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

* *

PRIVATE PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Private Plaintiffs respectfully submit this Memorandum of Law in Opposition to the Motion for Summary Judgment filed by Defendant the Maryland State Board of Education ("MSBE," or the "State," or "Defendant").

STATEMENT OF DISPUTED FACTS

MSBE's motion for summary judgment is not predicated on undisputed facts, Md. R. Civ. P. 2-501, but, rather, on characterizations that omit, or misstate key facts in the record. Pursuant to Md. R. Civ. P. 2-501(b), Plaintiffs refute MSBE's presentation as follows.

I. MSBE Omits Fundamental Information from its Claims of "Undisputed Facts" Concerning the Plaintiffs.

A. MSBE Fails to Discuss the Parties' So-Ordered Stipulation for Representative Plaintiffs.

MSBE claims that Plaintiffs are not "aggrieved" by conditions in BCPSS, Defendant's Memorandum of Law in Support of Motion for Summary Judgment (Dkt. 246/0) ("Def. Mem.") at 29-31, and that Plaintiffs further lack standing because they were not parties to the Consent Decree when it was originally signed. *Id.* at 31-33. MSBE's presentation omits any discussion of the terms, and the import, of the parties' Stipulation for Representative Plaintiffs, which was entered as an Order of the Court on December 14, 1995 (the "Stipulated Order") (Original Dkt. 41).[1]

The original Complaint, filed in 1994, sought declaratory and injunctive relief for a putative class of BCPSS students at risk of educational failure pursuant to the Education Clause of the Maryland Constitution, Md. Const. Article VIII ("Art. VIII"), to direct the State "to provide all schoolchildren residing in Baltimore City with an adequate public school

1 In 1999, the docket in this case was converted to an electronic docket. Citations labeled "Original Dkt." correspond to the pre-1999 docket cites as best as counsel can discern.

education." Compl. (Original Dkt. 3) ¶ 1. MSBE opposed Plaintiffs' motion to certify the class, see Original Dkt. 38, but with the guidance of the Court, the parties stipulated, and the Court ordered:

> 1. The named plaintiffs will be deemed 'representative plaintiffs' for the purposes of this litigation and may pursue their claims or defenses in that capacity on behalf of the named and unnamed plaintiffs.
>
> 2. Any declaratory or injunctive relief obtained by the named plaintiffs will be applicable to the BCPS[S] system as a whole, and will not be limited to the named plaintiffs.
>
> 3. Plaintiffs may substitute additional named plaintiffs as necessary and reasonable if representative plaintiffs become unavailable for reasons beyond their control.

Stipulated Order ¶¶ 1-3. Accordingly, this Court has repeatedly recognized that the representative Plaintiffs litigate this case on behalf of all the "at risk" schoolchildren of Baltimore City. In 2004, for example, the Court stated that plaintiffs "would be permitted to pursue their claims as representative plaintiffs on behalf of the class, although a class would not be formally certified." Pls. MSJ Ex. 4, 2004 Mem. Op. at 5, ¶¶ 4-5; *accord, Md. Bd. of Educ. v. Bradford*, 875 A.2d 703, 707 n.1 & 709-11 (2005) ("Pursuant to a stipulation, it was agreed that the plaintiffs' proposed class would not be certified in accordance with Maryland Rule 2-231 but that the plaintiffs would be deemed 'representative plaintiffs.'").

This Court denied MSBE's motion to strike the Notices of Substitution of the current Plaintiffs and granted the substitutions in September 2021. (Dkt. 162/2). As argued below, the Court should again deny MSBE's duplicative claim that the same Plaintiffs, named pursuant to the Stipulated Order, are ineligible to seek relief on behalf of the school children of Baltimore City.

B. MSBE Fails to Disclose Its Own Evaluations Showing the Inadequacy of the Schools Attended by Plaintiffs' Children and Presents a False Picture of Plaintiffs' Deposition Testimony.

According to MSBE, Plaintiffs concede that they have experienced no problem with the adequacy of education provided by BCPSS. This claim flatly ignores Plaintiffs' sworn deposition testimony as well as the State's own data concerning the performance of all BCPSS schools, including Plaintiffs' children's schools. Each of the Plaintiffs has averred that she is the parent of one or more children who "attend BCPSS and face the risk of educational failure." Plaintiffs' Notice of Substitution dated April 26, 2021 (Dkt. 136/0) at 3. Not one Plaintiff testified that she believed her child or children are not, or are no longer, facing the risk of educational failure. Indeed, Plaintiffs' children attend schools in which that risk looms large, as it does throughout BCPSS, as shown by MSBE's own measures. Low proficiency scores are a major issue in BCPSS today, just as they were in 2004. *See* 2004 Mem. Op. at 25-26, ¶¶ 98-106. [redacted]

[redacted]

Ex. 79, Neal Deposition Transcript ("Neal Dep.") at 70:2-14, November 11, 2021.[2] One can, of course, "Google it," as Ms. Neal suggests, and find MSBE's assessments: MSBE's "Report Card" database (available at

[2] In an effort to avoid duplicity of exhibits, Plaintiff only attaches exhibits to this Motion that have not been previously cited in the Plaintiff's Motion for Summary Judgment (Dkt. 250/0) or Defendant's Motion for Summary Judgment (Dkt. 249/0). Exhibits already included in the Plaintiff's Motion for Summary Judgment will be cited "Pls. MSJ Ex. XX." Exhibits already included in the Defendant's Motion for Summary Judgment will be cited "Def. MSJ Ex. XX."

https://reportcard.msde.maryland.gov/Graphs/#/ReportCards/ReportCardSchool/1/E/1/30/XXXX/2019) provides ratings for individual schools as well as proficiency-test results in math and English/Language Arts ("ELA") for BCPSS students. MSBE's statistics show very low percentages of students scoring as proficient in the city as a whole and in each of the schools attended by Plaintiffs' children. On MSBE's 2019 "Report Card," only 17.9% of all elementary students in BCPSS, and 13.7% of all Black elementary students, were proficient in math, and 18.6% of elementary students and 13.7% of Black elementary students in BCPSS demonstrated proficiency in ELA.

Dorothy I. Height Elementary, [redacted], earned 4.6 of 20 possible points awarded by MSBE in the category of academic achievement. At that school, 7.9% of all students and 8.2% of Black students were proficient in math, and 7.1% of all students and 7.4% of the Black students were proficient in ELA.

[redacted] Ex. 79, [redacted]. at 83, November 11, 2021. [redacted] *Id.* at 60-62. [redacted] *Id.* at 83. [redacted] *Id.* at 64-71.

Also unmentioned by MSBE is [redacted]

[redacted] *Id.* at 16-17. [redacted] *Id.* at 21-22, 25; *id.* at 88:15-16 [redacted] *Id.* at 22:5-7. In 2019, Coleman received 4.2 out of 20 available points for academic achievement on MSBE's Report Card, and 3.6 % of students, and 2.9 % of Black students tested as proficient in math in 2019, while 9.3 % of students, and 8.8 % of Black students tested as proficient in ELA. [redacted] *Id.* at 54-55.

[redacted] *Id.* at 91, 92 [redacted] *Id.* at 93. [redacted] *Id.* at 21. [redacted] *Id.* at 26.

[redacted] *Id.* at 33, 35-36; see also *id.* at 34:7-11 [redacted]

[redacted] *Id.* at 37:10-13. [redacted]

[redacted]

Id. at 40:13-20; *see also id.* at 53:9-14 [redacted]

[redacted] *id.* at 52:13-15 [redacted]

Baltimore International Academy ("BIA"), [redacted] received 7.5 of 20 possible points for academic achievement on MSBE's 2019 Report Card; 23.7% of all students and 20.3% of Black students were proficient in math. ELA proficiency was shown by 24.8% of all students and 21.5% of Black students. [redacted] Ex. 80, [redacted] Deposition ("[redacted] Dep.") at 61:20-22, 70, October 29, 2021. [redacted] *Id.* at 63-64; *id.* at 64:6-8 [redacted]

[redacted] *Id.* at 47:1-8 [redacted] In 2019, 7.9% of all students and 5.7% of Black students in Garrett Heights were proficient in math. ELA proficiency was demonstrated by 6.6% of all students and 5.7% of Black students. [redacted]

[redacted] Ex. 80, [redacted] Dep. at 49:12-16, October 29, 2021. [redacted] *Id.* at 80:10-13. [redacted] *Id.* at 80:14-19. [redacted] *Id.* at 55:5-11. [redacted] *Id.* at 82:5-11. [redacted] *Id.* at 64:17-19.

MSBE also fails to disclose that Southwest Baltimore Charter School ("SWB"), [redacted] earned 6 of 20 possible points in academic achievement for middle school students on MSBE's 2019 Report Card. Only 10.2% of all students, and 8.6% of Black students were proficient in math, and 21.1% of all students, and 18.1% of Black students, were proficient in ELA. These results are comparable to the citywide statistics: 13.5% of all middle school students and 9.2% of Black middle school students in BCPSS scored as proficient in math; 22.7% of all middle school students, and 18.2% of Black middle school students were proficient in ELA. [redacted] Ex. 81, [redacted] Deposition ("[redacted] Dep.") at 81, 92, July 9, 2021. [redacted]

[redacted] *Id.* at 39:13-40:3 [redacted] *Id.* at 85-87, 91-92, 34, 42. [redacted] *id.* at 34:3-5; see also id. at 40-41, 44-45, 100. [redacted] *Id.* at 19, 46-49. [redacted] *Id.* at 34:19-35:8. [redacted] *Id.* at 36:10-37:12. [redacted] *Id.* at 68:6-69:5 [redacted] *Id.* at 45:15-20.

[redacted] Green Street Academy [redacted] Ex. 79, [redacted] Dep. at 82. MSBE's 2019 Report Card awarded the school 6.6 of 20 points in academic achievement for middle school students, and 10.5 of 30 points in academic achievement for high school students. In 2019, 15.7% of all students at the school, and 15.4% of Black students, were proficient in math, and 17.9% of all students, and 17.8% of Black students, were proficient in ELA. [redacted] *Id.* at 28.

Tunbridge Public Charter School [redacted] earned 10.5 of 20 available points in academic achievement for middle school students on MSBE's 2019 Report Card. In 2019, 39.8% of all students at the school, and 30.4% of Black students, were proficient in math, and 45.2% of all students, and 35.5% of Black students, scored as proficient in ELA. [redacted] Ex. 82, [redacted] Deposition ("[redacted] Dep.") at 15-19, October 27, 2021. [redacted] *Id.* at 27:9-10. See *also id.* at 87:12-17 [redacted] *id.* at 27, 37-38; [redacted] *Id.* at 84-85, 90; *see also id.* at 84 [redacted]

Finally, Bard High School Early College ("Bard"), [redacted] earned 17.3 of 30 available points in the category of academic achievement on MSBE's 2019 Report Card, as MSBE once again does not disclose. [redacted] *Compare* Def. Mem. at 4 *to* Ex. 81, [redacted] Dep. at 95, July 9, 2021. [redacted] *Compare* Def. Mem. at 4 *to* Ex. 81, [redacted] Dep. at 23, 46-47, 99-100, July 9, 2021.

Plaintiffs' depositions, and the State's own data, show that Plaintiffs' children are at risk.

II. The Record Shows that the Blueprint for Maryland's Future Act (the "Blueprint Act," or the "Act") Does Not Provide Constitutionally-Adequate Support for BCPSS.

MSBE argues that funding under the Blueprint Act satisfies the constitution. The Act, however, describes, but does not guarantee, future funding for Maryland schools. Events that may take place in the future are, of course, not facts at all, but predictions or promises, and cannot form the basis of a motion for summary judgment. BCPSS is not scheduled to receive full funding under the Blueprint Act until FY2034. Pls. MSJ Ex. 14, DLS, *Blueprint for Md.'s Future – Chs. 36 & 55 of 2021, Updated Fiscal Note Appendices* (Aug. 2021), at App'x C (DLS 00275) available at, https://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/Appendices___A_through_H.pdf. Even if every cent promised by the Act were paid to BCPSS, the kindergartners of 2022 would not receive the full benefit of the Act until they are juniors in high school. But there is no guarantee that they would receive the full benefit even then: any increases under the Blueprint Act may be abandoned if the State's economy is estimated to grow less than 7.5% over the course of any year. *See* Md. HB1372, Section 19; Pls. MSJ Ex. 15, Brooks Dep. 220:14-22, May 5, 2021 (acknowledging the legislature could decrease funds or pause increases).

As BCPSS Chief of Staff Alison Perkins-Cohen declares in her affidavit, the Blueprint Act does not fully address the "historical inequities" and "long-standing and well-acknowledged adequacy gaps" that have accumulated for years at BCPSS. *See* Affidavit of Alison Perkins-Cohen, sworn to October 3, 2022 ("Perkins-Cohen Aff."), filed herewith, ¶¶ 14-17. This includes the $439.35 to $834.68 million gap in annual operational funding identified

by the Court; 2004 Mem. Op. at 22, ¶¶ 86-87; and the annual "adequacy gaps" that DLS found during the past 15 years. The State defines "adequacy" as: "State and local funding . . . sufficient to acquire the total resources needed to reasonably expect that ***all*** students can meet academic performance standards." *See* Pls. MSJ Ex. 12, DLS, Office *of* Policy Analysis, *Overview of the Blueprint for Maryland's Future: New Policies, Timelines and Funding* (Dec. 14, 2021) at 5 (DLS_002575), available at https://dls.maryland.gov/pubs/prod/Educ/BlueprintOverview.pdf (emphasis in original). The Blueprint Act simply assumes that adequacy standards have already been met: it purports to "build[] [upon] the adequacy structure created by the Thornton Commission." *Id.* at 32. For BCPSS, however, the Thornton adequacy standards have not been met, and the Blueprint Act promises a structure for which the base is still missing. *See* Perkins-Cohen Aff. ¶16 (the State "never fully lived up to its promise to fund the foundational educational resources for BCPSS that the Bridge Act was supposed to provide.").

The Blueprint Act recognizes that contemporary educational standards are now higher. *See* Md. HB1372. These higher standards increase the cost of an adequate education, Pls. MSJ Ex. 11, Kirwan Report at 22, and widen the funding gap for BCPSS, which was already underfunded by hundreds of millions of dollars annually by 20th-century standards. The Act does not even promise all of the additional resources required to fulfill its elevated standards. *See* Perkins-Cohen Aff. ¶ 28.

MSBE claims that funding under the Blueprint Act is no longer "speculative" because the State has provided funding under the Act for FY2023. Def. Mem. at 42-44. Funding levels, however, are not guaranteed after the current fiscal year because the State appropriates funding on a yearly basis. Perkins-Cohen Aff. ¶¶ 47. The Blueprint Act also has funding gaps. For

example, BCPSS spends significantly more on federally-mandated special education services than its state and federal funding for those services. *Id.* at ¶ 20. Even if all Blueprint Act funding were phased in, BCPSS's special education needs will require more than the dedicated funding stream allotted by the Act for special education services. In FY2023, the State will provide $57.6 million under the Blueprint Act for BCPSS's students with disabilities, and the City is mandated to provide an additional $25.4 million, for a total of $83 million; the total needed by BCPSS to meet these students' needs, however, is nearly $260 million. *Id.* ¶ 21. The $177 million difference necessarily reduces the general education funds for other students. *Id.*

The Blueprint Act also imposes new mandates based on five "policy areas." Def. Mem. at 16. These policy areas, as MSBE fails to disclose, are not fully funded. Under Policy Area 1, free pre-K for all low-income 3- and 4-year-olds, the State will provide $25.8 million of $27 million in Blueprint Act funding for FY2023 (the City must pay the remainder); however, BCPSS anticipates expenses for pre-K programming of $41 million. BCPSS must budget for an additional $14 million that reduces the funds available for other programs. Perkins-Cohen Aff. ¶ 26.

Policy Area 2, improving the standards and status of the teaching profession, increases the largest single expense for all school districts by setting a minimum starting salary for all teachers at $60,000 per year. However, parts of the new salary scale requirements fall entirely on local school systems. Perkins-Cohen Aff. ¶¶ 33-35; Def. Mem. at 16.

Policy Area 3 requires that students achieve a college and career readiness ("CCR") standard by the end of 10th grade and further requires school districts to provide advanced college and career pathways for 11th and 12th graders who have met the CCR standard. For FY2023, the

State provides $540 per pupil for those students who have met the standard. But the Blueprint Act does not fund the additional supports that it requires for 11th and 12th graders who have not met the CCR standard, nor does it offer dedicated funding to ensure that students will meet that standard by the end of 10th grade, even though it mandates "an extended curriculum with alternative approaches that are tailored to the student's specific circumstances and needs" for any "middle or high school student who is not progressing in a manner that would predictably result in the student meeting the CCR standard by the end of 10th grade." Perkins-Cohen Aff. ¶ 30. The Blueprint Act also requires provision of "accelerated pathways and enrichment programs for gifted and talented students to achieve college and career readiness before the end of 10th grade," Md. Ann. Educ. § 8-201(b)(2) but fails to fund this mandate. *Id.* ¶ 31.[3]

Policy Area 4, support for schools serving students living in poverty, provides the Concentrations of Poverty Grant ("CPG") for wraparound support services. CPG funding is projected to be available to schools with a poverty rate above 55%, but is not slated to be fully phased-in until 2025. Student poverty rates are also undercounted in BCPSS: "some schools with high English learner rates have poverty rates that are 'too low' to qualify for CPG funds," leaving those schools without wraparound services and support. Perkins-Cohen Aff. ¶¶ 22-23.

Policy Area 5 establishes the independent Accountability and Implementation Board ("AIB"), which withholds 25% of a school district's increase in state funding from the previous year unless still-to-be defined conditions are met. For the 2024-2025 school year, release of the Act's funds is contingent on initial implementation of a comprehensive plan approved by AIB. For the 2025-2026 school year, release of full funding is contingent on the AIB's determination of "sufficient progress on an implementation plan or taken appropriate steps to improve student

[3] MSBE claims that Plaintiff [redacted] is not "at risk" because [redacted] is "gifted and talented," Def. Mem. at 9 & 30, but the Blueprint Act funds no program for his educational needs. Perkins-Cohen Aff. ¶ 31.

performance." Perkins-Cohen Aff. ¶ 49. The Blueprint Act also gives AIB discretion to withhold more than 25% if it determines that a school system has not made sufficient progress in implementation and/or improving student performance. To date, however, the State has provided no guidance on how it will assess "satisfactory progress," which will be significantly more challenging for BCPSS to achieve given its history of under-resourcing. Perkins-Cohen Aff. ¶ 49.

The theoretical funding contemplated by the Blueprint Act is uncertain, does not redress historical inequities, imposes elevated standards that it does not fund, and fails to bring the State into compliance with the constitution.

III. The Record Refutes MSBE's Assertion that the Built to Learn Act Fully Addresses the Constitutional Inadequacy of BCPSS' Facilities.

MSBE asserts, without factual support, that the Built to Learn Act addresses the constitutionally inadequate state of BCPSS' facilities; however, just 31 school facilities in BCPSS's portfolio have been or will be renovated under the Act together with the 21st Century School Buildings Program; 89 additional buildings require a complete overhaul to meet minimally acceptable standards. Affirmation of A. Perkins-Cohen, August 12, 2022 (Dkt. 250/0) ¶ 26. Built to Learn promises approximately $420 million in additional State funding, but even if the Act and the Program were fully implemented, more than $3.86 billion (in 2022 dollars) would still be needed for all of BCPSS's school buildings to meet minimally acceptable standards. *Id.* ¶ 27 and Exhibit A thereto.

The Built to Learn Act, as MSBE would have the Court ignore, furthers inequities between school districts because it does not account for disparities in local contributions. The State formula requires a higher match for wealthier counties: BCPSS will receive an additional $24 million in matching funds from Baltimore City under the Act, while Montgomery County

Public Schools will receive an additional $400 million from that County. BCPSS's funding under the Act contemplates systemic upgrades to just three high school campus facilities, but these upgrades will not bring those facilities up to minimum educational standards, still less will they equal the capital renovations by other school districts in Maryland and across the nation. *Id.* ¶ 18.

IV. MSBE's Presentation Concerning Federal Funding Omits the Limited, Short-Term Nature of Federal Grants to BCPSS.

MSBE makes much of federal funding received by BCPSS. Under the Consent Decree and this Court's subsequent orders, however, federal funding does not address the State's obligation to BCPSS.

BCPSS's federal grants have already been put toward substantial expenditures on COVID-19 health and safety protocols and remote learning technology (*e.g.* laptops, educational technology software licenses). BCPSS also made significant investments in wireless connectivity (including hotspots, because many BCPSS students lack reliable home access to the Internet), and expanding the availability of WiFi to enable simultaneous instruction of in-person and remote students. Upgrading technology infrastructure is particularly challenging in aging facilities, which require major increases in power and HVAC capacity. Perkins-Cohen Aff. ¶ 63.

BCPSS will expend all of its federal recovery funds by the end of FY2024, on June 30, 2024. *See* Perkins-Cohen Aff. ¶ 59. The additional technology funding promised by HB1372 would not fully address BCPSS's ongoing projected costs to ensure, for example, that a laptop is available for every student who needs one. BCPSS estimates that, over the next five years, it will need at least $97.2 million to maintain and replace its existing inventory of student

laptops and other technology devices, as well as wireless and switch maintenance and replacements in school buildings and additional technical support. Perkins-Cohen Aff. ¶ 65.

V. MSBE Misrepresents Plaintiffs' Written Discovery.

MSBE claims that Plaintiffs "concede" they do not seek to "effectuate" or "implement" any judgment of this Court and "no longer question MSBE's compliance with the Court's prior Orders." Def. Mem. at 33. This argument (which this Court has already rejected, *see* pages 23-50 *infra*) is premised on an incomplete and misleading presentation of the record. Plaintiffs have consistently asserted that they seek relief from current conditions in BCPSS and that MSBE's continuing violations of the Consent Decree and the Court's subsequent Orders establish: (1) the Court's jurisdiction to hear the Petition and to ensure constitutionally adequate funding of BCPSS; and (2) the cause of the existing adequacy gap, *i.e.*, MSBE's longstanding failure to fund BCPSS in amounts this Court previously declared to be necessary. Plaintiffs have also consistently asserted that the Court's prior Orders provide guidance concerning the amounts needed to fund BCPSS adequately.

Plaintiffs responded to MSBE's objectionable Interrogatory seeking identification of "the specific paragraph numbers" of each Order violated by MSBE, "each act or omission" for each paragraph, and "all corresponding facts, communications, and documents,"[4] by stating that their "Petition concerns MSBE's ongoing violations of Art. VIII of the Constitution of Maryland, not the violation of specific terms of the Consent Decree or the Court's subsequent orders," and that "as of 2017 [MSBE] was providing BCPSS with over $300 million less annually than was required by the Court's earlier orders"—an express statement of violation of the Court's Orders. Def. MSJ Ex. L, at 11-12; Def. MSJ, Ex. M, at 7-8.

[4] MSBE fails to mention that Plaintiffs objected to those Interrogatories that improperly demanded specification and identification of every known act, omission, fact, or document. Def. MSJ Ex. L, at 4.

MSBE claims that Plaintiffs "do not cite to any particular order, let alone any provision, that supports [their] argument." Def. Mem. at 33, n.31. MSBE disregards that, in the same Interrogatory Response, Plaintiffs cite 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 that 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.

Def. MSJ Ex. O, Pls.' Answers to Def.'s Interrogs. at 12. MSBE's discussion also omits Plaintiffs' other Interrogatory Responses that detail MSBE's failure to comply with the Consent Decree and the Court's previous Orders. The Responses expressly incorporate DLS's analyses showing that MSBE's underfunding of BCPSS had produced annual adequacy gaps that reached $342.3 million for FY2017, in violation of the funding levels required by the Court's previous orders. *Id.* at 16–17, 27. Plaintiffs also incorporate by reference numerous documents, including DLS and Thornton Commission reporting that analyzes MSBE's underfunding of BCPSS from 2000 through 2017 and MSBE's failure to provide the "full Thornton funding . . . as adjusted for subsequent inflation," in violation of the funding levels set by the Court. *Id.* at 8, 9, 11, 14, 17; *see also* Mem. in Supp. of Pet. 16–18 (Dkt. 98/0).[5]

[5] MSBE also ignores that BCPSS's response to the same Interrogatory propounded to Private Plaintiffs includes the statement that MSBE "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." Ex. J, Interrog. No. 6 at 17, and that BCPSS's Interrogatory Response provides more than thirteen pages of

VI. The Record Refutes MSBE's Claim of Compliance with the Consent Decree and this Court's Subsequent Orders.

MSBE's claim that the State has complied with the Consent Decree and the Court's subsequent Orders is far from being "undisputed," Def. Mem. at 34. To the contrary, this assertion, which this Court has already rejected numerous times, is demonstrably untrue. The Court first held in 1996 that BCPSS's students were not receiving a constitutionally adequate education. Pls. MSJ Ex. 75, Order (Original Dkt. 65) at 2 (Oct. 18, 1996) ("1996 Order"). Thereafter, the Court entered as a judgment the parties' Consent Decree, under which the State was to provide $230 million over five years for operations and facilities. Pls. MSJ Ex. 2, Consent Decree at 15, ¶¶ 47-48. These funds, however, were concededly "not enough to provide an adequate education to Baltimore City's unique population of disadvantaged children." Pls. MSJ Ex. 3, 2000 Mem. Op. at 3. Accordingly, the Consent Decree required BCPSS and the State to retain an independent consultant to assess the need for further funding to reach constitutional adequacy. Pls. MSJ Ex. 2, Consent Decree at 12-13, ¶¶ 41-42. That consultant produced the "Metis Report," which found that an additional $2,698 per child—approximately $270 million per year—in operational and programmatic funding was needed for adequacy. Pls. MSJ Ex. 3, 2000 Mem. Op. at 14, 15. This Court adopted the findings of the Metis Report, holding that "[o]verall financial resources available to BCPSS are not adequate," *id.* at 14, substantial additional funds were necessary for adequacy, *id.* at 15, and the right of Baltimore City school children to a "thorough and efficient" education under Art. VIII was still being denied, *id.* at 25. The Court declared that BCPSS required an additional $2,000 to $2600 per pupil for educational operating expenses for FY2001 and FY2002 "to

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detailed explanation of MSBE's failures to comply with Art. VIII, the Consent Decree, and this Court's Orders. *Id.* at 16–30.

provide an adequate education measured by contemporary educational standards." *Id.* at 26; Pls. MSJ Ex. 3, 2000 Order at 1. The State appealed, then withdrew its appeal; accordingly, the Court's 2000 Mem. Op. and 2000 Order are "final, binding, and law of this case." Pls. MSJ Ex. 4, 2004 Mem. Op. at 57.

In 2001, the Thornton Commission, appointed to revise the formula for state education funding, concluded that the "adequacy gap" (not including facilities) for BCPSS was the highest in the State at $2,938 to $4,250 per pupil. *See* Pls. MSJ Ex. 5, Comm'n on Educ., Finance, Equity, & Excellence, Final Report (Jan. 18, 2002), available at https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/000000/000013/unrestricted/20030011e.pdf. Thus, the "State's own Thornton Commission identified funding needs substantially greater than those the Court recognized in June, 2000." Pls. MSJ Ex. 6, 2002 Mem. Op. at 5. In partial implementation of the Commission's recommendations, the State enacted the Bridge Act. This law recognized an "adequacy gap" of $3,380 per pupil in its funding for BCPSS, meaning the "difference between current funding and the funds necessary to provide an adequate education." Pls. MSJ Ex. 4, 2004 Mem. Op. at 12-13, ¶¶ 40, 43. In 2004, this Court held that the State was, in fact, not meeting its financial obligations nor was it complying with the June 2000 Order, and that full Thornton funding, at a minimum, was needed to achieve adequacy. *Id.* at 14-24, 57-58, 64-65. The Court determined it would retain jurisdiction indefinitely, until the State reached compliance with its constitutional obligations and the orders of the Court. *See id.* at 68. The Court thus determined that constitutionally adequate funding is at least equal to adequate funding as defined by DLS under the Bridge Act. The Bridge Act's "adequacy gap" formula included mechanisms for annual adjustments based on changes in "enrollment,

local wealth, and other factors," and payments were to be increased annually for inflation. Pls. MSJ Ex. 7, DLS, *Education in Maryland*, Legislative Handbook Series, Vol. IX (2014) at 63, 72, ("Handbook"), available at https://mgaleg.maryland.gov/Pubs/LegisLegal/2014-legislativehandbookseries-vol-9.pdf. DLS calculated that the adequacy gap in 2002 (before Bridge Act funding begun phasing in) at $270.4 million. Ex. 83, DLS, *Adequacy of Education Funding in Maryland*, Jul. 24, 2019, at 3. This total was close to Judge Kaplan's finding of a $2,000 to $2,600 per-pupil funding shortfall in 2000. Pls. MSJ Ex. 3, 2000 Mem. Op. at 26. But the Bridge Act provided less funding than needed through FY2007, with "full Thornton funding" of an additional $258.6 million annually projected to be provided for the first time only in FY2008. Pls. MSJ Ex. 4, 2004 Mem. Op. at 13-16, ¶¶ 44, 57. As of FY2005, therefore, the State had not "come close to complying with the Court's June 2000 direction that an additional $2,000 to $2,600 per pupil be provided to the BCPSS." *Id.* at 21, ¶ 80. Indeed, the State had:

> ***unlawfully underfunded*** [BCPSS] by $439.35 million [based on the low-end estimate of $2,000 per pupil] to $834.68 million [based on the estimate of $2,600 per pupil] representing amounts owed under this Court's final 2000 order for fiscal years 2001, 2002, 2003 and 2004.

Id. at 67 (emphasis added); *see also id.* at 22, ¶¶ 84-88 *and* 64-65. Funding from 2003 to 2005, moreover, was substantially less than projected when the Bridge Act was enacted, *id.* at 16, ¶ 57, and educational standards were "higher" than in 2001 and 2002, the years for which the Thornton Commission estimated the necessary amounts. *Id.* at 15-16, ¶¶ 52-56.

In violation of the Court's declaration of persistent underfunding, the General Assembly in its 2007 session eliminated inflation increases from Bridge Act funding for FY2009 and FY2010 and altered the annual inflation adjustment. Def. Mem. in Support of Mot. to Dismiss, June 19, 2019 (Dkt. 105/0) at 24 (*citing* 2007 Md. Laws (Special Session) ch.2 (Budget Reconciliation Act)). Despite this Court's declaration that it "will not . . . tolerate

any delays in full Thornton funding for the BCPSS beyond FY2008," Pls. MSJ Ex. 4, 2004 Mem. Op. at 68, BCPSS's funding for FY2008, according to DLS's 2009 calculations, was at 97% of adequacy. Ex. 84, DLS, *Bridge to Excellence Review, Presentation to the Budget and Taxation Committee*, (Jan. 28, 2009). After 2008, the adequacy gap for BCPSS grew: DLS calculated it to be $631 per pupil for FY2009. Ex. 85, Legislative Handbook Series (2010), Vol. IX-Education at 47; available at http://dlslibrary.state.md.us/publications/OPA/H/2010_9.pdf. For FY2013, it was $1,952 per pupil. Pls. MSJ, Ex. 7, DLS, *Education in Maryland*, Legislative Handbook Series, Vol. IX (2014) at 64. The annual per-pupil adequacy gaps were $3,611 for FY2015; Pls. MSJ Ex. 9, DLS Presentation (2016) at 7; and $4,384 for FY2017. Pls. MSJ Ex. 8, DLS Follow-up (2019) at 2. As DLS reported, State funding for BCPSS was nearly flat from FY2008 through FY2019, increasing by an average of just three-tenths of one percent (0.3%) per year. Ex. 86, DLS, *Overview of Education Funding in Maryland*, June 20, 2019, at 25. During the same period, the average annual rate of inflation was 1.57%, more than five times as high. CPI Inflation Calculator, available at https://www.in2013dollars.com/us/inflation/2008?endYear=2019&amount=1.

DLS's "adequacy gap" analyses are probably too low. In 2014, in belated response to the Bridge Act's mandate that the funding formula be revisited in ten years, MSBE retained Augenblick, Palaich, and Associates Consulting ("APA") to conduct the required independent analysis of schools and funding adequacy. *See* Bridge Act; Pls. MSJ Ex. 10, APA, *Final Report of the Study of Adequacy of Funding for Education in Maryland* (Nov. 30, 2016) ("APA Report") (BSC00038378), available at https://marylandpublicschools.org/Documents/

adequacystudy/AdequacyStudyReportFinal112016.pdf. APA's final report in November, 2016, based on FY2015 data, concluded that BCPSS needed an additional $358 million annually to "ensure all students, schools, and districts have the resources needed to meet [Maryland's] new standards." *Id.* at xii-xiii, xxv-xxvi, 111-12.

The facts in the record simply do not support any of MSBE's positions on this motion.

ARGUMENT

I. REPRESENTATIVE PRIVATE PLAINTIFFS HAVE STANDING AND ARE PROPER PARTIES TO PURSUE THIS CLAIM.

A. This Court has already rejected MSBE's standing arguments.

MSBE concedes that the Court denied its motion to strike the Notice of Substitution that added the current representative Plaintiffs, Def. Mem. at 3 n. 4, but does not recognize the consequences of that denial: this Court has already considered and rejected MSBE's position on standing. MSBE's motion to strike presented the some of the same arguments MSBE offers now that the representative Plaintiffs lack standing: (1) MSBE has complied with the Consent Decree, obviating Plaintiffs' standing; *compare* Def. Motion to Strike Pls. Notice of Substitution (Dkt. 162/0) ¶¶ 30, 38 *with* Def. Mem. at 28; (2) the representative Plaintiffs are not parties to the Consent Decree; *compare* Dkt. 162/0 ¶¶ 30, 38 *with* Def. Mem. at 28; (3) the substituted Plaintiffs are third-party beneficiaries, rather than parties to the Consent Decree; *compare* Dkt. 162/0 ¶¶33-37 *with* Def. Mem. at 31-32;[6] (4) the current Plaintiffs "cannot be seeking the same relief" as the original Plaintiffs because the original claims were resolved in

[6] MSBE cites *Doe v. D.C.*, 796 F.3d 96, 109 (D.C. Cir. 2015), which recognizes third party standing to enforce a consent decree when the third party: (1) is intended to receive a benefit under the terms of the decree; and (2) is conferred authority to sue to protect the benefit. Replacement representative Plaintiffs under the Stipulated Order meet both criteria.

the Consent Decree; Dkt 162/0 at 6; and, (5) the Stipulated Order was somehow terminated by the Consent Decree and is therefore no longer in effect. Dkt. 162/0. This Court rejected all of MSBE's arguments, granting the Notice of Substitution and denying MSBE's motion to strike. Dkt. 162/2.

The Court should again reject MSBE's arguments. It has already decided the issues presented and has no need to address them again, and its prior holdings are the law of the case. Decisions of 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) (internal quotes omitted).

MSBE's only new argument is that the current Plaintiffs are not adequate representatives based on their deposition testimony—an argument that is false on the facts, *see* pages 2-10 *supra*, and incorrect on the law. *See* pages 25-30 *infra*. Dismissal—whether on a motion to dismiss or on summary judgment—is in any event not the remedy when a class-action plaintiff is found to be unrepresentative of the class. In such a situation, the court should permit the substitution of an appropriate representative. *See e.g.*, *Walters v. Edgar*, 163 F.3d 430, 432 (7th Cir. 1998) (noting "the proper course" is adding or substituting when a plaintiff can no longer be an adequate representative); *McRae v. Sch. Reform Comm'n*, 2018 WL 4283056, at *5 (E.D. Pa. Sept. 6, 2018) (explaining "plaintiffs frequently move to substitute a class representative" and "substitutions of class representatives are freely permitted."). This Court has already disposed of the remainder of MSBE's standing claims, and should do so again.

B. MSBE's Arguments Fundamentally Misstate Plaintiffs' Claims, the Consent Decree, and the Constitutional Right at Issue.

MSBE's arguments on what it claims to be the experience of the individual students who are Plaintiffs' children misapprehends Plaintiffs' claims under Art. VIII, which requires the State to establish a "thorough and efficient system of public schools and provide by taxation or otherwise for their maintenance." MD. CONST. Art. VIII. As MSBE stipulated and this Court ordered (*see* pages 1-2 *supra*), Plaintiffs seek to remedy the constitutionally inadequate funding of BCPSS.[7]

MSBE's standing arguments are based on the meritless premise, which this Court has already rejected, that there is no continuing jurisdiction for anyone, including the representative Plaintiffs, to litigate claims arising out of the Consent Decree. The Court should dismiss MSBE's effort to re-package as a challenge to standing its four-times-rejected claim that the Court lacks jurisdiction. (*See* pages 29-39 *infra*). BCPSS and Plaintiffs properly sought additional relief under the Consent Decree in 2000 and again in 2004 and this Court held, twice, that MSBE had violated the Consent Decree and failed to provide constitutionally -adequate funding. Pls. MSJ Ex. 3, 2000 Mem. Op. at 26; Pls. MSJ Ex. 4, 2004 Mem. Op. at 67. Now, indeed, the Court has held twice more that its jurisdiction to address Plaintiffs' claims continues, and the Court of Special Appeal and Court of Appeals have both rejected Defendant's attempt to raise those issues on appeal rather than simply proceeding to litigate this case. Denial of Motion to Dismiss, No. CSA-REG-0201-2022, dated July 11, 2022; Denial of Motion for Discretionary Review, No. COA-PET-0131-2022, dated July 8, 2022. Whether MSBE frames this argument as concerning "standing," or "jurisdiction" or "failure of good

[7] Indeed, Defendant has argued elsewhere that no individual claim for violations of Art. VIII is permissible under Maryland law. *See* Ex. 87, Mem. in Resp. to Pet. for Declaratory Ruling, *Rozon v. Prince George's Cty. Bd. of Educ* (Md. State Bd. of Educ. Oct. 11, 2019) at 4-7.

cause," it is the same recycled and meritless argument, and the Court retains jurisdiction to address the Plaintiffs' claims that the State is violating its constitutional duty to children attending the BCPSS. To permit representative Plaintiffs, moreover, to vindicate a systemwide right and to seek relief for a systemwide violation is appropriate both under Maryland law, and the well-developed law from other jurisdictions under similar constitutional provisions that require the State to provide an adequate system of education. *See* Section I.C. *infra.*

C. The Representative Plaintiffs Would Have Standing as Individuals.

To have standing, a plaintiff need show only that the interest she seeks to protect "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *120 W. Fayette St., LLP v. Baltimore*, 407 Md. 253, 270 (2009) (citations omitted). School funding claims clearly raise issues of "significant, if not paramount, public interest" and claims for adequate school funding are within the zone of interests of the parents and students attending the schools at issue. *Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365, 376-77 (N.C. 2004). A court may, indeed, infer a right to relief for individuals who "attended constitutionally inadequate schools." *Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell*, 176 A.3d 28, 44 (Conn. 2018). Plaintiffs here more than show a right to relief: the Petition seeks constitutionally adequate funding for their school district and Plaintiffs cite to DLS's reports and expert analysis showing the district is inadequately funded by the State, as well as testimony about the adverse consequences of the State's failure to provide constitutionally adequate funding.

As their predecessor Plaintiffs were in 2004, the current Plaintiffs are "parents of children attending the BCPSS who are 'at risk' of educational failure, meaning that they live in poverty or otherwise are subject to economic, social, or educational circumstances

increasing the odds that they will not receive an adequate education." 2004 Mem. Op. at 2. They have an actual legal stake in the matter because their children attend schools with low ratings on MSBE's own Report Card and low percentages of students scoring as proficient, in a district that has been unconstitutionally underfunded for decades.

Plaintiffs' children are also at risk of educational failure because their district has school facilities that are, by most measures, the worst in the state, and the record is clear that Plaintiffs' complaints regarding facilities are representative of other student experiences. A new report by Plaintiffs' expert Joshua Sharfstein, M.D. reviewed data from every Maryland K-12 public school facility and found that Baltimore City Public Schools "cumulatively are more than 1000 years older than average, whereas Montgomery County Schools are more than 1000 years younger than average." Ex. 88, Sharfstein, Johns Hopkins University, *School conditions and educational equity in Baltimore City*, Sept. 19, 2022, available at https://gisanddata.maps.arcgis.com/apps/Cascade/index.html?appid=3ddf7ded140d4dc38bedc27d6c0e44f7.

BCPSS's substandard facilities hinder students' ability to learn and increase the risk of educational failure in well-documented ways. *See* Pls. MSJ at 31-35. Extreme temperatures are associated with difficulty concentrating, and exacerbate asthma and other health conditions. *See* Pls. MSJ Ex. 66(A), Maxwell Report at 11-12 (chronic exposure to noise caused by defective HVAC systems impairs students' cardiovascular health and is associated with lower reading and math scores and decreased motivation), *id.* at 21-25 (defects in roofing, windows, HVAC and piping "contribut[e] to the low academic achievement, low graduation rates, high absenteeism, and high drop-out rates among BCPSS students"); Pls. MSJ Ex. 49(A), Roseman Report at 68, 87; Pls. MSJ Ex. 47, Kopp Report at 4 (students in "poor" buildings perform 5 to 17% worse than students in functional school buildings); Pls. MSJ Ex. 13(A), Baker Report

at 134 (Harvard School of Public Health identified indoor air quality, water quality, and presence of dust and pests as particularly important to learning).

It is nonsensical to argue that buildings that leak from the ceilings, lack central air, heating, or drinkable water, are infested with vermin or have a deep-seated smell that no amount of bleach will remove "could not be rendering [childrens'] education inadequate." Def. Mem. at 31 n.38. To the contrary, it is undisputed that approximately $3.86 billion is needed to bring the BCPSS facilities to modern standards. *See* Affirmation of Alison Perkins-Cohen, affirmed August 12, 2022 (Dkt. 250/0) ¶ 14 *et seq.*

Plaintiffs' testimony that they have been pleased with some teachers and administrators, Def. Mem. at 7-13, is not dispositive on the issue of standing. This case concerns funding for all of BCPSS. Plaintiffs are more candid and more generous as advocates than MSBE's lawyers: they recognize that there are teachers and administrators in BCPSS who have been resilient and resourceful under impossible circumstances. Their schools are still underfunded. Their students lack access to the resources, programs and extracurriculars that they need for a thorough and efficient education, and must do their best to learn in buildings that are dilapidated and unhygienic. A focus group of BCPSS students observed:

> And then we go to school where there's no AC, water there. And then we go out [of school] and there's nothing to do. Like you make a way. So, it's like from a young age, we're put in a position where we have to survive, and we're blamed for that. It's not our fault. It's not our fault.

Pls. MSJ Ex. 20(A) Fine Report at 96. Even if more were required (it is not), all of Plaintiffs' children attend schools that MSBE's own metrics show to be performing well below state standards, and Defendant's claim that Plaintiffs have conceded their children are receiving an adequate education does not survive a cursory review of their depositions. *See* pages 2-10 *supra.*

Finally, although MSBE claims that Plaintiffs have no standing based on some of their schools' status as charters, MSBE recognizes that one school attended by the children of one Plaintiff is not a charter. Def. Mem. at 31.[8] This concession obviates MSBE's argument that Plaintiffs lack standing because their children attend charters: only one Plaintiff need have standing to represent the class. *See State's Att'y of Baltimore City v. City of Baltimore*, 274 Md. 597, 602, (1975) ("Since one of the plaintiffs . . . had standing to bring the action, it is unnecessary for us to consider the matter of [the other Plaintiff's] standing."). In any event, however, parents of students who attend charter schools are not disqualified to be representative plaintiffs under the Stipulated Order and Consent Decree by virtue of the fact that the Maryland Charter School Program began in 2003. *Cf.* Def. Mem. at 32 n. 29.

Charter schools in Maryland are public schools; those in Baltimore are part of BCPSS. *See* Md. Educ. Code Section 9-101 *et seq.*; Perkins-Cohen Aff., ¶ 5. Charter schools are a form of governance within the school district, and the "public chartering authority for the granting of a charter school shall be a county board of education;" here the county is Baltimore City. Md. Educ. Code Section 9-103. BCPSS's charter schools are funded by the State and the funds are disbursed by BCPSS commensurate with the funding of the other public schools. *Id.*, Section 9-109. Nothing in the Consent Decree or the Court's Orders limits their scope to the schools that existed at the time of the Complaint. To the contrary, the Decree, by its terms, applies to the entire system and provides for future relief for all students in all BCPSS schools.

[8] MSBE writes, "Dorothy Heights [sic] . . . also happens to be the *only* school attended by any of the plaintiffs' children that is not a charter school." Def. Mem. at 31. It is astonishing that MSBE would not know that Bard High School Early College Baltimore is not a charter. *See* Perkins-Cohen Aff. ¶ 11(a). It is disappointing that MSBE appears to think there is a neighborhood in Baltimore called "Dorothy Heights," Def. Mem. at 8, 9 & 31, and does not know that Dorothy I. Height was a key figure in the civil rights movement, an organizer of the 1963 March on Washington, who is credited with being the first person in the movement to connect equality for women and equality for African Americans, issues that had been treated historically as separate.

Plaintiffs' children who attend charter schools in BCPSS thus have standing. The fact that Plaintiffs had some positive comments about the charter schools their children attend does not refute that a majority of students in those schools are not proficient in basic subjects. Nor does it refute that these schools still suffer from dilapidated facilities, and lack sufficient resources to fund teachers, support staff, extra-curricular activities, lockers, computer labs, field trips, library books, and even basic supplies like paper and sanitizing wipes. *See supra* at 2-10.

II. FURTHER RELIEF IS AVAILABLE UNDER THE MARYLAND UNIFORM DECLARATORY JUDGMENT ACT BECAUSE MSBE HAS NOT COMPLIED WITH THE CONSENT DECREE AND THE COURT'S SUBSEQUENT ORDERS.

A. This Court has Twice Rejected Each of MSBE's Arguments.

As it does here, MSBE argued in a motion to dismiss in 2021 that Plaintiffs had conceded in discovery that they did not claim breaches of the Consent Decree. (Dkts. 183/0, 183/2). The Court rejected that argument. (Dkt. 183/3). As it does here, MSBE also claimed in 2019 and in 2021 that Blueprint Act funding would result in full compliance with the Consent Decree, (Dkts. 105/0, 150/5, 183/0, 183/2), and this Court rejected that claim each time. (Dkts. 105/8, 183/3). Finally, as it does here, MSBE claimed in 2019 and again in 2021 that this Court's jurisdiction under the Consent Decree had terminated, so there was no "good cause" for the Court to hear Plaintiffs' claims. (Dkts. 105/0, 150/5, 183/0, 183/2). The Court twice rejected that argument as well. (Dkts. 105/8, 183/3).

MSBE sought to delay the proceedings by appealing this Court's most recent rejection of its repetitive claims, raising exactly the same arguments about compliance with the Consent Decree, lack of jurisdiction, mootness, and political question that it repeatedly raised and lost in this Court. The Court of Special Appeals granted Plaintiffs' motion to dismiss MSBE's

impermissible interlocutory appeal (No. CSA-REG-0201-2022, dated July 11, 2022); the Court of Appeals denied Defendant's motion for discretionary review. (No. COA-PET-0131-2022, dated July 8, 2022). Those courts apparently saw no reason to become involved in this case, and this Court need not revisit its prior rulings.

Defendant now urges the view—without citation to authority—that "summary judgment is different," and that its reiterated motions to dismiss were considered under a "standard deferential to plaintiffs and the allegations in their petition" that "no longer applies post-discovery." Def. Mem. at 1. Defendant misstates the law; in fact, "[O]n a motion for summary judgment, a court must view the facts, including all inferences drawn therefrom, in the light most favorable to the opposing party." *Sterling v. Johns Hopkins Hosp.*, 145 Md. App. 161, 167 (2002) (quoting *Jones v. Mid–Atlantic Funding Co.*, 362 Md. 661, 676 (2001)).

MSBE, moreover, made extensive factual submissions in support of its 2019 and 2021 motions, and the Court considered them. *See* Defs. Opp. to Mot to Strike (Dkt. 189/3) at 7 ("when, as here, 'a motion to dismiss is based upon lack of jurisdiction, the court can consider affidavits or hold an evidentiary hearing on the motion to dismiss . . .'") (quoting *Evans v. Cnty. Council of Prince George's*, 969 A.2d 1024 (Md. 2009). Now, in support of its principal argument, that this Court no longer has jurisdiction because MSBE has complied with the Consent Decree and the Orders under it, MSBE has submitted the same two tables concerning state and total aid to BCPSS from 2007 to 2021 that it did with its 2021 motion to dismiss. *Compare* 2021 MTD at 34 *with* Def. MSJ Ex. N. This Court rejected Defendant's arguments in 2019 and 2021—on the same facts on which Defendant now relies—and there is no reason for it to reach a different result on the instant motion. In addition, Defendant's arguments and this Court's Orders denying MSBE's various motions, are based on the Consent Decree and

Plaintiffs' discovery responses. Those documents, and the analysis flowing from them, has not changed between the rulings on the motions to dismiss and the motion now before the Court.

B. Plaintiffs Have Not Disclaimed Any Allegation of Violations of the Consent Decree or of the Court's Subsequent Orders.

As this Court has held—most recently in the 2022 decisions that MSBE tried unsuccessfully to appeal—there is no basis for MSBE's claim that Plaintiffs "concede" that they do not seek to "effectuate" or "implement" any judgment of this Court and "no longer question MSBE's compliance with the Court's prior Orders." Def. Mem. at 33. Defendant's argument is premised on an incomplete and misleading presentation of the record. In fact, Plaintiffs Interrogatory Responses provide a detailed explanation of Defendant's noncompliance with the Maryland Constitution, the Consent Decree, and this Court's prior Orders. *See* pages 17 -18 *supra.*

C. MSBE has not complied with the Consent Decree.

The State's main argument is that Plaintiffs "cannot identify any violation or noncompliance of the consent decree or subsequent orders" because "it is not subject to factual dispute" that "there is none." Def. Mem. at 34. This Court has rejected this argument repeatedly, as noted above. *See* 2000 Mem. Op. (Dkt. 10/0); 2002 Mem. Op. (Dkt. 25/0); 2004 Mem. Op. (Dkt. 50/0); 2019 Mem. Op. (Dkt. 105/8); 2022 Mem. Op. (Dkt. 183/3).

Defendant asserts that all it need show is that it provided the funds required under the Consent Decree through 2002, and that the Court should assess jurisdiction without considering the subsequent Orders and whether MSBE complied with them. Def. Mem. at 34. The Consent Decree, however, expressly permits BCPSS, supported by the Private Plaintiffs, to return to court to seek additional funds. Consent Decree ¶ 53 (authorizing application for

"funding amounts greater than" those specified in the Decree). As this Court held in 2020, rejecting the same argument by MSBE, "the terms of the Consent Decree include references to "amounts greater than" and "on or after" (citing Consent Decree ¶¶ 16-17, 53), and the Court extended its jurisdiction over the Decree in 2002, so "this Court retains jurisdiction under the terms of the Consent Decree." 1/16/2020 Order at 9. The Court noted that it had rejected the same argument in 2000, 2002, and 2004. *Id.* at 9-10.

Pursuant to the Decree, BCPSS and the Plaintiffs sought and obtained the determinations that further support the relief requested in the Petition. *See* 2000 Mem. Op. at 14-15, 25-26 (additional funds are necessary for adequacy); 2002 Mem. Op. at 4-5 (the State's failure to comply constituted "good cause" for extending judicial supervision of the Consent Decree); 2004 Mem. Op. at 64-65 (the State has continued to unlawfully underfund BCPSS in violation of the Court's Orders). The State's argument that it "fully and timely complied with its obligations under the Decree" by funding an additional $280 million through 2002 ignores this Court's decisions holding otherwise.

D. MSBE has not complied with the Court's 2000 and 2004 Orders.

MSBE's claim that it complied with the Court's 2000 and 2004 Orders has also been raised and rejected, as described above. *See supra* at 32; 2022 Order (Dkt. 183/3) (March 8, 2022). In support of its claim, MSBE proffers only its Ex. N, which purports to show that BCPSS's "total funding from all sources" has exceeded the targets mandated by the Court's June 2000 order. Def. Mem. at 35. Ex. N, however, is hardly "undisputed evidence." It presents the same two tables that the Court considered when it rejected MSBE's 2021 claim of compliance with the 2000 and 2004 Orders. Def. Motion to Dismiss 2021 (Dkt. 183/0) at 34–35. Ex. N is clearly disputed by the State's own admissions and calculations showing that,

far from complying with the 2000 and 2004 Orders, the State's funding for BCPSS left annual adequacy gaps of about $156 million for FY2013; Pls. MSJ, Ex. 7, DLS, Education in Maryland, Legislative Handbook Series, Vol. IX (2014) at 64 (estimate based on per-pupil adequacy gap)); $290 million for FY2015; Ex. 9, DLS Presentation (2016) at 7; and $342.3 million for FY2017, the last year for which DLS conducted an educational adequacy analysis. Pls. MSJ Ex. 8, DLS Follow-up (2019) at 9.

The State purported to comply with the 2000 Order by enacting the Bridge Act. Funding under that Act was supposed to be fully phased in by 2008, but in 2007 the State began eroding mandated increases intended to account for inflation and the rising cost of education. *See* Opp. to 2019 MTD at 22-23 (Dkt. 105/1)(citing 2007 Md. Laws (Special Session) ch. 2; Handbook at 72). MSBE admitted on its 2019 motion to dismiss 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.

MSBE Mem. in Supp. of Mot. to Dismiss, Jun. 19, 2019, at 4 (citing 2007 Md. Laws (Special Session) ch. 2). MSBE also conceded that the legislature "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. Finally, MSBE admitted that the changes to the Thornton formula "increase[d] . . . the size of the estimated adequacy gaps for . . . [BCPSS]." *Id.* at 26. The State's pattern of freezing, capping, and diminishing Bridge Act funding, *see* pages 19-21 *supra*, is thus undisputed.

MSBE cannot controvert the State's own calculations, by DLS, of annual adequacy gaps in funding for BCPSS. In addition, Plaintiffs' expert Bruce Baker calculates that the per-

pupil funding totals identified by MSBE fall woefully short of the amounts necessary for adequate funding. *Compare* Ex. N to Defts. MSJ *with* Ex. 89, Baker Rpt., Table 18. For 2021, for example, MSBE claims it exceeds the adequacy standard with $18,396 in total per-pupil funding from all sources. Dr. Baker calculates that, for 2021, the base model for costs necessary for BCPSS to achieve national average performance was $20,632 per pupil, while the amount necessary to meet the Massachusetts level performance identified by the Kirwan Commission was $37,056. When the effect of systemic discrimination is accounted for, the necessary amounts are $26,590 and $45,975 respectively. Ex. 89, Table 18, Baker Expert Rpt.

Finally, MSBE's Ex. N purports to show that "BCPSS's total per pupil funding per fiscal year," but BCPSS's total funding is irrelevant. At issue here, as clearly set forth in the Consent Decree and subsequent Orders, are the additional funds the State must supply to BCPSS. *See* 1996 Consent Decree ¶ 47 ("*The State* shall provide to the Baltimore City Public Schools the following additional funds.") (emphasis added); *id.* ¶ 48 ("*The State* shall also provide at least $10 million to BCPS.") (emphasis added); 2000 Order ("*The State of Maryland* has failed to make the statutorily mandated best efforts to provide . . . the additional approximately $2,000 to $2,600 per pupil.") (emphasis added); 2000 Mem. Op. 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 provides a mechanism for the New Board to request *additional funds from the State* throughout the term of the Decree."); 2004 Mem. Op. at 21 ("In June 2000, this Court ruled that substantial *additional state funds* were necessary on top of funding already in the budget for FY 2001 and FY 2002. . . . *The State* has failed to provide the additional $2,000 to $2,600 per pupil that was ordered by this Court in 2000. . . . Funding sufficient for the BCPSS

to achieve constitutional adequacy will not occur until the BCPSS receives at least $225 million in *additional State funding*.") (emphasis added). The State cannot evade its constitutional duty to fund an adequate education for the children of Baltimore City by pointing to funds BCPSS may receive from other sources.

III. THERE IS GOOD CAUSE FOR CONTINUING JURISDICTION UNDER THE CONSENT DECREE.

MSBE's assertion that good cause no longer exists to support continuing jurisdiction should be rejected for the same reasons articulated above in Section II.C: (1) this Court has already held, based on the same factual showing MSBE makes here, that good cause continues to exist, most recently in the 2022 decision that MSBE sought unsuccessfully to appeal; and, (2) MSBE's claim of "full compliance" with the Decree and this Court's Orders is simply incorrect. MSBE's failures to comply provide jurisdiction for the Court to hear the Petition and decide the questions at the heart of the case. The Consent Decree itself, to which MSBE is a party, dictates that the initial term of the decree could be extended upon a showing of "good cause," and that the Court would retain jurisdiction even after the Decree terminated in order to resolve disputes that had arisen during the Decree's term. Consent Decree ¶¶ 68, 69. Good cause continues to exist for three reasons: (1) the constitutional violation that the Court has identified numerous times is continuing; (2) Defendant has not yet complied with this Court's orders; and (3) the Court may continue to monitor and enforce compliance with its own Orders.

This Court unquestionably has authority to continue judicial supervision over this matter until the constitutional violation the Court found in 2000 and 2004 has been remedied. A court may terminate a consent decree when it has determined that the party subject to it "is operating in compliance with the commands of the Constitution, and that it is unlikely that the party would revert to non-compliance." *J.G. v. Bd. of Educ. of the Rochester City Sch. Dist.*,

193 F. Supp. 2d 693, 699 (W.D.N.Y. 2002). When compliance has not yet occurred, however, the decree, and court supervision, should stay in place. *United States v. Balt. Police Dept.*, 290 F. Supp. 3d 420, 421 (D. Md. 2018) ("Pursuant to the terms of the Consent Decree, the Court retains jurisdiction of this action until such time as the Court determines" the Defendant achieved compliance with the consent decree.); *Riddick & Riddick v. Sch.. Bd. of City of Norfolk*, 784 F.2d 521, 530 (4th Cir. 1986) (affirming district court's decision "not to end litigation until it was satisfied that the school system was free from racial segregation."); *Felder v. Harnett Cnty. Bd. of Educ.*, 409 F.2d 1070, 1075 (4th Cir. 1969) (district court properly retained jurisdiction over the school system to make sure "it is operated in a constitutionally permissible fashion…") (citations omitted); *Washakie Cnty. Sch. Dist. No. 1 v. Herschler*, 606 P. 2d 310, 337 (Wy. 1980). In considering whether to terminate a consent decree, a court must look to "good faith commitment to the whole of the court's decree and to those provisions of law and the Constitution that were the predicate for judicial intervention in the first place." *Freeman v. Pitts*, 503 U.S. 467, 491 (1992). *See also Mo. v. Jenkins*, 515 U.S. 70, 89 (1995); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439 (1968).

This Court, moreover, has jurisdiction to enforce its own orders. *Butler v. S & S P'Ship*, 51 A.3d 708, 743 (Md. 2012); *In re Adoption/Guardianship of N.C.*, 2017 WL 4231312 at *11 (Md. 2017); *Reich v. Walker W. King Plumbing & Heating Contractor*, 98 F. 3d 147, 154 (4th Cir. 1996). After imposing constitutional requirements in education funding cases, courts properly retain jurisdiction to monitor the compliance of the executive and legislative branches with constitutional mandates. *See, e.g., Washakie Cnty. Sch. Dist. No. 1,* 606 P.2d at 337 (directing trial court to "retain jurisdiction until a constitutional body of [public school

financing] legislation is enacted"); *Robinson v. Cahill*, 355 A.2d 129, 139 (N.J. 1976) (court retained jurisdiction to ensure the legislature complied with its order).

In decisions in 2000, 2002, 2004, 2020, and 2022, this Court rejected MSBE's claims of compliance with the Consent Decree and Court's Orders and extended the Court's continuing jurisdiction for "good cause." In 2000, the Court held that BCPSS's 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. Mem. Op. 25 (Dkt. 10/0) (June 30, 2000). In 2002, the Court rejected Defendant's argument that the newly-enacted funding formula in the Bridge Act provided sufficient compliance and extended the Court's jurisdiction, "until such time as the State has complied with the Court's June 2000 order." Mem. Op. 3, 5 (Dkt. 25/0) (June 25, 2002). In 2004, this Court again found continuing violations by the State and held that "full compliance" would not occur until the State provided at least full funding of the adequacy formula enacted in the Bridge Act. 2004 Mem. Op. 64–65 (Dkt. 50/0) (Aug. 20, 2004) at 14-24, 57-58, 64-65. The Court further held that it retained jurisdiction under the Decree to "ensure compliance with its orders and constitutional mandates and to continue monitoring funding and management issues." *Id.* at 64-65. In 2019, the Court denied the Defendant's Motion to Dismiss, rejecting MSBE's 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. at 9-10 (Dkt. 105/8) (Jan. 16, 2020). Finally, the Court rejected MSBE's claims a fifth time when it denied the Defendant's second Motion to Dismiss, again rejecting the State's arguments of full compliance based on the same evidence MSBE submits again in support of the instant motion. Order at 2 (Dkt. 183/3) (Mar. 7, 2022). When Defendant tried

to elevate the issue to the appellate courts, the Court of Special Appeals and Court of Appeals summarily refused to hear the appeals. Court of Special Appeals Order Granting Dismissal (May 11, 2022); Petition for Writ of Certiorari Denial (Jul. 8, 2022). These five rulings definitively establish that the Circuit Court has jurisdiction until Defendant has complied fully with the Consent Decree and the Orders implementing it.

This Court's decisions, moreover, were made on the facts, *see* § II.A-C, pages 29-32 *supra*, and not, as MSBE contends, Def. Mem. at 36-7, on the bare allegations of the Petition. Contrary to MSBE's assertions on its earlier motions and here, BCPSS was not funded from FY2007 on in excess of the amount Judge Kaplan declared necessary; indeed, MSBE itself recognizes the adequacy gap that opened and widened year after year because the State, starting in 2007, eroded the required Thornton funding formula. *See* pages 17-20 *supra*. Before a consent decree may be dissolved, the party bound by it must exhibit faithful compliance, and that it is not likely to revert to its prior unconstitutional behavior. *See Alexander v. Britt*, 89 F.3d 194, 201 (4th Cir. 1996) (compliance for little more than a year not sufficient evidence of good faith compliance); *Peery v. City of Miami*, 977 F.3d 1061, 1075 (11th Cir. 2020) (to prove a consent decree has been fully achieved, a party must establish "(1) current substantial, good-faith compliance, and (2) that it is 'unlikely…[to] return to its former ways' absent the consent decree.") (quoting *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991)); *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987); *J.G. v. Bd. of Educ.*, 193 F. Supp. 2d at 699.

The State's conduct here in deliberately eroding any chance of compliance precludes a finding of "good cause" under the cases. The State, moreover, never applied to this Court in 2008 or afterwards for termination of the Consent Decree and this Court's jurisdiction; instead, it simply violated the Court's decisions. If the State believed it complied with the Court's

declarations in 2008, it would have sought the reassessment of good cause that this Court indicated it would perform.

The State's actual and projected funding increases under the Blueprint Act also do not constitute "good cause" for terminating the Consent Decree, given that the Act's funding is contingent and uncertain. *See* pages 9-14 *supra*. Even if every cent of the projected Blueprint funds were to be provided, this funding is predicated on the false assumption that BCPSS already achieved educational adequacy under the Bridge Act, Perkins-Cohen Aff. ¶ 16 and is insufficient to fill the decades-long accumulated adequacy gap caused by the State's unlawful underfunding of BCPSS. If the projected funding were to be provided in full, moreover, it would be phased in over at least a generation of students. In 2002, this Court found that projected funding increases under Thornton were not enough to terminate the Consent Decree; Mem. Op. at 3, 5 (Dkt. 25/0) (June 25, 2002); in 2004, it confirmed that its jurisdiction under the Decree would not terminate until at least full funding was phased in as planned; 2004 Mem. Op. at 64-65 (Dkt. 50/0) (Aug. 20, 2004); in 2020 it rejected the State's argument that projected Kirwan increases constituted good cause to terminate the Decree; Mem. Op. at 9-10 (Dkt. 105/8) (Jan. 16, 2020); and in 2022 it rejected that argument based on the initial year of funding and additional projections. Order at 2 (Dkt. 183/3) (Mar. 7, 2022). There is no reason for this Court to depart now from its settled determinations.

Finally, Defendant's "good cause" argument is controverted by the undisputed evidence of crumbling BCPSS facilities. *See* pages 3-9 *supra*. There can be no good cause to terminate the Decree and this Court's jurisdiction until all BCPSS students attend facilities that are safe, in good repair, and suited to educational purposes.

IV. THE RELIEF SOUGHT IN THE PETITION HAS NOT BEEN PROVIDED AND THE PETITION IS NOT MOOT.

MSBE's claim that the enactment of the Blueprint and Built to Learn Acts renders the Petition moot merely restates its baseless arguments concerning standing, compliance and jurisdiction, together with the failed argument that it made in 2004 that the Bridge Act had brought the State into compliance with the constitution. Pls. MSJ Ex. 4, 2004 Mem. Op. at 67-70. As set forth at pages 1–22; Section. II.C; and Section III *infra*, MSBE's reliance on the Blueprint Act to claim that the State has done what is required, under Art. VIII, the Consent Decree, or the Court's subsequent Orders, is meritless. As BCPSS's Chief of Staff observes:

> Education funding provided in any single year, whatever the amount, will not produce educational adequacy. Educational adequacy requires such elements as sufficient numbers of experienced teachers, school leaders, librarians, counselors, social workers, psychologists, nurses, and aides. It also requires modern, well-maintained buildings with dedicated, fully equipped libraries, gymnasiums, playgrounds, playing fields, science labs, art studios, and music rehearsal and performance space. Educational adequacy can be built and maintained only if there is sufficient funding year after year. BCPSS needs reliable, annual, additional funding to build back after more than four decades of insufficient funding.

Perkins-Cohen Aff. ¶ 45; *see also id.* ¶¶ 19-49.

Meanwhile, the Built to Learn Act covers only a small fraction of the improvements needed by BCPSS's schools. *See* pages 14 *supra.* If that Act and the 21st Century School Buildings Program were fully implemented, more than $3.86 billion (in 2022 dollars) would still be needed to bring all of BCPSS's school buildings up to minimally acceptable standards. *See* Affirmation of Alison Perkins-Cohen, affirmed August 12, 2022 (Dkt. 250/0) ¶ 14 *et seq.* and Exhibit A thereto. Dr. Sharfstein's report and his most recent publications on Maryland public school facilities shows BCPSS's facilities to be some of the worst in the state. *See* pages 26 *supra.*

The Consent Decree recognized the need for additional funding for BCPSS's facilities, Plt. MSJ Ex. 2, Consent Decree ¶¶ 29-34, 40-54, and in the 2000 Mem. Op, this Court adopted the specific conclusions and recommendations of the Metis Report including the conclusions that BCPSS physical facilities were in very poor condition and that substantial additional funding was necessary for school facilities improvements. 2000 Mem. Op. at 15-16. This Court further incorporated evidence of inadequate facilities into its findings in 2004 of continuing constitutional violations. 2004 Mem. Op. ¶¶ 24, 71. The State's funding for school facilities is still at least $3.86 billion shy of the amount needed to moot the Petition.

V. CHALLENGES TO STATE UNDERFUNDING OF PUBLIC EDUCATION UNDER ART. VIII ARE JUSTICIABLE.

MSBE seeks to resurrect its argument that Plaintiffs' challenge to the State's violation of Art. VIII presents a nonjusticiable political question. The contention that this Court lacks judicial power to declare and protect Plaintiffs' rights is flatly wrong, and the State conceded as much by: (1) entering into the Consent Decree recognizing the judicial power of this Court; and (2) its conduct before this Court and its admissions before the Court of Appeals. MSBE now argues, however, that the Consent Decree and the Court's declaratory rulings are nullities, and that Art. VIII's guarantee of a "thorough and efficient" public school education is meaningless because it is not enforceable.

To determine whether a claim constitutes a nonjusticiable political question, our courts apply a well-settled test. 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 *Powell v. McCormack*, 395 U.S. 486, 516-17 (1969)). Under this part of the test, the Court must determine "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the asserted right 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.* Factors to be considered include whether there exists:

> 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.

Id. In considering these factors, courts remain cognizant that the 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).

Since these standards were first announced in *Baker v. Carr*, 369 U.S. 186 (1962), the Court of Appeals has applied them to prohibit adjudications by Maryland courts only twice: (1) to prohibit a tort claim of negligence against the State arising from an accident during a National Guard military training exercise, *Burris*, 360 Md. 721, and, (2) to prohibit a claim that the state Senate had improperly extended adjournment without the consent of the House of Delegates. *Smigiel*, 410 Md. 302. By contrast, it has rejected application of the doctrine multiple times, in diverse contexts. *See Md. Comm. for Fair Rep'n v. Tawes*, 228 Md. 412 (1962) (legislative appointment); *Traore v. State*, 290 Md. 585, 591-92 (1981) (State Department decisions regarding retroactive effect of diplomatic immunity statute); *Lamb v. Hammond*, 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 governing submission by party's central committee of names to governor to fill legislative vacancies). The instant case, involving the right of school children under the Maryland Constitution to a thorough and efficient education, is a far cry from the two cases in which the Court found the political question doctrine to preclude judicial review.

A. This Court has Repeatedly Rejected MSBE's Claim That Plaintiffs Present a Non-Justiciable Political Question, and MSBE Conduct has Conceded this Court's Authority.

As this Court noted in rejecting MSBE's "political question" claim in ruling on its 2019 motion to dismiss, MSBE has raised this same argument without success since the inception of this case. 2020 Mem. Op. at 11 (MSBE has argued political question before this Court and the Court of Appeals, and its "position is deficient in light of the history of this matter"). Defendant first raised and lost the political question argument in 1996, State Mem. In Supp. of Mot. for Summary Judgment (Dkt. 62) Aug. 28, 1996 at 2-3; it raised it again in 2000 when it was brought back before the Court for the first time after entry of the Consent Decree; State Opp. To Pet. For Further Relief (Dkt. 3/1) Jun. 23, 2000 at 16-21; it then raised it on the appeal that it filed and then voluntarily dismissed; Brief of Appellants, Dec. 8, 2000 at 11-20; Notice of Dismissal, Jan. 30, 2001; and after the Plaintiffs' 2019 Petition was filed, MSBE raised the argument again, in a motion to dismiss filed in 2019 that this Court denied. Def. Motion to Dismiss (Dkt. 150/0) Jun. 19, 2019 at 51-59. The determination that this case presents justiciable issues not barred by the political question doctrine is thus plainly law of the case. *Ralkey v. Minn. Min. & Mfg. Co,* 63 Md. App. 515, 520 (1985) (quoting 21 C.l.S. § 195 at 330

(1940); *Wheeler v. Wheeler,* 636 A.2d 888 (Del. 1993) (voluntary dismissal of appeal made underlying decision law of the case). There is no reason for the Court to alter its previous determinations, as MSBE has offered no new facts or law to support its argument.

The State's own actions and admissions further confirm that the State itself has repeatedly recognized this Court's authority to address the constitutional questions raised here. The State entered into the Consent Decree, submitting to this Court's authority. It chose to dismiss its appeal from the 2000 Mem. Op., electing, as the then-Superintendent of Schools testified under oath, to abide by this Court's Orders. Tr., Aug. 4, 2004, at 1562-63. In 2004, it filed its own motion seeking a declaration it had complied with the Constitution. Dkt. 38/0, State Mot. for Declaratory Ruling, Mot. at 1, Mem. at J. Finally, in briefing before the Court of Appeals in 2005 it conceded this Court's power to determine the constitutionality of the State's actions, explaining 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." State Appellant Brief, Dec. 14, 2004, at 29-30, 35 n.10; State Appellant Brief, Dec. 8, 2000, at 24.

B. This Court has Plenary Authority to Order the State to Comply with the Constitutional Mandate of Adequacy, Including the Power to Order the Expenditure of Additional Funds.

As this Court held when it rejected MSBE's "political question" argument:

> Judicial review of constitutional violations, such as violations of Article VIII of the Maryland Constitution's right to an adequate education, are not prohibited by separation of powers. Defendant alleges that Plaintiffs are asking the judiciary to partake in matters that are under the sole authority of the legislative and executive branches. However, the Maryland courts maintain an inherent authority to review constitutional adequacy. Indeed, "executive and legislative budget authority is subject to constitutional limitations." *Ehrlich v. Perez*, 394 Md. 691, 736 (2006),

> *citing Judy v. Schaefer*, 331 Md. 239, 266 (1993). Therefore, review of adequacy of funding of public education in Maryland is within the purview of the Maryland Judiciary, through the actual appropriation of funds is the duty of other branches of government.

2020 Mem. Op. at 10-11. Despite this clear guidance, MSBE reiterates here its mistaken contention that the constitutional right of the children of Baltimore City to an adequate education is unenforceable because appropriation of state funds is constitutionally designated to the legislative branch. As the Court noted in its 2020 Mem. Op., however, the Court of Appeals rejected essentially the same argument and held that courts have clear judicial authority to order recalcitrant State agencies violating constitutional rights to provide the funding needed to comply with the Constitution. *Id.* In *Ehrlich*, the Court of Appeals unanimously held that the Maryland courts had inherent authority to determine that the State's failure to appropriate Medicaid funds for a certain class of individuals was unconstitutional and that the courts could issue a preliminary injunction requiring the State to provide the funds to pay the benefits at issue. 394 Md. 691 (2006). Citing Article III § 52, one of the provisions invoked by MSBE here, the *Ehrlich* defendants argued that "the court lacks the authority to order the executive legislative branches prospectively to reinstate medical assistance benefits" and that the order was "an illegal appropriation of funds." *Id.* at 735. The Court of Appeals disagreed, holding that, even if Article III §§ 32 & 52 "provide a comprehensive executive budgetary procedure for appropriating monies," the order did not "direct the appropriation of specific funds" but rather remedied defendants' unconstitutional withholding of funds. *Id.* at 735-736. Rejecting the *Ehrlich* defendants' argument that the plaintiffs' constitutional right "does not overbear the express terms of... the budget provisions of the Constitution," the Court of Appeals held that "the executive and legislative budget authority is subject to the

constitutional limitations of the Declaration of Rights." *Id.* at 736 (citing *Judy*, 331 Md. at 226).

Ehrlich is directly on point. When the State fails to appropriate funds in violation of a constitutional right, courts have plenary authority to order the State to comply with the Constitution, including the power to order the State to expend additional funds.

C. Nothing in Art. VIII Declares the Political Branches To Be the Sole Arbiters of the Constitutional Sufficiency of School Funding.

MSBE further asserts that *Hornbeck v. Somerset Cty. Bd. of Educ.*, 295 Md. 597 (1983) somehow shows that the Constitution commits state educational funding to the coordinate political departments. To the contrary, *Hornbeck* expressly acknowledges—and this Court has repeatedly confirmed—that judicial action may occur under the proper circumstances. Proof of inadequate education, for instance, would constitute a valid "evidentiary showing" of a violation of Art. VIII. Such a showing was lacking in *Hornbeck*:

> 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§ I 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.

Id. at 639. Plaintiffs here, by contrast, have amassed a full record demonstrating the lack of adequacy, presenting exactly the kind of case that *Hornbeck* held would be justiciable.

Hornbeck's description of the types of evidence that demonstrate a violation of Art. VIII, and its conclusion that the plaintiffs there had not presented such evidence, underscores the judiciary's authority to adjudicate the State's compliance, or lack thereof, with Art. VIII. A showing of any of three conditions—(1) a local school district's failure to meet state

qualitative educational standards; (2) inadequate state standards; or (3) insufficient funding by the state for a district to meet those standards—could establish a sufficient "evidentiary showing" that Art. VIII has been violated. Far from lending credence to MSBE's argument that the constitution grants the Legislature exclusive power over appropriations for school funding without regard for the constitutional rights of school children, *Hornbeck* directly contradicts that argument by providing a roadmap for litigating violations of Art. VIII.

In the initial proceedings in *Bradford*, the Court of Appeals confirmed that *Hornbeck* permits Plaintiffs' constitutional claim. Montgomery County appealed this Court's denial of its motion to intervene, and the Court of Appeals reaffirmed *Hornbeck* and made clear that proof of a failure to provide funding sufficient to meet state standards or proof of an inadequate state standard could establish a legally actionable violation of Art. VIII. See *Montgomery Cnty. v. Bradford*, 345 Md. 175, 181 (1997). Similarly, the Court of Appeals' opinion in the appeal from the 2004 Mem. Op. did not suggest that justiciability or political question issues should prevent this Court's adjudication of this case. See *Maryland State Bd. of Educ. v. Bradford*, 387 Md. 353, 384-85 (2005).

MSBE's further claim that "other courts" support its non-justiciability argument with regard to education funding, Def. Mem. at 49 n.37, is misleadingly incomplete. MSBE cites only one case in support of this sweeping claim, and does not mention that the majority of courts considering educational adequacy cases, including in states with constitutional language identical or very similar to Maryland's, reject "political question" and related separation-of-powers arguments in deciding that the courts may provide a remedy for constitutional violations. *See, e.g.*, *Lake View Sch. Dist. No. 25 of Phillips Cnty 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. Oppy. v. Carney*, 199 A.3d 109, 172-78 (Del. Ch. 2018).[9]

Courts may be required to abdicate their fundamental judicial authority to enforce the constitution only through a clear and explicit textual statement in Art. VIII. *See e.g.*, *Traore*, 290 Md. at 592 (questions concerning "interpretation or scope of legislative enactment" are "issues to be resolved by the judiciary"). Art. VIII, however, plainly lacks any language expressing the intent to preclude judicial review and to consign its "thorough and efficient" mandate to hortatory status. In *Jones*, the Court of Appeals rejected a political question defense because the text in question did not demonstrate the "commitment [of the question] to sole legislative purview." 432 Md. at 401. So, too, here. The General Assembly has responsibility to implement a system of thorough and efficient public schools, but there is nothing in Art. VIII that designates the political branches the sole arbiters of whether school funding is sufficient for public schools to meet constitutional requirements. This fact alone defeats MSBE's argument.

The textual silence of Art. VIII is amplified by the strong presumption under Maryland law that judicial power extends to reviewing the constitutionality of executive or legislative-branch acts or omissions. The judicial power to hear and remedy constitutional violations is

[9] *See also 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); *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 (I 983); *Abbeville Cnty 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. I of King Cnty. v. State*, 585 P.2d 71, 86-87 (Wash. 1978).

firmly established. As the Court of Appeals states, "[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. at 426 (citing *Marbury v. Madison*, 5 U.S. (1 *Cranch*) 137, 177-78 (1803)); *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. 236-43, 1802 WL 349, at *4 (Md. 1802) ("some power under the constitution" is necessary "to restrict the acts of the legislature within the limits defined by the constitution"). To accept MSBE's theory would reduce Art. VIII to an illusory promise, and would violate the fundamental canon that constitutional text cannot be rendered meaningless by construction. *See Tawes*, 228 Md. at 426.

MSBE points to no other provision of the Maryland Constitution that codifies a vital right but that gives the legislative and executive branches free rein to violate it. Maryland courts have long recognized that the judiciary's purpose 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 "has placed the judiciary as the barrier or safeguard to resist the oppression, and redress the injuries which might accrue from such 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); *see also Piselli v. 75th St. Med.*, 371 Md. 188, 205 (2002) (a "basic tenet" of Maryland's constitutional construction requires a remedy for every constitutional wrong); *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."). As Article 19 of the Declaration of Rights provides, "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 extends to protect Marylanders from all unconstitutional actions by state actors. *See, e.g. Doe v. Doe*, 358 Md. 113, 128 (2000) ("[U]nder Article 19, 'plaintiff injured by unconstitutional state action should have a remedy to redress the wrong.") (quoting *Ashton v. Brown*, 339 Md. 70, 105 (1995)). The State nonetheless seeks to deprive the children of Baltimore City of a judicial remedy to a constitutional violation. This Court should reject MSBE's argument, and once again rule that Plaintiffs' Article VIII claims are justiciable.

CONCLUSION

For the foregoing reasons, the Private Plaintiffs respectfully request that this Court deny Defendant's Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

I, Jeffrey E. Liskov, certify that I have this day caused to be served a copy of this PRIVATE PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT on the following counsel and parties by electronic mail and by U.S. mail with postage prepaid on October 4, 2022:

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