



October 15, 2019

William Kirwan, Chair
Kirwan Commission on Innovation and Excellence in Education
The Blueprint for Maryland's Future Funding Formula Workgroup
Maryland Department of Legislative Services
90 State Circle
Annapolis, MD 21401

Re: *Bradford v. Maryland State Board of Education*

Dear Members of the Commission:

On behalf of the Plaintiff class in *Bradford v. Maryland State Board of Education*, we write to apprise the Kirwan Commission of the proceedings in the case, as well as to urge the Commission to allocate adequate funding to the Baltimore City Public School System (BCPSS), as required by Article VIII, Section 1 of the Maryland Constitution. As discussed below, and in the attachments, the State's failure to direct adequate funding to BCPSS violates the Consent Decree in the case, as well as multiple decisions from the Court. More fundamentally, it represents a constitutional violation that is continuing to harm generations of children in Baltimore City – a district in which the majority of students are African-American and the majority live in poverty or have other special needs putting them “at risk” of educational failure – by depriving them of the adequate education guaranteed by Maryland's Constitution.

A. Article VIII of the Maryland Constitution Requires the State to Ensure Students Receive an Adequate Education.

Article VIII of the Maryland Constitution requires the State to provide Maryland's children with an education that is “adequate when measured by contemporary educational standards.”¹ When the State “‘fails to make provision for an adequate education,’ or the State's school financing system ‘[does] not provide all school districts with the means essential to provide the basic

¹ *Hornbeck v. Somerset Cty. Bd. of Educ.*, 295 Md. 597, 615 (1983); *Montgomery Cty. v. Bradford*, 345 Md. 175, 189 (1997).

education contemplated by §1 of Article VIII, when measured by contemporary educational standards,’ a constitutional violation may be evident.”² The State’s constitutional responsibility to all Maryland children includes not only the duty to ensure that schools have sufficient operational funding for instruction, but also adequate physical facilities, so that students may receive a “thorough and efficient” education. In fact, the State establishes exacting standards for such facilities.³

B. The Court in *Bradford* Found that the State Had Failed to Provide Students in BCPSS an Adequate Education.

For approximately two decades, the State has been under a court order finding that adequate funding of Baltimore City schools is required so that students may receive a constitutionally adequate education. In 1994, the *Bradford* class and the City plaintiffs (the Board of School Commissioners of Baltimore City, the Mayor and City Council of Baltimore City, and the City Superintendent) filed two separate suits in the Circuit Court for Baltimore City, both alleging that the State was failing to provide the students of Baltimore City with the “thorough and efficient” education that Article VIII of Maryland’s Constitution requires.

On October 18, 1996, based on an extensive and essentially undisputed factual record, the Court entered partial summary judgment for the Plaintiffs, finding that Baltimore City schoolchildren were not receiving the “thorough and efficient” education guaranteed by the Maryland Constitution. Among other things, evidence showed that Baltimore City schools performed abysmally on the State’s own “MSPAP” tests for reading, writing, geometry, and mathematics; dropout rates and absenteeism were unacceptably high; the State had designated over a fifth of the schools in the system as “reconstitution-eligible,” meaning their performance was so deficient that the State could take over if the schools they did not improve; and a substantial proportion of the system’s physical facilities were in poor condition.⁴ The Court also received evidence that almost 70 percent of students in Baltimore City experienced poverty or otherwise faced the risk of educational failure, accounting for almost one-third of all such students in the

² *Bradford*, 345 Md. at 181.

³ *E.g.*, COMAR 13A.01.02.04; COMAR 23.03.02.01, *et seq.*

⁴ Attachment 3, Plaintiffs’ Opposition to Defendant’s Motion to Dismiss, at 6.

entire State.⁵ Due to these failures, shortly before the trial was to begin in November 1996, the parties entered into the Consent Decree, agreeing to “provide a meaningful and timely remedy . . . to meet the best interests of the school children of Baltimore City.”⁶

In 2000, the Court heard undisputed evidence that, although student test scores in the BCPSS were improving with the additional funds provided by the Decree, BCPSS still fell woefully short of providing the education necessary to enable students to come close to meeting the State’s own standards of performance.⁷ The Court, in response, declared that the funds provided by the State as reflected in the FY 2001 budget, “f[e]ll far short . . . and [would] not enable the . . . Board . . . to provide the City’s schoolchildren with a Constitutionally Adequate Education when measured by Contemporary Educational Standards during Fiscal Years 2001 and 2002.”⁸ Accordingly, it declared that the State must provide additional funding to BCPSS in order to comply with constitutional requirements.⁹

In response, the State passed the Bridge to Excellence Act (the “Thornton” Commission formula), which provided additional funding to be phased in over six years and also required annual increases in funding to keep pace with inflation.¹⁰ In 2004, the Court again ordered the State to continue phasing in the funding mandated by the “Thornton” formula.¹¹ However, the

⁵ *Id.* at 7.

⁶ *Id.*

⁷ *Id.* at 11.

⁸ *Id.* at 12.

⁹ *Id.*

¹⁰ Attachment 1, Letter from NAACP Legal Defense Fund, *et al.*, to Governor Lawrence Hogan, Governor of Maryland, January 22, 2019, at 3.

¹¹ *Id.* at 3-4.

State halted or capped the inflation increases over a decade ago,¹² creating an “adequacy gap” in BCPSS educational funding that the State estimated to be, as of 2017, at least \$342 million a year.¹³

C. These Problems Persist Today.

Unsurprisingly, based on the record of persistent underfunding, many of the problems identified in 1996 continue today. The State’s own official measure of school performance confirms that BCPSS schools fail to meet state standards in numerous categories, and the seriously deficient physical conditions of BCPSS schools also deprive Baltimore City schoolchildren from learning in an adequate educational environment.

In 2017, the General Assembly passed legislation, the Protect Our Schools Act of 2017 (HB 978), refining the factors and calculations that the Maryland State Board of Education uses to assess schools statewide, assigning them star ratings—from one to five stars—and percentile rankings based on performance.¹⁴ All schools in the State are assigned a star rating based on the possible percentage of points achieved after an assessment of, among other things, standardized test scores, graduation rates, and the chronic absenteeism rate.¹⁵

BCPSS has 23 schools that received only one star, almost twice the number of one-star schools in all other Maryland school districts combined.¹⁶ Only 3 percent of schools statewide received the lowest rating, and 66 percent of these schools (23 of 35) are in BCPSS.¹⁷ Although

¹² *Id.* at 4.

¹³ Attachment 3, Plaintiffs’ Opposition to Defendant’s Motion to Dismiss, at 23-24 (citing Dep’t of Legis. Servs., *Follow-up from July 24*, Meeting, Aug. 1, 2019, at 2).

¹⁴ See Md. Laws 2017, ch. 29; Danielle E. Gaines, *With New Report Card, State Schools Receive A Star Rating*, Maryland Matters (Dec. 5, 2018), available at <https://www.marylandmatters.org/2018/12/05/with-new-report-card-every-state-school-receives-a-star-rating/>.

¹⁵ *Id.*

¹⁶ See <http://reportcard.msde.maryland.gov/>.

¹⁷ *Id.*

three and four-star ratings were by far the most common statewide, only 39 percent of BCPSS schools received those ratings, compared to 74 percent of schools in the rest of the State.¹⁸ BCPSS is the only school district in which the largest number of schools received two stars.¹⁹ Altogether, almost 60 percent of BCPSS schools received only one or two stars (99 of 166 schools)—not only the largest percentage in the State, but more than *eight times* the percentage for the rest of the State, where less than 7 percent of all schools received only one or two stars (80 out of 1150 total schools outside of Baltimore City).²⁰ Conversely, only three BCPSS schools received five stars.²¹ Baltimore County has 36 such schools; Howard County has 31 such schools; and, in Montgomery County, 50 schools were awarded five stars.²² Other evidence of the deficiencies abounds as well, as detailed in the submissions the *Bradford* plaintiffs have made to the Court.

The injuries are not limited to the quality of education provided. Over the last 12 years, the condition of facilities in BCPSS, which were already inadequate, has continued to deteriorate and remains inadequate today.²³ According to a BCPSS survey, as of 2012, 85 percent of the system’s buildings were rated as being in “poor” or “very poor” condition, and estimates of amounts necessary to address the deficiencies range up to \$4 billion and higher.²⁴ These problems remain a present problem.

Given the State’s continued failure to adequately invest in BCPSS schools as the Constitution requires, in March 2019, the NAACP Legal Defense Fund, the ACLU of Maryland, and the law firm of Baker Hostetler, on behalf of the Plaintiffs, filed a petition for further relief in the case. Specifically, Plaintiffs seek an order finding that the State has violated the Court’s previous decisions, as a result of the failures identified above, and directing the State to provide

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Attachment 2, Plaintiffs’ Petition for Further Relief, at 41-59.

²⁴ *Id.* at 42.



BCPSS with the funding necessary for students to receive the adequate education guaranteed them by Maryland's Constitution.

Respectfully, we submit that the Kirwan Commission should focus on addressing the State's broken promises to Baltimore children by ensuring any formula it adopts addresses the long-standing adequacy and equity issues that have injured generations of Black and Brown students in the District. Unless the Kirwan Commission sufficiently addresses this failure, it could subject the State to continued and future liability.

D. The Kirwan Commission Should Address These Problems.

We appreciate that the Commission's Formula Workgroup has committed to addressing disparities by reshaping educational services, focusing on early learning, and accounting for inflation in funding projections. However, we remain deeply concerned, based on publicly available information about the Commission's work, that the changes proposed may be insufficient to address the level of systemic underfunding that exists. Any formula that the Commission adopts should close the massive "adequacy gap" facing Baltimore City schools and provide funding in amounts sufficient to meet, and appropriately directed to meeting, the panoply of educational needs of the student population attending Baltimore City schools. The *Bradford* Plaintiffs will continue to work with the Commission and the Formula Workgroup to comment on proposals in the context of the litigation. In the short term, we suggest that the Workgroup should consider changes in the following areas:

- Ensure that sufficient state funding is available for jurisdictions like Baltimore City with less wealth and large populations of students with greater needs. One way to start addressing this issue – although there are others – is to eliminate the requirement in the current proposed formula that the state provide a uniform floor of minimum funding to wealthy jurisdictions. This would free up funding for less-wealthy jurisdictions with greater needs.
- Ensure that adequate funding is provided to systems that have historically been underfunded and whose student populations have experienced discrimination. One way to start addressing this need is for the Commission to apply the Kirwan Commission Interim Report's "Workgroup 4" recommendations to "weighted categories," and not the base formula. Additionally, the Commission could require well-resourced localities to increase their local contribution, where appropriate and feasible.



- Ensure generally that funding is available for sufficient services for Compensatory Aid and English Language Learners (ELL), particularly in jurisdictions with less local resources. One way to begin addressing this issue is for the Workgroup to include and direct services in the current base and the current weighted categories for English Language Learners (ELL) so they are directed to the jurisdictions with the greatest needs; and
- Begin to address the facilities deficiencies facing some of the less-wealthy jurisdictions by including sufficient funding in the operational formula to cover the elevated facilities maintenance costs for jurisdictions with older buildings without requiring those jurisdictions to use funding that would otherwise go to educational programs.

E. Conclusion

Attached to this correspondence is a letter sent to the State last January by the *Bradford* Plaintiffs, warning of its failure to comply with the Court's rulings in *Bradford* (Attachment 1), Plaintiffs' Petition for Further Relief (Attachment 2), and Plaintiffs' Opposition to the Defendant's Motion to Dismiss (Attachment 3). If we can provide further information regarding the *Bradford* litigation or the conditions in BCPSS, please do not hesitate to contact us at the information below.

Sincerely,

Ajmel Quereshi
Senior Counsel
NAACP Legal Defense Fund
700 14th Street, NW
Washington, DC 20005
Phone: (202) 216-5574
Email: aquereshi@naacpldf.org

Cara McClellan
Assistant Counsel
NAACP Legal Defense Fund
40 Rector Street, 5th floor
New York, NY 10006
Phone: (212) 965-2200
Email: cmclellan@naacpldf.org



Deborah Jeon
Legal Director
American Civil Liberties Union of Maryland
3600 Clipper Mill Road, Suite 250
Baltimore, MD 21211
Phone: (410) 889-8550
Email: jeon@aclu-md.org

Elizabeth B. McCallum
Partner
BakerHostetler LLP
1050 Connecticut Ave., Suite 1050
Washington, DC 20005
Phone: (202) 861-1522
Email: emccallum@bakerlaw.com



January 22, 2019

The Honorable Larry Hogan
Governor of Maryland
100 State Circle
Annapolis, MD 21401

Dear Governor Hogan:

We represent a class of parents of students attending public schools in Baltimore City in *Bradford v. Maryland State Board of Education*, a case pending in the Circuit Court for Baltimore City. As you may know, the Circuit Court in *Bradford* has found that the State is in violation of its duty under Article VIII of the Maryland Constitution to provide a “thorough and efficient” public school education to Baltimore City students because, among other things, the State has failed to provide sufficient funding for an adequate education.¹ The Court has repeatedly found that the State must ensure that sufficient funding is available to comply with the constitutional standard.² However, the State has been in violation of that order throughout the last decade. According to the State’s own estimate for FY2015, the “adequacy gap” to be addressed for the Baltimore City public schools (“BCPSS”) to have constitutionally-sufficient funding is at least \$290 million annually.³ The *Bradford* Court has determined it will retain jurisdiction until adequacy is achieved.⁴

We write now to address two recent events related to the State’s obligation to comply with *Bradford*. First, as you know, the “Kirwan” Commission – the State Commission tasked with revising the state’s formula for funding education – has been working to assess statewide needs for educational funding, including recommending changes to the current school funding formula necessary to ensure that all districts have sufficient funds to provide the adequate education required by Article VIII of the Maryland Constitution. Studies before the Kirwan Commission found that BCPSS needs approximately \$358 million in additional funding annually to provide

¹ *Bradford v. Maryland State Dep’t of Education*, No. 94340058/CE189672 (Md. Cir. Ct. Baltimore City), Order, Oct. 18, 1996.

² *Id.*, Mem. Op., June 30, 2000, at 24-25; *id.* Mem. Op., Aug. 20, 2004, at 57-58.

³ Dep’t of Legislative Services, Office of Policy Analysis, *Adequacy of Education Funding in Maryland*, Dec. 8, 2016, at 7.

⁴ *Bradford v. Maryland State Dep’t of Education*, No. 94340058/CE189672 (Md. Cir. Ct. Baltimore City), Order, June 25, 2002; *id.* Mem. Op., June 25, 2002, at 5; *id.* Mem. Op., Aug. 20, 2004, at 57-58; *id.* Order, Aug 20, 2004, at 1-2.

students a constitutionally adequate education.⁵ However, in December, state legislators recommended that the Kirwan Commission’s final findings, and state action to address those findings, be delayed until at least next year and quite possibly further, all while the constitutional violation continues.⁶

Second, you recently announced that your Administration will propose legislation providing approximately \$3.5 billion towards school facilities construction over the next ten years.⁷ Although we support providing additional funds for school facilities, we urge you to recognize that any funding proposal should address issues faced by the students and districts with the greatest need. Moreover, any funding proposal must satisfy *Bradford* and ensure that facilities at BCPSS are adequate for Baltimore City students to have the “thorough and efficient” education to which they are constitutionally entitled under Article VIII. For decades, starting well before your administration, BCPSS has been starved of the funds necessary to maintain its facilities, let alone to bring them to modern standards. The children attending BCPSS are expected to learn in physical facilities that oftentimes lack functional and reliable heat, lack air conditioning, lack drinkable water, are absent security measures such as classroom doors that lock or appropriate coverage by security cameras, have dilapidated elevators that routinely break down because they are decades beyond the date when they should have been replaced, and often have roofs and structures that are leaking, crumbling, and well beyond their useful lives.⁸ The 21st Century building program has been an important start, but it will replace at most only about 18 percent of BCPSS buildings.⁹ BCPSS has also had to commit at least \$20 million/year of its operating dollars for 30 years to leverage the bonds that finance the program¹⁰ – taking already limited dollars out of classrooms. Unfortunately, the needs for children in BCPSS schools are far greater, with at least 85 percent of the school buildings rated “very poor” or “poor” by industry standards.¹¹ Using estimates projected by BCPSS from the 2012 Jacobs Report, it would cost \$3 billion to bring Baltimore City Public School buildings up to a minimally acceptable standard through repairs and building replacements and \$5 billion to complete a full portfolio replacement to meet modern educational standards.

This letter addresses both issues, which are closely related. BCPSS pays for many repairs and renovations to facilities out of its operating budget.¹² Unlike any other school system in Maryland, BCPSS must pay substantial debt service payments for facility-related bonds, meaning that it must

⁵ Augenblick, Palaich & Associates, *Final Report of the Study of Adequacy of Funding for Education in Maryland*, prepared for Maryland State Dep’t of Education, Nov. 30, 2016, at 112.

⁶https://www.washingtonpost.com/local/md-politics/ambitious-md-effort-to-boost-change-education-funding-delayed-another-year/2018/12/19/16938d00-ffc5-11e8-83c0-b06139e540e5_story.html?utm_term=.b3526a581158.

⁷ <https://governor.maryland.gov/2018/12/11/governor-larry-hogan-announces-over-3-5-billion-building-opportunity-fund-school-construction-initiative/>.

⁸ E.g., <http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-ci-facilities-costs-20180914-story.html>; Jacobs, *State of School Facilities, Baltimore City Public Schools*, June 2012, at 23; BCPSS, *Comprehensive Educational Facilities Master Plan*, Oct. 12, 2018, at 616-26 (listing needs).

⁹<https://baltimore21stcenturyschools.org/roadmap> (listing school projects and status).

¹⁰ <https://baltimore21stcenturyschools.org/about/financing-plan>.

¹¹ Jacobs, *State of School Facilities, Baltimore City Public Schools*, June 2012, at 26.

¹² BCPSS, *Comprehensive Educational Facilities Master Plan*, Oct. 12, 2018, at 72-73.

divert scarce dollars from instruction to address the deplorable physical condition of Baltimore City school buildings. For these reasons, the State’s budget and any legislation related to school funding should incorporate funds to remediate both the unconstitutional adequacy gap in instruction and operations and BCPSS’s deteriorating school facilities – as the Maryland constitution requires and as Baltimore children deserve. We stand ready to work with State and legislative leaders on the specifics of any such legislation and provide our concrete suggestions in section C below.

A. The State Is Violating Court Orders Compelling Constitutionally Required Funding of Education in Baltimore City.

Article VIII of the Maryland Constitution requires the State to provide Maryland’s children with an education that is “adequate when measured by contemporary educational standards.”¹³ When the State “‘fails to make provision for an adequate education,’ or the State’s school financing system ‘[does] not provide all school districts with the means essential to provide the basic education contemplated by §1 of Article VIII, when measured by contemporary educational standards,’ a constitutional violation may be evident.”¹⁴

The State’s constitutional responsibility to all Maryland children includes not only the duty to ensure that schools have sufficient operational funding for instruction, but also adequate physical facilities, so that students may receive a “thorough and efficient” education. Indeed, the State establishes exacting standards for such facilities.¹⁵

You recognized that adequate school facilities as well as educational programs are an essential component of an adequate education in your recent announcement, explaining:

I believe very strongly that every single child in Maryland deserves access to a world-class education regardless of what neighborhood they happen to grow up in, and an important part of that is making sure that all of our students are educated in facilities that are modern, safe, and efficient which provide them with an environment that encourages growth and learning.¹⁶

Since 2000, the State has been under a court order finding that specific funding of Baltimore City schools is required so that students may receive a constitutionally adequate education.¹⁷ In 2002, the State passed the Bridge to Excellence Act (the “Thornton” Commission formula) which provided additional funding to be phased in over six years and also required annual increases in funding to keep pace with inflation.¹⁸ In 2004, the Circuit Court for Baltimore City *again* ordered

¹³ *Hornbeck v. Somerset Cty. Bd. of Educ.*, 295 Md. 597, 615 (1983); *Montgomery Cty. v. Bradford*, 345 Md. 175, 189 (1997).

¹⁴ *Bradford*, 345 Md. at 181.

¹⁵ *E.g.*, COMAR 13A.01.02.04; COMAR 23.03.02.01, *et seq.*

¹⁶ <https://governor.maryland.gov/2018/12/11/governor-larry-hogan-announces-over-3-5-billion-building-opportunity-fund-school-construction-initiative/>.

¹⁷ *Bradford v. Maryland State Dep’t of Education*, No. 94340058/CE189672 (Md. Cir. Ct. Baltimore City), Mem. Op., June 30, 2000, at 24-25.

¹⁸ Stephen C. Bounds, John R. Woolums, et al., *Maryland School Law Deskbook*, 2016-17 School Year Edition, § 4.37.

the State to continue phasing in the funding mandated by the “Thornton” formula.¹⁹ However, the State halted or capped the inflation increases nearly a decade ago,²⁰ causing an “adequacy gap” in BCPSS educational funding that the State estimates has now reached at least \$290 million a year.²¹ This means that, according to the State’s own assessments, Baltimore City schools are well behind where they were when the *Bradford* court last assessed the inadequacy of State educational funding.²² Moreover, a study before the Kirwan Commission found that annual increased funding needs for BCPSS are even greater, at \$358 million a year.²³ This is an unacceptable violation of the court’s orders and a major constitutional deprivation for many of the State’s children with the greatest needs.

Baltimore City lacks the resources of more wealthy jurisdictions, which are able to provide substantially more in educational funding.²⁴ Because Baltimore City does not have the resources to do this, the effect of the State’s noncompliance with the Thornton formula and the “adequacy gap” for children in Baltimore City schools has had a disproportionately greater impact.

Children attending Baltimore City public schools have needs that are greater than those of students in any other district in the State. Not only have the schools been chronically underfunded, but those deficiencies affect a student population that is the poorest in the State. Eighty-seven percent of BCPSS students live in poverty as measured by eligibility for Free and Reduced-price meals.²⁵ Additionally, 15 percent of BCPSS students qualified as students with disabilities, compared with 12 percent statewide.²⁶

Moreover, the systemic underfunding of BCPSS disproportionately deprives students of color of a constitutionally-adequate education. In 2017, BCPSS’s student population was 79.4 percent African-American, 8 percent white, and 10.4 percent Hispanic or Latino. This is compared with the State’s overall student population, which is 33.7 percent African-American.²⁷ The underfunding of the school district that has the largest percentages of African-American and poor

¹⁹ *Bradford v. Maryland State Dep’t of Education*, No. 94340058/CE189672 (Md. Cir. Ct. Baltimore City), Mem. Op., Aug. 20, 2004, at 57-58.

²⁰ Dep’t of Legislative Services, Office of Policy Analysis, *Education in Maryland*, in Legislative Handbook Series, Vol. IX, 2014, at 63; Augenblick, Palaich & Associates, *Final Report of the Study of Adequacy of Funding for Education in Maryland*, prepared for Maryland State Dep’t of Education, Nov. 30, 2016, at ii; Stephen C. Bounds, John R. Woolums, et al., *Maryland School Law Deskbook, 2016-17 School Year Edition*, § 4.37.

²¹ Dep’t of Legislative Services, Office of Policy Analysis, *Adequacy of Education Funding in Maryland*, Dec. 8, 2016, at 7 (estimating the “adequacy gap” resulting from failure to implement Thornton Commission increases for FY 2015).

²² Compare *id.* at 7 (FY2015 adequacy gap of \$290 million) with *id.* at 3 (FY2002 adequacy gap of \$270 million).

²³ Augenblick, Palaich & Associates, *Final Report of the Study of Adequacy of Funding for Education in Maryland*, prepared for Maryland State Dep’t of Education, Nov. 30, 2016, at 112.

²⁴ <http://dls.maryland.gov/pubs/prod/InterGovMatters/SteAidLocGov/Overview-of-State-Aid-to-Local-Governments-Fiscal-2019-Allowance.pdf>, at 31, 49.

²⁵ *Id.* at 52.

²⁶ <http://mdideareport.org/SupportingDocuments/MDSpecialEducationEarlyInterventionCensusDataRelatedTables.pdf>.

²⁷ <http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20172018Student/2018EnrollbyRace.pdf>.

students²⁸ also sends a message to BCPSS students that they are less valuable. This cannot be tolerated.

The ACLU has worked diligently to present support and information to the Kirwan Commission on how to bridge the adequacy gap, but, as you know, the Commission's final report and funding proposals have been delayed.²⁹ Recent announcements by the Commission and other State policymakers that the Commission will delay its final report until the end of this year, and that legislation and funding implementing its recommendations will be delayed until the 2020 legislative session or beyond, mean that the "adequacy gap" in Baltimore City will continue to grow and the constitutional violations (and the violations of the *Bradford* court orders) will continue unabated. This is unacceptable.

Every year of delay means another year that children do not receive the education mandated by the State Constitution. Every year of delay increases the adequacy gap in Baltimore City, making compliance that much more difficult. It is incumbent upon the State to comply with the court orders and meet its constitutional obligations to provide Baltimore City children with a thorough and efficient education.

In the FY 2020 budget and in legislation this legislative session, therefore, we urge you to include sufficient funds directed towards educational funding to comply with the existing *Bradford* court orders.

B. Baltimore City Schools' Physical Facilities Further Violate Constitutional Standards.

1. BCPSS Schools are in Extremely Poor Condition.

School facilities in Baltimore City are in abysmal condition. For decades, the State has abdicated its responsibility to provide adequate funding to address that condition. Due to chronic underfunding, it is estimated it would cost \$3 billion to bring Baltimore City School buildings up to minimally accepted standards through repairs and building replacements (based on a projection using the 2012 Jacobs Report). Replacing all existing schools to modern educational standards will cost an estimated \$5 billion, based on BCPSS' escalated estimates from the 2012 Jacobs report. The system has literally reached a breaking point.

Because of the urgency of the facilities crisis and BCPSS's lack of adequate funding, BCPSS very often must pay for repairs and renovations to facilities out of its operating budget, meaning that it must divert scarce dollars from instruction.³⁰ Additionally, as noted, BCPSS has been required to pledge at least \$20 million annually out of operating funds to support the 21st Century program.³¹ As a result, the constitutional "adequacy gap" in Baltimore City with respect to instruction is aggravated by the ongoing need to respond to the facilities crisis.

We recognize that in recent years the State has supported and participated in the 21st Century Schools Program, which has allowed the renovation or replacement of nine Baltimore City school

²⁸<http://dls.maryland.gov/pubs/prod/InterGovMatters/SteAidLocGov/Overview-of-State-Aid-to-Local-Governments-Fiscal-2019-Allowance.pdf>, at 52, 56.

²⁹https://www.washingtonpost.com/local/md-politics/ambitious-md-effort-to-boost-change-education-funding-delayed-another-year/2018/12/19/16938d00-ffc5-11e8-83c0-b06139e540e5_story.html?utm_term=.b3526a581158.

³⁰ BCPSS, *Comprehensive Educational Facilities Master Plan*, Oct. 12, 2018, at 72-73.

³¹ <https://baltimore21stcenturyschools.org/about/financing-plan>.

buildings and will eventually lead to 23-28 new or fully renovated schools,³² and also provided emergency funding last winter³³ when schools had to close because major elements of ancient heating systems failed in many of them. These contributions, while important, do not come close to resolving the problem.

Baltimore has, by far, the oldest physical facilities of any other large system in Maryland.³⁴ According to established industry criteria for assessing facilities, at least 85 percent of the system's 158 schools are now in "very poor" or "poor" condition.³⁵ Among the well-documented problems are: failure of ancient boiler systems (causing school closures due to lack of heat); roofs and other structural elements that are well past their replacement time; and lack of drinkable water due to un-remediated lead in water pipes.³⁶ In addition to crumbling structures, many Baltimore schools lack the range of specialized facilities necessary for an education that is adequate by contemporary educational standards.³⁷

These issues came to a head last winter when students in 87 Baltimore City public schools – over half of all public schools in the City – attended class in rooms that were without heat or with limited heat because boilers and other major elements of the schools' aging heating systems failed.³⁸ As a result, over the course of a two-week period, over 60 schools were forced to close, with thousands of students forced to miss multiple days of instructional time. Teachers and families tried to raise funds to buy winter coats and space heaters for their shivering students, including through well-publicized GoFundMe campaigns.³⁹ This past summer, numerous schools again were forced to close; this time, because classrooms had no air conditioning.⁴⁰ Nearly 40 percent of all BCPSS schools lack air conditioning.⁴¹ The school district is addressing that issue, but those efforts further limit its ability to use limited resources to address other critical needs.

Student, parent, and teacher comments illustrate the abysmal conditions in which Baltimore City children are expected to learn. Parent Michael Boyd says: "To be in a cold building all the time is

³²<https://baltimore21stcenturyschools.org/roadmap> (listing school projects and status).

³³https://www.washingtonpost.com/local/hogan-announces-25m-to-help-heat-baltimore-schools/2018/01/08/333f90ec-f4aa-11e7-9af7-a50bc3300042_story.html?utm_term=.bfe3a22d5e99.

³⁴ BCPSS, *Comprehensive Educational Facilities Master Plan*, Oct. 12, 2018, at 73; Jacobs, *State of School Facilities, Baltimore City Public Schools*, June 2012, at 13.

³⁵ Jacobs, *State of School Facilities, Baltimore City Public Schools*, June 2012, at 26.

³⁶ E.g., <http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-ci-facilities-costs-20180914-story.html>; Jacobs, *State of School Facilities, Baltimore City Public Schools*, June 2012, at 23; BCPSS, *Comprehensive Educational Facilities Master Plan*, Oct. 12, 2018, at 616-26 (listing needs).

³⁷ Jacobs, *State of School Facilities, Baltimore City Public Schools*, June 2012, at 17 (BCPSS facilities have "failing" grade on educational adequacy assessment).

³⁸ BCPS Memo to Delegate Maggie MacIntosh, Jan. 22, 2018; Washington Post, "Kids are freezing: Amid bitter cold, Baltimore schools, students struggle.", Jan. 5, 2018.

³⁹<https://www.wbalv.com/article/gofundme-created-in-hopes-of-solving-cold-school-crisis-in-baltimore-city/14751935>.

⁴⁰ E.g., Wmar2, *Lack of air conditioning closes 70+ Baltimore City schools early on first day*, Sept. 4, 2018

⁴¹<http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-ci-schools-dismiss-early-20180906-story.html>.

miserable. The only thing you can think of is being cold, and vice versa when it's hot. When it's hot the only thing you can think of is being hot. No[] matter what the teacher is doing, she could be doing something you like, but if you're hot you get distracted." Student Dashawna Bryant has sickle cell anemia, and spent a week in the hospital after a day in an unheated classroom last winter. She says: "I would like our leaders to know that students in Baltimore also have a dream, and just because some of us aren't rich enough to have those dreams come true doesn't mean they should be taken away from us. I want to study to be a child psychologist when I go to college. I know some of my friends are trying to be doctors or lawyers or judges, but the fact that we go to a Baltimore City school, and the fact that we don't have heating or air conditioning or all this funding, takes away from those dreams. And it makes it harder for people to want to go to college because they know how hard it is for them. So I just want the elected leaders to know that just because we don't go to a private school, or just because we don't live out in the county, we do still have dreams that we want to accomplish."

The State has failed to resolve these problems despite clear notice that BCPSS facilities are rapidly deteriorating. A 1992 assessment demonstrated that over 20 percent of BCPSS schools were then in "poor" condition, "with seriously leaking roofs and other structural defects," and only 16 percent were in "good" condition.⁴² By 1996, the percentage of schools rated as poor had risen to 35 percent, with only 10 percent of the buildings rated in "good" condition.⁴³ By 2003, a State task force examining the "minimal adequacy" of buildings concluded that almost 70 percent of BCPSS facilities did not meet air quality standards; 95 percent did not have sufficient heating and cooling systems (compared to 16 percent of schools statewide); none had drinkable water; almost 60 percent did not meet standards for "human comfort,"; 36 percent did not meet fire safety standards; almost 30 percent lacked adequate bathrooms; and many did not have sufficient space for library use, science labs, technology education, arts education, and health services.⁴⁴ In 2004, the State Superintendent of Schools testified that \$1 billion in additional funding was required to bring the BCPSS facilities to adequacy.⁴⁵ For the next several years, however, the State did not perform updated assessments of facilities, notwithstanding the Kopp Commission's recommendation that it do so every four years.⁴⁶

The most recent comprehensive survey available, by the engineering firm Jacobs in 2012, demonstrates the further deterioration of Baltimore City school facilities. Jacobs assessed all 185 school buildings then operating and rated them on the established industry standard, the Facilities Condition Index (FCI), for physical conditions and educational adequacy, including security, technology, classroom size, special use areas like libraries, lighting, as well as specific equipment

⁴² 1992 Facilities Master Plan; *Bradford v. Maryland State Dep't of Education*, No. 94340058/CE189672 (Md. Cir. Ct. Baltimore City), State Amended Admission 86.

⁴³ 1995 Facilities Master Plan; *Bradford v. Maryland State Dep't of Education*, No. 94340058/CE189672 (Md. Cir. Ct. Baltimore City), State Amended Admission 86.

⁴⁴ Task Force to Study Public School Facilities Final Report ("Kopp Commission Report"), Feb. 2004, at 90, 125.

⁴⁵ *Bradford v. Maryland State Dep't of Education*, No. 94340058/CE189672 Tr., May, 2004, at 1284:5-10, 1413:11-19, 1586:5-10.

⁴⁶ Task Force to Study Public School Facilities Final Report ("Kopp Commission Report"), Feb. 2004, at 10; 21st Century Facilities Commission Final Report "Knott Commission Report", Jan. 2018, at 9.

and space for programs like science, technology, and music/arts.⁴⁷ Its findings were damning. The overall FCI for BCPSS was 60 (on a 0-100 scale, with 100 the worst score), reflecting “facilities in very poor condition.”⁴⁸ Of these, 50 had such high FCIs that they “should be considered as candidates for replacement or [treated as] surplus.”⁴⁹ Simply put, “City Schools buildings do not provide the physical structures, technology and instructional space to support 21st-century teaching and learning.”⁵⁰ The report estimated that it would cost almost \$2.5 billion to renovate the buildings “to address current facility needs and educational adequacy deficiencies, and to cover lifecycle renewal costs for 10 years.”⁵¹ BCPSS now estimates that replacement costs would be over \$5 billion (based on an extrapolation of the 2012 Jacobs report).

Fixing the problems by replacing individual components is not an efficient or viable option, as the State recognized in approving the 21st Century Building Program. The buildings and systems are so aged and decrepit that replacing a single component – the boilers in a school, for instance – will not solve the problem for long because another problem, such as leaks in piping to and from the boilers, will soon appear. Wholesale replacement of the schools with failing grades is the only cost-efficient long-term option.

Nor are sufficient funds available even for necessary current maintenance. Facility management professionals use three percent of current replacement value as a guideline for the annual investment necessary to maintain school buildings in good condition. The district’s current replacement value is approximately \$5 billion. To achieve the recommended industry standards formula, BCPSS would need to increase the operating budget for maintenance from approximately \$23 million to \$150 million a year.⁵² This doesn’t even touch the deferred maintenance costs of \$3 billion, based on an estimate of the backlog of deferred maintenance.

2. These Deficiencies Have a Severe Effect on Students and Their Ability to Learn.

Just as insufficient operational/educational funding has a direct effect on the quality of education students receive, dilapidated school buildings also directly impact teaching and learning. As a State report explained, research “demonstrates a strong correlation between certain facility factors and student achievement.”⁵³ Recent research has confirmed “significant correlations between poor structural, conditional, and aesthetic attributes of school buildings and low student learning and achievement. These attributes include lighting, temperature and thermal comfort, acoustics, indoor air quality, and other environmental factors.”⁵⁴ For instance, a 2017 study found that

⁴⁷ Jacobs, *State of School Facilities, Baltimore City Public Schools*, June 2012, at 8-11.

⁴⁸ *Id.* at 25.

⁴⁹ *Id.* at 33.

⁵⁰ BCPSS, *State of City Schools Buildings: Summary of the Preliminary Jacobs Report*, at 6.

⁵¹ Jacobs, *State of School Facilities, Baltimore City Public Schools*, June 2012, at 10.

⁵² BCPSS, *Comprehensive Facilities Maintenance Plan*, SY2018-19, at 2-3.

⁵³ Task Force to Study Public School Facilities Final Report (“Kopp Commission Report”), Feb. 2004, at 4 (citing educational facilities expert Dr. Glen Earthman).

⁵⁴ Build Us Schools, *Education Equity Requires Modern School Facilities* at 2 (Sept. 2018) (citing research).

moving students out into new facilities increased test scores by ten percent of a standard deviation in math and five percent in English-language arts.⁵⁵

Additionally, as discussed above, there are disproportionate numbers of students who are poor and students of color attending the Baltimore City schools. The poor condition of BCPSS schools exacerbates the effects of historic discrimination and other barriers to achievement.

Baltimore City has the lowest per capita wealth and lowest tax base of any large district in the State⁵⁶ and lacks the resources that other jurisdictions of comparable size use to support school construction. Baltimore City also lacks the resources that other jurisdictions of comparable size use to supplement their public school maintenance budgets. As the 21st Century Schools Commission declared, this imbalance should be ameliorated by greater State funding to poorer districts: “[T]he State must focus its limited resources on critical areas of need, *especially in low-wealth jurisdictions including those with a higher proportion of students living in poverty* and those experiencing excessive enrollment growth.”⁵⁷

C. The State Must Ensure that Both Education and Facilities Are Constitutionally Adequate.

The State should comply with the governing *Bradford* orders and fulfill its constitutional duty to the students of Baltimore City by addressing the “adequacy gap” in educational funding starting this legislative session. That would require at least \$290 million, escalated from FY15, in increased annual funding to the BCPSS.⁵⁸ We ask further that the State move as quickly as possible to obtain and act on the Kirwan Commission’s recommendations, as that work so far shows substantial additional needs in BCPSS.⁵⁹

With respect to facilities, the State should live up to the 21st Century Commission’s promise to focus resources on “critical areas of need” and meet your own goal of ensuring that “every single child in our state” attends a school facility that is “modern, safe, and efficient” by including provisions in any facilities legislation sufficient to ensure that Baltimore City schools meet those standards. This could be done, for instance, by including funding necessary to fulfill the 21st Century Schools program for Baltimore City – estimated by the BCPSS as an additional \$5 billion over ten years – while in the meantime addressing improvements to current facilities to ensure students’ constitutional rights are protected during the transition period while schools are being repaired/replaced. It could also be accomplished by reducing the deferred maintenance backlog so that current facilities meet adequacy standards.

Any legislation related to school facilities must ensure that all BCPSS buildings:

⁵⁵ Lafortune, J. and D. Schönholzer. 2017. Does new School Construction Impact Student Test Scores and Attendance? Berkeley: California Policy Lab, University of California.

⁵⁶<http://dls.maryland.gov/pubs/prod/InterGovMatters/SteAidLocGov/Overview-of-State-Aid-to-Local-Governments-Fiscal-2019-Allowance.pdf>, at 31, 49.

⁵⁷ 21st Century Facilities Commission Final Report “Knott Commission Report”), Jan. 2018, at 7.

⁵⁸ Dep’t of Legislative Services, Office of Policy Analysis, *Adequacy of Education Funding in Maryland*, Dec. 8, 2016, at 7.

⁵⁹ Augenblick, Palaich & Associates, *Final Report of the Study of Adequacy of Funding for Education in Maryland*, prepared for Maryland State Dep’t of Education, Nov. 30, 2016, at 112 (annual increase of \$358 million necessary for City schools).

- Have adequate and reliable HVAC systems throughout the system, including reliable heating in the winter and air conditioning in the summer;
- Have adequate and reliable plumbing and piping systems;
- Have adequate (repaired or replaced) roofs;
- Have adequate and functioning bathrooms;
- Receive structural repairs, as necessary;
- Address issues relating to mold/other harmful chemicals;
- Address lead in the water supply and ensure drinkable water;
- Have adequate fire safety provisions;
- Have adequate ventilation;
- Have sufficient specialized facilities for a modern constitutionally adequate education, including computer, STEM, art, music, etc.

The legislation should also include sufficient resources for the ongoing maintenance of facilities, including, but not limited to, sufficient staff for maintenance, consistent with industry standards and consistent with the current aged condition of the BCPSS, including approximately \$150 million per year for ongoing maintenance.⁶⁰

Baltimore City school children cannot wait any longer. When schools annually have been denied hundreds of millions of dollars that a court has found necessary for educational programs; when schools cannot stay open during cold winter weather and late-spring or late-summer heat waves; when teachers must raise funds to buy winter coats for their students; when a school system reaches a multi-billion dollar backlog in deferred maintenance and has funding available to pay only a small fraction of what is required for basic ongoing maintenance, the State Constitution compels action. We ask that the State take that action in the current legislative session.

⁶⁰ BCPSS, Comprehensive Facilities Maintenance Plan, SY2018-19, at 2-3.

We are available and happy to discuss this letter further with you at any time.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'AJ' followed by a stylized flourish.

Ajmel Quereshi
Senior Counsel
NAACP Legal Defense Fund
700 14th Street, NW
Washington, DC 20005
Phone: (202) 216-5574
Email: aquereshi@naacpldf.org

Deborah Jeon
Legal Director
American Civil Liberties Union of Maryland
3600 Clipper Mill Road, Suite 250
Baltimore, MD 21211
Phone: (410) 889-8550
Email: jeon@aclu-md.org

Mitchell Y. Mirviss
Partner
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, MD 21202
Phone: (410) 244-7412
Email: mymirviss@venable.com

Elizabeth B. McCallum
Partner
Baker & Hostetler LLP
1050 Connecticut Ave. NW, Suite 1100
Washington, DC 20005
Phone: (202) 861-1522
Email: emccallum@bakerlaw.com

cc: The Honorable Thomas V. Miller Jr., President of the Senate, General Assembly
The Honorable Michael E. Busch, Speaker of the House, General Assembly

Keith Bradford, et al.,

Plaintiffs,

v.

Maryland State Board of Education,

Defendant.

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IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

Case No.: 24C94340058

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**MEMORANDUM OF GROUNDS, POINTS, AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' PETITION FOR FURTHER RELIEF**

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Plaintiffs Keith Bradford, *et al.*, along with additional class representatives Stefanie Croslin and Angela Gant,¹ by their undersigned attorneys, submit this Memorandum of grounds, points, and authorities in support of their Petition for Further Relief.

PREFATORY STATEMENT

This Petition for Further Relief seeks to redress the unconstitutionally inadequate, underfunded, and decrepit, public schools attended by tens of thousands of Baltimore City school children. Through this Petition, Plaintiffs, who are the parents of Baltimore City children at risk of not receiving the education they need to succeed in life, seek to enforce prior rulings by this Court establishing their right to a constitutionally adequate education by contemporary standards. This case is a longstanding action that was brought by Plaintiffs in 1994 to require the State to comply with its constitutional duty to provide an adequate education to Baltimore City school children, including adequate funding for Baltimore City public schools.

Under Article VIII of the Maryland Constitution, the State of Maryland must establish a “thorough and efficient” system of public education throughout the State, and must further provide sufficient funding to maintain that system.² Despite this constitutional duty, and notwithstanding prior rulings by this Court in this case that the State was not meeting its obligations under Article VIII, for decades the State has abdicated its responsibilities to provide adequate funding for instructional activities and to address the chronically abysmal physical condition of school

¹ Along with this motion, Plaintiffs have filed a notice of substitution, as permitted by this Court’s order of December 11, 1995 (Dkt. 41), designating Ms. Croslin and Ms. Gant to replace the prior class representatives. Their particular circumstances are discussed *infra* and in that notice.

² Article VIII is implemented by Article III, Section 52, which requires that the State budget include an estimate of appropriations for establishing and maintaining a thorough and efficient system of public schools throughout the State. Thus, both the executive and legislative branches are constitutionally obligated to determine the funding level needed to comply with Article VIII and then budget for that amount. As discussed below, Article III § 52’s constitutionally mandated budget process has broken down and effectively been abandoned for the last decade.

facilities in Baltimore City. According to the Maryland Department of Legislative Services (“DLS”), the level of state underfunding of Baltimore City schools, *i.e.*, the gap between what was constitutionally required and what was actually funded, or the “adequacy gap,” was \$290 million in FY 2015. According to an independent analysis mandated by the General Assembly, the State underfunded Baltimore City public schools by \$358 million that year. Over the decades of underfunding, the generations of children attending the Baltimore City schools have been deprived of over \$2 billion in educational funding to which they were constitutionally entitled. In 2000, this Court adopted the findings of a court-ordered independent study determining that many Baltimore City public school buildings were in poor condition and getting worse, and estimating that it would cost \$600 million to fix. The State ignored those and subsequent findings of decrepit school conditions, which now require \$3 billion to fix and \$5 billion to replace.

These numbers affect tens of thousands of Baltimore City school children, most of whom live in poverty and are children of color, who are denied the adequate education mandated by Article VIII. Among them are Stefanie Croslin’s two sons, ages 11 and 13, who are Baltimore City Public School Systems (“BCPSS”) students. The older of the two, Cohen, loves science, but his school does not have Bunsen burners or an eye wash station, much less the advanced computer technology available for students in comparable grades in neighboring Baltimore County. Teachers collect materials donated by parents to design experiments. Ms. Croslin’s younger son, Cyrus, was devastated when his school had to cancel music class, permanently, due to a lack of funding. It was his favorite subject. Most parents in BCPSS have stories like these. Dashawna Bryant has sickle cell anemia and had to spend a week in the hospital last winter after a day in an unheated classroom. Angela Gant’s daughter Naya, who used to excel in math, recently has begun

to struggle, but her school no longer offers tutoring services that were available when Ms. Gant's older daughter attended Baltimore schools.

On the whole, BCPSS has the lowest teacher to student, teacher and therapist to student, and non-instructional staff to student ratios in the State. The teachers that are employed often have less education and less experience than similarly-sized districts statewide. According to the State's own report card, BCPSS had the lowest number of five-star schools (the highest rating) and the highest number of one-star schools (the lowest rating) in the State. BCPSS students score lower than their counterparts nationally and across the State on almost every assessment and college entrance test. BCPSS's graduation rate is 17 points lower than the state average, and its dropout rate is nearly double the state average. In 2004, this Court pointed to similarly dismal statistics in concluding that the State's underfunding of BCPSS violated the State Constitution.

This Court has entered multiple orders declaring Plaintiffs' constitutional right to sufficient State funding for "adequate" public schools and specifying the then-minimum amounts of funding required, the last of which was entered in 2004. After a decade of working through the General Assembly and otherwise to attempt to convince Defendants (the State officials and agencies responsible for school funding) to honor their continuing promises to provide sufficient education funding, Plaintiffs now return to this Court to compel compliance with the mandate of Article VIII.

Article VIII guarantees:

The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools, and shall provide by taxation, or otherwise, for their maintenance.

Md. Const., Art. VIII, § 1. This Article requires that all students in Maryland's public schools be provided with an education that is "adequate when measured by contemporary educational standards." *Montgomery Cty. v. Bradford*, 345 Md. 175, 189 (1997) ("*Bradford I*"); *Hornbeck v.*

Somerset Cty. Bd. of Educ., 295 Md. 597, 615 (1983); Dkt. 1-66 Order (Oct. 18, 1996);³ Dkt. 10, Mem. Op. 24 (dated June 30, 2000, entered July 6, 2000). Article VIII is implicated when the State “‘fails to make provision for an adequate education,’ or the State’s school financing system ‘[does] not provide all school districts with the means essential to provide the basic education contemplated by § 1 of Article VIII, when measured by contemporary educational standards.’” *Bradford*, 345 Md. at 181 (quoting *Hornbeck*, 295 Md. at 639). Article VIII also requires the State make efforts to address student populations that require additional or different resources or programming, such as high concentrations of students who live in poverty. *See Hornbeck*, 295 Md. at 639 (affirming that Article VIII requires that “efforts are made . . . to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child”).

This Petition presents two closely related sets of violations. *First*, Defendants have failed to provide sufficient funding for constitutionally adequate school operations and instructional functions despite the Court’s numerous prior orders specifying the funding formulas that they must follow to reach minimal compliance. *Second*, Defendants have failed to fix the crumbling school facilities in Baltimore City that leave children cold from broken heat systems in the winter, overheated from schools lacking air conditioning in the summer, and wet from pipe leaks throughout the year. These failures directly limit the ability of students to learn.

To comply with Article VIII, Defendants must address both issues. Two full generations (12 grades per generation) have entered and graduated from Baltimore City Public Schools since this litigation was brought in 1994. Through the events of last winter and summer, the State’s constitutional violations have reached the point of national notoriety. Only action by this Court

³ The docket entries in this case are divided due to the conversion to an electronic docket in 2000, after which the numbering returned to start at number 1. For convenience, entries before the conversion are prefaced with “1-”.

will halt the violations from continuing so that the current generation of school children receives the adequate education guaranteed by the Maryland Constitution. Because Defendants have made clear that they will not do so voluntarily,⁴ Plaintiffs ask this Court to compel them to comply with the State Constitution.

LEGAL AND FACTUAL HISTORY

I. Defendants Have Not Complied with this Court's Declarations to Provide Full Funding to BCPSS, Thereby Preventing BCPSS from Providing an Education That is Adequate by Contemporary Standards.

A. Overview.

In a series of declaratory rulings in this case commencing in 1996, this Court (the Hon. Joseph H. H. Kaplan, Jr.) repeatedly ruled that the State of Maryland was in continuing violation of its constitutional obligation to provide children attending Baltimore City public schools with a “thorough and efficient” education, which this Court defined as an “an education that is adequate when measured by contemporary educational standards” mandated by Article VIII of the Maryland Constitution. Dkt. 1-66 Order (Oct. 18, 1996); Dkt. 10, Mem. Op. 24 (June 30, 2000) (relying on the Court of Appeal’s decision in *Hornbeck*). Those rulings apply even more vigorously today, as the State’s support for public schools in Baltimore City continues to fall far below minimum constitutional requirements. Each year, the gap has broadened between what the Maryland Constitution requires for on-going school operations and what the State of Maryland actually funds, depriving the students who have attended the BCPSS over the last decade of an accumulated \$2 billion to which they were entitled for instruction alone. Rapidly decaying school buildings dramatically amplify the gap, adding another \$3 billion to fix schools or \$5 billion to replace them

⁴ For instance, there has been no response to a Jan. 22, 2019 letter by Plaintiffs asking for action on the issues that was sent to the Governor and copied to legislative leaders. *Available at* https://www.aclu-md.org/sites/default/files/bradford_letter_1.22.2019_final.pdf.

to the amount needed to provide a constitutionally sufficient education. Together, these profound deficits mean that Baltimore City's children—many of whom live in extreme poverty and face daunting environmental and societal challenges—are extraordinarily short-changed in their educational opportunities.

This Petition for Further Relief is compelled by the State of Maryland's failure to meet this Court's expectations that the State would accept its constitutional obligations as established by the Court. This Court expected that the State would reach constitutional compliance by 2008, or, at the very least, that it would reach the funding levels for Baltimore City recommended by the Commission on Education Finance, Equity, and Excellence (the "Thornton" Commission), a legislatively created state body tasked with recommending adjustments to the state funding formula, and enacted by the legislature in the Bridge to Excellence Act. But, over the past decade, the State abandoned its promises to the Court that it would abide by the Thornton formula and instead each year has funded far less than the amount required by this Court's rulings. Moreover, the State has ignored the Court's direction that it attempt to remedy prior accumulated gaps in funding that had been identified by the Court as critical to bringing the State into constitutional compliance. This failure to abide by the Court's instructions as to what was constitutionally required has created an ever-deepening financing deficit that now totals billions of dollars and results in a constitutionally inadequate education for tens of thousands of Baltimore City children each year. That yawning "adequacy gap" constitutes the difference between an education that is adequate by contemporary standards (now commonly referred to as an education that prepares students for the 21st century economy) and the current struggling system.

This Court's rulings were intended to prevent this tragic record of educational deprivation. As this Court stated, it fully anticipated that, once the State's constitutional obligations were

spelled out in clear terms, Defendants would comply and honor those obligations. However, after several years of funding increases to approach the Thornton formula levels, the State elected to ignore the Court's rulings and abandon its prior commitments to adhere, at a minimum, to Thornton. Plaintiffs, therefore, return to this Court for further relief, namely an order compelling Defendants to comply with the State Constitution.

The need could not be greater. Since this litigation was brought in 1994, two generations of children have entered and graduated from BCPSS schools without receiving the education guaranteed them by the State Constitution. This is a wholesale abdication of the State's duty to provide sufficient funding to educate children in Baltimore City. Absent judicial enforcement of the children's constitutional rights and this Court's own prior declarations and orders, compliance with the Constitution will never occur. The question raised by this Petition is whether the constitutional guarantee of Article VIII will prove illusory for yet another generation of Baltimore City school children.

B. This Court's Prior Declaratory Rulings Determined that the State's Funding Levels Violate Article VIII of the Maryland Constitution.

This Court first found the educational system for Baltimore City children to be unconstitutional in 1996. The case was brought as a class action by parents of Baltimore City public school children "at risk of educational failure" because they lived in poverty; attended schools where a large number of students lived in poverty; needed special educational services; spoke English as a second language; had parents who did not graduate high school or were unemployed; were homeless; lived under a threat of violence; had been retained in grade at least once or had scored below grade level on standardized tests; or had experienced economic, social,

or educational disadvantage that increased the likelihood of an inadequate education.⁵ *See* Dkt. 1-4, Compl. at 3 ¶¶ 8-9. Plaintiffs claimed that the State failed to fund BCPSS at constitutionally required levels, even though enhanced funding was plainly necessary given that Baltimore City had the lowest test scores, the lowest graduation rates, and the highest number of students facing risk factors in the State. *Id.* at 12-24 ¶¶ 41-74. The Defendants included the State Superintendent and State Board of Education, among others. The City of Baltimore filed its own education funding suit nine months later, the two cases were consolidated, and the State counterclaimed against the City, alleging that deficiencies in education were the fault of BCPSS rather than any lack of funding or support from the State.

1. The Court First Ruled in 1996 that Baltimore City Children Were Being Denied a Constitutionally Sufficient Education.

On October 18, 1996, this Court granted partial summary judgment to Plaintiffs, ruling that the “thorough and efficient” clause of Article VIII of the Maryland Constitution “requires that all students in Maryland’s public schools be provided with an education that is adequate when measured by contemporary educational standards” and that that requirement was judicially enforceable. The decision declared:

There is no genuine material factual dispute in these cases as to whether the public school children in Baltimore City are being provided with an education that is adequate when measured by contemporary educational standards. Based on the evidence submitted by the parties on the partial summary judgment and summary judgment motions in these cases, . . . the public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards.

Dkt. 1-66, Order at 2 (Oct. 18, 1996).

On the eve of trial on issues of causation and remedy, the parties agreed to a Consent

⁵ The Court never formally certified a class and instead accepted an agreement of the parties that the Plaintiffs would be treated as a class and that the individual plaintiffs would be deemed “representative plaintiffs.” Dkt. 1-41, Order (Dec. 11, 1995).

Decree approved and entered by the Court which provided for a small but immediate influx of cash for operations and facilities over five years.⁶ BCPSS and the State were to retain an independent consultant to prepare interim and final assessments of, *inter alia*, the sufficiency of the additional funding, the need for further funding to reach constitutional adequacy, and the progress made toward reaching that standard. Dkt. 1-77, Consent Decree ¶¶ 41-42 (Nov. 26, 1996). Based on the results of the interim independent assessment, the BCPSS Board could return to court “to seek relief . . . for funding amounts greater than those described in Paragraph 47” of the Consent Decree. *Id.* ¶ 53.⁷ The final report was due by the end of 2001 and the decree was set to expire after five years, on June 30, 2002, unless expanded “upon a showing of good cause to extend the Decree.” *Id.* ¶ 68.

2. The Court’s June 2000 Order Found Continued Constitutional Violations.

The interim independent evaluation ordered by the Consent Decree (the “Metis Report”) found that, although progress was being made, an additional \$2,698 per child (for a total per pupil expenditure of \$10,274), or \$270 million a year, in operational/educational funding was then

⁶ In January 1995, Montgomery County tried, unsuccessfully, to intervene in the case. It appealed this Court’s denial of its motion to intervene, and the Court of Appeals affirmed the Court’s ruling denying intervention. *See Bradford I*, 345 Md. at 177, 200. Notably, as discussed above, the decision by Chief Judge Murphy affirmed *Hornbeck*’s holdings that Article VIII “does require that the General Assembly establish a Statewide system to provide an adequate public school education to the children in every school district” and that, if the State’s school financing system “did not provide all school districts with the means essential to provide the basic education contemplated by § 1 of Article VIII, when measured by contemporary educational standards, a constitutional violation may be evident.” *Id.* at 181 (discussing *Hornbeck*, 295 Md. at 639).

⁷ As this Court subsequently explained, “the parties were aware [at the time] that \$230 million over five years was not enough to provide an adequate education to Baltimore City’s unique population of disadvantaged children” and, therefore, provided in the Consent Decree “a mechanism for the New [BCPSS] Board to request additional funds from the State throughout the term of the Decree” and that, if, after June 1, 2000, “the State fails to satisfy the New Board’s request for additional funds, the New Board may go back to Court for a determination of whether additional funding is needed in order for the BCPSS to provide a Constitutionally Adequate Education.” Dkt. 10, Mem. Op. 3 (June 30, 2000).

needed for adequacy. Dkt. 10, Mem. Op. 14, 15 (June 30, 2000). When a lengthy process of negotiation with the State failed to secure additional funding for a BCPSS remedy plan implementing the Metis Report recommendations, BCPSS returned to the Court in 2000 to compel the State to provide constitutionally required funding. *See, e.g., id.* at 4.

On June 30, 2000, after considering substantial evidence submitted by the parties, this Court found that the State was not making “best efforts” to provide available funding for the BCPSS remedy plan as required by the Consent Decree; it formally adopted the Metis Report as its findings of fact. *Id.* at 14, 23-25. The Court specifically found that, despite progress, Baltimore City children continued to be deprived of “an education that is adequate when measured by contemporary standards” and “still are being denied their right to a ‘thorough and efficient’ education” as constitutionally required. *Id.* at 25. It further found that, despite a “significant budget surplus and new sources of revenue available in [FY 2001],” the State had failed to make sufficient efforts “to make a reasonable down payment on the additional funding of approximately \$2,000 to \$2,600 per pupil that is need[ed] to receive Constitutionally Mandated Adequate Education when measured by Contemporary Educational Standards.” *Id.* The Court therefore declared that “additional funding is required to enable [BCPSS] to provide an adequate education measured by contemporary educational standards,” that “the State is not meeting its obligations under Article VIII of the Maryland Constitution,” and that “additional funding of approximately \$2,000 to \$2,600 per pupil per year” was needed for FY 2001 and 2002 educational and operational funding (which translated to an annual shortfall of \$200 to 260 million). *Id.* at 26. As discussed below, as determined by DLS, the shortfall caused by State’s current funding for BCPSS now substantially exceeds this level.

For relief, the Court determined that this declaration of rights should suffice to spur the State to comply with the Constitution, making a direct order unnecessary. It explained:

Having determined and declared that the State is not fulfilling its obligations under Article VIII of the Maryland Constitution, as well as under the Consent Decree, the Court trusts that the state will act to bring itself into compliance with its constitutional obligations under the Consent Decree for the Fiscal Years 2001 and 2002 without the need for Plaintiffs to take further action.

Id. Thus, the Court trusted that its declaration of the State's constitutional violation would suffice to induce future compliance with Article VIII.

Some minimal progress was made after the Court's June 2000 order. However, the final evaluation required by the Consent Decree (the "Westat Report") confirmed the need for substantial additional funds, as did the Thornton Commission, the state body tasked by the Maryland legislature to revise the state formula for funding education. In 2001, the Thornton Commission issued its final report, which concluded that the BCPSS "adequacy gap" for educational funding needs (not including facilities) was the highest in the State at \$2,938-\$4,250 per pupil. *See* Thornton Comm. Rep. at 27-28 (Jan. 2002), *available at* http://dlslibrary.state.md.us/publications/OPA/I/CEFEE_2002_fin.pdf. The Thornton Commission report also provided a formula that would allow for determination of future levels of constitutional adequacy. *Id.* at iii, xiii.

In response, in 2002 the State enacted SB 856 (2002), the "Bridge to Excellence in Public Schools Act," to implement the Thornton Commission recommendations. 2002 Laws of Md., ch. 288. It recognized a substantial "adequacy gap" of \$3,383 per pupil for BCPSS and committed to provide BCPSS with an additional \$258.6 million annually in educational/operational funding, to be phased in over six years, *i.e.*, by FY 2008. Ex. 1, DLS, S.B. 856 Fiscal Note, Revised, at Exs.

1, 8 (July 3, 2002).⁸ That amount translated to approximately \$2,600 per pupil—the same amount this Court called for in its 2000 decision. *See* Dkt. 50, Mem. Op. at 3 (Aug. 20, 2004). The General Assembly, recognizing that costs of education increase and standards change, also directed an independent assessment of the schools, including the adequacy of educational funding, ten years after its Bridge to Excellence in Public Schools legislation. 2002 Laws of Md., ch. 288.

3. The Court’s June 2002 Order Found Continued Non-Compliance and Extended Jurisdiction Indefinitely until the State Complies with the June 2000 Order.

In May 2002, BCPSS and Plaintiffs jointly moved to extend the term of the Consent Decree and to continue the Court’s jurisdiction until such time that the State’s constitutional violations had been remedied. *See* Dkt. 25, Mem. Op. at 3 (June 25, 2002). After receiving substantial evidence from the parties, the Court issued a Memorandum Opinion on June 25, 2002 granting the motion over the State’s opposition. Judge Kaplan specifically found that continued jurisdiction was necessary because the Thornton funding was uncertain, as the State had not identified a revenue stream. *Id.* at 3-4. Moreover, the Court declared, “two years have passed and the State has yet to comply with this Court’s order[.]” It further found that, although recent legislation would “arguably result in substantial compliance with the June 2000 order by 2008, it is uncertain that all the recommended increases will be funded.” Accordingly, given the uncertainty and “the lack of compliance to date with the June 2000 order,” the Court ruled that it would “retain jurisdiction and continue jurisdiction until such time as the State has complied with this Court’s June 2000 Order.” *Id.* at 5.

⁸ The Bridge to Excellence in Public Schools Act provided additional funding for all Maryland schools, even those without an “adequacy gap.” The phase-in schedule treated all districts equally, without any recognition of the greater needs of Baltimore City and other districts with adequacy gaps.

4. The Court's August 2004 Opinion Found Ongoing Lack of Compliance, Accumulated Underfunding of \$439 to \$835 Million, and Substantial Educational Deficits for Baltimore City Children.

In 2004, well before full phase-in of the constitutionally-required Thornton funding, a \$58 million BCPSS deficit emerged that forced increases in class sizes, the elimination of summer school, and a reduction in supportive services such as guidance counselors. Dkt. 50, Mem. Op. at 30-51 (Aug. 20, 2004). As a result, Plaintiffs moved for further declaratory relief. After a week-long evidentiary hearing, the Court ruled in August 2004 that the State *still* had not provided the \$2,000 to \$2,600 per pupil the Court had found necessary in 2000 and that the State had “unlawfully underfunded [BCPSS] by an amount ranging from \$439.35 million to \$834.68 million” in the aggregate for FY 2001, 2002, 2003, and 2004. *Id.* at 64-65. It held that BCPSS would not be sufficiently funded, unless the State provided BCPSS at least \$225 million in additional annual funding by FY 2008, at the latest. Dkt. 51, Order at 2 ¶¶ 2-3 (Aug. 20, 2004).

Significantly, the Court further found that, due to increased costs, the funding increases previously determined to be necessary “should be adjusted to reflect that increased cost” of education. Dkt. 50, Mem. Op. at 24 ¶ 92 (Aug. 20, 2004). In other words, the Court found that by 2004 the constitutional floor already exceeded the Thornton Commission levels. *Id.* at 24 ¶ 94. Moreover, the Court found that compliance with its 2000 order would not occur until full funding of the Thornton Commission formula was achieved and further, that, because it “has unlawfully underfunded BCPSS . . . in contravention of a final order of this court,” it “should endeavor to repay over the next several years the amounts it failed to fund pursuant to this Court’s 2000 order.” *Id.* at 65; *see also id.* at 67-68.

The Court also made extensive findings of fact regarding the effect of the State’s continuing constitutional violation. Overall, the Court found that the “objective evidence continue[s] to demonstrate, as [it] did in 1996 and 2000, that the BCPSS students are performing

at levels far below state standards, and far below state averages, although there have been some improvements[.]” *Id.* at 25 ¶ 98. Among the deficits: school assessment scores were far below state standards and averages; a low percentage of Baltimore City children had passed the state high school assessment tests; BCPSS had high dropout and correspondingly low graduation rates; student attendance rates were “unacceptable”; and Baltimore City had the highest suspensions and expulsions in the State. *Id.* at 14-29 ¶¶ 95-121. All of these factors were attributable to an inadequate level of educational services. *Id.* These dismal outcomes were compounded by the profound poverty and other demographic and socioeconomic characteristics of BCPSS students that established a “significant number of children at risk of educational failure.” *Id.* at 29 ¶ 124. The Court found that these disadvantaged students “require increased educational focus and resources.” *Id.* at 29.

Overall, this Court concluded that, as a result of these funding deficiencies, “academic achievement among City students remained grossly unsatisfactory,” as the Court of Appeals later summarized the data. *See Md. State Bd. of Educ. v. Bradford*, 387 Md. 353, 379 & n.8 (2005) (“*Bradford II*”) (discussing 2004 Mem. & Op. 24-30 ¶¶ 94-125).⁹ The Court ruled that the constitutional violation it had previously found in 1996 and again in 2000 “is continuing,” that Baltimore City children “still are not receiving an education that is adequate when measured by contemporary educational standards,” and that they therefore were “still being denied their right to a ‘thorough and efficient’ education under Article VIII of the Maryland Constitution.” Dkt. 51, Order at 1-2 ¶ 1 (Aug. 20, 2004).

⁹ The State appealed the Court’s 2004 order and its many findings and declarations. The Court of Appeals declined to hear most of the State’s appeal on the basis that the Circuit Court’s order was not final. *See Bradford II*, 387 Md. at 385-86. The remainder of the appeal concerned the BCPSS budget deficit, and the Court of Appeals reversed a specific injunction regarding the budget deficit. *See id.* at 387-88. That limited ruling is not relevant here.

Moreover, the Court also ruled that changed circumstances since 2001 made it “likely” that the Thornton levels even then “were too low.” Dkt. 50, Mem. & Op. at 15 ¶¶ 52-55 (Aug. 20, 2004). It cited new, higher state standards for high school graduation; federal requirements under the No Child Left Behind legislation requiring all students to achieve satisfactory scores on statewide tests; and the increased needs of children in poverty (as acknowledged by the State Superintendent of Education); and higher education costs. *Id.* at 15-16 ¶¶ 52-56, 23-24 ¶¶ 92-94. In other words, “the cost of an adequate education” could not be measured by the Thornton numbers alone. *Id.* at 24 ¶ 94.

The Court declared that it would continue to retain jurisdiction to ensure compliance with its orders and to monitor funding and management issues and that it would revisit its continuing jurisdiction once full funding was achieved. Dkt. 51, Order at 2 ¶ 6 (Aug. 20, 2004). And, once again, it declared that “the Court trusts that the parties shall act in good faith and with all deliberate speed to ensure compliance without the necessity of further action by plaintiffs.” *Id.* at 4 ¶ 16.

The Court’s 2004 ruling was clear that: (1) at a bare minimum, the State must provide “full Thornton funding” for BCPSS “beyond FY 2008” to support any possible argument that it had achieved constitutional adequacy; and (2) that the Court would not, “in any event, tolerate any delays” in that “full Thornton funding.” *Id.* at 2 ¶ 4. Unfortunately, as shown below, the State has betrayed this Court’s trust and confidence that the State would abide by its constitutional obligations to provide an “adequate” education to Baltimore City children. Funding has not kept pace as constitutionally required, with disastrous consequences for Baltimore City children.

C. The State’s Current Funding of BCPSS Does Not Provide Sufficient Funding for a Constitutionally Adequate Education.

Notwithstanding this Court’s unequivocal rulings, the State has continued to violate Article VIII by serially underfunding BCPSS schools and shortchanging a generation of Baltimore City

school children. As DLS has concluded, the shortfall that existed three years ago was greater than the shortfall that existed when this Court first declared an additional \$2,000 to \$2,600 per pupil was necessary in 2000. An independent study completed in 2016, which was mandated by the General Assembly as part of the Bridge to Excellence in Public Schools Act, also confirmed a massive annual adequacy gap in Baltimore City. Most troubling of all, the State has recently delayed finalizing and acting on the recommendations of its own Kirwan Commission (identified below), which it had established to overhaul the Thornton formula.

1. The State's Studies Have Demonstrated an Annual Adequacy Gap of \$290 to \$353 Million Annually for Baltimore Schools.

This Court held that constitutional adequacy would not even begin to be met until the Thornton funding formula, enacted to fulfill this Court's 2000 decision, was fully phased in. This Court also found that adjustments to the formula were constitutionally necessary to address the rising cost of education and more stringent educational standards. Accordingly, even in 2004, before Thornton was fully phased in, the amounts in the Thornton formula were "likely" insufficient. Dkt. 50, Mem. & Op. at 15 ¶¶ 52-55 (Aug. 20, 2004). But the State has not even met that minimal floor, failing to fully fund Baltimore schools under the Thornton formula and failing to adjust it over time to address greater costs and needs.

The Thornton formula has built-in mechanisms for annual adjustments based on changes in "enrollment, local wealth, and other factors, including inflation in some cases." *See* DLS, Education in Maryland, IX Legislative Handbook Series (2014) ("Handbook") at 63, 72, *available at* <https://www.dllr.state.md.us/p20/p20legishandbook.pdf>. Initially, the Thornton formula amounts were to be increased for inflation each year, using a measure called the implicit price deflator for State and local government expenditures. *Id.* at 72. Starting with the 2007 legislative summer session, however, in response to a deficit, the State chose not to fund the increases

mandated by the Thornton Commission formula, even for BCPSS, notwithstanding this Court's rulings. Rather, it first eliminated and then capped inflation increases to the Thornton funding, among other reductions to the formula, which have continued since in every year thereafter, starting with FY 2009. *Id.* at 76-77. *Accord* APA Consultants, Final Report of the Study of Adequacy of Educational Funding in Maryland (2016) ("APA Final Report"), at 3, *available at* <http://marylandpublicschools.org/Pages/adequacystudy/index.aspx>. These decisions resulted in a steadily increasing "adequacy gap" by the State's own chosen method of calculation.

As a result, BCPSS received only minimal increases in State funding, contrary to the original Thornton formula and contrary to this Court's directions. In FY 2009, funding increased by only \$20 million and in FY 2010, BCPSS received only a \$9 million increase. By FY 2013, DLS calculated that the State's funding level for that year resulted in a shortfall for BCPSS of \$1,952 per pupil (one dollar less than the gap for Prince George's County, which had the largest gap). *Id.* at 64 (Ex. 3.4). ¹⁰ This translated to an FY 2013 adequacy gap of \$156 million.

For the State's FY 2015 budget, DLS again looked at the State's school financing levels and determined that the adequacy gap for BCPSS had risen to \$290 million, based on a per-pupil funding shortfall of \$3,611. *See* DLS, Education in Maryland, Presentation to the Commission on Innovation and Excellence in Education (2016) at 7, *available at* [http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2016-12-](http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2016-12-08_DLS_Adequacy_Presentation.pdf)

08_DLS_Adequacy_Presentation.pdf. Indeed, State funding for BCPSS has largely stayed flat since FY 2009. *See* Ex. 2, Funding Chart. This decade of flat funding has negated the Thornton

¹⁰ It appears that DLS did not use the original Thornton formula to calculate the adequacy gap for FY 2013 and instead applied an inflation factor that had been added to the statute in 2007. *See id.* at n.1. Thus, the actual shortfall for that year probably is higher than what DLS reported. Moreover, FY 2015 was the last year for which DLS appears to have performed this analysis.

increases of the prior decade. Based on the original Thornton formula, the State funding falls well below constitutional requirements for adequacy as previously determined by the Court, and therefore the funding level necessarily violates Article VIII.

These shortfalls have had a cumulative effect as well. The near-decade long period of constitutional violation of Article VIII has created an even greater educational programming deficit in Baltimore City. The aggregate underfunding since FY 2008 now totals (at least) over \$2 billion. This is in addition to the prior aggregate funding gap ranging from \$439.35 million to \$834.68 million that the Court identified in 2004 and directed the State to remediate. Contrary to the Court's finding and expectation that the State would redress this past deficit, the State never tried to ameliorate it. These accumulated annual deficits represent generations of BCPSS students deprived of their constitutional right to an adequate education.

Moreover, a subsequent State-mandated independent study confirmed DLS's findings of a massive annual shortfall that BCPSS requires to provide an adequate education. In 2002, the Bridge to Excellence in Public Schools Act implementing the Thornton Commission's recommendations had required a new independent analysis of schools and funding adequacy after ten years. See APA Final Report, *available at* <http://marylandpublicschools.org/Pages/adequacystudy/index.aspx>. The State Department of Education hired Augenblick, Palaich, and Associates Consulting ("APA") in 2014 to meet this requirement, and APA issued its final report in November 2016. That report concluded that a "significant increase" in funding was required for BCPSS, as well as a new formula for determining adequacy. *Id.* at 86-87.

In reviewing the FY 2015 data, APA determined that Baltimore City needed another \$358 million annually, or a per pupil amount of \$3,416. *Id.* at xxv-xxvi (Tables 9, 10), 111 (Tables

6.7b, 6.7c). To put this sum in perspective, the \$358 million shortfall constituted one-third of the State's entire funding level of BCPSS for FY 2015. *See id.* But even though this study was required by State law, funded by and prepared for the State Department of Education, it too failed to spur the State to reach compliance or materially change its funding pattern.

2. The State's Decision to Delay the Kirwan Commission Report Compounds the State's Continuing Constitutional Violation.

Instead of developing legislation to bring the State back into compliance after its actions reducing required funding under the Thornton formula, the State enacted legislation in 2016 to establish the "Commission on Innovation and Excellence in Education" (the "Kirwan Commission"). The Kirwan Commission was tasked with creating a new set of standards and funding proposals to establish "world-class" schools throughout Maryland, ensuring a 21st-century education for all Maryland children attending public schools and preparing them to meet the challenges of participating in the global economy. The Kirwan Commission was supposed to complete its work with a final report by December 31, 2017. That deadline has been postponed repeatedly, most recently from December 31, 2018 to December 31, 2019. Kirwan Commission, Interim Rep. of the Commission, at iv, 7-8, 11, *available at* <http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2019-Interim-Report-of-the-Commission.pdf> ("Kirwan Comm'n"). In the interim, the General Assembly has not addressed its ongoing failure to fund even the Thornton-required levels.¹¹

But the Kirwan Commission's work to date resoundingly confirms the desperate need—right now—for additional resources to achieve adequacy. It found that, on national and

¹¹ The legislation creating the Kirwan Commission (like the legislation that created the Thornton Commission) does not require the General Assembly to fund its recommendations. Thus, there is no guarantee that the Kirwan Commission's final recommendations, if and when they ever are issued, will result in constitutional compliance (just as the Thornton Commission recommendations have failed to achieve compliance).

international standards, “Maryland schools perform at a mediocre level in a country that performs at a mediocre level internationally.” *Id.* at 2. It found “glaring gaps in student achievement based on income, race, and other student subgroups.” *Id.* It found “big teacher shortages,” and noted that the current system is “unfair to poor communities and the children who live in them.” *Id.* at 3. Its preliminary recommendations are particularly clear about the ways in which the current educational system is failing students who live in poverty, especially those who attend schools with high concentrations of poverty, and students of color. *Id.* at 14-15. Based on these needs, the Commission reached the “inescapable conclusion” that “substantial and sustained improvement in Maryland’s educational performance requires targeted attention to its lowest performing schools and an integrated set of reforms that will enable its most challenged students to achieve their full potential.” *Id.* at 15. Such needs, moreover, include “critical social services, health care, nutritional, and other needs that students from more affluent families receive as a matter of course.” *Id.* (noting as well that such students “often live in neighborhoods where they experience traumas that are going untreated”). These needs, the Commission concluded, must be given priority, as must actions to address persistent racial inequities and the explicit and implicit biases that contribute to such inequities. *Id.* at 16-17.

Thus, the Kirwan Commission’s work to date confirms that the status quo is unacceptable and that what is “adequate when measured by contemporary educational standards,” *id.* at 117, has evolved since 2000, raising the constitutional floor. It demonstrates that modern educational needs have increased substantially, much as this Court recognized in 2004, just four years after the Thornton levels were established. And the State’s decision to delay the Kirwan work for at least another year, with no promise of adequate funding at the end, means that the children who need additional funding the most (per Kirwan’s recommendations) will not receive it.

3. BCPSS Has Submitted a Plan to the Kirwan Commission Confirming the Constitutional Inadequacy of Current Funding to the District.

Building on the Kirwan Commission's initial recommendations and areas of focus, BCPSS submitted its own analysis of needs in Baltimore City schools to the Kirwan Commission in January 2019. To develop the plan, called Investing in our Future: A World-Class Education System for Baltimore City Students (Jan. 2019) ("BCPSS World-Class Plan"), *available at* <https://www.baltimorecityschools.org/sites/default/files/2019-01/investinginourfuture.pdf>, BCPSS met with teachers, administrators, other stakeholders, and experts, and reviewed research on student outcomes, to attempt to answer the question: "What could it look like for a child born in Baltimore in the *second* 18 years of the 21st century— if all schools in Maryland were funded equitably and at a level that truly supports the world-class education that our children deserve?" BCPSS World-Class Plan at 3. The answer is a variety of programs and services focusing on the same areas that the Kirwan Commission identified: (1) early learning focus, including proposals both for three and four-year old public preschool programs and free childcare in public high schools for students who also are parents; (2) high-quality instruction including extended and special education options for students in need and tutors, assistant principals, assistants, and other necessary staff, for arts and elective funding, and for funds spent on technology purchases and upgrades; (3) college and career readiness, including ensuring BCPSS high schools are staffed with college and career counselors, along with internship programs and career education; (4) student wholeness—also one of the Kirwan Commission's most important areas—including providing mental health services, such as counselors and social workers, to students; (5) talent recruitment, development, and retention, with a focus on hiring and training; and (6) systems, structures, and facilities, including student transportation, administrative staffing, technological

upgrades, renovating current buildings, providing for preventative maintenance, and ensuring custodial and grounds support.

The plan's rich menu of programs and services further demonstrates that the students in the BCPSS are not receiving a constitutionally-adequate education. The plan does not specifically cost out its proposals for an adequate education or measure the additional funding necessary for implementation, but it seems likely that such costs would be substantially in excess of current funding.

4. The State Compounded Its Continuing Constitutional Violation by Diverting Funds from the Education Trust Fund.

Finally, adding yet another insult to the sorry story of constitutional injury set out above, for years the State raided an "Education Trust Fund" established in 2008, to receive a portion of new casino license revenues. In 2012, Governor O'Malley boasted that a plan to expand casino gambling would mean "hundreds of millions of dollars for our schools." See John Wagner, *Maryland's casino-gambling ballot measure: The big questions about Question 7*, Wash. Post (Oct. 22, 2012), available at https://www.washingtonpost.com/local/md-politics/marylands-casino-gambling-ballot-measure-the-big-questions-about-question-7/2012/10/22/347d10bc-1c54-11e2-9cd5-b55c38388962_story.html?utm_term=.eeca13d3cb12. That never happened. The funds Maryland voters were told would *supplement* education funding instead were used to *supplant* existing funding, meaning that available funds for compliance were not utilized and other priorities were funded instead. See Ian Duncan, *Casino "lockbox" for Maryland school funding and Election Day voter registration win approval*, Baltimore Sun, Nov. 6, 2018, available at <http://www.baltimoresun.com/news/maryland/politics/bs-md-state-ballot-20181102-story.html>. Even though a constitutional amendment was adopted this past year to establish a "lockbox" to halt reassignment of current funding, the current Governor has proposed legislation that would

utilize this funding to pay for statewide school construction requests, instead of using it to remedy existing constitutional violations in BCPSS and the State's ongoing violations of the Court's findings and orders. See HB 153, available at <http://mgaleg.maryland.gov/2019RS/bills/hb/hb0153f.pdf>.

5. National Studies Confirm the Huge "Adequacy Gap," Including its Impact on African-American Students.

National studies further confirm that the State's failure to fund BPCSS at constitutional levels over time has contributed to a widening gap between the education to which Baltimore students are constitutionally entitled and the education they receive, particularly in light of their increased level of need. For example, in its 2018 National Report Card of state support of public schools, the Education Law Center concluded that Maryland's system is among the most regressive in the entire country, receiving a "D" for its insufficient recognition of poverty and ranking 11th from the bottom nationwide. Education Law Center, *Is School Funding Fair: A National Report Card* (7th Ed. 2018), at 11, available at http://www.edlawcenter.org/assets/files/pdfs/publications/Is_School_Funding_Fair_7th_Editi.pdf. See also *id.* at 14 (demonstrating that Maryland is regressive as compared to its geographic region). Accord Kirwan Comm'n, *supra*, at 18 (finding that Maryland's formula is regressive). Additionally, Maryland's formula disproportionately harms its African-American population. The Education Trust looked at the State's funding distribution for FY 2015 and concluded that the system is inequitable for children of color, as the three districts with the highest numbers of children of color (Baltimore City, Prince George's County, and Caroline County) also are the three most underfunded districts in the State. See Baltimore Community Foundation, The Education Trust Report: Innovation, Excellence and Funding for Maryland Public Schools, "Inequities in Access to Funding of Students of Color" (2018), available at

<http://education.baltimorecommunityfoundation.org/2018/11/02/ed-trust-report/>. *Accord* discussion *supra* at 19-20 (discussing Kirwan Commission’s interim report recognizing the pressing needs of children of color and children who live in poverty).

* * *

Whatever the measure, the State’s current funding levels for BCPSS do not come close to meeting the requirements of Article VIII. During the years in which the State has been ignoring this Court’s declaration of rights of the Plaintiffs to adequate schools, two generations of children have entered and graduated BCPSS schools since this litigation began without receiving the education the State Constitution guarantees them. This Court needs to act now to halt the State’s chronic abdication of its fundamental duty to provide sufficient funding to educate the at-risk children in Baltimore City.

D. The State’s Failure to Fund BCPSS Sufficiently Continues to Result in the Denial of an Adequate Education in Violation of Article VIII.

What this Court first found in 1996 remains distressingly true today: “There is no genuine material factual dispute . . . as to whether the public school children in Baltimore City are being provided with an education that is adequate[.]” Dkt. 1-66, Order (Oct. 18, 1996). In 2004, the Court agreed with the Thornton Commission’s finding that Baltimore City’s “‘adequacy gap’ . . . was the highest in the State.” Dkt. 50, Mem. Op. at 12 ¶ 40 (Aug. 20, 2004). The sad reality is that, no matter the measure used, current data demonstrate that children in BCPSS continue to receive an education that is constitutionally deficient. These disparities echo the same deficits that Judge Kaplan found in 2004, and, as was the case then, are the result of the State’s failure to fund education in Baltimore sufficiently. These disparities are exacerbated by the lack of sufficient local revenue that Baltimore City, the poorest large jurisdiction in the State, can tap to fill the huge hole in State aid. They are particularly tragic given the needs of Baltimore City’s student

population, which is comprised by mostly low-income students of color who already suffer the combined effects of the persisting legacy of structural racial discrimination in Baltimore and the City's current economic woes.

The continuing constitutional violation is demonstrated both by the school system's "inputs" (the educational services, programs, and facilities available to students attending BCPSS) and its "outputs" (student performance on standardized tests and other measures used to determine whether and how well they are learning and being prepared to be 21st century citizens).

1. Baltimore City Public Schools Have Less Staff and Less Experienced Staff Than Other Districts Statewide.

The lack of financial resources translates to a lack of educational services. These disparities are reflected in, among other things, the lack of adequate numbers of teachers and staff in Baltimore City schools. Baltimore City averages the highest ratios of students to staff of any school district in the state: 16.4 students per teacher; 14.7 students per teacher and therapist; and 29.5 students per non-instructional staff member. *See* Maryland Public Schools ("MPS"), Staff Employed at School and Central Office Levels, at 5 (Oct. 2017) ("Staff Levels"), *available at* http://marylandpublicschools.org/about/Documents/DCAA/SSP/20172018Staff/2018_Staff_Emply.pdf.

The problem is exacerbated by the fact that BCPSS has had to reduce significantly the number of its teachers. Baltimore has nearly 500 fewer teachers than it had just three years ago. Ex. 3, BCPSS, Investing in Student Success at 9. Budget shortfalls have affected other staffing decisions as well. Recently, BCPSS had to slash spending on leadership and management. *Id.* at 8. Current spending levels on school leadership and management lag behind similar sized districts nationwide, including Boston, Cleveland, Oakland, and the District of Columbia. *Id.*

A disproportionate number of the BCPSS teachers lack sufficient formal training. Over 20 percent of BCPSS teachers lack standard professional certification, compared to 2.2 percent in Baltimore County Public Schools, 1.1 percent in Carroll County Public Schools, 1.2 percent in Harford County Public Schools, 1.2 percent in Howard County Public Schools, and none in Anne Arundel County Public Schools. *See* Cara McClellan, *OUR GIRLS, OUR FUTURE: Investing in Opportunity & Reducing Reliance on the Criminal Justice System in Baltimore*, at 11, available at https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf. BCPSS teachers are also less experienced and more likely to be absent from school: nearly 25 percent are in their first two years of teaching. *See* U.S. Dep't of Educ., Civil Rights Data Collection (2018), available at <https://ocrdata.ed.gov/districtschoolsearch#schoolsearch> ("Civil Rights Data Collection"). Over 69 percent of BCPSS teachers are absent more than ten days of the school year. *Id.*

BCPSS teachers also have fewer advanced degrees than their counterparts around the State. Over 73 percent of teachers in Baltimore County Public Schools have a Master's degree or higher. *See* MPS, Professional Staff by Type of Degree and Years of Experience, 2017, at 8, available at http://marylandpublicschools.org/about/Documents/DCAA/SSP/20172018Staff/2018_Prof_Staff_by_Degree.pdf. By comparison, only 50 percent of BCPSS teachers have a Master's degree or higher. *Id.* In Montgomery County Public Schools, 22 percent of teachers have only a Bachelor's degree or less. *Id.* By contrast, 41 percent of BCPSS teachers fall into this category. *Id.*

Although Baltimore City is the fourth largest district in the state, it has fewer support staff than similarly sized districts, such as Anne Arundel County. *See* MPS, Staff Levels, *supra*, at 1. Likewise, although Montgomery County Public Schools is less than twice the size of BCPSS, it has almost four times the number of support staff. *Id.* Similarly, although Baltimore County

Public Schools is approximately 1.3 times the size of BCPSS, it has more than double the number of support staff. *Id.* The disparities and shortages are not limited to support staff. Many schools lack their own school nurse and mental health professionals. *Id.* at 3. In 2017, BCPSS had no library aides. *Id.* Again, given the needs of the Baltimore City student population, these staffing shortages are especially harmful.

Likewise, BCPSS employed merely 81 school counselors. *Id.* at 2. By comparison, Anne Arundel County Schools, a system of similar size, employed 219. *Id.* In some areas, the disparities are starkest at the elementary school level. BCPSS employs merely ten guidance counselors in its 127 elementary schools. *Id.* at 7. Baltimore County Public Schools employs 125. *Id.* The disparities continue as children progress through school. BCPSS employs merely 62 librarians; Anne Arundel County Public Schools, by comparison, employs double that amount. *Id.* at 6.

BCPSS also is challenged to respond fully to the needs of students with disabilities. Although Baltimore City's student population is roughly equivalent in size to that of Anne Arundel County, BCPSS has only 75 percent of the special education therapists that Anne Arundel County Public Schools does. *Id.* at 11.

Currently only 55 percent of Baltimore City elementary school students have music courses and only 81 percent have visual art; very few have dance and theatre. *See Arts Every Day, Baltimore Arts Education Initiative at 5, available at* <https://www.artseveryday.org/wp-content/uploads/2019/02/City-Council-Hearing-2.pdf>. In neighboring Anne Arundel County, 100 percent of elementary students are enrolled in both music and visual arts classes each year. *Id.*

2. Students in Baltimore City Public Schools Are Not Proficient in Reading and Math.

The lack of sufficient staff, along with other similar funding related deficiencies, has a direct impact on student performance. Despite some improvements, BCPSS students continue to

perform at levels well below contemporary standards. By national standards, only 13 percent of BCPSS students in 4th and 8th grade are proficient readers. *See* National Assessment of Educational Progress (“NAEP”), National Assessment of Educational Progress Results: Presentation to the Baltimore City Board of School Commissioners (Apr. 2017) at 7, *available at* [https://www.boarddocs.com/mabe/bcpss/Board.nsf/files/AXPN9H5EB399/\\$file/18.04%202017%20National%20Assessment%20of%20Educational%20Progress%20\(NAEP\)%20Results.pdf](https://www.boarddocs.com/mabe/bcpss/Board.nsf/files/AXPN9H5EB399/$file/18.04%202017%20National%20Assessment%20of%20Educational%20Progress%20(NAEP)%20Results.pdf). The results are similarly alarming when students are tested as to proficiency in math. In 2017, only 14 percent of 4th graders and only 11 percent of 8th graders were proficient. *Id.* at 8.

The percentage of students who meet these basic proficiency standards is far lower than those of students in Maryland and across the country. The disparities exist at every level of the system, including among the City’s youngest students. Fourth grade students in Baltimore City, when tested as to their reading abilities, score 16 points lower than students in other large cities, 24 points lower than students nationwide, and 28 points lower than students on average throughout Maryland. NAEP, *supra*, at 5. Eighth grade students in BCPSS score 15 points lower in reading than students do in other large cities nationwide, 22 points lower than students across the country, and 24 points lower than students across Maryland. *Id.* Likewise, fourth grade students in BCPSS, when tested on math, score 17 points lower than students in other large cities, 24 points lower than students nationwide, and 26 points lower than students on average throughout Maryland. *Id.* at 6. Similarly, eighth grade students in BCPSS score 19 points lower than students in other large cities nationwide, 27 points lower than students across the country, and 26 points lower than students across Maryland. *Id.*

Even when compared with 28 other large school districts nationwide, Baltimore City students scored lower than all but three districts in reading and math. *Id.* at 19. Among the districts

that scored higher than Baltimore City were Atlanta, Philadelphia, and the District of Columbia, each of which have socio-economic demographic makeups similar to Baltimore. *Id.* BCPSS students in eighth grade scored lower than all but two districts, including Atlanta, the District of Columbia, Philadelphia, and Milwaukee. *Id.* at 20.

3. Baltimore City Students Score Lower on Advanced Placement and College Entrance Exams.

State funding also directly affects the availability of advanced placement and college preparatory courses and student performance on them. Of the 39 high schools that were open in 2017, only 23 offered Advanced Placement (“AP”) or an International Baccalaureate Diploma Program. Civil Rights Data Collection, *supra*.

The students who are fortunate enough to enroll in AP courses often score lower than other students statewide. Of the nearly 2,300 students who took Advanced Placement courses in 2017, only 31 percent passed. *See* BCPSS, College and Career Readiness Update: Presentation to the Baltimore City Board of School Commissioners, Teaching and Learning Committee (Nov. 5, 2018) at 46, *available* at [https://www.boarddocs.com/mabe/bcpss/Board.nsf/files/B5ZLUD4D571C/\\$file/College%20and%20Career%20Readiness%20Update.pdf](https://www.boarddocs.com/mabe/bcpss/Board.nsf/files/B5ZLUD4D571C/$file/College%20and%20Career%20Readiness%20Update.pdf). The average Maryland pass rate, 63.1 percent, was more than double that in BCPSS. *Id.* at 47. Again, the percentage of African-American students passing lagged far behind that of other students, with only 12.8 percent passing their exams. *Id.* at 48. The results are particularly alarming given that students in Maryland, on the whole, score more than 7 points higher than the national average. *Id.* at 47.

The disparities are likewise reflected in the lower test scores of BCPSS students taking college entrance exams. In 2017, the average SAT score for BCPSS students was 884, more than 150 points lower than the state average. *Id.* at 11. Similarly, 11th grade BCPSS students taking

the PSAT scored more than 183 points lower and students taking the SAT scored 162 points lower. *Id.* at 36, 51.

4. Graduation Rates Are Lower and Dropout Rates Are Higher among BCPSS Students.

These lower performance rates are reflected in the relatively low number of students who make it to graduation. Graduation rates for BCPSS students continue to lag behind students in other districts across the state. “Four-year graduation rates have flattened, with the class of 2017 showing a four-year rate of 70.7 [percent],” significantly lower than the statewide average of 87.7 percent and the average graduation rates in Anne Arundel, Howard, Montgomery, Prince George’s, and Baltimore County Public Schools. Ex. 4, BCPSS, Summary Report: 4 Year Graduation and Dropout Update Class of 2017, at 1.

“While graduation rates have flattened, four-year dropout rates in City Schools increased from the previous year. The four-year dropout rate for the Class of 2017 stood at 15.9 percent, up from 13.9 percent for the Class of 2016” *Id.* at 2. By contrast, only 8.2 percent of students statewide dropped out. *Id.* at 4. Rates from other large counties, including Anne Arundel, Howard, and Montgomery County Public Schools, were even lower. *Id.* Dropout rates increased among most student groups, but were most pronounced among the Hispanic/Latino and English Learner populations, which also saw the largest increases in population. Both groups’ dropout rates increased by more than 12 percentage points. *Id.* at 3.

The disparities are also reflected in where students find themselves once they graduate. The percentage of BCPSS students enrolled in a two or four-year college in their first fall after graduation has continued to fall, with only 41.7 percent of students enrolled, compared to 46 percent in 2012. *See* BCPSS, College and Career Readiness Update, *supra*, at 54. Two years after graduation, only 53 percent of former BCPSS students are enrolled in college, compared to 71.1

percent statewide. *Id.*; Md. State Dep't of Educ., Maryland Report Card: Demographics (2017), <http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20162017Student/2017EnrollbyRace.pdf>.

5. The Official State Report Card for Public Schools Confirms these Disparities.

The State's own official measure of school performance confirms that BCPSS schools fail to meet state standards in numerous categories. In 2017, the General Assembly passed legislation, the Protect our Schools Act of 2017 (HB 978) refining the factors and calculations the Maryland State Board of Education uses to assess schools statewide, assigning them star ratings—from 1 to 5 stars—and percentile rankings based on performance. *See* Md. Laws 2017, ch. 29; Danielle E. Gaines, *With New Report Card, State Schools Receive A Star Rating*, Maryland Matters (Dec. 5, 2018), *available at* <https://www.marylandmatters.org/2018/12/05/with-new-report-card-every-state-school-receives-a-star-rating/>.¹² All schools in the state were assigned a star rating based on the possible percentage of points achieved after an assessment of, among other things, standardized test scores, graduation rates, and the chronic absenteeism rate. *Id.* Five-star schools received at least 75 percent of the possible points; one-star schools received less than 30 percent of the possible points. *Id.* The report card improved on the previous system by, among other things, considering different factors for elementary, middle and high school students and improvement over time among elementary and middle school students. *Id.* The previous system was criticized for

¹² As explained by MSDE, the new Report Card assessment of schools constitutes the formal measurement tool for Maryland to comply with the federal Every Student Succeeds Act, which requires states to develop plans to improve schools through accountability and innovation. It was approved by the US Department of Education early in 2018. In addition to collecting information on how schools and districts fare on State assessments, it also measures “other factors such as growth in achievement, high school graduation, student access to a well-rounded curriculum, the progress of English language learners, and postsecondary readiness.” MSDE, Maryland Report Card, Introduction. *available at* <http://reportcard.msde.maryland.gov/>.

“paint[ing] too simplistic a picture of the complicated factors that go into” assessing whether a school is providing students an adequate education. *Id.*

The new system of measurement, like its predecessor, reveals the gross disparities between BCPSS and its counterparts. Baltimore had 23 schools that received only one star, almost twice the number of one-star schools in every other Maryland school district combined. *Id.* Only 3 percent of schools statewide received the lowest rating, and 66 percent of these schools (23 of 35) were in BCPSS. *Id.* Although three and four-star ratings were by far the most common statewide, only 39 percent of BCPSS schools were so rated compared to 74 percent of schools in the rest of the state. *Id.* BCPSS was the only school district in which the largest number of schools received two stars. *Id.* Altogether, almost 60 percent of BCPSS schools received only one or two stars (99 of 166 schools)—not only the largest percentage in the State, but more than *eight times* the percentage for the rest of the State, where less than 7 percent of all schools received only one or two stars (80 out of 1150 total schools outside of Baltimore City). *Id.*

Conversely, only three BCPSS schools received five stars. *Id.* Baltimore County had 36 such schools; Howard County had 31 such schools; and, in Montgomery County, 50 schools were awarded five stars. *Id.* Only 13 percent of BCPSS schools were awarded four or five stars—the lowest percentage in the State, and almost half that of the school district with the next lowest percentage. *Id.* Combined, 219 schools statewide received five stars. BCPSS accounted for barely 1.5 percent of these schools. *Id.* On average, 17 percent of schools statewide received five stars; in Baltimore, only two percent of schools did. *Id.*

6. Baltimore City’s Student Population Has Higher Needs Resulting from Higher Poverty Rates and Other “At-Risk” Factors.

Students who attend BCPSS face additional challenges that the State must account for. This Court previously found that the “students who live in poverty or face similar disadvantages

cost more to educate.” Dkt. 50, Mem. Op. at 12 ¶ 40 (Aug. 20, 2004); *accord id.* at 29 § 8 (finding that the substantial number of students who live in poverty and have other needs “require increased educational focus and resources”) (capitalization omitted). It accepted the Thornton Commission’s finding that “substantial additional resources in addition to then-current funding were necessary to educate students who live in poverty[] to enable those students to meet state standards and receive an adequate education.” *Id.* at 11 ¶ 38. Citing testimony by the State Superintendent, this Court also found that “the needs of children in poverty have increased since the Thornton recommendations were issued.” *Id.* at 16 ¶ 56. All of these findings apply with equal force today, as the January 2019 interim report from the Kirwan Commission confirms. *See* Kirwan Comm’n, *supra*, at 4 (recommending “broad and sustained new support” for students who liv in poverty); *id.* at 106-07 (explaining that “extra resources and a determined, persistent, and comprehensive effort” are needed for schools with high concentrations of poverty).

As calculated by the State, BCPSS has the highest “at risk student index” in the State—the combined percentage of students that receive free and reduced meals, have limited English proficiency, and have special education needs. *See* DLS, Overview of State Aid to Local Governments, Fiscal 2020 Allowance, at 40-42, *available at* <http://dls.maryland.gov/pubs/prod/InterGovMatters/SteAidLocGov/Overview-of-State-Aid-to-Local-Governments-Fiscal-2020-Allowance.pdf>. Over 86 percent of students in BCPSS are eligible for free and reduced meals—the highest percentage in the state. *Id.* at 40. By comparison, on average, only 42 percent of students are eligible statewide. *Id.* Of these, 19.3 percent of BCPSS students suffer from extreme poverty, nearly three times the statewide average. Ex. 3, BCPSS, Investing in Student Success at 4. BCPSS identified 2,716 homeless youth who attended the

district's schools in the 2012-13 school year. *See* BCPSS, Homeless Services, *available at* <http://www.baltimorecityschools.org/homeless>.

These differences are not without consequence. Students who are economically disadvantaged score significantly lower than other students. The National Assessment of Educational Progress found that, in 2017, BCPSS students, tested separately in grades 4 and 8, who received SNAP (Food Stamp) or TANF (welfare) benefits, were homeless, or were in foster care, received lower scores in both math and reading. NAEP, *supra*, at 15-16.

Unfortunately, the barriers extend beyond wealth. More than 7 percent of Baltimore City students have limited English proficiency—the sixth highest percentage in the state. *See* DLS, Overview, *supra*, at 41. Seventeen percent of the City's student population has special education needs—the second highest percentage in the state and four points higher than the state average. *Id.* at 42.

Because of the social and economic challenges that Baltimore neighborhoods face, BCPSS schools have a high proportion of students who need social and emotional supports. Nearly 30 percent of children in Baltimore, compared to 19 percent statewide, have ACE (“Adverse Childhood Experiences”) scores of two or more, meaning that they have experienced more than two incidences of traumatic events such as domestic violence, living with someone with an alcohol/drug problem, the death of a parent, or being a victim/witness of neighborhood violence. *See* Balt. City Health Dep’t, Healthy Baltimore 2020: A Blueprint for Health (Mar. 2017) at 10, *available at* <https://health.baltimorecity.gov/sites/default/files/HB2020%20-%20April%202017.pdf>. As research has established, these barriers drastically affect a student's ability to learn because toxic stress affects a child's developing brain. *See* Centers for Disease Control and Prevention, *Violence Prevention: Adverse Childhood Experiences*, *available at*

https://www.cdc.gov/violenceprevention/childabuseandneglect/cestudy/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Facestudy%2Findex.html.

Approximately 37 percent of BCPSS students are chronically absent due to these and other challenges. See Liz Bowie, *Does Maryland really have the highest rate of chronically absent students in the U.S.?*, Baltimore Sun (Sept. 17, 2018), available at <https://www.baltimoresun.com/news/maryland/education/k-12/bs-md-report-school-absence-20180917-story.html>. Students who attend high poverty schools are significantly more likely to experience conditions that make it difficult to attend school every day. See Hedy N. Chang & Mariajosé Romero, *Present, Engaged, and Accounted For: The Critical Importance of Addressing Chronic Absence in the Early Grades* (Sept. 2008), available at http://www.nccp.org/publications/pdf/text_837.pdf. These conditions include: physical and behavioral health conditions; substandard, unstable housing; dangerous routes to and from school; and unreliable public transportation. Many students have one or more health conditions that put them at risk for frequent absence from school, such as asthma, dental health, and vision impairments, among others. Chronic absence rates highlight educational inequity and lack of access to opportunities. See Krenitsky-Korn S., *High school students with asthma: attitudes about school health, absenteeism, and its impact on academic achievement*, 37 J. Ped. Nursing 61, 68 (2011); Julia Burdick Will, *et al.*, *Danger on the Way to School: Exposure to Violent Crime, Public Transportation, and Absenteeism*, 6 Sociological Sci. 118, 119-20 (2019); Stephanie L. Jackson, *et al.*, *Impact of Poor Oral Health on Children's School Attendance and Performance*, 101 Am. J. Pub. Health 1900, 1906 (2010).

These factors work together to decrease the quality of education and opportunities that students receive. Classes with significant student populations with high and diverse needs make

it more difficult for teachers to meet all students' needs. Ex. 3, BCPSS, Investing in Student Success at 21. As a result, schools must provide additional special education resources and other support services which otherwise would not be needed. *Id.* This leaves fewer resources for general education and the provision of a more rigorous curriculum for all students. *Id.* Examples of additional resources required might include, among other things, physical health supports, such as school nurses; mental and behavioral health supports, such as school psychologists; and academic support and tiered interventions, such as small group instruction and tutoring. *Id.*

BCPSS spends 24 percent of its total operating budget on services for students with disabilities, the highest among comparison districts in the State. *Id.* at 20. This is due, in part, to having to expend 41 percent more on physical health services and 60 percent more on social emotional services for students than other districts spend on average statewide. *Id.* City schools' transportation costs are also higher for students with disabilities. *Id.* According to BCPSS estimates, the district needs an additional \$600 per elementary school student and \$1,375 per middle and high school student to address *just the additional costs* that arise from having an overwhelmingly high need, student population. Ex. 5, Proposed Changes to the Fair Student Funding Model at 35 (Jan. 9, 2018).

Nonetheless, the State has ignored and continues to ignore Baltimore's student population. As of 2013, DLS determined that Baltimore City had the second largest funding gap per student in the state—the gap between current funding and funding determined by the State in 2002 to be necessary to provide students an adequate education—\$1,952 per student. *See Handbook, supra*, at 64. Although, in a majority of states, students in the poorest school districts tend to receive more funding than rich districts, Maryland is one of six states where the wealthiest 25 percent of school districts receive more money than the poorest. *See* Jill Barshay, *In six states, the school*

districts with the neediest students get less money than the wealthiest, The Hechinger Report (July 9, 2018) (discussing 2014-15 data from, and recent report by, the National Center on Educational Statistics), *available at* <https://hechingerreport.org/in-6-states-school-districts-with-the-neediest-students-get-less-money-than-the-wealthiest/>. As discussed above, a study by the Education Law Center found that Maryland's funding system is among the most regressive nationwide for its failure to provide additional funding to school districts with high concentrations of low-income students. *See* Education Law Center, *Is School Funding Fair: A National Report Card*, *supra*, at 15 & n.15.

7. BCPSS Is Racially Isolated from Surrounding School Districts.

Compounding matters, the Baltimore region is highly segregated, which is reflected in the racial composition of BCPSS's student population. *See* Jennifer B. Ayscue, *et al.*, *Settle for Segregation or Strive for Diversity? A Defining Moment for Maryland's Public Schools*, at 6 (April 2013), *available at* <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/settle-for-segregation-or-strive-for-diversity-a-defining-moment-for-maryland2019s-public-schools>; Gary Orfield, *et al.*, *Brown at 62: School Segregation by Race, Poverty and State*, at 4 (May 16, 2016), *available at* <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-62-school-segregation-by-race-poverty-and-state>. Accordingly, the State's failure to fund BCPSS adequately has caused the denial of an adequate education to a significant proportion of Maryland's African-American student population. Approximately 79 percent of BCPSS students are African-American—the highest percentage in the state. *See* MPS, *Public School Enrollment by Race/Ethnicity and Gender and Number of Schools*, at 1, *available at* <http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20172018Student/2018EnrollbyRace.pdf>. As of 2015, 53 percent of African-American students in Maryland attended

chronically underfunded schools, compared to just 8 percent of white students across the state. *See* Letter from Sonja Brookins Santelises to Kirwan Comm’n (Jan. 16, 2019), *available at* http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2019_01_18_BaltCityPublicSchoolsLetter.pdf. Moreover, as the Kirwan Commission has found, Maryland has “glaring gaps in student achievement based on income, race, and other student subgroups.” Kirwan Comm’n, *supra*, at 2; *id.* at 14 (citing data); *id.* at 16-17 (finding that “race and poverty are not interchangeable” and that students of color face unique barriers from racial inequities and explicit and implicit bias).

Additionally, racially isolated schools hamper the educational opportunities of all students by impeding the development of critical thinking skills, stifling educational and career goals, and failing to prepare students for careers in a diverse workforce. *See* U.S. Comm’n on Civil Rights, Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation at 5 (Jan. 2018), *available at* <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf>). The impact of racial isolation on educational opportunity can be addressed only through state-wide policies and initiatives to foster diversity and address the segregation that exists between schools and school districts. Thus, in addition to increasing funding on other areas that are proven to increase educational outcomes for students through recruiting and supporting strong and experienced faculty, expanding social and health services in schools, and offering high quality early education, among other things, additional funding to support a constitutionally-adequate education is needed to remediate the effects of racial segregation and isolation. *See* Jennifer Ayscue, *et al.*, *The Complementary Benefits of Racial and Socioeconomic Diversity in Schools* (Mar. 2017), *available at* <http://school-diversity.org/pdf/DiversityResearchBriefNo10.pdf>.

8. Baltimore City Public Schools Require State Funding Because Baltimore City Lacks Sufficient Revenue Resources Available to Wealthier Counties.

State funding is particularly important to BCPSS because of the low level of local funding available for education in Baltimore City. Only 24 percent (approximately \$278 million) of BCPSS funding comes from local sources, even though the City's property tax rate is the highest in the state. Ex. 6, Funding 101 Slides at 2. By comparison, Howard County receives over 70 percent (approximately \$572 million) of its funding from local sources. *Id.* The disparity is not borne from disinterest or inadequate support by the City government. Rather, it reflects the economic reality of Baltimore City's population: Baltimore City residents are lower-income than residents in surrounding districts. *See* <https://factfinder.census.gov>. Indeed, Baltimore City residents are, on average, much poorer than the residents in any other large jurisdiction in the State. *Id.* As a result, the tax base is much lower, and the City cannot fill budget holes with its own revenues like other large jurisdictions are able to do. The Kirwan Commission has recognized this problem, noting that "several national studies show Maryland to be 'regressive' in its school funding, which means, in effect, that our school finance system is unfair to poor communities and the children who live in them." Kirwan Comm'n, *supra*, at 3.

To cite one glaring consequence of this stark inequity, BCPSS expends over \$50 million annually from its general operating budget to pay its share of the cost of the bonds that are funding the new "21st Century School Plan"¹³ buildings in Baltimore City. *See* BCPSS Operating Budget for 2018-19 at 23 (listing \$53,496,255 for "debt service"), *available at* <https://www.baltimorecityschools.org/sites/default/files/2019-01/Budget-FY19OperatingBudget->

¹³ The Plan is a joint agreement between the City and the State to fund the construction of a limited number of new school buildings in Baltimore. *See* <https://baltimore21stcenturyschools.org/about/history>. However, as explained below, the Plan is insufficient to address the overwhelming facility needs of the system's buildings.

English.pdf. Other jurisdictions are able to pay their share of school construction costs out of separate capital budgets and thus do not have to raid academic operations in order to pay for new school construction.

This Court has already noted the significance of Baltimore City's comparative lack of resources. In 2004, Judge Kaplan made an express finding that Baltimore City ranked last among Maryland jurisdictions in wealth per pupil. Dkt. 50, Mem. Op. at 30 ¶ 125 (Aug. 20, 2004). Today, the situation is not much better.

Moreover, Baltimore City is already contributing more, proportionately, than many richer jurisdictions. APA's state-mandated study for the State Department of Education in 2016, for instance, concluded that not only should the State share of funding for Baltimore City be increased by \$387 million (in FY 2015 numbers), or 45 percent, but the City's share should actually be *decreased* by \$29 million, or 13 percent. *See* APA, *supra*, at 109 Table 6.7a, 6.7b (net annual "adequacy gap" of \$358 million).

9. The Aggregate Evidence Demonstrates that Defendants' Violations of Article VIII Persist, Nearly 15 Years after this Court's 2004 Decision.

For all of these reasons, what the Court concluded in 2004 about the State's chronic underfunding of BCPSS remains true today: "Student scores and other objective evidence continue to demonstrate, as they did in 1996 and 2000, that the BCPS students are performing at levels far below state standards, and far below state averages[.]" Dkt. 50, Mem. & Op. at 25 ¶ 98 (Aug. 20, 2004). Among the pertinent evidence were disproportionately low scores on state achievement tests and high school assessment tests; unacceptable dropout, graduation, and attendance rates; and high concentration of poverty and other high-risk factors. *Id.* at 25-30 ¶¶ 99-125. These poor outcomes and high-risk factors "indicate an inadequate level of educational services." *Id.* at 28 § 7 (capitalization omitted). The objective evidence of poor outcomes has not changed materially

since 2004, and, accordingly, neither should the Court's conclusions. BCPSS schools receive insufficient funds to provide "an [i]adequate level of educational services." *Id.* (capitalization omitted).

II. The State Is Violating Its Constitutional Obligation to Provide Baltimore City Students with Adequate School Facilities.

In addition to depriving Baltimore City children of funds sufficient for adequate educational and instructional programs, the State also has abdicated its duty under Article VIII to provide funding sufficient to ensure that students in the City attend school in buildings that are safe, functional, have reliable heat and air conditioning, and have sufficient facilities to support an adequate education program. The physical condition of most school facilities in Baltimore City is abysmal. The system has reached a breaking point, and the condition is getting steadily worse. Accordingly, these problems continue to directly affect the ability of Baltimore City students to learn.

Article VIII clearly requires adequate facilities, both because an adequate education under contemporary standards should be understood to include the facilities where students learn, and because adequate facilities are necessary for adequate learning. Accordingly, this Court has already recognized that facilities are relevant to assessing whether a system of education meets contemporary standards, because it approved the Consent Decree which included funds for improving schools and because it adopted as its own the findings of the Metis Report, which focused extensively on the inadequacy of the BCPSS facilities. As discussed below, moreover, that recognition is consistent with several decisions from other courts across the country applying identical or similar constitutional provisions.

Nonetheless, BCPSS has been starved of the funds necessary even to maintain its facilities, let alone to bring them to modern standards. Children attending BCPSS are expected to learn in

physical facilities that oftentimes lack functional and reliable heat, lack air conditioning, lack drinkable water, lack security measures such as classroom doors that lock or appropriate coverage by security cameras, have dilapidated elevators that routinely break down because they are decades beyond the date when they should have been replaced, and often have roofs and structures that are leaking, crumbling, and well beyond their useful lives. *See, e.g.,* Talia Richman, *Leaky roofs, lead in the water, fire risk: Baltimore schools face nearly \$3 billion maintenance backlog*, Baltimore Sun, available at <http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-ci-facilities-costs-20180914-story.html>; Ex. 7, Jacobs, State of School Facilities, Baltimore City Public Schools, June 2012, at 23 (“Jacobs Report” or “Jacobs Rep.”); Ex. 8, BCPSS, Comprehensive Educational Facilities Master Plan (Oct. 12, 2018), at 620-26 (listing schools with a variety of problems, including structural issues, fire safety issues, and the need to replace HVAC systems, roofs, and electrical systems). Last winter, the system closed for a week because numerous ancient heating systems failed and classrooms were without heat; last summer, schools closed for lack of air conditioning; this winter, problems have recurred.

Six years ago, at least 85 percent of the school buildings were rated “very poor” or “poor” by the engineering firm, Jacobs, which relied on accepted industry standards to assess every facility in BCPSS. Ex. 7, Jacobs Rep., *supra*, at 26. The Jacobs report, the standard it used, and its findings have served as the accepted basis by BCPSS and the State to assess facilities deficiencies in BCPSS. *See* <https://baltimore21stcenturyschools.org/about/history> (noting the importance of the Jacobs report and its findings to the work of the 21st Century Schools fund, under which the State and BCPSS have partnered to renovate a small number of Baltimore schools). Using estimates projected by BCPSS from the 2012 Jacobs Report, it would cost \$3 billion to bring BCPSS buildings up to a minimally acceptable standard through repairs and building replacements

and \$5 billion to complete a full portfolio replacement to meet modern educational standards. Nor does the BCPSS have the funds to adequately maintain the schools, particularly in light of their already dilapidated condition—the \$23 million annually it spends from its operating funds (taking funds from the classroom) is not even close to the \$150 million that industry standards require for similar systems. Ex. 9, BCPSS SY 18-19 Comprehensive Maintenance Plan at 3.

Students feel the effects of this systemic constitutional violation at the individual school level. One compelling measure of how students experience day-to-day education in Baltimore City’s aging facilities is the significant number of emergency/unscheduled work orders. Emergency work orders are “for immediate repair to equipment or the physical plant that is a threat to life and safety or the mitigation of the threat to life and safety.” *Id.* at 46. In 2017 there were almost 42,000 such work orders for BCPSS’s 159 school buildings, requiring 96,000 hours to address. There were 32,000 such work orders for 2018 requiring 53,000 hours. *Id.* at 46, 47. These emergency repairs “typically include full or temporary repairs to critical safety, mechanical, plumbing, electrical, and security systems” – and they can and do lead to school closures such as the events of last winter. *Id.* at 12.

A. BCPSS Facilities Are in Abysmal and Unconstitutional Condition.

1. Building Conditions Are So Poor that Emergency Issues, Including School Closures, Often Affect Students’ Opportunities to Learn.

Last winter, students in 87 Baltimore City public schools—over half of all public schools in the City—attended class in rooms that were without heat or with limited heat because boilers and other major elements of the schools’ aging heating systems failed. Ex. 10, BCPSS Mem. to Del. Maggie MacIntosh (Jan. 22, 2018) (“Mem. to Del. McIntosh”); *see also* Sarah Larimer, *Kids are freezing: Amid bitter cold, Baltimore schools, students struggle*, Wash. Post (Jan. 5, 2018), available at <https://www.washingtonpost.com/local/education/kids-are-freezing-amid-bitter-cold->

baltimore-schools-students-struggle/2018/01/05/8c213eec-f183-11e7-b390-a36dc3fa2842_story.html?utm_term=.9a7b8903265f. As a result, over the course of a two-week period, over 60 schools were forced to close, with thousands of students forced to miss multiple days of instructional time. Teachers and families tried to raise funds to buy winter coats and space heaters for their shivering students, including through well-publicized GoFundMe campaigns. See Tim Tooten, *GoFundMe created in hopes of solving cold-school crisis in Baltimore City*, available at <https://www.wbalv.com/article/gofundme-created-in-hopes-of-solving-cold-school-crisis-in-baltimore-city/14751935>. The problems with heat are chronic. Fifty-one of the 87 buildings that closed had *repeated* building-wide heating incidents during the 2017-18 school year. Ex. 11, 2018 Advisory Group Rep. 1. Fixing the problems is expensive: long-term capital needs related only to HVAC for these buildings were estimated at \$154 million; overall long-term capital needs were estimated at \$1 billion. Ex. 10, Mem. to Del. McIntosh, *supra*.¹⁴

This past summer, over 70 schools again were forced to close; this time, because classrooms had no air conditioning. See Abby Isaacs, *Lack of air conditioning closes 70+ Baltimore City schools early on first day*, WMAR Baltimore (Sept. 4, 2018), available at https://www.wmar2news.com/news/region/baltimore-city/lack-of-air-conditioning-closes-70_-baltimore-city-schools-early-on-first-day-of-school. Nearly 40 percent of all BCPSS schools lack air conditioning. See Richard Martin, *Baltimore Schools Without Air Conditioning Will Dismiss Early*, The Baltimore Sun (Sept. 6, 2018), available at <https://www.baltimoresun.com/news/maryland/education/k-12/bs-md-ci-schools-dismiss-early-20180906-story.html>; Ex. 11, 2018 Advisory Group Rep. 1.

¹⁴ The State provided \$12 million in short-term emergency funding at the peak of the crisis in late January 2018 but nothing for long-term capital needs. Only 21 of the 87 buildings are slated to be renovated, replaced, or surplused as part of the 21st Century Plan, discussed below. Ex. 10, Mem. to M. MacIntosh; Ex. 12, BCPSS Impact Mem.

This winter, issues with school closures because heat is lacking have continued. *See* Sara Meehan, *5 Baltimore schools closed because of water, heat problems Tuesday* (Jan. 22, 2019), *available at* <http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-school-closures-20190122-story.html>. Although the system reports working to improve monitoring and response times to avoid closures like last winter's, the capital needs that led to the problems remain. *See*, Talia Richman, *How are Baltimore Schools Preparing for Winter After Last Year's Heating Disaster* (Nov. 26, 2018), *available at* <http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-ci-schools-winter-preparedness-20181119-story.html>.

Heating and air conditioning are not the only urgent problems—aging plumbing and other structural systems cause disruptive situations as well. For instance, a teacher at one school recently tweeted a video of water coming from leaking pipes in the ceilings and reported that trash cans had been placed to catch it in the hallways. The system attributed the leak to “aging plumbing infrastructure.” *See Video Shows Water Pipe Leaking at Baltimore School*, WBALTV, *available at* <https://www.wbalTV.com/article/matthew-henson-elementary-leaking-water-pipes/26236298>; Aaron Maybin, *photos, available at* <https://www.dropbox.com/sh/q7twu6gfwsgwv6f/AADw3OwxLNTnnVcvaopnkqB0a?dl=0> (collection of pictures). Several schools have been closed for issues with their water systems. *See* Sarah Meehan, *5 Baltimore schools closed because of water, heat problems Tuesday*, (Jan. 22, 2019), *available at* <http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-school-closures-20190122-story.html>.

Student, parent, and teacher comments further illustrate the abysmal conditions in which Baltimore City children are expected to learn and the effect that these continuing emergency conditions have on learning and student achievement. Student Dashawna Bryant has sickle cell

anemia and spent a week in the hospital after a day in an unheated classroom last winter. She says:

I would like our leaders to know that students in Baltimore also have a dream, and just because some of us aren't rich enough to have those dreams come true doesn't mean they should be taken away from us. I want to study to be a child psychologist when I go to college. I know some of my friends are trying to be doctors or lawyers or judges, but the fact that we go to a Baltimore City school, and the fact that we don't have heating or air conditioning or all this funding, takes away from those dreams. It makes it harder for people to want to go to college because they know how hard it is for them. I just want the elected leaders to know that just because we don't go to a private school, or just because we don't live out in the county, we do still have dreams that we want to accomplish.

Similarly, a teacher, former NFL football player Aaron Maybin, described school closings due to lack of heat as “mass institutional negligence,” stating that it was “heartbreaking” to watch his students suffer:

When I'm sitting there in a classroom with my students, who I know, who I love, who I understand, who I expect the most out of, who I definitely drive to be better — when I'm a room with them, and they can see their breath in the room, and some of them don't have winter coats, so they're shivering, their lips are chapped, they're ashy, you know what I mean? . . . It's infuriating. It makes you angry. It makes you sad. It makes you heartbroken. But more than anything, you want to do something.

Larimer, *supra*.

2. The Vast Majority of BCPSS Buildings Are in “Very Poor” Or “Poor” Condition Under Accepted Industry Standards.

These urgent issues are a symptom of a much larger problem—the pervasive age and deterioration of the buildings, the continued lack of capital outlay and sufficient maintenance, and insufficient funding for ongoing maintenance. Many BCPSS schools are the oldest in Maryland. Currently, the system operates 159 buildings, decreasing to 156 in the 2019-20 school year. Twenty-three percent of the buildings were built before 1946 and 74 percent were built between 1946 and 1985. Only three percent, not counting the new schools just opened under the 21st Century Program, have been built since 1985. Ex. 13, BCPSS, State of City Schools Buildings: Summary of the Preliminary Jacobs Report at 4 (June-July 2012).

The most recent comprehensive survey available, by the engineering firm Jacobs in 2012, demonstrates the decrepit and abysmal condition of Baltimore City school facilities. Jacobs assessed all 185 school buildings then operating and rated them on the established industry standard, the Facilities Condition Index (“FCI”), for physical conditions and educational adequacy, including security, technology, classroom size, special use areas like libraries, lighting, as well as specific equipment and space for programs like science, technology, and music/arts. Ex. 7, Jacobs Rep., *supra*, at 8-11. Its findings were damning. The overall FCI for BCPSS was 60 (on a 0-100 scale, with 100 the worst score), reflecting “facilities in very poor condition.” *Id.* at 25. Sixty-nine percent of all school buildings were in “very poor” condition and an additional 16 percent were in “poor” condition. Of these, 50 buildings had such high FCIs that they “should be considered as candidates for replacement or [treated as] surplus.” *Id.* at 33. BCPSS schools scored nearly as poorly for “educational adequacy,” with an average score of 55, a “failing grade.” *Id.* at 9.

Simply put, “City Schools buildings do not provide the physical structures, technology and instructional space to support 21st-century teaching and learning.” Ex. 13, BCPSS, State of City Schools Buildings, *supra*, at 9. Jacobs estimated that it would cost \$2.5 billion (about \$3 billion today by BCPSS’s estimate) to bring BCPSS buildings up to a minimally acceptable standard through repairs and building replacements and \$4 billion (\$5 billion today) to complete a full portfolio replacement to meet modern educational standards. *Id.* at 25. Notably, in a report to the General Assembly, the State’s own Interagency Committee on School Funding (comprised principally of State cabinet officials, *i.e.*, the State Superintendent of Schools and the Secretaries for the Departments of General Services and of Planning), accepted the Jacobs Report’s conclusions that “that City Schools facilities are severely deficient when measured by a number of

commonly accepted standards: age of facility, educational adequacy, facility condition index (FCI), and level of utilization.” *See* Interagency Comm. on School Construction, Baltimore City: Public School Construction Program Block Grant Funding, at 4 (Jan. 8, 2013), *available at* http://www.pscp.state.md.us/reports/2012_p196_PSCP_Report%20on%20Baltimore%20City%20Block%20Grant.pdf.

The 2018 BCPSS Facilities Master Plan confirms that the problems identified in the Jacobs report persist in 2018 and continue to require substantial State funding to fix. Ex. 8, BCPSS, Comprehensive Educational Facilities Master Plan at 73 (Oct. 12, 2018). It further finds that “without considerable district-wide investment in capital improvement and facility sustainment, conditions will continue to deteriorate as older school buildings age and as deferred maintenance continues to degrade facility conditions.” *Id.* And it confirms that BCPSS’s facilities, the largest and oldest in the State, continue to need substantial emergency repairs to “critical building systems and equipment,” including HVAC. *Id.*

3. The System Lacks Funds for Ongoing Maintenance (Including Dealing with Emergencies), Further Contributing to Deficiencies.

The deplorable, deteriorating condition of the schools is steadily worsening because BCPSS lacks sufficient funds for current preventive and corrective maintenance and operation of its schools (*e.g.*, pest control, snow removal, landscaping, trash removal, and utility charges). Each day that maintenance needs go unaddressed, the conditions worsen and the cost for repairs increases. The industry standard for public schools is that systems should budget three percent of the current replacement value of the buildings annually for ongoing building maintenance. Ex. 9, BCPSS SY 18-19 Comprehensive Maintenance Plan at 3. For BCPSS, the current replacement value is approximately \$5 billion, and three percent of that is \$150 million. *Id.* But BCPSS’s annual

maintenance budget is only \$23 million, *just 15 percent of the established industry standard*. *Id.* That does not address the significant deferred maintenance costs. Ex. 7, Jacobs Rep., *supra*, at 23.

B. For Years, the State Has Failed to Fund Facilities While Buildings Crumbled.

The State has ignored these problems for decades, despite clear notice that BCPSS facilities are rapidly deteriorating, thus allowing a \$600 million problem to mushroom to a \$5 billion one. The Jacobs Report was not the State's first warning. Over two decades ago, Plaintiffs first alleged that the BCPSS facilities were not constitutionally sufficient. *See* Dkt. 1-4, Compl. ¶ 105. They relied on a 1992 assessment demonstrating that over 20 percent of BCPSS schools were then in "poor" condition, "with seriously leaking roofs and other structural defects," and only 16 percent were in "good" condition. *Id.* (citing 1992 Facilities Master Plan, State Amended Admission 86).

By 1996, when this Court entered its summary judgment ruling determining that the education being provided to Baltimore students was constitutionally inadequate, the percentage of schools rated as poor had risen to 35 percent, with only 10 percent of the buildings rated in "good" condition. This Court relied on that evidence, among much else, in finding a constitutional violation and setting a trial on remedy. Dkt. 1-66, Order at 2, ¶ 2 (Oct. 18, 1996).

Likewise, the Consent Decree to which the parties agreed, and which the Court approved, included corrections to the facilities problems Plaintiffs identified. Specifically, the Decree provided additional funding for facilities conditions. Dkt. 1-77, Consent Decree at ¶ 48. It also required BCPSS to develop a "Master Plan," which had to address (among other things) "[t]he planning and provision of construction, repair, and maintenance services within BCPS." *Id.* at ¶ 33(C). Additionally, it required interim and final independent evaluations of the schools, including adequacy of funding, and permitted the BCPSS board to return to court to seek more funding based on the results of the interim evaluation. *Id.* at ¶¶ 40-42, 47, 53.

By 1999, the interim independent evaluation, the Metis Report, was complete, and it found

that the condition of the BCPSS facilities was getting worse. *See* Ex. 14, Interim Evaluation of the Baltimore City Public School System (Feb. 1, 2000) (“Metis Report”). The Report relied on a 1998 facilities survey that had “identified over \$600 million in construction and improvement needs.” *Id.* at 8-9. Based on that 1998 study and its own investigations, including teacher complaints about using their own funds to repair and maintain their classrooms, the Metis Report recommended substantial additional funding for facilities. *Id.* at II-31, 3. Funding to implement capital improvements, the Report found, was “essential” to educational strategies such as smaller class sizes, technology updates, and the like. *Id.* at 8.

The survey upon which Metis relied, performed by engineering firm 3D-I, had found that BCPSS physical facilities were rapidly deteriorating, with one-third of schools in “very poor [condition] and in need of immediate renovation.” Major areas of concern included obsolete and deteriorating HVAC and electrical systems, worn roofs and windows, structural issues, battered doors and walls, deteriorated pavement and playgrounds, and leaks. *See* Baltimore City: Public School Construction Program Block Grant Funding, A Report to the Legislative Committees, at 15 (Jan. 8, 2013), available at http://www.pscp.state.md.us/reports/2012_p196_PSCP_Report%20on%20Baltimore%20City%20Block%20Grant.pdf.

In June 2000, this Court expressly adopted the Metis Report’s “specific findings and recommendations”, including the conclusions that BCPSS’s physical facilities were in very poor shape and substantial additional funding should be requested and provided. Dkt. 10, Mem. Op. at 15 (June 30, 2000).

By the time the final independent evaluation under the Consent Decree was completed in 2001, conditions were even worse. That report found that BCPSS facility deficiency costs had

“grown to approximately \$680 million” and that “[m]any school buildings have serious problems that interfere with the instructional mission.”

By 2004, the amount necessary to fix BCPSS facilities had grown to \$1 billion, an amount that the then-State Superintendent confirmed under oath to this Court. *See* May 2004 Hr’g Tr. at 1284:5-10, 1413:11-19, 1586:5-10. A state commission to study school facilities established by the General Assembly on the recommendation of the Thornton Commission, led by Treasurer Nancy Kopp and known as the “Kopp Commission,” confirmed this. It examined the “minimal adequacy” of buildings and concluded that almost 70 percent of BCPSS facilities did not meet air quality standards; 95 percent did not have sufficient heating and cooling systems (compared to 16 percent of schools statewide); none had drinkable water; almost 60 percent did not meet standards for “human comfort”; 36 percent did not meet fire safety standards; almost 30 percent lacked adequate bathrooms; and many did not have sufficient space for library use, science labs, technology education, arts education, and health services. *See* Task Force to Study Public School Facilities Final Report, at 90, 125 (Feb. 2004) (the “Kopp Commission Report” or “Rep.”), *available at* http://dlslibrary.state.md.us/publications/OPA/I/TFSPSF_2004.pdf.

The Court’s 2004 Memorandum Opinion again recognized facility needs, noting that BCPS had “sought an additional \$133 million annually for capital improvements,” and that school officials’ list of things for which they needed more money included immediate capital improvements. Dkt. 50, Mem. Op. at ¶¶ 24, 71 (Aug. 20, 2004). For the next two decades, the State ignored the Kopp Commission’s recommendation that it update its facilities assessment every four years. *See* 21st Century Facilities Commission Final Report at 9 (Jan. 2018) (the “Knott Commission Report” or “Rep.”), *available at* <http://dls.maryland.gov/pubs/prod/NoPblTabMtg/SchFac21stCent/2017-Final-Report-Knott.pdf>.

C. Substantial Additional State Funds Are Required to Ensure Adequate Facilities.

1. Capital Funding Has Been Insufficient to Meet Ever-Increasing Needs.

As discussed above, the most recent comprehensive assessment of the BCPSS buildings, the Jacobs report, found that \$3.1 billion (in today's dollars) is needed for adequate repair and renovation of the existing buildings and \$5 billion (again in today's dollars) is necessary for replacement. Over the years, State funding has been wholly insufficient to address these needs, with the result that the problem has grown from a \$600 million problem in 2000 to a \$5 billion problem today.

Baltimore City has the lowest per capita wealth and lowest tax base of any large district in the State and lacks the resources that other jurisdictions of comparable size use to support school construction. *See* DLS, Overview of State Aid to Local Governments, Fiscal 2019 Allowance, at 31, 49 (Jan. 2019), *available at* <http://dls.maryland.gov/pubs/prod/InterGovMatters/SteAidLocGov/Overview-of-State-Aid-to-Local-Governments-Fiscal-2019-Allowance.pdf>. The State has recognized its responsibility to address facilities issues in districts with outsized needs: the recent state report by the Knott Commission declares that “the State must focus its limited resources on critical areas of need, especially in low-wealth jurisdictions including those with a higher proportion of students living in poverty” *See* Knott Comm. Rep., *supra*, at 7.

The State's actual formula does not recognize this greater need. Rather, State support for capital spending on schools is based upon a formula that treats counties equivalently, without regard to county wealth, the age of schools, or other factors demonstrating acute need, based principally upon the size of the student population.

As a result, Baltimore City receives far less than required to replace or even repair its aging stock of schools. For instance, state funding for the larger county school systems shows roughly similar amounts given, but the much higher local amount contributed by, for example, Montgomery County (\$215.5 mil.), Prince George's (\$92.5 mil.), and Anne Arundel (\$96.9 mil.) dwarfs the amount Baltimore City contributes (\$16.9 mil.).¹⁵ See School Construction Funding Trends in Maryland, Presentation to the 21st Century School Facilities Commission at 7, *available at* <http://mgaleg.maryland.gov/Pubs/CommTFWorkgrp/2017-21st-Century-School-Facilities-Commission-Funding-Subcommittee-2017-9-27.pdf>; Local School Construction Funding Presentation to the 21st Century School Facilities Commission at 3, *available at* <http://mgaleg.maryland.gov/Pubs/CommTFWorkgrp/2017-21st-Century-School-Facilities-Commission-Funding-Subcommittee-2017-11-2.pdf>. The combined state-local school construction funding available is widely disparate, even before taking into consideration the difference in school building conditions the funding must address.

Finally, emergency stopgap measures are insufficient. Short-term fixes on boiler and related HVAC system components are difficult in aged schools that have been in use long past their maximum expiration date and have suffered from years of deferred maintenance. For example, replacing a boiler—not an easy task in itself—may not be sufficient because the pipes leading to that boiler and the necessary electrical systems are outdated as well. Typically, it is easier and more cost-efficient to replace an antiquated building entirely rather than to patch it up.

2. The 21st Century Building Program Will Address Problems in Only 18 Percent of BCPSS Buildings.

The one bright spot occurred in 2013, when the General Assembly passed HB 860, the

¹⁵ The Baltimore City share includes \$20 million that Baltimore City is able to contribute annually to the 21st Century Schools Program.

Baltimore City Public Schools Construction and Revitalization Act of 2013, as a starting point to replace a small number of aging BCPSS schools with 21st century replacements, based on the Jacobs Report. This “21st Century Schools Program” has allowed the renovation or replacement of nine Baltimore City school buildings, with outstanding results, and will eventually lead to 23-28 new or fully renovated schools. *See* 21st Century Schools Baltimore, Current Status, *available at* <https://baltimore21stcenturyschools.org/roadmap> (listing school projects and status).

The 21st Century program is an important and good first step. It also confirms the obvious point that fixing facilities problems by replacing individual building components is not an efficient option. Rather, replacement of the school buildings with failing grades is the only cost-efficient long-term option. At present levels, the 21st Century program, however, does not come close to resolving the systemic problems. It will replace at most only about 18 percent of BCPSS buildings. *See id.* By contrast, the Jacobs Report found that at least 85 percent of those buildings are in very poor or poor condition. Ex. 7, Jacobs Rep., *supra*, at 26.

Moreover, the funding structure for the 21st Century buildings adversely affects BCPSS. The system was required to commit at least \$20 million/year of its operating dollars for 30 years to leverage the bonds that finance the program, taking already limited dollars out of classrooms. *See* Financing the Plan, *available at* <https://baltimore21stcenturyschools.org/about/financing-plan>.

Although the Governor recently introduced legislation that would provide approximately \$3.5 billion towards school facilities construction over the next ten years, it is unclear whether that funding will be allocated any differently than the current inequitable distribution and how much of that money will address the unconstitutional deficiencies in BCPSS buildings. *See* <https://governor.maryland.gov/2018/12/11/governor-larry-hogan-announces-over-3-5-billion-building-opportunity-fund-school-construction-initiative>.

3. State-Imposed Procedural Hurdles Hamper BCPSS's Ability to Use the Capital Funds It Has Received.

BCPSS has also reported significant issues (in addition to the financial deficits) with State-imposed procedural requirements that have impaired BCPSS efforts to address facilities issues. The State's Knott Commission has confirmed that the State's required review process imposes unnecessary complexity and cost and proposed numerous reforms, precluding greater local control. *See* Knott Comm. Rep., *supra*, at 12-15 (citing local jurisdiction testimony that "the State's current review process is overly bureaucratic and time consuming, which can delay projects and increase costs" and finding that many State requirements were outdated, "unnecessarily burdensome or obsolete"). For instance, BCPSS has indicated that stringent after-the-fact bidding and award requirements effectively preclude bulk purchases and single source procurement, which has significantly slowed the process underway to install portable HVAC units in classrooms. *See* Ex. 11, 2018 Advisory Group Rep. at 2. Similarly, BCPSS has reported that a long-term problem with multi-year capital funding only fixed legislatively last year required it to return approximately \$66 million to the State, which then "recycled" those funds to support other projects rather than the ongoing multi-year project for which they were originally granted. *See* Ex. 15, BCPSS letter to Knott Commission (Oct. 17, 2017); HB 1783 (ch. 14, Laws of 2018).

D. Inadequate Facilities Harm Student Learning.

Just as insufficient operational/educational funding has a direct effect on the quality of education students receive, dilapidated school buildings also directly affect teaching and learning. Obviously, students whose schools are closed because they have no heat or air conditioning cannot learn. Even when schools are open, academic achievement suffers when students are forced to learn in poor conditions, without adequate light, ventilation, and essential facilities.

The Kopp Task Force, the State's prior task force on facilities, confirmed in 2004, adopting

a report by Plaintiffs' educational facilities expert Dr. Glen Earthman, that research "demonstrates a strong correlation between certain facility factors and student achievement." *See* Kopp Comm. Rep., *supra*, at 4. Dr. Earthman's report found that students in buildings rated "poor" (such as students in 85 percent of BCPSS schools) perform more poorly than students in functional school buildings, with scores five to 17 percent lower. *See* Ex. 16, Earthman Rep. at 8-9 (Jan. 5, 2004).¹⁶ The research demonstrated that student achievement was affected by a variety of human-comfort factors: temperatures within the human comfort range regulated by appropriate HVAC systems; indoor air quality, including appropriate ventilation and filtering systems; lighting; acoustical control; laboratory and other specialized facilities; and student capacity. *Id.* at 10-11. Additional critical factors directly affecting student health include potable water, fire safety, adequate lavatories, security systems, and communications systems. *Id.* at 10.

More recent research amply confirms what the Kopp Commission found in 2004, with numerous studies showing "significant correlations between poor structural, conditional, and aesthetic attributes of school buildings and low student learning and achievement. These attributes include lighting, temperature and thermal comfort, acoustics, indoor air quality, and other environmental factors." *See* Build Us Schools, *Education Equity Requires Modern School Facilities* at 2 (Sept. 2018) (citing research), available at <https://static1.squarespace.com/static/5a6ca11af9a61e2c7be7423e/t/5ba23b3688251b659c2f9eff/1537358671343/Education+Equity+Requires+Modern+School+Facilities.pdf>.

For instance, a 2017 study found that moving students from aging and degraded buildings into new facilities increased test scores by ten percent of a standard deviation in math and five percent in English-language arts. *See* Julian Lafortune and David Schönholzer, *Does new School*

¹⁶ "Poor" buildings are "those that lack appropriate HVAC systems, have poor lighting, are old, are noisy, lack functional furniture, or have some variation or combination of these qualities." *Id.* at 8.

Construction Impact Student Test Scores and Attendance?, Univ. of Calif. Policy Lab Policy Brief (Oct. 2017), available at <https://www.capolicylab.org/wp-content/uploads/2017/10/Policy-Brief-Lafortune-Schoenholzer.pdf>. Other studies show strong correlations between improved facilities and students' academic performance, standardized test scores, attendance, and overall school climate. See, e.g., Jack Buckley, et al., *Los Angeles Unified School District School Facilities and Academic Performance*, National Clearinghouse for Educational Facilities (2004), available at www.ncef.org/pubs/teacherretention.pdf (fixing a school facility so it went from “worst” to “best” on the overall environmental compliance rating correlated to a 36-point average increase in a school’s Academic Performance Index); David Branham, *The Wise Man Builds His House Upon the Rock: The Effects of Inadequate School Building Infrastructure on Student Attendance*, 85 Soc. Sci. Q. 1112, 1113 (finding that poor facility quality significantly reduced daily attendance and increased drop-out rates); Christopher Neilson & Seth Zimmerman, *The effect of school construction on test scores, school enrollment, and home prices*, 120 J. Pub. Econ. *Journal of Public Economics* 1 (2014) (finding that moving students into a rebuilt or renovated school results in strong gains (0.15 standard deviations) in reading scores); Lorraine E. Maxwell, *School building condition, social climate, student attendance and academic achievement: A mediation model*, 46 J. Env. Psych. 206 (higher ratings of school social climate—which were correlated to better building conditions, as assessed by building professionals—predicted lower student absenteeism, which in turn predicted higher standardized test scores).

Peer-reviewed studies also show that the quality of physical school facilities affects not only students, but also teachers, with high quality buildings contributing to teacher retention and satisfaction. A 2002 survey found that when teachers consider their school to be in poor physical condition, they are far more likely to report that they plan to leave their school or to leave teaching

altogether, compared to teachers working in facilities that they consider to be in good or excellent condition. *See* Buckley, *supra*. A 2017 study found that improved ventilation and indoor air quality at schools improved teachers' self-reported job satisfaction. Stuart Batterman, *et al.*, Ventilation rates in recently constructed U.S. school classrooms, 27 Indoor Air 880, 880 (2017).

Additionally, as discussed above, there are disproportionate numbers of students who are poor and students of color attending Baltimore City schools. The poor condition of BCPSS schools exacerbates the effects of historic discrimination and other barriers to achievement, telling those children that they are less worthy than their peers. *Stout v. Jefferson Cty. Bd. of Educ.*, 250 F. Supp. 3d 1092, 1096 (S.D. Ala. 2017) ("when black public school students are treated as if they are inferior to white students, and that treatment is institutionalized by state or municipal action, the resulting stigma unconstitutionally assails the integrity of black students."). Social science research makes clear that "[w]hen schools offer fewer material resources . . . to low-income students and students of color than to their wealthier and white peers, schools send the message that those kids are less valuable." *See* U.S. Comm'n on Civil Rights, Public Education Funding Inequity in the Era of Increasing Concentration of Poverty and Resegregation at 110 (2018, available at <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf>). Students who attend the decrepit, crumbling, weather-challenged schools in Baltimore City are taught the cruel lesson that they do not deserve the modern facilities that exist in neighboring jurisdictions that are wealthier and more diverse. *See, e.g.,* Michelle Fine, *The Psychological and Academic Effects on Children and Adolescents of Structural Facilities' Problems, Exposure to High Levels of Under-Credentialed Teachers, Substantial Teacher Turnover, and Inadequate Books and Materials*, available at http://decentsschools.org/expert_reports/fine_report.pdf.

In sum, as the federal Department of Education has stated:

Structurally sound and well-maintained schools can help students feel supported and valued. Students are generally better able to learn and remain engaged in instruction, and teachers are better able to do their jobs, in well-maintained classrooms that are well-lit, clean, spacious, and heated and air-conditioned as needed. In contrast, when classrooms are too hot, too cold, overcrowded, dust-filled, or poorly ventilated, students and teachers suffer.

U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Resource Comparability, at 17 (Oct. 1, 2014), *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

ARGUMENT

I. This Court Should Enter an Order Compelling the State to Comply with its Constitutional Obligations Pursuant to the Prior Rulings by this Court and the Additional Evidence Presented.

A. The State is Liable for Its Failure to Provide BCPSS Students a Constitutionally Adequate Education.

The principal issue regarding the funding of BCPSS school operation and instruction costs is not the legal question of Defendants' liability. This Court has established that Defendants are liable under Article VIII for their failure to fund local school districts adequately. The Court of Appeals affirmed that right, first in *Hornbeck* and again in *Bradford I*.

Nor can there be a legitimate question as to whether, as a factual matter, Defendants are now violating Article VIII with respect to funding for educational operations. This Court has already determined in three separate orders that the State's funding of BCPSS below the Thornton formula violates constitutional norms. DLS, the agency responsible for budgetary analysis for the General Assembly, already has determined that State's funding falls far short of Thornton and has fallen short continuously since FY 2009. Indeed, the gap between what Thornton requires and what the State actually funds for BCPSS is greater now than it was when the Court previously found them to be unconstitutional.

There is little question that constitutional adequacy requires, at a minimum, compliance with Thornton—indeed it likely requires more. However, Defendants have not even come close to complying with that minimum standard. Whatever the constitutional requirement may be, the State’s funding of BCPSS is at least \$300 million below Thornton and therefore at least \$300 million below even the minimum floor that existed 20 years ago.

B. The Court Has the Authority to Order the State to Correct Its Failure.

It is equally clear that this Court is not limited to declaring that the State has violated the Constitution, but has the power to compel the State to comply with Article VIII. As previously held by this Court, and as affirmed by the Court of Appeals in *Bradford I*, Article VIII establishes a specific right to an adequate education by contemporary educational standards for all Maryland children attending public schools, and it obligates the General Assembly to raise sufficient revenue through taxation or other means and to appropriate sufficient funds to ensure that all Maryland children receive a thorough and efficient education. Article III, Section 52 requires the State to budget for this amount. This right is judicially enforceable: Article VIII is not a meaningless, toothless provision that is valid on paper only. Constitutional rights that require State funding for compliance are fully enforceable by Maryland courts, and the courts have a *duty* to enforce those rights. The Court of Appeals has made that fundamental principle abundantly clear.

In *Ehrlich v. Perez*, 394 Md. 691 (2006), a group of Maryland residents who had immigrated to the United States after August 22, 1996, alleged that the State’s failure to appropriate funds to pay for state funded medical benefits for, among others, children and pregnant women, while appropriating funds for similar individuals who immigrated prior to that date, violated Article 24 of the Declaration of Rights’ guarantee of equal protection. The circuit court granted a preliminary injunction requiring payment of prospective and retrospective benefits, and the Court of Appeals affirmed in pertinent part, rejecting the defendants’ argument that courts

lacked constitutional power to order the State to expend unappropriated funds. The Court of Appeals emphasized that because the circuit court was tasked with remedying a constitutional violation, it was acting within its authority even if it resulted in state expenditures. It explained that “the order prospectively reinstating medical benefits to the plaintiffs does not operate as an order directing the appropriation of specific funds” and instead “serves as a judicial determination that [defendants’] action warranted the issuance of a preliminary injunction because there is a likelihood that [their] action was unconstitutional.” *Id.* at 735-36. Finally, the Court of Appeals confirmed that courts necessarily have power to issue an “order to remedy a constitutional violation.” *Id.* at 737 (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

The alternative is not tenable. As the Court of Appeals explained in *Ehrlich*, “to hold otherwise would create a ‘legal’ means for State government to employ invidious classifications that violate the equal protection guarantees of the Maryland Declaration of Rights (as well as other constitutional guarantees) by adopting budgets rather than by enacting laws, which we have long recognized is subject to constitutional constraints.” *Id.* at 736; *see also id.* at 735 n.25 (quoting *Md. Action for Foster Children v. State*, 279 Md. 133, 139 (1977), in which the Court of Appeals similarly “concluded that a statute requiring equal funding levels to parents of foster children was not an appropriation because it did ‘not purport to appropriate money out of the State Treasury or direct the Comptroller, Treasurer, or anyone else to make payments of money’”). Thus, the Court has plenary authority to order the State to comply with Article VIII by providing sufficient support to meet the threshold for a constitutionally required education. An order compelling State officials to comply with the State Constitution by providing constitutionally required services or benefits does not offend the separation of powers.

Moreover, Article VIII expressly *requires* the State to raise sufficient revenue through taxation or other means to fund the constitutional right to a thorough and efficient education. Article III, Section 52 specifically *requires* that the State budget determine the amount of funding necessary to comply with Article VIII's mandate of sufficient funding to ensure educational adequacy for all Maryland children and to budget for that amount. Adequate funding is an intrinsic, non-severable aspect of the constitutional right to an adequate education. If the latter is enforceable, so is the former. Having expressly required the State to budget for and raise sufficient revenue to fund public schools sufficiently to comply with the Constitution, the framers of Article VIII hardly could have intended that this express clause would be toothless surplusage. *Cf. In re Adoption/Guardianship of Dustin R.*, 445 Md. 536, 578-80 (2017) (rejecting separation-of-powers challenge to order directing state agency to provide services pursuant to express statutes).

Courts in other jurisdictions have issued orders compelling compliance with similar constitutional provisions, especially when the state is provided ample opportunity to come into compliance, but fails to do so. *See, e.g., Gannon v. State*, 368 P.3d 1024, 1058 (Kan. 2016) (holding that “the judiciary clearly has the power to review a [school funding] law and potentially declare it unconstitutional. But this power is not limited solely to review. It also includes the inherent power to enforce our holdings [that a funding formula is unconstitutional.]”); *McCleary v. State*, 269 P.3d 227, 259 (Wash. 2012) (“What we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education. Article IX, section 1 is a mandate, not to a single branch of government, but to the entire state. We will not abdicate our judicial role.”) (internal citation omitted); *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1264 (Wyo. 1995) (“When the legislature’s transgression is a failure to act, our duty to protect individual rights includes compelling legislative action required

by the constitution.”), *as clarified on denial of reh’g* (Dec. 6, 1995); *Robinson v. Cahill*, 351 A.2d 713, 720 (N.J. 1975) (“If . . . a thorough and efficient system of education is a fundamental right guaranteed by the Constitution . . . it follows that the court must afford an appropriate remedy to redress a violation of those rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper.”) (citation omitted).

Thus, the Court has clear authority to order the State to comply with Article VIII and provide BCPSS with the constitutionally required funding. Under the circumstances of this case, where the State’s failure to fund BCPSS pursuant to the Thornton formula is not reasonably debatable, and where overwhelming evidence demonstrates that the “adequacy gap” in fact has increased far beyond what had been necessary at the turn of the century, the need for judicial action is clear. Through a letter to the Governor, Plaintiffs have given Defendants notice of their continued constitutional violations, demanded prompt compliance, and warned of this action, all to no avail. *See* Letter from Bradford Plaintiffs (Jan. 22, 2019), *available at* https://www.aclu-md.org/sites/default/files/bradford_letter_1.22.2019_final.pdf. To date, Defendants have not responded. No plan currently exists for the State to come into compliance with Article VIII.

This Court trusted the State to honor its constitutional obligations to hundreds of thousands of Baltimore City children facing the risk of educational failure. The State has abjectly refused to honor that trust, causing lasting deprivations to at-risk children throughout Baltimore City. The State’s most recent extension of the deadline for completion of the Kirwan Commission’s work, making another year of constitutional deprivations inevitable, demonstrates the political resistance against Article VIII’s mandate to fund decent schools for all children regardless of whether they live in the wealthiest or poorest of jurisdictions. Given rising political concerns about Kirwan’s potential cost, there is no reason to believe that the latest deadline for a final report by December

31, 2019, will be enforced, or that the State will honor its findings. Without judicial action, the constitutional violations will continue, and another generation of children will go without the educational opportunities that Article VIII's framers required 151 years ago. Ten years of legislative inaction is enough time to establish a record that judicial authority is needed to compel the State to abide by its constitutional obligations.

The need for judicial intervention could not be graver. Lacking constitutionally adequate resources, BCPSS is unable to provide Plaintiffs with the educational programs and services required by the Maryland Constitution. Just a few of the statistics cited above reflect the urgency of the situation:

- **Lack of proficiency.** The lack of proficiency of BCPSS students in reading and math, with only 13 percent of 4th and 8th graders being proficient in reading per the national NAEP assessment, is a widely accepted evidence of substantial educational inadequacy. *See, e.g., Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109, 129 (Del. Ch. 2018) (finding that low state assessment results “support a reasonable inference that Delaware is not providing a system of public schools that is fulfilling its educational purpose for low-income students”); *Gannon*, 390 P.3d at 500 (“We complete our outputs examination by concluding that, at a minimum, the results on various standardized tests reveal that an achievement gap, or proficiency gap, found by the [lower court] panel to exist between “all students” and certain subgroups persists as of school year 2015-2016. And the numbers of all students failing to reach proficiency in core subjects each year continue to be significant.”).

- **Lack of staff.** BCPSS has the highest teacher-student ratios in the state, and the same is true for guidance counselors, therapists, maintenance staff, and others. These are crucial indicators of educational adequacy, or the lack thereof. *See Delawareans*, 199 A.3d at 116 (“Key

indicators of educational quality include levels of spending, teacher effectiveness, class size, and the availability of support services.”); *McCleary*, 269 P.3d at 255 (holding that Washington State’s school funding system was unconstitutional based on “compelling” evidence of severe shortfalls in “three major areas of underfunding: basic operational costs []; student to/from transportation; and staff salaries and benefits”).

- **Lack of student success under state standards.** The new state Report Card makes it abundantly clear that BCPSS schools fall far short of the State’s own standards for adequate schools. Where almost 60 percent of BCPSS schools received only one or two stars (99 of 166 schools), more than *eight times* the percentage for the rest of the State (7 percent), under an assessment formula mandated by state law (and approved by the federal government), Defendants should not be heard to contest the failure of BCPSS schools to meet constitutional standards. As the Court of Appeals, as well as numerous other jurisdictions have concluded, a state’s failure to meet its own standards is evidence of its failure to provide its students a constitutionally adequate education. *See Hornbeck*, 295 Md. at 639 (noting that the plaintiffs did not allege or present any evidence that the State had failed to comply with the educational standards laid out in COMAR); *Delawareans*, 199 A.3d at 166 (“the proper course . . . [is] to look first to the standards that the General Assembly and the Delaware Department of Education have chosen”); *id.* at 165, n.313 (citing, *e.g.*, *McCleary* 269 P.3d at 246-47 (measuring adequacy by the state’s own statutory and regulatory standards established in nine content areas)); *Idaho Schs. for Equal Educ. Opp. v. State*, 976 P.2d 913, 919 (Idaho 1998) (affirming that ““educational standards [promulgated] pursuant to the legislature’s directive”” can establish test for determining compliance for constitution’s requirement for thorough education) (alteration in original); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1186 (Kan. 1994) (using “the standards enunciated by the legislature and the state

department of education”); William F. Dietz, Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 Wash. U. L. Q. 1193, 1194 (1996) (“[T]he proper approach to a judicial definition of educational adequacy is to adopt as mandatory the standards that the legislature and the educational bureaucracy have adopted for themselves in the form of accreditation standards or statutory statements of educational goals.”).

- **Resegregated, underfunded schools.** In sharp contrast with surrounding districts, BCPSS serves mostly students of color, almost 4/5 of whom are African-American. They also are predominantly from low income families, with 86 percent eligible for free and reduced lunch meals, the standard measure of poverty for students in public schools. Yet Maryland is one of six states where the wealthiest 25 percent of school districts receive more money than the poorest. As a court recently ruled on similar facts in Delaware:

The complaint’s allegations regarding how the State allocates financial and educational resources, coupled with its allegations regarding how Disadvantaged Students have become re-segregated by race and class, support an inference that the current system has deep structural flaws. These flaws are so profound as to support a claim that the State is failing to maintain “a general and efficient system of free public schools” that serves Disadvantaged Students.

Delawareans, 199 A.3d at 117. Ameliorating the effects of such disparities is a necessary and inherent element of Article VIII’s mandate. See *Hornbeck*, 295 Md. at 780 (affirming that Article VIII requires that “efforts are made . . . to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child”).

- **Lack of local resources.** As a relatively poor jurisdiction, Baltimore City’s local financial contribution to its school system is much lower, proportionately, than any other large jurisdiction in Maryland. This exacerbates inadequate State funding, as amply demonstrated by the fact that BCPSS has to divert over \$50 million annually of scarce operating funds to cover debt service costs for the 21st Century Schools new school construction program and other capital

bonds, compounding the inequitable funding levels that already exist. *See, e.g., Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 262 (N.D. 1994) (“The higher revenues in wealthy districts translate into more staff, better teacher-pupil ratios and programs, and adequate supplies The existing school finance system in North Dakota has systematically created and continues significantly unequal educational access and opportunities, stemming from lower per pupil expenditures due to property wealth variations. These serious educational disadvantages for some children are only explained by the lack of uniformity in resources.”); *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 585 P.2d 71, 97-98 (Wash. 1978) (holding that school financing system was unconstitutional where complaining district was required to raise approximately one-third of its funding for maintenance and operations from a local levy).

This is an ongoing and escalating crisis. Every year, thousands of additional at-risk students have their constitutional rights violated. Every year, thousands graduate without receiving the education required by the Constitution. Every year, the State points to a future study or task force upon which no action should occur until the final findings are available for legislative contemplation, which then provides further excuse for the State to delay action, even though every year of additional delay means another year that children do not receive the education mandated by the State Constitution. It also means further inflation of the adequacy gap in Baltimore City, making subsequent compliance that much more difficult.

The Kirwan Commission is just the latest episode of this long saga. As the Kirwan Commission will not be proposing any solutions imminently, it is incumbent upon Defendants to comply with this Court’s directions and meet its constitutional obligations to provide Baltimore City children with a thorough and efficient education. Only concerted and persistent action by this Court induced Defendants to move toward compliance with Article VIII at least six years after

completion of the Thornton Commission's work and enactment of the Bridge to Excellence in Public Schools Act. But the effect of the Court's prior rulings has worn off, and, for the past decade, the State has ignored them with seeming impunity.

C. This Petition Is the Appropriate Vehicle for Plaintiffs to Seek the Necessary Relief from this Court.

A petition for further relief pursuant to Maryland Courts and Judicial Procedure Code Section 3-412(a) is the appropriate vehicle for this Court to address the State's decade-long failure to comply with the Court's prior declaratory orders, as it expressly provides that "[f]urther relief based on a declaratory judgment or decree may be granted if necessary or proper." Thus, the Declaratory Judgments Act permits parties to return to court to seek enforcement of rights previously determined by declaratory judgment when those declared rights are violated. *See DeWolfe v. Richmond*, 434 Md. 403, 419-20 (2012) (applying statute and quoting position by State defendants that § 3-412(a) provides plaintiffs with "'the option to seek further relief, if necessary, under [C.J.] § 3-412 at a later time if Defendants were to fail to comply with the declarations'") (alteration in original), *on reconsideration*, 434 Md. 444, 472 (2013) (affirming parties' right to raise additional issues in a petition for further relief); *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 289 (Md. 2008) ("The statutory scheme expressly permits further relief based on a declaratory judgment if necessary or proper, either in a separate action or by application [to] a court who retains jurisdiction.").

The Declaratory Judgment Act's lone procedural requirement is that the applicant file a petition for further relief in a court with proper jurisdiction. Md. Code Ann. Cts. & Jud. Proc. § 3-412(b). If the petition is facially valid, the Court must order Defendants to show cause why the requested relief should not be granted. *See id.* at § 3-412(c) ("If the application is sufficient, the court, on reasonable notice, shall require any adverse party whose rights have been adjudicated

by the declaratory judgment or decree, to show cause why further relief should not be granted.”). As this Petition obviously states a facially colorable claim, the Court should order Defendants to show cause why the requested injunctive and additional declaratory relief should not be granted. A proposed order to show cause accompanies the Petition.

II. This Court Should Enter an Order Directing the State to Ensure that Baltimore City Students Learn in Constitutionally Adequate Buildings.

More than an entire generation of students has come and gone since this litigation was first brought, and the conditions in BCPSS schools have steadily deteriorated. The State Constitution *requires* that Plaintiffs’ children attend schools that are not crumbling and are not at constant risk of closure due to seasonal weather patterns. Despite having had years to address the issue, the State instead has allowed a \$600 million repair cost to balloon to \$3 billion for repair and \$5 billion for replacement. Ex. 9, BCPSS SY 18-19 Comprehensive Maintenance Plan at 3. The 21st Century Schools Project will replace only 18 percent of the systems’ decrepit buildings, and operationally, BCPSS has funds for only a fraction of the ongoing current maintenance budget recommended for public school systems.

Baltimore City school children cannot wait any longer. When schools cannot stay open during cold winter weather and late-spring or late-summer heat waves; when teachers must raise funds to buy winter coats for their students; when a school system reaches a \$1.2 billion backlog in deferred maintenance and has funding available to pay only a small fraction of what is required for basic ongoing maintenance, the State Constitution compels action. This Court should compel Defendants to remedy these deplorable conditions and require the State to fulfill its duty to ensure that the physical facilities of Baltimore City schools provide students the “thorough and efficient” education the State Constitution requires.

A. “Thorough and Efficient” Education Requires Adequate Physical Facilities.

The State’s Article VIII obligation to “establish” and “provide for” for an adequate education, discussed in detail above, includes the duty to provide adequate physical facilities. Students cannot learn if they cannot attend school because there is no heat or air conditioning, or when they are unable to concentrate because of such conditions. Educational quality and teacher retention improves when school buildings are safe, inviting, functional, and adequately equipped.

Article VIII plainly applies to school environments for children’s educational instruction just as much as it applies to the quality of that instruction. This Court has recognized and incorporated evidence regarding inadequate facilities into its findings of continuing constitutional violation, and the original Consent Decree in this case included additional funding for facilities improvement. *See* Dkt. 1-66, Order at 2, ¶ 2 (Oct. 18, 1996); Dkt. 1-77, Consent Decree at ¶¶ 43-54 (additional funding); *Id.* at ¶¶ 29-34 (Master Plan requirement); *id.* at 40-42 (further interim and final evaluations); Dkt. 10, Mem. Op. at 15 (June 30, 2000) (adopting Metis Report); Dkt. 50, Mem. Op. at ¶¶ 24, 71 (Aug. 20, 2004) (discussing evidence from hearing).

Moreover, courts in numerous states have held that the same or very similar language to Article VIII in their state constitutions requires safe facilities suitable to provide educational services and that such facilities are a critical part of a constitutionally adequate education. For example, the New Jersey Supreme Court has construed an identical “thorough and efficient” constitutional provision to find that “[d]eteriorating physical facilities relate to the State’s educational obligation” and explained that it “continually ha[s] noted that adequate physical facilities are an essential component of that constitutional mandate.” *Abbott by Abbott v. Burke*, 693 A.2d 417, 437 (N.J. 1997). The Supreme Court of Ohio has reached the same conclusion, namely that its constitutional provision requiring a “thorough and efficient” education requires adequate physical facilities and equipment:

A thorough system means that each and every school district has enough funds to operate. *An efficient system means one in which each and every school district in the state has an ample number of teachers, sound buildings that are in compliance with state building and fire codes, and equipment sufficient for all students to be afforded an educational opportunity.*

DeRolph v. State, 728 N.E.2d 993, 1001 (Ohio 2000) (emphasis added). To “pass constitutional muster,” the Supreme Court of Ohio held, “the state must have in place legislation that will be likely to bring school facilities into compliance within a reasonable time.” *DeRolph v. State*, 754 N.E.2d 1184, 1195 (Ohio 2002).

In Wyoming, the state Supreme Court held that this constitutional right (based upon very similar constitutional language) guaranteed students safe and efficient school facilities and that a public educational system that did not provide safe and adequate physical facilities was unconstitutional. “*Safe and efficient physical facilities*,” the Court held, “*are a necessary element of the total educational process. State funds must be readily available for those needs.*” *Campbell Cty. Sch. Dist.*, 907 P.2d at 1275 (emphasis added). Idaho has reached the same conclusion. *See Idaho Schs. for Equal Educ. Opp.*, 976 P.2d at 919-20 (citing Idaho regulations that “facilities are ‘a critical factor in carrying out educational programs’ and that ‘[t]he focus of concern in each school facility is the provision of a variety of instructional activities and programs, with the health and safety of all persons essential,’” but concluding, as a matter of constitutional law, that “a safe environment conducive to learning is inherently a part of a thorough system of public, free common schools that Article IX, § 1 of our state constitution requires the Legislature to establish and maintain.”).

Moreover, a local jurisdiction cannot be saddled with a choice of diverting necessary funds for instructional operations toward maintenance to try to compensate for the lack of adequate capital spending by the State for adequate school facilities. This practice, all too true for Baltimore City, was rejected by Wyoming’s Supreme Court:

Without adequate funding for costly repairs, renovations, and building construction, school districts faced with non-routine major expenditure items must choose from the lesser of two evils: either ignoring the problem or, if that is no longer an option, diverting operational funding intended for teachers' and staff salaries and essential school programs. If the schools' operational funding budgets have no surplus money to divert, a deficiency results and educational staff and programs are eliminated to reduce expenditures. At the same time, it is rare that these extraordinary efforts are sufficient to properly maintain buildings.

State v. Campbell Cty. Sch. Dist., 32 P.3d 325, 327 (Wyo. 2001). A "fundamental precept," it concluded, was that "*the State is responsible for funding capital construction of facilities to the level deemed adequate by state standards.*" *Id.* at 337 (emphasis added).

Courts in other jurisdictions have similarly required substantial increases in state funding to address deplorable facilities. Arizona's Supreme Court has held that its state constitutional obligation includes establishing standards for school facilities and providing funding sufficient to ensure that districts do not fall below the standards. *See Hull v. Albrecht*, 960 P.2d 634, 637 (Ariz. 1998). Likewise, consent decrees and injunctions compelling increases in state funding for school facilities have been entered or ordered in many jurisdictions, including New Mexico, Arizona, New Jersey, and Los Angeles. *See, e.g., Martinez v. New Mexico*, Case No. D-101-CV-2014-00793 (N.M. Dec. 20, 2018); *Hull v. Albrecht*, 950 P.2d 1141, 1146 (Ariz. 1997); *Abbott v. Burke*, 693 A.2d 417, 456-57 (N.J. 1997); *Rodriguez v. Los Angeles Unified Sch. Dist.*, No. C 6 11-3 5 8 (July 22, 1992).

In a series of admissions, moreover, state representatives have also repeatedly recognized that the State's constitutional obligation extends to adequate school buildings suitable for learning. When he announced additional funds for facilities, Governor Hogan said:

I believe very strongly that every single child in Maryland deserves access to a world-class education regardless of what neighborhood they happen to grow up in, and an important part of that is making sure that all of our students are educated in facilities that are modern, safe, and efficient which provide them with an environment that encourages growth and learning.

Office of Governor Larry Hogan, available at:
<https://governor.maryland.gov/2018/12/11/governor-larry-hogan-announces-over-3-5-billion-building-opportunity-fund-school-construction-initiative/>.

Similarly, Robert Gorrell, Executive Director of the Maryland Public School Construction Program, affirmed in 2017 that facilities were covered by “the mandate” of Article VIII and that a “thorough and efficient system” of public schools included both programs and facilities. Ex. 17, Gorrell Presentation to Knott Comm. at 2 (Sept. 27, 2017) (“‘[The State] . . . shall by Law establish throughout the State a thorough and efficient *System* of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.’ Education *System* = Programs + Facilities”). “Educationally adequate facilities,” he explained, are those that “provide healthy and safe physical environments that support the effective delivery of education programs that meet Maryland’s education standards.” *Id.* at 7. Similarly, the Kopp Task Force in 2004 described its task as “to review, evaluate, and make findings and recommendations regarding whether public school facilities in Maryland are adequate to support educational programs funded through an adequate operating budget as proposed by the Thornton Commission.” *See* Kopp Comm. Rep., *supra*, at Apx. 4 p. 149.

B. Court Intervention Is Required to Compel the State to Remedy Its Constitutional Violations and Ensure that BCPSS School Facilities Can Provide an Adequate Education by Contemporary Educational Standards.

The State has watched Baltimore City schools steadily deteriorate throughout the course of this litigation, a period now spanning 24 years, without taking necessary, comprehensive action to fix the problems. It has yet to change a school construction program that allocates state funds to Baltimore City schools on a par with state funds to Montgomery County schools, despite the huge difference in availability of local funds. When the State has taken steps, the measures have been relatively limited (*i.e.*, the 21st Century School Buildings Program, which will renovate/build 18

percent of the building stock and requires only a State outlay of \$20 million/year), belated (the legislation last year to change the State's procurement cycle took years of advocacy before the General Assembly finally forced the State to change its policy), and insufficient (*e.g.*, the \$12 million in emergency funding last winter). The State has never tackled the overall problem, and, as a result, tens of thousands of children attend constitutionally inadequate schools each day, every year. A class of students graduates each year never having had the experience of attending class in modern, safe, and healthy schools.

The State's decades of neglect speak volumes. Its own Kopp Task Force made the gravity of the constitutional violations perfectly clear some fourteen years ago. No action was taken, and the State's funding of school construction failed to prioritize the conditions in Baltimore City. This longstanding record of neglect and inaction begs the question: Will the State comply with the Maryland Constitution without action by this Court? The past 24 years teach the clear lesson that Court intervention is necessary.

This Court first declared that Baltimore City school children were receiving an unconstitutionally deficient education in 1996. It made the same or similar declarations in 2000, 2002, and again in 2004. Those declarations, and the relief entered by the Court, have failed to achieve compliance. Today, the physical facilities are in much worse condition than they were in 1996 or 2004. Plainly, the relief previously ordered has failed to secure compliance with the Constitution, and further relief from the Court is required.

III. The Court Should Make the Following Declarations and Provide the Following Further Relief.

For these reasons, this Court should order Defendants to show cause why Plaintiffs are not entitled to the following relief.

First, this Court should find and declare that:

- a. The State is violating Article VIII by failing to provide a “thorough and efficient” education, *i.e.*, an education that is “adequate when measured by contemporary educational standards,” to students at risk of educational failure attending BCPSS;
- b. The State has been in continuous violation of Article VIII since this litigation commenced and has never complied with the Court’s prior declarations as to its constitutional obligations under Article VIII, including the Court’s declaration that, at a minimum, “full Thornton funding” is constitutionally required;
- c. The State’s current funding level for educational services in BCPSS is below constitutionally required levels;
- d. The State’s continuing failure to provide funding to BCPSS at levels required by Article VIII has deprived BCPSS students of least \$2 billion that this Court has ordered over the past decades;
- e. These constitutional violations will persist until the State of Maryland, including its legislative and executive branches, acts to provide constitutionally adequate funding for educational services in BCPSS and to remedy the effects of its prior constitutional violations;
- f. The State also is violating Article VIII by failing to provide sufficient resources to ensure that BCPSS facilities are adequate for a “thorough and efficient” education, *i.e.*, one that is “adequate when measured by contemporary educational standards”; and
- g. These constitutional violations will persist until the State of Maryland, including its legislative and executive branches, acts to remedy the physical condition of the facilities to make them “adequate when measured by contemporary educational standards.”

Second, this Court should order Defendants to comply immediately with the Court’s prior rulings that “full Thornton funding,” at the very least, is constitutionally required, using, at a minimum, the \$290 million shortfall in annual funding that DLS found was needed for “full Thornton funding” for FY 2015, as adjusted for subsequent inflation;

Third, this Court should order Defendants to develop and submit a comprehensive plan for full compliance with Article VIII and the Court’s prior orders and declarations, subject to review and approval by the Court. This must include, but not be limited to, provisions:

- a. Remedying the effect of the aggregate shortfall of past violations of Article VIII;
- b. Remedying the effects of the historic and continued racial isolation of BCPSS's primarily African-American student population;
- c. Directing sufficient State funding and oversight to ensure that all BCPSS schools are brought into compliance with educational adequacy standards, including but not limited to, funding necessary for the Baltimore City Public School System's 2019 "Investing in our Future: A World-Class Education System for Baltimore City Students";
- d. Ensuring that the State provides sufficient funding such that all BCPSS schools will have, among other things, adequate and reliable HVAC systems; adequate and reliable plumbing and piping systems; drinkable water; clean, well-lighted, and well-maintained facilities; adequate roofing; adequate and functioning bathrooms; adequate fire safety provisions; adequate ventilation; sufficient specialized facilities for a modern constitutionally adequate education, including computer, science, art, and music;
- e. Directing on-going capital and operational funding sufficient to maintain, update, and replace BCPSS buildings as necessary, including funding necessary to bring all schools to the standards of the 21st Century Schools program;
- f. Ensuring adequate resources for, and organizational structure supporting, ongoing maintenance of facilities, including but not limited to sufficient staff for maintenance, consistent with industry standards and consistent with the current aged condition of BCPSS facilities and consistent with the staffing levels of other systems in Maryland; and
- g. Removing unnecessary procedural barriers to accomplishing the above as quickly as reasonably possible, including bidding and contracting requirements;

Fourth, this Court should order the final approved plan to be entered as an enforceable judicial decree of the Court along with any additional relief that the Court finds necessary and appropriate; and

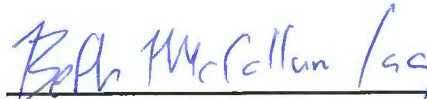
Finally, this Court should order that, should Defendants not comply with these orders and decrees, Defendants may be required to pay compensatory damages, including attorney's fees incurred in enforcing the Court's orders and decrees, as well as penalties to compel compliance.

Dated: March 7, 2019

Respectfully submitted,

BAKER & HOSTETLER LLP

By:



Elizabeth B. McCallum (*admitted pro hac vice*)
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
emcallum@bakerlaw.com
(202) 861-1500
Fax: (202) 861-1783

Deborah A. Jeon
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MARYLAND
3600 Clipper Mill Road
Suite 350
Baltimore, Md 21211
jeon@aclu-md.org
(410) 889-8550, ext. 120

Ajmel Quereshi
Cara McClellan
Sherrilyn Ifill
NAACP LEGAL DEFENSE FUND
700 14th Street, NW, 6th Floor
Washington, DC 20005
aquereshi@naacpldf.org
cmcclellan@naacpldf.org
sifill@naacpldf.org
(202) 216-5574

Attorneys for Keith Bradford, et al.

**IN THE CIRCUIT COURT
FOR BALTIMORE CITY**

KEITH A. BRADFORD, et al.,

Plaintiffs,

v.

MARYLAND STATE BOARD OF EDUCATION,
et al.,

Defendants.

Case No. 94340058/CE 189672

BOARD OF SCHOOL COMMISSIONERS OF
BALTIMORE CITY, et al.,

Plaintiffs,

v.

MARYLAND STATE BOARD OF EDUCATION,
et al.,

Defendants.

Case No. 95258055/CL202151

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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Defendants the Maryland State Board of Education and the State Superintendent of Schools' (collectively, the "State") Motion to Dismiss Plaintiffs' Petition for Further Relief challenges Plaintiffs' ability to seek any relief from this Court to redress the State's ongoing violations of Plaintiffs' children's constitutional right to an adequate education. To be blunt: the State is violating the constitutional rights of tens of thousands of children in Baltimore City every year, yet the State asserts that the Court is powerless to hear and act upon those claims due to various procedural and justiciability defenses. No Maryland case has applied these defenses to bar an action seeking to enforce vital constitutional rights, and for good reason: in Maryland, as in most states, the judiciary has a fundamental obligation to enforce the state Constitution and to ensure that the political branches live up to their constitutional obligations.

Notably, the State does not challenge either Plaintiffs' right under the Declaratory Judgment Act to seek further relief enforcing this Court's prior declaratory rulings, or the sufficiency of the facts set forth in the Petition to support such a claim for further relief. Instead, the State asserts meritless objections. Many of these were previously considered and rejected by this Court in the earlier proceedings, and others blatantly mischaracterize the Petition. For instance, the State portrays the Petition as a belated claim for compensatory relief when Plaintiffs seek prospective equitable relief for current, future, and generally ongoing violations. Similarly, its principal claim of prejudice is based upon a purported concern about the fading memory of marginally relevant (at best) events 15 years ago, when the State is *currently* violating the State Constitution. Its substantive arguments that the Petition is barred by the Consent Decree and is not a nonjusticiable political question were rejected by this Court long ago, and the State subsequently abandoned them. In seeking to revive them now, it is the State who wants to relitigate

the past, taking advantage of the Court's current unfamiliarity with the history of the case. These arguments were wrong before, and they remain wrong today.

The State raises four arguments in its Motion. Each is based on a fundamental mischaracterization of the law and/or the facts of the case.

First, the State's argument that Plaintiffs' Petition is barred by the defenses of the statute of limitations or laches is wrong for both legal and factual reasons. Neither applies to Plaintiffs' claims for prospective relief based upon *current* constitutional violations. Because, as the State acknowledges, Plaintiffs seek equitable relief, the statute of limitations does not apply here by definition. Likewise, laches does not apply because Plaintiffs seek prospective relief for an ongoing violation of the Constitution. The State was not prejudiced by the purported delay in asserting these rights; if anything, it benefited by having the opportunity to resolve the ongoing violations through other means. But even the charge of undue delay is demonstrably false. The State's laches defense is premised on the falsehood that Plaintiffs and their representatives have been inactive in the intervening years since the last decision in this case. As the State is well aware, Plaintiffs and their representatives have remained in regular contact with the State, continuously advocating for the same relief that Plaintiffs now seek to accomplish through their Petition.¹

¹ The time-bar posited by the State ultimately would be futile. The State does not dispute the conditions described in Plaintiffs' Petition regarding the inadequate education and facilities provided to children attending Baltimore City public schools. If the Court were to rule that a time-bar prohibits Plaintiffs from reopening this case, the current set of thousands of parents of children attending those public schools could simply re-file their claims in a separate, original suit as new claims of new violations. Given the degree of problems identified, it is far more efficient for both the Court and the parties to address the problems in this existing case already addressing these issues.

Second, the State's argument that the Consent Decree precludes Plaintiffs' Petition ignores this Court's prior opinions rejecting that argument. More fundamentally, it also ignores the language of the Consent Decree, which expressly permitted the Court to retain jurisdiction if the State failed to adequately fund the Baltimore City Public School System ("BCPSS") in the ensuing years – which, by the State's own measure, unquestionably occurred – and the Court's orders directing that jurisdiction would continue until constitutional compliance was demonstrated to the Court's satisfaction. Contrary to the State's claims, the Decree *expressly* allows Plaintiffs to return to Court to seek additional funds, setting out a specific process that was invoked years ago and applied by the Court, which also extended jurisdiction for enforcement purposes. That process allowed the Court to issue its 2000 and 2004 findings that BCPSS needed additional State funding. In 2000, the State raised these same objections to those post-Consent Decree proceedings, and this Court rejected them (prompting the State to appeal the issue, which it then withdrew and abandoned one week before oral argument in the Court of Appeals).

Third, this Court has previously considered and rejected the State's argument that constitutional challenges to the provision of inadequate education are non-justiciable political questions. The argument flies against two decisions of the Court of Appeals. The State abandoned a third opportunity for the Court of Appeals to reverse course, dismissing its appeal from the Court's 2000 orders and publicly declaring that it "agreed to be bound" by the Court's jurisdiction and decisions. In any event, the State's argument is wrong on the merits. This is not a "political" question beyond the purview of the judiciary. Well-settled Maryland law authorizes courts to order equitable relief to remedy a constitutional violation, even if it would require the expenditure of state funds. *See* Md. Decl. of Rights, Art. 19 (requiring a remedy for every wrong).

Finally, in arguing that Plaintiffs cannot seek monetary sanctions, the State responds to an argument that Plaintiffs never make. Plaintiffs do *not* now seek compensatory damages for Defendant's previous violations of the Constitution. Instead, in light of past violations by the State, Plaintiffs included in their *ad damnum* a request for sanctions simply to reserve their rights in case of future violations of the orders requested as relief in the Petition. It is premature for the Court to decide now whether such relief is appropriate as the violations have not yet occurred, but, to the extent the issue should be addressed now, the Court's power to impose financial sanctions and award attorney's fees as remedies for such violations is well established.²

BACKGROUND

Although Plaintiffs' petition addresses the *current* constitutional violations affecting students attending Baltimore City schools *today*, Plaintiffs are compelled by the State's arguments to address the history of this litigation in some detail. The State seems to want to ignore the history of this case — in particular the fact that the current petition is grounded in and seeks supplemental relief related to this Court's repeated determinations that the State is violating its constitutional duties to Baltimore students and the State's continued failure to redress that violation. Accordingly, Plaintiffs separately set out this statement of facts to correct a number of inaccuracies and omissions in the State's description of the history underlying this case. Among other things, the State: (1) does not accurately depict the Consent Decree it signed, which expressly permitted the BCPSS Board to return to the Court for additional funding; (2) does not accurately describe

² The State's motion to dismiss presents independent evidence beyond that presented in Plaintiffs' petition. *See e.g.*, State Mem. in Supp. of MTD, June 19, 2019, at 37-38 (citing the declarations of Nancy Grasmick, Karen Salmon, and Amalie Brandenburg). This is improper. A motion to dismiss must be limited to the information presented in Plaintiffs' Petition. *See* Md. Rules, Rule 2-322(c). Plaintiffs present information beyond that presented in their Petition to respond to the State's submission.

the history of the proceedings before this Court that led to the *Bradford* class' current litigation – including this Court's declarations of constitutional inadequacy and rejections of the State's current defenses, which are the law of this case; (3) inaccurately claims that it has fully complied with the Court's orders in 2008 even though the General Assembly passed a bill in 2007 that made full compliance impossible and compounded that lack of compliance by a number of similar measures in later years; and (4) ignores the years of advocacy that the *Bradford* class' representatives engaged in to try to compel the State to comply with its constitutional obligation.

A. The 1996 Summary Judgment and the Consent Decree

More than two decades ago, the *Bradford* class and the City plaintiffs (the Board of School Commissioners of Baltimore City, the Mayor and City Council of Baltimore City, and the City Superintendent) filed separate suits in the Circuit Court for Baltimore City, both alleging that the State was failing to provide the students of Baltimore City with the "thorough and efficient" education Article VIII of Maryland's Constitution requires. The State filed its own affirmative claims in both suits, contending that the challenged educational deficiencies were not the result of the State's conduct, but rather the result of the City's failure to manage the schools effectively and arguing that relief could be effectuated only through restructuring the school system's management.

The State initially filed a motion for summary judgment unsuccessfully raising, among other things, the same argument it repeats now, that the constitutionality of Maryland's system for school funding as it affects Baltimore City students is a matter for the legislature, not the courts, to address. Dkt. 62, State Mem. in Supp. of Mot. for Summary Judgment, Aug. 28, 1996, at 2-3;

Dkt 62A, Plaintiffs' Opp. to State Mot. for Summary Judgment, Sept. 17, 1996, at 15 n. 15.³ On October 18, 1996, however, based on an extensive and essentially undisputed factual record, this Court entered partial summary judgment for the Plaintiffs instead, finding that Baltimore City schoolchildren were not receiving the "thorough and efficient" education the Maryland Constitution guarantees. The Court first held, following the Court of Appeal's decision in *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 619, 638-39 (1983), that the "thorough and efficient" language of Article VIII requires that "all students in Maryland's public schools be provided with an education that is adequate when measured by contemporary educational standards." Exhibit B, Dkt. 66, Order, Oct. 18, 1996. Next, the Court found "no genuine material factual dispute in these cases as to whether the public school children in Baltimore City are being provided with an education that is adequate when measured by contemporary educational standards." *Id.*

This Court's summary judgment ruling was based on substantial, almost entirely undisputed evidence that City students were not receiving a "thorough and efficient" education. Among other things, evidence presented showed that Baltimore City schools performed abysmally on the State's own "MSPAP" tests for reading, writing, and mathematics; dropout rates and absenteeism were unacceptably high; the State had designated over a fifth of the schools in the system as "reconstitution-eligible," meaning their performance was so bad that the State could take them over if improvement did not occur; and a substantial proportion of the system's physical facilities were in poor condition. Dkt. 61, Plaintiffs' Mem. in Supp. of Partial Summary Judgment,

³ Plaintiffs have attempted to minimize voluminous attachments by citing to docket materials, to materials as attached already to other recent filings in this case, and to place where voluminous sources can be found online. They are happy to provide copies of the cited materials on request, however.

Aug. 30, 1996, at 26-29, 32-37, 55-56. The Court also received evidence that almost 70 percent of students in Baltimore City experienced poverty or otherwise faced the risk of educational failure, accounting for almost a third of all such students in the entire State. *Id.* at 43-48. Educational experts agree, as does the State of Maryland, that students who experience poverty need additional and focused resources in order to have the same chance of succeeding in school as their wealthier counterparts. *Id.* at 49; Exhibit I, Commission on Education Finance, Equity, and Excellence, Final Report, Jan. 2002, at 11, 349 (“Thornton Report”); Exhibit C, Dkt. 10/0, Opinion, June 30, 2000, at 18-19 (quoting State admissions). Finally, the Court received evidence that despite its large population of at-risk students, the BCPSS’ per-pupil spending level fell far short of meeting the recommendations of a State commission on educational adequacy and well below the State average, while per-pupil staffing levels were well below almost any other district. Dkt. 61, Plaintiffs’ Mem. in Supp. of Partial Summary Judgment, Aug. 30, 1996, at 49-52 (noting among other things that the BCPSS “spends far less per student on actual instruction ... than any other school district in Maryland”).

The Court set the case for trial to resolve the remaining issues, including the cause of the educational inadequacy and the appropriate remedy. Shortly before the trial was to begin in November 1996, the parties entered into the Consent Decree, agreeing to “provide a meaningful and timely remedy . . . to meet the best interests of the school children of Baltimore City.” Exhibit A, Dkt. 77, Consent Decree, Nov. 26, 1996, at 3. The bulk of the Decree addressed the State’s concerns regarding management deficiencies in BCPSS by creating a State-City partnership for management and setting up a new board – the Board of School Commissioners for Baltimore City (the “Board”) – jointly appointed by the Governor and Mayor from a panel proposed by the State Board of Education, and imposed other management changes as well. *Id.* ¶¶ 8-26. The Decree

also provided for modest increases in State-provided operational funding, \$30 million in 1998 and \$50 million from 1999-2002. *Id.* ¶¶ 43-47.

As this Court explained in 2000 and again in 2002 and 2004, however, the Decree also recognized that additional funds were likely needed and provided a “mechanism” for the BCPSS Board to ask for such funds:

Because the parties were aware in 1996 that \$230 million over five years was not enough to provide an adequate education to Baltimore City’s unique population of disadvantaged children, the Consent Decree provide[d] a mechanism for the New Board to request additional funds from the State throughout the term of the Decree. It also provide[d] that, after June 1, 2000, if the State fails to satisfy the New Board’s request for additional funds, the New Board may go back to Court for a determination of whether additional funding is needed in order for the BCPSS to provide a Constitutionally Adequate Education.

Ex. C, Dkt. 10/0, Opinion, June 30, 2000, at 3. *Accord* Exhibit D, Dkt. 25/0, Opinion, June 25, 2002, at 2-3 (describing mechanism); Exhibit E, Dkt. 50/0, Opinion, Aug. 20, 2004, ¶¶ 12-15 (same).

Accordingly, the Decree required independent experts jointly hired by the State and the Board to perform an interim evaluation of the schools halfway through the five-year term of the Decree and a final evaluation at the end of the Decree. Ex. A, Dkt. 77, Consent Decree, Nov. 26, 1996, ¶¶ 40-41. The Decree required the evaluations “at a minimum” to include “an assessment of the sufficiency of the additional funding provided by the State.” *Id.* ¶ 41. The State and other parties also agreed that the Board could, based on that assessment, provide “recommendations concerning ... the need for funding in excess of the amounts provided herein in order for the BCPS[S] to provide its students with an education that is adequate when measured by contemporary educational standards.” *Id.*

Once the jointly-retained expert rendered its report, the Decree provided that the BCPSS Board could request State funds in addition to the increases required by the Decree. If the State’s

response to the request was unsatisfactory, the BCPSS Board was permitted, after June 1, 2000, to “seek relief from the Circuit Court for Baltimore City for funding amounts greater than those described” earlier in the Decree. *Id.* ¶ 53. The independent expert’s evaluation was required to be admitted as evidence in the hearing, *id.*, and the parties also could appear and present additional evidence. Any claim for additional funding was to be placed on an expedited schedule, and the parties agreed that they would jointly seek immediate expedited appellate review of any Circuit Court decision, *id.*, so that a decision could be rendered and any appeal resolved in time for the 2001 legislative session. The Decree also provided that in a proceeding for additional funding, the State would “reserve all of its defenses” to “any Court order for [additional] funds in amounts greater than those provided” in the Consent Decree. *Id.* ¶ 53(A).

Finally, the Decree provided that its initial term (five years) could be extended upon a showing of “good cause.” *Id.* ¶ 68. It further provided that this Court would retain jurisdiction even after the Decree terminated to resolve disputes that had arisen during the Decree’s term. *Id.* ¶ 69.

In April 1997, the Maryland General Assembly codified the principal terms of the Decree in S.B. 795. *See* S.B. 795, 1997 Reg. Sess.

B. The Interim Expert Evaluation and the June 2000 Declaration

The interim expert evaluation called for by the Decree was completed on February 1, 2000. As required by the Consent Decree, the State and the BCPSS Board jointly hired a neutral expert, Metis Associates, Inc. (“Metis”). They agreed that Metis would evaluate “whether the fiscal resources available to BCPSS, including the additional funding under SB 795, [were/were] not sufficient to ... enable students to meet state performance goals.” *See* Ex. J, Metis Associates, Inc., Interim Evaluation of the Baltimore City School System 1998-99 Master Plan Implementation and

Related Issues, Feb. 1, 2000 ("Metis Report"), at IV-1. The State and the Board also agreed that Metis would subcontract the evaluation of the adequacy of funding provided to BCPSS to another independent third-party expert, the Council of Great City Schools, and agreed on the appropriate methodology to evaluate the adequacy of funding. *Id.* at IV-2.

After an extensive process studying the system and meeting with stakeholders, the expert concluded the system was making "meaningful progress" in improving management and "implementing instructional initiatives at the elementary grade levels." *Id.* at Exec. Summary 3. Nonetheless, Metis found that BCPSS needed substantial additional funding, approximately \$2,700 per pupil, to provide an adequate education for the unique student population of Baltimore City. *Id.* at IV-14. Metis also concluded that there were a number of specific initiatives that could help students facing the risk of educational failure for which funding was insufficient, including summer school programs and smaller class sizes. *Id.* Exec. Summary; Appx. A pg. 19.

As the Consent Decree permitted, the Board promptly sought additional funding from the State, both through the normal budget process, as permitted by paragraph 52 of the Decree, and through a specific request to the State, as permitted by paragraph 53. The Board's paragraph 53 request was contained in a "Remedy Plan," requesting approximately \$265 million, or \$2,650 per pupil at then-current enrollment levels, in order to fund a programs and services designed to benefit students facing the risk of educational failure. Ex. C, Dkt. 10/0, Opinion, June 30, 2000, at 16-17.⁴

After negotiations with the State were unsuccessful, the Board "s[ought] relief from the Circuit Court ... for funding amounts greater than those described in" the Decree, as permitted by

⁴ As its paragraph 52 request for FY 2001, the Board, at the State's request, engaged in a "triage" process and submitted a substantially-narrowed "priorities" plan asking for a \$49.7 million "downpayment" on the programs and services for which the system had the most immediate and critical need. *Id.* at 17.

the Decree. Ex. A, Dkt. 77, Consent Decree, Nov. 26, 1996, ¶ 5; Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, ¶ 15. The State's opposition raised the same defenses it raises again now, that the Consent Decree did not permit this Court to determine the sufficiency of additional funds for constitutional adequacy, and incorporated the separation of powers and legislative immunity arguments it had made in its 1996 motion for summary judgment as well. Dkt. 3/1, State Opp. to Pet. For Further Relief, Jun. 23, 2000, at 16-21.

The Circuit Court held a hearing on June 23, 2000, at which the Board, the *Bradford* class, and the State all appeared. The evidence included the report of the Board and the State's independent expert, a declaration from another educational expert, Dr. Stephen Ross, and the Board's detailed Remedy Plan, as well as some 100 other exhibits and affidavits. Dkt. 3/0, New Board and Bradford Plaintiffs' Joint Mem. in Supp. of the New Board's Pet. for Further Relief Pursuant to the Consent Decree, Jun. 9, 2000, at 11-53 (citing and attaching evidence). Among other things, the Court heard (as it had in 1996) undisputed evidence that, although student test scores in BCPSS were improving with the management changes and additional funds provided by the Decree, BCPSS still fell woefully short of providing the education necessary to enable students to come close to meeting the State's own standards of performance. *Id.* Although the hearing was set for two days, the State did not proceed beyond oral argument, and made no effort to put on its own witnesses or to cross-examine Board and *Bradford* plaintiffs' witnesses.

The Circuit Court issued its Memorandum Opinion and Order on June 30, 2000. It adopted many findings of the joint independent Metis Report, including the finding that substantial additional funds were needed. Ex. C, Dkt. 10/0, Opinion, June 30, 2000, at 14-16. It declared that the students in BCPSS still were not receiving a "thorough and efficient" education, that is, an education that was "adequate when measured by contemporary educational standards." *Id.* at 25.

It further declared that the funds provided by the State as reflected in the FY 2001 budget, “[e]ll far short ... and [would] not enable the ... Board ... to provide the City’s schoolchildren with a Constitutionally Adequate Education when measured by Contemporary Educational Standards during Fiscal Years 2001 and 2002.” *Id.*; *see also id.* at 26 (“[A]dditional funding is required to enable the Baltimore City public schools to provide an adequate education measured by contemporary educational standards”). Based on the extensive evidence before it, including the report of the parties’ jointly-retained independent expert, the Court declared, pursuant to paragraph 53 of the Decree, that additional funding of “at least” \$2,000 to \$2,600 per pupil was necessary for FY 2001 and 2002. *Id.* at 26.

C. The State Appeals and Abandons its Appeal

On August 1, 2000, the State appealed the Court’s June 2000 declaration. The appeal was fully briefed. On appeal, the State raised the same arguments it had raised below and it raises again now. It argued that the Circuit Court exceeded its authority under the Consent Decree in determining a constitutional violation and estimating the amount of money necessary for a constitutionally-adequate education. *Compare* Exhibit F, Brief of Appellants, Dec. 8, 2000, at 11-20 *with* State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 38-51. It also argued that this Court had determined a non-justiciable political question that should be left to the General Assembly. *Compare* Ex. F, Brief of Appellants, Dec. 8, 2000, at 20-25 *with* State Mem. in Support of Mot. to Dismiss, June 19, 2019, at 51-59.

Based on its claim that the ongoing work of the State’s “Thornton Commission” on school funding would result in compliance with the June 2000 declaration, the State then tried to stay and, subsequently, abandoned its appeal. In 1999, the State had established the Commission on Education Finance, Equity, and Excellence, commonly known as the “Thornton Commission,” and directed it to assess the adequacy and equity of school financing throughout the State. *See*

H.B. 10 § 1(b)(1), 1999 Reg. Sess. In 2002, the Commission's recommendations were largely adopted as Maryland's current school funding system in the Bridge to Excellence in Education Act. *See infra* § D. On January 26, 2001, the BCPSS Board and the State asked the Court of Appeals, jointly, for an order staying the appeal indefinitely while the Thornton Commission completed its work and the General Assembly considered the Thornton Commission's recommendations. *See* Joint Mot. to Stay, Jan. 26, 2001. They did so as the result of an "interim settlement" between the BCPSS Board and the State, in which the Board agreed not to bring an enforcement action against the State while the Thornton Commission was deliberating. *Id.* ¶¶ 2-7. The Plaintiffs were not parties to the joint motion or the interim settlement. *Id.* ¶ 8. The Court of Appeals denied the motion to stay the same day it was filed (Order, Jan. 26, 2001), signaling that it was unwilling to put the issues involved in the appeal "on hold" indefinitely.

Four days later, on January 30, 2001, the State voluntarily dismissed its appeal. Notice of Dismissal, Jan. 30, 2001. As Dr. Nancy Grasmick, then Superintendent of Maryland schools, said in sworn testimony before the Circuit Court in 2004, the State thus "*agreed to be bound*" by the June 2000 declaration. Ex. H, Tr., Aug. 4, 2004, at 1562-63 (emphasis added).

D. The Thornton Commission and the Bridge to Excellence Act

The Thornton Commission issued its final report in 2002. Dr. Alvin Thornton, the former chair of the Prince George's County School Board, chaired the 27-member Commission, which included then-State Superintendent Dr. Grasmick and other the State representatives, many members of the General Assembly, representatives from public school systems, various county government officials, and other key groups across the State. Ex. I, Thornton Report at v, vi, ix. The Commission worked for two-and-a-half years to address adequacy and equity issues, examining the then-current system and options for change, holding numerous public hearings, and

receiving evidence and comments from experts and the public. *Id.* at 3-4. As part of its assessment, the Thornton Commission engaged school funding experts in order to estimate how much additional funding would be necessary for each district in Maryland to meet state standards. *Id.* at 6-7.

The Commission found, as had this Court and Metis with respect to Baltimore City, a substantial gap between the resources currently available to school systems in Maryland and the resources necessary for educational adequacy. *Id.* at 27-29. It also confirmed what this Court recognized, that school systems like Baltimore City with a high concentration of students who experience poverty and have other special needs are farthest from adequacy and, thus, need the most significant increases in State aid. *Id.* at 11-13, 43, 349. It found that Baltimore City's "adequacy gap" – the difference between current funding and the funds necessary to provide an adequate education – was the highest in the State. The Commission cited evidence demonstrating that Baltimore City needed an additional \$2,938 to \$4,250 per pupil for adequacy. *Id.* at 27-29. Altogether, this translated to annual operational funding increases of approximately \$290 to \$420 million. *See generally* Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, ¶¶ 34-41.

When the General Assembly enacted the Commission's recommendations into law in the Bridge to Excellence Act in 2002, it likewise recognized that Baltimore City had an "adequacy gap" of \$3,380 per pupil – again, an amount significantly larger than the Circuit Court had determined was necessary in June 2000. *See* Ex. K, Dep't of Legislative Services, S.B. 856 Fiscal Note, May 2, 2002, at 11. The General Assembly predicted, when full Thornton funding was phased-in, Baltimore City should have received an increase over then-current funding of approximately \$3,070 per pupil. *Id.* at 24. *See generally* Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, ¶¶ 42-44.

Under the Bridge to Excellence Act, full funding would not be phased in until Fiscal Year 2008. If all the increases anticipated by the Act had been fully phased in, the Bridge to Excellence Act would have resulted in \$1.3 billion in additional annual State funding for all counties by FY 2008, including an additional \$258.6 million for Baltimore City – an amount roughly equivalent to the \$2,000 to \$2,600 per pupil this Court had declared necessary in its June 2000 opinion. *See* Ex. K, Dep’t of Legislative Services, S.B. 856 Fiscal Note, May 2, 2002, at 23.

The State, as well as the Court, recognized the importance of compliance with the Act to the State’s fulfillment of its constitutional obligations. Not only did the State ask the Court of Appeals to stay its appeal of the June 2002 order pending completion of the Thornton Commission’s work (*see supra* § C), it also expressly acknowledged (and this Court has found) that the Bridge to Excellence Act was enacted in response to the June 2000 order. Ex. H, Tr., Aug. 4, 2004, at 1425) (testimony of State Superintendent Nancy Grasmick that “the commission was really a response to Judge Kaplan’s order regarding the per pupil expenditure”); Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, ¶¶ 33-34. The State has also recognized that full compliance with the Thornton Commission’s recommendations is necessary for Maryland students, including students in BCPSS, to have sufficient funds to enable them to meet State standards. *E.g.*, Ex. H, Tr., Aug. 4, 2004, at 1425-26, Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, ¶¶ 49-52 (citing and quoting statements). Finally, the State has conceded that satisfying the Commission’s recommendations was necessary for the State to meet constitutional mandates. *E.g.*, Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, ¶ 51 (citing and quoting State Board resolution recognizing full funding of the Commission’s recommendations is necessary for the provision of a “thorough and efficient” education); Dkt. 21/1 State Opp. to Joint Mot. for Ext’n of Judicial Supervision at 9 (concession

in State's 2002 filing that the Bridge to Excellence Act was enacted "in order to provide constitutionally adequate funding for all students in the public schools throughout the State").

Additionally, this Court has recognized that the cost of education does not remain static, but increases over time due to rising costs for teacher salaries, as well as improved educational standards. Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, ¶¶ 52-54, 92-94. Consistent with this, the Bridge to Excellence Act included an "inflation adjustment" to be applied each year – the Implicit Price Deflator for State and Local Government Expenditures – thus ensuring that funding pursuant to the Bridge to Excellence Act would increase over time as costs increased. *See* S.B. 856, 2002 Sess., at 16; Ex. K, Dep't of Legislative Services, S.B. 856 Fiscal Note, May 2, 2002, at 25 n.1.

The Bridge to Excellence Act also included provisions designed to ensure that Maryland would return to and reassess the question of appropriate funding formulas to ensure educational adequacy over time. Specifically, it mandated another statewide commission, like the Thornton Commission, to begin work in 2012 to examine questions of funding and educational adequacy and to make recommendations to the General Assembly in response. S.B. 856, 2002 Sess., § 7.

E. The Circuit Court's Decision to Retain Jurisdiction

In June 2002, soon after the State had enacted the Bridge to Excellence Act, the Board and the Plaintiffs asked the Circuit Court to extend the Consent Decree's initial five-year term and its own jurisdiction over the case, a proceeding that the Decree explicitly contemplated upon a demonstration of "good cause." Dkt. 21/0, Joint Mot. for Ext'n of Judicial Supervision; Ex. A, Dkt. 77, Consent Decree, Nov. 26, 1996, ¶ 68. The State objected. As "good cause," the BCPSS Board and Plaintiffs pointed to (1) the continuing constitutional inadequacy and the undisputed evidence from the Thornton Commission and the joint expert that substantial additional State funds were necessary to address this inadequacy; and (2) the State's failure to comply with this Court's declaration that substantial additional funds were necessary for constitutional adequacy. Dkt. 21/0,

Joint Mot. for Ext'n of Judicial Supervision at 14-25. In particular, they pointed out that although the State had passed the Bridge to Excellence Act, that funding was both phased in and uncertain, particularly given that the State had not yet identified revenue sources. *Id.* at 11 (noting that funding had been found for only the first two years and remaining funding was contingent); Dkt. 23/0, Joint Reply in Supp. of Mot. for Ext'n of Judicial Supervision at 8-9. In response, the State *conceded* that it had not complied with the June 2000 declaration (Dkt. 21/1 State Opp. to Joint Mot. for Ext'n of Judicial Supervision at, admitting that State "did not fund that large amount per pupil in Baltimore City in fiscal years 2001 and 2002"), but argued that by passing the Bridge to Excellence Act it had satisfied the June 2000 declaration and its constitutional obligations to Baltimore's children. *Id.* at 2-7.

This Court found the requisite "good cause," noting as well its inherent authority to monitor and enforce compliance with its own orders, and extended the Decree and its jurisdiction "until such time as the State has complied with the Court's June 2000 order." Ex. D, Dkt. 25/0, Order, June 25, 2002. The Court further determined that even "arguabl[e]" compliance with the June 2000 declaration would not occur unless and until the Bridge to Excellence in Public Schools Act was fully funded. Ex. D, Dkt. 25/0, Opinion, June 25, 2002, at 5. It rejected the State's argument that the State had already complied fully with the Consent Decree, and further rejected its argument that it had fully complied with the June 2000 order by enacting the Bridge to Excellence Act because full Thornton funding was inevitable, finding instead it was uncertain. *Id.* at 3-5 (citing State admissions that funding was not certain).

The State did not attempt to appeal the 2002 order.

F. The August 2004 Proceedings

The Thornton funding was phased in equally for all Maryland districts, with no front-loading for districts with special or higher needs, meaning that BCPSS' first big increase came in 2004 and there was strain on its efforts to improve educational programs in the meantime. Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, ¶ 47; Affidavit of Bebe Verdery ("Verdery Aff.") ¶ 17. In late 2003, public reports began to surface that the BCPSS had accumulated a deficit of approximately \$58 million, and as a result, had taken budget-cutting steps that affected education, such as increasing class sizes, eliminating systemic summer school for grades K through 8, and eliminating guidance counselors in elementary schools. Ex. E, Dkt. 50/0, Order, Aug. 20, 2004, ¶ 7; Opinion, Aug. 20, 2004 ¶¶ 126-232 (citing record evidence). Accordingly, on July 8, 2004, Plaintiffs asked this Court for a determination that the cost-cutting actions that BCPSS had taken to address the fiscal crisis were adversely affecting educational opportunities for students. Plaintiffs argued that the State had not yet complied with the June 2000 order or fulfilled its constitutional obligations to BCPSS, and pointed out that the Court was supervising what had turned out to be a long-term, gradual, phased-in remedy for the constitutional violation it first identified in 1996. Plaintiffs sought a declaration "preserving that gradual remedy, and directing the State, City, and Board to revisit their plans to address the fiscal crisis to make certain that funds available to educate students in the 2004-2005 school year are sufficient to ensure continued progress in the direction of that remedy." Dkt. 30/6, Plaintiffs' Mot. for a Decl. Ensuring Continued Progress Towards Compliance with Court Orders and Constitutional Requirements, July 8, 2004, ¶ 10.

The State then filed its own *affirmative* motion asking the Circuit Court for a declaration that the State was complying with its constitutional obligations to Baltimore City's children and had complied with all its obligations under the June 2000 opinion and order. Dkt. 38/0, State Mot.

for Declaratory Ruling and Other Relief, July 16, 2004, at 1. The State also asked this Court for an order “restructuring” BCPSS, on the theory that any continuing educational inadequacy was attributable to systemic mismanagement, not insufficient funding. *Id.*

Beginning in July 2004, the Circuit Court held a four-day bench trial on the pending motions. The Court received exhibits into evidence, heard testimony from two separate experts on educational programs and services, and also considered testimony from the State Superintendent, Baltimore City’s Finance Director, BCPSS’ Chief Executive Officer, and a number of other BCPSS officials, and parents and students. It also received into evidence a number of declarations from students, parents, teachers, and principals, including one declaration attaching thousands of petitions describing the adverse effects of the fiscal crisis. Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, at 4 & passim (citing extensive evidence).

During that hearing, the Circuit Court heard substantial objective evidence that, although student test scores had been rising steadily as funding to BCPSS increased, students in BCPSS still were not receiving a constitutionally-adequate education. *Id.* ¶¶ 95-121 (citing testimony, expert reports, and other evidence). The Court also received admissions from State Superintendent Nancy Grasmick and BCPSS CEO Bonnie Copeland that BCPSS needed substantial additional resources to provide an adequate education to students, *id.* ¶¶ 66-72; testimony from the State Superintendent and a memorandum prepared by former Director of the Department of Fiscal Services William Ratchford that the State had not yet complied with the June 2000 order, *id.* ¶¶ 85-91; testimony from State Superintendent Grasmick and a declaration from State Coordinator of Fiscal and Policy Analysis John Rohrer, that full Thornton funding, at the least, was necessary for BCPSS to achieve adequacy, *id.* ¶¶ 49-51; and testimony from State and BCPSS witnesses, including expert testimony, that the increase in class sizes, elimination of summer school programs, and other cost-

cutting measures resulted in a significant reduction of educational programs that previously benefited BCPSS' at-risk student population, *id.* ¶¶ 144-232.

Based on this evidence, this Court, on August 20, 2004, did the following:

- Declared that the constitutional violation it had found in June 2000 was continuing and that students were “still not receiving an education that is adequate when measured by contemporary educational standards and are still being denied their right to a ‘thorough and efficient’ education under Article VIII,” Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, at 67;
- Noted among other things that the “objective evidence continue[s] to demonstrate, as [it] did in 1996 and 2000, that the BCPSS students are performing at levels far below state standards, and far below state averages, although there have been some improvements,” *id.* ¶ 98; that these dismal outcomes were compounded by the profound poverty experienced by and other demographic and socioeconomic characteristics of BCPSS students that established a “significant number of children [faced the] risk of educational failure,” *id.* ¶¶ 122-24; and that students facing these barriers “require increased educational focus and resources,” *id.* at 29;
- Rejected the State’s argument that it already had complied with the June 2000 order, declaring that:
 - The State still had not provided the additional \$2,000 to \$2,600 per pupil the Court had found necessary in 2000, *id.* ¶¶ 80-91;
 - Full compliance would not occur unless the State provided BCPSS with full funding by 2008, *id.* at 67;

- Found that the State's failure to comply with its constitutional obligations had led to an accumulated shortfall of \$439.55 to \$834.68 million, *id.*;
- Declared that given the State's failure to comply with the June 2000 declaration and the continued substantial unconstitutional underfunding of the schools over the past several years, the Court would not tolerate any further delays in the provision of the full funding called for by the Thornton Commission, *id.* at 68;
- Found that, due to increased costs of education, the funding increases previously determined to be necessary "should be adjusted to reflect that increased cost" of education, *id.* ¶ 90-92; that is, by 2004, the constitutional floor already exceeded the levels called for by the Thornton Commission;
- Ruled that changed circumstances since 2001 made it "likely" that the Thornton levels even then "were too low," citing new, higher state standards for high school graduation, federal requirements under the No Child Left Behind legislation requiring all students to achieve satisfactory scores on statewide tests, and the increased needs of children who had experienced poverty (as acknowledged by the State Superintendent of Education), and higher education costs, *id.* ¶¶ 52-56; and
- Found, accordingly, that "the cost of an adequate education" could not be measured by the Thornton Commission's numbers alone, *id.* at 94.

The Court determined that it would continue to retain jurisdiction to "ensure compliance with its orders and constitutional mandates and to continue monitoring funding and management issues." When "full funding outlined in" the opinion was received, the Court held, it would "revisit

the issue of its continuing jurisdiction, and determine whether the Consent Decree should then be additionally extended for good cause.” *Id.* at 68; Dkt 50/0, Order, Aug. 30, 2004, ¶ 5.⁵

G. The State Reduced Full Thornton Funding Starting in 2007

Despite the Court’s ruling, the State continued to fail to meet its constitutional obligation. After the decision, in accordance with the Bridge to Excellence Act, the State gradually increased funding for BCPSS. These increases were, unfortunately, short-lived.

As noted, the Thornton funding formula contained an inflation-type adjustment, called the Implicit Price Deflator for State and Local Government Expenditures, that recognized that prices and educational costs increase, as this Court had also found in 2004. *See* S.B. 856, 2002 Sess., at 16; Ex. K, Dep’t of Legislative Services, S.B. 856 Fiscal Note, May 2, 2002, at 25 n.1. *See generally* Education in Maryland, IX Legislative Handbook Series (2014) (“Handbook”) at 63, 72, at <https://www.dllr.state.md.us/p20/p201egishandbook.pdf>.

During the 2007 legislative session, the General Assembly eliminated mandated inflationary increases and changed the mandated inflation measurement as well. 2007 Md. Laws (Special Session) ch. 2; Handbook at 72. Over time, it continued either to eliminate or cap inflation adjustments to Thornton funding. Handbook at 72, 76-77 (describing changes); *accord* APA Consultants, Final Report of the Study of Adequacy of Educational Funding in Maryland (2016) (“APA Final Report”), at 3, at <http://marylandpublicschools.org/Pages/adequacystudy/index.aspx>. These decisions resulted in a steadily increasing “adequacy gap” between the full funding this

⁵ The State appealed the Court’s August 2004 determinations. The Court of Appeals dismissed the majority of the appeal on the basis that some portions of that the August 2004 order were not final, and reversed a specific injunction regarding the budget deficit. *Maryland State Board of Education v. Bradford*, 387 Md. 353, 385-88 (2005) (“*Bradford II*”).

Court had determined was constitutionally mandated based on the original Thornton funding formula and the actual funding received by BCPSS.

The State admits as much in its motion papers. The State explains that “[a]mong the many cost-containment measures adopted during the 2007 Legislative Session, the General Assembly eliminated inflation increases to the Bridge to Excellence Act funding formulas for fiscal years 2009 and 2010 and altered the annual inflation adjustment to moderate annual growth in subsequent years.” State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 4 (citing 2007 Md. Laws (Special Session) ch. 2). Additionally, the State explained, the General Assembly “further limit[ed] the growth of spending under the State’s education funding formula” by limiting and eliminating planned increases in the “foundation” amount per pupil and further extending the inflation cap.” *Id.* at 25.

The State also concedes the inevitable result of its decision to decrease the Thornton spending this Court held was constitutionally required. The changes to the Thornton formula “increase[d] the size of the estimated adequacy gap ... for Baltimore City Public Schools.” *Id.* at 26 (emphasis added).

The cumulative effect of the State’s cuts in 2007 and over several years thereafter to the Thornton Commission’s formula is significant and undisputed. The Department of Legislative Services has calculated that the “adequacy gap” in 2002, before Thornton funding began to be phased in, was \$270.4 million. State Ex. 11, Dep’t of Legis. Servs, Adequacy of Education Funding in Maryland, Jan. 19, 2017, at 3. By 2015, after the various cuts and adjustments starting with the elimination of the inflation adjustor in 2007, the adequacy gap between what BCPSS should have received under the Thornton formula and actual funding was \$290.1 million. *Id.* at 7. As of 2017, according to newly-released numbers from the Department of Legislative Services,

this adequacy gap between Thornton and actual funding had grown to \$342.3 million. Ex. L, Dep't of Legis. Servs., *Follow-up from July 24, Meeting*, Aug. 1, 2019, at 2. Importantly, the State never returned to court in 2008 or afterwards seeking to terminate the Consent Decree and this Court's jurisdiction; instead, it simply determined that it would violate the Court's decisions.

In response, the American Civil Liberties Union of Maryland ("ACLU"), on behalf of the Plaintiffs, assiduously worked through the legislative process to mitigate the proposed cuts. *See generally* Verdery Aff. ¶¶ 15, 17-19, 21. Efforts included meeting with state legislators, organizing rallies, and producing educational materials and letters on behalf of community members. *Id.* Throughout its work, the ACLU, on behalf of the Plaintiffs, emphasized that the proposed cuts, as well as any additional cuts, would violate the Court's decisions in this case. *Id.* ¶ 22. As a result of these efforts, although the ACLU was not able to preserve Thornton funding in its entirety, it was able to help forestall some of the cuts. *Id.* ¶¶ 15, 17-19, 21. The ACLU was able to save almost \$50 million from being cut in 2007, including \$16 million for BCPSS. *Id.* ¶ 17. In 2009, the legislature proposed a \$140 million dollar cut, including \$31 million in cuts for BCPSS. The ACLU exposed that the proposed plan would hurt BCPSS more than all but one other district in the State. As a result of the ACLU's work on behalf of the Plaintiffs, over \$50 million was saved from cuts, including \$9 million for BCPSS. *Id.* ¶ 18. Similar cuts were proposed and similar efforts were undertaken by the ACLU in 2010 and 2011. *Id.* ¶¶ 19, 21.

H. The State Delays the Statutorily-Required Ten-Year Reassessment of the Funding Formula.

An important aspect of the Bridge to Excellence Act was the requirement that, in 2012, the State would sponsor a new independent study of school funding and, then, adjust the state's funding formula accordingly. S.B. 856, 2002 Sess., § 7. The State, however, did not appoint the assessors (APA Consulting) until 2014, and they did not issue their report until 2016. *See* APA

Final Report, at <http://marylandpublicschools.org/Pages/adequacystudy/index.aspx>. Were it not for the ACLU's efforts on behalf of the Plaintiffs, the delay would have been longer. *Verdery Aff.* ¶¶ 23-24 (State first proposed that assessors not begin work until 2016 but then agreed to appoint assessors after a two-year delay). All of this occurred while the ACLU continued to organize advocacy efforts to combat proposed cuts by the State to education in 2014, 2015, and 2016. *Id.* ¶¶ 29, 33.

When the assessors finally produced the report, they concluded that a "significant increase" in funding was required for BCPSS, as well as a new formula for determining adequacy. APA Final Report at 86-87. In reviewing the FY 2015 data, APA determined that BCPSS needed another \$358 million annually, or \$3,416 per pupil. *Id.* at xxv-xxvi (Tables 9, 10), 111 (Tables 18 6.7b, 6.7c).

Instead of developing legislation to bring the State into compliance, the State, in 2016, established the "Commission on Innovation and Excellence in Education" (the "Kirwan Commission"). The Kirwan Commission was tasked with creating a new set of standards and funding proposals to establish "world-class" schools throughout Maryland, ensuring a 21st century education for all Maryland children attending public schools and preparing them to meet the challenges of participating in the global economy. Hoping that the Commission would finally constitute a concrete effort by the State to meet its constitutional obligation, the ACLU, on behalf of the Plaintiffs, engaged the Commission via various advocacy efforts. *Verdery Aff.* ¶ 30. The ACLU attended Commission meetings, presented information to the Commission, and distributed information about the Commission's work to the larger public. *Id.*

Nonetheless, the State again delayed action. It was originally intended that the Kirwan Commission would present a final report by December 31, 2017. The deadline has been postponed

repeatedly, most recently from December 31, 2018 to December 31, 2019. *See* Kirwan Commission, Interim Rep. of the Commission, Jan. 2019, at iv, 7-8, 11, at <http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2019-Interim-Report-of-the-Commission.pdf> (“Kirwan Comm’n”). In the interim, the General Assembly has not addressed its ongoing failure to fund even the levels called for by the Bridge to Excellence Act, despite ACLU’s comprehensive advocacy efforts on behalf of the Plaintiffs. In response to the first delay, the ACLU with Baltimore parents launched the “Fix the Gap” campaign to advocate for increased funding until the Kirwan Commission finished its work. *Verdery Aff.* ¶ 33. As a result, a three-year deal was reached by which the City and the State would each provide a small amount of additional funding to BCPSS. *Id.* Similarly, during the 2018 legislative session, the ACLU lobbied state officials to pass House Bill 1415 which provided a relatively small increase of \$11.4 million to BCPSS. *Id.* ¶ 34. Finally, as the adequacy gap continued to increase and no solution from the General Assembly was in sight, the Plaintiffs returned to Court on March 7, 2019.

ARGUMENT

I. The Affirmative Defenses of Statute of Limitations and Laches Are Not Applicable to Plaintiffs’ Petition for Further Relief.

The State’s opposition to Plaintiffs’ Petition for further relief mischaracterizes the relief that Plaintiffs seek, as well as the law governing the inapplicability of the defenses of statutes of limitations and laches to Plaintiffs’ Petition. As detailed in the Petition, Plaintiffs generally seek three forms of relief. None of the three are subject to these defenses.

First, Plaintiffs seek a declaratory ruling that the State is violating Article VIII by failing to provide adequate funding for education in BCPSS. *See, e.g.,* Plaintiffs’ Pet., Mar. 7, 2019, at 74-45 (“First, this Court should find and declare that [among other things] [t]he State is violating Article VIII by failing to provide a ‘thorough and efficient’ education . . .”). As Maryland courts

have plainly stated, a request for declaratory relief is “primary relief” and thus, under Maryland law, is not subject to either the defenses of statute of limitations or laches. *Murray v. Midland Funding, LLC*, 233 Md. App. 254, 261 (2017) (“There is no time bar at all if Murray seeks the primary relief of a simple declaration. Our courts (and others) hold that she can obtain such a declaration “at any time,” meaning there is not, nor will there ever be a time bar to that cause of action.”).

Additionally, Plaintiffs seek an injunction ordering the State to “comply immediately with the Court’s prior rulings” by “at a minimum” closing the \$290 million annual gap in funding for BCPSS.⁶ Plaintiffs’ Pet., Mar. 7, 2019, at 75. Finally, Plaintiffs request that the Court “order Defendants to develop and submit a comprehensive plan for compliance with Article VIII and the Court’s prior declarations, subject to review and approval by the Court.” *Id.* at 75-76. As discussed below, neither of these requests for equitable relief is subject either to a statute of limitations or laches defense.

Although the State alleges that Plaintiffs additionally seek a remedy at law in the form of compensatory damages, this is a misreading of Plaintiffs’ Petition. *See* State Mem. in Supp. of Mot. to Dismiss, Jun. 19, 2019, at 60-61 (arguing that Plaintiffs may not recover compensatory damages for past misconduct by the State). Plaintiffs request monetary relief only in the event that the State refuses to comply with any of the Court’s subsequent orders going forward and, thus, it becomes necessary for the Court to impose sanctions as a means of ensuring compliance. Plaintiffs’ Pet., Mar. 7, 2019, at 77 (“[T]his Court should order that, should Defendants not

⁶ This number was based on the most recent available information when the Petition was filed. State Ex. 11, Dep’t of Legis. Servs, Adequacy of Education Funding in Maryland, Jan. 19, 2017, at 5. Since then, more recent analyses have become available indicating that, as of 2017, the gap was \$342 million. Dep’t of Legis. Servs., *Follow-up from July 24*, Meeting, Aug. 1, 2019, at 2.

comply with these orders and decrees, Defendants may be required to pay compensatory damages, including attorney's fees incurred in enforcing the Court's orders and decrees, as well as penalties to compel compliance."'). Beyond financial sanctions of this sort, or attorney's fees, in the case of actions taken in bad faith, Plaintiffs seek no damages. This request for relief is no different than equitable enforcement measures available to the Court in every case, regardless of the remedy the plaintiffs seek, in the event that a party refuses to comply with a Court's order or otherwise interferes with the proceedings of the court. *See* Md. Rule 15-203(a) ("The court against which a direct civil or criminal contempt has been committed may impose sanctions on the person who committed it summarily if (1) the presiding judge has personally seen, heard, or otherwise directly perceived the conduct constituting the contempt and has personal knowledge of the identity of the person committing it, and (2) the contempt has interrupted the order of the court and interfered with the dignified conduct of the court's business."); Md. Rule 15-206(b)(2) ("Any party to an action in which an alleged contempt occurred and, upon request by the court, the Attorney General, may initiate a proceeding for constructive civil contempt by filing a petition with the court against which the contempt was allegedly committed."'). Plaintiffs' reservation of the right to seek monetary sanctions in these limited circumstances does not convert Plaintiffs' petition to a request for damages. Were it so, no case could ever be characterized as seeking only equitable relief.⁷

For the reasons discussed below, none of the defenses asserted bar the request for equitable relief in Plaintiffs' Petition.

⁷ Alternatively, in the event that the Court disagrees, Plaintiffs waive their right to seek monetary sanctions.

A. No Statute of Limitations Is Applicable to Plaintiffs' Request for Equitable Relief.

As discussed above, Plaintiffs seek no remedy at law, i.e., damages. To the extent the State claims they do, that directly contradicts Plaintiffs' Petition. Accordingly, as the State concedes, Plaintiffs' Petition is not subject to a statute of limitations. *See* State Mem. in Supp. of Mot. to Dismiss, Jun. 19, 2019, at 32 (stating that whether a petition for further relief is subject to statute of limitations depends on whether Plaintiffs seek a remedy at law); *Murray*, 233 Md. App. at 263 (“If the ancillary relief is of an equitable nature, the court will analyze whether that ancillary relief is barred by laches”).

B. Even if a Statute of Limitations Defense Was Applicable, the State Incorrectly Asserts That the Statute Began to Run when the Judgment Was Entered.

Regardless, even if Plaintiffs had sought anything other than equitable relief, the State's argument would still fail. The State argues that relief under the Declaratory Judgements Act, Maryland Courts and Judicial Proceedings § 3-412, is subject to the 12-year statute of limitations provided in Maryland Courts and Judicial Proceedings § 5-102. However, § 5-102 explicitly provides that the statute shall not begin to run until the “cause of action accrues.” § 5-102(a). The statute does not define what this term means. *Id.* The State cursorily deals with the matter by citing a single case, which was decided more than a century ago and has been expressly limited by Maryland courts to narrow circumstances not present here, in support of the argument that a cause of action accrues once the judgment is entered. State Mem. in Supp. of Mot. to Dismiss, Jun. 19, 2019, at 33 (citing *Lang v. Wilmer*, 131 Md. 215, 227 (1917)). The State's argument contradicts well over a century of subsequent Maryland case law.

As the Court of Appeals has repeatedly stated for well over a century, the general rule for all civil actions in Maryland is that the cause of action accrues upon each individual breach. *See, e.g., Hecht v. Resolution Trust Corp.*, 333 Md. 324, 334 (1994); *Waldman v. Rohrbaugh*, 241 Md.

137, 139 (1966). In fact, Maryland courts have continued to expand plaintiffs' rights to seek relief, declaring not only that a cause of action accrues only when the injury occurs, but will generally not accrue until the plaintiff actually discovers the injury alleged. *Vigilant Ins. Co. v. Luppino*, 352 Md. 481, 489 (1999) ("Generally, a cause of action for breach of a contract accrues, and the statute of limitations begins to run, when the plaintiff knows or should have known of the breach."); *Doe v. Maskell*, 342 Md. 684, 690, *cert. denied*, 519 U.S. 1093 (1997) ("[A] cause of action 'accrues' when plaintiff knew or should have known that actionable harm has been done to him."); *Hecht*, 333 Md. at 334 ("[T]his Court [has] adopted what is known as the discovery rule, which now applies generally in all civil actions, and which provides that a cause of action accrues when a plaintiff in fact knows or reasonably should know of the wrong."); *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 668 (1983) (noting that the discovery rule "affords a reasonably diligent person ... the full benefit of the statutory period in which to file suit, retains some degree of protection of a potential defendant's right to repose, and promotes judicial efficiency.").

Likewise, Maryland courts have recognized the "continuation of events" theory, whereby "in cases where there is an undertaking which requires a continuation of services, or the party's right depends upon the happening of an event in the future, the statute begins to run only from the time the services can be completed or from the time the event happens." *Hecht*, 333 Md. at 334 (quoting *W., B. & A. Elec. R.R. Co. v. Moss*, 130 Md. 198, 204-205 (1917)) (internal quotation marks omitted); *see also Singer Co. v Baltimore Gas & Elec. Co.*, 79 Md. App. 461, 475 (1989) ("where a contract provides for continuing performance over a period of time, each successive breach of that obligation begins the running of the statute of limitations anew").

These rules are equally applicable in cases involving the enforcement of a judgment. For example, in *Miller v. Miller*, the plaintiff sought to enforce a judgment entered in 1970 requiring her former husband to pay support payments in the amount of \$250.00 per month. 70 Md. App. 1 (1987). The petitioner sought relief in 1985, more than 12 years after the judgment at issue was entered. *Id.* at 4-5. Nonetheless, the Court held that she could recover any payments that were due in the twelve years immediately preceding the date of action: “The statute of limitations did not begin to run as to any payment until the payment became due. And because the statute of limitations for each payment is twelve years, the arrearages that the wife could recover are those for which the twelve-year statute of limitations has not yet run.” *Id.* at 22. The decision is consistent with over 60 years of decisions from the Court of Appeals. See *O’Hearn v. O’Hearn*, 337 Md. 292 (1995) (finding that plaintiff could seek recovery of child support owed under a separation order, but not paid for the previous twelve years before the action was filed); *Bradford v. Futrell*, 225 Md. 512, 524 (1961) (“[O]ur view as to the nature of support payments is in harmony with the approach to limitations that prevails in most jurisdictions, that the statute of limitations begins to run against each installment of support payments from the date on which it accrues.”); *Marshall v. Marshall*, 164 Md. 107 (1933) (agreeing with the plaintiff that he could seek recovery of any sums that became payable less than 12 years before the action was filed).

In recognizing that a cause of action under a judgment accrues from each breach of the judgment, not when the judgment is entered, Maryland courts have explicitly rejected the sole case – *Lang v. Wilmer* – on which the State relies. In *Fischbach v. Fischbach*, plaintiff filed suit, seeking to recover among other things, pension benefits paid to her husband more than 12 years after the separation agreement between them. 187 Md. App. 61, 79 (2009). Like the State here, her spouse cited to *Lang v. Wilmer*, 131 Md. 215 (1917), in support of his assertion that “[i]t is

black letter law in this State that limitations begin to run from the date the judgment is entered.” *Fischbach*, 187 Md. App. at 79. The Court rejected this argument, explaining that *Lang* was limited to the specific context in which a debtor, against whom a judgment has issued, dies, and the creditor seeks payment from the deceased’s heirs. *See id.* (“[In *Lang*,] [t]he Court of Appeals held that, ‘[w]here the defendant in a judgment dies, a *scire facias* may be sued out to revive the judgment against the administrator alone to bind the assets in his hands, but where it is desired to review the judgment against the land of the deceased judgment debtor the *scire facias* should also issue against the heirs and terre-tenants.’) (internal citations omitted). In that extremely limited context, the statute of limitations for enforcement of the judgment against the deceased’s heirs may begin to run from the date of judgment. *See id.* (“In that context, the Court of Appeals held that the statute of limitations begins to run as to judgments from the date of the judgment, and is not suspended by the death of the judgment debtor, or neglect of those entitled to administration upon his estate.”) (internal citations and quotation marks omitted). But the Court made clear that outside of *Lang*’s unique context, courts must rely on the general rule outlined in *Marshall* that a plaintiff may recover for any harms that occurred 12 years before the action for further relief was commenced. *See id.* (“*Lang* is factually and legally inapposite. We find instructive, instead, *Marshall v. Marshall* . . .”).

Applying these rules to this case, it is apparent that even if the 12-year statute of limitations did apply to the equitable claims presented here, Plaintiffs’ claims are timely. The violations highlighted in Plaintiffs’ Petition not only occurred and persisted during the course of the last 12 years, but continue today. Plaintiffs expressly argue that the State is failing today to comply with this Court’s declarations regarding the level of funding necessary to comply with constitutional mandates. Plaintiffs also explicitly argue that the “state’s current funding of BCPSS does not

provide sufficient funding for a constitutionally adequate education.” Plaintiffs’ Pet., Mar. 7, 2019, at 15. Specifically, Plaintiffs alleged facts demonstrating that based on State estimates from 2015, the annual funding gap, is, at a minimum, \$290 million. *Id.* at 16; *see supra* at 23 (2017 estimates of a \$342 million gap). This deficit has resulted in the continuous and current denial of an adequate education to BCPSS students, as demonstrated by the current lack of sufficient and experienced staff, lower numbers of students currently proficient in reading and math, lower student scores on the most recent advanced placement and college entrance exams for which information was available, and lower graduation rates based on the most recent available data. *Id.* at 24-40.

The injuries are not limited to the quality of education provided. As Plaintiffs demonstrated, over the last 12 years, the condition of facilities in BCPSS has been inadequate, has continued to deteriorate and are even more inadequate today. *See id.* at 41-59. According to an engineering firm survey, as of 2012, 85 percent of the system’s buildings were rated as being in “poor” or “very poor” condition. *Id.* at 42. These problems remain a present problem. For example, in 2017, there were almost 42,000 work orders for Baltimore’s 159 school buildings, requiring 96,000 hours to address. *Id.* at 43. These emergency repairs are not minor matters; they “typically include full or temporary repairs to critical safety, mechanical, plumbing, electrical, and security systems.” *Id.* Based on estimates from that report, it would currently cost approximately \$3 billion to conduct the variety of necessary repairs. *Id.* at 42. The most glaring example of these failures came in January 2018, when students in 87 of the system’s 159 schools were forced to attend class in rooms without heat or with limited heat, and then again in August 2018, when 70 schools were forced to close due to inhumanely high temperatures in classrooms. *Id.* at 43-44.

These continuing violations of both this Court's declarations and of the Constitution demonstrate that Plaintiffs' Petition readily satisfies any statute of limitations defense even if it were applicable.

C. The Defense of Laches Does Not Bar Plaintiffs' Request for Equitable Relief.

The defense of laches is equally inapplicable to Plaintiffs' Petition. As an initial matter, because Plaintiffs' Petition seeks redress for ongoing harms, laches does not apply to Plaintiffs' request. Even if the defense was available, the State meets neither of the prongs necessary for the defense to apply. In order to establish laches, the State has the burden of proving by a preponderance of the evidence that "(1) there was an unreasonable or impermissible delay in asserting a particular claim; and, (2) that the delay prejudiced the State." *Lopez v. State*, 205 Md. App. 141, 43 A.3d 1125, 1144-45 (Md. 2012), *vacated on other grounds*, 72 A.3d 579 (Md. 2013). In this case, the State simply cannot meet this burden.

1. Laches is Not Available as a Defense Because the State is Committing Ongoing Breaches of Court Declarations and Ongoing Violations of the Maryland Constitution.

Courts have repeatedly found that "[laches] does not prevent plaintiff[s] from obtaining injunctive relief or post-filing damages" for ongoing harms. *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 412 (6th Cir. 2002); *see e.g., Ohio A. Philip Randolph Institute v. Smith*, 335 F. Supp. 3d 988, 1002 (S.D. Ohio 2018) (plaintiffs' claim for "prospective relief only ... is not barred by laches"); *League of Women Voters of Michigan v. Benson*, 373 F. Supp. 3d 867, 909 (E.D. Mich. 2019) ("laches does not apply to Plaintiffs' claims for declaratory and injunctive relief" in a challenge asserting unlawful political gerrymandering, even after multiple election cycles using those maps); *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990) (refusing to bar a racial gerrymandering claim, determining that "[b]ecause of the ongoing nature of the violation, plaintiffs' present claim ought not be barred by laches."). While laches is a doctrine

intended to ferret out “stale” claims, here the State attempts to wield laches as a shield to insulate itself from liability for ongoing unlawful acts. Where a plaintiff is challenging ongoing breaches of a Court’s declaration and the unconstitutionality of an ongoing practice, the basis for the claim is not stale and does not cause prejudice to the State, which continues to engage in unlawful actions. *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 959–60 (9th Cir. 2001) (“Laches stems from prejudice to the defendant occasioned by the plaintiff’s past delay, but almost by definition, the plaintiff’s past dilatoriness is unrelated to a defendant’s ongoing behavior that threatens future harm.”).

2. Plaintiffs Have Not Unreasonably Delayed the Pursuit of Their Claim.

Even if the defense of laches were available, this case does not involve the kind of unreasonable delay that warrants its application. A plaintiff has not “unreasonably” delayed in bringing her claim simply because it has taken time to bring suit. *See e.g., Ross v. State Bd. of Elections*, 387 Md. 649, 669 (2005) (“The passage of time, alone, does not constitute laches”). Instead, courts must look to the context of each individual case to assess whether the plaintiff’s delay was “unreasonable and unjustifiable,” or “inexcusable.” *Parker v. Bd. of Election Sup’rs*, 230 Md. 126, 130 (1962). In evaluating whether a delay is unreasonable, Maryland courts are “permitted to weigh all the facts” including “the motivations of the parties” and the consequences to the public generally of permitting or precluding the suit. *State Ctr., LLC v. Lexington Charles Ltd. P’ship*, 438 Md. 451, 608 (2014).

Here, rather than delaying, Plaintiffs and their representatives have been diligently pursuing their rights since the last Order in the case. After the Consent Decree was signed in 1996, the ACLU, on behalf of the Plaintiffs, began regularly lobbying state representatives to ensure that the State allocated adequate funding to BCPSS. *Verdery Aff.* ¶ 5. In doing so, Plaintiffs’

representatives emphasized that a failure to do so would be contrary to the terms of the Decree. *Id.* ¶¶ 6-7, 22. Once the Thornton Commission was created, the ACLU regularly worked with members of the Commission, attended Commission meetings, and presented evidence to the Commission regarding the need for additional education funding for students in BCPSS. *Id.* at ¶ 10.

When the General Assembly enacted the Bridge to Excellence in Public Schools Act, codifying the Thornton Commission's funding recommendations, in 2002 the ACLU, on behalf of the Plaintiffs, did not simply wait for adequate funding to be directed to BCPSS, but remained active participants in the legislative process, engaging with the State regarding the need for additional funding for operations and facilities. In the ensuing years, the ACLU organized a large coalition resulting in a 10,000-person rally in Annapolis, and collected thousands of postcards that they delivered to the General Assembly and Governor asking for continued funding. *Id.* at ¶ 15. When the legislature, in 2007, started to pare back education funding for BCPSS, the ACLU immediately went to work, sending a letter to the Governor reminding him he could not cut funding without violating the Bridge to Excellence Act, meeting with state legislators, educating the public about the impact of adjusting the formula, and producing educational materials and letters with community members. *Id.* ¶ 17. Although the State began in 2007 to erode full Thornton funding, the ACLU was able to save almost \$50 million statewide from being cut, including reducing BCPSS's cut by \$16 million. *Id.*

The ACLU continued to advocate on behalf of the Plaintiffs against the State's continued freezes and cuts to education funding in subsequent years. In 2009, the State proposed a \$140 million cut, including \$31 million for BCPSS. *Id.* ¶ 18. As a result of the ACLU's work on behalf of the Plaintiff class, over \$50 million was saved from cuts, including \$9 million for BCPSS. *Id.*

Nor was the ACLU's work, on behalf of the Plaintiff class, limited to advocating for increased educational funding for operations. The ACLU also advocated before the "Kopp" State Task Force to Study School Facilities – the body created to study and address minimum standards and discrepancies in school facilities in Maryland – to highlight the need for increased resources for BCPSS' deteriorating physical facilities. *Id.* ¶ 11. The ACLU attended the Commission's meetings and presented evidence to the Commission regarding the need for additional funding for facilities funding in Baltimore. *Id.* In 2010, the ACLU released a report entitled "Buildings for Academic Excellence," which highlighted the deficient, unhealthy, and unsafe learning conditions in BCPSS school facilities. *Id.* ¶ 20. The report also put forward various funding and financing models that the city and state could adopt to address the problem. *Id.* Plaintiffs' representatives met with Baltimore's state and city representatives, and educated city advocates regarding avenues for increased education funding for Baltimore. *Id.* ¶ 20.

Plaintiffs also reasonably relied on the terms of the Bridge to Excellence Act, which required the State to hire a consultant to re-assess the adequacy of funding under the State's formula in 2012. *See supra* at 24. The State, however, delayed compliance, not issuing the Request for Proposal for a study consultant until 2014; as a result, the adequacy study final report was not submitted until December 2016. *See* APA Final Report, at http://marylandpublicschools.org/Documents/adequacystudy/AdequacyStudyRFP_R00R440234_2.pdf. Had it not been for the ACLU's efforts on behalf of the Plaintiff class, the delay would have been even greater. The State initially proposed delaying the start of the consultant's work until 2016, but after considerable advocacy from the ACLU the State limited the delay. *Verdery Aff.* ¶¶ 23-24. Once the consultant began its work, representatives for the Plaintiffs served on the Stakeholder Advisory Group selected by the State to provide input to the adequacy study

consultant. *Id.* ¶ 30. In numerous meetings over the course of two years, Plaintiffs' representatives reviewed and commented on dozens of documents, continuing to advocate as they had done for two decades on behalf of BCPSS's students. *Id.* ¶¶ 30-32.

In 2015, legislation established the Commission on Innovation and Excellence ("the Kirwan Commission") to review and update the current funding formula for Maryland schools. *See Kirwan: Maryland's Commission on Innovation and Excellence in Education*, ACLU, <https://www.aclu-md.org/en/kirwan-marylands-commission-innovation-and-excellence-education>. The Commission was originally slated to complete its work in December 2017, with the expectation that the legislature would provide additional necessary funding during the subsequent legislative session. Erin Cox, *Landmark Kirwan Commission Delays Plan on School Funding*, Baltimore Sun, Oct. 25, 2017, <https://www.baltimoresun.com/politics/bs-md-kirwan-delay-20171025-story.html>. In January 2018, the Kirwan Commission released preliminary recommendations, pledging to provide its final recommendations by the end of the year. *A Call to Action*, Commission on Innovation and Excellence in Education, Jan. 8, 2018, <http://mgaleg.maryland.gov/Pubs/CommTFWorkgrp/2018-Innovation-Excellence-in-Education-Commission-2018-01-08.pdf>. The ACLU remained intensely involved in providing feedback and advocating for legislation to adopt the Commission's recommendations in order to alleviate the ongoing constitutional harm identified in *Bradford*. The ACLU attended Commission meetings, presented information to the Commission, and distributed information about the Commission's work to the larger public. Verdery Aff. ¶ 32.

Unfortunately, in December of 2018, state legislators declined to take further action and, instead, recommended that the Kirwan Commission's final findings be delayed a second time. *See* Letter from Thomas V. Mike Miller, President of the Maryland Senate, and Michael E. Busch,

Speaker of the Maryland House of Delegates, to William E. Kirwan, Chair of the Maryland Commission on Innovation and Excellence in Education, Dec. 18, 2018, <https://conduitstreet.mdcounties.org/2018/12/19/presiding-officers-ask-kirwan-commission-to-delay-recommendations/>. Recognizing that there not be redress through the legislative process in the near future, on January 22, 2019, the ACLU, on behalf of the Plaintiffs, wrote a letter to the State reminding the Governor of the State's duty to comply with the court's orders in *Bradford*. Letter from ACLU and LDF to Governor Hogan, Jan. 22, 2019, https://www.aclu-md.org/sites/default/files/bradford_letter_1.22.2019_final.pdf. When the State still declined to act, Plaintiffs moved for further relief in *Bradford* on March 7, 2019. See Plaintiffs' Pet., Mar. 7, 2019.

Contrary to the State's assertions, Plaintiffs and their representatives have engaged in precisely the kind of diligent pursuit of their rights that is required under the circumstances, all while seeking to avoid pulling the State into costly litigation when compliance seemed reasonably possible. As the Court of Appeals has stated, "(d)elay will be excused when occasioned by efforts to obtain a settlement or satisfaction without litigation." *Smith v. Watner*, 256 Md. 400, 410 (1970).

Furthermore, the State's arguments here are puzzling from a public policy standpoint. One would think that the State would and should support what Plaintiffs and their representatives have done here – going through normal government channels to advocate for relief without litigation. But the State's current argument would discourage such advocacy and foster lightning-trigger returns to court instead lest the opportunity to seek judicial relief be lost.

As authority for its odd argument, the State relies on *Stoewer v. Porcelain Enamel & Mfg. Co. of Baltimore*, 199 Md. 146 (1952), a case in which an individual plaintiff filed suit, then failed

to pursue the case at all for over a decade. *See id.* at 151 (“In the instant case the appellant signed and swore to a bill for an injunction against conditions allegedly existing in 1939. She allowed the matter to rest until 1950.”). *Stoewer* in no way involved the type of diligence that the Plaintiffs and their representatives have shown. Nor are the facts in that case analogous to a case such as this. In *Stoewer*, in the period between the plaintiff’s actions, “the whole business of the plant changed[.]” *Id.* It could “not [be] shown that the defendant is now engaged in the practices then alleged to constitute a nuisance, or that its management or business is the same.” *Id.* These circumstances present a marked contrast from this case where the State continues, and will continue to deny students in BCPSS an adequate education, unless the Court directs it otherwise.

In short, there has been no unreasonable delay in this case that could justify barring schoolchildren and their families from accessing courts to ensure that their schools receive constitutionally adequate funding.

3. Any Delay Has Not Prejudiced the State.

Even if the State could establish that Plaintiffs “unreasonably delayed” in bringing their claims, the moving party asserting laches has the additional burden of proving that its case has been prejudiced. This requires that the defendant demonstrate specifically how the delay caused harm to its legal position. *See, e.g., Van Schaik v. Van Schaik*, 35 Md. App. 19, 24 (1977) (quoting *Bradley v. Cornwall*, 203 Md. 28, 39-40 (1953)) (“Laches in legal significance is not mere delay, but delay that works a disadvantage to another.”). The passage of time does not automatically establish that the defendant has been prejudiced. *Jones v. State*, 445 Md. 324, 339-40 (2015). Rather, the party asserting laches is required to show that their case has been actually damaged in some specific way because of the other party’s unreasonable delay. *Id.* This, the State cannot do.

The State vaguely asserts that its case has been prejudiced because the former State Superintendent of Education, who testified for the State in a 2004 hearing, no longer has “independent recollection ... of pertinent details that would be needed for her testimony.” State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 37-38. This is insufficient for three reasons.

First, at a minimum, the State must do more than merely assert that one witness’s recollection of the events has faded; the State must show actual change that “works a disadvantage” and “prevent[s] material evidence from being presented.” *Van Schaik*, 35 Md. App. at 24-25. Plaintiffs’ claim does not turn on the experience of one individual with knowledge of the system as it existed almost 15 years ago. Rather, the central questions are systemic questions related to the funding of BCPSS at present and in the interim, and the resulting quality of education provided throughout the system today. Accordingly, given the many other state actors who have either contributed or have knowledge of the ongoing violations more recently and the many who are involved with the system and its operation and funding right now, the stale memory of one former official as to conditions that are not relevant now except for historical reasons is not enough to establish a material disadvantage. *See State v. Christian*, 463 Md. 647, 654 (2019) (“Memory problems alone do not establish that [the party asserting laches] has been placed in a less favorable position, i.e., that he has been prejudiced.”); *Van Schaik v. Van Schaik*, 35 Md. App. 19 at 24-25 (rejecting Defendant’s claim that the death of three witnesses “during the delay in bringing suit . . . prejudiced appellant’s defense,” because “unavailability of the deceased witnesses” did not implicate the defense’s case sufficiently to “make it inequitable to grant the relief sought.”); *Costello v. United States*, 365 U.S. 265, 282–83 (1961) (holding that death of certain witnesses does not establish prejudice where plaintiff had failed to “suggest how the witnesses . . . could have aided him on any issue material in this proceeding”). Moreover, Dr. Grasmick testified

extensively during earlier parts of this litigation (Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, *passim* (citing Grasmick testimony); accordingly, to the extent that her understanding at that time is relevant, the Court has her testimony under oath then and thus need not rely on her fading memory now.

Second, the State is not prejudiced because Plaintiffs are not seeking “back payments” accrued during the intervening years, but just the funding to which Baltimore City students are entitled going forward. Whether Plaintiffs could or should have brought claims earlier has no bearing on the legality of the State’s ongoing violations of the Constitution or Plaintiffs’ ability to seek redress for them. Accordingly, courts have repeatedly held that “[t]he concept of undue prejudice, an essential element in a defense of laches, is normally inapplicable when the relief is prospective.” *Env’tl. Defense Fund v. Marsh*, 651 F.2d 983, 1005 n.32 (5th Cir. 1981); *see Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 959-60 (9th Cir. 2001) (“almost by definition, the plaintiff’s past dilatoriness is unrelated to a defendant’s ongoing behavior that threatens future harm”); *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 799 (4th Cir. 2001) (“A prospective injunction is entered only on the basis of current, ongoing conduct that threatens future harm. Inherently, such conduct cannot be so remote in time as to justify the application of the doctrine of laches.”).

Third, as discussed *supra*, the purported delay in this case occurred as a result of the Plaintiffs’ attempts to resolve the underlying dispute through the legislative process. During this process, Plaintiffs’ representatives repeatedly highlighted that the State’s failure to provide adequate funding would violate the Court’s orders. Verdery Aff. ¶¶ 6-7, 22. Accordingly, the State is not prejudiced, but has been well-aware of the changing circumstances that warranted delay. Moreover, the State has not only been involved in the process, but by repeatedly delaying the work of the Kirwan Commission, has been a driving force responsible for the delay. *Loughran*

v. Ramsburg, 174 Md. 181, 186-87 (1938) (holding that defendant's contribution to the delay is relevant to evaluating whether the delay is unreasonable and prejudicial, and that equity does not require precluding an untimely claim where "negotiations were continued" between the parties in the intervening period before filing).

4. Reference to the Statute of Limitations Does Not Aid the State's Laches Argument.

Finally, the State argues that Plaintiffs' claims are barred by laches if the court rules that the Petition filed "after the expiration of the most analogous statute of limitations." State Mem. in Supp. of Mot. to Dismiss, June 19, 2019, at 36. For the reasons explained above, Plaintiffs' Petition is not subject to a statute of limitations. Furthermore, even if it were, Plaintiffs have complied with the 12-year limitations period which the State alleges applies. As with the defense of laches, a statute of limitations defense may not bar a claim seeking equitable relief for on-going violations. Accordingly, reference to the most analogous statute of limitations undercuts, rather than supports, the State's laches defense.

Even if that were not so, a defendant cannot establish laches merely by reference to a statute of limitations. The defenses are two different doctrines, which serve different purposes. Maryland courts analyzing a laches defense "are not irrevocably bound to the statutory time limitation" and are "free, if the equities so require, to assess the facts ... independent of a statutory time limitation applicable at law." *Ross v. State Bd. of Elections*, 387 Md. 649, 670 (2005). Indeed, Maryland courts have expressly stated that "there is no firm time limit for laches," and that the proper laches analysis must take into account the facts and circumstances of each case. *Murray v. Midland Funding, LLC*, 233 Md. App. 254, 260 (2017). Thus, courts have consistently rejected arguments that would have the consequence of "eras[ing] all distinction between the doctrine of laches and

the statute of limitations ... mak[ing] the individual facts of the case irrelevant to analysis of a laches defense.” *Buxton v. Buxton*, 363 Md. 634, 645 (2001).

The State relies on *State Center, LLC v. Lexington Charles Limited Partnership* for the proposition that if Plaintiffs’ claim falls outside the statute of limitations, then the delay will be deemed unreasonable. State Mem. in Supp. of Mot. to Dismiss, June 19, 2019, at 35. But, in fact, that is not what *State Center* states or stands for. Rather, that court expressly rejected the kind of mechanical analysis the State suggests, “declin[ing] ... to adopt the direct analogy” to the relevant administrative law provision, and instead conducting an independent analysis “adhering to the flexible nature of the laches doctrine.” 438 Md. 451, 606-07 (2014).

II. The State Should not be Permitted to Re-Litigate Defenses that this Court Has Repeatedly Rejected, Particularly Given the State’s Acceptance of this Court’s Authority.

A. This Court’s Power to Adjudicate the State’s Violations of Article VIII is Established as the Law of the Case.

The State’s various arguments that this Court has no power to determine this case – that further determinations are not authorized under the Consent Decree, and that the case presents non-justiciable questions under the political question doctrine and separation of powers principles – are not new. Rather, this Court has repeatedly rejected them, both expressly and implicitly.

The State first squarely raised the political question/separation of powers argument in 1995 when it initially sought summary judgment dismissing the case. *See* Dkt. 62, State Mem. in Supp. of Mot. for Summary Judgment, Aug. 28, 1996, at 2-3; Dkt 62A, Plaintiffs’ Opp. to State Mot. for Summary Judgment, Sept. 17, 1996, at 15 n. 15.

In granting Plaintiffs’ cross-motion in pertinent part, this Court necessarily rejected the State’s argument, as did its many subsequent rulings asserting judicial authority and jurisdiction over the matter. Ex. B, Dkt. 66, Order, Oct. 18, 1996 (holding that the “thorough and efficient”

language of Article VIII requires that “all students in Maryland’s public schools be provided with an education that is adequate when measured by contemporary educational standards and that BCPSS children were being denied a constitutionally-adequate education); Ex. C, Dkt 10/0, Opinion, June 30, 2000, at 25 (“In examining the evidence presented to this Court . . . this Court declares that . . . the public schoolchildren in Baltimore City still are not being provided an education that is adequate when measured by contemporary educational standards”); Ex. D, Dkt. 25/0, Opinion, June 25, 2002, at 4 (“In the education funding arena, courts regularly declare what the Constitution requires, and then retain jurisdiction to monitor actions the executive and legislative branches take to comply with constitutional mandates.”); Ex. E, Dkt. 50/0, Opinion, August 20, 2004, at 54 (“This Court has continuing jurisdiction to remedy the constitutional violation it found in October 1996 and June 2000”).

Similarly, the State first claimed in 2000 that the Consent Decree did not permit this Court to determine whether additional funding was necessary to remediate a constitutional violation, when the Board, joined by the *Bradford* Plaintiffs, first returned to Court seeking such funding. Dkt. 3/1, State Mem. in Opp. to Board’s Pet., June 23, 2000, at 16-19 (also incorporating the State’s earlier arguments that the questions presented were non-justiciable). This Court rejected the argument that the Consent Decree did not permit the return to Court then, declaring that substantial additional funding was necessary to remediate the State’s continuing constitutional violation. Ex. C, Dkt. 10/0, Opinion, June 30, 2000, at 25 (BCPSS children “are still being denied their right to a ‘thorough and efficient’ education Article VIII of the Maryland Constitution. The Court also declares that additional funds provided for the Baltimore City public schools in the State Budget . . . will not enable the New Baltimore City Board of School Commissioners to provide the City’s schoolchildren with a Constitutionally Adequate Education.”). The Court then reaffirmed that

determination in 2002 when it rejected the State's invitation to terminate its jurisdiction on the basis that the State had not yet complied with its 2000 declaration. Ex. D, Dkt. 25/0, Opinion, June 25, 2002, at 5. And it again reaffirmed that determination in 2004 when it declared that the State still had not complied with its 2000 declaration, further stated that changed circumstances since that time meant that more was required for compliance, and again rejected the State's invitation to terminate jurisdiction because compliance had not yet occurred. See Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, at 65.

Additionally, the State has raised and abandoned these issues on appeal. It appealed this Court's first determination regarding funding and adequacy in 2000. It raised exactly the same arguments that this Court rejected then and that it raises again now – that school funding in compliance with Article VIII is a political question, and that this Court lacks authority under the Consent Decree to determine the sufficiency of funding. Compare Exhibit F, State Appellant Brief, Dec. 8, 2000, at 20-24 with State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 51-60 (political question); compare Exhibit F, State Appellant Brief, Dec. 8, 2000, at 11-20 with State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 38-51 (consent decree). But it chose to abandon that appeal because it had reached an "interim" settlement with the Board to wait for the Thornton Commission to complete its work, first asking the Court of Appeals to stay it "indefinitely" and then, when that motion was denied, dismissing the appeal a week before oral argument. See Joint Mot. to Stay, Jan. 26, 2001, ¶¶ 2-7; Order, Jan. 26, 2001; Notice of Dismissal, Jan. 30, 2001.

This Court's prior holdings rejecting the political question and "no authority under the Consent Decree" arguments, and finding that substantial additional funds are necessary for constitutional adequacy, are the law of the case. Decisions by the Court ordinarily should be

followed in subsequent proceedings. “The law of the case doctrine generally provides that a ‘legal rule of decision between the same parties in the same case’ controls in subsequent proceedings between them” and typically “‘remains binding until an appellate court reverses or modifies it.’” *Ralkey v. Minn. Min. & Mfg. Co.*, 63 Md. App. 515, 520 (1985) (quoting 21 C.J.S. § 195 at 330 (1940)). This is not always a hardened rule that binds the Court and constrains its discretion to reconsider earlier rulings by a prior judge. *See Baltimore Police Dep’t v. Cherkas*, 140 Md. App. 282, 300-01 (2001) (affirming that successor judge is not bound by rulings by prior judge). However, where the affected party *fails to appeal* the ruling, then the law of the case *is* binding. *See Ralkey*, 63 Md. App. at 521 (affirming that trial court ruling may qualify as binding law of the case if it is not appealed) (citing *Acting Dir., Dep’t of Forests & Parks v. Walker*, 39 Md. App. 298, 302 (1978)); *Wheeler v. Wheeler*, 636 A.2d 888 (Del. 1993) (voluntary dismissal of appeal made underlying decision law of the case). That is what happened here. This Court rejected the political question and “no authority under consent decree” arguments, and the State dismissed its 2001 appeal raising these exact issues just one week before oral argument in the Court of Appeals, thereby triggering application of the rule.

Even if the Court was not formally bound by the law of the case, it should not lightly cast aside Judge Kaplan’s prior rulings and start anew. The State fails to offer any reason why this Court should revisit Judge Kaplan’s prior decisions – grounded in extensive evidence – rejecting its arguments and finding that substantial additional funding is needed for constitutional adequacy. Not only does it not assert a material change in law or fact, the State does not even acknowledge that it is seeking a second (or in some cases third or fourth) bite. Absent *any* rationale why the Court should revisit settled issues that the State abandoned on appeal, re-litigation of those issues is not appropriate.

B. The State Has Repeatedly Accepted this Court's Jurisdiction and its Authority Under the Consent Decree.

The State's conduct and admissions in this case also bely its contentions that the judiciary cannot adjudicate in this purportedly "political" arena and that the Consent Decree does not permit Plaintiffs' Petition. When it has been convenient to do so, the State has taken full advantage of the Court's judicial power to compel reforms of the City school system. Most notably, rather than try the question of whether the State or BCPSS was responsible for causing the Article VIII violations to Plaintiffs, the State negotiated the Consent Decree, which imposed substantial reforms on Baltimore City. *See* Exhibit 1 to Defendant's Motion to Dismiss. This unconditional acceptance of judicial authority when it served its interest belies the State's argument against justiciability now.

This inconsistency recurred in 2001, when the State abandoned its appeal on the *same issues* – political question and lack of authority under the consent decree – one week before oral argument in the Court of Appeals. *See supra* at 12-13. According to Dr. Nancy Grasmick, the State Superintendent for Schools, the State dismissed its appeal because it had decided to abide by the Court's rulings and wanted the Thornton Commission's process to go forward. Ex. H, Tr., Aug. 4, 2004, at 1562-63.

In 2004, the State again attempted to take advantage of this Court's judicial power by expressly asking the Court to make the exact same constitutional determinations it now says are beyond the Court's authority under the Consent Decree and/or constitute non-justiciable political questions. When the Plaintiffs returned to Court in 2004, they sought limited relief – that the Court take action to ensure that the BCPSS' short-term cost cutting measures did not harm students. The State, however, asked this Court to reach the larger constitutional questions of whether the State had provided constitutionally-adequate funding to the BCPSS. In its own motion, the State asked

the Court to “declare that State aid as legislated in the Bridge to Excellence Act satisfies the constitutional standard of adequacy,” claiming that “[s]tate aid is more than sufficient to permit the [BCPSS] to provide its students with a constitutionally adequate education as measured by contemporary standards.” Dkt. 38/0, State Mot. for Declaratory Ruling, Mot. at 1, Mem. at 1. The Court, in return, found that the State had failed to comply with the Constitution.

Finally, in its 2005 briefing in the Court of Appeals, the State admitted that this Court *does* have judicial authority to adjudicate Plaintiffs’ rights under Article VIII and that the constitutional constraints arise only as to certain remedies, conceding that courts may determine “the legal question of the constitutionality of the ‘efficient and thorough’ education established by the legislature” and necessarily “retain[] the power to decide if [the other two] branches of government have acted constitutionally in the way they address school funding issues.” . Exhibit G, State Appellant Brief, Dec. 14, 2004, at 29-30, 35 n.10; Exhibit F, State Appellant Brief, Dec. 8, 2000, at 24.

Of course, no party can confer jurisdiction by consent. But the State’s willing acquiescence to this Court’s judicial authority when expedient and advantageous is a telling admission of the lack of merit to its challenge. The State accepted the benefits of the Consent Decree in 1996; later accepted the benefits of its settlement with the Board, dismissing its appeal from the June 2000 ruling and “agree[ing] to be bound” by it; and then in 2004 affirmatively asked this Court to enter the exact type relief it now contends is forbidden. Given these facts, the State’s argument that this Court does not have jurisdiction or authority to address the Petition should be taken with a considerable grain of salt, as it seems to shift depending on the State’s situational need at the time.

III. The Consent Decree Expressly Permitted this Court to Determine the Sufficiency of Additional Funding and Extend Jurisdiction to Ensure Compliance.

Even if this Court had not already rejected the State's arguments regarding its authority under the Consent Decree and entered two binding declarations requiring additional funding, this Court should reject the State's attempt to rewrite history to preclude Plaintiffs' Petition.

The State is correct that a Consent Decree is both a binding contract and a binding judgment. But the State ignores the actual language of the Decree and this Court's orders under it. This Consent Decree was not a case settlement through which the parties trade concessions, abandon their pending litigation, and cease work. In that type of settlement – the type at issue in the cases the State cites⁸ – it is accurate that the settlement extinguishes the underlying claims, meaning any future claims lie only for breach of the settlement. Here, however, the Consent Decree did more than just fashion an immediate, one-time resolution. In language that the State ignores, the Decree recognizes that this Court had already found a constitutional violation – “the public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards”—and accordingly was intended to “provide a meaningful and timely remedy ... to meet the best interests of the school children of Baltimore City.” Ex. A, Dkt. 77, Consent Decree, Nov. 26, 1996, at 2-3. Accordingly, the parties agreed in the Consent Decree to do two things immediately: (1) address the State's concerns by

⁸ *Kent Island, LLC v. DiNapoli*, 430 Md. 348 (2013) (consent decree provided that County would make certain zoning and public works accommodations to plaintiff subdivision); *Long v. State*, 371 Md. 72 (2002) (consent decree vacated judgment against contempt defendant but, as modified *sua sponte* by the court, remanded for further contempt proceedings); *United States v. Armour & Co.*, 402 U.S. 673 (1971) (consent decree prohibited defendant from dealing in certain commodities and prohibits the defendant's acquisition by a corporation dealing in those commodities).

altering the management structure of the BCPSS (*id.* ¶¶ 8-38); and (2) begin to address the Plaintiffs' concerns regarding educational adequacy and available resources by providing for an immediate, but limited additional funding stream (*id.* ¶¶ 43-50).

Significantly for this Petition, however, the Decree also provides for a remedy going forward under which the Plaintiffs are entitled to seek additional resources. Specifically, the Decree provides a mechanism by which a jointly-retained independent entity must assess funding sufficiency along with school performance. *Id.* ¶¶ 40-41. That assessment must include "an assessment of the sufficiency of the additional funding provided by the State," and it should also address "the need for funding in excess of the amounts provided herein in order for the BCPS[S] to provide its students with an education that is adequate when measured by contemporary educational standards." *Id.* ¶ 41. After that assessment, the BCPSS Board was empowered to go back to Court to seek "funding amounts greater than those described" elsewhere in the Decree, at an evidentiary hearing during which the independent evaluation, as well as other evidence, would be received in evidence. *Id.* ¶ 53. If the Board went back to Court, the Plaintiffs were able to join the proceeding. *Id.*

The Decree also provides that the Court can remedy violations of the Decree – both before and after the Decree terminated – and that the Court could extend the initial five-year term of the Decree for "good cause." *Id.* ¶¶ 68-69.

All the events going forward and leading to Plaintiffs' Petition are authorized by and flow directly from these provisions of the Consent Decree authorizing future remedies and authorizing this Court to extend its jurisdiction to ensure compliance with those remedies. In 2000, the Board returned to this Court seeking "additional funding" based on the findings of the independent consultant as permitted by Paragraph 53. This Court declared that at least \$2,000 to \$2,600 per

pupil was necessary for constitutional adequacy. Ex C., Dkt. 10/0, Opinion, June 30, 2000, at 26. Then in 2002, the parties returned to Court again, this time as permitted by Paragraph 68-69 of the Decree, asking the Court to extend the Decree and its jurisdiction. The Court granted that motion, over the State's opposition, finding "good cause" to extend the Decree because the State had not complied with the June 2000 order. *See supra* at 17. Then in 2004, this time in response to the State's motion to find full compliance and terminate jurisdiction, this Court reaffirmed once again that the State had not complied with the June 2000 order, found the State had not yet complied, and ruled it would retain jurisdiction until full compliance had occurred. *See supra* at 20-21.

All these determinations were expressly contemplated by the Consent Decree. So, too, is this Petition, which seeks to enforce those rulings and seeks appropriate "further relief" based on a Court declaration "if necessary or proper." Md. Code Ann., Cts & Judic. Proc § 3-412(a). Starting in 2007, the State began eroding full funding promised under the Act, in a pattern continuing to this day, with the result that the State's own analyses show that BCPSS has an even larger adequacy gap than it did before the June 2000 declaration. *See supra* at 22-24. This petition seeks to remedy that violation, to obtain appropriate supplemental relief under the Court's prior declarations as expressly permitted by Maryland's Declaratory Judgment Act, and, finally, to fulfill the Consent Decree's promise of a "meaningful remedy" for the constitutional violation this Court found in 1996 and reaffirmed in 2000 and 2004.

The State's various arguments as to why the Consent Decree purportedly does not allow this Petition have no merit.

First, the State argues in a vacuum that this Petition is not permitted by the Consent Decree's language. That argument ignores both the language of the Decree and the years of history under it, including: (1) Plaintiffs' participation in the 2000 proceeding and the resulting June 2000

Court ruling under the Decree stating that additional funds were needed for adequacy; (2) the State's own recognition of the 2000 ruling in its decision to enact the Bridge to Excellence Act and its repeated presentation of the Act as evidence of compliance with the decision; (3) the Court's 2002 order extending the Decree and this Court's jurisdiction given a finding of "good cause" – the State's non-compliance; and (4) Plaintiffs' efforts to enforce the Court's decisions in 2004 and the resulting August 2004 Court declaration finding that the State was not in compliance with the June 2000 ruling, and as a result, the Court would retain jurisdiction.

This argument also ignores other telling language from the Decree. In addition to providing that the Board can return to Court for additional funding, it also provides that in any proceeding for "funding amounts greater than those described" in the Decree, the State "reserves all of its defenses as to any Court order for such funds in amounts greater than those provided" in the Decree. Ex. A, Dkt. 77, Consent Decree, Nov. 26, 1996, ¶ 53(A). That is, if the Board chose to seek additional funding through a Court process, the State could – and, in fact, did – re-raise its merits defenses without any concern that those defenses were precluded by the Consent Decree. For instance, the State could argue that any problems were due to the Board's actions rather than lack of resources and that all questions raised were political. This provision is significant because if the State is right that the Decree resolves all the underlying claims without any possibility of revisiting them, there would be no reason whatsoever for the State to have the right to revive its defenses in response to a claim for additional funding.

And finally, the State's argument also ignores this Court's own interpretation of the Decree. This Court, which was intimately involved in the Decree's drafting, has explained that the Decree expressly provided for the parties to seek additional funding going forward and for this Court to retain jurisdiction to ensure compliance with its declarations. Ex. C, Dkt. 10/0, Opinion, June 30,

2000, at 3 (“Because the parties were aware in 1996 that \$230 million over five years was not enough to provide an adequate education to Baltimore City’s unique population of disadvantaged children, the Consent Decree provide[d] a mechanism for the New Board to request additional funds from the State throughout the term of the Decree,” including a return to Court “for a determination of whether additional funding is needed in order for the BCPSS to provide a Constitutionally Adequate Education”); Ex. D, Dkt. 25/0, Opinion, June 25, 2002, at 2-3 (describing mechanism); Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, ¶¶ 12-15 (same).⁹ A court’s own interpretation of its previous orders is entitled to deference. *See, e.g., Vaughn v. Bd. of Educ.*, 758 F.2d 983, 989 (4th Cir. 1985) (lower court was “best able to interpret its own orders”);

Second, and relatedly, the State contends that only the BCPSS Board, and not the Plaintiffs, have the ability to seek relief related to the Decree. As explained above, this argument again ignores the language of the Decree, as well as the proceedings in this case. The Decree reserved the initial decision to return to Court for additional funds and to appeal from any order, if necessary, to the Board, Ex. A, Dkt. 77, Consent Decree, Nov. 26, 1996, ¶ 53, but the Board made that decision in 2000, and under the Decree, once that decision was made, the Plaintiffs were expressly allowed to participate. They promptly joined the Board at that time, and they have fully participated (without objection until now) from that point forward. There is nothing in the Decree and the State cites nothing providing that the Plaintiffs, thereafter, do not have all the rights of any party to a lawsuit to seek enforcement of this Court’s declarations and supplemental relief under them. Nor did the State raise any such claim when the Plaintiffs returned to Court in 2004 under the Decree and the June 2000 order.

⁹ The Decree was entered after a series of lengthy mediation sessions in Chambers with the parties and the Judge then overseeing this case, the Honorable Joseph H.H. Kaplan.

Third, the State misrepresents the nature of the Petition when it states that Plaintiffs “do not even purport” to ground it in the Decree, but rely solely on the Declaratory Judgments Act. State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 42. In fact, the Petition flows directly from the Decree and this Court’s rulings under it. The Decree allowed the Plaintiffs to return to Court for additional funds; there was such a return; the Court declared that additional funds were necessary; and the Court reiterated that same declaration in 2004 because the State still had not complied. This Petition seeks to remedy that non-compliance, both under the Court’s unquestionable authority to enforce its own orders and under the “supplemental relief” provision of the Declaratory Judgment Act, which allows further relief in support of a declaration when “necessary or proper.” See Md. Code Ann., Cts. & Jud. Proc. § 3-412(a).

Fourth, in an apparent effort to distract this Court from the fact that the State has determined that as a result of its own failure to fully fund the Thornton Commission’s recommendations, BCPSS has an “adequacy gap” of \$342 million (see DLS analysis, *supra* at 23), the State argues that the Thornton Commission and the funding provided by the Bridge to Excellence Act have nothing to do with the June 2000 declaration or constitutional adequacy; rather, these funds were allegedly “an aspirational” rather than a constitutional goal. State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 26. This is false.

The State has it backwards. As the Court made clear in 2004, the Thornton Commission’s determinations are what the State, at a minimum, must meet to even make an argument for constitutional compliance. Ex. E, Dkt. 50/0, Opinion, Aug. 20, 2004, at 58-59.

The State’s argument is not only legally inaccurate, but it contradicts the State’s long history of relying affirmatively on funding arising out of the Thornton Commission’s recommendations to try to demonstrate *compliance* with constitutional obligations. This includes,

among other things, when the State agreed with the BCPSS Board that the Board would not pursue further funding claims while the Thornton Commission completed its work; when the State asked the Court of Appeals to stay its appeal of the June 2000 order based on the Thornton Commission's ongoing work; when it relied on the funding, issued in response to the Thornton Commission's conclusions, in 2002 and 2004, to claim that it was in full compliance with constitutional requirements; and, in its most recent brief, in which the State argues repeatedly that it has complied with this Court's declarations and the Constitution because of this same funding. *See supra* at 11, 15-16; State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 46. However, when discussing the years for which the State failed to meet the required funding levels, the State reverses course, claiming that the funding levels were not constitutionally mandated, but just "aspirational." Furthermore, the Thornton Commission explicitly linked its analysis to constitutional mandates. *See Ex. I, Thornton Final Report, Jan. 18, 2002, at iv* (letter from Dr. Thornton providing final Report, noting that "Article VIII, Section 1 of the Maryland Constitution . . . requires the State to establish a 'thorough and efficient System of Free Public Schools[,]'" and explaining that the Commission's recommendations "reflect the constitutional priority granted to public education in Maryland"); *accord supra* at 15 (citing State admissions that the Thornton Commission was a response to the June 2000 decision and was intended to ensure constitutional compliance).

Fifth, the State appears to claim that this Court should have terminated the Consent Decree in 2002 because the State supposedly presented "unrebutted" evidence then it had complied with the Decree by passing legislation that was intended to provide funding in line with the Thornton Commission's recommendations. This is an odd argument. One would never know from the State's description that it actually *lost* its bid to terminate the Consent Decree in 2002 because the Court recognized that promised funding is not actual funding, particularly because the State had

at that point identified no revenue source for the promised funding, the phase in process had only just begun, and the funds promised to Baltimore City schools were “backloaded” – i.e., the largest increases would come only towards the end of the intended phase-in period. Unfortunately, the Court’s 2002 decision to extend the Decree and retain jurisdiction to ensure full actual, rather than promised, funding proved prescient.

Sixth, the State claims that the Consent Decree limits any order for additional funding under it to 2001 and 2002. Again, the State’s argument ignores the language of the Decree. The Decree allowed the Board to *request* additional funding from the State for 2001 and 2002, but if the State failed to fulfill that request, the Decree permitted the Board, with input from the Plaintiffs, to ask the Court “for funding amounts greater than” the amount specified in the Decree. Ex. A, Dkt. 77, Consent Decree, Nov. 26, 1996, ¶ 53. The allowance for the Board, as well as the Plaintiffs to return to Court includes no temporal limitation. *Id.* It also ignores the Decree’s purpose of ensuring a “meaningful and timely remedy” for the constitutional violation this Court had already found. Moreover, it is undisputed and the State has conceded that it never complied with this Court’s declarations in those two years – indeed the Bridge to Excellence Act provided only a phased in increase in 2002 with full funding not even arguably occurring until 2008. *See supra* at 15, 20. Again, this Court’s prior decisions confirm that this is the appropriate analysis. Had this case been complete in 2002, as Defendants claim, the Court could not, and would not have found in 2004 that the State had failed to provide appropriate funds and had a continuing obligation to do so going forward.

Seventh, the State argues that it actually complied with this Court’s June 2000 and August 2004 declarations by 2008; thus, the Court should have terminated jurisdiction then under the declaration in the August 2004 order that it would reassess “good cause” when and if Thornton-

related funding was fully phased in. Not only is this argument odd since the State never asked for such termination, it plainly presents disputed fact issues beyond the scope of a motion to dismiss. In fact, the State began eroding Thornton-related funding well before 2008, starting at least as early as 2007, by beginning the years-long pattern of freezing, capping, and diminishing Thornton-related funding, with the result that BCPSS now has an “adequacy gap” of \$342 million per pupil and is worse off in funding terms than it was before the June 2000 order. *See supra* at 23. It is telling, moreover, that the State never returned to this Court in 2008 or later to attempt to terminate jurisdiction. If the State had believed it complied with the Court’s declarations in 2008, one would have expected it would have returned and asked for the reassessment of “good cause” that the Court indicated it would perform. But, it did not; likely because it recognized that this Court would not have concluded that the State had complied with the Constitution, given that it had, shortly before, reduced Thornton-related funding going forward.

IV. Determining and Enforcing Plaintiffs’ Constitutional Right to an Adequate Education Is not a Political Question Beyond this Court’s Adjudicatory Power.

Despite multiple decisions by the Court of Appeals that discuss the rights of Plaintiffs and others to enforce their right to an adequate education under contemporary standards pursuant to Article VIII of the Maryland Constitution, and despite having freely entered into a Consent Decree recognizing the judicial power of this Court in lieu of proceeding to trial on Plaintiffs’ claims, the State now insists that the Court lacks judicial power to declare or protect Plaintiffs’ rights. In other words, the State contends that Article VIII is purely hortatory and the rights established thereby are illusory and of no legal consequence. Under the State’s theory, because the claims are not now, and never have been, justiciable, both the Consent Decree it is bound to and the Court’s declaratory rulings are nullities, and the Court of Appeals lacked jurisdiction to issue its ruling in *Bradford I.*

This improbable argument fails for numerous reasons:

1. The Court of Appeals has implicitly rejected it by twice affirming that Article VIII compels the State to ensure that children in every jurisdiction receive an adequate education under contemporary standards.

2. As discussed above in Section II, this Court previously rejected the State's justiciability argument when it granted partial summary judgment in favor of Plaintiffs. Thereafter, it made numerous declarations regarding the State's violations of Article VIII. The Court's prior assertions of judicial authority to hear and resolve Plaintiffs' claims is the law of the case and therefore controlling absent a material change of circumstances. The State does not assert any such change of circumstances. Nor could it.

3. Also as discussed above, the State has repeatedly abandoned its justiciability argument in prior proceedings in this case. In 1996, the State agreed to the Consent Decree and jointly asked this Court to enter it as a binding, judicially enforceable order. In 2001, the State fully briefed the issue in the Court of Appeals, but then dismissed their appeal and, once again, affirmatively and voluntarily accepted this Court's judicial authority. In fact, in the 2004 proceedings, the State freely conceded in its appellate brief in the Court of Appeals that this Court *does* have judicial authority to determine whether the General Assembly has funded Baltimore City schools appropriately.

4. Even if the State could relitigate this issue (and it cannot), the State's contention that the political question doctrine prohibits *any* form of judicial review of the State's noncompliance with Article VIII would fail under Maryland law. First, settled Maryland constitutional law makes clear that the judicial power vests courts with plenary authority to determine and enforce constitutional rights, including those under Article VIII. Second, no aspect

of the political question doctrine – which in Maryland has rarely been applied to bar judicial action – extends so far as to preclude adjudication of individual rights set forth in the Maryland Constitution. Third, the State’s contention that the determination of a constitutionally adequate education is too amorphous and standardless to be adjudicated by the judicial branch is belied by the history of the case, in which this Court *has* successfully adjudicated the constitutional issue, and by the State’s own history, when State agencies have repeatedly and recently made the very determination that the State now suddenly insists is impossible. Fourth, the State’s separation-of-powers argument goes to the question of remedy – the extent of this Court’s injunctive power – and not to the Court’s authority to adjudicate whether the State has violated the Maryland Constitution. In any event, the Maryland Constitution vests courts with judicial power to provide a remedy for violations of Plaintiffs’ constitutional rights, and the Court of Appeals has expressly confirmed the judicial power to compel State agencies to expend funds when payment is required to comply with such constitutional rights.

5. Numerous decisions by courts around the country have rejected similar defenses by state agencies seeking to avoid judicial enforcement of state constitutional rights to an adequate education. Only a small minority have ruled otherwise, usually involving constitutional language quite different from that in Article VIII.

A. The Court of Appeals’ Prior Rulings Acknowledge Judicial Power to Adjudicate Plaintiffs’ Right to an Adequate Education when Measured by Contemporary Standards.

In challenging this Court’s judicial power to hear claims arising under Article VIII, the State does not write on a blank slate. When it was last before the Court of Appeals in this case, the State admitted that “[c]ourts should emphatically state what the law is,” may determine “the legal question of the constitutionality of the ‘efficient and thorough’ education established by the legislature, as this Court did in *Hornbeck*” and necessarily “retain[] the power to decide if

[the other two] branches of government have acted constitutionally in the way they address school funding issues.” Exhibit G, State Appellant Brief, Dec. 14, 2004, at 29-30, 35 n.10; Exhibit F, State Appellant Brief, Dec. 8, 2000, at 24. These admissions are diametrically at odds with the State’s instant motion.

The State’s admissions to the Court of Appeals in 2004 were a candid, but necessary, acknowledgement that the Court of Appeals had already recognized the very rights asserted in this proceeding without any concern for whether it was trespassing into a political realm or the exclusive province of the legislative or executive branches. Indeed, the Court of Appeals had done so twice before.

First, in *Hornbeck v. Somerset Cty. Bd. of Educ.*, 295 Md. 597 (1983), the Court of Appeals rejected a challenge to Maryland’s localized wealth-based system of school funding based upon Article VIII as well as state and federal equal-protection rights, addressing the merits of the challenge, rather than punting because the question was not justiciable. To the contrary, the Court of Appeals addressed the terms of what constitutes compliance under Article VIII, Section 1, confirming that the State must ensure that all children receive a basic education, but that uniformity of education across the State is not required:

To conclude that a “thorough and efficient” system under § 1 means a full, complete and effective educational system throughout the State, as the trial judge held, is not to require a statewide system which provides more than a basic or adequate education to the State’s children. The development of the statewide system under § 1 is a matter for legislative determination; at most, *the legislature is commanded by § 1 to establish such a system, effective in all school districts, as will provide the State’s youth with a basic public school education.* To the extent that § 1 encompasses any equality component, it is so limited. *Compliance by the legislature with this duty is compliance with § 1 of Article VIII of the 1867 Constitution.*

Id. at 632 (emphasis added). Next, the Court made clear, unlike the case brought by the *Hornbeck* plaintiffs, a case demonstrating violations of statewide qualitative standards *would* constitute a valid “evidentiary showing” of a constitutional violation of Article VIII:

In contrast to New Jersey and West Virginia, Maryland has, by legislation, and by regulations and bylaws adopted by the State Board of Education, established comprehensive statewide qualitative standards governing all facets of the educational process in the State's public elementary and secondary schools. *See* Code, Education Article; COMAR Title 13A. *No evidentiary showing was made in the present case—indeed no allegation was even advanced—that these qualitative standards were not being met in any school district, or that the standards failed to make provision for an adequate education, or that the State's school financing scheme did not provide all school districts with the means essential to provide the basic education contemplated by § 1 of Art. VIII of the 1867 Constitution. The trial court did not find that the schools in any district failed to provide an adequate education measured by contemporary educational standards.* Simply to show that the educational resources available in the poorer school districts are inferior to those in the rich districts does not mean that there is insufficient funding provided by the State's financing system for all students to obtain an adequate education.

The record in this case demonstrates that Maryland has continuously undertaken to provide a thorough and efficient public school education to its children in compliance with Article VIII of the Maryland Constitution. That education need not be “equal” in the sense of mathematical uniformity, so long as efforts are made, as here, to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child. *The current system, albeit imperfect, satisfies this test.*

Id. at 639 (emphasis added).

Hornbeck's conclusion as to the types of evidence that *would* have shown a constitutional violation of Article VIII implicitly acknowledges the judicial authority to adjudicate the State's compliance, or lack thereof, with Article VIII. It plainly states that a showing of any of three conditions—a local school district's failure to meet state qualitative educational standards, inadequate state standards, or insufficient funding by the state for any district to meet those standards—could establish a sufficient “evidentiary showing” of a constitutional violation of Article VIII. The State's assertion that the courts have no business adjudicating rights under

Article VIII is antithetical to *Hornbeck*'s blueprint for litigating constitutional violations of Article VIII.

In the prior *Bradford* proceedings, Plaintiffs followed *Hornbeck*'s blueprint. Applying *Hornbeck*, in 1996, this Court granted partial summary judgment in favor of Plaintiffs "based on the evidence submitted by the parties, [that] there was no genuine material factual dispute that the public schoolchildren in Baltimore City were not being provided with an education that is adequate when measured by contemporary educational standards." *Montgomery Cty. v. Bradford*, 345 Md. 175, 189 (1997) ("*Bradford I*"). When the Montgomery County Board of Education appealed a denial of its motion to intervene, the Court of Appeals reaffirmed *Hornbeck* and made clear that proof of either a failure to provide funding sufficient to meet state standards or an inadequate state standard could establish a legally actionable violation of Article VIII:

As *Hornbeck* recognizes, 295 Md. 639, 458 A.2d 758, Maryland has established "comprehensive Statewide qualitative standards governing all facets of the educational process in the State's public elementary and secondary schools." Where, however, these standards "failed to make provision for an adequate education," or the State's school financing system "did not provide all school districts with the means essential to provide the basic education contemplated by § 1 of Article VIII, when measured by contemporary educational standards, a constitutional violation may be evident."

Id. at 181. Notably, the Court of Appeals was well aware of the rulings below in this case, including the Court's finding that Plaintiffs' constitutional right to an adequate education when measured by contemporary standards was being violated and that a judicially-enforceable Consent Decree had been entered, yet the Court of Appeals expressed no concern about justiciability. *See id.* at 200. The majority did not even comment on a dissenting opinion complaining that some aspects of the Consent Decree (but not all) violated the separation of powers. *See id.* at 202-09 (Eldridge, J., dissenting). Instead, it considered the merits of Montgomery County's appellate claim that it was entitled to intervene as a matter of right.

Finally, in 2005, the Court of Appeals again considered this case and again failed to raise any concern that this Court had wrongly invaded the political realm by adjudicating violations of Article VIII. *See Bradford II*, 387 Md. 353 (2005). Here, too, the Court of Appeals addressed the merits of a ruling below (here, an injunction) without raising any concern about justiciability (even though the State raised the same arguments they make here). *See id.* at 387-88. The Court of Appeals' repeated refusal to give credence to the State's political question argument is powerful evidence of its lack of merit. To paraphrase *Bradford II*, "[g]iven the importance of this case," if this case had all been for naught, surely the Court of Appeals would have done more in *Bradford I* or *II* than politely advise this Court in a concluding footnote to be "careful" in its future orders. *Id.* at 388 n. 12.

B. The Maryland Constitution Establishes this Court's Plenary Judicial Power to Adjudicate Plaintiffs' Rights and Order Remedies under Article VIII.

The State's political question argument would fail even if they could relitigate the issue. Adjudicating the constitutional right of Baltimore City children to a minimally sufficient education is a core function of a Maryland court of general jurisdiction: declaring and protecting the constitutional rights of tens of thousands of children. Separation of powers is not affected: the Maryland Constitution vests courts with both the power and the duty to compel remedial action when state agencies violate constitutional rights, even if the remedy involves the expenditure of funds. Importantly, the State's own "adequacy gap" analysis demonstrates that current funding levels fall below the constitutional threshold, thus answering the State's charge that it is impossible to determine and apply an enforceable standard. In sum, not one of the various political question tests supports the State's assertion that the judicial branch lacks the constitutional capacity to adjudicate whether the State is violating Plaintiffs' constitutional right to an adequate education by contemporary standards.

The political question doctrine is an extreme variant of the separation of powers and accordingly is rarely applied in Maryland. To Plaintiffs' knowledge, it never has been applied to bar the adjudication of a violation of vital constitutional rights. This is not surprising. Under basic precepts of Maryland law, the State cannot violate Plaintiffs' constitutional rights with impunity, yet that is exactly what the State seeks here: unprecedented blanket immunity for its constitutional violations. Maryland law provides no such protection.

1. General Principles.

The tests for determining whether a claim constitutes a nonjusticiable political question are settled. First, the Court must "evaluate 'whether the claim presented and the relief sought are of the type which admit of judicial resolution.'" *Smigiel v. Franchot*, 410 Md. 302, 324 (2009) (quoting *Lamb v. Hammond*, 308 Md. 286, 293 (1987) (in turn quoting *Powell v. McCormack*, 395 U.S. 486, 516-17 (1969))). Under this element, the Court "must determine 'whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.'" *Estate of Burris v. State*, 360 Md. 721, 745 (2000) (quoting *Powell*, 395 U.S. at 517). Second, the Court must determine whether the structure of government" makes the issue not justiciable "because of the separation of powers provided by the Constitution." *Id.* (quoting *Powell*, 395 U.S. at 517)). Factors cited in the second test include

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

In considering these factors, “[t]he political question doctrine is narrowly applied; courts will not abstain from reviewing actions that are not within the *express purview* of the ‘textually demonstrable constitutional commitment.’” *Jones v. Anne Arundel Cty.*, 432 Md. 386, 400-01 (2013) (emphases added).¹⁰ Thus, in the modern era (since these standards were first announced by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962)), the Court of Appeals has applied the doctrine to prohibit adjudication of claims by Maryland courts only *twice*, once to prohibit a state tort claim of negligence against the State arising from an accident during a National Guard military training exercise, *Burris*, 360 Md. 721, and once to prohibit litigation over whether the Maryland Senate had improperly extended an adjournment without the consent of the Maryland House of Delegates, *Smigiel*, 410 Md. 302. It has rejected application of the doctrine multiple times. *See Md. Comm. for Fair Rep’n v. Tawes*, 228 Md. 412 (1962) (legislative apportionment); *Traore v. State*, 290 Md. 585, 591-92 (1981) (reversing Court of Special Appeals holding that courts could not review State Department decision regarding retroactive effect of diplomatic immunity statute); *Lamb*, 308 Md. at 303-04 (legislative authority to determine election winners and conduct of elections for General Assembly seats); *Jones*, 432 Md. at 410 (county council’s removal of legislator from office for violating county residency requirements); *Fuller v. Republican Cent. Comm. of Carroll Cty.*, 444 Md. 613, 624-27 (2015) (rules for how party’s central committee submits names to the Governor to fill legislative vacancies). This case, involving the rights of families to a thorough and efficient education for their children as

¹⁰ The State asserts that the two tests are disjunctive, such that a finding that a question is political under one test is sufficient to render the question nonjusticiable. *See* Def.’s Mem. at 52-53. They are disjunctive, but in both directions. Thus, *Jones* held that the question was *not* political solely by applying the second test (finding no textual support for political exclusivity) and never considered the first test. *See Jones*, 432 Md. at 410.

guaranteed by the Maryland Constitution, is a far cry from these cases, all of which involved political subject matter.

2. Article VIII Lacks Textual Language Conferring the Legislative and Executive Branches with Express Purview over the Constitutional Sufficiency of Baltimore City Public School Funding Levels.

The State's argument that the Maryland Constitution "unquestionably commits to the political branches the issue of public school funding," State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 53, focuses on the second test (textual language supporting separation of powers), but fails the threshold aspect of that test under *Lamb* and *Jones*: a textually demonstrable constitutional commitment consigning the issue to the exclusive domain of the political branches. See *Jones*, 432 Md. at 401. In *Jones*, the Court of Appeals rejected a political question defense simply because the text in question did not demonstrate the "commitment [of the question] to *sole legislative purview*." *Id.* (emphasis added). As Judge Battaglia's decision concluded, "there just is no commitment rendering the County Council *the sole arbiter* of its members' qualifications." *Id.* (emphasis added). So, too, here. The State does not, and cannot, point to any language in Article VIII rendering the political branches the sole arbiters of whether school funding is sufficient for public schools to meet constitutional requirements. This fact alone defeats the State's argument.

Rather than cite a clear *textual* basis for exclusivity, the State cherry-picks quotes from *Hornbeck*'s summary of the Constitutional Convention of 1867, when Article VIII was approved. See State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 53-54. That is not the relevant inquiry. But, in any event, the State omits key context for this Court's statements in *Hornbeck* and therefore presents an extremely misleading account of that decision.

As *Hornbeck* explains, the drafters' concern in 1867 was to end the then-existing uniform system of public schools, a mandatory statewide tax rate, a ban against local tax contributions, and

to terminate the excessive unilateral authority of the state superintendent of public instruction to establish the uniform system of schools, as had been required by the 1864 Constitution and implementing legislation. *See Hornbeck*, 295 Md. at 622-28. The quotes cited by the State refer to establishing legislative authority vis-à-vis the executive branch and to eliminating the old system of a statewide uniform school system and establishing the new county-based public education system, *not* to an exclusion of the judicial branch from any role in adjudicating the constitutional sufficiency of these efforts.¹¹ Indeed, as discussed above, *Hornbeck* expressly acknowledges that judicial action *can* occur under the proper circumstances, and, in their 2005 briefing to the Court of Appeals, the State conceded this Court's judicial power to determine whether they were violating the Constitution's requirements in Article VIII.¹² The State cites nothing from the legislative history of Article VIII demonstrating any intent to preempt judicial review. Their discussion therefore is beside the point.

The textual silence of Article VIII is sufficient proof that the provision does not confer exclusive authority in the political branches, as necessary to preempt judicial review. That silence is amplified by the strong presumption under Maryland law that the judicial power extends to reviewing the constitutionality of executive or legislative-branch acts or omissions. For over 300 years, the judicial power to hear and remedy constitutional violations has not been questioned. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) (“[i]t is emphatically the province and

¹¹ Plaintiffs' original motion for partial summary judgment discussed the Constitutional Convention of 1867 proceedings in detail. *See* Dkt. 1/5 (converted from 082896), Plaintiffs' Mem. in Supp. of Mot. for Partial Summary Judgment at 16-20, which is incorporated by reference.

¹² The State ignores an Attorney General opinion noting that the State's system of education must be “complete” and “effective” and that Article VIII requires the State's funding system to “provide all students within the State an adequate educational opportunity.” 62 Op. Att'y Gen. Md. 338, 349, 350 (1977).

duty of the judicial department to say what the law is”); accord, e.g., *Stearman v. State Farm Mut. Auto. Ins. Co.*, 381 Md. 436, 454 n.13 (Md. 2004) (“If the legislative act in question were unconstitutional, the judiciary has the power to step in and declare it so.”); *Whittington v. Polk*, 1 H. & J. 236, 242-43, 1802 WL 349, at *4 (Md. 1802) (recognizing “the necessity of some power under the constitution to restrict the acts of the legislature within the limits defined by the constitution”). As the Court of Appeals instructs, “[t]hat the Judiciary is the ultimate authority to determine whether constitutional limitations have been transcended is a proposition that has been so long established and frequently applied it can no longer be seriously challenged.” *Tawes*, 228 Md. 412 at 426 (citing *Marbury*, 1 Cranch 137).

The State’s contention that the judicial branch is powerless to adjudicate Article VIII’s educational guarantee to Maryland children has no support in Maryland law. In insisting that Article VIII is judicially unenforceable, the State would relegate Article VIII to purely hortatory and illusionary status, violating the fundamental canons that constitutional text cannot be rendered meaningless by dint of construction. It points to no other provision of the Maryland Constitution that provides vital rights on paper, but allows the legislative and executive branches to violate it with impunity. Nor does it cite any case in which programmatic decisions by the legislative and executive branches (as opposed to purely political or military affairs like the adjournment procedures of the General Assembly or a National Guard training exercise) enjoy such immunity. Indeed, one of the State’s cited cases, *Judy v. Schaefer*, 331 Md. 239 (1993), *did* assess the substantive legality of budget cuts ordered by the Governor to reduce appropriation levels, and it held that the Governor’s actions were consistent with the Maryland Constitution (including the budget provisions of Article III § 52, relied upon by the State here). The Court of Appeals did not

even discuss the Governor's argument that the court lacked power to review the Governor's decision – essentially the same argument the State raises here.¹³

To effect such a unique sea-change in the tripartite constitutional structure that requires courts to abdicate their fundamental judicial authority to enforce the Constitution, a clear explicit textual signal in Article VIII was needed. *See, e.g., Traore*, 290 Md. at 592 (noting that questions concerning “the interpretation or scope of legislative enactment” are “issues to be resolved by the judiciary”). But Article VIII lacks any such language signaling an intent to exclude judicial review and consign the “thorough and efficient” text to hortatory status. On that basis alone, the State's political question defense fails.

3. Adjudication of Plaintiffs' Constitutional Rights Does Not Violate the Separation of Powers.

The State's further argument that adjudication of Plaintiffs' constitutional rights would violate the separation of powers because it would force the Court to make “public schools funding decisions” and supplant the constitutional roles of the executive and legislative branches, State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 55, fares no better. If funding levels for a constitutionally required program fail to meet constitutionally required minimum levels, courts may determine that the Constitution has been violated and direct the offending agencies to remedy the violation. This is a core function of the judicial branch. Stripping it away would do far more violence to the separation of powers than any impact from Plaintiffs' case.

¹³ The Court of Appeals has subsequently reaffirmed this aspect of *Judy*. In *Ehrlich v. Perez*, the court explained that *Judy* had “appl[ied] a standard of review to a governor's reduction to a budget appropriation that examined whether the governor and an executive board acted within their legal boundaries.” 394 Md. 691, 736 (2006) (citing *Judy*, 331 Md. at 266).

The State's concern about judicial intrusion into budgetary matters fails for multiple reasons. First, the Court of Appeals has rejected essentially the same argument, holding that courts have clear judicial authority to order recalcitrant State agencies violating constitutional rights to provide funding needed to comply with constitutional rights going forward. In *Ehrlich v. Perez*, 394 Md. 691 (2006), for example, the Court of Appeals held that courts have inherent authority to determine that the State's failure to appropriate Medicaid funds for a certain class of individuals was unconstitutional and that the court also had authority to issue a preliminary injunction requiring the State to provide the funds to pay the required benefits. Citing Article III § 52, one of the provisions cited by the State here, the *Ehrlich* defendants claimed that "the court lacks the authority to order the executive and legislature branches prospectively to reinstate medical assistance benefits" and that the order was "an illegal appropriation of funds." *Id.* at 735. The Court of Appeals rejected this argument, holding that, even if Article III §§ 32 and 52 "provide a comprehensive executive budgetary procedure for appropriating monies," the order did not "direct[] the appropriation of specific funds" and instead remedied the defendants' unconstitutional withholding of funds. *Id.* at 735-36. Similarly, the Court of Appeals rejected the State's argument that the plaintiffs' constitutional right "does not overbear the express terms ... of the budget provisions of the Constitution" because "the executive and legislative budget authority is subject to the constitutional limitations of the Declaration of Rights." *Id.* at 736 (citing *Judy v. Schaefer*, 331 Md. at 226).

Ehrlich is directly on point. If the State fails to appropriate funds needed to comply with a constitutional right, courts have plenary authority to order the State to comply with the Constitution, even if compliance requires expenditure of additional funds. In response, the State offers two weak distinctions. It first contends that the constitutional intrusion was less significant

in *Ehrlich* because Plaintiffs seek an order specifically “directing the appropriation of funds.” State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 57. This is wrong: Plaintiffs seek an order requiring the State to provide constitutionally required funding – exactly what was ordered in *Ehrlich*. In any event, concerns about the breadth and specificity of possible relief are premature and speculative and do not justify outright dismissal of the claims before liability is adjudicated. The State’s second distinction, that *Ehrlich* addressed an equal protection right arising under Article 24 of the Declaration of Rights, *id.*, is equally meritless. This distinction is without a difference. Both cases involve the State’s separation-of-powers challenge to whether the judicial branch can adjudicate and remedy a violation caused by the State’s failure to provide requisite funding to meet its constitutional obligations. It does not matter whether the constitutional right at issue is located in the Declaration of Rights or in the main Constitution.

Second, the State ignores the settled role of courts in the Maryland constitutional scheme to fashion remedies to cure constitutional violations. Maryland courts have long recognized that the judiciary’s job is to “ensure that the fundamental constitutional rights, which are reserved to the people, are protected.” *Frase v. Barnhart*, 379 Md. 100, 130 (2003) (Cathell, J., concurring). A right without a remedy is no right at all. The Constitution accordingly places the judiciary as “the barrier or safeguard to resist the oppression, and *redress the injuries* which might accrue from ... inadvertent, or intentional infringements of the constitution [by the legislature].” *Whittington v. Polk*, 1 H. & J. 236, 245, 1802 WL 349, at *5 (emphasis added). A “basic tenet” of Maryland’s constitutional structure requires a remedy for every constitutional wrong. *Piselli v. 75th St. Med.*, 371 Md. 188, 205 (2002); *In re Legislative Districting of the State*, 370 Md. 312, 323 (2002) (“The Maryland Constitution requires us, in addition to reviewing the plan, to provide a remedy – appropriate relief – when the plan is determined to be invalid.”). Article 19 of the Declaration of

Rights – which has no counterpart in the federal constitution – makes this clear: “That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.” Md. Const. Decl. of Rights, Art. 19. This principle applies to *all* unconstitutional actions by state actors. *See, e.g., Doe v. Doe*, 358 Md. 113, 128 (2000) (“[U]nder Article 19, ‘a plaintiff injured by unconstitutional state action should have a remedy to redress the wrong.’”) (quoting *Ashton v. Brown*, 339 Md. 70, 105 (1995)). Article 19 of the Declaration of Rights answers the State’s charge that the right to an adequate education in Article VIII is somehow less deserving of a remedy than the right to equal protection in Article 24 of the Declaration of Rights.

Finally, the State’s concerns about the reach of any remedy that might be imposed by the Court are premature. A wide range of potential remedies is possible. Should Plaintiffs prevail in their liability claims, the State will have ample opportunity to raise their separation-of-powers concerns as to *specific* proposed remedies. Doing so now is speculative.

4. The Standards for Constitutional Compliance Are Not Unmanageable and Disrespectful to the Other Branches.

The State’s contention that the Court should not impose standards on the other branches, State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 58, ignores the reality of this case. The standards have existed for years. The State, in fact, has promulgated many of them (albeit half-heartedly), whether through the Thornton Commission, the Bridge to Excellence Act, the various determinations by the Department of Legislative Services of the annual constitutional shortfalls in funding, the State’s own report cards, other measures of school-system performance, or the State’s comprehensive requirements promulgated in COMAR. Plaintiffs’ Petition relies extensively upon the State’s own data and statements to show the constitutional violations. The

State's Motion to Dismiss tellingly omits any discussion of how Plaintiffs' use of the standards the State has already adopted based on prior Court orders fails to "respect" the work of the "coordinate branches" of government.

One recent factual development puts this argument into vividly sharp focus. The Department of Legislative Services, which keeps score for the State on its compliance – or lack thereof – with the constitutional norms established by the Thornton Commission, just recently announced that in FY 2017 that State funding for the BCPSS fell \$342 million short of the Thornton adequacy target. Exhibit L, Dep't. of Legislative Services, *Follow-up from July 24 Meeting*, Aug. 1, 2019, at 3, 6. The State's complete failure to explain how utilization of the State's own number for measuring adequacy under this Court's prior orders could fail to "respect" the independent roles of the coordinate executive and legislative branches demonstrates that this is a makeweight argument at best.

5. The State Mischaracterizes Prior Statements in a COA Brief.

Finally, the State resorts to mischaracterization in claiming that Plaintiffs acknowledged in their brief to the Court of Appeals in 2000 that the remedies sought in the Petition would violate the separation of powers. State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 59. Plaintiffs said no such thing. The State quotes Plaintiffs' statements explaining why Judge Kaplan's declaratory rulings did *not* violate the separation of powers and extrapolate from them that Plaintiffs implicitly, *sub silentio*, signaled that strong remedies, such as some of those sought in the Petition, would violate separation of powers. This is legerdemain. Plaintiffs did not admit to a "threshold" or describe some line that remedies could not cross. There was no need to do so when only declaratory orders by the Court were on appeal and before the Court of Appeals.

E. Many Other Jurisdictions Have Rejected Similar Challenges to State Constitutional Provisions Requiring Educational Adequacy.

A long list of jurisdictions has considered and rejected the same arguments raised against court enforcement of constitutional provisions essentially the same as Article VIII, or quite similar. The majority rule is consistent with the Maryland rule – that enforcement of these provisions is not political and falls within the judiciary’s purview. *See, e.g., Lake View Sch. Dist. No. 25 of Phillips Cty. v. Huckabee*, 91 S.W.3d 472, 482-83 (Ark. 2002), *supplemented*, 189 S.W.3d 1 (Ark. 2004), *recalled on other grounds*, 210 S.W.3d 28; *Lobato v. State*, 218 P.3d 358, 375 (Colo. 2009); *Delawareans for Educ. Opp. v. Carney*, 199 A.3d 109, 172-78 (Del. Ch. 2018); *Idaho Sch. for Equal Educ. Opp. v. Evans*, 850 P.2d 724, 734-35 (Idaho 1993); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989); *Cruz-Guzman v. State*, 916 N.W.2d 1, 9-10 (Minn. 2018); *DeRolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997), *opinion clarified*, 678 N.E.2d 886 (1997), and *order clarified*, 699 N.E.2d 518 (1998); *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 459-63 (Pa. 2017); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 776–82 (Tex. 2005); *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1264 (Wyo. 1995), *as clarified on denial of reh’g* (Dec. 6, 1995).

Indeed, other states have reached the same conclusion regarding provisions that are less similar to Article VIII. *See Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 217-26 (Conn. 2010); *McDaniel v. Thomas*, 285 S.E.2d 156, 157 (Ga. 1981); *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 260-61 (Mont. 2005); *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 363-64 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1138 (1983); *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 163-64 (S.C. 2014), *amended*, 777 S.E.2d 547 (2015), *order superseded and amended*, 780 S.E.2d 609 (2015); *Davis v. State*, 804 N.W.2d 618, 641 n.34 (S.D. 2011); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 147-48 (Tenn. 1993); *Brigham v. State*, 889 A.2d 715, 719-20 (Vt. 2005); *Seattle Sch. Dist. No. 1 of King*

Cty. v. State, 585 P.2d 71, 86-87 (Wash. 1978). Moreover, additional other states have implicitly recognized that such claims are justiciable by addressing the merits. *See Delawareans*, 199 A.3d at 173 n.340 (citing cases from Arizona, California, Kansas, Maine, Massachusetts, Missouri, Nevada, New Hampshire, New Jersey, West Virginia, and Wisconsin).

By contrast, only a “distinct minority” of decisions depart from the position of the Maryland Court of Appeals and hold that education clause challenges are nonjusticiable. *Id.* at 173 n.341. Those usually involve constitutional provisions that do not require that the education system have particular characteristics; for example, that it be “thorough and efficient” or “free”. *Id.*

Collectively, these decisions make clear that the school-finance cases do not unduly trespass against legislative or executive branch prerogatives. To the contrary, they speak with a remarkably clear voice that courts must have the last word as to what the constitution requires and must have the power to enforce that decision if further remedy is required. Abdication of that role would mean the deprivation of constitutional required educational access for tens of thousands of Baltimore City children every year.

V. Plaintiffs’ Request for Monetary Sanctions in the Event that the State Fails to Comply with Subsequent Orders of the Court is Authorized Under Maryland Law.

The State devotes the final section of its brief to disputing an argument that Plaintiffs never, in fact, advance. As noted above, Plaintiffs request that in the event the State fails to comply with either of the equitable orders the Plaintiffs have requested, the Court, if necessary, has the power to impose monetary sanctions to ensure compliance. *See Plaintiffs’ Pet.*, Mar. 7, 2019, at 77 (“Finally, this Court should order that, should Defendants not comply with these orders and decrees, Defendants may be required to pay compensatory damages, including attorney’s fees incurred in enforcing the Court’s orders and decrees, as well as penalties to compel compliance.”).

At no point do Plaintiffs argue that they seek damages for the State's failure to comply with this Court's previous decisions. Accordingly, the majority of the State's arguments – which concern the availability of compensatory damages for violations of the Court's previous orders – are irrelevant to the matter before the Court. The State's remaining arguments – regarding the violation of an order that the Court has yet to enter – need not be addressed by the Court at this time because the Order has yet to be entered, the State has yet to violate it, and the Plaintiffs have yet to seek redress for any such violation. Nevertheless, in an abundance of caution, Plaintiffs preliminarily address this premature argument below.

Importantly, the State concedes that a willful violation of a court order may, in certain circumstances, “form the basis for a monetary award in a civil contempt case.” State Mem. in Supp. of Mot. to Dismiss, June 19, 2019, at 61 (citing *Dodson v. Dodson*, 380 Md. 438, 454 (2004)). The State, nonetheless, argues that the possibility of such damages should be eliminated because they “find it difficult to imagine” how such a violation could occur, given the fact that funding decisions are made by an assembly of individuals. *Id.* Generously construed, the State's argument is essentially that where the State is an institution, courts may never find that the institution has committed a willful violation. The State provides no support for its position. Unsurprisingly, courts have rejected this proposition, finding that the intent of an institution can be gleaned by the collective statements and actions of its members. *See e.g. Village of Arlington Heights v. Metropolitan Housing Developing Corp.*, 429 U.S. 252, 267 (1977) (setting out a variety of factors to be considered in determining whether a legislative body acted with illegal intent including the legislative history, the sequence of events leading up the challenged decision, and a departure from the normal procedural sequence); *Frazier v. McCarron*, No. 1297, 2018 WL 6622219 (Md. Ct. Spec. App. Dec. 17, 2018) (hearing testimony from the City Clerk, City

Manager, and several council members as a means of determining whether City Council acted in “willful” violation of the Open Meetings Act). Additionally, to the extent that the failure is the result of any individual’s actions, Plaintiffs may seek remedies against that individual, as well. *Hook v. State of Ariz.*, 907 F. Supp. 1326, 1339-42 (D. Az. 1995) (imposing sanctions against the Director of the Arizona Department of Corrections for the Department’s failure to comply with a prior Court Order).

The State’s argument regarding the imposition of attorney’s fees is similarly unavailing. Rule 1-341 provides a limited exception to the “American Rule” – cited by the State – allowing a party to recover attorney’s fees where the opposing party acted in bad faith. *See Christian v. Maternal-Fetal Medicine Associates of Maryland, LLC*, 459 Md. 1, 18 (2018) (“Rule 1-341 constitutes a limited exception to the American Rule, which is that, generally, litigants pay their own attorney’s fees regardless of the lawsuit’s outcome. (internal citations and quotation marks omitted)). Rule 1-341(a) provides:

In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys' fees, incurred by the adverse party in opposing it.

Rule 1-341(a); *see also Johnson v. Baker*, 84 Md. App. 521, 527 (1990), *cert. denied*, 322 Md. 131 (1991) (citing *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383, 390 (2d Cir. 1985)). As with Plaintiffs’ request for financial sanctions, Plaintiffs need not establish and the Court need not decide whether such fees are appropriate at this time.

Alternatively, the State argues that the State, or any of its agencies, may not be assessed monetary damages, or attorney’s fees, for their failure to comply with a court order on account of sovereign immunity. State Mem. in Support of Mot. to Dismiss, Jun. 19, 2019, at 62. While the

State cites authority in support of the general proposition that compensatory damages may not be sought from the State, it provides no authority directly addressing whether immunity extends to financial sanctions, or attorney's fees, issued in contempt actions or in response to actions during litigation taken in bad faith. *Id.* at 62-64. Nor can it. Moreover, it is undisputed that if any such actions are the result of any individuals' actions, Plaintiffs may hold those state official liable for actions committed with malice. *Higginbotham v. Public Service Com'n of Maryland*, 412 Md. 112, 129-30 (2009) (citing *Lee v. Cline*, 384 Md. 245 (2004) (explaining that although the State is immune from actions in which it acted with malice, state employees are only immune if they acted without malice)).

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny the State's motion to dismiss. Additionally, Plaintiffs respectfully request that the Court approves Plaintiffs' proposed scheduling order, allowing for a prompt resolution of Plaintiffs' Petition.

Dated: August 23, 2019

Respectfully submitted,

BAKER & HOSTETLER LLP

By:



Elizabeth B. McCallum (*admitted pro hac vice*)

BAKER & HOSTETLER LLP

1050 Connecticut Avenue, N.W.

Suite 1100

Washington, D.C. 20036

emccallum@bakerlaw.com

202-861-1500

Fax: 202-861-1783

Deborah A. Jeon
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MARYLAND
3600 Clipper Mill Road
Suite 350
Baltimore, MD 21211
jeon@aclu-md.org
410 889-8550, ext. 120

Ajmel Quereshi
Cara McClellan
Sherrilyn Ifill
NAACP LEGAL DEFENSE FUND
700 14th Street, NW, 6th Floor
Washington, DC 20005
aquereshi@naacpldf.org
cmcclellan@naacpldf.org
sifill@naacpldf.org

Attorneys for Keith Bradford, et al.

CERTIFICATE OF SERVICE

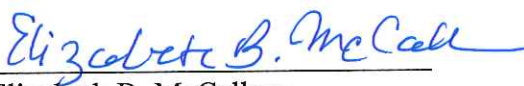
I HEREBY CERTIFY that on this 23rd day of August, 2019, a copy of the foregoing Opposition to Motion to Dismiss Plaintiff's Petition for Further Relief, with supporting exhibits and affidavit, was sent electronically by email and a hard copy was mailed, postage prepaid, to:

Steven M. Sullivan
Elizabeth M. Kameen
Elliott L. Schoen
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, Maryland 21202
ssullivan@oag.state.md.us
ekameen@oag.state.md.us
eschoen@oag.state.md.us

*Attorneys for Maryland State Board of
Education*

Warren N. Weaver
Ilana Subar
Whiteford, Taylor & Preston, L.L.P.
Seven Saint Paul Street, Suite 1500
Baltimore, Maryland 21202
wweaver@wtplaw.com
isobar@wtplaw.com

*Attorneys for Baltimore City Board of
Commissioners*


Elizabeth B. McCallum
Attorney for Bradford Plaintiffs