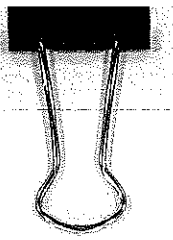

KEITH BRADFORD, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF EDUCATION,	*	BALTIMORE CITY
Defendant.	*	Case No.: 24C94340058

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AND IN OPPOSITION TO DEFENDANT'S SECOND MOTION TO DISMISS PLAINTIFFS' PETITION FOR FURTHER RELIEF AND DISSOLVE CONSENT DECREE

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Although Defendant terms its filing a Motion to Dismiss and alleges that it is based on a change in Plaintiffs' theory of the case and supposedly new developments in the Maryland legislature, these characterizations are contradicted by the substance of its filing and the history of this case. The reality is that both Defendant's arguments regarding the impact of the legislation on this case, as well as the purported insufficiency of Plaintiffs' claims, have been raised previously by Defendant and rejected by this Court.

In its First Motion to Dismiss and at oral argument, Defendant specifically argued that pending legislation mooted and then later required staying Plaintiffs' case. As Plaintiffs explained, the legislation was insufficient because: 1) it can be eroded just as was the Bridge to Excellence in Education Act; 2) it provides for a phase-in of funding that does not fill the State's admitted adequacy gap for programmatic funding from FY 2017 until FY 2024, at earliest; and 3) it has no impact on facilities which, given a several billion dollar shortfall, remains a vital part of the case. For these reasons, the Court previously denied the First Motion to Dismiss and later refused to stay the case.

Furthermore, as stated in Plaintiffs' Petition for Further Relief (Dkt. 98/0) ("Petition"), Plaintiffs' Opposition to Defendant's First Motion to Dismiss, oral argument on that Motion, and most recently in Private Plaintiffs' and Plaintiff Baltimore City Board of School Commissioners' interrogatory responses, Plaintiffs' claims concern ongoing violations of Article VIII arising out of the current conditions affecting class members attending schools within the Baltimore City Public School System ("BCPSS"). The Consent Decree and the Court's previous decisions remain relevant because Defendant's failure to comply with them provides the basis for the Court's jurisdiction, and explains the factual circumstances that led to the current funding shortfall harming

students in BCPSS. To the extent that Defendant argues there has been any change in Plaintiffs' position, it is based on a selective reading of parts of the relevant documents and transcripts.

At base, the arguments in Defendant's Second Motion to Dismiss simply repeat its arguments from its First Motion to Dismiss (*see* Dkt. 105/0), and are an untimely attempt to either convince the Court to reconsider and reverse its previous decision on jurisdiction and the impact of the legislation on this case, or to improperly provide additional bases for Defendant to raise in an appeal of the previous jurisdictional decision. Accordingly, Plaintiffs respectfully request that the Court either: 1) strike Defendant's Second Motion to Dismiss because it amounts to an untimely motion for reconsideration, an unnecessary consumption of the Court's resources, and a premature move for summary judgment; or 2) deny Defendant's Motion for the same reasons the Court previously rejected Defendant's First Motion to Dismiss.

I. The Legislation Does Not Warrant the Dismissal of Plaintiffs' Claims.

Although Defendant titles its filing a motion to dismiss, it liberally relies on a wide array of material that is beyond the Petition, much of which is relevant to the parties' pending discovery requests and will be the subject of expert reports. Rather than have the Court consider all of these materials, Defendant asks the Court to "dismiss" Plaintiffs' claims based on a selective sampling of evidence extraneous to the Petition, supposedly supporting Defendant's position. Accordingly, the Court should strike Defendant's Second "Motion to Dismiss".

Even were the Court to consider Defendant's Second Motion to Dismiss, a quick review of Defendant's First Motion to Dismiss, as well as its presentation at oral argument regarding that Motion, reveals that its present arguments are identical to those it raised previously, as well as in its further redundant Motion to Delay Establishment of a Litigation Schedule after the Court rejected its First Motion to Dismiss. For the same reasons Plaintiffs previously expressed, the Court should again reject these arguments.

A. Plaintiffs' Motion to Dismiss Should be Stricken as a Premature Motion for Summary Judgment.

Maryland Rule 2-322(c) dictates the circumstances under which a motion to dismiss must be treated as a motion for summary judgment:

> If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501.

Accordingly, "when a trial judge is presented with factual allegations beyond those contained in the complaint to support or oppose a motion to dismiss and the trial judge does not exclude such matters, then the motion shall be treated as one for summary judgment." *Okwa v. Harper*, 360 Md. 161, 177 (2000).

Although Defendant describes its motion as a Motion to Dismiss, its arguments rely heavily on a wide range of material external to the Petition. Defendant's Motion relies on, among other things, the Fiscal Note for HB 1300, an exhibit created by the Maryland Department of Legislative Services ("DLS") regarding the impact of state legislation, and a separate exhibit related to the impact of federal legislation on BCPSS, each of which allegedly posits the amount of funding that shall be provided to each local education agency ("LEA"). Mot. to Dismiss Pl.'s Pet. for Further Relief & Mot. to Dissolve Nov. 26, 1996 Consent Decree at 7-8, 13-14 (Dkt. 183/0). Relying on these materials, Defendant presumes and argues that any complaints Plaintiffs may have regarding the amount of programmatic funding for students in BCPSS have been satisfied. *Id*. at 22. To consider these materials, which are not in the Petition and the accuracy and impact of which are subject to material dispute, would be improper at the motion to dismiss stage.

Nor does the fact that Defendant has chosen to publicly post some of these materials make them a proper subject for judicial notice. Facts that are in dispute, particularly if they lay at the

center of a party's claims, are not a proper subject for judicial notice. *See Abrishamian v. Wash. Med. Grp.*, 216 Md. App. 386, 415 (2014); *Attorney Grievance Comm'n of Md. v. Bear*, 362 Md. 123, 138, 763 A.2d 175 (2000) ("[A] court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it") (citations and quotation marks omitted); *see also* Md. Rule 2-501(b) ("A judicially fact must be one not subject to reasonable dispute. . . . "). As discussed below, Plaintiffs dispute the materials because, as Defendant admits, the projected numbers in the state charts do not necessarily reflect the amounts that will in fact be provided to each LEA once Defendant completes its calculations. *See* Ex. A, Brooks Dep. at 136:5–12 (Q: "[A]re the amounts on this page the amounts that will actually be provided under HB 1300?" A: "I don't know the answer to that. I think because of the number of things that potentially would change between now and FY '30. But I believe this is what the Department of Legislative Services is projecting that it would be."). Rather, they provide only an estimate of what will be provided each year. *Id*. at 135:21–136:4 (Q: "What do you understand this page as providing?" A: "I understand this to be the Department of Legislative Purposes' [sic] estimates with regard to the recommendation of how additional funding could be phased in under the recommendations.").

Exhibit D to Defendant's Second Motion to Dismiss, related to the impact of federal funding on BCPSS, is simply an untitled document with names of LEAs and numbers. The document does not appear to be publicly available; nor has it provided any explanation how the calculations therein are made. Accordingly, the numbers in each are not undisputed facts of which courts may take judicial notice. *See Abrishamian*, 216 Md. App. at 416 (refusing to take judicial notice of facts where the party "wasn't simply asking the court to notice judicially the existence of the pleadings – he wanted the court to assume the truth of the assertions within those pleadings");

Walker v. D'Alesandro, 212 Md. 163, 169 (1957) (permitting trial court to take judicial notice that the defendant was the Mayor of Baltimore City, but finding error in its taking judicial notice that he was acting in his official capacity with respect to the underlying claims).

Defendant's Second Motion to Dismiss, with its reliance on extrinsic materials as purported facts, is more properly treated as a motion for summary judgment, albeit a premature one given the information is yet to be produced and presented to the Court. Defendant raised precisely this argument — that Plaintiffs' case was unnecessary in light of state legislation — in its First Motion to Dismiss, and then later as a basis to stay discovery in this case. *See* Ex. B, 12/12/19 Hr'g Tr. 6:10–13, 61:1–14; Def.'s Mot. to Defer Establishment of Litig. Schedule Pending Legislative Session (Dkt. 112/0). Both attempts failed. *See* Mem. Op. & Order (Dkt. 105/8) (Jan. 16, 2020) (denying Defendant's Motion to Dismiss); Order (Dkt. 112/2) (Mar. 3, 2020) (denying Defendant's Motion to Defer Establishment of Litig. Schedule Pending Legislative Session (Dkt. 112/0)); and Case Management Order No. 2 (Dkt. 118/0) (setting a timeline for discovery despite Defendant's request that the case be stayed pending completion of legislative session).

Since then, both parties have produced and undertaken significant discovery precisely as to whether the legislation satisfies Plaintiffs' complaints. Plaintiffs served several document requests related to, among other things, the calculations underlying the legislation, as well as any conclusions that the legislation provides sufficient funding for an adequate education. *See e.g.,* Ex. C, Pls.' Second Set of Reqs. for the Produc. of Docs. to Def. No. 4 ("All documents providing the data underlying the funding formula estimates (state aid and local obligation) for the revised fiscal note for House Bill 1300 during the Maryland General Assembly's 2020 Legislative Session, found here: http://mgaleg.maryland.gov/2020RS/fnotes/bil_0000/hb1300.pdf"); Ex. D, Pls.' First Set of Reqs. for the Produc. of Docs. to Md. Dep't of Legislative Servs. No. 3 ("All documents

providing the assumptions, formulas, data and calculations underlying the funding formula estimates (state aid and local obligation) for the revised fiscal note for House Bill 1300 during the Maryland General Assembly's 2020 Legislative Session"). Plaintiffs deposed the Maryland State Board of Education's corporate representative, questioning him extensively regarding the amount of funding that would be provided to each LEA in Maryland, *see* Ex. A at 136, the sufficiency of the amount of funding provided, *see id.* at 138, differences between the amount of funding provided by the Kirwan Commission and HB 1300, *see id.* at 104–41, requirements as to what that funding would be used for, *see id.* at 210, mechanisms in place to measure the sufficiency of the amount of funding, *see id.* at 172, and why the amount of funding is less than the amount that two separate state appointed commissions had determined was necessary, *see id.* at 145–46. Importantly, Defendant's representative, Mr. Stephen Brooks, refused to answer questions related to several of these matters because Defendant had not yet completed its work regarding the impact of the legislation. *See e.g., id.* at 148.

In July 2021, Plaintiffs filed a Motion to Compel the DLS to respond to discovery requests regarding the basis for the calculations in the same Fiscal Note and Chart on which Defendant now relies. *See* Pls.' Mot. to Compel DLS (Dkt. 155/0) (July 6, 2021). DLS, represented by counsel for Defendant, has refused to produce this information, thus barring Plaintiff, and the Court, from testing Defendant's current arguments that the legislation will be sufficient to provide BCPSS a constitutionally adequate education. Ex. E, DLS' Opp'n to Pls.' Mot. to Compel. Despite not producing any discovery that was not publicly available, now Defendant advances the exact argument Plaintiffs predicted it would, based on the subject matter at issue in the discovery dispute. *See* Mot. to Compel 3 (explaining discovery from DLS is necessary because "the State has indicated that it intends to argue in this case that the funding provided by HB1300 following the

Kirwan Commission's recommendations essentially moots Plaintiffs' claim in this case because the funding will provide Baltimore City with more than necessary to achieve an adequate education."). Defendant's continued and repeated reliance on the state legislation, while refusing to produce discovery because it claims that it is irrelevant, Ex. E at 8–11, is reason to deny Defendant's Second Motion to Dismiss for improper discovery gamesmanship, and also further reason to grant Plaintiffs' Motion to Compel DLS.

Even if Plaintiffs' Motion to Compel DLS is denied, the parties anticipate further expert discovery in the coming months as to the sufficiency of the amount of funding the legislation may provide. On November 22, 2021, Plaintiffs served Defendant with five separate expert reports, two of which explicitly address the amount of funding that is needed for BCPSS to provide children an adequate education. Ex. F, Report of Dr. Bruce Baker; Ex. G, Report of Dr. Kirabo Jackson. Defendant has yet to serve its responsive expert reports, which may include the final results of a state-wide assessment of all BCPSS facilities, of which the parties have previously informed the Court. Third Mot. to Modify Scheduling Order ¶ 6 (Dkt. 175/0) (Sept. 17, 2021) (seeking to extend the discovery period so that the parties may consider the preliminary results of the State's assessment of school facilities); Ex. H, MSBE Answers to City of Baltimore's Interrogs., No. 11 ("[T]he Answer to the Interrogatory can be ascertained from the documents produced to date and that will continue to be produced by the IAC relating to the ongoing study of facilities being conducted by Bureau Veritas."). Although Defendant has produced preliminary assessments of all facilities, Defendant has admitted that these scores are incomplete and will be adjusted over the course of the next four months. *See* Ex. I, Workgroup on the Assessment & Funding of School Facilities 5 (noting that the Facility Conditions Index Score must be combined with the

Educational Sufficiency Factor to determine the final score for each school). To decide this matter now would prevent either party, and in particular Plaintiffs, from accessing this vital information.

For this same reason, were the Court to consider these materials and to dismiss Plaintiffs' case at this stage, that would be an inefficient use of both the parties and the Court's resources and time. *See* Def.'s Mem. in Supp. of Mot. to Dismiss 26 (Dkt. 183/0) (arguing that allowing the case to continue would be an inefficient use of the Court's resources). The parties have spent more than 16 months conducting depositions of multiple state representatives, and requesting, receiving, and reviewing thousands of pages of documents. Plaintiffs also have incurred significant costs in engaging five separate experts to prepare reports regarding the impact of the legislation and, specifically, the sufficiency of the amount of funding provided therein. Defendant would deny Plaintiffs the opportunity to present this evidence to the Court so that it may decide based on the complete record, as opposed to what Defendant unilaterally claims will occur in future years while simultaneously refusing to provide the factual support for such claims in discovery.

B. Defendant's Attempts to Dismiss the Litigation Duplicates Its Unsuccessful Previous Attempts and, if Considered, Should Again Be Rejected Again.

As noted above, this is the third attempt by Defendant to dismiss or stay this case on account of the same legislation that has served as the basis for the prior two unsuccessful attempts. This latest duplicative attempt, less than two years after Defendant last raised this argument, violates the law of the case, and is tantamount to an untimely motion for reconsideration.

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. Mining & Mfg. Co.*, 63 Md. App. 515, 520 (1985) (quoting 21 C.J.S. § 195 at 330 (1940)).

For the same reason, Defendant's Second Motion to Dismiss is, in effect, an untimely motion for reconsideration of the Court's denial of the First Motion to Dismiss, presenting no new facts or law that the Court overlooked, while failing to acknowledge the repetitive nature of its arguments. *See Khodor v. Whiteford, Taylor & Preston*, No. 24-C-04-006528, 2005 WL 1983370, *7 (Cir. Ct. Md. June 13, 2005) ("[T]he burden of proof for the proponent on a motion for reconsideration is extremely high. A motion for reconsideration 'is a request for extraordinary relief that may be granted only upon a showing of exceptional circumstances.'" (quoting *Sanders v. Clemco Indus.*, 862 F.2d 161, 169 n.14 (8th Cir. 1998) (citation omitted)).

Defendant initially raised the state legislation at issue in its First Motion to Dismiss. It emphasized that in most recent session at the time, the legislature had "enacted the Blueprint for Maryland's Future . . . adopting the Kirwan Commission's policy recommendations as State policy for public education in Maryland." Mot. to Dismiss Pls.' Pet. for Further Relief 30 (Dkt. 105/0) (June 19, 2019). Defendant then went on, as it does in its current arguments, to emphasize the amount of funding that would allegedly flow to Baltimore as a result of the law's passage. *Id.*

The Court was well aware of the legislation at the time it denied Defendant's First Motion to Dismiss. During the December 12, 2019 argument on that Motion, this Court opened the proceedings by asking both parties "what impact, if any, does the fact that the funding issue is currently and very actively being considered by the executive and the legislative branches have on this litigation[?]" Ex. B at 6:10-13. Receiving no response from Defendant, the Court raised the point directly with its counsel on rebuttal: "And so the Court is to wait and see if the Kerwin [sic] Commission does that for this legislative session? Is that what I am to do?" *Id*. at 60:22–24. Defendant responded affirmatively: "the Kerwin [sic] Commission's recommendations, if adopted, or even if partially adopted, will revolutionize the system in such a way that would moot

many of the issues that require a completely different analysis." *Id*. at 61:1–4. The Court questioned whether this justified the dismissal of Plaintiffs' case, reasoning that "in some courtroom, at some point, somebody argued the same with the Thornton Commission[.]" *Id*. at 61:6–8. Plaintiffs, in response, explained exactly why the proposed legislation was insufficient, even if it passed. *Id*. at 42:11–43:14.

First, Plaintiffs explained there remained uncertainty as to whether the funding initially planned would actually be provided. *Id*. at 43:8–14 ("[I]t's not clear if they're actually passed into legislation whether or not there will be further cuts in the future which is a situation we dealt with in the Bridge to Excellence Act where it called for increases in funding all the way until 2008, but by 2007 the State was already cutting the inflation adjustments for Fiscal Year 2009 and Fiscal Year 2010."). As noted above, Defendant's corporate representative has conceded this remains the case.

Second, Plaintiffs explained that while the amount of funding proposed in the legislation is significant, it pales in the face of the even larger amount needed to close the adequacy gap required to provide students in BCPSS a thorough and efficient education. *Id*. at 44:1–5 ("[A]ssuming that they're actually passed sometime soon and assuming that they're not cut in the future as was done with the Bridge to Excellence in Education Act[, they] don't provide a sufficient amount to cover the 342 million dollar annual adequacy gap until 2030.").

Finally, Plaintiffs explained that the legislation upon which Defendant was relying, and now again relies, does not cover the separate $3 to $5 billion shortfall needed to ensure BCPSS school facilities are in adequate condition. *Id*. at 43:15–23 ("Our case also addresses facilities. Facilities are not taken into consideration for the Kerwin [sic] Commissions [sic] work. So that's a huge problem especially given by -- given the school districts numbers based on a 2012 report.

There's somewhere between a $3 billion and $5 billion shortfall for Baltimore City Public Schools and that's based on the results of the Jacobs report which we put in as an exhibit in our petition."). The Court ultimately allowed the case to go forward, despite Defendant's arguments regarding the alleged impact of the proposed legislation. *See* Mem. Op. &Order (Dkt. 105/8) (Jan. 16, 2020) (denying First Motion to Dismiss).

Nonetheless, Defendant again attempted to use legislation to delay the litigation after the Court denied its First Motion to Dismiss. On February 14, 2020, Defendant filed a Motion to Defer Establishment of a Litigation Schedule Pending the Legislative Session. (Dkt. 112/0). The arguments therein mirrored those Defendant duplicates now. Defendant noted that the Speaker of the House had recently introduced HB 1300, which allegedly "addresses matters that go to the heart of the relief Plaintiffs seek, including a new formula for education funding[.]" *Id*. at 1–2. As it does here, Defendant then went on to cite DLS estimates on the amount of funding that would be provided to BCPSS. *Id*. at 2. Defendant also cited the Built to Learn Act and made similar arguments as it does here, noting that "the[] work on the pending legislation may resolve some and potentially all of the material issues in the case." *Id*. at 3.

In response, Plaintiffs clearly stated that the legislation did not "justify a stay of discovery because it will not resolve this case." Pls.' Opp'n to Mot. to Defer at 5 (Dkt. 112/1). They explained further:

> It is undisputed that the legislation even if passed, in spite of Defendant's efforts to the contrary, will not satisfy the $342 million operations deficit affecting children attending BCPSS for more the decade. *See* Plaintiffs' Opposition to Defendant's Motion to Dismiss, at 23-24 (citing Dep't of Legis. Servs., Follow-up from July 24, Meeting, Aug. 1, 2019, at 2); Def's Motion to Stay, at 2 (explaining that the legislation will only provide $90 million in additional funding in FY 2021, while the total amount will be phased in "over the rest of the decade"). Likewise, the facilities legislation referenced in Defendant's motion will not fulfill the $3 billion

> facilities shortfall affecting students attending BCPSS. *See* Plaintiffs' Petition for Further Relief, at 42; Def's Motion to Stay, at 2 (outlining $420 million in additional school construction funding).

Id. The Court denied Defendant's Motion to Defer and set a schedule for discovery which the parties have relied upon during the last 16 months and have devoted enormous resources towards completing. Case Management Order No. 2 (Dkt. 118/0).

Accordingly, Defendant's arguments, though it frames them as novel and thereby meriting a second motion to dismiss, are in fact just an attempt to reargue positions the Court has already rejected. Defendant has established no good cause to consume this Court's valuable resources dealing with redundant arguments for the third time. The Second Motion to Dismiss should be stricken as improper, or again denied for the same reasons as the prior motions.

C. Plaintiffs Have Sufficiently Alleged and Can Prove That the Legislation Does Not Moot Plaintiffs' Claims.

Even were the Court to take the unnecessary step of entertaining Defendant's arguments on the merits again, they would fail again. Plaintiffs have sufficiently alleged and, as discussed below, can prove that there remain serious inadequacies that remain unresolved despite the passage of the legislation that Defendant relies upon. As Plaintiffs noted in the Petition and in response to the First Motion to Dismiss, the legislation is insufficient to address the Article VIII violations alleged given the size of the adequacy gap, the delay before the amounts pledged will be provided and fully phased in, and language in the legislation allowing the amounts forecasted to be reduced.

Likewise, although Defendant vaguely asserts that the Built to Learn Act addresses Plaintiffs' claims regarding the facility conditions in BCPSS, the entire state-wide value of the Act is less than the amount Plaintiffs allege is needed to repair BCPSS facilities alone. Although Plaintiffs' allegations are sufficient to defeat Defendant's Second Motion to Dismiss, materials

produced in discovery further support the conclusion that the legislation is insufficient to address Plaintiffs' claims.

1. The Legislation Does Not Resolve Plaintiffs' Claims Regarding the Lack of Sufficient Programmatic Funding for BCPSS.

Although Defendant claims that the purpose of Plaintiffs' Petition was the passage of HB 1300, *see* Second Mot. to Dismiss 26 (Dkt. 183/0), Defendant's argument is undercut by the explicit terms of Plaintiffs' Petition and Memorandum in Support, which make clear that the amounts provided for in the legislation are insufficient to address the lack of funding for programs in BCPSS.

Plaintiffs' Memorandum in Support of the Petition devotes an entire section to outlining the amount of programmatic funding needed to address the constitutional deficiencies identified in the Petition — amounts that are well beyond those the legislation supposedly will provide BCPSS in the future. *See* Mem. in Supp. of Pet. at 15–24 (Dkt. 98/0). According to the Petition, by Defendant's own estimates, the State has underfunded BCPSS programs by somewhere between $290 and $353 million annually, as of FY 2015. *Id*. at 16. As Plaintiffs noted, this amount was merely one measure of the programmatic funding that may be needed. Plaintiffs also noted that BCPSS has provided the State a comprehensive plan outlining the types of programs and services required to provide students in BCPSS an adequate education. *Id*. at 21. Ultimately, as Plaintiffs' request for relief made clear, the $290 million to $353 million estimate was just the minimum of what the constitutional standard requires, and, therefore, the Court should order Defendant to develop a comprehensive plan for full compliance with Article VIII of the Maryland Constitution, which would take into account seven different measures to determine the amount of funding needed, including, among other things, the amount necessary to bring BCPSS into full compliance with the terms of BCPSS' World Class Plan. *Id*. at 75–76.

Although the Memorandum in Support of the Petition mentioned the delay of the Kirwan Commission's work, it did so to highlight that this delay "compound[ed]" the harm from the ongoing failure to provide sufficient funding. *Id*. at 19. In fact, Plaintiffs' Petition explicitly noted that even once the Commission completed its work, there was "no promise of adequate funding at the end." *Id*. at 20.

Defendant's Second Motion to Dismiss, unsurprisingly, makes no mention of these facts, but instead focuses on a discussion of Plaintiffs' legislative efforts to support passage of the legislation based on the Kirwan Commission's work. Second Mot. to Dismiss 25–26 (Dkt. 183/0). Defendant's argument is flawed for two reasons. First, although Plaintiffs discussed their efforts in support of the legislation, the discussion arose in the context of responding to Defendant's argument that Plaintiffs' claim should be barred by laches because of their alleged failure to seek relief since 2004 — not because it circumscribes the relief Plaintiffs seek. Pls.' Opp'n to First Mot. to Dismiss at 38 (Dkt. 105/1) (Aug. 23, 2019). The relief Plaintiffs seek is, as discussed, described in detail in the portion of the Petition explicitly claiming to do so. Mem. in Supp. of Pet. at 74–77 (Dkt. 98/0).

Second, merely because Plaintiffs, in a non-litigation capacity, sought passage of legislation does not foreclose them from later seeking greater relief in litigation. To hold otherwise would encourage an all-or-nothing approach, in which Plaintiffs would be discouraged from using the legislative process for fear that engaging in such a process would later foreclose them from fully vindicating their constitutional rights. As with Defendant's other arguments, this is a position which the parties previously disputed at the hearing on its First Motion to Dismiss, s*ee* Ex. B at 41:18–25 ("I think normally the State complains when civil rights lawyers are quick to run to court and essentially call for use of the legislative and executive process. I mean, there's some

inconsistency in the State at once arguing that this is a political question, that it's something for the legislature and then at the same time faulting us for using precisely legislative mechanisms that we did."). The Court ultimately rejected Defendant's argument. *See* Mem. Op. & Order at 7–8 (Dkt. 105/8) (Jan. 16, 2020) (noting that laches was inapplicable because Plaintiffs "have continued to raise the issue of inadequate funding through numerous methods over the years.").

Even if Plaintiffs had limited their request for relief to only the $353 million in annual additional funding that the State's own contractor conceded was necessary in FY 2015, HB 1300 would not resolve Plaintiffs' claims. As discussed above, Defendant conceded that the projections on which it now relies are merely DLS's estimates of the amount of funding that may be provided, and do not in fact guarantee that the amounts of funding projected will actually be provided. Should Defendant provide less than what it estimates, as Defendant admits it may, Plaintiffs would have no judicially enforceable commitment to seek the amounts estimated.

Even if these projections turn out to be accurate, HB 1300 explicitly provides that any increases in funding provided may be abandoned if the state's economy is estimated to grow less than 7.5% over the course of any year. *See* HB 1372, Section 19. Furthermore, the Governor has stated that he would like to revisit the legislation in the next legislative session, because he has concerns about how to pay for it. *See* Elizabeth Shwe, *Hogan Allows 'Kirwan 2.0' to Become Law Without His Signature*, Maryland Matters (Apr. 2, 2021), https://www.marylandmatters.org/2021/04/02/hogan-allows-kirwan-2-0-to-become-law-without-his-signature/ (quoting the Governor saying: "The General Assembly will need to once again rewrite the original legislation to address these critical fiscal flaws in the 2022 legislative session."). As Defendant conceded, the lack of economic growth led to the State's failure to increase funding in accordance with the Bridge to Excellence in Education Act which was passed

to allegedly resolve Plaintiffs' claims in 2000, exacerbating the adequacy gap of which Plaintiffs now complain. APA Consulting, *Final Report of the Study of Adequacy of Funding for Education in Maryland* at ii (Nov. 30, 2016), https://www.marylandpublicschools.org/Documents/adequacystudy/AdequacyStudyReportFinal112016.pdf. Nonetheless, Defendant again asks the Court to dismiss Plaintiffs' Petition notwithstanding the Court's prior rejection of the same arguments, and while admitting that the same problems which led to the Petition will likely repeat themselves.

Furthermore, assuming for sake of argument that the projections are accurate and that the projected amounts are actually provided, despite language in the legislation and the Governor's explicit statements to the contrary, the FY15 $353 million annual adequacy gap would be met no sooner than FY 25. *See* Second Mot. to Dismiss (Dkt. 183/0), App. C (projecting that $356.4 million in additional state aid will supposedly be provided in FY 25). As explained in the Petition, and in keeping with common sense, the cost of education increases over time. Mem. in Supp. of Pet. 13 (Dkt. 98/0) (noting that the Court has previously "found that due to increased costs, the funding increases previously determined to be necessary should be adjusted to reflect the increased costs of education." (internal quotations and citations omitted)). Accordingly, by FY25, the $353 million estimate will be much larger than it was almost a decade earlier. Thus, the actual adequacy gap will not be met, even hypothetically, until several years thereafter.

Finally, as noted in Plaintiff BCPSS's interrogatory response, even if this adequacy gap were to be filled in the future, it would not remedy the cumulative effects of almost fifteen years of ongoing and increasing adequacy gaps. *See* Ex. J, BCPSS' Answers to Def.'s Interrogs. 22 ("And the Kirwan legislation still does not make up for accumulated gaps in baseline funding for

City Schools over numerous years, as determined by the Court in its Orders and described further in this response.").

The evidence currently produced in discovery and the work of Plaintiffs' experts support this conclusion. According to the preliminary projections of Plaintiffs' programmatic funding expert Dr. Bruce Baker, BCPSS needs at least $429 million additional annually as of FY22. *See* Ex. F at 9, Figure E1. By FY24, this number will have increased to at least an additional $528 million. *Id*.

2. The Legislation Does Not Resolve Plaintiffs' Claims Regarding the Lack of Funding for BCPSS Facilities.

Defendant's argument that the Built to Learn Act resolves Plaintiffs' claims regarding the inadequacy of BCPSS facilities is similarly ill-founded. Second Mot. to Dismiss 6, 13 (Dkt. 183/0). In support of their Petition, Plaintiffs identify a series of facility-related deficiencies affecting students in BCPSS, including such basics as the lack of working heating and air condition systems, aging plumbing and structural systems, and the lack of funding for ongoing maintenance. Mem. in Supp. of Pet. 41–49 (Dkt. 98/0). Altogether, as alleged in the Petition, 85 percent of the buildings in BCPSS are in poor or very poor condition. *Id*. at 42. Plaintiffs estimate that based on a recent assessment by a third-party contractor, somewhere between $3.1 and $5 billion will be needed to make necessary repairs and improvements to BCPSS facilities. *Id*. at 52. Defendant concedes that the entire value of the Built to Learn Act — which is to be split among all school systems in Maryland — is $2.2 billion, barely over half of the amount needed to address deficiencies in BCPSS alone. Second Mot. to Dismiss 14 (Dkt 183/0). Furthermore, as Defendant concedes, only $420 million, at most, would be directed towards BCPSS. *Id*. This amount is nowhere near what is necessary to make the necessary improvements Plaintiffs allege are needed.

This amount is barely enough to renovate three schools, let alone the 85 percent of BCPSS facilities that Plaintiffs allege in their Petition that are in poor or very poor condition. Ex. J at 28.

As with Plaintiffs' claims regarding the inadequacy of programmatic funding for BCPSS, the evidence produced in discovery supports this conclusion. Robert Gorrell, the Director of the State's Inter-Agency Commission on Facilities, conceded that the State regularly provides BCPSS less funding than it requests to address facility-related deficiencies. For example, "in fiscal year 2022, Baltimore City requested $97,697,000 through the Capital Improvement Program" but the State "Capital Improvement Program funded [only] $29,829,000[.]" Ex. K, Gorrell Dep. 132:22–33:5. Furthermore, in addition to money needed for repairs, the State consistently provides insufficient funds for maintenance, as alleged in Plaintiffs' Petition. Mem. in Supp. of Pet. 48–49 (Dkt 98/0). As Director Gorrell also conceded, BCPSS needs on average 2 percent of its buildings' capital reported value yearly to provide routine maintenance on its facilities. Ex. K, Gorrell Dep 221. This would amount to nearly $100 million annually, far more than the approximately 23 million currently provided. Mem. in Supp. of Pet. 48–49 (Dkt. 98/0). *See also* Ex. J 39–40 (stating that BCPSS needs approximately $200 million annually to perform recommended maintenance); Ex. L, Roseman Report 12 (explaining that BCPSS needs 4% of CRV, as opposed to 2%, to perform adequate maintenance).

3. Defendant's Remaining Arguments Are Unpersuasive.

In effect, Defendant acknowledges the inadequacy of the state legislative efforts, but points to a provision of COVID-related federal funds to BCPSS to justify the deficiency. Second Mot. to Dismiss 14–15 (Dkt. 183/0). As even a preliminary discussion makes clear, however, the impact of federal funds are matters of dispute upon which the parties should be allowed to present evidence, not resolved at the motion to dismiss stage. Defendant's arguments fail to recognize the context that led to the need for the federal funds, as well as the limitations on the funding. The

funding was provided to school districts around the country, including those without adequacy gaps, as a means of addressing the profound education-related impacts of the COVID pandemic, which exacerbated the deficits facing students in low-wealth districts such as BCPSS. *See* U.S. Dep't. of Ed., Office of Elementary and Secondary Ed., *Elementary and Secondary School Emergency Relief Fund*, https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/ ("[T]he Department awarded these grants to State educational agencies (SEAs) for the purpose of providing local educational agencies (LEAs), including charter schools that are LEAs, with emergency relief funds to address the impact that COVID-19 has had, and continues to have, on elementary and secondary schools across the Nation."); SB 3548 ("To provide emergency assistance and health care response for individuals, families, and businesses affected by the 2020 coronavirus pandemic."); *see also* Mike Cummings, *COVID School Closures Most Harm Students From Poorest Neighborhoods*, Yale News (Jan. 5, 2021), https://news.yale.edu/2021/01/05/covid-school-closures-most-harm-students-poorest-neighborhoods ("Pandemic-related school closures are deepening educational inequality in the United States by severely impairing the academic progress of children from low-income neighborhoods while having no significantly detrimental effects on students from the county's richest communities").

For example, by May 2020, BCPSS had prepared, served, or delivered over 700,000 meals, as well as distributed several tons of shelf-stable food or produce through partnerships with the City and the Maryland Food Bank. Ex. M, Education Stabilization Fund Program Elementary and Secondary Sch. Emergency Relief Fund, Md. Local School Sys. Appl. and Cert. 4. Throughout these efforts, BCPSS lost an estimated $16 to $20 million. *Id*. Additionally, in just the first five months of the pandemic, BCPSS spent approximately $9 million from its general reserves to

purchase computers and internet hotspots for BCPSS students who could not afford these items and thus would not have been able to participate in virtual school without them. Ex. N, Baltimore City Public Schools, Presentation to the Maryland Philanthropy Network (August 20, 2020). These are just a few examples. Additional COVID-related expenditures included costs related to: personal protective equipment & PPE distribution; disinfecting facilities, including increasing the number of custodians, purchasing disinfectant supplies, and increased overtime cost for weekly deep cleaning; adjusting the number of students in each classroom pursuant to public health guidance; modifying buildings to promote public health through investments such as plexiglass shields for student desk; enhancing ventilation through strategies such as carbon filters in classrooms and school busses; modifying transportation plans to support hybrid learning scenarios; and hiring additional staff and contractors to support COVID-related work. Ex. M 22. BCPSS anticipates additional funding is required going forward for, among other things, resources for: students with disabilities who face unique challenges engaging in appropriate grade-level content as a result of extended school closures; the homeless student population requiring additional supports for academic recovery work; and additional supports for student social and emotional learning addressing the disparate impact of the pandemic on racially diverse and socio-economically depressed communities. *Id*. at 34–39.

Furthermore, the CARES Act and ESSER funding are a one-time influx of funds while, as explained in Plaintiffs' Petition, the adequacy gap faced by the schools is an annual repeating deficit. *See* U.S. Dep't. of Ed., *Frequently Asked Questions About the Elementary and Secondary School Emergency Relief Fund (ESSER Fund)*, https://oese.ed.gov/files/2020/05/ESSER-Fund-Frequently-Asked-Questions.pdf ("ESSER funds are available for obligation by LEAs and other subrecipients through September 30, 2022"); Mem. in Supp. of Pet. 16 (Dkt. 98/0). Accordingly,

BCPSS cannot significantly increase expenditures, when similar levels of funding from the State may not become available until several years thereafter.

Finally, Defendant points to provisions of HB 1300 that require Defendant to take certain measures, which it alleges mirror the Petition's requests for relief. Second Mot. to Dismiss 24–25 (Dkt. 183/0). However, as Defendant concedes, the required implementation plans have yet to be completed and need not be completed until June 15, 2022. *Id*. at 24. Even if they are completed at that time, neither Plaintiffs nor the Court have any means of knowing at this time whether the plans will sufficiently address Plaintiffs' concerns. It would be inappropriate to dismiss Plaintiffs' claims upon Defendant's unsupported assertion that it will satisfy Plaintiffs' claims somehow next year or later, particularly in light of the history of the case in which Defendant has repeatedly pledged to resolve Plaintiffs' claims only to either delay the changes promised or subsequently amend previous plans to improve the quality of education provided students in BCPSS. *See* Pls.' Opp'n to First Mot. to Dismiss 16–26 (Dkt. 105/1) (Aug 23, 2019).

4. The Cases Cited by Defendant Do Not Support Its Argument.

The fact that the legislation at issue does not actually resolve Plaintiffs' claims easily distinguishes this case from the cases Defendant cites in its brief. *See Hill v. Snyder*, 878 F.3d 193, 204 (6th Cir. 2017) (rejecting plaintiffs' claim challenging the constitutionality of a statute because they "provide[d] no specific information regarding the continued enforcement or application" of the legislation which they challenged). Furthermore, *Kranz v. State*, 459 Md. 456 (2018), upon which Defendant relies, actually supports Plaintiffs' position. In *Kranz*, the state, as Defendant does here, argued that the plaintiff — an individual who had been previously incarcerated, but had been released from custody, sought habeas relief overturning his conviction — no longer had a live claim. *Id*. at 471. However, the Court rejected the state's defense, explaining that although the state had taken the action it claimed, other negative collateral

consequences such as the loss of the ability to serve on a jury and the limitations on employment continued to hinder the plaintiff going forward. *Id*. at 473. Likewise, here, Plaintiffs do not dispute, and have not previously disputed, that Defenant has taken some action that is relevant to Plaintiffs' claims, but that action does not automatically resolve Plaintiffs' claims. *See e.g.,* Pls.' Opp'n to First Mot. to Dismiss 13–16 (Dkt. 105/1) (Aug. 23, 2019) (discussing the passage of the Bridge to Excellence in Education Act in response to the *Bradford* litigation). As Defendant has conceded, necessary funding will not be provided until several years into the future, and even then the amount that will be provided, as well as its sufficiency, remain unresolved and a matter of dispute.

Several other cases Defendant cites are entirely irrelevant to this case, as they arise in different factual circumstances in which either plaintiffs did not seek relief in a timely manner or in which a plaintiff specifically limited its challenge to a statute which was then repealed or altered. *See Voters Organized for the Integrity of City Elections v. Balt. City Elections Bd.*, 451 Md. 377, 394 (2017) (dismissing plaintiffs' claims as moot, not because of intervening legislative change, but because plaintiffs filed their claim too late to impact the election which they were challenging); *Hill*, 878 F.3d at 203–04 (dismissing plaintiffs' claims as moot after legislative repeal where plaintiffs request for relief was explicitly limited to achieving the legislative change which had occurred); *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 645–46 (D.C. Cir. 2011) (dismissing plaintiffs' claim where subsequent legislative action altered the policy definition challenged such that it no longer explicitly covered the plaintiffs).

II. Plaintiffs Have Not Altered Their Litigation Position in the Case.

Defendant's secondary argument — that the Petition should be dismissed because Plaintiffs supposedly "concede" their claims are "not based on any alleged violation of or failure to comply with either the Consent Decree or any Court order," Second Mot. to Dismiss at 27 (Dkt. 183/0) —

is premised on an incomplete and misleading presentation of the record. Contrary to Defendant's argument, the discovery record is consistent with the Petition and Plaintiffs' subsequent filings and arguments. Plaintiffs have consistently asserted that they seek relief related to current conditions in BCPSS, but that Defendant's continuing violations of the Consent Decree through the Court Orders following that Decree are part of this case because: 1) they establish this Court's jurisdiction to hear the Petition and to ensure that Defendant's funding of BCPSS reaches constitutionally adequate levels; and 2) they establish the causes of the existing adequacy gap — Defendant's longstanding failure to fund BCPSS in the amounts this Court previously declared are necessary — and include important conclusions regarding the amount of funding needed to adequately fund BCPSS.

Moreover, even if Defendant's portrayal of the out-of-context snippet from Plaintiffs' interrogatory response were accurate, it would not provide a basis to dismiss Plaintiffs' entire case. The dispute over a single interrogatory — which itself was improper because it did not concern a factual issue of which a named Plaintiff would have personal knowledge — is properly resolved by a follow up request for supplementation, not another duplicative motion to dismiss. Although Defendant terms its filing a Motion to Dismiss, it is, in actuality, better styled as a motion to compel a more detailed response.

Finally, Defendant's Second Motion to Dismiss, as it concedes, is just an attempt to re-argue its previous position from its First Motion to Dismiss that it has satisfied the Consent Decree and the Court's previous Orders and, thus, this Court should supposedly dismiss the case. Defendant's arguments in its Second Motion to Dismiss should be either be struck as being repetitively and untimely raised or rejected again.

A. Private Plaintiffs' and BCPSS' Interrogatory Responses Have Not "Disclaimed" Defendant's Noncompliance Alleged in the Petition.

The lynchpin of Defendant's argument is its representation that Private Plaintiffs and Plaintiff BCPSS have "conceded" or "disclaimed" all allegations of Defendant's noncompliance with the Consent Decree and the Court's prior declarations which, in turn, Defendant argues, eliminates all "good cause" for this Court's jurisdiction and justifies termination of the Decree. Second Mot. to Dismiss at 18, 27 (Dkt. 183/0). To make this argument, however, Defendant omits relevant and critical discovery responses, and presents even the limited responses quoted out of context. Defendant does so because it is, in reality, attempting to re-argue its position from its First Motion to Dismiss that Plaintiffs may not pursue relief for current conditions affecting students attending BCPSS.

1. Private Plaintiffs' Interrogatory Responses Identify Defendant's Violations of the Consent Decree and Previous Court Orders and Do Not Disclaim Their Petition Allegations.

The single snippet of one interrogatory response cited by Defendant fails to establish that Plaintiffs have "conceded" or "disclaimed" all of their Petition and additional allegations. Second Mot. to Dismiss at 18 (Dkt. 183/0). Indeed, in response to Defendant's objectionable interrogatory seeking Plaintiffs to identify "the specific paragraph numbers" of each Court order violated by Defendant, "each act or omission" for each paragraph, and "all corresponding facts, communications, and documents,"[1] Plaintiffs stated that their "Petition concerns Defendant's ongoing violations of Article VIII of the Constitution of Maryland, not the violation of ***specific*** terms of the Consent Decree or the Court's subsequent orders." Second Mot. to Dismiss (Dkt. 183/0), Ex. A at 12 (emphasis added). In the same response, Plaintiffs also stated that "*as of*

[1] Defendant omitted that Plaintiffs objected to the interrogatories that improperly demanded specification and identification of every know act, omission, fact, or document. Second Mot. to Dismiss (Dkt. 183/0), Ex. A at 1–5.

2017 [Defendant] was providing BCPSS with over $300 million less annually ***than was required by the Court's earlier orders***" — which is an express statement of violation of the Court's Orders. *Id*. (emphasis added). Incredibly, the Second Motion to Dismiss omitted this last statement of the interrogatory response because it contradicts Defendant's entire argument, instead replacing it with ". . . ." in the portion quoted for the Court. *Id*.

In the same interrogatory response, Private Plaintiffs go on to cite various specific provisions of the Consent Decree, as well as the Court's previous Orders that Plaintiffs allege have been violated and continue to be violated, thus giving the Court jurisdiction, and creating the conditions which currently deprive students of a constitutionally adequate education:

> The Court's continuing jurisdiction is fully consistent with the terms of the 2004 Order. Declaration Six of the 2004 Order stated that the Court would continue to ensure compliance with its Orders and constitutional mandates until necessary funding had been provided. As the Court concluded in its 2020 Order, this continuing jurisdiction is also consistent with paragraphs 53, 68, and 69 of the Consent Decree, as well as language on page 5 of the Court's 2002 Order. Plaintiffs note, further, that the State admits as of 2017 it was providing BCPSS with over $300 million less annually than was required by the Court's earlier orders.

Ex. O, Pls.' Answers to Def,'s Interrogs. at 12. As discussed below, this framing is entirely consistent with that in Plaintiffs' Petition, Plaintiffs' Memorandum in Support of their Petition for Further Relief and Plaintiffs' Opposition to Defendant's First Motion to Dismiss.

Equally misleading, Defendant completely omits Private Plaintiffs' other interrogatory responses detailing Defendant's failure to comply with the Consent Decree and the Court's previous Orders, because they further contradict Defendant's argument. For example, Private Plaintiffs' responses expressly incorporate DLS' analyses showing Defendant underfunded BCPSS in the amount of $342.2 million during 2002 through 2017, in violation of the funding levels set in the Court's previous orders. *Id*. at 16–17, 27. Plaintiffs also repeatedly incorporate

documents cited by the Petition (as well as numerous other documents), *id*. at 9, 11, 14, 17 — which include DLS and Thornton Commission documents analyzing Defendant's underfunding of BCPSS from 2000 through 2017 and Defendant's failure to provide the "full Thornton funding . . . as adjusted for subsequent inflation," in violation of the funding levels set by the Court's previous orders. *Id.* at 8; *see also* Mem. in Supp. of Pet. 16–18 (Dkt. 98/0).

2. Plaintiff BCPSS's Interrogatory Responses Identify Defendant's Violations of the Consent Decree and Previous Court Orders and Do Not Disclaim the Petition's Allegations.

Defendant's representation that BCPSS' discovery responses "confirmed that they are no longer contending that the relief sought by the petition is based on any failure to comply with orders previously issued by this Court" is even more disingenuous. Second Mot. to Dismiss at 2 (Dkt. 183/0). Defendant quotes portions of BCPSS's responses to ***document requests*** — which did not request a narrative response and are not admissions in any event — *see, e.g.*, *Beck v. Beck*, 112 Md. App. 197, 205 (1996) — while completely ignoring BCPSS's ***interrogatory responses*** that disprove Defendant's representation and undercut its repetitious argument for dismissal.

In response to the same interrogatory posed to Private Plaintiffs above, Plaintiff BCPSS answered that it understands "Plaintiff's Petition concerns Defendant's ongoing violations of Article VIII of the Constitution of Maryland, not the violation of specific terms of the Consent Decree or the Court's subsequent orders." Ex. J, Interrog. No. 6 at 16. Similar to Private Plaintiffs, BCPSS also stated that Defendant "*has* ***failed to provide sufficient funding*** *to comply with the Maryland Constitution* ***and this Court's repeated declarations in 1996, 2000, 2002, and 2004*** *regarding insufficient funding of City Schools*." *Id.* at 17 (emphasis added).

Plaintiff BCPSS' interrogatory answer also provides more than thirteen pages of detailed explanation of Defendant's failures to comply with Article VIII, the Consent Decree, and this

Court's prior Orders — all ignored by Defendant in its representations to the Court. *Id.* at 16–30.

BCPSS' explanation includes:

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

Id. at 18.

> In 2000, this Court found that City Schools students continued to be deprived of "an education that is adequate when measured by contemporary standards" and "still are being denied their right to a 'thorough and efficient' education" as constitutionally required.

Id. (quoting Mem. Op. 25 (Dkt. 10) (June 30, 2000)).

> In 2002, this Court extended the term of the Consent Decree until the State's constitutional violations were remedied and ruled that it would "retain jurisdiction and continue judicial supervision of this matter until such time as the State has complied with this Court's June 2000 Order."

Id. (quoting Mem. Op. 3, 5 (Dkt. 25) (June 25, 2002)).

> In 2004, this Court ruled that the State was continuing to violate Article VIII because it still had not provided the $2,000 to $2,600 per pupil that the Court had found necessary in 2000. In the aggregate, this Court found, "the State ha[d] unlawfully underfunded [City Schools] by an amount ranging from $439.35 million to $834.8 million" for FY 2001, 2002, 2003, and 2004. The Court found that compliance with its 2000 order would not occur until at least full funding of a formula established by the [Thornton Commission].

Id. at 18–19 (quoting Mem. Op. 64–65 (Dkt. 50) (Aug. 20, 2004)).

> Starting with the 2007 legislative session, the State acted to halt implementation of full Thornton funding. These actions have caused a steadily increasing "adequacy gap" for City Schools. By FY 2013, DLS calculated an adequacy gap of $156 million, and for FY 2015, that gap had risen to $290 million. A state-required evaluation separately calculated a $358 million annual 'adequacy gap' in FY 2015…. And for FY 2017, DLS found that the State had

> underfunded City Schools for adequate educational instruction by $342.2 million.

Id. at 19–20.

> Even if the Thornton Commission's funding formula had been followed, as this Court recognized in 2004, it fell far short of the amount needed for constitutional adequacy then and that is even more apparent nearly twenty years later.

Id. at 20. Given Plaintiff BCPSS's detailed explanation of Defendant's noncompliance with the Maryland Constitution, the Consent Decree, and this Court's prior Orders, Defendant's attempt to induce the Court into finding that Plaintiff BCPSS has changed its theory of the case, based on a single line in a document request response, should be rejected.

3. Defendant Mischaracterizes Plaintiffs' Interrogatory Responses to Support Its Actual and Previously Rejected Argument that Plaintiffs' Claims Concerning Current Conditions Are Improper.

At bottom, Defendant's complaint is not that Private Plaintiffs and Plaintiff BCPSS have failed to identify relevant provisions of the Consent Decree or the Court's previous Orders in interrogatory responses – because, as noted above, the specific provisions are in Private Plaintiffs' and Plaintiff BCPSS' responses, as well as in the Petition and subsequent filings and arguments. Rather, Defendant's actual complaint is that Plaintiffs seek relief for current conditions arising out of these ongoing violations. As it argued in support of its First Motion to Dismiss, and as it argues again in this Second Motion to Dismiss, Defendant believes that any claims regarding current conditions should be barred because they are allegedly not authorized under the Consent Decree and the Court's previous Orders. *See* Second Mot. to Dismiss 2 (Dkt. 183/0) (arguing Plaintiffs' claims regarding current conditions are not authorized); Ex. B, 12/12/19 Hr'g Tr. 11:5–8 (counsel for the Defendant arguing that "in this case, particularly in the petition for further relief, [Plaintiffs] are seeking relief that goes beyond the terms of the consent decree."); *id*.at 11:19–22 (arguing the Court does not have authority to order relief beyond the terms of the Consent Decree); *id*.at 12:15–

19 (complaining that Petition supposedly did not identify anything in the Consent Decree that authorized the Petition); *id*.at 13:5–14 (arguing the Petition did not rely on the Consent Decree); First Mot. to Dismiss Pls.' Pet. for Further Relief 3 (Dkt. 105/0) (June 19, 2019) (complaining that Plaintiffs' requested relief is based on the Petition and not the Consent Decree); *id*. at 31 (acknowledging that Petition concerns current conditions and arguing, as a result, it is not authorized under the Consent Decree); *id*. at 38 (arguing that Petition is not authorized by the Consent Decree); *id*. at 43 (same). Despite the denial of its First Motion to Dismiss, Defendant has continued to maintain this position, even asserting it as a basis to deny Plaintiffs' Notice of Substitution, Def.'s Mot. to Strike Pls.' Notice of Substitution 6 (Dkt. 162/0), which the Court denied. Order (Dkt. 162/2) (Sept. 10, 2021) (Granting Plaintiffs' Notice of Substitution).

However, having been unable to convince the Court on its first or second try that Plaintiffs' claims should be barred, Defendant now seeks yet another bite at the same apple by attempting to twist a small part of lengthy interrogatory responses into some sort of newfound "concession" that Plaintiffs' claims are limited to current claims and have nothing to do with the Consent Decree and the Court Orders under it. In order to recycle its prior, denied arguments, Defendant asserts that Plaintiffs' claims previously were limited to the Consent Decree and did not extend to current conditions, and that Plaintiffs have somehow changed their position to limit their claims to current conditions only. But Plaintiffs have consistently made plain that they seek a remedy for current conditions rooted in Defendant's ongoing violations of Court Orders, which both provide this Court with its jurisdiction and caused the current unconstitutional state of affairs. This was Plaintiffs' position when they filed the Petition, when the Court denied Defendant's First Motion to Dismiss, and now.

B. Plaintiffs' Discovery Responses are Consistent with Their Litigation Positions.

Defendant tries to bolster its argument by claiming Plaintiffs have also taken inconsistent litigation positions. Second Mot. to Dismiss 18–19, 27–36 (Dkt. 183/0). But Defendant's characterization is belied by the record in this case, which demonstrates that Plaintiffs' discovery responses and litigation positions have been consistent throughout.

The present litigation arises out of the Petition filed in 2019, to enforce the Consent Decree and the Court's follow-on Orders. The impetus for Petition was the ***current*** conditions in Baltimore City Public Schools, resulting from Defendant's continuing failure to fund BCPSS at a constitutionally adequate level, as required by Article VIII and by this Court's Orders arising out of the Consent Decree. Petition 4–5 (Dkt. 98/0); *see also* Mot. in Supp. of Pet. at 5–41 (Dkt. 98/0).

1. Plaintiffs Have Consistently Alleged That They Seek Relief for Ongoing Violations of Article VIII.

Plaintiffs have consistently alleged that although they seek relief for ongoing violations of Article VIII, these ongoing violations resulted from Defendant's failure to comply with the Court's previous Orders issued under the Consent Decree, the violation of which also gives the Court jurisdiction to hear the Petition.

As explained in Plaintiffs' previous filings and at oral argument on Defendant's First Motion to Dismiss, Plaintiffs have consistently sought relief for ongoing violations of Article VIII. At oral argument, the Court explicitly questioned Plaintiffs as to whether the Court should just dismiss the case so the Court would not be forced to make determinations about what occurred "20 years ago, 15 years ago." Ex. B, 12/12/19 Hr'g Tr. 38:22–23. Plaintiffs responded:

> The Plaintiffs arguments are about what is happening today. It's not about what happened 20 years ago. The only reason we are talking about what happened 20 years ago is because the state filed a motion to dismiss and tied it to us not having the right to come back into court. That's the reason we are talking about what happened 20

> years ago. Our petition for further relief is all about the facility conditions now. It's about the fact that in 2012, 85 percent of schools were found to be in poor or very poor condition.

Id. at 38:25–39:10; s*ee also id*. at 46:3–5 ("And so plaintiffs seek equitable relief for ongoing violations of Article 8 of the Maryland Constitution."); *id*. at 45:4–7 (noting that the case concerned an ongoing constitutional violation); *id*. at 54:6–8 (same). This was entirely consistent with Plaintiffs' Petition, as well as their Opposition to the Defendant's First Motion to Dismiss. *See* Pls.' Opp'n to First Mot. to Dismiss 1 (Dkt 105/1) (Aug. 23, 2019) (alleging that this is a case about ongoing violations); *id*. at 2 ("Neither applies to Plaintiffs' claims for prospective relief upon *current* constitutional violations.") (emphasis in original); Mem. in Supp. of Pet. 2 (Dkt. 98/0) ("tens of thousands of Baltimore City school children . . . are denied the adequate education mandated by Article VIII"); *id*. at 3 ("Plaintiffs now return to this Court to compel compliance with the mandate of Article VIII"); *id*. at 15 (arguing that the current funding levels despite the Court's prior rulings are too low, and that the Court's prior rulings prove the current funding level is inadequate); *id*. at 24 ("whatever the measure, the State's current funding levels for BCPSS do not come close to meeting the requirements of Article VIII"); *id*. at 40 (concluding that violations of Article VIII persist today); *id*. at 59 (alleging that the various deficiencies identified prove that the state is violating Article VIII); *id*. at 60 (arguing that the Court has authority to order remedies for violations of Article VIII); *id*. at 63 (same); *id*. at 62 (discussing what Article VIII requires of the State in terms of raising additional funding for schools attended by students receiving an inadequate education).

In response to questions as to what standards the Court would use in determining whether Plaintiffs should prevail, Plaintiffs explained that the Court should look to current state regulations governing the provision of education in Maryland. Ex. B, 12/12/19 Hr'g Tr. 36:5–8; *see also id*. at 38: ("we would be asking the Court to apply" these standards were the litigation allowed to go

forward). Similarly, in response to questioning from the Court as to whether a determination of inadequate funding should be "based on today's numbers", Plaintiffs responded, "That is correct, your honor." *Id*. at 39:17. Likewise, Plaintiffs confirmed that any experts Plaintiffs would engage would examine current conditions in the schools. *Id*. at 40:12; 74:25–75:4 ("As we've talked about earlier, the work that the experts would be doing if we're allowed to proceed with our discovery schedule would relate to the conditions in the schools as they are now.").

Further, throughout the oral argument, Plaintiffs repeatedly cited to current conditions in the system as the basis for relief. *Id*. at 37:7–23 (citing to test scores, graduation rates, and the state's revised "star system" to make the point that the Court has a basis to assess the current conditions in the school); *id*. at 47:23–25 (discussing the fact that several BCPSS schools were closed in 2018 due to inadequate facilities). This was consistent with Plaintiffs' Memorandum in Support of their Petition and in Opposition to the Defendant's First Motion to Dismiss. (Dkt. 105/1) (Aug. 23, 2019) (noting that the ongoing constitutional violation is exhibited by, among other things, current lack of staff, lower test scores); *id*. at 33 (noting the present facilities problems); Petition ¶ 12 (Dkt. 98/0) (noting the ongoing violations arising out of current conditions); *id*. at ¶ 14 (noting that BCPSS facilities are in poor condition in violation of Article VIII); Mem. in Supp. of Pet. at 24 (Dkt. 98/0) (analyzing several metrics regarding current programmatic resources and the impact on current student performance); *id*. at 41 (arguing that current facility conditions violate Article VIII); *id*. at 46 (describing BCPSS facilities that are currently in poor condition); *id*. at 74 (explaining that the current conditions in BCPSS violate Article VIII and citing specific facts regarding current conditions in support).

As relief, Plaintiffs specifically requested at oral argument, and in their filings, a comprehensive plan for compliance with the Court's previous Orders and Article VIII going

forward. Ex. B, 12/12/19 Hr'g Tr. 51:21–52:1; Pls.' Opp'n to First Mot. to Dismiss 26 (Dkt. 105/1) (Aug. 23, 2019) (seeking a declaration that the State is violating Article VIII); *id*. at 27 (asking the Court to close the adequacy gap as it currently exists, not as it existed at the time of the Court's previous orders or the Consent Decree); *id*. at 42 (explicitly noting that we are seeking payments to BCPSS to address problems going forward); Mem. in Supp. of Pet. at 74–75 (Dkt. 98/0) (requesting, first, a declaration that the State is "violating Article VIII by failing to provide a thorough and efficient education"); Petition ⁋ 20.a. (Dkt. 98/0) (same).

Plaintiffs' framing was not lost on Defendant which, at oral argument, explicitly acknowledged that Plaintiffs' case concerned ongoing violations of the Article VIII. Ex. B, 12/12/19 Hr'g Tr. 57:25 (Defendant's counsel acknowledging Plaintiffs have argued that the case is about the "here and now").

As noted above, the issue additionally arose in the context of Defendant's argument that Plaintiffs' claim should be dismissed because Defendant would be prejudiced by having to defend a claim alleging violations of matters occurring over a decade ago. First Mot. to Dismiss 37–38 (Dkt. 105/0) (June 19, 2019). In response, Plaintiffs repeatedly explained that Defendant would not be prejudiced because the case concerned current conditions in BCPSS. Opp'n to First Mot. to Dismiss 41 (Dkt. 105/1) (Aug. 23, 2019) ("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."); *id*. (arguing that what is important is the many individuals available who have knowledge of how BCPSS is funded today).

In sum, Defendant's argument that Plaintiffs' interrogatory response, focused on seeking relief for ongoing violations of Article VIII arising out of current conditions, represents a

"fundamental change," Second Mot. to Dismiss 2 (Dkt. 183/0), overlooks overwhelming record evidence to the contrary.

2. Plaintiffs Have Also Consistently Alleged, as They Did in the Interrogatory Response, that Defendant Violated the Court's Prior Rulings Arising Out of the Consent Decree and Those Violations Caused the Current Conditions and Give the Court Jurisdiction.

Consistent with their interrogatory response, Plaintiffs have also consistently argued that although their claims and prayer for relief concerns ongoing violations of Article VIII, the Consent Decree and previous Orders are an important part of the case. First, Plaintiffs have consistently argued, including in the interrogatory response, that Defendant's failure to comply with the Consent Decree and the Court's previous Orders provides jurisdiction for the Court to hear the Petition and determine its authority to decide the questions at the heart of the case. Ex. B, 12/12/19 Hr'g Tr. 33:19–34:8 (explaining that the history of the case is all relevant to whether there is "finality to the consent decree"); *id*. at 39:20–24 ("I think the reason that [Plaintiffs] are talking about what happened 20 years ago is [that] the State is arguing that we don't have the right to bring this case and it doesn't tie back at all to what happened before"); *id*. at 57:4–10 (arguing, as Plaintiffs did in their Interrogatory Response, that paragraph 53 of the Consent Decree authorized the Petition); Petition ⁋⁋ 6–8 (Dkt. 98/0) (walking through the Court's previous declarations as a means of explaining why the Court retains jurisdiction to hear Plaintiffs' Petition); Pls.' Opp'n to First Mot. to Dismiss 52, 55 (Dkt. 105/1) (explaining that the Petition flows out of the Consent Decree and the Court's previous declarations). *See also supra* at pages 24–29 (discussing Interrogatory responses).

Second, as Plaintiffs have consistently argued, the current conditions for which Plaintiffs seek relief are the product of Defendant's failure to comply with previous Orders of the Court and the Consent Decree, and thus the prior rulings and Defendant's conduct in violating them evidence

the causes of the current violation, the party responsible for them, and the amount of funding needed to remedy them. Plaintiffs made this point, as they did in the interrogatory responses, at oral argument. Ex. B, 12/12/19 Hr'g Tr. 39:24–40:3 ("[T]he reason that we're talking about what happened 20 years ago is I'm trying to explain the connection between why we have a 342 million dollar shortfall and how that ties to what happened in the case 20 years ago."); *id*. at 74–75 (explaining that the prior rulings remained relevant because they indicate the amount of funding that is needed for BCPSS). Plaintiffs did so as well in their post-Petition filings with the Court, including those leading this Court to deny the State's First Motion to Dismiss. Mem. in Supp. of Pet. 7 (Dkt. 98/0) (explaining that the Court's prior rulings evidence the amount of funding needed for BCPSS); Pls' Opp'n to First Mot. to Dismiss 4 (Dkt. 105/1) (Aug 23, 2019) (noting that the Petition is grounded in the previous decisions of the Court and that the failure to comply with them led to the current violation); *id*. at 32 ("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."); Mem. in Supp. of Pet. 3 (Dkt. 98/0) (noting that these violations have occurred despite numerous orders that require the Defendant to comply with article VIII); *id*. at 5 (walking through the history of the case to explain how the current constitutional violations came to be); Petition ¶ 10 (Dkt. 98/0) (explaining that the State's previous failures to comply with the Court's prior orders created the adequacy gap affecting students currently attending BCPSS); *id*. at ¶ 18 (explaining that the Court's declarations required it to comply with the Constitution which it has failed to).

As explained in Plaintiffs' previous filings, under the terms of the Consent Decree, the State was required to provide BCPSS with additional funding, beginning in fiscal year 1998, and the Plaintiffs were permitted to return to Court to seek additional funding if an Independent

Evaluation found it was necessary. *See* Mot. to Dismiss Pls' Pet. for Further Relief (Dkt. 105/0), Ex. 1 ("Consent Decree") at ⁋⁋ 47–49, 68–69. In the ensuing years, Defendant never adequately funded the BCPSS. The Court recognized this in its 2000, 2002, and 2004 decisions, ultimately holding that Defendant had underfunded the BCPSS by an aggregate of $439.35 million to $834.68 million from FY 2001–2004. Mem. Op. 64–65 (Dkt. 50/0) (Aug. 20, 2004). Rather than work to implement full Thornton funding, including annual inflation adjustments due to budgetary constraints beginning in 2007, the State refused to implement the adjustments called for by the Bridge to Excellence in Education Act, and funding of the BCPSS stagnated. *See* Mem. in Supp. of Pet. 16–17 (Dkt. 98/0). This dramatically increased the "adequacy gap" between required and actual funding. *See id.* at 17. To this day, funding of BCPSS *still* is not constitutionally adequate. *See id.*at 17–19.

BCPSS, in its opposition to the State's First Motion to Dismiss made these same points. BCPSS' Opp'n to First Mot. to Dismiss Pls.' Pet. for Further Relief 4 (Dkt. 105/1) ("The state's continuing failure to provide funding to BCPSS at levels required by Article VIII of the Maryland Constitution has deprived BCPSS students of at least $2 billion that this Court has ordered over the past decades."); *id*. at 12 (discussing the Consent Decree in response to Defendant's argument that the Consent Decree does not allow the Petition).

Defendant's failure to address, let alone cite, the numerous instances in which Plaintiffs made clear their position, and its own prior statements acknowledging such, is another reason enough to deny the Second Motion to Dismiss.

3. Even if the Defendant's Inaccurate Description of the Interrogatory Response Was True, This Does not Provide a Basis to Dismiss the Entire Case.

Even if Defendant's attempt to misconstrue a single incomplete phrase from an interrogatory response into a fundamental change in Plaintiffs' position were accurate (it is not,

see supra at pages 24–29, that would not justify the dismissal of Plaintiffs' case. As an initial matter, the interrogatory is improper as it does not seek factual information that an individual plaintiff would be positioned to answer, but rather concerns the theory of Plaintiffs' case. *Blankenship v. Wagner*, 261 Md. 37, 47 (1971) ("The appellees on appeal have raised the question as to whether the appellant . . . should not have been required to amend his answer to the defendant's interrogatories so as to advise them that he was abandoning his claim of specific negligence and relying on the doctrine or res ipsa loquitur. We find no merit to this contention. Interrogatories relate to the facts and the doctrine of res ipsa loquitur is not a fact but a theory of the case.").

Second, if Defendant believed these responses were inadequate, it should have met and conferred with Plaintiffs and, if necessary, moved to compel. Moving to dismiss, however, is not a proper or recognized request from Defendant, confirmed by its failure to cite any authority supporting dismissal of an entire case based on a partial interrogatory response.

Moreover, one supposedly incomplete or inconsistent interrogatory response does not justify the dismissal of a party's case. A party who submits an incomplete or incorrect interrogatory response may "seasonably" supplement its responses. *See Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 320–21 (C.D. Cal. 2004). However, Defendant provides no authority that a court should dismiss a lawsuit because of one phrase from one interrogatory response. Furthermore, to the extent this Court finds the interrogatory response is inconsistent, an inconsistent interrogatory response, at worst, creates an issue of fact, not a basis for an adverse inference as a matter of law. *See Lawrence v. United States*, 679 F. Supp. 2d 820, 826–27 (E.D. Mich. 2010); *Goh v. Nori O Inc.*, No. 2:16-cv-02811 (KSH) (CLW), 2020 WL 7640518 at *6 (D.N.J. Dec. 23, 2020). Thus, there is no basis to dismiss the case, *as a matter of law*, due to the

single interrogatory response, let alone one that Defendant has cherry-picked and selectively quoted.

C. The Court Has Previously Rejected Defendant's Argument That This Case Should Be Dismissed Because It Has Satisfied the Consent Decree and the Court's Prior Rulings.

Towards the end of its filing, Defendant seeks to re-package another of its central arguments from its First Motion to Dismiss – that Plaintiffs' claim is not authorized under the Consent Decree and the Court's prior rulings, because it has supposedly satisfied all of its obligations under each, including supposedly having provided the required funding. Second Mot. to Dismiss 38 (Dkt. 183/0). Defendant's attempt to raise this same argument again, more than two years after it was rejected, is essentially another untimely motion for reconsideration that should be struck.

In its First Motion to Dismiss, in 2019, Defendant argued it had "satisfied all of the requirements of the Consent Decree." First Mot. to Dismiss 7–10 (Dkt. 105/0) (June 19, 2019); *id.* at 2 (arguing that State resources to BCPSS have increased significantly, supposedly far more than required by the Court's 2000 Order). Based on its purported full compliance, Defendant argued there is no "good cause" to extend the Consent Decree pursuant to Paragraph 68 or to authorize the Court to take up the Petition pursuant to Paragraph 69. *Id*. at 46. Defendant also argued it was in "full compliance with the Court's 2000, 2002, and 2004 Orders", *id*. at 22–27,[2] including having supposedly provided the funding required, which, Defendant asserted, deprived this Court of the authority to hear the Petition, *id*. at 46–50.

[2] Notably, despite its laudatory language, Defendant could not avoid admitting that it had failed to provide inflation increases for BCPSS funding. First Mot. to Dismiss 24 (Dkt. 105/0) (June 19, 2019).

Defendant repeated these arguments during the 2019 hearing on Defendant's First Motion to Dismiss. Defendant asserted that it had "complied with fully" all of the school funding obligations relating to the Consent Decree. Ex. B 25:3–7 ("In this case, this is an unusual case where a consent decree has been extended. In every other case I'm aware of consent decrees are extended because the terms have not been complied with fully. Not true here."). And based on this purported compliance, Defendant argued "there was no good cause" for extending the Consent Decree or this Court's jurisdiction. *Id.* at 25:14; *see also id.* at 25:19–23 ("it would still be a very unusual case perhaps one of a kind in the state where the consent decree was complied with but we're still having to litigate what the consent decree provided and, of course, we argue that that's improper."). In response, Plaintiffs explained that "[b]efore the . . . full Thornton funding had been provided in 2008, the State began to make cuts capping inflation increases. That occurred in fiscal 2007 for the fiscal 2009 and 2010 years. And as Defendant acknowledges in its briefing, that sort of capping continued all the way until 2015. *Id.* at 32:15–20.

The Court ultimately denied Defendant's First Motion to Dismiss, and thus rejected its argument that its purported full compliance with the Consent Decree and subsequent Court Orders eliminated the Court's authority to hear the Petition. Mem. Op. 10–11 (Dkt. 105/8) (Jan. 16, 2020). This Court recognized that "Judge [] Kaplan lengthen[ed] the timeframe of judicial supervision until such time as compliance with the 2000 Order. This Court retains jurisdiction under the Consent Decree." *Id*. at 9.

Defendant's present argument that it has satisfied the Consent Decree and the Court's subsequent Orders recycles its arguments from 2019 that it has achieved full compliance. The Court need not devote its limited resources to entertaining repeated arguments. And if it does, the Court should reject them for the same reasons it previously did.

III. Further Relief Under the Maryland Uniform Declaratory Judgments Act Is Available and Warranted.

Plaintiffs have consistently made plain what relief they seek: the Consent Decree and the Court's prior Orders, and Defendant's violation of those Orders, establish jurisdiction for this Court to address Defendant's continuing failure to fund the BCPSS at a constitutionally adequate level. In failing to do so, Defendant has infringed not only its obligations under the Maryland Constitution, but also the duties affirmatively imposed upon it by the Consent Decree and its follow-on Orders by this Court, as discussed *supra*.

The Maryland Uniform Declaratory Judgments Act enables a party to petition for further relief under a consent decree, provided the circumstances for such relief are "necessary or proper" and the adverse parties are properly notified. Md. Code, Cts. & Jud. Proc. § 3-412. As explained in Plaintiffs' Memorandum in Support of the Petition, and consistent with Plaintiffs' interrogatory responses, Plaintiffs returned to this Court to vindicate several of the Court's previous findings as they relate to current conditions in BCPSS, namely that Article VIII requires Defendant to provide adequate funding; Defendant is responsible for ensuring that students receive an adequate education; and the amount of State funding currently provided falls below the thresholds previously set. Mem. in Supp. of Pet. 68 (Dkt. 98/0).

Defendant takes issue with this Court hearing the instant litigation because it claims several alleged deficiencies: lack of jurisdiction, new parties and claims, and re-litigation of an already-resolved claim. Second Mot. to Dismiss 37–38 (Dkt. 183/0). None of these contentions have merit, however, and each is an argument that Defendant already raised during the last two years and the Court has rejected. Defendant fails to acknowledge such, let alone explain why the Court should hear Defendant's repeat arguments again and reach a different conclusion now.

First, as stated in the Court's 2020 Order, this Court retains jurisdiction in this case. Jurisdiction in this case arises from the Consent Decree and its follow-on Orders. Specifically, the Consent Decree provides this Court continuing jurisdiction over this case, through at least June 30, 2002. Consent Decree ⁋⁋ 68–69. In 2000, this Court found that Defendant was not complying with the Consent Decree and ordered additional funding for the BCPSS. Order 1–2 (Dkt. 10) (June 30, 2000). In 2002, this Court, finding Defendant *still* not in compliance with the Consent Decree or the 2000 order, determined it would retain jurisdiction until the State complied with the 2000 order. Order 1 (Dkt. 25) (June 25, 2002). Finally, in 2004, this Court determined that jurisdiction would continue under the Consent Decree *until such time* as the State funds the BCPSS at the constitutionally adequate "Thornton" level. Order 2 (Dkt. 50) (Aug. 20, 2004). The funding never reached that level because, as the Petition alleges, Defendant began to cut inflation increases before it had fully complied with the Court's Orders, resulting in the adequacy gap currently affecting students attending BCPSS. *See* Petition ⁋ 10 (Dkt. 98/0). Thus, this Court retains jurisdiction to hear the instant litigation.

There are no new parties nor claims in this ongoing litigation. Over the course of this litigation, Plaintiffs have been substituted as needed when they have become unavailable because their children have aged out of the BCPSS or other personal issues have caused unavailability. *See, i.e.* Notice of Substitution (Dkt. 149/0) (June 21, 2021). Under a 1995 stipulated order, the parties decided to treat this litigation as a class action and allow substitution of representative plaintiffs "as necessary and reasonable if representative plaintiffs become unavailable[.]" Stipulation for Representative Pls. ¶¶ 1–3 (Dkt. 1-41) (Dec. 14, 1995). Defendant recently attempted to strike such a substitution, a motion that this Court properly denied. *See* Minute Order (Dkt. No. 162/2) (Sept. 10, 2021).

Furthermore, the claim remains the same as it was in 1994 because Defendant, in violation of Article VIII, has continuously failed to fund BCPSS as necessary to provide a thorough and efficient education to the school children of Baltimore City. The violation is ongoing, and although Defendant claims it has remedied the issue through legislation, Second Mot. to Dismiss 1–15 (Dkt. 183/0), the funding proposed by recent legislation is not currently in place, and there is no guarantee Defendant actually will provide these funds, and not reduce them as it has done numerous times since this litigation was first instituted in the 1994. Nor, as explained above, does the Built to Learn Act provide sufficient funding for BCPSS' inadequate facilities. *See supra* pages 17–18.

Finally, Defendant is wrong, as this Court already found it was in 2019, that the claim here is rendered final by the Consent Decree. While a consent decree operates both as a settlement and a court order, *see, e.g., Long v. State*, 371 Md. 72 (2002), this Consent Decree contains provisions for further relief should a party fail to meet its obligations thereunder. Consent Decree ⁋⁋ 68–69; *accord* Md. Code, Cts. & Jud. Proc. § 3-412 (enabling a party to seek further relief under a consent decree). When Plaintiffs returned to court, as the Consent Decree permitted, the Court found that Defendant was violating the Maryland Constitution by underfunding BCPSS, and ordered Defendant to bring itself into constitutional compliance by dramatically increasing said funding. Order 1–2 (Dkt. 10) (June 30, 2000). As noted above, the Court subsequently extended its jurisdiction to achieve full compliance with the 2000 Order, as well as subsequent Orders of the Court. Order 1 (Dkt. 25) (June 25, 2002); Order 1–4 (Dkt. 50) (Aug. 20, 2004). Before the ordered funding could be fully implemented, Defendant capped the necessary inflation adjustments resulting in the adequacy gap facing BCPSS today. *See* Petition ⁋ 10 (Dkt. 98/0). Additionally, Defendants, at no point, addressed the outstanding facilities deficiencies affecting students

attending BCPSS. Thus, Defendant remains in derogation of Article VIII and of its obligations under several Orders of this Court, rendering this issue unresolved. Plaintiffs remain in need of further relief from this Court.

IV. Conclusion

For the aforementioned reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion to Strike and deny Defendant's Second Motion to Dismiss Plaintiffs' Petition for Further Relief and Motion to Dissolve November 26, 1996 Consent Decree.

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