IN THE COURT OF APPEALS
OF MARYLAND

September Term, 2004

No. 85

MARYLAND STATE BOARD OF EDUCATION
AND STATE SUPERINTENDENT OF SCHOOLS
Appellants,

v.

THE NEW BOARD OF SCHOOL COMMISSIONERS
FOR BALTIMORE CITY AND THE BRADFORD PLAINTIFFS
Appellees.

On Appeal From The Circuit Court for Baltimore City
(Hon. Joseph H.H. Kaplan)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

BRIEF AND INCORPORATED MOTION TO DISMISS OF APPELLEES THE BRADFORD PLAINTIFFS

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STATEMENT OF THE CASE

"[E]ducation is perhaps the most important function of state and local governments." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). As the *Brown* Court observed:

> [Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. ...[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.
>
> *Id.*

In Maryland, an adequate education is not only of paramount importance to children and society, it is also a constitutional right of every schoolchild, as this Court recognized in *Hornbeck v. Somerset County Board of Education*, 295 Md. 597, 638-39 (1983). That right is guaranteed by Article VIII of the Maryland Constitution, which places upon the General Assembly the duty to establish and maintain throughout the State a "thorough and efficient" system of public schools. This constitutional duty obligates the State to provide for a public education system, effective in each school district in Maryland, that offers each child an adequate education as measured by contemporary education standards. *Hornbeck*, 295 Md. at 639.

Plaintiffs/appellees, Keith A. Bradford *et al.*, represent a class (the "Bradford plaintiffs" or the "Bradford class") of "at-risk" students attending the Baltimore City public school system (often abbreviated as "BCPSS"). "At risk" students live in poverty or suffer from other disadvantages that can make it difficult for them to succeed in school. In Baltimore City, at risk students comprise almost the entire student population. Mr. Bradford and several other individual plaintiffs brought this suit in 1994, when Mr. Bradford's oldest son, now a high school graduate, was starting the third grade.

In 1996, the Circuit Court for Baltimore City found that the Bradford plaintiffs were not receiving the "thorough and efficient" education to which the Constitution

entitles them. Shortly thereafter, the parties entered a Consent Decree that fundamentally altered the management structure of the BCPSS and provided limited additional funding from the State. In June 2000, pursuant to a Consent Decree provision that permitted BCPSS to seek additional funds from the State midway through the term of the Decree, the Circuit Court declared that the State was unconstitutionally underfunding the schools, and that additional State funding of $2,000 to $2,600 per pupil was necessary. It left the details of compliance in the first instance to the executive and legislative branches.

The General Assembly responded in 2001 by enacting the Bridge to Excellence in Public Schools Act, which established a new statewide funding system for public education. This new funding system should ultimately result in substantial compliance with the June 2000 declaration, but the new system will not be fully phased in until 2008. In 2002, the Circuit Court extended the Consent Decree for "good cause," as the Decree permitted, until the State had complied with the June 2000 declaration.

In August of this year, the Circuit Court issued the declaration at issue in this appeal, as a result of the fiscal crisis that befell BCPSS. The Court declared, as the Bradford plaintiffs had requested and on the basis of substantial, essentially undisputed evidence, that steps taken by BCPSS to address the fiscal crisis – including, *inter alia,* the elimination of systemic summer school, increases in class size, the elimination of teacher mentors and academic coaches, and the elimination of elementary school guidance counselors – reduced the educational opportunities available to Baltimore's school children and interfered with progress toward their receiving a constitutionally adequate education. The Court estimated the amount of funding necessary to correct this reduction in services at $30-45 million and declared that all of the governmental entities involved – BCPSS, the City of Baltimore, and the State – should work together to redress this reduction in services, by identifying a source for increased funding, by readjusting budget priorities from deficit reduction to educational services, or by taking some other action that would alleviate the effect of the budget cuts on the students. Finally, it called upon

the governmental parties to report back, within a limited period of time, about the steps they had taken to respond to the declaration.

Also, in response to a request by the State, the Court considered and rejected arguments – virtually identical to arguments that it had rejected in 2002 – that increases in state funding since its June 2000 declaration had already brought the State into compliance with that declaration and with the State's obligation under the Maryland Constitution to ensure the availability of sufficient funding to provide BCPSS students with a "thorough and efficient" education. Instead, again on the basis of substantial evidence, including numerous admissions by representatives of the State, the Court determined that this level of funding will not be achieved unless and until the State fully implements the new state education finance system. It also declared that, given the continuing constitutional inadequacy faced by the Bradford class, it would tolerate no delays in the planned phase-in of the new funding system. This ruling should not have been surprising, since the entire purpose of the new state funding system, as expressly acknowledged by the General Assembly at the time of its enactment, was to achieve a constitutionally sufficient level of public education funding across the state.

No party disputes that the education the class are receiving is constitutionally inadequate, and has been for at least a decade. No party really disputes that substantial additional resources are necessary for the Baltimore City schools to provide an adequate education to children. And no party really disputes the central facts that led to the declaration now at issue, that the BCPSS was unfortunately obliged to take a series of actions that deprived some of the State's poorest students of the benefit of programs and services that educational research demonstrates can be crucial in helping them achieve their potential.

The Circuit Court's August 2004 ruling was in keeping with the tenor of this case from the time of its filing, through the 1996 consent decree, and up until almost the present time: throughout, this case has been marked by a high degree of cooperation and comity among parties who, while often disagreeing on the appropriate steps to be taken,

agreed that the children of Baltimore City were being ill-served by the current public school system and worked together to try to improve educational opportunities. Indeed, this may be the only education finance lawsuit in the country in which the parties succeeded in negotiating a consent decree in order to start a process of improving the schools. Recognizing the extent to which the governmental defendants have acted in good faith to try to fix the constitutional violation the Court had found, the plaintiffs have generally limited themselves to seeking specific, narrow forms of declaratory relief and the Circuit Court – after reviewing very substantial evidentiary submissions – has likewise limited itself to issuing narrow, specific declarations and then providing the defendants with time and opportunity to determine the best way to bring themselves into compliance with the Court's rulings.

One would never recognize these facts from the State's brief, however. The State paints a picture of a Circuit Court out of control, willfully reaching out to interfere in a school system, improperly dictating appropriation decisions to the General Assembly, and flouting the limitations of the parties' Consent Decree. Nothing could be further from the truth, as the discussion below makes clear. The Circuit Court's declaration in 2004, and its entire series of declarations, were appropriate, reasoned, respectful and essentially conservative responses to the enormous, complex problem at the core of this case – the grossly inadequate education provided to nearly 100,000 of the state's poorest and neediest residents, the children who attend BCPSS. This Court should affirm.

QUESTIONS PRESENTED

1. Whether the State's appeal should be dismissed in whole or in part because the Circuit Court's declaration is not an appealable order, and because the State is precluded by its earlier actions from challenging the Circuit Court's authority and the justiciability of its determinations.

2. Whether the terms of the Consent Decree, in which the parties expressly agreed that the Circuit Court would determine requests for additional State funding,

authorized the Circuit Court's June 2000 declaration that an additional $2,000 to $2,600 per pupil was necessary to provide Baltimore City's public school children with a constitutionally-adequate education, and whether the further declarations the Circuit Court made to effectuate and enforce compliance with the June 2000 declaration and the State's continuing constitutional obligation also were within the Court's authority.

3. Whether the Circuit Court acted with appropriate respect for the coordinate branches of government in its series of declarations addressing the undisputed and continued constitutional inadequacy of the education being provided to the public school children of Baltimore City and the State's continued failure to provide sufficient funds to ensure an adequate education.

4. Whether the Circuit Court's determinations that (1) it will tolerate no delay in the schedule for full Thornton funding, given the continuing constitutional inadequacy and the State's continuing failure to provide sufficient funds for adequacy; (2) the State has failed to date to comply with the Court's June 2000 declaration requiring additional funding; and (3) the steps taken to address the fiscal crisis last year reduced educational opportunities and harmed BCPSS students all should be affirmed, as each was supported by overwhelming and undisputed evidence.

STATEMENT OF FACTS

The Bradford plaintiffs are compelled to correct a number of factual inaccuracies and omissions in the State's description of the facts, pursuant to Md. Rule 8-504(a)(4). *First*, the State does not accurately describe the terms and effect of the Consent Decree that it signed, a Decree that explicitly and plainly contemplates the proceedings that the State now claims are beyond the Court's authority. *Second*, the State misconstrues the terms of the Court's June 2000 order and the proceedings underlying that order, describing it as an untoward and unprecedented excursion beyond the Court's subject matter jurisdiction, when in fact it was precisely the proceeding the parties agreed to in the Consent Decree. *Third*, the State does not describe the circumstances surrounding its

decision to abandon its appeal from the June 2000 declaration. *Fourth*, the State's description of the Circuit Court's determination to extend the Consent Decree in 2002 is materially incorrect. *Fifth,* the State does not accurately describe the Court's August 2004 declaration. *Finally*, and perhaps most importantly, the State ignores the overwhelming and almost entirely undisputed evidence of its own continued unconstitutional underfunding that supported the Circuit Court's declarations in 2000, 2002, and 2004 – evidence that includes the findings of the State's own Commission on Education Finance, Equity, and Excellence (the "Thornton Commission"), the findings of the General Assembly when it enacted the new state funding formula in the Bridge to Excellence Act, the findings of two separate independent experts jointly retained by the State and BCPSS to evaluate the sufficiency of State funding, and admissions from the State Superintendent that additional resources are necessary.

A. The 1996 Summary Judgment and the Consent Decree

More than a decade 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 required by Article VIII of Maryland's Constitution. The State claimed in both suits that educational deficiencies were not a result of the State's conduct, but rather the result of the City's failure to manage the schools effectively. It argued that relief could be effectuated only through restructuring system management.

On October 18, 1996, the Circuit 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. The Court first held, following this Court's decision in *Hornbeck*, 295 Md. at 619, 638-39, 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." E.38-39. 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." E.39.

The Circuit Court's summary judgment was based on substantial, almost entirely undisputed evidence that the students attending the Baltimore City schools were not receiving a "thorough and efficient" education. Among other things, the 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; and 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. R.552, Pl. S.J. Br., 26-29, 32-37.[1]

The summary judgment in 1996, therefore, was based on exactly the kind of evidence that this Court observed was missing from the *Hornbeck* record in 1983. *See* 295 Md. at 639 ("*[n]o evidentiary showing was made in the present case* – indeed no allegation was even advanced – that [the State's own] qualitative standards were not being met in any school district .... *The trial court did not find that the schools in any district failed to provide an adequate education measured by contemporary educational standards*.") (emphasis added). The State did not seriously dispute the factual underpinnings for the 1996 summary judgment. R.834(a)-834(z). It *still* does not dispute

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[1] The Circuit Court also received evidence that Baltimore City had a substantial population of students who lived in poverty and otherwise were "at risk" of educational failure – almost 70% of the students in the system lived in poverty as measured by eligibility for the federal free and reduced price lunch program, comprising almost a third of the total poor students in the entire State. *Id.* at 43-48. Educational experts agree, as does the State of Maryland, that students who live in poverty need additional and focused resources in order to have the same chance of succeeding in school as their wealthier counterparts. Apx.316, 367, 379; E.1674-1675; E.3022-26.

that the education being provided to Baltimore City children is constitutionally inadequate. State Br. at 50 (describing "constitutionally inadequate education provided to BCPSS students").

The Circuit Court then set the case for trial to resolve 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." E.43. Addressing the State's concerns regarding management deficiencies in the BCPSS, the Decree reorganized the Baltimore City school board by creating 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. E.44-53. The Decree also provided for modest increases in State-provided operational funding, $30 million in 1998 and $50 million from 1999-2002. E.55-57.

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. E.52-53. The Decree required the evaluations "at a minimum" to include "an assessment of the sufficiency of the additional funding provided by the State." They could also, based on that assessment, provide "recommendations concerning ... the need for funding in excess of the amounts provided herein in order for the BCPS to provide its students with an education that is adequate when measured by contemporary educational standards." E.52-53.

Once the jointly-retained expert had rendered its report, the Decree provides, the Board could request State funds in addition to the increases required by the Decree through a "paragraph 53" proceeding. If the State's response to the request was unsatisfactory, the 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. E.56-57. The independent expert's evaluation was required to be admitted

as evidence in the hearing, E.57, 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 review of any Circuit Court decision in this Court, E.57, so that a decision could be rendered and any appeal resolved in time for the 2001 legislative session. Significantly, the Decree also provided that in any such proceeding, 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. E.57. That meant that if the Board returned to Court and got an order for additional funds, the State could raise all the same defenses it originally had raised to plaintiffs' claims – including, for instance, defenses that any order of the Court regarding constitutional adequacy or the funds needed for constitutional adequacy would improperly intrude on the duties of coordinate branches of government and would not be justiciable.[2]

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 Baltimore City School Board jointly hired a neutral expert, Metis Associates, Inc. They agreed that their expert would evaluate "whether the fiscal resources available to BCPSS, including the additional funding under SB 795, are/are not sufficient to ... enable students to meet state

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[2] The Decree also provided, in paragraph 52, another mechanism for the Board to seek additional funds: for Fiscal Years 1999-2002, the Board could present a "detailed plan" seeking funds through the regular budget process, and the State was contractually obligated to use "best efforts to satisfy" such request "subject to" availability of funds. E.56.

performance goals." Apx.50.[3] The State and 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. Apx.51.

To complete its evaluation, the joint independent expert spent some six months investigating the Baltimore City system, interviewing principals, teachers and parents, observing classrooms, and reviewing critical documents, such as budgets and expenditure records. Apx.3, 33. Throughout this process, the expert met regularly with committees on which the State and Board were both represented, vetting each aspect of its processes and evaluations and even providing draft reports for review and feedback. Apx.3, 33.

After this extensive process, the expert concluded the system was making "meaningful progress" in improving management and "implementing instructional initiatives at the elementary grade levels." Apx.4. It found, though, that BCPSS needed substantial additional funding, in the approximate amount of $2,700 per pupil, to provide an adequate education for the unique student population of Baltimore City. Apx.53. The expert also concluded that there were a number of specific initiatives that could help at-risk students for which funding was insufficient, including summer school programs and smaller class sizes. Apx.55-56.

As the Consent Decree permitted, the Board promptly sought additional funding from the State, both through the normal budget process (as permitted in any year by paragraph 52) and through a specific request to the State (as permitted for FY 2001 and 2002 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

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[3] In *Hornbeck*, this Court had declared that because Maryland had "comprehensive" statewide qualitative standards governing all facets of the educational process, these State qualitative standards would (as long as they themselves were constitutionally adequate) serve as the principal measure for judging educational adequacy. 295 Md. at 639.

enrollment levels, in order to fund a variety of programs and services designed to benefit at-risk students. E.131-32.[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 the Decree permits. E.57; E.87-88. The Circuit Court held a hearing on June 23, 2000, at which the Board, the Bradford class, and the State all appeared and presented evidence. That evidence included the report of the Board and 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. Apx.61-127. Among other things, the Court heard (as it had done in 1996) undisputed evidence that, although student test scores in the BCPSS were improving with the management changes and additional funds provided by the Decree, the 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. Apx.75-93.

The Circuit Court issued its Memorandum Opinion and Order on June 30, 2000. 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." E.140. The funds currently provided by the State as reflected in the FY 2001 budget, the Court found, "fall far short ... and will 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." E.140; *see also* E.141 ("additional 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

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[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

parties' jointly-retained independent expert and the Board's Remedy Plan, the Court declared, pursuant to Consent Decree ¶ 53, that additional funding of "at least" $2,000 to $2,600 per pupil was necessary for FY 2001 and 2002. E.141. The Circuit Court also found the State had violated its separate *contractual* obligation under the Consent Decree ¶ 52 to use "best efforts" to fund additional requests from the Board that were submitted through the regular budget process, particularly in light of the $900 million-plus surplus that year. E.138-39. Finally, having declared a constitutional and contractual violation and estimated the amount of additional funding necessary for adequacy, the Court stated that it trusted that the executive and legislative branches would act to "bring [themselves] into compliance with its constitutional and contractual obligations" without the necessity for further action by plaintiffs. E.141, 143.[5]

C. The State's Abandoned Appeal From the June 2000 Declaration

On August 1, 2000, the State appealed the June 2000 declaration. This Court granted immediate expedited review, and the appeal was fully briefed. In its briefs, the State raised the exact same arguments about the Circuit Court's authority to decide constitutional questions and the propriety of its declaration specifying a remedy for the constitutional violation as it raises now. *Compare* E.145 *with* State Br. at ii.

On January 26, 2001, the Board and State moved the Court of Appeals, jointly, for an order staying the appeal while the Thornton Commission did its work (*see infra* § D)

$49.7 million "downpayment" on the programs and services for which the system had the most immediate and critical need. E.132.

[5] The State is incorrect when it repeatedly claims (*e.g.*, State Br. at 8 n.3) that the Circuit Court confused the standards for paragraph 52 and paragraph 53 proceedings. In fact the Court recognized that both types of proceedings were before it, E.118-19, and its declaration encompassed both a paragraph 52 "best efforts" finding and a paragraph 53 determination that $2,000 to $2,600 was necessary for constitutionally adequate funding. E.140-143. The Court reaffirmed that those were its holdings in 2002 and 2004. E.455; E.2299-2302.

and the General Assembly considered the Thornton Commission's recommendations. E.262-71. They did so as the result of an "interim settlement" between the Board and the State, in which the Board agreed not to bring enforcement action against the State while the Thornton Commission was deliberating. E. 270-71. The Bradford plaintiffs were not parties to the joint motion or the interim settlement. This Court denied the motion to stay the same day it was filed, signaling that it was unwilling to put the issues involved in the appeal "on hold" indefinitely. E.276.

Four days later, on January 30, 2001, the State voluntarily dismissed the appeal. E.278. As State defendant Dr. Nancy Grasmick said in sworn testimony before the Circuit Court in 2004, the State thus "*agreed to be bound*" by the June 2000 declaration. E.2054 (Tr. 1562-63) (emphasis added).

D. The Thornton Commission and the Bridge To Excellence Act

In response to the June 2000 declaration, the State enacted the Bridge to Excellence in Education Act, largely adopting the recommendations of the State's Thornton Commission. The General Assembly had formed the Commission and directed it, among other things, to determine how much in additional State funding was necessary for students in all Maryland's districts, including Baltimore City, to meet state educational standards. H.B. 10 § 1(b)(1), 1999 Reg. Sess.

Dr. Alvin Thornton, the former chair of the Prince George's County School Board and an *amicus curiae* in this proceeding, chaired the 27-member Commission, which included Dr. Grasmick and other MSDE representatives, many members of the General Assembly, representatives from public school systems, various county government officials, and other key groups across the State. Apx.313. The Commission worked for two-and-a-half years to address adequacy and equity issues, examining the current system and options for change, holding numerous public hearings, and receiving evidence and comments from experts and the public. Apx.309. As part of its assessment, it

commissioned school funding experts in order to estimate how much additional funding would be necessary for each district in Maryland to meet state standards. Apx.314-15.

The Commission found a substantial gap between the resources currently available to school systems in Maryland and the resources necessary for educational adequacy. Apx.351-52. It first confirmed what the Circuit Court also had recognized, that school systems like Baltimore City with a high concentration of students who live in poverty and have other special needs are farthest from adequacy and need the most significant increases in State aid. Apx.379, 316. 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. Apx.351-52. That translates to annual operational funding increases of approximately $290 to $420 million.

When it enacted the Commission's recommendations into law in the Bridge to Excellence Act, the General Assembly 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. Apx.237. The General Assembly predicted, when full Thornton funding was phased-in, that Baltimore City should receive an increase over then-current funding and already built-in inflationary increases of approximately $3,070 per pupil. Apx.250.

Full funding under the Bridge to Excellence Act will not be phased in until Fiscal Year 2008. If all the increases anticipated by the Thornton drafters are fully phased in (they have not been, so far), the Bridge to Excellence Act will result 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 the Circuit Court had declared necessary in its June 2000 opinion. Apx.249.

The State has acknowledged that the Bridge to Excellence Act was a response to the June 2000 order. E.2019 (Tr. 1425) (testimony of State Superintendent Nancy

Grasmick that "the commission was really a response to Judge Kaplan's order regarding the per pupil expenditure"). It has also repeatedly recognized that full Thornton funding is necessary for Maryland students, including students in the BCPSS, to have sufficient funds to enable them to meet State standards. *E.g.*, E.2020 (Tr.1425-26); E.2848-49; E.333. And, it has conceded that full Thornton funding is necessary for it to meet constitutional mandates. *E.g.*, E.3243 (State Board resolution recognizing full Thornton funding necessary for "thorough and efficient" education); E.332 (concession in State's 2002 filing that Thornton was enacted "in order to provide constitutionally adequate funding for all students in the public schools throughout the State").

E. The Final Evaluation by the Joint Independent Expert

In January 2001, the Board and State jointly hired another independent expert consultant, Westat, to conduct the final evaluation of the BCPSS required by paragraph 42 of the Consent Decree. Apx.129. As the Decree requires, the final evaluation was designed to address BCPSS' progress at improving student achievement and system management, and the sufficiency of funding available to BCPSS. Apx.156-157. Westat, as Metis had done before it, evaluated BCPSS extensively over several months. Apx.131.

Based on its extensive inspection and evaluation of the schools, Westat concluded generally that the system was "tremendously improved" under the Consent Decree. Apx.133. In the area of instructional reforms, BCPSS had "accelerated its rate of progress at the elementary grades where the vast majority of resources have been targeted," and in many areas the rate of progress in Baltimore's schools had exceeded the progress of the State overall. Apx.133, 171. Westat attributed the improvement in student achievement in considerable degree to targeted and effective application of the limited additional funds received under the Consent Decree: "[W]here the monies have been spent," progress has been made, but "where monies have been more scarce, such as at the high school level, less progress is seen." Apx.168. However, Westat found (as had the Thornton Commission, Metis, the General Assembly, and the Circuit Court before it)

that the BCPSS needed "substantial" additional funding to meet State standards. Apx.170, 172, 169, 140.

F. The Circuit Court's Decision to Retain Jurisdiction To Ensure Compliance With the June 2000 Declaration

In June 2002, the Board and the Bradford 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 contemplates upon a demonstration of "good cause." E.63; E.285-318. The State objected. As "good cause," the Board and Bradford plaintiffs pointed to (1) the continuing constitutional inadequacy and the undisputed evidence that substantial additional State funds were necessary, including the findings of the Thornton Commission and the joint expert's final evaluation; and (2) the State's failure as of yet to comply with the Circuit Court's declaration that at least $2,000 to $2,600 in additional funds per pupil was necessary for constitutional adequacy E.293-299. In response, the State *conceded* that it had not complied with the June 2000 declaration (E.332, 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. E.325-31.

The Circuit 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." E.454-55. It further determined that even "arguable" compliance with the June 2000 declaration would not occur unless and until the Bridge to Excellence in

Public Schools Act was fully funded in 2008. E.455. It rejected the State's argument that full Thornton funding was inevitable, finding instead it was uncertain. E.453-54.[6]

G. The August 2004 Proceedings

In late 2003, public reports began to surface that the BCPSS had accumulated a deficit of approximately $58 million, in part because it had spent too much money on programs that were academically valuable, and crucial to its success in raising scores, but expensive. E.3108. In March and April of 2004, that deficit led to a cash flow problem. In order to address the cash flow problem and related fiscal issues, Baltimore City provided a short-term loan to the BCPSS in the amount of $42 million. (The State previously had offered a loan, on condition of increased State control over the schools.)

The Board, to address the fiscal issues, took a number of drastic budget-cutting steps. It increased class sizes by up to four students in some grades, even though research indicates that smaller class sizes are effective in raising scores and are especially important in educating at risk students. E.1874, 1702-1703, 1723 (Tr.1296:2-5; 563:14-24; 565:7-10; 648:8-11); E.3037; E.1674-75 (Tr. 451-454). It eliminated systemic summer school offerings for grades K through 8 and substantially reduced offerings to high schoolers, meaning that many thousands of struggling students would not have the benefit of programs that all parties had recognized were valuable because they provide additional focus and instructional time to at risk students. E.1692, 1588, 1863 (Tr. 523:10-13; 521:13-17; 105:13-106:1; 1204:22-25); E.1676 (Tr. 458:1-7, 458:18-22);

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[6] Evidence before the Circuit Court made plain that the uncertainty continues, because even though it is mandatory for the Governor to include full funding in the budget he submits to the General Assembly, it is *not* inevitable that the General Assembly will provide full funding. E.2057 (Tr. 1576:1-4); E.2060 (Tr. 1587:4-6). Indeed, there have been efforts in every legislative session thus far to cut back or delay Thornton funding – and the same issue is likely to arise this year as well. *See* Department of Legislative Services, *Issue Paper, 2005 Legislative Session, Education* 53-54, http://mlis.state.md.us/Other/IssuePapers/2005/05.pdf (state aid "trigger" provision may force decreased Thornton funding in FY 2006).

E.3136. It eliminated guidance counselors in elementary schools, and took other cost-cutting measures that directly affected educational opportunities for students. E.1589, 1691, 1797, 1835-1836 (Tr.109:9-17; 520:6-9; 940:10-25; 1091:12-1096:1); E.3136. The State concedes that these measures were taken, and concedes that they deprived students of educational opportunity. State Br. at 11, 28. Using the savings effectuated by these measures, the BCPSS agreed to eliminate the accumulated $58 million deficit, as well as build up a $20 million reserve fund, by the end of Fiscal Year 2006. E.1873, 1863-1864 (Tr.1244:4-7; 1204:3-1205:2); E.3108. Eliminating the deficit in two years was required by a newly-enacted State statute, S.B. 894, and also was required under the terms of a Memorandum of Understanding between the Board and the City.

On July 8, 2004 the Bradford plaintiffs filed a motion asking the Circuit Court for a determination that the cost-cutting actions that the BCPSS had taken to address the fiscal crisis were adversely affecting educational opportunity for students. The Bradford plaintiffs argued that the State had not yet complied with the June 2000 order or fulfilled its constitutional obligations to Baltimore City, and pointed out that the Court was supervising what had turned out to be a long-term, very gradual, phased-in remedy for the constitutional violation it first identified in 1996. The Bradford plaintiffs sought a declaration that, while full compliance had not yet occurred, the parties could not take actions to address the fiscal crisis that further deprived children of educational opportunities – moving the system backwards rather than forwards. E.645-646. The Board, in its response to the Bradford plaintiffs' motion, agreed that the State had not yet complied with the June 2000 order or fulfilled its constitutional obligations to Baltimore children. E.1107-1108. The City agreed.

In response, the State 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 with all its obligations under the June 2000 opinion and order. E.1064, 1069. The State also asked the Circuit Court for an order "restructuring" the

BCPSS, on the theory that any continuing educational inadequacy was attributable to systemic mismanagement, not insufficient funding. E.1064, 1069.

In late July and early August, 2004, the Circuit Court held a four-day bench trial on the pending motions. The Court received numerous exhibits into evidence, heard testimony from two separate experts on educational programs and services, and also heard testimony from the State Superintendent, Baltimore City's Finance Director, the BCPSS' Chief Executive Officer, 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. E.3261-3309.

During that hearing, the Circuit Court heard substantial objective evidence that, although student test scores had been rising steadily as funding to the BCPSS increased, students in BCPSS still were not receiving a constitutionally-adequate education. *E.g.*, Apx.173-212 (State "report card" showing BCPSS poor performance); E.2809 (chart showing BCPSS regular education students with roughly equivalent scores to students in Montgomery County receiving special educational services); E.1674 (Tr. 451-52); E.1766-67 (Tr. 817-18); E.1792 (Tr. 918-20); E.1809 (Tr. 988-89). It received substantial evidence, including admissions from State Superintendent Nancy Grasmick and BCPSS CEO Bonnie Copeland, that the BCPSS needs substantial additional resources to provide an adequate education to students. *E.g.*, E.1726 (Tr. 657-48); E.1739 (Tr. 710-12); E.1740-41 (Tr. 716-17); E.1745 (Tr. 733-34); E.1796 (Tr. 934-35); E.1801-02 (Tr. 955-58); E.1801-02 (Tr. 961-62); E.1873-74 (Tr. 1215-17); E.1866-67 (Tr. 1243-45); E.1883 (Tr. 1281-88); E.2057 (Tr. 1574-76). It heard substantial evidence, including the testimony of the State Superintendent and a memorandum prepared by former State Finance Director William Ratchford, that the State had not yet complied with the June 2000 order. *E.g.,* E.2021-22 (Tr. 1433-34); Apx. 223-25; Apx. 213-454. It received substantial evidence, including, again, 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. *E.g.*, E.1888 (Tr. 1301); E.2019-20 (Tr. 1425-27); E.2027 (Tr. 1574-76); E.2847 (Rohrer declaration); E.3240. Finally, it heard substantial evidence, including once again testimony from State and BCPSS witnesses as well as compelling 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. *E.g.*, E.1674-79 (Tr. 449-71); E.1688-89 (Tr. 507-11); E.1698 (Tr. 545-46); E.1723 (Tr. 645-48); E.1740 (Tr. 713-16); E.1869 (Tr. 1225-27); E.1874 (Tr. 1245-46); E.2059 (Tr. 1583-84).[7]

Based on this evidence, the Circuit Court:

- Declared that the constitutional violation it had found in June 2000 continued, E.2283-84;
- Rejected the State's argument that it already had complied with the June 2000 order, and declared that full compliance with that order would not occur at least until the BCPSS received full Thornton funding by FY 2008, E.2364;
- Made plain, 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, that the Court would not tolerate any delays in full Thornton funding, E.2364;
- Declared that steps taken to address the fiscal crisis facing the schools (including elimination of systemic summer school programs and increases in class sizes) impermissibly interfered with continued progress towards providing a constitutional adequate education, E.2365;
- Declared that the parties should ensure that educational opportunities for children are not reduced by making additional operational funding of $30-45 million – the savings achieved from the cuts the Court identified – available for programs and services for at-risk children during this academic year, E.2365;

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[7] The Bradford class has cited only a small sampling of the voluminous documentary and testimonial evidence received by the Circuit Court and supporting its opinion. The class' proposed findings of fact (E.2216), as well as the findings submitted by the Mayor and City Council and the Board (E.2085-2118; E.2131-2147) and the Circuit Court's August 20 opinion (E.2293) describe the evidence in considerably more detail.

- Indicated that the evidence demonstrated a number of ways in which the parties could ensure that educational opportunities for children were not reduced in the current academic year, including identifying an additional source of funding, revising fiscal priorities to use existing funds for education rather than retiring the deficit, or accelerating amounts due from the City to the Board for accrued but unpaid leave time, E.2365, E.2343-44;

- In order to ensure that the BCPSS was free to stretch out deficit repayment and make additional funds available to at-risk children, declared that the State statutory provision in SB 894 that mandated retirement of the accumulated deficit within two years was unconstitutional as applied to the BCPSS, and invalidated as well the similar requirement imposed by the contract between Board and City, E.2366.[8]

The Circuit Court did not issue affirmative orders or injunctions directing action with respect to its various declarations. It did not order the State to provide additional funds to the BCPSS. It held no party in contempt. Rather, it directed the parties to report in four weeks on the status of their steps toward compliance, and stated that it trusted that the parties would "act in good faith and with all deliberate speed to ensure compliance without the necessity of further action by plaintiffs." E.2366.

The parties as of yet have done nothing of substance to comply with the Circuit Court's declarations. In its required reports to the Circuit Court, the State continues to claim that it has fulfilled all of its duties to the children of Baltimore and need do no more. E.2417. The City has provided no affirmative additional funding. E.2748-2759.

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[8] The State's repeated suggestion that the Circuit Court found that the State owed the school system between $439.55 to $834.68 million (*e.g.*, State Br. at 1-2) is misleading. The Circuit Court did find that the State had not complied with the June 2000 order, and estimated that the cumulative amount of underfunding over the past four years fell within that range, but it did not order the State to repay that amount. Rather, that finding (which is supported by substantial evidence, *see infra* § II.D.2), was part of the factual predicate underlying the Court's declaration that the Court would not tolerate delays in full Thornton funding and that actions taken to address the budget deficit could not result in a further affirmative deprivation of educational opportunities. E.2364-2365. It was, further, a specific response to the State's claim that it had adequately funded the schools.

The Board has declined to stretch out its deficit repayment plan or otherwise to take actions to make additional programs or funds available to assist at-risk students deprived of educational opportunities by the cuts made last year. E.2422-23. As a result, students that already have attended a constitutionally-inadequate system for their entire academic careers – there are students about to graduate from high school who were in first grade when this case was brought in 1994 – continue to suffer this year.

SUMMARY OF ARGUMENT

The Court should dismiss this appeal (and the *Bradford* plaintiffs hereby move to dismiss, pursuant to Md. Rule 8-603(c)), for two reasons. *First*, the declaration is not final, and is therefore not appealable. The Circuit Court contemplated substantial additional proceedings, directing the parties to file reports after the declaration was issued detailing steps taken to comply with it. *Second*, the State is precluded from raising in this appeal its two major issues – the contention that the declarations were outside the Circuit Court's authority under the Consent decree, and the claim that any Circuit Court determination on the specifics of a remedy for the ongoing constitutional violation violates separation of powers principles. The State raised precisely those same issues in an earlier appeal from the June 2000 declaration and then chose to abandon them. The doctrines of law of the case and "acquiescence" in a judgment preclude the State from relitigating them now. The State also waived any right to raise issues of the Court's authority to make a constitutional holding by failing to object, and indeed urging the Court to make such a constitutional holding, in the 2004 proceedings.

If the Court decides to reach the merits of the issues presented, it should affirm the Circuit Court's declaration for at least three reasons. *First*, notwithstanding the State's "the sky is falling" argument, every order that the Circuit Court has issued so far has been expressly authorized by the Consent Decree or flows directly from the Court's inherent power to monitor compliance with and enforce its own orders. In the Consent Decree, the parties agreed that the Circuit Court could adjudicate a request for additional State

funding based on the results of a neutral expert's evaluation. That is precisely what the Circuit Court did in June 2000. In June 2002, the Circuit Court relied on the express language of the Decree permitting extension for "good cause," as well as its undisputed inherent power to monitor compliance with and enforce its own orders, when it extended its jurisdiction until the State complies with the June 2000 declaration. This year, the Court issued declarations designed to ensure that the constitutional rights of Baltimore City's school children were not further battered by the actions taken to address the budget crisis while the constitutional violation continued and full remedy funding was not yet in place – again, actions contemplated by the Consent Decree and well within the Court's inherent power to enforce its own orders.

Second, the State's claim that the declaration impermissibly intrudes on the coordinate branches and/or adjudicated a nonjusticiable political question is wholly without merit. Throughout this case, the Court has issued narrow declarations based on extensive evidentiary records, and has permitted the executive and legislative branch substantial initial discretion in devising appropriate responses. Indeed, it could be argued that the Court has been too respectful of the coordinate branches, at least in the August 2004 declaration, because the school year is now more than half over and no party has done anything to comply with the declaration. The State concedes, as it must, that the Court has power to determine whether the General Assembly has funded the schools appropriately. State Br. at 35 n.10. Its claim that the Court cannot then address the specifics of the funds necessary for adequacy or take any further steps to ensure compliance rests on the fundamentally untenable proposition that Article VIII provides a right without a remedy. That is inconsistent with hundreds of years of constitutional law, and with numerous decisions from Maryland's sister states considering similar questions under the same or analogous constitutional language.

And, *finally*, all of the Circuit Court's factual findings are supported by substantial evidence. State testimony and State documents established the continuing constitutional inadequacy, the need for substantial additional resources, and the adverse effect on

students from the budget-slashing measures undertaken this year. The State does not really dispute that evidence, nor could it. The Circuit Court's conclusion that the State has not yet complied with the June 2000 declaration and provided additional funding of $2,000 to $2,600 per pupil also is based on substantial evidence, including the State's own calculations, an admission from State Superintendent Nancy Grasmick regarding non-compliance, and a memorandum prepared by the former State director of the Department of Fiscal Services, William Ratchford.

ARGUMENT

I. THE COURT SHOULD DISMISS THE STATE'S APPEAL

A. The August 2004 Declaration Is Not A Final Appealable Judgment

The State's appeal should be dismissed because the Court's August 20 order is not appealable. An order is final and appealable only if it is intended as an unqualified, final disposition of the matter in controversy and adjudicates all claims against all parties. *See Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989); *Albert W. Sisk & Son, Inc. v. Friendship Packers, Inc.*, 326 Md. 152, 159 (1992). The judgment is not final if the issuing court does not intend that the order end the litigation. *Keene Corp. v. Levin*, 330 Md. 287, 292 (1993); *Rohrbeck,* 318 Md. at 41-42; *Walbert v. Walbert*, 310 Md. 657, 661 (1987).

The Circuit Court's August 2004 declaration is not final and appealable under these standards, because the Circuit Court did not intend that the declaration end the litigation. To the contrary, the declaration contemplates substantial continued action before the Circuit Court. The Court issued declarations, but did not direct actions necessary for compliance with those declarations. Instead, it suggested several feasible alternatives supported by the evidence – including, for instance, additional money from the State, additional money from the City, acceleration of $31.6 million in accrued but unpaid leave time that the City owes the BCPSS – and left the specific steps necessary for compliance to the parties in the first instance. It explicitly provided for a next step before

the Circuit Court – reports from the parties detailing their progress towards compliance. Indeed, proceedings in the Circuit Court about its declaration have continued even while this appeal has been pending. R.2417, 2418, 2447 (initial status reports); R.2744 (order regarding initial status reports); R.2748, 2760 (supplemental status reports). It further retained jurisdiction to ensure no further delays in scheduled Thornton funding increases, and to monitor compliance. The appeal should be dismissed.[9]

The State claims, in a footnote, that the declaration is appealable for two reasons: (1) "to the extent that the court's order is in the nature of an injunction," the State argues, it is immediately appealable under Md. Cts. & Jud. Proc. Code Ann. § 12-303, and (2) according to the State, all declarations are "final judgments" under Md. Cts. & Jud. Proc. Code Ann. § 3-411. State Br. at 4 n.1. Neither of these arguments has merit.

The State's first claim, that an injunction is immediately appealable under Section 12-303, is correct but irrelevant. There was no injunction here.

The State's claim that the declaration is appealable because it is "final" under Section 3-411 confuses the binding effect of a declaration with its appealability. Section 3-411 provides that a declaration, whether "affirmative or negative," "*has the force and effect* of a final judgment or decree." Md. Ct. & Jud. Proc. Code Ann. § 3-411 (emphasis added). The statute provides that declarations are *binding* on the parties – as this one is – because, otherwise, parties would argue that a mere declaration, without a further coercive order, does not require compliance. However, a binding declaration, like any other court action, is appealable only if it disposes of all parties and all claims and does not contemplate further Court supervision or action. A number of cases from this Court, and from federal courts considering the identical language in the federal declaratory

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9 In contrast, the Consent Decree expressly provided for an immediate appeal from the Court's June 2000 declaration. E.57 (upon an order on a request for additional funds, "[a]ny party may appeal the Circuit Court's ruling").

judgment statute, have so recognized.[10] If a declaration does not otherwise meet the requirements for finality and appealability – as this one does not – it is not appealable.

B. The State Is Precluded From Challenging The Circuit Court's Authority And The Justiciability Of Its Declarations

Even if the August 2004 declaration was final and appealable (it is not), the State is precluded from challenging the Circuit Court's authority to enter constitutional determinations, and the justiciability of its determinations, for a number of reasons.

1. The State's Choice to Abandon Its Appeal in 2000 Precludes It From Relitigating Abandoned Issues Now

The State claims on appeal that the Circuit Court's authority under the Consent Decree did not extend to determining whether the State was violating the Constitution or declaring the amount of State funding necessary to remedy that violation. State Br. at 19-22. The State also claims that any Circuit Court determination that a specific amount in additional state funding is constitutionally required is precluded by separation of powers principles. State Br. at 29-32.

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[10] *See, e.g., Huber v. Nationwide Mut. Ins. Co.*, 347 Md. 415, 423 (1997) (dismissing appeal from declaratory judgment that did not dispose of all claims and all issues in a case; citing "well-established policy against piecemeal appeals"); *East v. Gilchrist*, 293 Md. 453 (1982) (dismissing appeal because declaratory judgment on counterclaim not final and appealable when other issues and claims in the case remained undecided); *Washington Suburban Sanitary Comm'n v. Frankel*, 302 Md. 301 (1985) (same); *Porter Hayden Co. v. Commercial Union Ins. Co.*, 339 Md. 150 (1995) (same). *Accord, e.g., Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742 (1976) ("[E]ven if we accept respondents' contention that the District Court's order was a declaratory judgment on the issue of liability, it nonetheless left unresolved respondents' requests for an injunction, for compensatory and exemplary damages, and for attorneys' fees"); *Peterson v. Lindner*, 765 F.2d 698, 703-04 (7th Cir. 1985) (declaratory judgments not "more final, or final at an earlier stage, than other sorts of judgments"; "declaratory judgments should be treated like other judgments for purposes of determining finality" because otherwise parties would be required "to immediately appeal any statement resembling a declaration").

The State raised precisely the same issues and then abandoned them when it reached its "interim settlement" with the Board, dismissed its pending appeal from the June 2000 declaration, and "agreed to be bound" by it. E.2054 (Tr. 1562-1563). Indeed, a comparison of the State's brief now and its brief in 2000 compellingly demonstrates that the State is making exactly the same arguments now that it abandoned then. *Compare, e.g.*, State Br. at 23-24 (Consent Decree provided no authority for the Circuit Court to "assign[] liability solely to the State for the constitutional inadequacy provided in BCPSS ... without a trial") *with* E.163 (State Br. 2000 at 15) (Decree provided no authority to "make [a] determination [on the State's constitutional liability or the amount of funding necessary] without a full trial of the case"); *also compare* State Br. at 30-37 (Circuit Court declaration that a specific amount of State funding is necessary for constitutional adequacy violates separation of powers questions and presents a non-justiciable political question) *with* E.168-172 (State Br. 2000 at 20-24) (same argument).

The State should not be permitted now to relitigate the same issues it chose to abandon four years ago. Basic law of the case principles should apply to bar the appeal. This case does not present the classic "law of the case" fact pattern, where a party asks an appellate court to revisit a determination made by an earlier appellate court in the same case. *E.g.*, *Scott v. State*, 379 Md. 170 (2004). It does, however, present a compelling case for application of the doctrine, because principles of judicial economy and certainty support the conclusion that once an issue is presented to a reviewing court or could have been presented to that court, subsequent reviewing courts should not revisit the issue. Here, the State noticed an appeal from the June 2000 declaration, it asked this Court to decide the issues presented, it even unsuccessfully tried to persuade the Court to stay the appeal *indefinitely*, and it only then chose to abandon the appeal. The only reason there is not an earlier appellate decision from this Court addressing these issues is because the State chose to dismiss its appeal and agreed to be bound by the order after it failed to persuade the Court to stay proceedings. As this Court has explained,

> Once this Court has ruled upon a question properly presented on an appeal, or, if the ruling be contrary to a question that *could have been raised and argued in that appeal* on the then state of the record, ... such a ruling becomes the law of the case, and is binding on the litigants and courts alike, ... and neither the question decided *nor the ones that could have been raised and decided* are available to be raised in a subsequent appeal.

Turner v. Housing Auth., 364 Md. 24, 32 (2001) (quotations omitted; emphasis added).

The doctrine of "acquiesence" also applies to bar relitigation of the State's abandoned issues. Here, the State "agreed to be bound" by the declaration, accepted the benefit of the "breathing room" it got as a result of the Board's agreement not to take enforcement action while the Thornton Commission was doing its work, and now has acted like the June 2000 declaration was binding and applicable for four years. As this Court has directed, "'the right to appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal.'" *Dietz v. Dietz*, 351 Md. 683, 689 (1998) (citation omitted). Stated differently, a "voluntary act of a party which is inconsistent with the assignment of errors on appeal normally precludes that party from obtaining appellate review." *Franzen v. Dubinok*, 290 Md. 65, 69 (1981). *Accord Downtown Brewing Co. v. Mayor & City Council,* 370 Md. 145, 149 (2002). These cases compel the conclusion that, by accepting the benefits of its settlement with the Board, dropping its appeal from the June 2000 declaration, and "agree[ing] to be bound" by the declaration, the State forfeited its right to revive its challenges to that declaration.

Plaintiffs, likewise, have relied, apparently to their detriment, upon the State's agreement that it would be "bound" by the June 2000 declaration. Neither the Board nor the Bradford plaintiffs have initiated enforcement action for the State's failure to comply in the four years since the June 2000 declaration was entered. Both parties have patiently waited while the Thornton Commission deliberated, the General Assembly acted, and an excruciatingly slow remedy began to be phased in, with full relief not expected until a full eight years after the declaration. Now, at the first hint of an action from the Circuit Court

that might actually have consequences for it, the State is directly challenging the same order it "agreed to be bound" by. Black-letter principles of equitable estoppel should preclude such conduct. *E.g., Jurgensen v. New Phoenix Atl. Condo. Council of Unit Owners*, 380 Md. 106, 125 (2004) (equitable estoppel precludes the exercise of a right "'as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse'") (citation omitted).

And, finally, simple contract principles also preclude the State's attempt to challenge the June 2000 declaration and its underlying basis. In the Decree, the parties agreed to an immediate expedited appeal from any paragraph 53 determination, E.57, in order to obtain certainty and finality quickly. The State decided not to pursue that agreed-upon immediate appeal. It should not get another bite at the apple four years later.[11]

2. The State Is Precluded From Challenging The Circuit Court's Authority To Make The Constitutional Determination The State Urged It To Make

The State itself expressly and repeatedly *invited* the Court to make constitutional determinations in the most recent round of proceedings, so it should not now be heard to challenge the Court's authority to do so. 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

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11 The State's attempt to relitigate the issues it abandoned in 2000 is also inconsistent with its argument that *any* declaration, simply by virtue of being a declaration, constitutes a final and immediately appealable order. The State is not correct. *See supra* § I.A. But if it were, then its failure to appeal the June 2000 declaration (as well as the June 2002 declaration) would mean that black-letter principles of res judicata and collateral estoppel bar any attempt now to challenge the propriety of the Circuit Court's earlier determinations. *E.g., Colandrea v. Wilde Lake Cmty. Ass'n,* 361 Md. 371, 387 (2000) (res judicata and collateral estoppel both apply when, among other things, a "valid and final judgment" is at issue).

permit the [BCPSS] to provide its students with a constitutionally adequate education as measured by contemporary standards." E.1064-1065; E.1069.

The State specifically asked the Circuit Court to determine whether it was meeting constitutional requirements. The State got an answer that it doesn't like. It should not now be permitted to shift positions on appeal and argue that the Court had no authority to make precisely the determination the State asked it to make. *See, e.g., Klauenberg v. State*, 355 Md. 528, 544 (1999) ("a [party] who himself invites or creates error cannot obtain a benefit – mistrial or reversal – from that error.'") (citation omitted).

3. The State Waived Any Appellate Issue On the Circuit Court's Authority By Failing To Raise That Issue Below

Having asked the Circuit Court to make constitutional determinations, the State not surprisingly also failed to object to the Circuit Court's authority under the Consent Decree to make those determinations.[12] A party that does not first object to a claimed error in the trial court and give the trial court a chance to correct the error has waived the ability to raise that error for the first time on appeal. Md. Rule 8-131(a); *see, e.g., Sodergren v. Johns Hopkins Univ. Applied Physics Lab.*, 138 Md. App. 686, 707 (2001) (appellate court should decide unraised issues only in extraordinary circumstances); *Guerassio v. Am. Bankers Corp.*, 236 Md. 500, 505 (1964).[13]

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[12] The State's claim that it "questioned the court's authority to hear and decide the matters presented" (State Br. at 13) below is disingenuous. The citation provided is to a single sentence in which the State claimed only that separation of powers principles precluded the relief sought. E.2205. Nowhere did the State claim that the relief requested was beyond the scope of the Circuit Court's authority under the Consent Decree.

[13] The State seeks to avoid the effect of its waiver by claiming that the issue of the Court's authority under the Consent Decree is one of *subject matter jurisdiction*, an issue that parties generally can raise at any time. However, the Circuit Court plainly has subject matter jurisdiction over a claim that the State violated its constitutional obligation to Baltimore's children. Even the State concedes that. State Br. at 35 n.10 (court "retains the power to decide if [the coordinate] branches of government have acted

II. IF THE COURT REACHES THE MERITS OF THE STATE'S APPEAL, IT SHOULD AFFIRM THE DECLARATION

A. The Language Of The Consent Decree And The Court's Undisputed Power To Enforce Its Own Orders Squarely Authorized The Circuit Court's Declarations

If the Court reaches the merits of the questions presented, it should affirm because, contrary to the State's claim, the language of the Decree and the Court's undisputed authority to enforce its own orders plainly authorized the Circuit Court's declarations in 2000, 2002, and 2004. The State purports to challenge directly the Circuit Court's authority to enter the 2004 declaration that actually is at issue in this appeal. In fact, however, the State's argument rests entirely on the claim that the Circuit Court had no authority to decide whether the State was unconstitutionally underfunding the schools in 2000, so (the State claims) the 2002 declaration extending the Court's jurisdiction to monitor compliance with the 2000 declaration and the 2004 declaration that was necessitated by the State's failure to date to comply with the 2000 declaration also were

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constitutionally in the way they address school funding issues"). Whether the Circuit Court appropriately acted within the scope of its authority under the Consent Decree is a pure question of contract law and interpretation, *not* a subject matter jurisdiction issue.

The State's reliance on *federal* cases that use the word "jurisdiction" to refer to the scope of the trial court's power to enforce and interpret consent decrees is misplaced, because federal courts are courts of "limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Thus if a federal court does not have authority to hear an enforcement dispute under a consent decree, it likely will not have subject matter jurisdiction either, unless the parties are diverse or another independent basis for federal jurisdiction exists. *Id.* at 381-82 (when federal court did not retain jurisdiction to address disputes under a consent decree, jurisdiction over such disputes, which were essentially garden-variety breach of contract actions, was properly in state court, unless there was some "independent basis for federal jurisdiction."). The Circuit Court, in contrast, has "original general jurisdiction ... and may hear and decide all cases at law and in equity other than those which fall within the class of controversies reserved by a particular law for the exclusive jurisdiction of some other forum." *First Federated Commodity Trust Corp. v. Comm'r of Securities*, 272 Md. 329, 335 (1974).

beyond the scope of the Circuit Court's authority. The problem with this argument (apart from the fact that the State is precluded from making it, *see supra* § I.B) is that the plain language of the Consent Decree the State signed explicitly authorized the 2000 declaration. Once it entered the 2000 declaration, the Circuit Court had authority under the Consent Decree to extend jurisdiction to monitor compliance with it in 2002 and had authority to enter its declaration in 2004 to effectuate and monitor compliance with it.

1. The Consent Decree's Plain Language Permits The Circuit Court To Determine Whether The State Is Unconstitutionally Underfunding The Schools

The State concedes, as it must, that consent decrees are contracts and the Circuit Court's authority to make the determinations it did flows from the terms of the parties' agreement. State Br. at 17; E.159-60. As this Court has explained, "[i]t is the parties' agreement that defines the scope of the decree. When there is an issue as to the scope of the judgment, therefore, it is to the parties' agreement that we look and interpret." *Long v. State*, 371 Md. 72, 83-84 (2002). As with all contracts, consent decrees must be interpreted in accordance with the intent of the parties expressed in their language, given its commonly understood meaning, *id.* at 84, and in a manner that gives each and every provision effect, *Jones v. Hubbard*, 356 Md. 513, 534 (1999). And, as with any contract, neither the parties nor the Court may supply language or provisions that the parties chose not to include when they negotiated the agreement. *Long*, 371 Md. at 83 ("the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it").

Here, the Consent Decree unambiguously provides that in 2000 the Board was permitted to "seek relief from the Circuit Court for Baltimore City for funding amounts greater than those described in" the Consent Decree. E.57. That is exactly what the Board did, and the question whether the State must provide those additional funds is exactly what the Circuit Court decided. There is absolutely no basis in this language for

the State's proposed limitation on the Circuit Court's authority. The Decree neither explicitly nor implicitly limits the Circuit Court's ability to determine the extent of any additional funding needed, nor does it circumscribe the basis on which the Court may make that determination. If the State had wanted to limit the issues the Circuit Court could decide, the magnitude of the additional funds the Board could request, or the basis for its request, the State could and should have negotiated for such a limitation and memorialized it in the Decree.

Further explicit confirmation that the parties intended to permit the Circuit Court, in a paragraph 53 proceeding, to determine whether the existing level of State funding met constitutional standards may be found in several other provisions of the Decree. *See Jones*, 356 Md. at 534 ("[T]he interpretation of the [consent decree] language is to be of the entire language of the agreement, not merely a portion thereof."). The Decree required the Circuit Court to admit into evidence the results of the jointly-appointed independent expert's interim evaluation. E.57. That evaluation was required to address the "sufficiency of additional funding" and could, based on that assessment, make recommendations regarding "the *need for funding* in excess of the amounts provided herein in order for the [BCPSS] to provide its students with an *education that is adequate when measured by contemporary educational standards*." E.53 (emphasis added). This is the definition of a constitutional "thorough and efficient" education, as provided in *Hornbeck,* 295 Md. 597. There would be no reason for the expert to evaluate the sufficiency of funding or to make recommendations on whether it was adequate under the *Hornbeck* standard – as the expert in fact did – or for the Court to receive the expert's conclusions into evidence, as required by paragraph 53 of the Decree, if the Circuit Court was precluded from considering such questions.

Moreover, in paragraph 53 of the Consent Decree the State expressly reserved all the defenses it had raised in the original lawsuit (including, for instance, defenses based on separation of powers and justiciability arguments), preserving its ability to raise those defenses in a proceeding pursuant to paragraph 53 on a request for additional funds.

E.57. Reservation of such defenses would have been unnecessary if the parties had not contemplated that the Circuit Court proceeding could and would address a claim that the State had unconstitutionally underfunded the schools.

When the Consent Decree is read in its entirety, the reason for paragraph 53 is clear. It provides a procedure by which, after the management changes and limited additional funding provided by the Decree had been given an opportunity to work for three years, and a neutral, jointly-retained independent expert had assessed the success of those remedial efforts, the Board could petition the Circuit Court for a determination whether additional funding was needed to support the constitutional adequacy of the Baltimore City schools. Based on the joint expert's evaluation, the question of adequacy then could be answered without the need for lengthy litigation.[14]

The State raises a variety of arguments to distract the Court from the plain language of the Decree the State signed. None of them have merit. First, the State's reliance on the Decree's recitation that a dispute remained among the parties "'as to the causes of and appropriate remedies for'" the failure of the BCPSS to provide Baltimore children with a constitutionally-adequate education (State Br. at 23) is misplaced. It is true that such a dispute existed at the time the parties entered the Decree, but nothing in the Decree limited the Circuit Court's authority to resolve that dispute as part of a request for additional funds. To the contrary, the Decree recognized that that question remained open and authorized the Circuit Court to resolve that open question through a paragraph 53 proceeding seeking additional funds.

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[14] The State's cases all are distinguishable, because each of them involves a situation, unlike the one presented here, in which it was plain that the language of the Consent Decree did *not* encompass the relief at issue. *See Pigford v. Veneman*, 292 F.3d 918, 923-24 (D.C. Cir. 2002) (court could not extend deadlines for filing individual proceedings in class action when decree set strict deadlines for such proceedings); *Johnson v. Robinson*, 987 F.2d 1043 (4th Cir. 1993) (under basic principles of contract law, court had no authority to impose additional duties not contemplated in decree).

The State's claim that the expedited nature of the paragraph 53 proceeding demonstrates that the Decree could not possibly have anticipated a proceeding addressing constitutional issues also is without merit. For one thing, the State's description of the proceeding is misleading, because the State fails to describe the six-month process before the hearing in which the State and BCPSS' jointly-appointed expert, with full State cooperation and constant contact with the State (*see supra* p. 8) investigated the schools' performance, the new management structure, and the adequacy of funding. The expert delivered its report to the State on February 1, 2000 – four full months before the date fixed in the Consent Decree for the Board to petition the circuit court for further relief. Apx.1. Far from raising any objection to the report, the State endorsed it. Apx.106 (citing letters).[15]

2. The Language Of The Consent Decree And The Court's Authority To Enforce Its Own Orders Authorized The Circuit Court's June 2002 Declaration

The State's convoluted effort to bootstrap its (waived) objections to the June 2000 order into an argument that the June 2002 extension of the Consent Decree likewise was beyond the Court's authority also is without merit. The Consent Decree permits extension of its term for "good cause." E.63. The State concedes, as it must, that the Court has inherent authority to monitor compliance with and enforce its own orders. State Br. at 21; *see, e.g., Link v. Link*, 35 Md. App. 684, 688, (1977); *Levitt v. State Deposit Ins. Fund Corp.*, 66 Md. App. 524, 544 (1986) (Circuit Court "could pass any

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15 The terms of the Consent Decree also simplified the issues to be resolved in a paragraph 53 proceeding in another way as well. Earlier in the litigation, the State had contended that problems of mismanagement in BCPSS were the primary cause of educational inadequacy. The Consent Decree responded to these concerns by putting in place a new management structure, a Board approved and jointly appointed by the State. This management change at the State's behest significantly undermined the State's subsequent ability to argue, in the paragraph 53 proceeding, that inadequate funding was not the primary cause of continued educational inadequacy.

order necessary to aid in enforcement of [the consent] order it had previously issued"). The State conceded in 2002 that it had not complied with the June 2000 declaration. E.332. The State cites no authority, and there is none, holding that the need to ensure compliance with a properly-entered paragraph 53 order for additional funding does not constitute "good cause" for extension of the Decree. The State, moreover, chose not to attempt to appeal the June 2002 determination.

3. The State's Objection To the August 2004 Declaration Is Based Entirely On Its Unfounded Objection To The June 2000 Declaration, And Fails For The Same Reasons

Similarly, the State's argument that the August 2004 order is beyond the Circuit Court's authority because the Court improperly "substituted" the June 2000 declaration for the Consent Decree obligations and then improperly enforced that declaration in 2004 fails for the same reasons the challenge to the June 2000 declaration fails. The Decree explicitly permitted the June 2000 proceeding and the declaration thereunder. *See supra* § II.A.1. The State concedes that courts have inherent authority to monitor and enforce compliance with their own orders, and substantial authority supports that proposition. *See supra* § II.A.2.

That is exactly what the Circuit Court did in its August 2004 declaration. In August 2004, the State had not yet complied with the June 2000 order. There would have been no budget crisis or accumulated $58 million deficit if the State had provided the additional $200 to $260 million a year contemplated by the June 2000 declaration starting in FY 2001 or 2002. Instead, the Court had properly extended the term of the Decree and was supervising a slow and gradual response to the June 2000 declaration, the phased-in stream of additional funding provided in the Bridge to Excellence Act. The Circuit Court was asked to decide, and did decide, that while the State had not provided the constitutionally-mandated additional funding, the steps taken to address the deficit could not result in further depriving students of educational opportunities. That decision flows directly from the earlier order and the State's failure so far to comply. Moreover, specific

issues of adequate funding only arose in the proceeding because the State raised them by asking the Circuit Court to decide that it was adequately funding BCPSS. E.1064-1069.

B. The Circuit Court's Declarations Are Appropriate And Restrained Judicial Responses To A Continued Constitutional Violation

There is equally no merit to the State's contention that the Circuit Court 2004 declaration, and the underlying June 2000 declaration, violated the separation of powers doctrine and/or presented nonjusticiable "political questions." The State acknowledges, as it must, that "[c]ourts should emphatically state what the law is." State Br. at 29-30. The State further recognizes, again as it must, that courts may determine "the legal question of the constitutionality of the 'efficient and thorough' education established by the legislature, as this Court did in *Hornbeck*" (E.172) and that courts necessarily "retain[] the power to decide if [the other two] branches of government have acted constitutionally in the way they address school funding issues" (State Br. at 35 n.10).

The State's separation of powers/political question argument, therefore, boils down to a single untenable proposition: the Circuit Court may determine whether students are receiving a thorough and efficient education, and may also determine whether the executive and legislative branch have provided *enough* funding for schools, but it will exceed its authority if it assigns a dollar-figure range to the additional funding necessary to remedy the constitutional violation or otherwise addresses the specifics of any remedy for the violation.

That argument, when stated clearly, makes little sense. How could a court ever determine whether the executive and judicial branches have improperly underfunded schools, as the State concedes that it may, without estimating the amount of funds necessary to provide a constitutionally-adequate education? The argument is also utterly without merit, for the reasons set out below.

1. The State's Claim That Courts Cannot Provide a Remedy For Violations Of The Constitutional Right To An Adequate Education Is Contrary To Settled Principles Governing The Role Of The Judiciary

The State's position depends upon the untenable proposition that courts have no power to direct a *remedy* for an undisputed violation of the Constitutional *right* to an adequate education guaranteed by the Maryland Constitution. A right without a remedy is no right at all. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). To ensure that the rights of Maryland citizens are protected, the function of the judiciary in the State's tripartite system is to determine whether constitutional violations have occurred, and where necessary to compel a remedy.

To this end, Section 1 of Article IV of the Maryland Constitution vests the judicial power of the State exclusively in the judiciary, giving the courts the ultimate authority to determine whether constitutional limitations have been transcended. *See Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 426 (1962). 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). *Accord Hornbeck*, 295 Md. at 603-04 (construing the constitutionality of Maryland statutes governing the system of financing public schools).

As this Court long ago instructed, the Constitution has placed 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*, 1802 WL 349, at *5 (Md. 1802) (emphasis added); *accord Marbury*, 5 U.S. (1 Cranch) at 177-78 ("[i]t is emphatically the province and duty of the judicial department to say what the law is"). Thus, courts abdicate their own constitutional responsibility unless they declare acts of the legislature or executive unconstitutional, when such actions violate constitutionally-protected rights, and unless they provide an appropriate remedy when such a remedy is necessary. *See In re Legislative Districting*,

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."); *Stearman v. State Farm Mut. Auto. Ins. Co.*, 381 Md. 436, 454 n.13 (Md. 2004). *Accord Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad"). For this very reason, this Court long ago recognized "the necessity of some power under the constitution to restrict the acts of the legislature within the limits defined by the constitution." *Whittingon*, 1802 WL 349, at *4. As this Court has directed, "'the purpose [of separating the exercise of the sovereign powers] was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.'" *Attorney Gen. v. Waldron*, 289 Md. 683, 688 (1981) (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

Under these principles, the Circuit Court's declarations fulfilled the primary function of the judiciary – ensuring that the fundamental constitutional rights of the people are protected. Far from violating separation of powers/political question principles, the Circuit Court's declaration represented an appropriate, respectful, and conservative approach to the knotty question of addressing the continued undisputed constitutional inadequacy of the education being provided to nearly 100,000 of the State's poorest children.

The Bradford plaintiffs asked the Circuit Court to decide a single narrow question – whether, in light of the continuing, undisputed constitutional inadequacy of the schools, and the State's delayed and gradual response to providing the full funding necessary to remedy that inadequacy, the students should be required to suffer the immediate substantial deprivation of educational opportunities that resulted from the drastic budget cutting measures. E.646. The State, in response, affirmatively asked the Circuit Court to determine that it had fully complied with constitutional mandates and adequately funded the schools. E.1064. The Circuit Court rejected the State's argument, and accepted the

Bradford plaintiffs'. It reconfirmed a continuing constitutional violation, and reconfirmed that the State had not yet provided adequate funding as required by the June 2000 declaration. It confirmed that budget slashing measures were harming students and further depriving them of an adequate education. It declared that no delays in full adequate funding would be tolerated, and further declared that immediate steps should be taken to ensure that the budget cuts did not penalize students. Finally, it offered a number of options that could help solve the problem, including, among other things, finding additional funds to replace the slashed programs or readjusting budget priorities that would channel additional existing funds to educational programs. It left considerable discretion in the parties as to how they would comply with its mandates.

These actions lie well within the judicial power and duty to declare what the law is and to "redress the injuries" that flow from constitutional violations. *Whittington*, 1802 WL 349, at *5. Indeed, the Circuit Court did not go nearly so far as it could have to assure a remedy. It did not, for instance, affirmatively order that additional funds be found or that specific programs and service be restored – with the result that the parties, to date, have essentially ignored its declarations and the students in Baltimore City who have already attended unconstitutional schools for years must continue to suffer in a system that has now moved even further away from adequacy.[16]

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16 The State's inconsistent suggestion that because the Circuit Court's declarations are not *coercive*, they are not binding on the parties and are without effect (State Br. at 31-32) is completely without basis. As the State points out in support of its claim that the declaration is appealable, a Maryland statute explicitly provides that a declaration "has the force and effect of a final judgment or decree." Md. Cts. & Jud. Proc. Code Ann. § 3-411; *see also id.* § 3-403(a). These statutes do not make the declaration immediately and automatically appealable, but they do provide that a declaration is binding on the parties with the same force as any other judicial act. *See, e.g., Powell v. McCormack,* 395 U.S. 486, 517-18 (1969) (request for declaratory relief justiciable even if the court did not or could not issue coercive relief effectuating declarations).

2. This Is Not A "Political Question"

Nor is the State correct that the Circuit Court's declarations meet all the requisites of a non-justiciable "political question." *First*, there is no "textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 217 (1962), as the political question doctrine requires. The Constitution requires the General Assembly to establish and fund a "thorough and efficient" system of public schools, as the State points out. The Constitution nowhere provides, however, that it is for the General Assembly alone to decide what a "thorough and efficient" education is. Nor does it provide that if the General Assembly violates Maryland childrens' constitutional rights by failing to establish or adequately fund such a system, the judiciary lacks power to act to redress that violation. Indeed, the State concedes that the Court can and should exercise such power. State Br. at 35 n.10 ("a court retains the power to decide if [the coordinate] branches of government have acted constitutionally in the way they address school funding issues"). The Circuit Court's declarations, given the facts presented, did not invade a power textually committed to the other branches, but represented an appropriate judicial reaction to the State's failure thus far to fulfill its constitutional responsibility.[17]

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[17] The Circuit Court's declaration is completely different from the conduct this Court held to be "non-judicial" in *Duffy v. Conaway,* 295 Md. 242 (1983). *See* State Br. at 31-32. The Court in *Duffy* found that legislation requiring, in election fraud cases, that "the circuit court act as a mere collector of evidence and fact finder for the House of Delegates" improperly cast the court in a non-judicial role. 295 Md. at 261. Because, under the Maryland Constitution, the House of Delegates, and not the court, makes the final determination whether or not the election results are void, any order by the circuit court unquestionably would "'bind[] nobody and determine[] nothing.'" *Id.* (citation omitted). Similarly, the situation presented in *Estate of Burris v. State*, 360 Md. 721, 748 (2000), is entirely distinguishable. There, the Court held that a negligence claim against the Maryland Army National Guard was nonjusticiable, basing its decision on, among other things, a string of federal cases that require judicial deference to the "unique role of the military."

The State is also incorrect that the *second* requisite for application of the political question doctrine, the "lack of judicially discoverable and manageable standards" for resolving the question, applies. Essentially, the State's argument is that even though courts may determine compliance with the Constitution, and even may address whether there has been unconstitutional underfunding, the dollar amounts necessary to remedy constitutional violations are essentially unquantifiable and beyond the limits of judicial competence. State Br. at 35.

But the State's claim that the judiciary is unsuited to determining the specifics of adequacy is not credible in light of the fact that the State itself has a number of times quantified the amount necessary for Baltimore schools to provide an adequate education, first in the report of the jointly-appointed expert and again in the Thornton Commission report and the General Assembly's adoption of that report's findings. Apx.4; Apx.391; Apx.227. The Circuit Court did not have to go far to estimate the additional amount necessary for constitutionally-adequate funding in 2000 and again in 2004 – the State's and the Board's expert first set that amount at $2,700 per pupil, and the State's Thornton Commission and the General Assembly then rendered similar, but higher, estimates of the amount Baltimore City needed in 2001. Apx.305. These estimates all relied on "costing out studies" performed by education funding experts – the exact same kind of studies that courts around the country in school funding cases have directed, and considered, in determining the adequacy of legislative actions.[18] After reviewing these conclusions, the Circuit Court essentially adopted them as its own.

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[18] *See, e.g., Montoy v. State*, 2005 Kan. LEXIS 2, at **11-12 (Kan. Jan. 3, 2005) (relying on evaluation performed at the direction of the state's legislature that concluded that the current financing formula and funding levels were inadequate to meet accreditation standards and performance criteria); *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 348 (N.Y. 2003) (ordering state to "ascertain the actual cost of providing a sound basic education in New York City" through a costing out study); *Flores v. Ariz.*, 160 F. Supp.2d 1043, 1047 (D. Ariz. 2000) (ordering state to "prepare a cost study to establish the proper appropriation to effectively implement" the State's programs for school

And, finally, the State provides no compelling authority for the proposition that it would be impossible for the judiciary to address specific remedies for constitutional inadequacy "without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. There is no inherent lack of respect in a declaration that, as here, attempts to hold the State to its own promised funding increases and to ensure that the system does not move backwards while those increases are phased in. Indeed, the Circuit Court demonstrated *substantial* respect for the coordinate branches when it left the specifics of a remedy to them in the first instance, and stated that it trusted that they would comply without the necessity of further Court action.[19]

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children with limited English proficiency); *Abbott v. Burke*, 693 A.2d 417, 437 (N.J. 1997) (ordering the state to conduct an adequacy study to determine the cost of supplemental services that would be needed by special needs students to compensate for disadvantages); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) (requiring a study to calculate the cost of a constitutionally adequate education).

[19] Moreover, authority from other states demonstrates that courts considering educational adequacy cases under identical or similar constitutional language almost uniformly reject arguments that such questions present non-justiciable "political questions." *See, e.g., Seymour v. Region One Bd. of Educ.*, 803 A.2d 318, 324 (Conn. 2002) ("[S]imply because the case has a 'connection to the political sphere,' [does not mean there is] an independent basis for characterizing the issue as a 'political question.'") (citation omitted); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 484 (Ark. 2002) ("This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We cannot close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education."); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 208-10 (Ky. 1989) (describing as "unthinkable" the notion that the judiciary could not enforce state constitutional guarantee of "efficient" education); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978) (adequacy challenge to school finance system justiciable); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981) (rejecting defendants' argument that adequacy challenge to state's funding system presents a non-justiciable question); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997) (holding challenge to government action places a duty on courts to determine if action was within constitutional limits); *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975) (the judiciary must afford an appropriate remedy to redress violation of constitutional right). Indeed, as *amici curiae*

3. Authority from Other States In Educational Adequacy Cases Confirms The Propriety Of The Circuit Court's Declarations

A review of school funding decisions in other jurisdictions with identical or similar constitutional language demonstrates the conservative nature of the steps taken thus far by the Circuit Court in this action.[20] As described in more detail in the *amici curiae* brief filed by the National School Boards Association and others, in the numerous school funding cases around the country, courts take an incremental approach to school funding remedies, imposing more prescriptive remedies only when the coordinate branches of government fail to take meaningful steps to address the constitutional violation.

Initially, courts tend to declare a constitutional violation and trust the executive and legislative branches to take appropriate steps to remedy that violation. *E.g., Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999). The Circuit Court here has twice taken precisely that conservative and well-accepted approach. E.141; E.2361.

If coordinate branches do not act promptly to remedy a violation, however, courts considering school funding cases can and do go much further. Courts have directed, for instance, that specific programs of benefit to at-risk students be provided, and that specific additional funding amounts be provided to benefit such students. In the *Abbott*

National School Boards Association and others point out, only two state courts out of some forty that have addressed constitutional school funding issues have found the questions presented entirely non-justiciable. Many states, moreover, have imposed or upheld specific *remedial* measures. *See infra* § II.B.3; discussion of cases in *amici curiae* brief of National School Boards Ass'n et al.

[20] This Court regularly looks to decisions from its sister states in interpreting the Maryland Constitution, particularly when, as here, the constitutional language at issue is similar. *See, e.g., In re Legislative Districting*, 370 Md. 312, 368 (2002) ("This holding is consistent with the decisions of our sister states with [similar] constitutional provisions...."); *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 66-67 (1985).

series of cases in New Jersey, the New Jersey Supreme Court first rejected a statewide funding bill as it applied to state's poor urban districts and ordered the State to provide funding parity with the average expenditures of the state's 110 successful districts. *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997). It directed that "to achieve parity in the coming year, the State will have to provide more than $248,152,068." *Id.* at 446 n.1 (Garibaldi, J., dissenting). Then, finding that "the continuing constitutional violation had persisted too long and clearly necessitated a remedy," the Court remanded for reports from a special master and from the parties. *Abbott v. Burke*, 710 A.2d 450, 456 (N.J. 1998). Based on those reports, the court ordered a series of specific entitlements for disadvantaged children, including whole-school reform in elementary schools, full-day kindergarten, preschool for 3 and 4-year olds, a comprehensive facilities effort, after-school programs, and summer school. *See id.* at 464. Noting that "adequate funding remains critical to the achievement of a thorough and efficient education," the court required the commissioner to "ensure that all ... Abbott schools shall have the resources and additional funds that are necessary to implement pre-school education by the commencement of the 1999-2000 school year." *Id.* at 464, 469-70. *Accord Abbott v. Burke*, 748 A.2d 82 (2000) (laying out more detailed preschool requirements); *Abbott v. Burke*, 751 A.2d 1032 (N.J. 2000) (clarifying the State was also required to fully fund necessary facilities remediation and construction costs).

Other state courts have ordered the State to perform expert studies to determine how much additional funding is necessary, have specified the programs and services that must be included in such studies, and have directed the State to provide sufficient funding when the appropriate amount has been determined. New York's highest court, in *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003), recently affirmed the broad parameters for an adequate education system set out by the trial court, including a sufficient number of qualified teachers, principals, and other personnel; appropriate class size; adequate and accessible school buildings; suitable curricula, including a program for at-risk students; sufficient and up-to-date books, supplies, libraries,

educational technology, and laboratories. *See id.* at *Campaign for Fiscal Equality v. State*, 719 N.Y.S.2d 475, 550 (Sup. Ct. 2001), *aff'd in part and modified in part*, 801 N.E.2d 326 (N.Y. 2003). The court gave the State a year to implement the following specific cost-based measures, which it saw as "hardly extraordinary or unprecedented:" (1) ascertain the actual cost of providing a sound basic education in New York City; (2) ensure that every school in New York City has the resources necessary for providing the opportunity for a sound basic education; and (3) ensure a system of accountability to measure whether the implemented reforms actually provide the opportunity for a sound basic education. 801 N.E.2d at 349-50.[21]

Still other state courts go even further to coerce compliance when coordinate branches fail to act, enjoining *any* funding for education until appropriate steps to address constitutional inadequacy are taken. In *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1988), the Texas high court enjoined state officials from distributing any money under the Texas School Financing System after numerous failed attempts by the legislature to bring the system into constitutional compliance. In *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), similarly, the court set a deadline for a legislative remedy, after several inadequate legislative responses, and enjoined disbursement of all school funds until the court determined that the constitutional violation was remedied. It explained that the court is "the designated last-resort guarantor of the Constitution's command" and if it does not afford a remedy, the constitution would

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[21] When the state failed to comply with the rulings, the trial court appointed a group of three judicial referees (special masters) to address the state's non-compliance. The referees ultimately concluded that New York needed to provide an additional $5.63 billion in operating aid to provide a basic education under the New York Constitution. *See Campaign for Fiscal Equality v. State*, No. 111070/93, Report and Recommendations of the Judicial Referees at 4-7 (Nov. 30, 2004), Apx.455. Urging the court to implement its recommendations, the panel concluded that the court "would not be overstepping its bounds; to the contrary, it would be engaged in the most quintessential of judicial functions – protecting the constitutional rights of the citizenry." Apx.510 at 54.

simply "'embod[y] rights in a vacuum, existing only on paper.'" *Robinson v. Cahill*, 339 A.2d 193, 200, 204 (N.J. 1975) (citation omitted). Likewise, in *Montoy v. State*, 2004 WL 1094555, at *15 (Kan. May 11, 2004), the court initially gave the state an entire legislative session to craft remedial legislation, then ordered the legislature to cease and desist all expenditures until it enacted a constitutional system. *Id.* at *15.[22] Similarly, the Kentucky Supreme Court in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 214 (Ky. 1989), invalidated the state's entire education article, and directed passage of a new one incorporating the court's seven-part definition of constitutional adequacy, including providing students with sufficient communication skills; sufficient knowledge of economic, social, and political systems; sufficient understanding of governmental processes; and sufficient academic or vocational skills to compete favorably with other states.

Placed in this context, it is plain that the Circuit Court's rulings struck a proper and respectful balance, recognizing the role of both the courts and the legislature in preserving the integrity of the public education system in Maryland. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 483 (Ark. 2002) (noting that the roles of the legislative and executive branches "do not operate at cross purposes in the school-funding context"). The Court acknowledged that the General Assembly had passed the Bridge to Excellence Act, but also that it had delayed and backloaded full funding for six years. The Court did not demand that the State do more to achieve adequate funding more quickly, but made clear that it would not tolerate the State doing anything less, and that it would not tolerate budget-slashing actions that resulted in students losing educational

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[22] Following this ruling, the Kansas Supreme Court stayed its application, but ruled that the legislature must take action by April 12, 2005 to "fulfill its constitutional duty" or the Court will initiate its own steps. *See* 2005 Kan. LEXIS 2, at *6 (Kan. Jan. 3, 2005) ("the Legislature, by its action or lack thereof in the 2005 session, will dictate what form our final remedy, if necessary, will take").

opportunities that had been proven effective in helping them while funding still was constitutionally inadequate.

C. The Circuit Court's Factual Findings Are Supported By Overwhelming Evidence

This Court applies a deferential standard of review to the factual findings of trial courts, setting aside such findings only if they are clearly erroneous. *See Himelstein v. Arrow Cab*, 113 Md. App. 530 (1997), *aff'd*, 348 Md. 558 (1998). The threshold is quite high. So long as the factual determination is based upon evidence that is competent, credible, or substantial, clear error cannot lie. *See GMC v. Schmitz*, 362 Md. 229, 234 (2001); *Geo. Bert. Cropper, Inc. v. Wisterco Invs., Inc.*, 284 Md. 601 (1979). It is the trial judge's exclusive prerogative to judge the credibility of the witnesses and weigh the evidence, *Cannon v. Cannon*, 156 Md. App. 387, 403 (2004), *aff'd*, 2005 Md. LEXIS 3 (Md. Jan. 5, 2005), and the reviewing court must consider the evidence "in the light most favorable to the prevailing party," *Della Ratta v. Larkin*, 382 Md. 553, 563 (2004). "Where there are two permissible views of the evidence, a factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City,* 470 U.S. 564, 574 (1985).

Measured against these standards, the State's challenges to the various factual findings of the Circuit Court must fail.[23]

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[23] The State's claim that this Court should strictly scrutinize the Circuit Court's findings because the Court adopted the proposed findings submitted by the *Bradford* plaintiffs is a red herring. In the first instance, the Circuit Court did not adopt the Bradford plaintiffs' suggested findings and conclusions wholesale, but accepted some and rejected others, as it did with the findings submitted by the City and Board as well. The heart of the Court's declaration, its conclusions of law, were not taken verbatim from *any* proposed findings, although the Court incorporated elements of the sets proposed by different parties. E.2347-2358. The Court's declaration incorporated elements *not* suggested by the Bradford plaintiffs. *Compare* E.2360 ¶ 5 *with* E.2276; *also compare* E.2361 ¶¶ 10-12 *with* E.2276-77 ¶¶ 9-10. Moreover, the Court rejected a number of findings the Bradford plaintiffs had suggested. *Compare* E.2232 *with* E.2309-2310. Even if the Court had

1. Overwhelming Evidence Supports The Circuit Court's Declarations With Respect To Funds Necessary To Remedy The Continuing Constitutional Violation

The State claims that the Circuit Court committed clear error by completely ignoring the State's evidence that there were and are management issues in the Baltimore City schools, and by instead holding that "money alone was the answer to remedying the constitutionally inadequate education provided to BCPSS' students." State Br. at 50. Of course, that is not what the Circuit Court held. To the contrary, the Court explicitly recognized that there are troubling management issues affecting the operation of the schools. E.2345. It did *not*, however, agree with the State that the evidence demonstrated that a complete restructuring of the schools was the *only* appropriate remedy and that until such restructuring was accomplished additional funds would do no good. E.2357-2358.

Rather, the Court relied on undisputed, substantial, credible, and indeed overwhelming evidence that there was a continuing constitutional inadequacy and that additional resources were necessary to correct the constitutional inadequacy, both through full and timely funding of the Bridge to Excellence Act and an additional $30 to $45 million in this academic year to compensate for the programs and services slashed because of the budget deficit. That evidence included, among other evidence admitted during the four-day hearing:

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adopted the findings verbatim, moreover, not a single Maryland court has adopted the rule that the State proposes, and indeed Maryland courts recognize that it is entirely appropriate for a court to request and adopt proposed findings. *See, e.g.*, *Green v. Taylor*, 142 Md. App. 44, 59 (2001) (trial court's adoption of debtor's proposed findings of fact and conclusions of law into its order was not improper). Other courts have likewise declined to apply heightened scrutiny to adopted findings, but have assessed such findings under the clearly erroneous standard. *See, e.g.*, *Anderson*, 470 U.S. at 572 (trial judge's verbatim adoption of a party's findings not reversible unless clearly erroneous); *Ind. Trial-City Plaza Bowl, Inc. v. Estate of Glueck*, 422 N.E.2d 670, 674 (Ind. 1981) ("If the proposed findings of fact and conclusions of law did not state the facts as the trial court found them to be, it would not have adopted them as its own. . . . These findings will not be set aside unless clearly erroneous.") (citations omitted).

- The State's own "report card" of school performance demonstrating that although the BCPSS' student scores continue to improve, students still perform substantially below state standards on all tests in all areas, confirmed by expert testimony from Dr. Steven Ross that the scores indicated a system that was not providing an adequate education to its students, Apx.175-212; E.1674 (Tr. 452:5-19).

- The findings of the State's own Thornton Commission and the General Assembly that a substantial gap exists between the funds that the BCPSS currently gets from the State and the funds it needs to meet State standards, along with a declaration from John Rohrer, State Coordinator of Fiscal and Policy Analysis for the State Department of Legislative Services, confirming the "adequacy gap,"Apx.314-315; E.2850-2851; E.2057 (Tr. 1575:18-22); E.2850-2851;

- Testimony from State Superintendent Nancy Grasmick, from John Rohrer, State Coordinator of Fiscal and Policy Analysis for the State Department of Legislative Services, and evidence from numerous State documents that full funding under Thornton is necessary to permit the students to meet state standards, E.3243, 2057 (Tr. 1575:15-1576:1);

- Testimony from State Superintendent Nancy Grasmick that the Baltimore City schools continue to need substantial additional resources, and that management improvements alone are not enough to correct educational inadequacy, E.2057 (Tr. 1574:21-1578:4);

- Testimony from BCPSS Chief Executive Officer Bonnie Copeland that the BCPSS needs substantial additional resources to provide an adequate education, because BCPSS does not have enough resources to focus on providing the best and most talented teachers in the classroom, the best and most talented leaders at the principal and administrative level, and support services necessary to allow at-risk students to learn, E.1883-1884 (Tr. 1283:1-1285:7);

- Testimony from BCPSS Chief Academic Officer Linda Chinnea and Officer for Student Support Services Gayle Amos that the BCPSS needs more money to provide a constitutionally adequate education to its students (*Id.* at ¶¶ 70-71);

- Testimony from education expert Dr. Stephen Ross, State Superintendent Nancy Grasmick, BCPSS CEO Bonnie Copeland, and other BCPSS officials that at risk students need substantial additional resources to obtain the same educational outcomes as other students, and that the BCPSS has a high proportion of at risk students, E.3034; E.1674 (Tr. 451:10-17); E.2009 (Tr. 1386:16-1387:3); E.2036 (Tr. 1491:17-24); E.1888 (Tr. 1303:3-8);

- Testimony and documents showing that the BCPSS' decision to raise class sizes by up to four students in order to address the fiscal crisis harmed students because

smaller class sizes can be vital to educating at risk students, E.1886 (Tr. 1296:2-5); E.1702 (Tr. 563:14-24); E.1703 (Tr. 565:7-10); E.1723 (Tr. 648:8-11);

- Testimony and documents showing that the BCPSS' decision to eliminate systemic summer school for elementary and middle school students (a program which previously had served between 18,965 and 30,600 struggling students a year) in order to address the fiscal crisis harmed students because the increased instructional time made available to at risk students through a systemic summer school program can be vital to educating those students. E.3174, 3193-94; E.1588 (Tr. 105:13-106:1); E.1863 (Tr. 1204:22-25); E.1698 (Tr. 545:13-546:4); E.1723 (Tr. 645:21-646:1); E.1740 (Tr. 713:9-16); E.1874 (Tr. 1245:16-21); E.1676 (Tr. 457:21-25) (458:1-7) (458:18-22);

- Testimony and documents demonstrating that BCPSS' decision to impose substantial fees on high schoolers attending summer school (up to $300 per student) in order to address the fiscal crisis meant that the program would serve substantially fewer students as a result E.1694 (Tr. 531:1421); E.1730 (Tr. 673:22-674:25); E.1729 (Tr. 669:22-670:4); E.1677 (Tr. 464:15-19);

- Testimony and documents that demonstrating that BCPSS' decision to eliminate guidance counselors in elementary schools in order to address the fiscal crisis harmed students because those counselors and the support they provide can be crucial in helping at-risk students learn, E.3136; E.1589 (Tr. 109:9-17); E.,1691 (Tr. 520:6-9); E.1757 (Tr. 774-76); E.1798-1799 (Tr. 943-946); E.1678 (Tr. 468:4-7); E.3035-3036;

- Testimony that, in order to address the fiscal crisis, the BCPSS eliminated hundreds of employees E.1625 (Tr. 255:9-18); E.1887 (Tr. 1298:4-15); E.1888 (Tr. 1303:9-1304:7);

- Testimony and affidavits from numerous parents, students, and teachers demonstrating the deep and immediate adverse effect of the elimination of these programs on both educational opportunities and on the morale of those parents, students, and teachers. E.3261-3309; E.3261-3309.

Much of this evidence was essentially undisputed. Indeed, virtually all of the foregoing points were supported by statements in the State's own documents, declarations, and live witness testimony.

Even a cursory review of this extensive evidence before the Court demonstrates that the State's argument that the Court clearly erred by not determining that the *only* cause of the educational inadequacy in the system was poor management is utterly

without merit. The Circuit Court heard all the evidence described above and more over a four-day hearing. It credited the testimony and documents demonstrating that substantial additional funds, in at least the amount of increases planned under the Thornton act, remained necessary for the schools to achieve constitutional adequacy. It credited the testimony and evidence that the budget slashing measures were resulting in substantial and immediate harm to students and were inconsistent with continued progress towards an adequate system. It credited the testimony from BCPSS witnesses and documents that the system was taking steps to address the management and fiscal controls issues that had gotten the system into the budget crisis to begin with (E.2357-2358), but, although it noted a number of management issues that troubled it, chose not to accept the State's argument that the only appropriate remedy was an immediate, complete restructuring of the system. *Id.* Each of these choices is supported by substantial evidence, and should be affirmed.

2. Overwhelming Evidence Supports The Circuit Court's Determination That The State Has Not Yet Complied With The June 2000 Declaration

Overwhelming evidence also supports the Circuit Court's determination that the State has not yet complied with the June 2000 declaration that an additional $2,000 to $2,600 per pupil is necessary for the State to begin to achieve compliance with constitutional mandates. E.2313-16, E.2356-57. The State claims that the appropriate starting point for measuring the State's compliance with the June 2000 declaration is FY 1999, and contends that it has complied with that declaration in this fiscal year because, since 1999, the State has provided more than $2,300 per pupil in total increased State aid. State Br. at 42. The Circuit Court properly rejected that claim, based on its interpretation of its own order, which is entitled to substantial deference, and the State's own admissions and calculations demonstrating that the State had *not* provided the requisite funding increases to date. The evidence in support of this determination is credible and substantial, and it must be affirmed.

The Circuit Court first properly rejected the State's assertion that FY 1999 is the appropriate starting point, holding instead that State compliance should be measured by increases over FY 2001 and FY 2002 funding levels. E.2313-14. In its June 2000 declaration, as it explained in August 2004, the Court had explicitly held that the State was required to provide $2,000 to $2,600 in additional funds *on top of already existing funding in FY 2001 and FY 2002*, thus establishing FY 2001 and 2002 as the "baseline" years from which State funding increases should be measured. E.2313 ("The Court . . . declares that additional funds provided for the Baltimore City public schools in the State budget *for Fiscal Year 2001* fall far short of [constitutional] levels ... [t]he Baltimore City public schools need additional funding of approximately $2,000 to $2,600 per pupil for educational operating expenses *for Fiscal Years 2001 and 2002*") (citing and quoting E.140). The Circuit Court issued its determination in 2000, *after it had already seen the enacted FY 2001 budget and noted its insufficiency*, a circumstance that further demonstrates why 2001 is an appropriate base year. E.140. It would have made no sense for the starting point for the increases to have been FY 1999, because the declarations were not entered until June 30, 2000, and no funding increases could have been instituted in any event until the next legislative session starting in the Spring of 2001, at which the budget for FY 2002 would be considered.[24]

The Circuit Court's interpretation and application of its own order is entitled to substantial deference – as the party that drafted the order, the Circuit Court is presumed to be in the best position to know what it means. *See, e.g., Vaughns v. Bd. of Educ.*, 758 F.2d 983, 989 (4th Cir. 1985) (lower court was "best able to interpret its own orders");

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[24] William Ratchford, former director of the State Department of Fiscal Services, reached the same conclusion, in a memo that was admitted into evidence before the Circuit Court. Apx.223. Mr. Ratchford explained that that "the additional state funds" in the June 2000 order "were in addition to the amount of state funds for fiscal 2001 that began the next day and for fiscal 2002, the budget to be considered by the General Assembly at the next legislative session in 2001." Apx.223.

United States v. Rhynes, 206 F.3d 349, 369 (4th Cir. 1999) (same). Indeed, courts are entitled to "inherent deference" when they construe their own orders. *See Rhynes*, 206 F.3d at 369 (citation omitted).[25]

The Circuit Court's conclusion that, when properly measured from FY 2001 and 2002, the increases in State aid were significantly less than $2,000 per pupil is supported by substantial evidence, most of it from the mouths of State witnesses and from State documents. As the Circuit Court properly found, *using the figures that the State itself put into evidence*, State aid per pupil increased only $1,650 from FY 2001 to FY 2005; and only $1,353 from FY 2002 to FY 2005. E.2313-14 (citing E.2842-2843, Attachment A to the Affidavit of Stephen A. Brooks, Chief, Budget Branch MSDE). Moreover, as the Circuit Court noted, State Superintendent Nancy Grasmick forthrightly *conceded* the State's lack of compliance with the June 2000 declaration over several years in testimony, just as the State had conceded during court proceedings in 2002. E.2021-2022 (Tr. 1433:10-34:3); E.133.

The Circuit Court also explained that the "Court ... intended the increased funding required under its June 2000 declaration to be provided on top of pre-existing mandated increases," E.2315, because such increases occur as a matter of course to account for the rising cost of education. This means that the proper measure of whether the State has provided sufficient increased funding to comply with the June 2000 declaration is not the straight-line increase in total State funding described by the State witnesses (under which compliance hadn't occurred anyway, *see supra*). Instead, the appropriate question is

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[25] Moreover, the State's argument that the Court rested its June 2000 declaration solely on Council of Great City Schools' analysis, and thus should be deemed to have "adopted" the baseline year used in that calculation (State Br. at 42) is also inconsistent with what the Circuit Court actually held in the June 2000 declaration. In fact, the Court rested its determination not only on the CGCS analysis, but also on the Board's own comprehensive Remedy Plan estimating additional funds necessary starting in 2001 and 2002. E.141.

whether the increases in State funding that are in addition to the annual increases already built into pre-existing State funding formulas exceed $2,000 to $2,600 per pupil.

The Circuit Court found that, when properly-measured on top of the annual increases that would have occurred anyway, State funding in FY 2005 had increased only $500 per pupil since FY 2001. The requisite $2,000 increase would not occur until at least FY 2008, assuming full and timely Thornton funding. E.2315. In so concluding, the Court relied on a memorandum prepared by the former Director of the State Department of Fiscal Services, William Ratchford, among other compelling evidence. E.2315 (citing Apx.223 (Ratchford memo); Apx.227 (declaration of third-party witness John Woolums)). *Accord* Apx.227 (Department of Legislative Services calculation of Thornton increases as increases in addition to anticipated increases already built into pre-existing law).

To avoid the effect of its own admissions, Mr. Ratchford's memorandum, and all the other evidence that it has not yet complied with the June 2000 declaration, the State makes two meritless arguments designed to limit the declaration's application. First, it claims that the declaration imposed on it only a duty to use its "best efforts" to make a "reasonable down payment" on the $2,000 to $2,600. State Br. at 41-42. But the "best efforts" language relates to the State's contractual obligation under paragraph 52 of the Decree to respond properly to a Board request for funds through the normal budget process. The Court made a separate determination that the State had a constitutional obligation under paragraph 53 of the Decree actually to provide the additional $2,000 to $2,600. E.141-43. The Circuit Court itself, the best arbiter of what was intended by the June 2000 declaration, explained both in 2002 and in 2004 that it imposed a constitutional duty to provide an additional $2,000 to $2,600 per pupil, not just a "best efforts" obligations. E.455; E.2299-2302.

The State's second meritless argument is that the Decree and the June 2000 declaration were limited to additional funds required in 2001 and 2002, so the State's obligation under the June 2000 declaration ceased after 2002. State Br. at 27-28. But

nothing changed about the system or the State's funding after 2002 to suggest that the State was somehow then instantly relieved of its constitutional obligation to the children of Baltimore. As the State itself explained in briefing before this Court in 2002, "if the State's constitutional obligation has been definitively set, that obligation will be continuing." E.165 n.6. And the Circuit Court, in its 2002 ruling extending judicial supervision for "good cause," made clear that the State's obligation to provide such funding continued and that the Court would retain jurisdiction until funding was provided. E.455.

D. The Circuit Court's Decision To Strike A Portion Of SB 894 Was Legally Correct And Supported By Substantial Evidence

Finally, the State contends the Circuit Court erred by holding Section 4 of Senate Bill 894 unconstitutional as applied to the BCPSS, to the extent that it required the BCPSS to retire its accumulated deficit in two years and thus necessitated the substantial cuts in programs and services the system instituted in order to meet this requirement. The State's claim that the Circuit Court erred because there is a rational basis for S.B. 894 misses the point altogether. The Circuit Court struck a portion of S.B. 894 not because it lacked a rational basis[26] but because it is inconsistent with the right to an adequate education guaranteed by Article VIII of the Constitution.

Section 4 requires the BCPSS to eliminate its accumulated deficit in two years, by FY 2006. The effect of the section is to require an artificially accelerated and financially unnecessary deficit paydown, forcing cost cutting measures adversely affecting educational opportunity and moving the system further away from constitutional adequacy. Undisputed testimony at the hearing from the State Superintendent indicated that, as long as BCPSS was maintaining a currently-balanced budget, there was no fiscal

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[26] The language the State quotes from the *Hornbeck* decision is taken out of context, from that Court's discussion of an equal protection challenge to Maryland's state-wide school finance system. *Hornbeck*, 295 Md. at 653.

reason why it should not stretch repayment of its accumulated deficit over several years, and that if it did so, more money would be available to spend on programs and service that benefit at-risk students. Indeed, former BCPSS financial advisor Sen. Robert Neall had suggested a ten-year payoff period. E.2059 (Tr. 1584-85). CEO Bonnie Copeland, similarly, testified that if funds were not being used to retire the accumulated deficit in two years, these much-needed funds would be available for programs and services that benefit students. E.1873-74 (Tr. 1243-45).

Both Maryland authority and authority from other jurisdictions provides that it was plainly within the Circuit Court's power to strike Section 4 as applied to the BCPSS to the extent that its requirements are inconsistent with the children's constitutional right to an adequate education.[27] Maryland courts generally provide that statutes that are inconsistent with the Constitution may be stricken. *See Galloway v. State*, 365 Md. 599, 611 (2001) (where an act of the state legislature violates the Maryland Constitution, courts "'are required to declare such an act unconstitutional and void.'" (citations omitted)); *Sugarloaf Citizens Ass'n v. Gudis*, 319 Md. 558, 568 (1990) ("[c]ourts can invalidate legislation on grounds of unconstitutionality."). While acts of the Legislature are owed deference, courts still must respond appropriately when a constitutional violation is shown. *See Horace Mann League v. Bd. of Pub. Works*, 242 Md. 645, 663 (1966) ("The actions of the Legislative Branch are ... entitled to consideration and respect, but they are not controlling in the determination of a direct and specific constitutional attack on an individual statute.") (internal citation omitted).

Under similar circumstances, a number of courts elsewhere have found public school financing statutes to be unconstitutional because of their impact on certain

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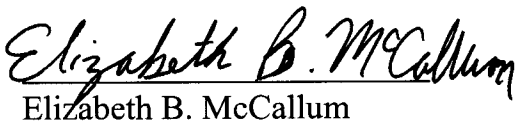
[27] The Circuit Court did not excuse the BCPSS from complying with any portion of S.B. 894 other than Section 4. The BCPSS still must comply with S.B. 894's audit requirement, the requirement of a currently balanced budget, and the reporting requirements to the State Superintendent. *See* Md. Code Ann. art. 1, § 23 (2003).

students' ability to receive a constitutionally adequate education. A recent decision in which the New Hampshire Supreme Court exercised its authority to interpret the constitution not just to invalidate particular funding schemes, but to strike down another statute as inconsistent with the political branches' constitutional duties, is instructive. In *Claremont School District v. Governor*, 794 A.2d 744 (N.H. 2002), the court struck a pre-existing statute that explicitly allowed school districts to fail to meet certain minimum standards if "'the financial condition of the school district . . . warrant[s] delay in full compliance,'" *id.* at 754, reasoning that "[t]he State's duty [to provide a constitutional adequate education] cannot be relieved by the constraints of a school district's tax base or other financial condition" and that such statute was facially inconsistent with state duties because it tolerated noncompliance with adequacy standards. *Id.* at 755. And in *Rose v. Council for Better Education,* 790 S.W.2d 186 (Ky. 1989), the Kentucky Supreme Court invalidated the entire Education Article of the state code. *See also, e.g.*, *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990) (minimum aid provisions of state school funding statute held unconstitutional because of effect on poor urban districts); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (statutory funding scheme found unconstitutional).

CONCLUSION

For the reasons set forth in Section I above, the appeal should be dismissed. If the appeal is not dismissed, judgment of the circuit court should be affirmed for all the reasons set forth in Section II.

Respectfully submitted,



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