit held that "[t]he district court's declaration of unitary status 'is predicated on a misunderstanding of the governing rule of law' and is clearly erroneous."[33] Ultimately, the Ninth Circuit ordered the district court "to maintain jurisdiction until it is satisfied that the School District has met its burden by *demonstrating* — not merely promising — its 'good-faith compliance'" with the settlement agreement and its elimination of "'the vestiges of past discrimination . . . . to the extent practicable' with regard to all of the *Green* factors."[34]

While the Ninth Circuit rightly overturned the district court's decision and affirmed the important role courts play in desegregation efforts, the court could have strengthened the system of federal oversight by explicitly discouraging district court judges from exercising their discretion in ways contrary to the goal of achieving integrated school systems. At present, the national project of creating racially integrated public schools is significantly undermined by legal-doctrinal pressure from the highest level — Supreme Court precedent lowering the bar for constitutional compliance — and, at the ground level, social pressure to retain the status quo from a public largely indifferent to issues of racial equality. What remains of the process of desegregation is played out in the space between those two forces: the district courts with supervisory responsibilities and the circuit courts that in turn supervise them. In *Fisher*, the Ninth Circuit focused on the substantive error of the district court's decision to declare Tucson Unified School District unitary. The panel appeared to take little notice of the fact

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[30] *Id.* at 1142.

[31] *Id.*

[32] *Id.* (quoting Fisher v. United States, 549 F. Supp. 2d 1132, 1149 (D. Ariz. 2008)) (internal quotation mark omitted).

[33] *Id.* at 1142–43 (quoting Thornburg v. Gingles, 478 U.S. 30, 79 (1986)).

[34] *Id.* at 1143–44 (alterations in original) (quoting Freeman v. Pitts, 503 U.S. 467, 498 (1992)).

that the wheels for that declaration were set in motion *not* by a school district convinced of its constitutional compliance and weary of federal oversight, but by a district court judge issuing a sua sponte show cause order. Given the vulnerability of desegregation efforts, whose progress is already stymied by powerful external forces, the Ninth Circuit should have discouraged the use of such procedural moves, which undermine courts' central role in the process.

The legal standard for declaring a school system unitary is much weaker today than it was decades ago, resulting in a substantive predisposition toward the termination of federal oversight. The issue of American public school segregation was raised to the level of constitutional significance in 1954's landmark decision *Brown v. Board of Education*.[35] In *Brown*, the Court unanimously condemned segregated public school systems as violations of the Equal Protection Clause of the Fourteenth Amendment, declaring that "[s]eparate educational facilities are inherently unequal."[36] Over a decade later, in *Green*, the Court set a stringent standard for how school systems should implement the changes *Brown* demanded: they 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."[37] A system of federal oversight would ensure that school districts took the necessary steps.[38] But even with legally enforced racial separation removed, demographic shifts and other factors frustrated integration efforts, making it clear that the roots of segregation ran deeper than had been anticipated.[39] Confronted with this reality, the Court relaxed the school districts' obligation, "replac[ing] its 1968 call to remove segregation 'root and branch' with a 1991 declaration that discrimination need only be 'eliminated to the extent practicable.'"[40] This more forgiving standard governs today.[41]

Along with the diluted "unitary" standard fashioned by the Supreme Court, shifting public attitudes leave desegregation efforts vulnerable. A 2000 national survey suggested that there exists "a consensus that integrated schools seem like a good idea but 'we shouldn't do

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[35] 347 U.S. 483 (1954).

[36] *Id.* at 495.

[37] Green v. Cnty. Sch. Bd., 391 U.S. 430, 437–38 (1968).

[38] For a succinct description of the stages of federal oversight, see Gretchen M. Widdig, Board of Education of Oklahoma City v. Dowell*: A Solution to Perpetual Judicial Supervision*, 27 TULSA L.J. 85, 85–86 (1991).

[39] *See* MARTHA MINOW, IN *BROWN*'S WAKE 7 (2010).

[40] *Id.* at 25 (quoting *Green*, 391 U.S. at 438; Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 250 (1991)).

[41] *See* Charles Ogletree, *All Too Deliberate*, *in* THE UNFINISHED AGENDA OF *BROWN V. BOARD OF EDUCATION* 45, 55–56 (Black Issues in Higher Educ. et al. eds., 2004) (arguing that *Brown* has been "disembowel[ed]").

anything to promote them.'"[42] Politics reflects this sense of apathy: as Professors Gary Orfield and Erica Frankenberg have pointed out, "[t]he last two decades have witnessed little serious political discussion of positive steps toward urban desegregation . . . . There has been no serious policy proposal in Congress for three decades to provide substantial aid even for voluntary desegregation."[43] Amidst the public's apathy, educational inequalities persist along racial lines in many areas. Students of color continue to lack equal access to highly qualified faculty, Advanced Placement courses, science labs, and other necessary components of a quality education.[44] Meanwhile, "[c]ourts since *Brown* declare that enough time has passed since the elimination of intentional and explicit segregation to stop using judicial measures to remedy patterns of racial separation within public schools."[45]

In *Fisher*, however, the Ninth Circuit affirmed the important role district courts play in the pursuit of integrated school systems. Judge Thomas admonished that "where good faith lacks and the effects of *de jure* segregation linger, public monitoring and political accountability do not suffice."[46] This perspective is not unique, as "[t]he judiciary has always played an important role in recognizing the rights of minority groups, who are often marginalized by majoritarian branches of our government."[47] District court judges are on the front lines of overseeing school systems' compliance with desegregation orders and are the primary actors charged with applying the unitary-status standard. While their proximity to the on-the-ground realities within individual school systems requires that they have some degree of freedom to act,[48] such freedom under an already lenient legal standard creates a danger that judges who are ambivalent about, or even hostile to, continued federal involvement in desegregation will undermine the process. This

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[42] MINOW, *supra* note 39, at 27 (quoting RICHARD D. KAHLENBERG, ALL TOGETHER NOW 42 (2001)).

[43] Gary Orfield & Erica Frankenberg, *Reviving* Brown v. Board of Education*: How Courts and Enforcement Agencies Can Produce More Integrated Schools*, *in* BROWN AT 50, at 185, 207 (Deborah L. Rhode & Charles J. Ogletree, Jr., eds., 2004); *see also id.* at 207 ("State and local officials often claim that courts and bureaucracies should not set policy, yet experience shows that elected officials will rarely respond adequately to unequal educational opportunities, given the risk of racial wedge issues and the political weakness of minorities.").

[44] *See* Linda Darling-Hammond, *Educational Quality and Equality: What It Will Take to Leave No Child Behind*, *in* ALL THINGS BEING EQUAL 39, 55–59 (Brian D. Smedley & Alan Jenkins eds., 2007).

[45] MINOW, *supra* note 39, at 8.

[46] *Fisher*, 652 F.3d at 1143.

[47] Orfield & Frankenberg, *supra* note 43, at 208.

[48] As the Ninth Circuit pointed out in *Fisher*, district court judges have "discretion to fashion equitable relief . . . , to tailor that relief as progress is made, and to cede full control to local authorities at the earliest appropriate time." 652 F.3d at 1142 (citing Freeman v. Pitts, 503 U.S. 467, 486–92 (1992)).

is the hazard circuit courts must guard against and is the danger the Ninth Circuit could have lessened in *Fisher*.

If district court judges feel free to set the wheels in motion for termination of federal oversight sua sponte and are then left to make the factual findings and legal rulings that ultimately dispose of the case, the entire system of federal supervision could find itself in jeopardy. Typically, school districts file petitions for unitary status on their own initiative, not at the prompting of a district court judge.[49] But in *Fisher*, the district judge raised the prospect of terminating federal oversight of the Tucson school district sua sponte, in the face of decades of hesitance by the school district and over the objections of the plaintiffs who represented the minority student population.[50] The decision in *Fisher* was only able to arrest the momentum toward affirming termination of oversight because the judge's factual findings and legal ruling were fundamentally at odds with one another, leaving the Ninth Circuit a clear path to reverse the decision. In other cases, however, where successful desegregation has perhaps not been fully achieved, but where the district court's decision does not meet the extremely high bar of "clear error," a court of appeals may simply be unable to rescue federal oversight from termination.

The Supreme Court has been silent on the use of sua sponte orders in the desegregation context. The Eleventh Circuit has on occasion reversed district court sua sponte orders, but those orders had directly terminated federal oversight without a hearing, presenting due process problems.[51] The comparatively less severe situation on display in *Fisher* — a sua sponte show cause order biasing the proceedings in favor of termination — has been unaddressed. While it may be too drastic to suggest that circuit courts overturn any terminations of federal jurisdiction that result from sua sponte show cause orders, the Ninth Circuit might at least have indicated that such cases will be reviewed in a more harshly critical light than will those initiated by the school districts or, even better, by the students and parents. The Supreme Court might well be hostile to such a notion: the clear error standard is prescribed by federal rule,[52] and in another context the Court has prohibited circuit courts from heightening the standard in response to another relatively ancillary consideration, whether the fact

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[49] *See* Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1189, 1213 (2000) (reporting that in segregation cases typically "judges are not active participants in the litigation," and noting that of twenty-eight cases that reached the point of termination, a judge had raised the issue in only six).

[50] *See Fisher*, 652 F.3d at 1137, 1138.

[51] *See, e.g.*, Lee v. Etowah Cnty. Bd. of Educ., 963 F.2d 1416, 1420 (11th Cir. 1992).

[52] *See* FED. R. CIV. P. 52(a)(6).

under review would be dispositive of the case.[53] However, since the Court has never expressly prohibited taking into account a decision's procedural posture, circuit courts may have some leeway to incorporate an order's having been issued sua sponte into the clear error standard as an indicator of the credibility of factual findings underlying a declaration of unitary status.

While sua sponte show cause orders may have some potential to alleviate the widespread stagnancy of desegregation litigation,[54] the risks of premature unitary declarations' going uncorrected outweigh the potential benefits. Concededly, where judges are indifferent or hostile to judicial involvement in desegregation, they might ignore the cases or manage them in a pro-defendant manner if they retain jurisdiction.[55] But even under an ambivalent judge, continued federal oversight offers affirmative benefits. In many states, school districts under federal supervision receive federal funding to aid them in meeting the goal of desegregation. The district court noted as much in *Fisher*, implying that the school district had been reluctant to seek termination of jurisdiction because the attendant loss of funding that "provide[d] for operation of . . . magnet programs, unique educational programs . . . , multi-cultural studies departments, the student assignment plans, and [the plans' required] transportation" in Tucson.[56] Thus, even where cases appear largely dormant for decades, the possibility remains that some good is being done. Indeed, in many areas, school districts that have been declared unitary and released from federal oversight have promptly resegregated.[57] Given the prevailing hands-off political climate, there is little reason to think that a local government would take steps to remedy such a situation; such inaction would leave disadvantaged minority students with no recourse.

Though imperfect, federal oversight of school desegregation serves useful purposes, and in the current sociopolitical climate, it may be the best option. By unequivocally discouraging sua sponte orders in this context, the Ninth Circuit could have preemptively restrained a procedural threat to this still-valuable system.

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[53] *See* Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).

[54] One estimate concluded that 695 school desegregation cases remained open as of 2002, and yet "a ten-year search of district court opinions revealed only fifty-three school districts subject to actively litigated cases." Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1639 (2003).

[55] *See* Parker, *supra* note 49, at 1218.

[56] Fisher v. United States, Nos. CV 74-90-TUC-DCB, CV 74-204-TUC-DCB, 2007 WL 2410351, at *5 (D. Ariz. Aug. 21, 2007).

[57] *See* Jack Greenberg, *Excerpts from Crusaders in the Courts, Anniversary Edition: Legal Battles of the Civil Rights Movement*, *in* BROWN AT 50, *supra* note 43, at 148, 159 ("In many districts where court-ordered desegregation ended in the past decade, there has been a major increase in segregation."); Ogletree, *supra* note 41, at 58–59.