IN THE CIRCUIT COURT
FOR BALTIMORE CITY

KEITH A. BRADFORD, et al., Plaintiffs, v. MARYLAND STATE BOARD OF EDUCATION, et al., Defendants.	Case No. 94340058/CE 189672
BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY, et al., Plaintiffs, v. MARYLAND STATE BOARD OF EDUCATION, et al., Defendants.	Case No. 95258055/CL202151

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes, and Regulations

Court Rules

Other Authorities

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

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

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

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

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

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

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

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

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

BACKGROUND

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

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

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

A. The 1996 Summary Judgment and the Consent Decree

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

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

Dkt 62A, Plaintiffs' Opp. to State Mot. for Summary Judgment, Sept. 17, 1996, at 15 n. 15.[3] On October 18, 1996, however, based on an extensive and essentially undisputed factual record, this Court entered partial summary judgment for the Plaintiffs instead, finding that Baltimore City schoolchildren were not receiving the "thorough and efficient" education the Maryland Constitution guarantees. The Court first held, following the Court of Appeal's decision in *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 619, 638-39 (1983), that the "thorough and efficient" language of Article VIII requires that "all students in Maryland's public schools be provided with an education that is adequate when measured by contemporary educational standards." Exhibit B, Dkt. 66, Order, Oct. 18, 1996. Next, the Court found "no genuine material factual dispute in these cases as to whether the public school children in Baltimore City are being provided with an education that is adequate when measured by contemporary educational standards." *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Interim Expert Evaluation and the June 2000 Declaration

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

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

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

As the Consent Decree permitted, the Board promptly sought additional funding from the State, both through the normal budget process, as permitted by paragraph 52 of the Decree, and through a specific request to the State, as permitted by paragraph 53. The Board's paragraph 53 request was contained in a "Remedy Plan," requesting approximately $265 million, or $2,650 per pupil at then-current enrollment levels, in order to fund a programs and services designed to benefit students facing the risk of educational failure. Ex. C, Dkt. 10/0, Opinion, June 30, 2000, at 16-17.[4]

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

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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 $49.7 million "downpayment" on the programs and services for which the system had the most immediate and critical need. *Id.* at 17.

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

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

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

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

C. The State Appeals and Abandons its Appeal

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

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

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

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

D. The Thornton Commission and the Bridge to Excellence Act

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

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

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

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

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

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

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

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

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

E. The Circuit Court's Decision to Retain Jurisdiction

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

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

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

The State did not attempt to appeal the 2002 order.

F. The August 2004 Proceedings

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

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

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

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

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

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

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

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

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

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

the issue of its continuing jurisdiction, and determine whether the Consent Decree should then be additionally extended for good cause." *Id.* at 68; Dkt 50/0, Order, Aug. 30, 2004, ¶ 5.[5]

G. The State Reduced Full Thornton Funding Starting in 2007

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiffs also reasonably relied on the terms of the Bridge to Excellence Act, which required the State to hire a consultant to re-assess the adequacy of funding under the State's formula in 2012. *See supra* at 24. The State, however, delayed compliance, not issuing the Request for Proposal for a study consultant until 2014; as a result, the adequacy study final report was not submitted until December 2016. *See* APA Final Report, *at* http://marylandpublicschools.org/Documents/adequacystudy/AdequacyStudyRFP_R00R4402342.pdf. Had it not been for the ACLU's efforts on behalf of the Plaintiff class, the delay would have been even greater. The State initially proposed delaying the start of the consultant's work until 2016, but after considerable advocacy from the ACLU the State limited the delay. Verdery Aff. ¶¶ 23-24. Once the consultant began its work, representatives for the Plaintiffs served on the Stakeholder Advisory Group selected by the State to provide input to the adequacy study

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

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

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

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

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

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

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

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

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

3. Any Delay Has Not Prejudiced the State.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

followed in subsequent proceedings. "The law of the case doctrine generally provides that a 'legal rule of decision between the same parties in the same case' controls in subsequent proceedings between them" and typically "'remains binding until an appellate court reverses or modifies it.'" *Ralkey v. Minn. Min. & Mfg. Co.*, 63 Md. App. 515, 520 (1985) (quoting 21 C.J.S. § 195 at 330 (1940)). This is not always a hardened rule that binds the Court and constrains its discretion to reconsider earlier rulings by a prior judge. *See Baltimore Police Dep't v. Cherkes*, 140 Md. App. 282, 300-01 (2001) (affirming that successor judge is not bound by rulings by prior judge). However, where the affected party *fails to appeal* the ruling, then the law of the case *is* binding. *See Ralkey*, 63 Md. App. at 521 (affirming that trial court ruling may qualify as binding law of the case if it is not appealed) (citing *Acting Dir., Dep't of Forests & Parks v. Walker*, 39 Md. App. 298, 302 (1978)); *Wheeler v. Wheeler*, 636 A.2d 888 (Del. 2993) (voluntary dismissal of appeal made underlying decision law of the case). That is what happened here. This Court rejected the political question and "no authority under consent decree" arguments, and the State dismissed its 2001 appeal raising these exact issues just one week before oral argument in the Court of Appeals, thereby triggering application of the rule.

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

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

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

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

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

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

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

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

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

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

The State is correct that a Consent Decree is both a binding contract and a binding judgment. But the State ignores the actual language of the Decree and this Court's orders under it. This Consent Decree was not a case settlement through which the parties trade concessions, abandon their pending litigation, and cease work. In that type of settlement – the type at issue in the cases the State cites[8] – it is accurate that the settlement extinguishes the underlying claims, meaning any future claims lie only for breach of the settlement. Here, however, the Consent Decree did more than just fashion an immediate, one-time resolution. In language that the State ignores, the Decree recognizes that this Court had already found a constitutional violation – "the public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards"—and accordingly was intended to "provide a meaningful and timely remedy ... to meet the best interests of the school children of Baltimore City." Ex. A, Dkt. 77, Consent Decree, Nov. 26, 1996, at 2-3. Accordingly, the parties agreed in the Consent Decree to do two things immediately: (1) address the State's concerns by

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This improbable argument fails for numerous reasons:

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

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

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

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

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

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

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

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

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

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

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

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

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

> In contrast to New Jersey and West Virginia, Maryland has, by legislation, and by regulations and bylaws adopted by the State Board of Education, established comprehensive statewide qualitative standards governing all facets of the educational process in the State's public elementary and secondary schools. *See* Code, Education Article; COMAR Title 13A. *No evidentiary showing was made* in the present case—indeed no allegation was even advanced—*that these qualitative standards were not being met in any school district, or that the standards failed to make provision for an adequate education, or that the State's school financing scheme did not provide all school districts with the means essential to provide the basic education contemplated by § 1 of Art. VIII of the 1867 Constitution.* ***The trial court did not find that the schools in any district failed to provide an adequate education measured by contemporary educational standards***. Simply to show that the educational resources available in the poorer school districts are inferior to those in the rich districts does not mean that there is insufficient funding provided by the State's financing system for all students to obtain an adequate education.
>
> The record in this case demonstrates that Maryland has continuously undertaken to provide a thorough and efficient public school education to its children in compliance with Article VIII of the Maryland Constitution. That education need not be "equal" in the sense of mathematical uniformity, so long as efforts are made, as here, to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child. *The current system, albeit imperfect, satisfies this test.*

Id. at 639 (emphasis added).

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

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

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

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

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

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

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

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

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

1. General Principles.

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: August 23, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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