NO. 18-16926

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TUCSON UNIFIED SCHOOL DISTRICT,
Defendant – Appellant,

vs.

UNITED STATES OF AMERICA,
Plaintiff – Intervenor –Appellee,

ROY FISHER, et al.,
Plaintiffs – Appellees - Cross-Appellants,

and

MARIA MENDOZA, et al.,
Plaintiffs – Appellees - Cross-Appellants.

Appeal from the U.S. District Court for Arizona at Tucson
D. C. Nos. 74-cv-00090-DCB

MENDOZA PLAINTIFFS' MOTION TO DISMISS DEFENDANT TUCSON UNIFIED SCHOOL DISTRICT, NO. ONE'S APPEAL

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INTRODUCTION

Defendant Tucson Unified School District, No. One ("TUSD" or the "District") appeals from the district court's September 6, 2018 order finding that it achieved partial unitary status (Doc. 2123) ("Sept. 6 Order") (Rodriguez Decl. ¶3, Exhibit A) under the governing school desegregation consent decree, the Unitary Status Plan ("USP") (Doc. 1450), because the court "refused to declare the school district unitary and terminate court supervision." TUSD describes the main issue on appeal as whether it "has met the requirements" for unitary status. TUSD Mediation Questionnaire (Dkt. 2-1) ("TUSD MQ") (Rodriguez Decl. ¶4, Exhibit B). [1]

Insofar as TUSD appeals the district court's "refus[al] to declare the school district unitary," this Court lacks jurisdiction under *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) and controlling precedent from this Court. Simply put, the Sept. 6 Order contained no adverse finding to support the Unitary Status Appeal because it did not deny TUSD any pending request for full unitary status. Further, the Sept. 6 Order does not cause TUSD "severe, perhaps irreparable

[1] The Mendoza Plaintiffs refer to this component of TUSD's appeal as the "TUSD Unitary Status Appeal." They address the component of TUSD's appeal concerning what it says are the Sept. 6 Order's "new and additional tasks, requirements, and orders" (*see* TUSD MQ) in Section "V" below.

consequence" that can be resolved "only by immediate appeal" because TUSD remains free to move the district court for full unitary status. TUSD also has failed to demonstrate that this Court has jurisdiction over an appeal from what TUSD describes as the Order's "new" "requirements." Accordingly, this aspect of TUSD's appeal also fails to fall within the narrow limits of the jurisdiction conferred by 28 U.S.C. § 1292(a)(1) and should be dismissed.

PROCEDURAL BACKGROUND

On March 20, 2017, TUSD filed in district court its Motion for Partial Unitary Status, Doc. 2005, under the governing desegregation consent decree, the USP, Doc. 1713. On May 17, 2017, the district court denied TUSD's motion as moot based on its finding that a decision "would be an ineffective use of Court resources so close in time to when the question regarding attainment of unitary status in total is scheduled to commence"[2] and also ordered that the Special Master file a report concerning TUSD's "status for attainment of unitary status."[3] May 17, 2017 Order, Doc. 2023, at 2:24-28, 3:12-15; *see generally* May 25, 2017 Order, Doc. 2025 (clarifying May 17, 2017 Order); July 19, 2017 Order, Doc. 2037

[2] Under the USP, a "motion for the determination of complete unitary status shall not be filed prior to the end of the 2016-2017 school year." USP, Doc. 1713, at 61.

[3] The time within which to timely appeal the May 17, 2017 decision lapsed long before commencement of this appeal.

(same). In its subsequent May 25, 2017 Order, the district court addressed party disagreement concerning the import of its May 17 Order as follows: "It seemed to go without saying that TUSD, which bears the burden of showing it has attained unitary status, must move this Court to end its oversight of the USP." Doc. 2025 at 2:12-15 (Rodriguez Decl. ¶5, Exhibit C). TUSD did not subsequently move the district court for a finding that it had achieved unitary status.

On June 15, 2017, the Special Master filed his report and recommendation concerning TUSD's status for attaining unitary status (Doc. 2026). On Sept. 6, 2018, the district court awarded TUSD unitary status as to some areas of the USP. Sept. 6 Order (Rodriguez Decl. ¶3, Exhibit A) at 149:10-152:17. This appeal followed.

ARGUMENT

I. 28 U.S.C. § 1292(a)(1) is Narrowly Construed.

28 U.S.C. § 1292(a)(1) creates an exception to the general principle that only *final* district court orders are appealable. The Supreme Court provided instruction concerning the scope of 28 U.S.C. §1292(a)(1) in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), when it wrote: "[b]ecause §1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly… ." *See also Thompson v. Enomoto*, 815 F.2d 1323 (9th Cir. 1987) (concerning the application of *Carson*, "the congressional policy against

piecemeal appeals is best served by deferring review"). "Doubts as to the applicability of section 1292(a)(1) are to be resolved against immediate appealability." *Morales Feliciano v. Rullan*, 303 F.3d 1 (1st Cir. 2002).

II. The TUSD Unitary Status Appeal is Subject to the *Carson* Test Because it Concerns a Modification to the Governing Consent Decree, the USP.

Under 28 U.S.C. § 1292(a)(1), orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court" are appealable. 28 USC § 1292(a)(1). "[W]hen an interlocutory order of a district court does not expressly rule on a specific request for injunctive relief… the case must meet the requirements set forth in *Carson v. American Brands, Inc.*, 450 U.S. 79… (1981)." *Constr. Laborers Pension Tr. V. Cen-Vi-Ro Concrete Pipe & Prod. Co.*, 776 F.2d 1416, 14-21-22 (9th Cir. 1985); *see also Salazar v. District of Columbia*, 671 F.3d 1258, 1261 (D.C. Cir. 2012). This Court has "clearly recognized that orders modifying consent decrees should be reviewed under *Carson*." *U.S. v. El Dorado Cty., Cal.*, 704 F.3d 1261, 1264 (9th Cir. 2013); *see also Carson*, 450 U.S. at 73-74.

Because what TUSD describes as its challenge to the "district court refus[al] to declare the school district unitary and terminate court supervision..." under the

USP (*see* TUSD MQ) concerns modification (indeed, would be dissolution) of that consent decree, the TUSD Unitary Status Appeal must satisfy the *Carson* requirements.

III. This Court Lacks Jurisdiction to Hear the TUSD Unitary Status Appeal Because TUSD Cannot Meet the *Carson* Test as the Sept. 6 Order Did Not Deny TUSD Any Request for Unitary Status, and TUSD Remains Free to Make Such a Request in the District Court.

This Court has jurisdiction to consider the TUSD Unitary Status Appeal under the narrow limits of Section 1292(a)(1) only if it meets each requirement of the *Carson* test*:* the Sept. 6 Order (1) has the "practical effect" of "granting or denying" or modifying injunctive relief, (2) it would cause TUSD "serious, perhaps irreparable consequence," and (3) it can be effectively changed only by immediate appeal. *Salazar*, 671 F.3d at 1261 (*citing Carson,* 450 U.S. at 84); *El Dorado Cty., Cal.*, 704 F.3d at 1264 (orders modifying consent decrees are equally subject to the *Carson* test as are orders denying them).

TUSD's Unitary Status Appeal cannot meet any prong of the *Carson* test because the Sept. 6 Order does not "deny" or "modify" injunctive relief in a manner adverse to TUSD. Further, TUSD remains free to move for full unitary status in the district court and attempt to demonstrate to the satisfaction of that court that it should be found to have achieved unitary status. Therefore the Sept. 6.

Order does not have any "serious, perhaps irreparable consequence." Finally, the Sept. 6 Order's lack of finding of unitary status for some areas of the USP can be "effectively changed" by means other than an immediate appeal; specifically, the district court can address any actual TUSD request for full unitary status if and when the District makes such a request in that court.

A. The TUSD Unitary Status Appeal Fails the First *Carson* Requirement Because the Sept. 6 Order Did Not Deny TUSD Any Request for Unitary Status and, as to Unitary Status, Modified the USP in TUSD's Favor

The TUSD Unitary Status Appeal fails the first inquiry of the *Carson* test requiring that the Sept. 6 Order have the "practical effect" of denying or modifying an injunction because that Order modified the USP in TUSD's favor through a finding of partial unitary status and TUSD had no pending request for a finding of either partial or total unitary status under the USP that the Court could "deny".

First, the Supreme Court and this Court each has made clear that an appellant fails to demonstrate the "denial" of injunctive relief under the first prong of the *Carson* test where its appeal was not preceded by the appellant's request for such relief.

In the Supreme Court case of *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1976), the petitioner challenged a district court order granting respondents'

request for partial summary judgment concerning the issue of liability (and in which the relief respondents prayed for, including injunctive relief, was not addressed). The Supreme Court held that, even if the district court order had refused an injunction within the meaning of Section 1292(a)(1), such an order "would have allowed *respondents* to then obtain review… there was no denial of any injunction sought by the Petitioner and it could not avail itself of that grant of jurisdiction." *Liberty Mut.*, 424 U.S. at 744-45 (emphasis in original). Similarly, in *E.E.O.C. v. Pan Am. World Airways, Inc.*, 796 F.2d 314 (9th Cir 1986), this Court held that it lacked jurisdiction to hear appellant Pan Am's appeal under Section 1292(a)(1) because it was the appellee, and not Pan Am, that had sought the injunctive relief that was rejected in and the subject of the challenged district court order. *Pan Am*, 796 F.2d at 316-17.

Similar to the *Liberty Mutual* and *Pan Am* appeals in which the appellants made no requests to the district court for injunctive relief, TUSD had no pending request to dissolve (or modify) injunctive relief (a request for a finding of full unitary status) in the district court at the time the Sept. 6 Order was issued. The Sept. 6 Order therefore did not deny TUSD any request for dissolution or modification of injunctive relief. Indeed, the argument for Section 1292(a)(1) jurisdiction in this case is even weaker than that in *Liberty Mutual* and *Pan Am*

because in this case, no party had any pending request relating to unitary status at the time the Sept. 6 Order was issued; no party was "denied" requested relief.

Further, while the Sept. 6 Order had the "practical effect" of modifying an injunction under *Carson*, *El Dorado County Cal.*, 704 F.3d at 1263, TUSD lacks standing for the TUSD Unitary Status Appeal because those modifications, the attainment of unitary status as to several areas of the USP, all are favorable to the District. Indeed, "[i]t is a central tenet of appellate jurisdiction that a party who is not aggrieved by a judgment of the district court has no standing to appeal it." *See U.S. v. Fletcher ex rel. Fletcher*, 805 F.3d 596, 601-02 (5th Cir. 2015) (finding class of intervenor students attending school district under desegregation order lacked standing to challenge order denying the school district unitary status); *APL Co. Pte. Ltd. v. UK Aerosols Ltd.*, 540 F. App'x 692 (9th Cir. 2013) (("To have standing to appeal, a party must be aggrieved by the district court's order.") (*quoting Bryant v. Tech Research Co.*, 654 F.2d 1337, 1343 (9th Cir. 1981).

B. The Sept. 6 Order Does Not Cause TUSD "Serious, Perhaps Irreparable Harm" Under *Carson* Because TUSD is Free to Move the District Court for a Finding of Full Unitary Status

TUSD further cannot meet the *Carson* test's second prong requiring "serious, perhaps irreparable consequence" because there is nothing preventing TUSD from moving the district court for a finding that it has achieved full unitary

status and should be relieved from Court oversight. *See Carson*, 450 U.S. at 84; *see also El Dorado Cty., Cal.*, 704 F.3d at 1264 (applying *Carson* and holding that potential injuries in terms of money, time and energy that the government might expend before it had an opportunity to challenge order on appeal did not qualify as serious or irreparable harm). Plainly, if this Court were to dismiss the TUSD Unitary Status Appeal, TUSD would not suffer "serious, perhaps irreparable, consequence" by continuing to be subject to the terms of the consent decree, the USP to which it agreed, pending filing and determination of a proper motion for an order awarding it full unitary status.

C. The TUSD Unitary Status Appeal Fails to Meet *Carson*'s Third Requirement Because the Sept. 6 Order's Purported "Refusal" to Grant TUSD Full Unitary Status Can Be Changed By a Proper Motion and Showing to the District Court that TUSD has in Good Faith Eliminated the Vestiges of Past Racial Discrimination to the Extent Practicable.

For the same reason, the District also cannot demonstrate that it has met the third prong of the *Carson* test requiring that the only way to effectively change the challenged order be by immediate appeal. The absence of a finding that TUSD has achieved unitary status as to certain areas of the USP as reflected in the Sept. 6 Order can be changed by motion and a proper showing that TUSD has in good faith eliminated the vestiges of past racial discrimination to the extent practicable.

While Mendoza Plaintiffs contest the TUSD's ability to make such a showing, the District remains free to seek such relief from the district court. TUSD therefore also cannot demonstrate that it has met the third prong of the *Carson* test.

For the reasons stated above, the Mendoza Plaintiffs respectfully request that this Court dismiss TUSD's appeal insofar as it seeks to challenge the failure of the lower court to have awarded full unitary status and ended court oversight of the school district.

IV. Providing the District Court the Opportunity to Review the Merits of a Request for a Finding of Full Unitary Status in the First Instance Would Further the Interests of Comity and Judicial Economy

This Court should not allow TUSD to bypass the district court by seeking, on appeal a finding that it has achieved full unitary status because doing so would conflict with basic notions of comity and judicial economy. *See Bridgeport Guardians, Inc. v. Delmonte*, 537 F.3d 214, 220–21 (2d Cir. 2008) (lack of jurisdiction under 28 U.S.C. § 1292(a)(1) because the "Court cannot review [the issue until]… the district court… has had an opportunity to rule on th[e]" matter… "in an appealable order that is then brought before us."); *Watchtower Bible & Tract Soc. of New York, Inc. v. Colombani*, 712 F.3d 6, 11 (1st Cir. 2013) (the "'filing of a notice of appeal is an event of jurisdictional significance—it confers

jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal…" 'Allowing more than one court to take charge of a case at any given moment often disserves the interests of comity and judicial economy."). Depriving the district court, with its knowledge of the USP gained through years of oversight, of the opportunity to rule in the first instance on a request for full unity status would be disrespectful to the court and inefficient as a matter of court process.

V. TUSD Has Not Demonstrated that this Court has Jurisdiction to Hear Its "New" "Requirements"Argument.

Beyond the District's purported challenge to the "denial" of full unitary status, the TUSD MQ makes reference to its challenge of the district court's setting of "a wide range of new and additional tasks, requirements, and orders." TUSD MQ (Rodriguez Decl. ¶4, Exhibit B). There is no indication of what these "new" requirements are, or that they qualify as an injunction subject to immediate appeal.[4] The Sept. 6 Order simply sets out a process to resolve the remaining USP areas with respect to which the court did not find that TUSD had achieved unitary status. These process issues do not support an independent appeal. This Court should

[4] Mendoza Plaintiffs reserve their right to further contest this Court's jurisdiction over this portion of the appeal once the nature and scope of that portion of the appeal is clarified by TUSD.

require TUSD to demonstrate that it has jurisdiction to hear this aspect of its appeal, and should dismiss the TUSD appeal in its entirety if TUSD fails to do so.

VI. This Court Should Construe Mendoza Plaintiffs' Appeal as Independent From the TUSD Appeal

In an abundance of caution, Mendoza Plaintiffs note that if this Court grants their motion to dismiss TUSD's appeal, their own appeal (Case No. 18-16982) of the Sept. 6 Order's finding that TUSD has achieved partial unitary status would not be resolved. They therefore request that, to the extent this Court is inclined to grant this motion, it construe Mendoza Plaintiffs' appeal as an appeal independent from the TUSD appeal.

A cross-appeal can be construed as independent from an initiating appeal that is dismissed (and thereby avoid dismissal itself) where that cross-appeal was filed within the 30-day deadline for appealing an order under FRAP 4(a)(1)(A). *See Stephanie-Cardona LLC v. Smith's Food and Drug Centers, Inc.*, 476 F.3d 701, 705 (2007) (dismissing cross-appeal where cross-appeal not filed within 30 days of challenged order); *Ulin v. Lovell's Antique Gallery*, 528 Fed.Apx. 748 (9th Cir. 2013) (unpublished) ("Because the notice of cross-appeal was filed within thirty days of the district court's order…, we construe the notice of cross-appeal as a timely notice of appeal…").

Mendoza Plaintiffs' October 5, 2018 notice of cross-appeal (Doc. 2141) was filed within 30 days of the Court's Sept. 6 Order. The cross-appeal can therefore be construed as an appeal independent from TUSD's appeal in the event the Court finds that it lacks jurisdiction to hear TUSD's appeal.[5]

CONCLUSION

For the reasons set forth above, the Mendoza Plaintiffs respectfully request that this Court dismiss TUSD's appeal to the extent it challenges the Sept. 6 Order's failure to award the District full unitary status and end court oversight. Moreover, there are no substantive "new" "requirements" in the challenged order that trigger or support an independent appeal. Mendoza Plaintiffs further respectfully request that their cross-appeal be construed as an appeal independent from the TUSD appeal.

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[5] In this regard, Mendoza Plaintiffs note that as representatives of a class of Mexican American children attending TUSD schools, they were aggrieved by the Sept. 6 Order to the extent that it awarded TUSD partial unitary status as to several areas of the USP. *See Fletcher*, 805 F.3d at 601-02.

Dated: January 22, 2019

Juan Rodriguez
MALDEF

By: /s/ Juan Rodriguez
Juan Rodriguez

Lois D. Thompson
Proskauer Rose LLP

By: /s/ Lois D. Thompson
Lois D. Thompson

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, I caused to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit a true and correct copy of Mendoza Plaintiffs' Motion to Dismiss Defendant Tucson Unified School District, No. One's Appeal by 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. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that all participants in the case were registered for CM/ECF use.

Dated: January 22, 2019

By: /s/ Mariana Esquer
Mariana Esquer