No. 13-15691

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs–Appellees

and

UNITED STATES OF AMERICA,

Plaintiff–Intervenor–Appellee

v.

STATE OF ARIZONA,

Proposed Intervenor–Appellant

and

TUCSON UNIFIED SCHOOL DISTRICT,

Defendant–Appellee

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

BRIEF FOR THE UNITED STATES AS PLAINTIFF-INTERVENOR-APPELLEE

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RULE:

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. 1331. On February 6, 2013, the district court denied the State of Arizona's second motion for reconsideration of the denial of its motion for intervention. 1 E.R. 1436 at 2.[1] Arizona timely appealed from that order. 2 E.R. 1456 at 2; see also 28 U.S.C. 2107(b). This Court has jurisdiction pursuant to 28 U.S.C. 1291 to review the denial of the State's second motion for reconsideration. As explained below, however, this Court lacks jurisdiction to review either the June 14, 2012, order denying intervention or the July 30, 2012, order denying Arizona's first motion for reconsideration. The State failed to file a timely notice of appeal of either of those two orders. See p. 22, *infra*.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in denying Arizona's second motion for reconsideration of its motion for intervention as of right and for permissive intervention.

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[1] References to "__ E.R. __ at __" are to the volume number, document number and, where appropriate, page number in the Excerpts Of Record submitted by Proposed Intervenor-Appellant. References to "S.E.R. __ at __" are to the document number and, where appropriate, page number in the Supplemental Excerpts Of Record submitted with the United States' brief.

STATEMENT OF THE CASE

Arizona filed a motion for intervention in this longstanding school desegregation case on May 10, 2012. 4 E.R. 1367; S.E.R. 1368. The district court denied the motion on June 14, 2012, holding that Arizona met neither the qualifications for intervention as of right nor for permissive intervention. 3 E.R. 1375. On July 24, 2012, Arizona moved for reconsideration of the district court's denial of its motion for intervention. S.E.R. 1378. The district court denied the motion for reconsideration on July 30, 2012. See S.E.R. 1380. On December 20, 2012, Arizona filed a second motion for reconsideration, citing a "significant change in circumstances." 2 E.R. 1418 at 2. On February 6, 2013, the district court denied the second motion for reconsideration. 1 E.R. 1436. This appeal followed.

STATEMENT OF THE FACTS

This appeal involves the State of Arizona's unsuccessful attempt to intervene at the unitary status stage of this 39-year-old school desegregation case, on the narrow issue of the Tucson Unified School District's (TUSD or the District) implementation of a multicultural curriculum for District courses.

1. The Initial Lawsuit

In May 1974, the National Association for the Advancement of Colored People filed a lawsuit on behalf of the African-American students of Tucson

School District Number One,[2] charging that the District was segregating and otherwise engaging in unconstitutional discrimination against black elementary and junior high school students. See *Mendoza* v. *United States*, 623 F.2d 1338, 1341 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981); see also *Fisher* v. *Tucson Unified Sch. Dist.*, 4:74cv90 (D. Ariz.). Later the same year, the Mexican American Legal Defense & Educational Fund filed suit, charging the District with segregation and various acts of discrimination against Mexican-American elementary, junior high, and high school students. *Mendoza*, 623 F.2d at 1341. In 1975, Fisher and Mendoza were certified as class representatives for these two groups of students, and the cases were consolidated for trial and disposition. *Ibid.* In 1976, the United States was permitted to intervene as a plaintiff in the consolidated actions. *Ibid.*

The cases were tried in January 1977. In June 1978, the district court issued an order ruling that the District had previously acted with segregative intent; that the effects of such actions remained in a number of District schools; and that the District must remedy these effects. *Mendoza*, 623 F.2d at 1341. On August 11, 1978, the district court approved the District's proposed desegregation plan, and on August 31, 1978, approved a Settlement Agreement (Agreement). *Id.* at 1343.

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[2] Now the Tucson Unified School District.

The Agreement contains 26 paragraphs, "each of which required the District to undertake a specific task, implement a specific program or adopt a specific policy." S.E.R. 1119 at 5.

2. Post-Unitary Status Plan, Ninth Circuit Appeal, And Appointment Of Special Master To Develop Unitary Status Plan

Twenty-five years later, after the case was reassigned to a new judge, the district court *sua sponte* issued an order directing the parties to show cause why the court's jurisdiction should not be terminated. S.E.R. 1004, 1028. In response, in January 2005, the District filed a Petition for Unitary Status. S.E.R. 1119 at 2. After a unitary status proceeding, on April 24, 2008, the district court issued an order terminating court oversight of the matter pending its acceptance of a Post-Unitary Status Plan (PUSP). S.E.R. 1270 at 58. On December 18, 2009, the court issued a final judgment "approv[ing] the Post-Unitary Status Plan adopted by the District's Governing Board on July 30, 2009." S.E.R. 1299 at 2. Among other things, the PUSP called for an expanded Mexican American Studies (MAS) Department at middle and high school levels, and expanded services at the elementary school level, with a variety of course offerings in middle and high schools. S.E.R. 1296-2 at 32-34. The PUSP also called for the African American Studies Department to assist in "infusing culturally responsive and relevant African American perspectives into TUSD's middle school and high school curricula." S.E.R. 1296-2 at 34-35.

Plaintiffs appealed, arguing that the district court had improperly relinquished its oversight of the case. See *Fisher* v. *Tucson Unified Sch. Dist.*, 652 F.3d 1131 (9th Cir. 2011). On July 19, 2011, this Court reversed the district court's decision, ordering the 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 over a reasonable period of time." *Fisher*, 652 F.3d at 1143-1144 (citation, internal quotation marks, and alterations omitted).

On remand, on January 6, 2012, the district court appointed a special master, Dr. Willis Hawley, who was charged with developing a plan for TUSD to achieve unitary status (Unitary Status Plan or USP). S.E.R. 1320 at 3-7; 4 E.R. 1350. The court directed Dr. Hawley to work with the parties over the course of six months on a plan containing "[s]pecific substantive programs and provisions to be implemented by TUSD to address all outstanding *Green* factors and all other ancillary factors." 4 E.R. 1350 at 5. The court also ordered that, in developing the USP, the Special Master should consider the briefs, filings, data, and opinions of the parties and designated school desegregation experts. 4 E.R. 1350 at 5, 13-14. In addition, the court allowed the Special Master to accept input from District employees, PUSP Committee or Independent Citizens' Committee members, parents, students, teachers, and any other interested parties. 4 E.R. 1350 at 5.

3. Arizona House Bill 2281 And Suspension Of The MAS Courses

In 2010, the State of Arizona passed House Bill (HB) 2281, Ariz. Rev. Stat. §§ 15-111 and 15-112. HB 2281 prohibits any school district or charter school in Arizona from:

> [I]nclud[ing] in its program of instruction any courses or classes that include any of the following: 1. Promote the overthrow of the United States government. 2. Promote resentment toward a race or class of people. 3. Are designed primarily for pupils of a particular ethnic group. 4. Advocate ethnic solidarity instead of the treatment of pupils as individuals.

Ariz. Rev. Stat. Ann. § 15-112(A) (2011); see also S.E.R. 1368 at 3-6.[3]

On December 30, 2010, then-State Superintendent of Public Instruction Tom Horne issued an administrative finding that TUSD had violated Ariz. Rev. Stat. § 15-112(A) "because of courses offered as part of TUSD's Mexican American Studies ('MAS') program." See *Acosta* v. *Huppenthal*, No. 10-623, 2013 U.S. Dist. LEXIS 37408, at *6 (D. Ariz. May 8, 2013). Horne's successor, John Huppenthal, later issued a second finding "that TUSD was in 'clear violation' of §§ 15-112(A)(2), (3), and (4), based on his conclusion that the MAS program contained content promoting resentment towards white people, advocated Latino

[3] Among other things, however, the statute exempts "[c]ourses or classes that include the history of any ethnic group and that are open to all students, unless the course or class violates [15-112(A)]," and "[c]ourses or classes that include the discussion of controversial aspects of history." Ariz. Rev. Stat. Ann. § 15-112(E) (2011).

solidarity over the treatment of pupils as individuals, and was primarily designed for Latino pupils." *Ibid*. Superintendent Huppenthal "ordered TUSD to bring the MAS program into compliance with the statute within sixty days." *Ibid*. TUSD administratively appealed the finding of violation on June 22, 2011. *Ibid*. On December 27, 2011, an Administrative Law Judge concluded that TUSD's MAS program violated Ariz. Rev. Stat. §§ 15-112(A)(2), (3), and (4). *Id*. at *6-7. "Superintendent Huppenthal then issued an order accepting the ALJ's 'recommended decision.'" *Id*. at *7 (citation omitted). Superintendent Huppenthal subsequently ordered the Arizona Department of Education (ADE) to withhold ten percent of the monthly apportionment of state aid that would otherwise be due to TUSD retroactively from August 15, 2011, until such time as TUSD corrected its violation of Ariz. Rev. Stat. § 15-112. 4 E.R. 1352 at 4; 4 E.R. 1352 at 69, 71 (Exhibit E). On January 10, 2012, before ADE withheld any funds, TUSD's Governing Board voted to suspend the District's MAS courses, effective immediately. 4 E.R. 1352 at 4.

TUSD filed a notice with the district court in the instant case informing the court of its decision to suspend the MAS courses. 4 E.R. 1352. On February 2, 2012, the Mendoza plaintiffs filed a response requesting that the district court reinstate those courses, arguing that TUSD's suspension of the courses violated the PUSP. 4 E.R. 1354 at 2, 17. On February 29, 2012, the district court denied that

request. S.E.R. 1360. The court noted that the Special Master, in a February 23, 2012, memorandum to the court, had agreed with the Mendoza plaintiffs that discontinuing the MAS courses violated the PUSP, but that the Special Master was moving forward to develop an Initial (draft) USP, which would "include comprehensive strategies for meeting the academic and social-developmental needs of Mexican American students." S.E.R. 1360 at 2-3. The Special Master thus warned against sidetracking the efforts necessary to prepare the Initial USP. S.E.R. 1360 at 3. Noting that it did "not intend to delay the Special Master's work regarding development of the USP to debate the merits of enforcing this provision of the PUSP," the district court found that the discontinuance of the MAS Department courses "w[ould] not violate the Equal Protection Clause of the Constitution by intentionally segregating or discriminating against student[]s based on race or ethnic group." S.E.R. 1360 at 3.

On the same day, the court filed a copy of the February 23, 2012, memorandum it had received from the Special Master. 4 E.R. 1361. In that memorandum, the Special Master stated that while he did not recommend reinstatement of the MAS Department's (MASD) courses,

> [t]here is no question that courses rich in the historical and contemporary experiences – both negative and positive – of the different racial and ethnic groups represented in the TUSD should be available, if not required, for all students in the district. In my consideration of how best to implement a district-wide ethnically and culturally relevant curricula, I will consult with and take into account

> the perspectives of members of the Tucson community, district staff, the Governing Board, and nationally prominent scholars, and will make effective use of research relating to such learning experiences.

4 E.R. 1361 at 2.

The Mendoza plaintiffs moved the district court to reconsider its order. 4 E.R. 1364. The Special Master subsequently issued a second memorandum stating that while "it is unlikely that the MAS courses, as they had been structured, will be available" in the USP, the USP would include, assuming the court's approval, "in-depth ethnic courses aimed at developing students' capacity for critical and systematic analysis and complex problem solving." 4 E.R. 1366 at 1-2. On April 3, 2012, the district court denied the motion for reconsideration, noting that constitutional questions regarding the suspension of the MAS courses were pending in another suit[4] and that the Special Master had indicated that the USP would provide in-depth ethnic-conscious core courses. See 4 E.R. 1365 at 2-3.

4. Arizona's Motion For Intervention

More than a month later, on May 10, 2012, the State of Arizona filed its motion to intervene in this case. 4 E.R. 1367; S.E.R. 1368. Citing the Arizona Legislature's passage of HB 2281 and the administrative law finding that TUSD's

[4] The constitutionality of Ariz. Rev. Stat. § 15-112 with respect to the suspension of the MAS program has been raised in *Arce* v. *Huppenthal*, Nos. 13-15657 and 13-15760 (9th Cir.), which is currently pending before this Court.

MAS program had violated that statute, Arizona argued that it had "the limited right to appear and protect its interests against federal interference with its educational policy through participation in the development of the Unitary Status Plan specifically related to the development of ethnic studies curricula for TUSD." S.E.R. 1368 at 4, 6. Specifically, the State alleged that the "breadth of the Special Master's statement of intent [regarding his plans to implement ethnically and culturally relevant curriculum] suggests that the resulting ethnic studies curricula may violate HB 2281." S.E.R. 1368 at 5. The State argued that "[i]f the Special Master and TUSD develop curricula for the USP that violate state law, the State would be harmed." S.E.R. 1368 at 6.

On June 14, 2012, the district court denied the motion for intervention. The court noted that "[t]his case is not about the constitutionality of A.R.S. 15-112," and that, although the Mendoza Plaintiffs had twice requested that the district court "reinstate the ethnic studies courses offered through the Mexican American Studies Department," the court had "[t]wice * * * declined" to allow the reinstatement of the MAS program. 3 E.R. 1375 at 3-4. The court held that "[u]nless [] the Attorney General is asserting that any and all ethnic studies and/or curriculum will *per se* violate A.R.S. § 15-112, the Special Master has asserted an approach [that] on its face does not appear to be contrary to Arizona law." 3 E.R. 1375 at 4. The court further found that "TUSD has exhibited its capability and interest in ensuring

that the USP complies with state law," noting that TUSD stands to lose "millions of dollars of state funding," and that the District had previously "suspended the MASD course even in the face of violating the PUSP and orders issued" by the district court. 3 E.R. 1375 at 4-5 & n.4.

In the same order, the court ruled, however, that it would allow the State to appear as *amicus curiae* in the case, and to file a brief with respect to the Initial USP at the same time the parties filed their own objections to the plan. 3 E.R. 1375 at 5. The court also emphasized that the State had access to the Special Master, and noted that that the Special Master had invited the State to meet with him regarding the case. 3 E.R. 1375 at 5.

The court then addressed the four factors relevant to the question of intervention of right under Federal Rule of Civil Procedure 24(a)(2): (1) whether the motion for intervention is timely; (2) whether the applicant's interest is related to the transaction involved in the suit; (3) whether the disposition of the suit may adversely affect the applicant's interest unless intervention is allowed; and (4) whether the existing parties adequately represent the would-be intervenor's interest. The court held that Arizona had not satisfied these criteria. 3 E.R. 1375 at 5. The court found that "the timing of the State's Motion to Intervene on this single issue would be an unnecessary sidetrack of the Special Master's efforts to prepare the Initial USP." 3 E.R. 1375 at 5 & n.5. The court also observed that

intervention less than "30 days before the filing date [of the Initial USP on July 5, 2012] * * * is untimely and would cause unnecessary delay" in the progress that had been made. 3 E.R. 1375 at 6. The court also noted that the case was only about desegregation in TUSD, and that any state law or interest found to be an impediment to such desegregation must "yield to the supremacy of the Federal Constitution." 3 E.R. 1375 at 5.

The court further held that Arizona had not met the criteria for permissive intervention under Federal Rule of Civil Procedure 24(b)(1)(B). The court found that the "request to intervene is untimely and unnecessary given the mechanisms afforded the State to comment and provide input regarding this single issue of concern to it," and that "intervention * * * will unduly delay and prejudice the adjudication of the rights of the existing parties, who had waited over 30 years for the formulation of a comprehensive plan to eliminate * * * the vestiges of * * * segregation." 3 E.R. 1375 at 6.

5. Arizona's First Motion For Reconsideration

On July 24, 2012, Arizona moved for reconsideration of the district court's denial of its motion for intervention, noting that there had been a scheduling change delaying the filing of the Initial USP until September 21, 2012. S.E.R. 1378 at 3. The State argued that it had "as vital a stake" in the issue of whether the USP would include ethnic studies "as any other party," and that it would be

disadvantaged by seeing the plan only after it was in final form. S.E.R. 1378 at 2. It therefore renewed its motion to be included in the case with the "status of intervenor limited to the issue of ethnic studies." S.E.R. 1378 at 2.

The district court denied the motion. S.E.R. 1380. The court noted that there had been a change in the scheduling, with the Initial USP being released only to the parties on July 13, 2012, followed by a 60-day period for the parties to review it and attempt to settle any disputes. The court found, however, that once the USP was filed with the court on September 21, 2012, the State would have the same opportunity to file objections to the plan as would each of the parties. See S.E.R. 1380 at 2-3. The court emphasized that the State would be able to "participate, equally, in the briefing schedule for filing responses and replies" regarding this initial USP, and that it would also have "free and unfettered access to the Special Master during the preparation of the initial USP." S.E.R. 1380 at 2. The court thus found that nothing in the changed schedule for preparing and filing the initial USP altered its determination that the State would have "ample opportunity to enforce the laws of the State of Arizona in respect to ethnic studies classes." S.E.R. 1380 at 3. It further concluded that "intervention during the 60 days allocated by the parties to identify areas of agreement and disagreement in a comprehensive plan by a party solely committed to a single issue may unduly delay or prejudice the process." S.E.R. 1380 at 3.

6. The Proposed Unitary Status Plan

On November 9, 2012, the parties filed a joint document reflecting their objections to the proposed USP. See S.E.R. 1406. TUSD objected to a portion of the document that stated:

> By the beginning of the 2013-2014 school year, the District shall develop and implement culturally relevant courses of instruction designed to reflect the history, experiences, and culture of African American and Latino communities. Core courses of instruction shall be developed in social studies and literature and shall be offered at all feasible grade levels in all high schools across the District, subject to the District's minimum enrollment guidelines. All courses shall be developed using the District's curricular review process and shall meet District and state standards for academic rigor. The core curriculum described in this section shall be offered commencing in the fall term of the 2013-2014 school year. The District shall pilot the expansion of such core or elective courses to sixth through eighth graders in the 2014-2015 school year, and shall explore similar expansions throughout the K-12 curriculum in the 2015-2016 school year.

3 E.R. 1406-1 at 37 (Section V(6)(a)(ii)). Specifically, "[t]he District object[ed] to these courses being offered as core courses and propose[d] removing the words 'core' and 'elective' where they appear." 3 E.R. 1406-1 at 37 (comment [A17]).

On November 28, 2012, Arizona, participating as *amicus curiae*, filed its objections to the proposed USP. 3 E.R. 1409. Arizona objected to the requirement that TUSD establish culturally relevant core courses, calling such relief "unprecedented," and arguing that the requirements would "violate Arizona law, promote segregation, and prompt the return of the discredited Mexican-American

Studies ('MAS') Program." 3 E.R. 1409 at 2. Arizona also objected to the requirement, contained in Section V(6)(a)(i) of the USP, that TUSD develop and implement a multicultural curriculum.[5] The State argued that "to the extent that the proposed curriculum meets the State's Academic Content Standards, this requirement is unnecessary. To the extent that the proposed curriculum is not aligned to the State's Academic Content Standards, this requirement violates State law." 3 E.R. 1409 at 2-3.

7. Arizona's Second Motion For Reconsideration

On December 20, 2012, the State filed a second motion for reconsideration of the court's denial of its motion for intervention, citing a "[s]ignificant [c]hange in [c]ircumstances." 2 E.R. 1418 at 2. (The State's second motion for

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[5] Specifically, the draft USP stated:

> The District shall continue to develop and implement a multicultural curriculum for District courses which integrates racially and ethnically diverse perspectives and experiences. The multicultural curriculum shall provide students with a range of opportunities to conduct research and improve critical thinking and learning skills, create a positive and inclusive climate in classes and schools that builds respect and understanding among students from different racial and ethnic backgrounds, and promote and develop a sense of civic responsibility among all students. All courses shall be developed using the District's curricular review process and shall meet District and state standards for academic rigor. The courses shall be offered commencing in the 2013-2014 school year.

See 3 E.R. 1406-1 at 37 (Section V(6)(a)(i)).

reconsideration is the subject of this appeal.) Specifically, Arizona cited the election to TUSD's Governing Board of three new board members who had expressed support for the former MAS program, as well as the fact that the Governing Board had voted not to renew its objections to the curricular requirements in the proposed USP.[6] 2 E.R. 1418 at 3. The State argued that unless the court granted its motion to intervene, there would be "no party opposed to the creation" of a curriculum that in its view was "likely to be presented in the same biased, political, and emotionally charged manner as the prior [MAS] course." 2 E.R. 1418 at 3 (internal quotation marks omitted). The State argued that this change in circumstances could not be "reconciled with the due process rights of the State" and that the "change in circumstances justifie[d]" the court's reconsideration of the motion to intervene. 2 E.R. 1418 at 3.

On February 2, 2013, the district court once again denied the State's motion, finding that there had been no significant change in circumstances to warrant reconsideration, and no manifest injustice caused by the denial of intervention. 1 E.R. 1436 at 11. The court observed that Arizona's objection was directed at a subsection of the USP providing for the development of culturally relevant

[6] TUSD withdrew its objections to the USP after the Governing Board passed a resolution stating that "[d]esignating a course as a core course means that passing the course will satisfy requirements for graduation. It does not mean that all students must take the course; culturally relevant courses will remain optional." See 1 E.R. 1436 at 13 (quoting Notice of Withdrawal of Objection (2 E.R. 1421)).

courses. 1 E.R. 1436 at 13. The court found that although the State was treating that provision "as calling for the reinstatement of MAS courses[,]" in reality, those courses were terminated pursuant to the State's decision that they violated Ariz. Rev. Stat. § 15-112, and that "[s]ince then, no MAS courses are being offered in TUSD." 1 E.R. 1436 at 13-14. The court emphasized that the "MAS courses * * * are not at issue in this case," because "[t]hey have been discontinued," and "[t]he first step called for in the proposed USP is course development." 1 E.R. 1436 at 13-14.

The court observed that the "State does not appear to argue [that] any and all culturally relevant courses will necessarily violate A.R.S. § 15-112 because it does not object to culturally relevant courses for African American students." 1 E.R. 1436 at 16. The court held that the "State * * * must set aside what has occurred in TUSD in the past and assume * * * that the USP will be implemented in good faith by the District." 1 E.R. 1436 at 16. The court further noted that the State was "free to monitor the development of the culturally relevant courses and their implementation" and "free to enforce its laws as it did in 2011 when it took action against TUSD for the MAS courses, if it believes any culturally relevant courses developed and implemented in TUSD violate state law." 1 E.R. 1436 at 16. Finding that intervention was not necessary for the State to enforce its laws, and that there was no issue ripe for resolution until the culturally relevant courses were

developed, the district court refused to overturn its earlier decision denying Arizona intervention as of right. 1 E.R. 1436 at 17. Finding that permitting intervention on this one issue would unduly delay and prejudice the adjudication of rights of parties who had waited 30 years for a comprehensive desegregation plan, the court also refused to reverse its previous denial of permissive intervention. 1 E.R. 1436 at 18.

This appeal followed. 2 E.R. 1456 (Arizona's Notice of Appeal from the denial of its second motion for reconsideration).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying Arizona's second motion for reconsideration of its motion for intervention as of right or for permissive intervention. In refusing to overturn its earlier decision denying intervention as of right, the court appropriately ruled that the State's challenge was aimed at a subsection of the USP providing for the development of culturally relevant courses, and that while the "State [was] treat[ing] this provision as calling for reinstatement of MAS courses," those courses had in reality been "discontinued." 1 E.R. 1436 at 13-14. Given that the State did "not appear to argue [that] any and all culturally relevant courses w[ould] necessarily violate" Arizona law, the district court did not abuse its discretion in holding that there was "no issue ripe for resolution" and in declining to overturn its earlier denial of

Arizona's request to intervene as a right. See 1 E.R. 1436 at 16-17. The court also appropriately found that Arizona had been provided a "robust opportunity * * * to be heard" via participation as *amicus curiae* in this case and the opportunity to submit objections to the USP (3 E.R. 1375 at 5-6), and that it would continue to be able to monitor the development and implementation of the culturally relevant courses. 1 E.R. 1436 at 16. Moreover, the court properly recognized that to the extent that Arizona would attempt to override the commands of the Fourteenth Amendment with its state law – including remedial orders for violations of the Fourteenth Amendment – that state law must cede. See 1 E.R. 1436 at 16-17; *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45 (1971) ("[S]tate policy must give way when it operates to hinder vindication of federal constitutional guarantees."). Finally, the court appropriately rejected Arizona's motion as the State failed to meet a requirement courts have imposed for intervention in desegregation cases: an interest in the achievement of desegregation itself.

The court also did not abuse its discretion in denying Arizona's second motion for reconsideration of the denial of its motion for permissive intervention. As the district court correctly found, allowing the State to intervene on one discrete issue would "unduly delay and prejudice the adjudication of the rights of the existing parties, who have waited over 30 years for the formulation of a

comprehensive plan to eliminate, 'root and branch,' the vestiges of the segregation that occurred in the TUSD four decades ago." 1 E.R. 1436 at 18 (citation omitted).

This Court should therefore affirm the district court's denial of Arizona's second motion for reconsideration of the denial of its motion to intervene as of right and for permissive intervention.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING ARIZONA'S SECOND MOTION FOR RECONSIDERATION OF THE DENIAL OF ITS MOTION TO INTERVENE AS OF RIGHT AND FOR PERMISSIVE INTERVENTION

A. Standard Of Review

This Court "review[s] the denial of a motion for reconsideration for abuse of discretion." *Smith* v. *Pacific Props. & Dev. Corp*., 358 F.3d 1097, 1100 (9th Cir.), cert. denied, 543 U.S. 869 (2004).

Perhaps recognizing this highly deferential standard of review for denials of motions to reconsider, the State attempts to recast its second motion for reconsideration as a "second motion to intervene," and contends that the proper standard of review is *de novo*. See Arizona Br. 12-13 & n.2; Arizona Br. 22. Specifically, Arizona argues that "[t]he title on the motion was incorrect," and that, between the filing date of December 20, 2012, and the district court's decision on February 6, 2013, it did not have time to "file a notice of errata amending the caption." (Arizona Br. 13). Contrary to the State's contention, however, the text

of the motion makes clear the motion was for reconsideration, and not a second motion to intervene. See 2 E.R. 1418 at 2 ("A court may *reconsider* a prior decision where, among other things, changed circumstances exist."); 2 E.R. 1418 at 3 ("This change in circumstances justifies this Court's *reconsideration* of Arizona's Motion to Intervene and compels the conclusion that Arizona be permitted to intervene to protect its right to set educational policy."); 2 E.R. 1418 at 5 ("It is therefore respectfully requested that this *Motion to Reconsider* the Motion to Intervene (S.E.R. 1367) be granted.") (emphases added). Arizona's assertion that it did not have sufficient time between December 20, 2012, and February 6, 2013, to amend the caption on its second motion for reconsideration also rings hollow. The abuse of discretion standard of review therefore governs this appeal. See *Smith*, 358 F.3d at 1100.

Moreover, as noted p. 2, *supra*, because Arizona did not appeal from the district court's orders denying its motion for intervention or the first motion for reconsideration, the district court's rulings on those issues are final, and not before the Court in this appeal. See, *e.g.*, *Mount Graham Red Squirrel* v. *Madigan*, 954 F.2d 1441, 1462-1463 (9th Cir. 1992) ("While we lack jurisdiction over the merits of the district court's denial of the motion to intervene [because a notice of appeal was not filed within sixty days of that judgment and a motion for reconsideration was not filed within ten days of the judgment], we do have jurisdiction over

Mountain States' appeal from the denial of its motion for reconsideration because the notice of appeal was filed within sixty days of that judgment."); *Browder* v. *Director, Dep't of Corr.*, 434 U.S. 257, 263 n.7 (1978). Accordingly, the only question at issue in this appeal is whether the district court abused its discretion in denying the State's second motion for reconsideration.

B. The District Court Did Not Abuse Its Discretion In Denying Arizona's Second Motion To Reconsider The Denial Of Its Motion To Intervene As Of Right

For the reasons set out below, Arizona has failed to demonstrate the district court acted outside the bounds of its considerable discretion in rejecting Arizona's second motion for reconsideration of the denial of its motion to intervene as of right.

1. Standards For Intervention As Of Right

"In the absence of a statute conferring an unconditional right to intervene, Federal Rule of Civil Procedure 24(a)(2) governs a party's application for intervention as of right in the federal courts." *League of United Latin Am. Citizens* v. *Wilson* (*LULAC*), 131 F.3d 1297, 1302 (9th Cir. 1997). Rule 24(a) provides that, "[o]n timely motion, the court must permit anyone to intervene who * * * claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter

impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

This Court has set forth a four-part test for examining a motion to intervene under Rule 24(a)(2): "(1) the application must be timely; (2) the applicant must have a 'significantly protectable' interest relating to the transaction that is the subject of the litigation; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the parties before the court." *LULAC*, 131 F.3d at 1302 (citing *Northwest Forest Res. Council* v. *Glickman*, 82 F.3d 825, 836 (9th Cir. 1996)). "The party seeking to intervene bears the burden of showing that *all* the requirements for intervention have been met." *United States* v. *Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004).

2. In Rejecting Arizona's Second Motion For Reconsideration, The District Court Correctly Concluded That The State Failed To Satisfy The Requirements For Intervention As Of Right

In rejecting the State's second motion for reconsideration, the district court correctly determined that Arizona had failed to demonstrate changed circumstances warranting the conclusion that it had met all of the requirements for intervention as of right.

a. Arizona Does Not Have A "Significantly Protectable" Interest In The Subject Matter Of The Suit

As the district court indicated in denying Arizona's second motion for reconsideration, the State had not established that it has a "significantly protectable interest" in the subject matter of the suit. *United States* v. *Aerojet Gen. Corp*., 606 F.3d 1142, 1149 (9th Cir. 2010) (citation omitted). A proposed intervenor has a "significantly protectable interest" only if "(1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Ibid.* (quoting *California ex rel. Lockyer* v. *United States*, 450 F.3d 436, 440-441 (9th Cir. 2006)). This Court has held that an applicant for intervention as a matter of right "generally satisfies the 'relationship' requirement only if the resolution of the plaintiff's claims actually will affect the applicant." *Donnelly* v. *Glickman*, 159 F.3d 405, 410 (9th Cir. 1998) (citing *Montana* v. *EPA*, 137 F.3d 1135, 1141-1142 (9th Cir. 1998)). "[T]he intervenor cannot rely on an interest that is wholly remote and speculative." *City of Emeryville* v. *Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010) (quoting *United States* v. *Union Elec. Co.*, 64 F.3d 1152, 1162 (8th Cir. 1995)).

Arizona attempts to assert a legally cognizable interest by alleging that culturally relevant courses to be developed and implemented pursuant to the USP may violate state law (HB 2281). This allegation, however, is wholly "remote and speculative." *Emeryville*, 621 F.3d at 1259. Arizona's opening brief focuses

extensively upon the now-discontinued MAS program, arguing that "[t]he MAS program was litigated once and the State should not have to litigate it each time TUSD changes the name of the course." Arizona Br. 38. But as the district court observed, the MAS programs were "terminated subsequent to the administrative decision issued by the State that they violated A.R.S. § 15-112," and "are not at issue in this case. They have been discontinued." 1 E.R. 1436 at 14. Since the time of that discontinuation, "no MAS courses are being offered in TUSD." 1 E.R. 1436 at 13. Moreover, the USP does not set forth the specific details of curriculum content, but rather commands only the development of courses "reflect[ing] the history, experiences, and culture of African American and Mexican American communities." See 1 E.R. 1436 at 13 (citation omitted).

Arizona further claims a legally protectable interest on the ground that the new "proposed USP included a curricular mandate that again violated A.R.S. §§ 15-111 - 112." This argument, however, is contrary to the district court's finding that "the State does not appear to argue [that] any and all culturally relevant courses will necessarily violate A.R.S. § 15-112." 1 E.R. 1436 at 16. In any event, it is well-settled that "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional

guarantees." *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45 (1971). To the extent that Arizona's argument rests upon the notion that the mere requirement that the District develop a multicultural curriculum violates State law, and that it has a legally protectable interest in overriding the federal court's order to this end, it is mistaken; its statutes must yield to the demands of the Fourteenth Amendment. See *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974) ("[N]o state law is above the Constitution[.] * * * [T]he present laws with respect to local control * * * are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies."); *Missouri* v. *Jenkins*, 495 U.S. 33, 55, 57-58 (1990) ("[W]here * * * a particular remedy is required, the State cannot hinder the process by preventing a local government from implementing that remedy.").

It is beyond dispute that the district court may consider the quality of education and academic achievement when evaluating progress toward unitary status. See *Freeman* v. *Pitts*, 503 U.S. 467, 482-484, 492 (1992) (in addressing the elements of a unitary system discussed in *Green*, a court may consider whether other elements ought to be identified, and "determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies to ensure full compliance with the court's decree"). In this case, the culturally relevant courses and other aspects of student engagement were put into

place in the USP in order to "improve the academic achievement and educational outcomes of [TUSD]'s African American and Latino students, using strategies aimed at closing the achievement gap and eliminating the racial and ethnic disparities for these students in academic achievement, dropout and retention rates, discipline, access to advanced learning experiences, and any other areas where disparities and potential for improvement exists." 1 E.R. 1436 at 12. As the district court found, various studies and research have found that "strengthening pride in one's race and ethnicity, particularly for disadvantaged groups, is related to positive intergroup attitudes as well as to academic achievement." 1 E.R. 1436 at 15. The district court thus concluded that "including culturally relevant courses in the USP" was "one way to improve student achievement." 1 E.R. 1436 at 16. And, indeed, the State itself "does not dispute the merits of culturally relevant courses to improve academic achievement for minority students." 1 E.R. 1436 at 15.

Moreover, as made clear in the district court's opinion denying the second motion for reconsideration of the motion for intervention, the multicultural curriculum will benefit *all* students in the district. The USP calls for the curriculum to "provide students with a range of opportunities to conduct research and improve critical thinking and learning skills, create a positive and inclusive climate in classes and schools that *builds respect and understanding among*

students from different racial and ethnic backgrounds, and promote and develop a sense of civic responsibility *among all students*." 1 E.R. 1436 at 12 (emphases added). Arizona's state law and Tenth Amendment sovereignty concerns therefore have no place within this suit. See *Milliken* v. *Bradley*, 433 U.S. 267, 291 (1977) ("The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment.").

Arizona also fails to meet another requirement courts have imposed for intervention in desegregation cases, which is an interest in the achievement of desegregation itself. While the State asserts in its brief that it has "an interest in ensuring that any remedies that purport to end desegregation do not in fact promote resegregation" (Arizona Br. 20), it provides no evidence that its position actually furthers desegregation. Cf. *United States* v. *Perry Cnty. Bd. of Educ.*, 567 F.2d 277, 279-280 (5th Cir. 1978) ("Nothing in [proposed intervenors'] brief or in their petition for intervention in the district court indicates that they are challenging the location of the school on the ground that it impedes establishment of a unitary school system. Instead, they oppose the location on various policy grounds, which, though important, are unrelated to desegregation and the establishment of a unitary school system."); *Valley* v. *Rapides Parish Sch. Bd.*, 646 F.2d 925, 941 (5th Cir. 1981) (noting that the court had "affirmed [a] district court's denial of intervention

on the ground that the movants were attempting to challenge elements of the plan," rather than expressing an interest in a desegregated school system).

In sum, Arizona's interest in this case – speculative, conclusory, and removed from any relationship to the goal of school desegregation embodied in the USP – cannot serve as a cognizable basis for intervention. Cf. *Alisal*, 370 F.3d at 920 ("Regardless of the phase of litigation at which an interest arises, that interest must be related to the underlying subject matter of the litigation. * * * Here, * * * [the applicant's] interest * * * in the prospective collectability of a debt * * * is several degrees removed from the overriding public health and environmental policies that are the backbone of this litigation.").

b. The Disposition Of This Matter Will Not Impede Arizona's Ability To Protect Its Interests

Arizona argues that by denying its motion for intervention, the district court "impaired [its] ability to ensure that the USP adequately complies with Arizona law and education policy." Arizona Br. 30. This argument is incorrect. Arizona has had and continues to have more than adequate opportunity to participate in this case and otherwise to achieve its goals. The State was granted *amicus curiae* status in the proceedings below to allow it to express its views regarding the inclusion of culturally relevant courses in the USP. 3 E.R. 1375 at 6. The State was contacted by the Special Master before the initial due date of the USP, and was invited to meet with him regarding its concerns. See 3 E.R. 1375 at 5 n.5

(noting that on May 22, 2012, the Special Master "contacted the State and invited it to meet with him regarding its concerns [and that he] was in Arizona from May 31 to June 1"). After the filing of the initial USP was delayed so that the parties could identify their areas of agreement and disagreement, the district court again indicated that the Special Master would remain available to meet with Arizona to discuss its concerns. S.E.R. 1380 at 3. And, indeed, on precisely the same timeline as the parties, Arizona ultimately submitted its USP objections to the district court, arguing that the USP's ethnic studies requirement "violates Arizona law," that the courses were "unnecessary," and that such relief was "unprecedented." 3 E.R. 1409 at 2-3. Arizona's claim that it "never got an opportunity to express itself" is therefore manifestly contrary to the record in this case. See 3 E.R. 1375 at 6 ("The robust opportunity afforded the State to be heard by the Special Master and by this Court cuts against intervention.").

Moreover, as the district court emphasized in denying the second motion for reconsideration, the State remains able to participate in the development of the culturally relevant courses by "monitor[ing] the[ir] development * * * and their implementation." 1 E.R. 1436 at 16. Before the courses are implemented, as the district court noted, they must "be approved through the District's normal curriculum review process, including approval by the TUSD Governing Board, and evaluated to ensure they align with state curriculum standards before being offered

in TUSD." 1 E.R. 1436 at 14. And, indeed, as set forth in the district court's order, implementation of the courses is not a one-step process: the USP calls for the culturally relevant courses to be implemented in high schools in 2013-2014; for the District to "pilot the expansion of courses * * * to sixth through eighth graders in the 2014-2015 school year," and to explore similar expansions throughout K-12 grade levels in 2015-2016. See 1 E.R. 1436 at 13. And, finally, within the confines of the Fourteenth Amendment principles discussed above, the State also remains free to "t[ake] action * * * if it believes any culturally relevant courses developed and implemented in TUSD violate state law." 1 E.R. 1436 at 16; cf. *Lockyer*, 450 F.3d at 442 ("Even if this lawsuit would *affect* the proposed intervenors' interests, their interests might not be *impaired* if they have 'other means' to protect them.") (citation omitted). Arizona thus has suffered no cognizable harms, and the district court did not abuse its discretion in so holding.

Furthermore, as noted above, the USP merely calls for a "multicultural curriculum" that can "provide students with a range of opportunities to conduct research and improve critical thinking and learning skills"; that can "create a positive and inclusive climate in classes and schools that builds respect and understanding among students from different racial and ethnic backgrounds"; and that will "promote and develop a sense of civic responsibility among all students." See 1 E.R. 1436 at 12 (citation omitted). Even if intervention were otherwise

appropriate, which it is not, the issue of course content was simply not ripe for resolution at the time the court ruled on the second motion for reconsideration. 1 E.R. 1436 at 17.

c. Arizona's Interests Were Adequately Represented By Existing Parties

In evaluating adequacy of representation, this Court examines three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." See *Arakaki* v. *Cayetano*, 324 F.3d 1078, 1086 (9th Cir.), cert. denied, 540 U.S. 1017 (2003).

The district court did not abuse its discretion in rejecting Arizona's argument that the District's withdrawal of its limited objections to the culturally relevant courses constituted a "significant change in circumstances," or in holding that the District had "adequately represented the State's interest in enforcing A.R.S. § 15-112." 1 E.R. 1436 at 11, 17. As the court noted, "[i]n the face of strong public support from members of its community for MAS courses, the Governing Board voluntarily terminated the MAS courses, subsequent to the decision by the State that they violated state law. The District chose to comply with directives from the State rather than the Post Unitary Status Plan, a federal court order." 1 E.R. 1436

at 17; cf. *Cayetano*, 324 F.3d at 1086 ("When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises."). Moreover, as the court emphasized, "[t]he State's ability to withhold 10% of state funding from TUSD is a powerful weapon at the State's disposal to ensure that TUSD complies with state law." 1 E.R. 1436 at 17. Despite the election of several new board members, TUSD has not reversed its previous decision to stop the MAS courses and has given no indication that it intends to readopt the now defunct MAS program. In sum, both the State and TUSD share an interest in ensuring that any culturally relevant courses do not violate Arizona state law.

In these circumstances, the district court did not abuse its considerable discretion in denying Arizona's second motion for reconsideration of the denial of its motion to intervene as of right.

C. The District Court Did Not Abuse Its Discretion In Denying Arizona's Second Motion To Reconsider The Denial Of Its Motion For Permissive Intervention

For similar reasons, the district court acted well within its discretion in denying the State's second motion for reconsideration of the denial of its motion for permissive intervention.

1. Standards For Permissive Intervention

"An applicant who seeks permissive intervention must prove that it meets three threshold requirements: (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims." *Donnelly* v. *Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). Yet "[e]ven if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." *Ibid*.; see also *County of Orange* v. *Air Cal.*, 799 F.2d 535, 539 (9th Cir. 1986) ("Permissive intervention is committed to the broad discretion of the district court."), cert. denied, 480 U.S. 946 (1987). "In exercising its discretion, the district court must consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties." *Donnelly*, 159 F.3d at 412.

2. In Rejecting Arizona's Second Motion For Reconsideration Of The Denial Of Intervention, The District Court Correctly Concluded That The State Had Failed To Satisfy All Of The Requirements For Permissive Intervention

The district court did not abuse its discretion in denying Arizona's second motion for reconsideration of the denial of permissive intervention. In rejecting that motion, the court reiterated its prior finding that "intervention by the State in this one issue w[ould] unduly delay and prejudice the adjudication of the rights of the existing parties," who, the court noted, "have waited over 30 years for the formulation of a comprehensive plan to eliminate * * * the vestiges of the

segregation." 1 E.R. 1436 at 18 (quoting 3 E.R. 1375 at 6). And, as the court held in its order denying the State's original motion for intervention, intervention was both "untimely and unnecessary given the mechanisms afforded the State to comment and provide input regarding this single issue of concern to it." 3 E.R. 1375 at 6. These findings took into account the requirements set forth in this Court's precedents. See *Donnelly*, 159 F.3d at 412. Indeed, timeliness is an even stricter element for permissive intervention than for intervention as of right. See *LULAC*, 131 F.3d at 1302, 1308 (timeliness is a threshold requirement for both intervention as of right and permissive intervention, but that "[i]n the context of permissive intervention, however, we analyze the timeliness element more strictly than we do with intervention as of right"). Moreover, as discussed above, this action involves the desegregation of TUSD; Arizona's only asserted interest is in the narrow question of TUSD's multicultural curriculum, and it has expressed no interest in the larger questions of desegregation of the district. In these circumstances, the district court's denial of the State's second motion for reconsideration of the denial of permissive intervention was well within the court's discretion.[7]

[7] Arizona also argues that the district court "abused its discretion when it unconstitutionally exceeded its authority by requiring TUSD to offer special classes for two specific ethnic groups." Arizona Br. 41. Arizona, however, is not a party to this case. The only matter properly before this Court is the question

(continued…)

CONCLUSION

This Court should affirm the district court's order denying Arizona's second motion for reconsideration of its motion for intervention as of right and permissive intervention.

Respectfully submitted,

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(…continued)
whether the district court abused its discretion in denying Arizona's second motion for reconsideration of its motion for intervention as of right or permissive intervention. Cf. *United States* v. *Georgia*, 19 F.3d 1388, 1393 (11th Cir. 1994) ("[T]he merit of the appellants' contentions that the school district has achieved unitary status and that consolidation would result in resegregation are not properly before us. The only issue before us is a narrow one: whether the appellants were entitled to intervene in the case as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2)."). In any event, the State's assertion is factually wrong. The USP doesn't require creation of classes "for" two specific groups; rather, they are classes for everyone, intended to "build[] respect and understanding among students from different racial and ethnic backgrounds, and promote and develop a sense of civic responsibility among all students." 1 E.R. 1436 at 12.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I hereby certify that there are no related cases.

s/ Holly A. Thomas
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the 14,000 word limit set forth in Ninth Circuit Rule 32(a)(7)(B)(i). The brief was prepared using Microsoft Office Word 2007 and contains 8841 words of proportionally spaced text. The typeface is Times New Roman, 14-point font.

s/ Holly A. Thomas
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Date: November 13, 2013

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2013, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS PLAINTIFF-INTERVENOR-APPELLEE with the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. All participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

On the same date I mailed one copy of the foregoing document by Certified Mail on the following, who is not a registered CM/ECF user:

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