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

* *

PLAINTIFFS' [PROPOSED] CONCLUSIONS OF LAW

The Private Plaintiffs, by their undersigned counsel, respectfully submit the following Proposed Conclusions of Law, as directed by the Court on December 14, 2022:

I. THE PARTIES' MOTIONS TO EXCLUDE EXPERTS[1]

1. Expert testimony may be admitted only if the Court determines that it "will assist the trier of fact." Md. R. Evid. 5-702. Under this standard, the proposed testimony must have sufficient factual basis and appreciably help the court. In addition, expert testimony must be reliable, considering the "methodology" employed by the expert and whether the proposed testimony is "relevant and 'fits' the case at issue." *Rochkind v. Stevenson*, 471 Md. 1, 31 (2020).

2. The proposed testimony of each witness proffered by MSBE as an expert fails to satisfy these threshold requirements for admissibility. Neither Eric Hanushek nor Nate Levenson presents analysis of BCPSS's performance or spending. *See* Pls. Mot. Exclude Expert Test. at 5–7, 10–11, 12-15, Dkt. 251/0. Hanushek is unable to substantiate or explain his analysis, *see id.* at 7–10; and Levenson concedes that he is not an expert in school facilities or their fitness, *see id.* at 12–13. Neither Levenson nor Matthew Munter, who is employed by the State's assessor of facilities, can

[1] The parties' motions are addressed in the order of argument held December 14, 2022. However, it is possible to grant the Plaintiffs' summary judgment motion without granting Plaintiffs' Motion to Exclude Experts or Motion to Strike.

be permitted to serve as an expert "mouthpiece" for MSBE's facts. *See id.* at 16, 20–21. Munter's views also lack sufficient basis, analysis, and reliability for expert testimony. *See id.* at 18–20.

3. The Court rejects MSBE's Motion to Preclude Plaintiffs' Expert Testimony of Bruce Baker, Kirabo Jackson, Jerry Roseman, Lorraine Maxwell, Michelle Fine, and Joshua Sharfstein. Plaintiffs' experts: (1) are qualified; (2) will assist the trier of fact; and (3) have sufficient factual support. Pls. Opp. Mot. Preclude Experts at 5–25, Dkt. 247/1. Plaintiffs' experts possess extensive credentials in the subject areas for which they are offered (*see id.* at 5–9), they will provide testimony tailored to the specific conditions of BCPSS that will aid the Court in assessing the connections between funding levels and adequacy of education in Baltimore City (*see id.* at 9–11), and they considered and incorporated into their opinions sufficiently deep and varied sources of factual information specific to the unique conditions of BCPSS that allow them to render reliable opinions that fit the specific issues in controversy in this case (*see id.* at 14–25).

II. PLAINTIFFS' OBJECTION AND MOTION TO STRIKE

4. In deciding a motion for summary judgment, the Court may not rely on inadmissible evidence. *See George v. Balt. Cnty.*, 463 Md. 263, 273-274 (2019). Materials not otherwise in the record that are submitted with a motion are admissible only if accompanied by an affidavit affirming their authenticity. Md. R. Civ. P. 2-311(d), 2-501(a); *Scully v. Tauber*, 138 Md. App. 423, 431 (2001).

5. The Court finds that Exhibit N submitted by MSBE in its Motion for Summary Judgment (Dkt. 246/0) is inadmissible. Exhibit N is not supported by an affidavit by someone with personal knowledge of its calculations, preparation or conclusion as required by Md. R. Civ. P. 2-311(d) and 2-501(a). *See* Pls. Obj'n & Mot. Strike ¶¶ 12-15, Dkt. 259/0. Exhibit N is also inadmissible because it fails to identify the basis for the numbers it presents and is devoid of information

necessary for the Plaintiffs and the Court to assess the accuracy of those numbers. *See* Pls. Obj'n & Mot. Strike Reply at 3, Dkt. 259/2. As Exhibit N is inadmissible, it will not be considered for the purposes of summary judgment.

6. It is within this Court's discretion to grant a motion to strike "any improper, immaterial, impertinent, or scandalous matter" in any pleading or to "order any pleading that is late or otherwise not in compliance with these rules stricken in its entirety." Md. R. Civ. P. 2-322(e).

7. The Court strikes the table purporting to show a "surplus" submitted by MSBE in its Motion to Preclude Plaintiffs' Experts and the corresponding exhibits cited within the table. Dkt. 247/0 at 35-36. The table and MSBE's exhibits present excerpts from Certified Annual Financial Reports ("CAFRs") that are misleading as they: (a) are constructed based on a misunderstanding of basic accounting principles; and (b) do not contain or refer to those portions of the CAFRs demonstrating that the numbers in the "surplus" table do not actually constitute funds available for expenditure. Pls. Obj'n & Mot. Strike ¶¶ 17-18**;** Pls. Obj'n & Mot. Strike Reply at 4–6.[2]

8. As to the first point, the "surplus" table is inaccurate because the CAFRs explicitly state "net changes in position," not surpluses. Supp. Aff. Perkins-Cohen (Oct. 3, 2022) ¶¶51–57. BCPSS's Chief Financial Officer explained that a "change in net position," "under accrual-based accounting," means that "income and expenses are recorded as they are incurred, whether or not money changes hands at that point." Aff. Doherty (Dec. 7, 2022) ¶10. "Accrual-based accounting requires the recognition of … long-term transactions as an increase in assets whose ultimate impact

[2] If the Court elects not to strike the "surplus" table, then Md. R. Evid. 5-106 would require the introduction of the portions of BCPSS's CAFRs that provide essential additional context by demonstrating that the numbers in the "surplus" table are not actually available for spending. Md. R. Evid. 5-106. For this reason, the Court accepts the supplemental materials (Plaintiffs' Exhibits 101 through 111 and the Doherty Affidavit) submitted by Plaintiffs. *See* Pls. 12/8/22 Notice Supp. & Correct Record at 1-6.

is a positive change in net position, such as a facility renovated by the Maryland Stadium Authority rather than BCPSS." *Id.*

9. The Court strikes the pages of MSBE's Motion to Preclude Plaintiffs' Expert Testimony that contain summary judgment argument because these pages have no relevance to the admissibility of Plaintiffs' experts' testimony. *See* Pls. Obj'n & Mot. Strike ¶¶ 19-25.

III. PRIVATE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IS GRANTED. [3]

10. Summary judgment is appropriate when "there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." *Piscatelli v. Smith*, 197 Md. App. 23, 36 (2011); Md. R. Civ. P. 2-501.

11. Maryland's Constitution provides that the "General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools, and shall provide by taxation, or otherwise, for their maintenance." Md. Const. Art. VIII § 1. Article VIII is implemented by Article III, Section 52, which requires that the State budget include an estimate of appropriations for establishing and maintaining a thorough and efficient system of public schools throughout the State.

12. A thorough and efficient system of education is one that is "adequate by contemporary educational standards." Order, Dkt.1-66 at 2 (Oct. 18, 1996); Pls. Ex. 3 (2000 Mem. Op.) at 24-25; Pls. Ex. 4 (2004 Mem. Op.) at 57–58; *Hornbeck v. Somerset Cnty. Bd. of Educ*., 295 Md. 597, 639 (1983); *Montgomery Cnty. v. Bradford*, 345 Md. 175, 181 (1997).

13. The Court finds that there is no genuine dispute of material fact that the State has not complied with this Court's prior orders implementing the Consent Decree—which explicitly

[3]The [Proposed] Conclusions of Law address arguments raised in Plaintiffs Motion for Summary Judgment before addressing arguments raised in MSBE's Motion for Summary Judgment, including its mootness and justiciability arguments.

allowed Plaintiffs to seek further funds from the Court to remedy the constitutional violation—and that MSBE has committed and is committing an ongoing violation of Article VIII.

A. The Court has Jurisdiction.

14. This Court has repeatedly held that it "retains jurisdiction under the terms of the Consent Decree" and has rejected MSBE's arguments: (a) that the Consent Decree does not allow for continued jurisdiction, and, (b) that MSBE has complied with the Consent Decree. *See* Pls. MSJ Opp. at 31–32, 37–38 (citing 2000, 2002, 2004, 2020, and 2022 decisions by this Court). The Court again holds that it has jurisdiction in this case for two primary reasons.

15. *First*, this Court has inherent jurisdiction to enforce its own orders. Pls. Ex. 6 (2002 Order) at 4; Pls. MSJ Opp. at 36. In the education funding arena, courts regularly declare what the Constitution requires and then retain jurisdiction to monitor compliance. *See id.*

16. In 2000, Plaintiffs sought additional funding pursuant to the Consent Decree. After an evidentiary hearing, the Court declared a continuing constitutional violation and held that "Baltimore City public schools need additional funding of approximately $2,000 to $2,600 per pupil for FY 2001 and 2002." Pls. Ex. 3 (2000 Mem. Op.) at 26; *see also* Pls. MSJ at 6–8.

17. In 2004, the Court held that the constitutional violation continued and found that the State had underfunded BCPSS by $439.35 to $834.68 million cumulatively for FY2001 to 2004; moreover, at least $225 million in additional funding remained to be phased in under the Bridge to Excellence Act ("Bridge Act"), which the State had passed in response to the 2000 Order. Pls. Ex. 4 (2004 Mem. Op.) ¶¶ 34, 57–59, 86–87. Accordingly, the Court found that the State had not "complied with this Court's June 2000 order, a final order of this court, which constitutes the law of this case." *Id.* at 64. The Court further concluded that the amounts needed to remedy the constitutional violation had increased since the Court's estimate in 2000 of the $2,000 to $2,600

per pupil funding gap. *Id.* ¶¶ 52–56. Even if the Bridge Act had been fully phased in, such funding would have been insufficient to close the funding adequacy gap and remedy the constitutional violation.

18. As discussed below, the State began eroding funding for the Bridge Act in 2007. *See infra* ¶¶ 22–24. As a result, by FY2017 the State was underfunding BCPSS by $342.3 million a year, significantly more than this Court held was necessary in 2000. Pls. Ex. 8 at 2, 4. Accordingly, MSBE did not comply with the 2000 and 2004 declarations.

19. *Second*, the Court finds that the constitutional violation that this Court identified in 1996, 2000, 2002, and 2004 continues today. *See infra* ¶¶ 21-36.

20. The Court's prior orders establish that a continuing violation of Article VIII constitutes good cause to continue jurisdiction under the Consent Decree.[4] In 2004, the Court held that it

> will continue to retain jurisdiction to ensure compliance with its orders and constitutional mandates . . .When the full funding outlined herein [at least $2,000 to $2,600 more per pupil] is received, the Court will revisit the issue of its continuing jurisdiction, and determine whether the Consent Decree should then be additionally extended for good cause.

Pls. Ex. 4 (2004 Mem. Op.) ¶ 6. Remediation of the constitutional violation is thus required for full compliance.

B. Unconstitutional Underfunding of BCPSS Programs and Operations.

21. The Court finds that there is no genuine dispute of material fact that the students in BCPSS are not receiving a "thorough and efficient" education, that is an education that is adequate

[4] *See* Order, Dkt.1-66 at 2 (Oct. 18, 1996) ("[T]he public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards."); Pls. Ex. 2 (Consent Decree) ¶¶ 68-69 ("This Decree shall be in effect through June 30, 2002, unless the Court extends the term …and upon a showing of good cause to extend the Decree"); Pls. Ex. 3 (2000 Mem. Op.) at 25-26 ("determined and declared that the State is not fulfilling its obligations under Article VIII of the Maryland Constitution, as well as under the Consent Decree"); Pls. Ex. 6 (2002 Order) at 5 ("…[T]his Court should, pursuant to paragraph 68 of the Consent Decree, retain jurisdiction and continue judicial supervision of this matter until such time as the State has complied with this Court's June 2000 order"); Order, Dkt. 105/8 at 8–10 (Jan. 16, 2020).

by contemporary educational standards. Further, there is no genuine dispute of material fact that MSBE has unconstitutionally underfunded BCPSS programs and operations.

22. MSBE does not dispute that it did not fully comply with the Court's Order from 2000 to 2007, when the Bridge Act was being phased in. Pls. MSJ Reply at 8-9. In 2007, before full Bridge Act funding was scheduled to be provided to BCPSS, the General Assembly eliminated the inflation increases for FY2009 and FY2010 and altered the annual inflation adjustment. *Id.*

23. MSBE does not dispute that, after the elimination and limiting of the Bridge Act's inflation increases, the Department of Legislative Services (DLS) found adequacy gaps in funding for BCPSS from FY2009 through FY2017 (the last year for which the DLS calculated an adequacy gap). *See, e.g.*, Pls. MSJ at 8–10; Pls. MSJ Reply at 8–13; Pls. MSJ Opp. at 32–34; Pls. Ex. 85 at 47 (FY2002 $631 per pupil gap); Pls. Ex. 7 at 64 (FY2013 $1,952 per pupil gap); Pls. Ex. 9 at 7 (FY2015 $3,611 per pupil gap); Pls. Ex. 8 at 2, 4 ($342.3 million gap).

24. The Court finds that these persistent adequacy gaps, as determined by the State's own research agency, are undisputed facts and support the Court's finding that there is a continuing constitutional violation. Indeed, MSBE conceded that full Bridge Act funding was necessary for constitutional adequacy. Pls. Ex. 4 (2004 Mem. Op.) ¶¶ 49–51.

25. It is undisputed that BCPSS has a high proportion of at-risk and higher need students, including students who live in neighborhoods of concentrated poverty, have disabilities or special needs, are English-language learners, and are students who had adverse childhood experiences. Pls. MSJ at 12–16; Pls. Ex. 10 at 126; Pls. Ex. 16 at 32, 40-42; Pls. Exs. 18–22.

26. It is undisputed that a school district with these student demographics requires more funding to provide the resources students need to achieve academically. *See* Pls.. Ex. 3 (2000 Mem.

Op.) at 18–19; Pls. Ex. 4 (2004 Mem. Op.) ¶¶ 38–40; Pls. Ex. 5 (Thornton Commission) at 55–56; Pls. Ex. 11 (Kirwan Commission) at 1–2, 29–30.

27. As evidenced by the undisputed persistent adequacy gaps, BCPSS has not received constitutionally adequate funding, *i.e.*, the amount of funding needed to enable a school district to provide an "adequate" education to the student population that it enrolls when measured by "contemporary educational standards." *See* Order, Dkt.1-66 at 2 (Oct. 18, 1996); Pls. MSJ at 5-12; Pls. MSJ Reply at 7-12.

28. There are no genuine disputes that underfunding negatively impacts academic achievement and that scores improved when funding increased under the Bridge Act. *See* Pls. Ex. 4 (2004 Mem. Op.) ¶ 151; Pls. MSJ at 20–22; Pls. Ex. 13A (Baker expert report) at 12; Pls. Ex. 96 (Jackson expert report) at 3; Pls. Ex. 84 at 6, 20–21; Pls. 92 at 12-13; Pls. Ex. 93 at vii; Pls. Ex. 94 at 4, 10.[5]

29. This Court has repeatedly looked to the State's own standards and other objective indicators to assess BCPSS's outputs, including its students' academic performance. *See* Pls. Ex. 4 (2004 Mem. Op.) ¶¶ 6, 98–125. Standards change over time, as the State imposes new tests and academic requirements. *Id.* ¶ 52; *see also Hornbeck*, 295 Md. at 639 (adequate by "*contemporary* educational standards") (emphasis added). Today they include, for example, the Maryland Comprehensive Assessment Program, the Report Card, and the standards set under the Blueprint Act. Pls. MSJ Reply at 2–7.

30. It is undisputed that BCPSS is performing below the State's standards. Def. MSJ Opp. at 5 ("The private plaintiffs also argue compellingly that outcomes for Baltimore's school children

[5] The Court has granted Plaintiffs' motion to exclude MSBE's experts Levenson and Hanushek; if credited, however, their testimony would not raise a genuine issue of material fact on this point. *See* Pls. Ex. 97 at 88, 89 (Hanushek: "you'd have to be a fool to say money doesn't matter"); Pls. Ex. 24 at 96 (Levenson: "all students who have come to school with greater trauma and greater disadvantages will require greater funds to serve them….").

in 2022 remain sobering."). Plaintiffs cite undisputed evidence showing low proficiency scores, low graduation rates, high dropout rates, low attendance rates, low scores on Advanced Placement and college entrance exams, and low rates of postsecondary education. Pls. MSJ at 16-20; Pls. Ex. 25 (2019 Report Card found 13.5-21.8% of students are proficient in Math and 18.6-32.9% are proficient in English Language Arts); Pls. Ex. 19; Pls. Exs. 26–40.

31. The Court finds that BCPSS's certifications pursuant to the Code of Maryland Regulations ("COMAR") do not raise a genuine dispute that its students are receiving a constitutionally adequate education because BCPSS did not certify compliance with all COMAR requirements, and COMAR requirements only reflect a subset of the services school systems must provide. Pls. MSJ Reply at 20–22; Suppl. Aff. Perkins-Cohen (Oct. 28, 2022) ¶¶4–26. For example, the math certification requires that a curriculum include certain subjects; but certification does not dispute that BCPSS lacks math supplemental supports that would be needed to assist students who are struggling or have special needs. *See id*.

C. Unconstitutional Underfunding of BCPSS Facilities.

32. MSBE is also in violation of Article VIII for its continuous, decades-long underinvestment in BCPSS facilities, which prevents students from receiving a "thorough and efficient" education. Pls. MSJ at 23-24. Inadequate BCPSS facilities were first raised by Plaintiffs in their Complaint in 1994. Original Dkt. 1-4, Compl. at 2, 28. The record contains undisputed findings by the State—dating back to 1992—showing a significant percentage of BCPSS facilities in poor, or very poor condition. *See* Original Dkt. 1-4, Compl. ¶ 105; (citing 1992 Master Facilities Plan). The Metis Report, an independent evaluation of BCPSS's facilities required by the Consent Decree, concluded that the facilities were in very poor condition and required substantial improvements. Pls. 2019 Petition, Ex. 14 (Metis Report) at Executive Summary 8-9, 16, 21 II-9,

II-27—II-33, IV-29; Pls. Ex. 2 (Consent Decree) ¶¶ 40–42, 47, 53. The findings and recommendations of the Metis Report were adopted by this Court, which thereafter made further findings, as did the State, of inadequacies in BCPSS's facilities. Pls. Ex. 3 (2000 Mem. Op.) at 4, 14, 16; Pls. Ex. 4 (2004 Mem. Op.) at 8; Pls. Ex. 47 at iv.

33. Recent facilities assessments by engineering and construction experts document widespread inadequacies across BCPSS. Pls. MSJ at 24–28. In 2012, engineering firm Jacobs Management Group rated 85% of the BCPSS buildings as "poor" or "very poor." In the category of "educational adequacy," which measured whether the physical buildings could support educational programming, BCPSS received a score of 55 out of 100, "a failing grade." Pls. Ex. 50 at 17. Adopting the Jacobs findings, Maryland's Interagency Commission on School Construction ("IAC") acknowledged that "City School facilities are severely deficient when measured by a number of commonly accepted standards: age of facility, educational adequacy, facility condition index ("FCI") and level of utilization" and recognized that "to correct the deficiencies will require approximately $2.45 billion in funding over a 10-year period." Pls. Ex. 51 at 4. The Statewide Facilities Assessment performed by Bureau Veritas in 2020 on behalf of the IAC made a similar assessment of the BCPSS portfolio, finding that that more than 60% of schools in the portfolio are rated "poor" or "very poor." Pls. Ex. 49(A) at 37.

34. BCPSS's aged, degraded buildings (particularly those that lack suitable HVAC systems) violate Article VIII, not least because they have resulted in 1.5 million hours of lost instructional time between 2014 and 2019. Pls. Ex. 56(A) at 11. Students cannot receive a "thorough and efficient" education with lost classroom time, inhospitable temperatures, unhygienic bathrooms, and insect and rodent infestations—all of which cause them to feel undervalued and disillusioned about their education and their opportunities in life. Pls. MSJ at 22-23, 34. Instead of providing

safe, healthy environments that support the delivery of Maryland's educational programs, BCPSS facilities impede student achievement and put the well-being of students at risk. *Id.* at 31-35.

35. It is well-established that school facilities require ongoing resources for maintenance and operations ("FM&O") and for capital improvements ("CIP"). *Id.* at 29. Under nationwide industry standards, a school system should spend at least 7% of the system's current replacement value ("CRV") annually on FM&O and CIP. Pls. Ex. 61 at 23-24. The IAC recommends an annual minimum expenditure of 4% of CRV, emphasizing that a school district that spends less will have difficulty maintaining the functionality and sustainability of its facilities. Pls. Ex. 63 at 7. The Court finds that BCPSS's annual spending for FM&O and CIP has been below industry and State standards for decades; for example, in FY 2022, BCPSS expenditure was just 1% of CRV. Pls. MSJ at 29–31.

36. As discussed *infra*, 89 facilities will remain untouched by facilities-related legislation, leaving tens of thousands of children in deteriorated buildings that violate Article VIII. The Court finds that the persistent underinvestment can only be remedied with several billion dollars to fund comprehensive systemic renovations to replace BCPSS's aging portfolio, in addition to ongoing annual expenditures for FM&O and CIP. Aff. Perkins-Cohen (Aug. 12, 2022) at 3-10.

D. Declaratory Relief Pursuant to the Declaratory Judgments Act is Appropriate.

37. Under the Declaratory Judgments Act, "[f]urther relief based on a declaratory judgment or decree may be granted if necessary or proper." Md. Courts & Judicial Proc. Code, § 3-412(a). When declared rights have been violated, a party may return to court for enforcement of rights previously determined by declaratory judgment. *DeWolfe v. Richmond*, 434 Md. 403, 419-20 (2012); *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 289 (Md. 2008).

38. Plaintiffs have shown that their declared rights have been violated. *See* Pls. MSJ at 6–35. This Court has repeatedly rejected MSBE's arguments that it has complied with the Consent Decree and subsequent court orders enforcing the Consent Decree. *See* Pls. MSJ Opp. at 31-32. MSBE has never complied with its constitutional obligations under Article VIII or provided the "full Thornton funding" required by this Court's orders enforcing the Consent Decree. *See id.* at 31–34; Pls. MSJ at 36–38. MSBE's history of providing constitutionally inadequate funding to BCPSS throughout the pendency of this case demonstrates that, absent a direct mandate by this Court, MSBE will remain in violation of its constitutional obligations and in violation of the Court's declarations. Given MSBE's historic underfunding of BCPSS leading to significant and persistent adequacy gaps and inadequate facilities funding, it is both "necessary" and "proper" that the Court issue an order granting Plaintiffs' requested relief. Pls. MSJ at 41–50.

39. For facilities, the Court finds that 4% of BCPSS's current CRV is necessary and proper interim relief for the constitutional violation. The amount is $288 million. Pls. MSJ at 29.

40. For programs and operations, Plaintiffs ask the Court to choose among uncontested calculations of the minimum shortfall. The Court finds that the 2017 DLS per pupil adequacy gap, adjusted for inflation, multiplied by the current number of students enrolled is necessary and proper interim relief for the constitutional violation. That amount is $417,134,716. *Id.* at 47-48.

IV. MSBE'S MOTION FOR SUMMARY JUDGMENT IS DENIED.

A. The Private Plaintiffs Have Standing to Pursue Their Claims.

41. The Court finds that the named Private Plaintiffs are proper representative plaintiffs and have standing to pursue claims on their own behalf and, as ordered by this Court, on behalf of parents of Baltimore City children who are at risk of educational failure. *See* Pls. Ex. 4 (2004 Mem. Op.) at 5.

42. This Court's September 9, 2021 Order denying MSBE's Motion to Strike Plaintiffs' Notice of Substitution rejected MSBE's arguments that: (i) MSBE has complied with the Consent Decree; (ii) the representative Plaintiffs are not parties to the Consent Decree; (iii) the substituted Plaintiffs are third-party beneficiaries rather than parties to the Consent Decree; (iv) the current Plaintiffs cannot seek the same relief as original Plaintiffs because the original claims were resolved by the Consent Decree; and (v) the Stipulated Order was terminated by the Consent Decree and is no longer in effect. Sept. 9, 2021, Order re Pls. Notice of Substitution (Dkt. 162/2) ("Substitution Notice"); *see also* Pls. MSJ Opp. at 22–29.

43. This Court's December 14, 1995, Stipulated Order—an order that Defendants expressly agreed to—provided that the named plaintiffs would be deemed "representative plaintiffs" who "may substitute additional named plaintiffs as necessary and reasonable." Stipulated Order ¶¶ 1–3 (Original Dkt. 41). The current named Plaintiffs were properly substituted and stand in the shoes of the prior representative plaintiffs. Substitution Notice (Dkt. 162/2).

44. The Court finds that these Plaintiffs are aggrieved and, thus, have standing to pursue claims on behalf of the class of all at-risk students in BCPSS. Generally, standing "depends on whether one is aggrieved." *Green v. Comm'n on Jud. Disabilities*, 247 Md. App. 591, 602 (2020) (citation omitted). The plaintiff "must demonstrate an 'injury-in-fact' or 'an actual legal stake in the matter being adjudicated.'" *Norman v. Borison*, 192 Md. App. 405, 420 (2010) (citation omitted).

45. Plaintiffs have disputed and, indeed, have disproved, MSBE's claim that they have not shown they have been injured by the State's failure to comply with Article VIII and this Court's orders. Each Plaintiff testified to programmatic failures in BCPSS schools and the corresponding risk of educational failure to their child or children. Pls. Ex. 79 (Neal Dep.) at 16–17, 64–71, 82–

83; Pls. Ex. 80 (Mitchell Dep.) at 61; Pls. Ex. 81 (Croslin Dep.) at 24, 85–87, 91–92, 95, 40–45; Pls. Ex. 82 (McCray Dep.) at 82. Each Plaintiff's child's school has received unacceptable scores on objective indicators, showing that each one is failing to provide an adequate education. Pls. MSJ Opp. at 4–11. Plaintiffs testified to facilities deficiencies in BCPSS and the corresponding injury and risk of educational failure. Pls. Ex. 79 (Neal Dep.) at 21, 26, 91–93; Pls. Ex. 80 (Mitchell Dep.) at 49, 80–82; Pls. Ex. 81 (Croslin Dep.) at 79–80, 82, 92.

46. Plaintiffs are aggrieved because their children are at-risk of educational failure due to the State's underfunding of BCPSS schools, as shown by undisputed objective indicators previously identified by the Court. Pls. Ex. 4 (2004 Mem. Op.) ¶¶ 98–125. The State's own academic progress assessments reveal very low proficiency scores among BCPSS students in key subjects. Pls. MSJ at 16–27. Likewise, the State's own data reveal inadequate facilities in BCPSS, and the negative effect these poor conditions have on student health and learning is undisputed. *Id.* at 22–35.

B. The Court Rejects MSBE's Claims of Full Compliance and No Continuing Constitutional Violation.

47. *First*, the Court again rejects MSBE's argument that Plaintiffs and BCPSS disclaimed in their interrogatory responses their contention that MSBE did not comply with the Court's prior orders. Order (Dkt. 183/3) (Mar. 7, 2022); Pls. MSJ. Opp. 16–17, 31.

48. *Second*, the Court rejects MSBE's assertion that BCPSS has a budget surplus and, thus, has not been underfunded. This assertion is based on a reading of BCPSS's CAFRs that is plainly incorrect. *See supra* ¶¶ 7–8; Pls. MSJ Reply at 10–11. The CAFRs do not state that BCPSS has a cash surplus, and they do not present undisputed proof that there is no ongoing constitutional violation.

49. *Third*, the Court has struck Exhibit N, *see supra.* That exhibit, therefore, cannot be used to establish compliance with the Court's orders. If the Court were to consider Exhibit N, however,

it would not support a finding in MSBE's favor. Plaintiffs have clearly disputed and, indeed, disproven, MSBE's claim of compliance with the Court's 2000 Order. Pls. MSJ Opp. at 32–35.

50. Exhibit N purports to show the high end of per pupil resources declared in the 2000 Order adjusted for inflation compared to BCPSS's total funding per pupil from all sources from 2007 onward. As noted above, the Court's 2004 Order declared that *at least* $2,000 to $2,600 more per pupil was required as of FY2001 and that the cost of an education had increased thereafter. *See supra* ¶ 17. The $2,000 to $2,600 range clearly was understood by the Court to be the minimum to achieve adequacy in FY2001 and FY20002, but likely to be insufficient to achieve constitutional adequacy in FY2007 or subsequent years.

51. The 2000 Order, moreover, required the State to provide $2,000 to $2,600 per pupil more, *on top* of all pre-existing funding streams and pre-planned funding increases. *See* Pls. MSJ at 36–38; Pls. MSJ Opp. at 34–35. Exhibit N, in contrast, does not appear to take all pre-planned funding streams for each fiscal year and *add* $2,600 to the total; rather it adjusts the amount declared in 2000 for inflation.

52. Importantly, Exhibit N does nothing to refute the adequacy gaps found by DLS. The funding levels listed in Exhibit N are too low, *by the State's own calculations*, to close the adequacy gaps. *See supra* ¶ 23. This is especially true in light of evolving contemporary standards, including the Blueprint Act. *See supra* ¶ 29; Pls. Ex. 11 at 8–9, 22.

53. Finally, the amounts reflected in Exhibit N do not address the underfunding of BCPSS facilities. *See supra* ¶¶ 32–36.

C. MSBE has not Shown that Plaintiffs' Claim Are Moot.

54. In denying MSBE's Motions to Dismiss, this Court twice rejected MSBE's argument that the Blueprint Act and Built to Learn Act moot Plaintiff's Petition. Mem. Op. at 9–10 (Dkt. 105/8)

(Jan. 16, 2020), Order at 2 (Dkt. 183/3) (Mar. 7, 2022). Neither the Appellate Court nor the Supreme Court (previously the Court of Special Appeals and the Court of Appeals, respectively) found reason to disturb these rulings. Appellate Court Granting Dismissal (May 11, 2022); Denial of Pet. for Writ of Certiorari (Jul. 8, 2022). Now, at the summary judgment stage, MSBE has presented no new facts to support its argument that sources of state and federal funding—namely, the Blueprint Act, the Built to Learn Act, 21st Century School Buildings Program, or recovery funding in response to the COVID-19 pandemic—would be sufficient to bring BCPSS into constitutional compliance and moot Plaintiffs' claims.

55. Programmatic Claims: BCPSS suffers from extensive programmatic deficiencies both in terms of inputs (*e.g.* sustained funding gaps), and outputs (*e.g.* very low proficiency scores). *See supra* ¶¶ 21-31. The Court rejects the argument that the uncertain and prescriptive funding promised under the Blueprint Act would resolve these deficiencies. Although the Blueprint Act purports to build upon the educational standards enshrined in the Bridge Act, it is undisputed that BCPSS never received the baseline funding promised by the Bridge Act—as evidenced by the State's repeated recognition of annual adequacy gaps. Pls's MSJ at 7–11. It is further undisputed that the Blueprint Act's higher educational standards raise the cost of providing an education, only exacerbating BCPSS's existing funding deficit. *See* Aff. Perkins-Cohen (Oct. 3, 2022) at 23–24.

56. Funding of the Blueprint Act's programs requires yearly appropriations and may be abandoned in any year in which the State's economy is estimated to grow less than 7.5%. *Id.* at 12, 23-24.; HB1372, Md. Laws, 2021 Session, Chapter 55, § 19. Even in a scenario in which full funding for BCPSS is awarded, it is not promised for at least another decade: BCPSS children who entered kindergarten in September 2022 would not benefit from full implementation until they are juniors in high school. Pls. MSJ at 12. With uncertain projections that, at best, leave behind yet

another generation of students, the Blueprint Act is insufficient to remediate the State's constitutional violations and thus does not moot Plaintiffs' programmatic claims. *See id.* at 49.

57. Facilities Claims: Similarly, the record is clear that the funding schemes established under the 21st Century School Buildings Program and the Built to Learn Act will be sufficient to finance systemic renovations to just 31 of the 149 facilities in BCPSS's portfolio as of FY2021. Aff. Perkins-Cohen (Aug. 12, 2022) at 7; Pls. Ex. 63 at 185. The 21st Century School Buildings Program and subsequent refinancing—which requires BCPSS to commit $20 million each year from its operating budget for a period of 39 years—will yield approximately $1.1 billion in funding to support the systemic renovations of 29 facilities. Aff. Perkins-Cohen (Aug. 12, 2022) at 4–7. The Built to Learn Act is expected to provide $420 million, which will fund systemic upgrades for two additional high school facilities. *Id.* at 5–6; Pls. MSJ at 27–28.

58. Assuming full implementation of the 21st Century School Buildings Program and Built to Learn Act (and taking into account other systemic renovations completed in the past 20 years or that are now fully funded, as well as projected school closures) approximately 89 facilities in the BCPSS portfolio will remain in need of systemic renovations in order to meet *minimally acceptable standards*. Aff. Perkins-Cohen (Aug. 12, 2022) at 3–11 & Exhibit A thereto.

59. With the majority of BCPSS facilities left without funding for such renovations—which have an undisputed cost (derived from IAC estimates) of over $3.86 billion—this Court rejects the contention that the existing facilities legislation can bring the BCPSS portfolio into constitutional compliance. *Id.* at 3, 10. Indeed, even more funding is required to bring the portfolio in compliance with the IAC standards and those utilized by other school districts in Maryland. *Id.* Especially as the State has offered no plan to fund the remaining $3.86 billion or the minimum annual expenditures for FM&O and CIP, Plaintiffs' facilities claims are not moot.

60. Neither is the federal recovery funding sufficient to moot Plaintiffs' claims for relief. Based on the most current data, BCPSS has received 29 grants from federal, state and philanthropic sources totaling $799,905, 354.26. BCPSS Board Presentation, at 55 (Jan. 10, 2023), *available at* https://go.boarddocs.com/mabe/bcpss/Board.nsf/files/CMTKSJ51AFFA/$file/RRR%20Update_January%202023_V4.pdf. As of November 15, 2022, 43.74% of total grant funding has been spent, with the remaining amount to be extinguished by the end of FY2024. Aff. Hoffmann (Jan. 13, 2023) at Attachment A; Aff. Perkins-Cohen (Oct. 3, 2022) at 26.

61. The recovery funding was provided as temporary aid for school systems to respond to and recover from the COVID-19 pandemic, not to address the State's systemic under-resourcing of BCPSS as a whole. Aff. Perkins-Cohen (Oct. 3, 2022) at 27. This limitation was imposed by the grants themselves, where federal and state law restricted the use of funds to pandemic-related needs only. *See* ESSER and GEER Use of Funds FAQs, (Dec, 7, 2022) at 2, *available at* https://oese.ed.gov/files/2022/12/ESSER-and-GEER-Use-of-Funds-FAQs-December-7-2022-Update.pdf. For example, for one of its federal grants—ESSER II—BCPSS was required to use at least 20% funding on learning loss. *See* HB 1372 at 22, Dep't of Leg. Servs., *available at* https://mgaleg.maryland.gov/2021RS/fnotes/bil_0002/hb1372.pdf.

62. The court too rejects the State's contention that recovery funding mooted Plaintiffs' facilities claims. *See* Tr. 179:4–179:25. The United States Department of Education "strongly discourage[d]" school districts from using ESSER grants for "remodeling, renovation, and new construction…which may not be workable under the shorter timelines associated with ESSER and GEER funds." ESSER and GEER Use of Funds FAQs[6]; 12/14/22 Tr. 144:20–149:21, 181:15–

[6] The ESSER and GEER Use of Funds FAQs is a publicly available document authored by the United States Department of Education. U.S. Dep't of Educ., *ESSER and GEER Use of Funds FAQ*, Dec. 7, 2022, *available at* https://oese.ed.gov/files/2022/12/ESSER-and-GEER-Use-of-Funds-FAQs-December-7-2022-Update.pdf. Pursuant

185:3. And even if BCPSS were permitted to utilize all recovery grants for facilities, it would not come close to addressing the billions of dollars in facilities needs. *See supra* ¶¶ 32-36. Rather than mooting Plaintiffs' claim, the pandemic highlighted the under-resourcing of BCPSS facilities: BCPSS needed recovery funds to make significant investments in basic technology infrastructure such as Wi-Fi, as well as in air purifiers for facilities without adequate HVAC; but these are mere stop gap measures and by no means constitute the systemic renovations necessary to bring the deteriorated and unsafe facilities into constitutional compliance. *Id.* at 10.[7]

63. The court also finds MSBE's arguments regarding recovery funding and mootness unavailing because, consistent with federal and state requirements for use of grant funds, MSBE reviewed and approved BCPSS' three-year plan to use its federal recovery grants in their entirety by FY2024. Aff. Perkins-Cohen (Oct. 3, 2022) at 27; Aff. Hoffmann (Jan. 13, 2023), at 4–6, Attachment A, B. The COVID recovery grants served as a desperately-needed band aid to assist BCPSS through an unprecedented pandemic, but were not nearly enough to cure the State's ongoing violations of Article VIII.[8]

D. Plaintiffs' Claim is not Barred by the Political Question Doctrine.

64. The Court again holds that this case does not present a non-justiciable political question.

65. MSBE concedes that "[i]t is of course within the province of Maryland's Courts to declare action constitutional or unconstitutional, and MSBE has not argued otherwise." Def. MSJ Reply

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to Rule 5-201, Plaintiffs request that the Court take judicial notice of this public document and the facts therein as they constitute "adjudicative facts" under Rule 5-201. *Marks v. Criminal Injuries Comp. Bd.,* 196 Md. App. 37, 78 (2010); *see also Faya v. Almaraz*, 329 Md. 435, 444 (1993) (stating that trial courts can take judicial notice of "matters of common knowledge or [those] capable of certain verification.").

[7] BCPSS's expenditure of federal recovery funds was largely driven by how under-resourced it was *prior* to the pandemic. To be sure, the pandemic was especially challenging for BCPSS given the disproportionate impact it had on Baltimore City's neediest communities, including students without access to technology, students with disabilities, English learners, and homeless students. Aff. Perkins-Cohen (Oct. 3, 2022) at 27–31.

[8] At the very least, there exists a genuine dispute of fact precluding a grant of summary judgment to MSBE on the issues of the impact of the Blueprint Act, Built to Learn Act, 21st Century School Buildings Program, and federal recovery funding.

at 19; *see also* Br. of Appellant Br. (Dec. 14, 2004) at 29–30, 35 n.10 (courts necessarily "retain[] the power to decide if [the other two] branches of government have acted constitutionally in the way they address school funding issues.").

66. MSBE thus appears to argue only that Plaintiffs present a nonjusticiable political question to the extent that they seek an order requiring specific appropriations.

67. Plaintiffs request a three-part remedy: (1) a declaration of a constitutional violation, (2) an order requiring immediate payment of specific amounts, and (3) an order directing MSBE to develop a comprehensive compliance plan. *See* Pls. Proposed Order, Dkt. 250/0. The Court does not understand MSBE to claim that either the first or third requested remedies constitute a nonjusticiable political question. The Court addresses MSBE's claims against the second requested remedy—an order requiring payment of specific sums—in more detail below.

i. The Political Question Claim Has Already Been Decided in this Case.

68. MSBE has repeatedly raised political question arguments since 1996, and the Court has repeatedly rejected them. *See* Pls. MSJ Opp. 43–46; Jan. 16, 2020 Mem. Op. at 10, Dkt. 105-8 ("issues presented in Plaintiffs' Petition are not non-justiciable issues") & 11 ("review of adequacy of funding of public education in Maryland is within the purview of the Maryland Judiciary").

69. The Court holds that MSBE has also waived the argument that Plaintiffs' claim is non-justiciable. MSBE raised this argument in 2000. Br. of Appellants (Dec. 8, 2000) at 20 ("The Circuit Court Lacks Authority to Order the Governor or the General Assembly to Appropriate Funds"); Def. Opp. to Pet. for Further Relief (Dkt. 3/1) (June 23, 2000) at 16–21. Following full briefing, MSBE voluntarily withdrew its appeal. Not. of Dismissal, Jan. 30, 2001. After dismissal, then-Superintendent of Schools Nancy Grasmick testified under oath that by dismissing the appeal, the State agreed to be bound by Judge Kaplan's 2000 Order. Pls. Ex. 90 at 1562–63.

70. By withdrawing its appeal, MSBE waived, for purposes of this litigation, the arguments against the 2000 Order that it raised in that appeal, including this non-justiciability argument. *See Osztreicher v. Juanteguy*, 338 Md. 528, 534–35 (1995) (party waives an argument when it acquiesces in an adverse judgment of the Court); *Rocks v. Brosius*, 241 Md. 612, 630 (1966) (right to appeal "may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken"). Accordingly, the 2000 Order, is "final, binding, and the law of this case." Pls. Ex. 4 (2004 Mem. Op.) at 10.

ii. The Court Rejects MSBE's Political Question Argument on the Merits.

71. On the merits, moreover, Plaintiffs' claims and requested relief are not barred by the political question doctrine.

72. Determining whether an issue is a non-justiciable political question requires answering: (1) "whether the claim presented and the relief sought are of the type which admit of judicial resolution," and (2) whether the structure of government "renders the issue a political question—that is, a question which is not justiciable in federal [or State] court because of the separation of powers provided by the Constitution." *Estate of Burris v. State*, 360 Md. 721, 744–45 (2000). MSBE claims that it would violate the separation of powers for this Court to decide the school funding issues presented by this case.

73. Case law, however, supports a claim for violation of Article VIII. *See Hornbeck*, 295 Md. 597; *Montgomery Cnty.*, 345 Md. 175.

74. *Hornbeck* held that Maryland has established a "comprehensive statewide qualitative standard governing all facets of the educational process in the State's public elementary and secondary schools." 295 Md. at 638. Where, however, (1) "these qualitative standards were not being met in any school district," (2) "the standards failed to make provision for an adequate

education," or (3) "the State's school financing scheme did not provide all school districts with the means essential to provide the basic education contemplated by § 1 of Article VIII," a constitutional violation may be evident. *Id.* at 639.

75. *Hornbeck* thus confirmed the right to bring a claim under Article VIII, and it identified three types of claims that may be brought. This case is distinct from *Hornbeck* because Plaintiffs bring a claim not alleged or supported by evidence in *Hornbeck*: "that the school's financing scheme did not provide all school districts with the means essential to provide the basic education contemplated by Article 8." *Hornbeck*, 295 Md. at 639; Pls. MSJ Opp. at 46–50; 12/14/22 Tr. 189:15–195:25.

76. In *Montgomery County*, an appeal from a motion to intervene in this case, the Supreme Court affirmed *Hornbeck*'s teaching that claims regarding an adequate education were cognizable under Article VIII. 345 Md. at 181 ("While *Hornbeck* teaches that the Maryland constitutional provision does not mandate uniformity in per pupil funding or require that the system operate uniformly in every school district, it does require that the General Assembly establish a Statewide system to provide an adequate public school education to the children in every school district.").[9]

77. In addition, an order compelling State officials to comply with the State constitution by providing constitutionally required services does not offend the separation of powers. Here, Plaintiffs seek an order to remedy the Article VIII violation, which requires funds be made available to BCPSS. Plaintiffs clarified at oral argument that it does not matter how the State makes

[9] Similarly, the Supreme Court's opinion in the appeal of the 2004 Memorandum Opinion did not find political question issues prevented this Court's adjudication of this case. *See Maryland State Bd. of Educ. v. Bradford*, 387 Md. 353, 384–85 (2005). Indeed, the Supreme Court declined to hear most of the State's appeal on the basis that this Court's order was not final. *Id.* at 385–86. The remainder of the appeal concerned the BCPSS budget deficit in 2004, and the Supreme Court reversed a specific injunction regarding the budget deficit. *Id*. at 387–88. That limited ruling is irrelevant to the justiciability of Plaintiffs' claims and requests for relief. *See* 12/14/22 Tr. 89:12–92:5.

the funds available, and that they are not asking the Court to order the General Assembly to appropriate specific funds. 12/14/2022 Tr. at 208:22–209:7.

78. In *Ehrlich v. Perez*, the Supreme Court found that cutting Medicaid funding violated the Constitution. It issued a preliminary injunction requiring the State to reinstate funding. 394 Md. 691 (2006). The Court found that an order remedying the State's unconstitutional withholding of funds was not an order directing specific appropriation. *Id.* at 735–36. Under *Ehrlich*, this Court has the authority to order payments to remedy a constitutional violation; such an order is distinct from directing specific appropriations.

79. Courts in other jurisdictions have reached the same conclusion. *See* Pls. MSJ Opp. at 47–48 (collecting cases). Most recently, the North Carolina Supreme Court affirmed the judiciary's authority to order a remedy for a continuing violation of students' constitutional right to public education under the North Carolina constitution. *See Hoke Cnty. Bd. of Ed. v. State*, 879 S.E. 2d 193 (2022). The North Carolina Supreme Court stated: "our Constitution empowers the judicial branch with inherent authority to address constitutional violations . . . For twenty-five years, the judiciary has deferred to the executive and legislative branches to implement a comprehensive solution to this ongoing constitutional violation. Today, that deference expires." *Id.* ¶ 4. Accordingly, the court affirmed a trial court order directing the transfer of approximately $1.7 billion from within the state budget to fund the first two years of a court-approved comprehensive remedial plan. *Id.* ¶¶ 6, 68. Given the similar history of state non-compliance, this Court finds the reasoning of *Hoke County* with respect to the political question doctrine highly persuasive.

80. Finally, the fact that other branches of Maryland's government have a duty to appropriate funds does not deprive this Court of authority to review their appropriations. *See Ehrlich*, 294 Md. at 736 ("executive and legislative budget authority is subject to [ ] constitutional limitations.").

81. Fundamentally, there must be a remedy for every constitutional violation. *See* Md. Const. Decl. of Rights Art. 19; *Doe v. Doe*, 358 Md. 113, 128 (2000) ("plaintiff injured by unconstitutional state action should have a remedy to redress the wrong"); *Frase v. Barnhart*, 379 Md. 100, 130 (2003) (Cathell J., concurring) (judiciary "ensure[s] that the fundamental constitutional rights, which are reserved to the people, are protected."); Pls. MSJ Opp. at 49–50; Pls. MSJ at 41–48.

82. For these reasons, the Court finds that there is no political question claim against Plaintiffs' first and third requests for relief; and that the Court is not barred by the political question doctrine from ordering specific sums as relief for a constitutional violation.

REMEDY

83. Having found that Plaintiffs have presented undisputed facts that support the conclusion that there is a violation of Article VIII of the Maryland Constitution, this Court's prior orders, and the Consent Decree, the Court will enter an Order:

a. Adopting the foregoing Proposed Conclusions of Law;

b. Granting Plaintiffs' Motions to Strike and to Exclude MSBE's Experts;

c. Granting Plaintiffs' Motion for Summary Judgment and the relief sought by Plaintiffs in that Motion, including but not limited to:

    1. Declaring that MSBE has violated Article VIII by failing to provide a "thorough and efficient education," to the public school children of Baltimore City;

    2. Finding the following sums are necessary to address the constitutional violation and ordering interim payment of: $417,134,716 for educational programming and

$288,000,00 for FM&O and CIP for the reasons set forth in Plaintiffs' Motion for Summary Judgment.[10]

3. Ordering MSBE to develop a comprehensive plan to address the constitutional violation;

d. Denying MSBE's Motions for Summary Judgment and to Preclude Plaintiffs' Experts; and,

e. Granting such other further relief as the Court deems just and proper.

Dated: January 13, 2023

Respectfully submitted,

Elizabeth B. McCallum
Jeffrey E. Liskov
Danyll Foix
Baker & Hostetler LLP
1050 Connecticut Ave., NW, Suite 1100
Washington, DC 20036
Phone: (202) 861-1522
Email: emccallum@bakerlaw.com
jliskov@bakerlaw.com

Arielle Humphries*
Victor Genecin*
Alaizah Koorji*
NAACP Legal Defense Fund
40 Rector Street, 5th Floor
New York, NY 10006
Phone: (212) 965-2200

[10] Plaintiffs have provided alternative amounts in their Motion for Summary Judgment which the Court would also be justified in ordering. *See* Pls. MSJ. at 46–48.
As an alternative to ordering MSBE to pay the sums sought by Plaintiffs, the Court has the authority to declare that the amounts Plaintiffs seek must be provided in order for MSBE to make substantial progress toward complying with the Court's previous orders to provide constitutionally adequate education to students in BCPSS. *See also Nova Rsch., Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 460 (2008) ("a court generally has jurisdiction to grant all further and necessary or proper relief to effectuate the declaratory judgment entered by the court").

Email: Ahumphries@naacpldf.org
Vgenecin@naacpldf.org
Akoorji@naacpldf.org
**Admitted by Motion for Special Admission*

Deborah Jeon, Esq.
Tierney Peprah, Esq.
ACLU of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Phone: (410) 889-8550
Email: jeon@aclu-md.org
tpeprah@aclu-md.org

CERTIFICATE OF SERVICE

I, Elizabeth B. McCallum, certify that I have this day caused to be served a copy of this PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW on the following counsel and parties by electronic mail and by U.S. mail with postage prepaid on January 13, 2023:

Steven M. Sullivan
Elliott L. Schoen
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, MD 21202
Email: ssullivan@oag.state.md.us
eschoen@oag.state.md.us

Charles O. Monk, II
Jason M. St. John
Mark A. Simanowith
Saul Ewing Arnstein & Lehr LLP
500 E. Pratt Street, Suite 800
Baltimore, MD 21202
Email: charles.monk@saul.com
jason.stjohn@saul.com
mark.simanowith@saul.com

Stephen Salsbury
Baltimore City Law Department
100 N. Holliday Street, Suite 101
Baltimore, MD 21202
Email: stephen.salsbury@baltimorecity.gov

Warren N. Weaver, Esq.
Ilana Subar, Esq.
Whiteford, Taylor & Preston, L.L.P.
Seven Saint Paul Street, Suite 1900
Baltimore, MD 21202
Phone: (800) 987-8705
Email: wweaver@wtplaw.com
isubar@wtplaw.com

Dated: January 13, 2023

Elizabeth B. McCallum

Elizabeth B. McCallum