IN THE APPELLATE COURT OF MARYLAND

September Term, 2023

NO. ACM-REG-0209-2023

THE BRADFORD PLAINTIFFS
(KEITH A. BRADFORD, *ET AL.*),

Appellants,

v.
MARYLAND STATE BOARD OF EDUCATION,

Appellee.

On Appeal from the Circuit Court for Baltimore City (Hon. Audrey Carrion)

BRIEF OF APPELLANTS THE BRADFORD PLAINTIFFS (PAGE PROOF): ORAL ARGUMENT REQUESTED IN BRIEF

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STATEMENT OF THE CASE

Plaintiffs-Appellants ("Appellants") are parents representing children who attend the Baltimore City Public School System ("BCPSS") and who are at risk of educational failure. They pursue this action because chronic and systemic underfunding by the Maryland State Board of Education ("MSBE" or the "State") denies their children the right to a "thorough and efficient education," in violation of Article VIII of the Maryland Constitution. Most of BCPSS's students are Black or Brown; many live in deep poverty and have faced discrimination and trauma; and a significant number have disabilities or are English language learners. It is these students, with some of the greatest needs, who the State has deprived of the constitutional right to an education that is adequate by contemporary educational standards.

In 1996, the Baltimore City Circuit Court held that Appellants' children were not receiving an adequate education by contemporary educational standards. Subsequently, MSBE entered a Consent Decree (the "Decree") providing an agreed-upon and court-ordered path for BCPSS to achieve sufficient funding to provide meaningful educational opportunities. The State, however, has not honored its obligations under the Decree, the court's decisions pursuant to it, and Article VIII, leaving BCPSS schoolchildren in crumbling, unsafe, and outdated learning facilities, and resulting in systemically low educational outcomes.

In 2019, Appellants filed a Petition for Further Relief, seeking: (1) a declaration that the State continues to violate the Decree and Article VIII; (2) a comprehensive plan to remedy the State's persistent violations; and (3) an immediate increase of funding for BCPSS while a comprehensive plan is developed and implemented. On summary judgment, Appellants presented extensive evidence that the State's decades-long underfunding of BCPSS has resulted in an educational system that falls far short of constitutional adequacy. Expert reports, testimony, and documentary evidence—much of it from State agencies—detail numerous deficiencies flowing

from insufficient funding, including millions of hours of learning lost annually due to inoperative heating, ventilation, and air conditioning systems; rodent infestations; lead pipes for drinking water; and low academic proficiency. The State acknowledged that the record of BCPSS's educational outcomes was "sobering," yet argued that Article VIII requires no more from the State and that Appellants' claims are not justiciable.

The Circuit Court granted the State's summary judgment motion and held that Maryland's Constitution "only requires an effort by the State to at most provide a basic education." This interpretation of Article VIII is contrary to precedent and makes Maryland an outlier from a long list of jurisdictions whose constitutions require adequate systems of public education. The court erred by holding: (1) Appellants could not seek relief under the Decree and Maryland Declaratory Judgments Act ("MDJA"); (2) Article VIII requires no more than an effort by the State to provide "at most" a basic education; (3) there is no dispute of material fact concerning the State's constitutional violation; and (4) certain of Appellants' prayers for relief are not justiciable under the political question and separation of powers doctrines. If allowed to stand, the court's decision will leave BCPSS's 76,000 schoolchildren in unsafe, depreciated facilities without adequate resources for meaningful educational opportunity. The Circuit Court's decision should be reversed, and this case remanded for further proceedings.

QUESTIONS PRESENTED

1. Whether Appellants claims for relief are available under the Decree or MDJA.
2. Whether the Circuit Court erred by departing from established precedent, and persuasive authority from other jurisdictions, by holding Article VIII "only requires an effort by the State to at most provide a basic education," rather than an "education that is adequate by contemporary educational standards."

3. Whether the Circuit Court properly granted summary judgment for the State on a record containing reports of egregious facility conditions, low academic achievement, and funding inadequacies.
4. Whether the Circuit Court's power to remedy constitutionally-inadequate school funding is limited by the political question or separation of powers doctrines.

STATEMENT OF FACTS

A. Initial Litigation and the Decree

Appellants filed this case in 1994, alleging that the State's chronic underfunding caused the quality of education and facilities in BCPSS to be constitutionally inadequate, and, therefore, the State had not provided the "thorough and efficient" education required by Article VIII. [12/6/94 Compl.]. The parties stipulated, and the court ordered, that Appellants could proceed in the litigation on behalf of all students in BCPSS. [12/14/95 Stip. Or.].

In 1996, the Circuit Court entered partial summary judgment for Appellants, holding Article VIII's "thorough and efficient" standard requires that "all students in Maryland's public schools be provided with an education that is adequate when measured by contemporary educational standards." [10/18/96 Or. ¶ 1]. The court found "no genuine material factual dispute" that BCPSS's students were not receiving the constitutionally-mandated education. [*Id.* ¶¶ 1-2].

On the eve of trial, the parties reached a consent decree, entered by the Court, that was intended to establish a "meaningful and timely remedy crafted to meet the best interests of the school children of Baltimore City." [Decree at 3]. The decree required changes to management and additional funding for educational quality and facilities improvement. [*Id.* ¶¶ 8, 33, 47-48]. It further directed BCPSS and the State to retain an independent expert to evaluate BCPSS's needs, permitting BCPSS to request additional funding based on the expert's findings and to return to

Court if such funding was not provided. [*Id.* ¶¶ 40-42, 52-53]. If BCPSS sought more funds, the Decree accorded Appellants the opportunity to participate in the proceedings. [*Id.* ¶ 53]. The initial term of the Decree was to end on June 30, 2002, "unless the Court extends the term upon timely motion of one of the parties upon a showing of good cause to extend the Decree." [*Id.* ¶¶ 68-69].

B. Independent Expert Report and Appellants' 2000 Return to Court

MSBE and BCPSS jointly selected an independent expert, Metis Associates, to assess, *inter alia*, "the need for funding in excess of the amounts provided [in the Decree] in order for the BCPSS to provide its students with an education that is adequate when measured by contemporary educational standards." [Decree ¶ 41]. Metis reported that the State needed to provide an additional $2,698 per student to fund BCPSS adequately. [D MSJ A at 3]. Metis also found substantial facilities needs and inadequacies. [*Id.* at 3, 8-9, II-31].

BCPSS, supported by Appellants, applied to the Circuit Court pursuant to the Decree for additional funding to address the deficiencies identified by Metis. [Decree ¶¶ 53-54; 6/9/00 BCPSS PET]. In June 2000, the court adopted Metis's findings, reiterating its holding that the State was not providing BCPSS students with a "constitutionally adequate education when measured by contemporary educational standards," and found that the State "still [has] not provid[ed]" them with one. [6/30/2000 Or. at 1-2; 6/30/2000 Op. at 14-16, 25]. The court declared that "approximately $2,000 to $2,600 per pupil…is need[ed] in order for students of [BCPSS] to receive a Constitutionally Mandated Adequate Education when measured by Contemporary Educational Standards," and that the State had not made a "reasonable downpayment" on those amounts. [6/30/00 Op. at 25]. The court retained jurisdiction pursuant to the Decree and declared that it "trust[ed…] the State will act to bring itself into compliance with" the Constitution "without the need for Plaintiffs to take further action." [*Id.* at 26].

The State appealed, arguing: (1) separation of powers forbids Maryland courts to determine adequacy under Article VIII; (2) courts cannot order the other branches of government to "appropriate" funds for education; and (3) the Decree did not permit the relief directed by the Circuit Court. [12/8/00 Appellants Br. at 11-24]. Shortly before argument, the State agreed to provide the relief declared by the court and dismissed its appeal. [1/30/01 Notice of Dismissal]. Nancy Grasmick, then Superintendent of Education, subsequently testified during the 2004 trial that the State "agreed to be bound" by the 2000 Order when it voluntarily dismissed its appeal. [Grasmick Tr. 1563].

C. Thornton Commission, Bridge Act, and Appellants' 2002 Return to Court

In 1999, the General Assembly established the Commission on Education, Finance, Equity, and Excellence (the "Thornton Commission"), to "study[], evaluat[e], and mak[e] recommendations to…support the outcomes embodied in the Consent Decree." [6/25/02 Op. at 3]. The Commission's proposals included a revised "education finance system" with a $1.1 billion annual increase in State funding, including an additional $258 million to BCPSS by 2008. [*Id.* at 3]. The legislature adopted the Thornton Commission's proposals in the Bridge to Excellence in Education Act ("Bridge Act"), effective in 2002. [*Id.* at 3].

Appellants moved to extend judicial supervision under the Decree because the Bridge Act would not provide the funding declared necessary for a constitutionally adequate education until 2008. [6/19/02 Mot. Extension of Jud. Supervision]. Accordingly, Appellants sought, and the court granted, an extension of the term of the Decree and the court's jurisdiction to monitor compliance until the Bridge Act was fully phased-in. [6/25/02 Op. at 5].

D. Appellants' 2004 Return to Court

In 2004, it "became apparent to the parties, and to the court" that "progress…toward constitutional adequacy" was jeopardized by a cash-flow crisis in BCPSS, and Appellants filed a motion seeking further relief to continue progress towards constitutional compliance. [8/20/04 Op. at 4]. After a four-day trial, the court reaffirmed that Article VIII requires the State to provide "an education that is adequate by contemporary educational standards," and held the State remained in violation of Article VIII and had not funded the amounts declared necessary by the 2000 Order. [*Id.* ¶¶ 1-6]. The court retained jurisdiction to ensure such funds would be provided. [*Id.* ¶ 6].

The State appealed. The Supreme Court granted *certiorari* and noted that the Circuit Court made several declarations during its "continuing jurisdiction" of the case but dismissed most of the issues on appeal as non-final. It reversed only the Circuit Court's order that BCPSS put funds toward instructional programs rather than retiring certain loans. *Md. State Bd. of Educ. v. Bradford*, 387 Md. 353, 382-89 (2005).

E. Developments from 2005 to 2019

The State did not comply with the Circuit Court's 2000 and 2004 orders. Commencing with FY2007, the legislature reduced Bridge Act funding by capping and eliminating inflation increases. 2007 Md. Laws (Special Session) ch. 2. BCPSS suffered increasing annual "adequacy gaps" between the funding the State provided and the amount the State determined was necessary under the Bridge Act. As of FY2017, the State's estimate of the annual adequacy gap for BCPSS was $342.3 million. [P MSJ EX8 at 2, 4]. In 2019, the State's Commission on Innovation and Excellence in Education also found that BCPSS had substantial additional funding needs. [P MSJ EX11 at 8-10].

In addition to the "adequacy gap" for education programs described above, the cost to repair and renovate BCPSS facilities, after decades of underinvestment, ballooned to an estimated $3.86 billion by 2022. [8/12/22 Perkins-Cohen Aff. ¶ 14]. Today, there are still no capital funding plans to address systemic renovations necessary to meet minimally acceptable standards at 89 of the 149 BCPSS total facilities. [*Id.* ¶¶ 21, 22, 26].

F. Appellants' 2019 Petition for Further Relief

After years of consistent and extensive legislative advocacy for additional state funding, Appellants petitioned the Circuit Court in 2019 for further relief pursuant to the Decree and MDJA. [Mem. Supp. Pet. at 1-7, 40, 58-59, 68, 73-77]. Appellants asserted that the constitutional violation was ongoing, and that the State had failed to fully remedy the violation as required by the Decree and the court's orders in 2000, 2002, and 2004.

The State twice moved to dismiss Appellants' petition; each time its motion was denied. In 2020, the Circuit Court denied the State's motion, rejecting the State's argument that the Decree terminated in 2002 based on the Decree's text and because the court had extended its jurisdiction under the Decree in 2002 and 2004. [01/16/20 Op. at 6, 9]. The court also rejected the State's assertion that Appellants had presented "nonjusticiable" political questions, holding that "Maryland courts maintain an inherent authority to review constitutional adequacy" and "review of the adequacy of funding of public education is within the purview of the Maryland Judiciary" even if "the actual appropriation of funds" is left to other branches of government. [*Id*. at 10-11].

In 2021, the State again moved to dismiss, relying on substantially the same arguments rejected in 2020. [11/10/21 D MTD]. The court again denied the State's Motion. [3/7/22 Order at 2]. The State appealed. [3/24/22 Appeal Not.]. This Court dismissed the State's appeal and the

Supreme Court denied *certiorari*. *Maryland St. Bd. of Ed. v. Bradford*, Case No. CSA-REG-0201-2022 (Md. Ct. Spec. App. May 11, 2022); Case No. COA-PET-0131-2022 (Ct. App. July 8, 2022).

After extensive discovery, the parties cross-moved for summary judgment, and on March 3, 2023, the Circuit Court granted summary judgment to the State, contravening precedent on the standard for educational adequacy, and ignoring substantial evidence that should have precluded summary judgment. Appellants timely filed a notice of appeal, and the State noticed a cross-appeal. [Pls. Appeal Not.; MSBE Cross-Appeal Not.].

STANDARD OF REVIEW

Appellate courts review legal errors *de novo*. *State v. Robertson*, 463 Md. 342, 351 (2019). The Court will accord "no deference" to the lower court decision and will "review [it] to determine whether [it is] legally correct." *Turner v. Bouchard*, 202 Md. App. 428, 442 (2011). Likewise, an appellate court reviews *de novo* a circuit court's grant of summary judgment, considering the record in the light most favorable to the nonmoving party and construing any reasonable inferences that may be drawn from the facts against the moving party. *Roy v. Dackman*, 445 Md. 23, 39 (2015); Md. Rule 2–501. A summary judgment proceeding does not try the case or attempt to resolve factual disputes; it determines whether there is a dispute as to material facts sufficient to provide an issue to be tried. *Honaker v. W.C. & A.N. Miller Dev. Co.*, 285 Md. 216, 231 (1979).

ARGUMENT

I. THE CIRCUIT COURT ERRED BY HOLDING APPELLANTS CANNOT SEEK FURTHER RELIEF FOR THE STATE'S CONSTITUTIONAL VIOLATION.

The Circuit Court "repeatedly held that it retains jurisdiction under the terms of the Consent Decree to monitor and enforce compliance with its terms." [03/3/23 Op. at 15 (citing 6/30/00 Op.; 6/25/02 Op.; 8/20/04 Op; 01/16/20 Op.)]. Continuing jurisdiction is consistent with Decree paragraphs 53, 68, and 69, as well as page 5 of the court's 2002 Order. [01/16/20 Op. at 9].

Moreover, it is a "well-established principle that a trial court retains jurisdiction to enforce consent decrees[.]" [3/3/23 Op. at 14 (citation omitted)]. The Circuit Court, thus, has jurisdiction to enforce the Decree.

However, the court erred in determining that notwithstanding its jurisdiction, Appellants could not receive further relief under the Decree, the orders issued pursuant to it, or the MDJA. In denying the State's first motion to dismiss, the court found that "Plaintiffs' Petition is authorized by the Consent Decree," and permitted Appellants to proceed through years of discovery in support of their claims. [1/16/20 Op. at 8]. The court changed course at summary judgment, holding: "no allegations have been articulated that identify any specific violations" because Appellants "only allege general violations of the Consent Decree and this Court's subsequent orders based on violations of ART. VIII, § 1." [3/3/23 Op. at 15]. The court further held that the Appellants could not seek relief under the MDJA because "[t]he prior orders of this Court do not provide a final declaratory judgment under which the Plaintiffs may seek further relief." [*Id.* at 12]. This holding is erroneous.

First, Appellants are not limited to alleging failures by the State to perform the discrete actions required during the initial term of the Decree from 1998 to 2002. The Decree provides for further court oversight and involvement, authorizing BCPSS to seek "funding amounts greater than those described" in the Decree based on the expert funding assessment. [Decree ¶¶ 40-41, 53]. It further provides that in a proceeding for additional relief, "the State reserves all of its defenses as to any Court order for such funds in amounts greater than those provided" in the Decree. [*Id.* ¶ 53]. Thus, the Decree contemplates that additional funding might be ordered, subject to further adversarial proceedings between the parties. Finally, the Decree authorizes the court to extend its jurisdiction beyond 2002 "upon a showing of good cause to extend the Decree," and

permits further relief if a party fails to meet its obligations. [*Id.* ¶¶ 68-69]; *accord* Md. Code, Cts. & Jud. Proc. § 3-412 (permitting further relief under a consent decree). The court extended jurisdiction for good cause "[s]o that the Court may continue to monitor and enforce compliance with its June 2000 Order." [6/25/02 Op. at 4-5; *see also* 8/20/04 Or. ¶ 6]. Further the Decree provides that even if it is terminated, the court retains jurisdiction to resolve any disputes arising during its term. [Decree ¶ 69]. Taken together, these terms allow the parties to seek further relief pursuant to the Decree.

Second, Appellants identified specific provisions of the court's orders that are not being followed. The 2000 Order declared that, to achieve constitutional adequacy, BCPSS needed "additional funding of approximately $2,000 to $2,600 per pupil for educational operating expenses for [FY]2001 and 2002." [6/30/00 Op. at 26; 6/30/00 Or. at 1]. In 2004, the court held that the State had "unlawfully underfunded [BCPSS] by $439.35 million to $834.68 million representing amounts owed under this Court's final 2000 order" for FY2001 to 2004, and it "retain[ed] jurisdiction to ensure compliance with its orders and constitutional mandates." [8/20/04 Op. at 67; 8/20/04 Or. ¶ 6]. Appellants presented substantial evidence that the State had not funded BCPSS at the levels detailed in the 2000 Order, nor had it provided the updated amount called for in the 2004 Order. [P MSJ at 6-12 (detailing history of state underfunding, including funding adequacy gaps from 2009 to 2017)].

Third, the State's failure to remedy the constitutional violation is not a "general violation[]" separate from the obligations of the Decree. [3/3/23 Op. at 15]. The court's orders pursuant to the Decree incorporated Article VIII's requirement that the State provide funding necessary for BCPSS students to receive a constitutionally-adequate education, and declared that at least the funding levels detailed in the 2000 Order must be achieved to comply with the constitution and

court orders. [6/30/00 Op. at 26 ("Having 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, the Court trusts that the State will act to bring itself into compliance with its constitutional and contractual obligations under the Consent Decree"); 8/20/04 Op. at 68 ("The Court will continue to retain jurisdiction to ensure compliance with its orders and constitutional mandates")].

Finally, the Decree, as "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree," is a judgment pursuant to which the court can issue further relief. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992). The MDJA empowers courts to grant relief to any party that seeks to enforce rights previously determined by declaratory judgment, and to seek "[f]urther relief based on a declaratory judgment or decree." *See* Md. Cts. & Jud. Proc. I, § 3-412(a); *Nova Rsch., Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 458 (2008). The Uniform Declaratory Judgments Act, upon which the MDJA is based, "merely carries out the principle that every court, with few exceptions, has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective." *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C. Cir. 1988) (citing Borchard, Declaratory Judgments 441 (2d ed.1941)); 6/25/02 Op. at 4 (the court has "inherent power to enforce its own orders"); *see also Falls Rd. Cmty. Ass'n, Inc. v. Baltimore Cnty.*, 437 Md. 115, 148–149 (2014) (describing history and purpose of MDJA). The Decree and court orders issued pursuant to it give rise to the court's ability to issue further relief. Courts must construe the MDJA liberally, and that direction is particularly applicable here, as the court is called to redress a persisting constitutional violation, and not simply resolve a contractual or regulatory dispute. *See Boyds Civic Ass'n v. Montgomery County Council,* 309 Md. 683, 688 (1987) (MDJA "is remedial," and "shall be liberally construed and administered.").

For these reasons, the Circuit Court had authority to issue further relief for Appellants' claims, whether pursuant to the terms of the Decree, inherent authority to enforce its own orders, or the MDJA.[1]

II. THE CIRCUIT COURT ERRED BY HOLDING ARTICLE VIII "ONLY REQUIRES AN EFFORT BY THE STATE TO AT MOST PROVIDE A BASIC EDUCATION."

The Circuit Court erroneously concluded that the right to education guaranteed by Article VIII requires nothing more than an "effort by the State to at most provide a basic education." [3/3/23 Op. at 18]. This conclusion departs from Supreme Court precedent, the Circuit Court's prior rulings, the original understanding of the "thorough and efficient" clause, and persuasive authority from other jurisdictions, all of which demonstrate that Article VIII mandates the State to provide an education that is adequate by contemporary educational standards.

A. The Circuit Court Ignored Precedent that the State Must Provide an Education that is Adequate When Measured by Contemporary Educational Standards.

The Circuit Court's interpretation of Article VIII is inconsistent with Supreme Court precedent, which measures "basic" or "adequate" by contemporary educational standards.

The Supreme Court held in *Hornbeck v. Somerset County Board of Education*, 295 Md. 597 (1983), that Article VIII does not require uniformity among the counties in education funding, so that "mathmetical[ly]" unequal funding does not in itself result in a constitutional violation. *Id.* at 639. The Court clarified, however, that a future case could present evidence that the State "failed

[1] In the event this Court disagrees, however, Appellants respectfully request that the Court affirm solely on those grounds and vacate the other parts of the Circuit Court's decision. As discussed *infra*, the court also made erroneous rulings concerning the meaning of Article VIII, the summary judgment standard, and the justiciability of Appellants' claim. *See VNA Hospice of Md. v. Dep't of Health & Mental Hygiene*, 406 Md. 584, 606 (2008) (the Supreme Court "will avoid deciding the constitutional issues and decide the case on a non-constitutional ground if reasonably possible").

to provide an adequate education measured by contemporary educational standards" 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 [Article VIII]." *Id.*

In *Montgomery County v. Bradford*, 345 Md. 175 (1997) ("*Bradford I*"), the Supreme Court reiterated that a "basic" or "adequate" education is determined "when measured by contemporary educational standards." *Id.* at 181 (citing *Hornbeck*, 295 Md. at 639). *Bradford I* makes clear that *Hornbeck,* and Article VIII, require a basic or adequate education when measured by contemporary standards.

Not only did the Circuit Court err in articulating the standard, but it erred in reconsidering the standard at all. Prior to the decision at bar, the court held that Article VIII requires provision of an education that is "adequate when measured by contemporary educational standards." [6/30/00 Op. at 25]. On appeal from the 2000 Order, the State argued that the Supreme Court "has never resolved the exact meaning and contours of the obligation upon the State created by the 'thorough and efficient education' language in the Maryland Constitution," but waived that challenge to the court's articulation of the standard when it voluntarily withdrew its appeal from the 2000 Order. [12/8/00 State Br. at 16; 1/30/01 State Notice of Dismissal (dismissing appeal)]. Litigants cannot re-litigate issues they could have raised in a previous appeal. *See Fidelity-Baltimore Nat'l Bank & Trust Co. v. John Hancock Mut. Life Ins. Co.,* 217 Md. 367, 372 (1958). MSBE's voluntary dismissal of its 2000 appeal constituted waiver of the arguments it raised on appeal.

B. As Understood When Article VIII was Drafted, the Words "Thorough" and "Efficient" Support a More Demanding Constitutional Standard.

The Article VIII standard articulated in *Bradford I* and prior decisions in this case is supported by the meaning of "thorough" and "efficient" when the Constitution was drafted. The Supreme Court recognized in *Hornbeck* that examination of the historical context is critical to

interpreting Article VIII's "thorough and efficient" clause. 295 Md. at 620. Such an examination necessarily includes the contemporaneous understanding of the words "thorough" and "efficient." *See Harvey v. Marshall*, 389 Md. 243, 261 n. 11 (2005) (legislative intent should include consulting dictionaries from the time of enactment); *Johns Hopkins Univ. v. Williams,* 199 Md. 382, 386 (1952) (courts may consider common usage of language used in legislation). At the time of drafting in 1867, "thorough" was understood to mean "complete" or "perfect." N. Webster, *An American Dictionary of the English Language* (Springfield, MA.: George & Charles Merriam, 1859) at 1148; J. E. Worcester, *A Dictionary of the English Language* (Boston: Swan, Brewer & Tileston, 1860) at 1503 (same). The word "efficient" in the 19th century, and for much of the 20th century, meant "effective" or "effectual," that is, capable of achieving the intended result. *See*, *e.g.*, Webster at 38; Worcester at 465.

The framers would also have been informed in drafting Article VIII by Article 43 of the Maryland Declaration of Rights: "[t]hat the Legislature ought to encourage the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures." Md. Const. Decl. of Rts. Article 43. To the framers of Article VIII, therefore, a "thorough and efficient" education would have meant an education effective in completely accomplishing the ends espoused by the Declaration of Rights for the education of the citizens of Maryland, one that gives each student the opportunity to develop the knowledge and skills necessary to thrive. Such a standard corresponds to the one articulated in *Hornbeck* and *Bradford I*: the requirement that the State provide an education that is adequate when measured by contemporary educational standards.

C. Persuasive Authority from Other Jurisdictions Establishes that a Constitutionally Adequate Education Requires More than "At Most" "Efforts" by the State.

In interpreting Article VIII, *Hornbeck* also examined precedents from other states whose constitutions contain similar guarantees regarding public education. *See* 295 Md. at 632-38. Review of that case law reveals an important pattern: whether a state's constitution guarantees a "thorough and efficient," "adequate," or "basic" education, its courts require more of state government than "at most" an "effort" to satisfy the constitutional right to education.

Indeed, the courts of other states hold that a constitutional "basic" or "adequate" education must go "beyond th[e] minimum" of "skills necessary for the enjoyment of the rights of speech and of full participation in the political process." *McDaniel v. Thomas,* 285 S.E.2d 156, 165 (Ga. 1981) (citation omitted); *see also Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997) ("adequate public education" goes beyond "mere competence in the basics [of] reading, writing, and arithmetic."). Other states' courts hold that a basic or adequate education requires an educational system that creates a meaningful opportunity for students to gain the knowledge necessary to participate, compete, and succeed as citizens in our modern society and economy. *See, e.g., William Penn. Sch. Dist. v. Pennsylvania Dep't of Educ.,* 2023 WL 1990723, at *312 (Pa. Commw. Ct. Feb. 7, 2023) ("the constitutional standard…requires that every student receive a meaningful opportunity to succeed academically, socially, and civically, by receiving a comprehensive, effective, and contemporary education"); *Davis v. State*, 804 N.W.2d 618, 641 (S.D. 2011) ("a free, adequate, and quality public education…provides [children] with the opportunity to prepare for their future roles as citizens, participants in the political system, and competitors both economically and intellectually"); *Leandro v. State,* 488 S.E.2d 249, 255 (N.C. 1997) (A "sound basic" education allows a child to "participate fully in society as it exist[s] in his or her lifetime.").

The consensus among these states' courts is that a constitutionally adequate education must enable students to succeed in contemporary society. This definition is fully consistent with, and supports the requirement of, *Hornbeck* and *Bradford I* that Maryland must provide an adequate education as measured by contemporary educational standards. It is entirely *inconsistent* with the holding of the Circuit Court below.

III. THE CIRCUIT COURT ERRED BY HOLDING THERE WAS NO GENUINE DISPUTE OF MATERIAL FACT REGARDING THE STATE'S CONSTITUTIONAL VIOLATION.

The Circuit Court summarily held, without addressing the evidence of profound educational inadequacy in the record, that BCPSS students were receiving a "basic" education and that "Plaintiffs' claim of a constitutional violation is denied as a matter of law." [3/3/23 Op. at 18]. Applying the proper legal standard, however, the State's motion for summary judgment should have been denied because Appellants presented genuine issues of material fact under any standard of adequacy, including the erroneous one adopted by the court.

Appellate courts routinely reverse summary judgment rulings where circuit courts ignored material issues of fact. *See, e.g.*, *Sutton-Witherspoon v. S.A.F.E. Mgmt., Inc.*, 240 Md. App. 214, 239-40 (2019) (reversing summary judgment and ordering remand); *Bogert v. Thompson*, 255 Md. App. 307, 326 (2022) (same). For the same reasons, this Court should reverse the Circuit Court's decision, as Appellants presented overwhelming evidence that there are genuine issues of material fact as to the State's failures to provide a "through and efficient system of education" under the State's own standards, including evidence of the inadequacy of the existing school facilities and educational programming due to systemic underfunding.

A. The Circuit Court Failed to Look to the State's Own Standards to Determine if There is a Constitutional Violation.

For educational opportunity to be adequate by contemporary standards, the State must, at a minimum, ensure that public schools meet the educational standards promulgated by the State. *See Hornbeck*, 295 Md. at 639 (claim of constitutional noncompliance requires showing that the state's comprehensive educational standards have not been met); [8/20/04 Op. ¶¶ 98-121 (relying on state's standards to determine constitutional violation)].

Numerous other state courts follow the same approach, examining whether state educational standards are met in determining compliance with analogous constitutional rights to education. *See, e.g., Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1185 (Kan. 1994) ("the court…will utilize as a base the standards enunciated by the legislature and the state department of education"); *Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997) ("Once a standard is set, the legislature must choose a funding mechanism…that ensures that no school in Arizona falls below the standard."); *Delawareans for Educ. Opp. v. Carney*, 199 A.3d 109, 165-66 (Del. Ch. 2018) ("the proper course in this case will be for the court to look first to the standards that the General Assembly and the Delaware Department of Education have chosen"); *Abbott v. Burke*, 693 A.2d 417, 432-33 (N.J. 1997) (recent legislation "provide[s] a new, facially valid definition of the substantive educational opportunity required by the Constitution").

Considering *Hornbeck* and persuasive authority from other states, persistent failure to meet state educational standards constitutes a failure to provide a constitutionally adequate education. At minimum, evidence that state standards are not met creates a genuine dispute as to whether there is Article VIII compliance.

B. There Is a Genuine Issue of Material Fact as to the State's Failure to Provide Constitutionally Adequate Facilities.

The court ignored the Appellants' expert evidence and evidence from state assessments showing BCPSS schoolchildren have suffered, for decades, from schools that are in disrepair due to lack of funding, with dire consequences for educational outcomes.

The record contains undisputed determinations by the State dating back to 1992 that a significant percentage of BCPSS facilities are in poor, or very poor, condition. *See* [12/6/94 Compl. at ¶ 105 (citing 1992 Master Facilities Plan)]. The poor conditions of these facilities due to disinvestment have been a consistent feature of BCPSS, from the inception of this litigation to the present. In its 2000 Opinion, the court adopted the findings and recommendations of the Metis report, which concluded facilities were in poor condition and required substantial improvements and specific funding to reach adequacy. [6/30/00 Op. at 14-16]. Independent and state assessments since that time agree. [P MSJ EX50 at 26 (2012 BCPSS-authorized report rating around 91% of the BCPSS buildings as "poor" or "very poor"); *id.* EX49(A) at 25, 37 (2020 assessment based on State data finding more than 60% of schools in the portfolio are rated "poor" or "very poor.")].

BCPSS school facilities are, by most measures, the worst in Maryland. BCPSS facilities "cumulatively are more than 1000 years older than average," making them the oldest buildings in the entire state. [*Id.* EX88 at 4 (based on data from the State of Maryland Interagency Commission on School Construction)]. Between 2014 and 2019, essential building system failures in these facilities caused emergency closures that resulted in 1.5 million hours, or 221,000 full days of school, of lost instructional time. [*Id.* EX56(A) at 11 (Appellants' expert's findings based upon data from Baltimore City Public Schools and the Statewide Facilities Assessment)]. Photographic evidence illustrates the deficiencies in BCPSS's schools: there are facilities covered in mouse

droppings; asbestos floor tiles; severely corroded, rusted, and molded pipes; exposed wires in classrooms; water intrusion damage; and walls covered with lead paint. [*Id.* EX49(A) at 186-301].

Appellants further presented evidence that BCPSS's substandard facilities hinder students' ability to learn and increase the risk of educational failure. Appellants testified at deposition about the deteriorated condition of their children's schools, and how those conditions limit their children's educational opportunities. *See, e.g.*, [*Id.* EX81 at 81 (school early dismissal because of nonfunctioning heat or air conditioning); *id.* EX79 at 93 (school has pests); *id.* EX 80 at 49 (bathrooms smell foul even after cleanings)]. Expert reports reiterated the educational harms of substandard facilities. *See* [*id.* EX66(A) at 11-12 (chronic exposure to noise 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"); *Id.* EX47 at 4 (finding "there is a strong correlation between certain facility factors and student achievement")].

The foregoing evidence inarguably presents a genuine dispute of material fact whether BCPSS facilities meet constitutional standards, yet the Circuit Court's decision in this case did not even mention it. A rational factfinder could conclude that students cannot receive a "thorough and efficient" education with lost classroom time, inhospitable temperatures, unhygienic bathrooms, and rodent infestations—all of which cause them to feel disillusioned about their education and their opportunities in life. *See* [*id.* EX46 at 39 (finding young people "made a connection between how society valued them and how they navigate their place in the world by the way their school buildings are run and maintained."); *id.* at 33 (BCPSS students often felt "because they attended a

predominantly Black school district, their quarantining to a school building equivalent to the slums was inevitable.")].

C. There Is a Genuine Issue of Material Fact as to the State's Failure to Provide Constitutionally Adequate Educational Programming.

The Circuit Court also overlooked material record evidence—much of it from the State's own documents—that BCPSS performs well below State standards. As MSBE admitted, "The private plaintiffs also argue compellingly that outcomes for Baltimore's school children in 2022 remain sobering." *See* [D MSJ Opp. at 5]. In 2004, the court concluded, based on "objective indicators," such as performance scores, attendance rates, and graduation rates, that BCPSS's students were performing "far below state standards, and far below state averages" because of underfunding. [8/20/04 Op. ¶¶ 95-125]. The record on summary judgment shows that BCPSS students continue to perform below state standards due to persistent underfunding, according to those same objective indicators.

In its 2019 assessment of school performance, for example, the State reported that 17.9% of BCPSS elementary students were proficient in Math, and 18.6% were proficient in English Language Arts ("ELA"); 13.5% of middle school students were proficient in Math, and 22.7% were proficient in ELA; and 21.8% of high school students were proficient in Algebra I, and 32.9% were proficient in ELA 10. Proficiency rates are even lower for students with disabilities. BCPSS data for the 2018-19 school year show that only 5% of students with disabilities in grades 3 to 8 met or exceeded expectations in Math and ELA; and only 5% of high school students with

disabilities met or exceeded expectations in Algebra I and English 10.[2] These performance levels are well below state targets and averages. [P MSJ at 16-17].

The record also reflects that BCPSS students significantly underperform on college entrance exams and advanced placement courses compared to students statewide. [*Id.* at 19]. The State's 2019 report, moreover, shows a BCPSS 4-year cohort high school graduation rate of 72%, and for students with disabilities, less than 50%. [*Id.* at 18]. BCPSS's dropout rate is double that of the Statewide rate, and its dropout rate for students with disabilities was the highest in the State. [*Id*.]. Graduating BCPSS students enrolled in two- or four-year colleges in their first year after graduation at substantially lower rates than graduates from the other school districts in Maryland. *Id.* at 20.

The evidence also demonstrated that the unique student population of Baltimore City requires additional resources to ensure an adequate education. The Circuit Court ignored evidence that a high proportion of BCPSS students live in poverty, have disabilities or special needs, are English-language learners, and have had adverse childhood experiences. *See, e.g.*, [P MSJ 16 at 40-42; *id.* EX18; *id.* EX21 at 6, 11]. Both the State and its proffered experts acknowledge that students living with these disadvantages require additional resources. *See* [*id.* EX23 at 80:19-22, 39:19-21; *id.* EX24 at 96:9-19]. Moreover, State analysis and expert testimony, found admissible by the court, directly link improvement in outcomes to increased funding. *See, e.g.*, [*id.* EX84 at 6, 20-21 (State analysis showing that BCPSS' scores rose 28% when funding increased by 22%);

[2] Appellants cited the performance statistics from the 2018-2019 State Report Card in their Motion for Summary Judgment because it was the most recent data available at the time. The 2021-2022 Report shows that BCPSS students continue to underperform as in prior years: 9.9% of elementary students proficient in Math, and 19% proficient in ELA; 6.7% of middle school students proficient in Math, and 23% proficient in ELA; and 13.3% of high school students proficient in Math, and 42% proficient in ELA. *See* https://reportcard.msde.maryland.gov/Graphs/#/ReportCards/ReportCardSchool/1/E/1/30/XXXX/2022.

Id. Ex96 at 1-4 (Expert report showing that increases in funding lead to better test scores and higher graduation rates)].

This evidence creates, at the very least, a genuine issue of material fact whether students in BCPSS are receiving a constitutionally adequate education.

D. There Is a Genuine Issue of Material Fact as to the State's Failure to Provide Constitutionally Adequate Funding.

The Circuit Court stated that "[n]o dispute of material fact exists here regarding the adequacy of funding provided by MSBE," because the Maryland General Assembly had passed "several bills that attempt to improve the state's education system" including the Blueprint for Maryland's Future Act ("Blueprint Act"), Built to Learn Act, and the 21st Century School Buildings Program, and the federal government has provided grants for COVID-19 relief. [3/3/23 Op. at 22]. The court held that this legislation and federal grants constitute sufficient "effort" to provide a basic education to BCPSS schoolchildren. [*Id.* at 18]. However, the court disregarded a record creating a genuine dispute whether legislation or federal grants sufficiently remedy the Article VIII violation.

Appellants presented evidence that the State fails to fund BCPSS facilities sufficiently to meet minimally acceptable standards. [P MSJ at 29-31 (BCPSS's facilities funding is below nationwide and state standards); *id.* EX61 at 23-24 (nationwide facility funding standards); *id.* EX63 at 7 (state facility funding recommendations)]. The current legislation and federal grants will not fully address the problem: just 31 of BCPSS's facilities have been or will be renovated under the Built to Learn Act and 21st Century School Buildings Program, leaving 89 facilities untouched by facilities-related legislation. [8/12/22 Perkins-Cohen Aff. ¶ 26]. Even if these two bills were fully implemented, Appellants' evidence shows that more than $3.86 billion (in 2022 dollars) is still needed to bring the BCPSS facilities to minimally acceptable standards. [*Id.* ¶ 14].

Without relief, tens of thousands of BCPSS students will continue to learn in these crumbling buildings.

With respect to educational programs, Appellants presented evidence thar the State failed to provide the funding required by the 2000 Order and allowed the funding gap for BCPSS to grow steadily thereafter. The State conceded that full funding under the Bridge Act was necessary for constitutional adequacy. [8/20/04 Op. ¶¶ 49-51]. By 2004, however, the Court determined that the State had already failed to meet the Bridge Act funding targets. *See* [*id.* at Concl. ¶ 1]. In 2007, before full Bridge Act funding was completely phased in, the General Assembly eliminated inflation increases and altered the annual inflation adjustment. 2007 Md. Laws (Special Session) ch. 2. The State's Department of Legislative Services' funding analyses show massive "adequacy gaps" in funding for BCPSS from FY2009 through FY2017, the last year for which the State calculated an adequacy gap. *See, e.g.*, [P MSJ EX85 at 47 (FY2009 $631 per pupil gap); *id.* EX8 at 2, 4 (FY2017 $4,384 per pupil gap)].

Appellants proffered evidence that there is no guarantee of full funding for BCPSS under the Blueprint Act because it requires yearly appropriations and may be abandoned in any year in which the State's economy is estimated to grow less than 7.5%. *See* HB1372, Md. Laws, 2021 Session, Chapter 55, § 19. In addition, the Blueprint Act does not fully account for the additional resources required to fully meet the needs of specific student populations in BCPSS, including students with disabilities, those living in poverty, and those in pre-kindergarten programs. [*See* 10/3/22 Perkins-Cohen Aff. ¶ 19]. The record is also clear that other funding sources are limited in scope and duration, including the federal recovery funding that was provided as temporary aid for school systems to respond to and recover from the COVID-19 pandemic. [*Id.* ¶ 58]. These

persistent funding gaps and the deficiencies in Blueprint Act funding at a minimum create a genuine issue of fact as to whether the State continues to violate Article VIII.

IV. THE CIRCUIT COURT ERRED BY HOLDING APPELLANTS' CLAIMS PRESENT A NON-JUSTICIABLE POLITICAL QUESTION.

The Circuit Court acknowledged that it had the authority to find a constitutional violation, but it erred by holding that part of Appellants' requested relief "would interfere directly with the authority of the political branches of government to provide funding for education." [3/3/23 Op. at 22]. This ruling should be reversed for two reasons. *First*, the court ignored two other forms of relief Appellants sought that the State did not oppose on justiciability grounds: (1) a declaration of the constitutional violation, and (2) an order for the State to develop a comprehensive plan to remedy the violation. *Second*, with respect to Appellants' third form of requested relief, an order to expend funds, the court wrongly circumscribed judicial power to address a constitutional violation by characterizing such relief as an "appropriation" of funds that is non-justiciable.

There is a two-prong test to resolve a challenge to justiciability: (1) the court must decide whether the claims can be adjudicated by a judicial branch; if it can, then (2) the court must determine if doing so would be barred by separation of powers. As set forth below, Appellants' requested relief satisfies the two-prong test. Even if this Court were to affirm the Circuit Court with respect to an order to "appropriate" funds, the Court should make plain that that declaratory relief and equitable relief, such as the comprehensive plan requested by Appellants, are squarely within the Court's power to order.

A. The Article VIII Violation Can Be Adjudicated by the Judicial Branch.

As to the first justiciability prong, the court asks whether "the duty asserted can be judicially identified," "its breach judicially determined," and its remedy "judicially molded." *Estate of Burris v. State*, 360 Md. 721, 744-45, 759 (2000).

The Circuit Court correctly held it has the power to determine an Article VIII violation. [3/3/23 Op. at 18 (citing 1/16/20 Op. at 11 ("review of the adequacy of funding of public education in Maryland is within the purview of the Maryland Judiciary"))]. As the State recognized when this case was last before the Maryland Supreme Court, "[c]ourts should emphatically state what the law is," and may determine "the legal question of the constitutionality of the 'efficient and thorough' education established by the legislature, as this Court did in *Hornbeck*." [*See* 12/14/04 Br. at 29-30].

The Circuit Court did not explicitly consider whether protection of Article VIII could be "judicially molded." [*See* 3/3/23 Op. at 19]. To be sure, the court has already demonstrated its ability to judicially mold a remedy by entering partial summary judgment, entering the Decree, and enforcing the Decree through its 2000, 2002 and 2004 orders. *See supra*. Similarly, here, the court had the power to order the State to develop a plan to remedy the Article VIII violation. For the reasons below, more specific relief requiring the expenditure of funds is also not barred by separation of powers.

B. Adjudicating an Article VIII Violation is Not Barred by Separation of Powers.

As to the second justiciability prong, the court considers "whether the structure of government 'renders the issue presented a 'political question'—that is, a question which is not justiciable in [State] court because of separation of powers provided by the Constitution." [3/3/23 Op. at 19 (citing *Powell v. McCormack*, 395 U.S. 486, 516-17 (1969))]. Factors considered in the second prong include whether there is, *inter alia*, "a lack of judicially discoverable and manageable standards for resolving it;" "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" and "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker*

v. Carr, 369 U.S. 186, 269 (1962). Each of these considerations favor Appellants with respect to all forms of requested relief.

1. Resolving an Article VIII Claim is Judicially Manageable.

The State has promulgated contemporary educational standards that should be used to assess whether a "thorough and efficient" education is being provided. MSBE sets standards for facilities, curriculum, and proficiency goals. The State has thus established comprehensive, detailed, judicially-manageable benchmarks that can be applied to Article VIII compliance and enforced against the State if its compliance falls short. *See Sugarloaf Citizens Ass'n, Inc. v. Gudis*, 319 Md. 558, 569 (1990) (considering whether "the legislative body provided sufficient guidance limiting the court's discretion so that the court is not called upon to make a decision based on policy, expediency or politics.").

2. The Text of Article VIII Does Not Commit the Question of Compliance and Enforcement Exclusively to the Political Branches.

The Maryland Constitution provides: "The General Assembly, at its First Session after the adoption of this Constitution, 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." Const., Article VIII, § 1. The drafters of Article VIII did not write that the General Assembly "may" provide a thorough and efficient education. Rather, Article VIII states that a thorough and efficient system of free public schools "shall" be established, and that the General Assembly "shall" provide funds for the maintenance of that system. Far from conferring exclusive authority upon the political branches, Article VIII imposes a mandate on the General Assembly, telling it what it "shall" do. As in other contexts, the actions of the political branches are reviewable by the judiciary, and constitutional violations by those branches must be remedied by the courts *See, e.g.*, *Getty v. Carroll Cnty. Bd. Of Elections*, 399 Md. 710, 737 (2007) ("If an adopted [redistricting] plan does

not pass constitutional muster and is declared void, the Maryland Constitution requires us to do more—we must provide a remedy.").

In *Lamb v. Hammond*, 308 Md. 286 (1987), the Supreme Court considered whether the political question doctrine barred courts from adjudicating a dispute over counting previously excluded absentee ballots in an election. It held that although the Constitution provided that the House of Delegates "shall be the judge of qualifications and elections of its members," Const., Article III § 19, that did not mean that a dispute about excluded absentee ballots could not be adjudicated by the courts. *Lamb*, 308 Md. at 303 ("there is a role for both the courts and the Legislature in resolving questions over the conduct of elections for seats in the General Assembly").

Moreover, in *Jones v. Anne Arundel County*, 432 Md. 386 (2013), the Supreme Court held that the political question doctrine must be "narrowly applied…[as] courts will not abstain from reviewing actions that are not within the express purview of the 'textually demonstrable constitutional commitment.'" *Id.* at 400-01. In *Jones*, the Supreme Court held that the issue of whether a county council exceeded its authority in declaring a councilmember's seat vacant because he was incarcerated was not a political question. In arguing to the contrary, the County relied on Section 5(Q) of the Express Powers Act, which provides that the County Council may enact local laws "to govern the conduct and actions of all such county officers in the performance of their public duties, and to provide for penalties, including removal from office, for violation of any such laws or the regulations adopted thereunder." The Court rejected this argument, holding that this provision contained "no commitment rendering the County Council the sole arbiter of its members' qualifications" *Id.* at 435.

As was true of the laws at issue in *Lamb* and *Jones*, the text of Article VIII does not commit any issue to the legislature's sole discretion, and the courts have a complementary role in ensuring Article VIII is enforced for all students. The State has acknowledged the court's role in providing such a check on the legislative and executive branches to ensure each has properly discharged their duties under the Constitution. *See* [12/8/00 Br. at 35 (arguing that the court "retains the power to decide if [the other two] branches of government have acted constitutionally in the way they address school funding issues.")].

3. Maryland Courts Have Plenary Authority to Enforce Constitutional Rights.

The foregoing discussion makes clear that there is no political question or separation of powers impediment that would prevent the Circuit Court from granting Appellants' request for declaratory relief and an injunction requiring the State to develop a funding plan. With respect to the only form of relief the Circuit Court addressed, Appellants' request for a specific amount of funds, Maryland courts have the power to compel State agencies to remedy constitutional violations, even if it requires the State to expend funds to do so.

In *Ehrlich v. Perez*, 394 Md. 691 (2006), the Supreme Court considered whether the equal protection principles embodied in Article 24 of the Declaration of Rights required the State to fund Medicaid benefits to Maryland residents who immigrated after a set date, as the State provided those benefits for individuals who immigrated before that date. *Ehrlich* affirmed the lower court's grant of a preliminary injunction requiring payment of Medicaid benefits. The State claimed that Article III §§ 32 and 52 "provide a comprehensive executive budgetary procedure for appropriating monies," and therefore "the court lacks the authority to order the executive and legislature [sic] branches prospectively to reinstate medical assistance benefits." *Id.* at 735. The State further argued that the Declaration of Rights did "not overbear the express terms of the

Constitution;" accordingly, "[i]f there were a conflict between Article 24 and the budget provisions of the Constitution, the more specific budget provisions would prevail." *Id.* at 736. The Court rejected this attempt to circumvent constitutional guarantees, holding that "the executive and legislative budget authority is subject to the constitutional limitations of the Declaration of Rights." *Id*.

Ehrlich's reasoning applies with equal force here. Moreover, in reaching a contrary conclusion, the Circuit Court placed undue emphasis on the concept that the *Ehrlich* injunction required "reinstatement" of benefits. *Ehrlich,* like the instant case, invoked the court's authority to remedy "defendants' unconstitutional withholding of funds." In such a case, the mechanism to make the withheld funds available is irrelevant. *See* [*id*. at 735-36]; *see also Ehrlich*, 3/27/07 Order ("Plaintiffs are entitled to restoration of said Program benefits…").

The Circuit Court's ruling is also contrary to that of many jurisdictions that held enforcement of similar educational provisions falls within the scope of judicial review. *See, e.g.*, *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 441 ("when the exercise of remedial power necessarily includes safeguarding the constitutional rights of the parties…the court has inherent authority to direct local authorities to perform that duty);[3] *Milliken v. Bradley II*, 433 U.S. 267, 291 (1977) (affirming lower court order requiring state defendants to expend funds to remedy constitutional violation in desegregation case); *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W. 3d 232, 243 (Tenn. 2002) (requiring state to expend funds by equalizing teachers' salaries to achieve constitutional compliance); *Abbott v. Burke*, 575 A.2d 359, 390-91 (N.J. 1990) (addressing

[3] The Circuit Court below distinguished *Hoke* because it "afforded significant deference prior to invoking its powers" and the same "extraordinary circumstances" are absent here in light of recent Maryland legislation. [3/3/23 Op. at 22]. However, as discussed *supra*, extraordinary circumstances *do* exist here, because tens of thousands of children are being deprived of a constitutionally adequate education in BCPSS.

violation of New Jersey's "thorough and efficient" constitutional guarantee, issuing a remedy which, in part, required the passage of new legislation to expend funds).

In fulfilling its mandate under Article VIII, the State must act "as prescribed by the Constitution and Laws of the State." *Lamb*, 308 Md. at 304; *see also Stearman v. State Farm Mut. Auto Ins. Co*., 381 Md. 436 ("if the legislative act in question were unconstitutional, the judiciary has the power to step in and declare it so"). Just as the defendants in *Lamb* were not "empowered…to act arbitrarily and capriciously, to disenfranchise people who are legally entitled to vote," the State is not empowered to leave BCPSS students behind year after year, in violation of Article VIII.

CONCLUSION

For these reasons, the Circuit Court's decision should be reversed and remanded.

STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument.

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 9,089 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the requirements stated in Rule 8-112.

TEXT OF RELEVANT STATUTES AND RULES

Maryland Constitution Article VIII.

SECTION 1. The General Assembly, at its First Session after the adoption of this Constitution, 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.

SECTION 2. The System of Public Schools, as now constituted, shall remain in force until the end of the said First Session of the General Assembly, and shall then expire; except so far as adopted, or continued by the General Assembly.

SECTION 3. The School Fund of the State shall be kept inviolate, and appropriated only to the purposes of Education.

Maryland Constitution, Article III, §§ 32, 52.

SECTION 32. No money shall be drawn from the Treasury of the State, by any order or resolution, nor except in accordance with an appropriation by Law; and every such Law shall distinctly specify the sum appropriated, and the object, to which it shall be applied; provided, that nothing herein contained, shall prevent the General Assembly from placing a contingent fund at the disposal of the Executive, who shall report to the General Assembly, at each Session, the amount expended, and the purposes to which it was applied. An accurate statement of the receipts and expenditures of the public money, shall be attached to, and published with the Laws, after each regular Session of the General Assembly.

…

SECTION 52. (1) The General Assembly shall not appropriate any money out of the Treasury except in accordance with the provisions of this section *(amended by Chapter 159, Acts of 1916, ratified Nov. 7, 1916; Chapter 497, Acts of 1947, ratified Nov. 2, 1948)*.

(2) Every appropriation bill shall be either a Budget Bill, or a Supplementary Appropriation Bill, as hereinafter provided.

(3) On the third Wednesday in January in each year, (except in the case of a newly elected Governor, and then not later than ten days after the convening of the General Assembly), unless such time shall be extended by the General Assembly, the Governor shall submit to the General Assembly a Budget for the next ensuing fiscal year. Each Budget shall contain a complete plan of proposed expenditures and estimated revenues for said fiscal year and shall show the estimated surplus or deficit of revenues at the end of the preceding fiscal year. Accompanying each Budget shall be a statement showing: (a) the revenues and expenditures for the preceding fiscal year; (b) the current assets, liabilities, reserves and surplus or deficit of the State; (c) the debts and funds of the State; (d) an estimate of the State's financial condition as of the beginning and end of the preceding fiscal year; (e) any explanation the Governor may desire to make as to the important features of the Budget and any suggestions as to methods for reduction or increase of the State's revenue *(amended by Chapter 725, Acts of 1955, ratified Nov. 6, 1956; Chapter 161, Acts of 1964, ratified Nov. 3, 1964)*.

(4) Each Budget shall embrace an estimate of all appropriations in such form and detail as the Governor shall determine or as may be prescribed by law, as follows: (a) for the General Assembly as certified to the Governor in the manner hereinafter provided; (b) for the Executive Department; (c) for the Judiciary Department, as provided by law, as certified to the Governor; (d) to pay and discharge the principal and interest of the debt of the State in conformity with Section 34 of Article III of the Constitution, and all laws enacted in pursuance thereof; (e) for the salaries payable by the State and under the Constitution and laws of the State; (f) for the establishment and maintenance throughout the State of a thorough and efficient system of public schools in conformity with Article 8 of the Constitution and with the laws of the State; and (g) for such other purposes as are set forth in the Constitution or laws of the State *(amended by Chapter 20, Acts of 1952, ratified Nov. 4, 1952; Chapter 62, Acts of 1990, ratified Nov. 6, 1990)*.

(5) The Governor shall deliver to the presiding officer of each House the Budget and a bill for all the proposed appropriations of the Budget classified and in such form and detail as he shall determine or as may be prescribed by law; and the presiding officer of each House shall promptly cause said bill to be introduced therein, and such bill shall be known as the "Budget Bill." The Governor may, with the consent of the General Assembly, before final action thereon by the General Assembly, amend or supplement said Budget to correct an oversight, provide funds contingent on passage of pending legislation or, in case of an emergency, by delivering such an amendment or supplement to the presiding officers of both Houses; and such amendment or supplement shall thereby become a part of said Budget Bill as an addition to the items of said bill or as a modification of or a substitute for any item of said bill such amendment or supplement may affect *(amended by Chapter 20, Acts of 1952, ratified Nov. 4, 1952)*.

(5a) The Budget and the Budget Bill as submitted by the Governor to the General Assembly shall have a figure for the total of all proposed appropriations and a figure for the total of all estimated revenues available to pay the appropriations, and the figure for total proposed appropriations shall not exceed the figure for total estimated revenues. Neither the Governor in submitting an amendment or supplement to the Budget Bill nor the General Assembly in amending the Budget Bill shall thereby cause the figure for total proposed appropriations to exceed the figure for total estimated revenues, including any revisions, and in the Budget Bill as enacted the figure for total estimated revenues always shall be equal to or exceed the figure for total appropriations *(added by Chapter 745, Acts of 1973, ratified Nov. 5, 1974)*.

(6) The General Assembly shall not amend the Budget Bill so as to affect either the obligations of the State under Section 34 of Article III of the Constitution, or the provisions made by the laws of the State for the establishment and maintenance of a system of public schools or the payment of any salaries required to be paid by the State of Maryland by the Constitution *(amended by Chapter 373, Acts of 1972, ratified Nov. 7, 1972).*

(6a) In enacting a balanced Budget Bill each fiscal year as required under this Section, the General Assembly may amend the bill by increasing or diminishing the items therein relating to the General Assembly, and by increasing or diminishing the items therein relating to the Judiciary, but except as hereinbefore specified, may not alter the said bill except to strike out or reduce items therein, provided, however, that the salary or compensation of any public officer shall not be decreased during the public officer's term of office. When passed by both Houses, the Budget Bill shall be presented to the Governor for approval or disapproval according to Section 17 of Article II of this Constitution *(added by Chapter 645, Acts of 2020, ratified Nov. 3, 2020).*

(6b) In enacting a balanced Budget Bill as required under this Section for Fiscal Year 2024 and each fiscal year thereafter, the General Assembly may amend the bill by increasing, diminishing, or adding items therein relating to the General Assembly, by increasing, diminishing, or adding items therein relating to the Judiciary, and by increasing, diminishing, or adding items relating to the Executive Department, provided that the total of the appropriation for the Executive Department approved by the General Assembly does not exceed the total proposed appropriation for the Executive Department submitted by the Governor. The salary or compensation of any public officer may not be decreased during the public officer's term of

office. When passed by both Houses, the Budget Bill shall be a law immediately without further action by the Governor *(added by Chapter 645, Acts of 2020, ratified Nov. 3, 2020).*

(7) The Governor and such representatives of the executive departments, boards, officers and commissions of the State expending or applying for State's moneys, as have been designated by the Governor for this purpose, shall have the right, and when requested by either House of the General Assembly, it shall be their duty to appear and be heard with respect to any Budget Bill during the consideration thereof, and to answer inquiries relative thereto *(amended by Chapter 159, Acts of 1916, ratified Nov. 7, 1916; Chapter 497, Acts of 1947, ratified Nov. 2, 1948)*.

(8) Supplementary Appropriation Bill. Either House may consider other appropriations but both Houses shall not finally act upon such appropriations until after the Budget Bill has been finally acted upon by both Houses, and no such other appropriation shall be valid except in accordance with the provisions following: (a) Every such appropriation shall be embodied in a separate bill limited to some single work, object or purpose therein stated and called herein a Supplementary Appropriation Bill; (b) Each Supplementary Appropriation Bill shall provide the revenue necessary to pay the appropriation thereby made by a tax, direct or indirect, to be levied and collected as shall be directed in said bill; (c) No Supplementary Appropriation Bill shall become a law unless it be passed in each House by a vote of a majority of the whole number of the members elected, and the yeas and nays recorded on its final passage; (d) Each Supplementary Appropriation Bill shall be presented to the Governor of the State as provided in Section 17 of Article 2 of the Constitution and thereafter all the provisions of said section shall apply *(amended by Chapter 416, Acts of 1966, ratified Nov. 8, 1966)*.

(9) Nothing in this section shall be construed as preventing the General Assembly from passing at any time, in accordance with the provisions of Section 28 of Article 3 of the Constitution and subject to the Governor's power of approval as provided in Section 17 of Article 2 of the Constitution, an appropriation bill to provide for the payment of any obligation of the State within the protection of Section 10 of Article 1 of the Constitution of the United States *(amended by Chapter 159, Acts of 1916, ratified Nov. 7, 1916; Chapter 497, Acts of 1947, ratified Nov. 2, 1948)*.

(10) If the Budget Bill shall not have been finally acted upon by the Legislature seven days before the expiration of the regular session, the Governor shall issue a proclamation extending the session for some further period as may, in his judgment, be necessary for the passage of such bill; but no other matter than such bill shall be considered during such extended session except a provision for the cost thereof *(amended by Chapter 576, Acts of 1970, ratified Nov. 3, 1970)*.

(11) For the purpose of making up the Budget, the Governor shall require from the proper State officials (including all executive departments, all executive and administrative offices, bureaus, boards, commissions and agencies that expend or supervise the expenditure of, and all institutions applying for State moneys and appropriations) such itemized estimates and other information, in such form and at such times as directed by the Governor. An estimate for a program required to be funded by a law which will be in effect during the fiscal year covered by

the Budget and which was enacted before July 1 of the fiscal year prior to that date shall provide a level of funding not less than that prescribed in the law. The estimates for the Legislative Department, certified by the presiding officer of each House, of the Judiciary, as provided by law, certified by the Chief Judge of the Court of Appeals, and for the public schools, as provided by law, shall be transmitted to the Governor, in such form and at such times as directed by the Governor, and shall be included in the Budget without revision *(amended by Chapter 971, Acts of 1978, ratified Nov. 7, 1978; Chapter 62, Acts of 1990, ratified Nov. 6, 1990)*.

(12) The Governor may provide for public hearings on all estimates and may require the attendance at such hearings of representatives of all agencies, and for all institutions applying for State moneys. After such public hearings he may, in his discretion, revise all estimates except those for the legislative and judiciary departments, and for the public schools, as provided by law, and except that he may not reduce an estimate for a program below a level of funding prescribed by a law which will be in effect during the fiscal year covered by the Budget, and which was enacted before July 1 of the fiscal year prior thereto *(amended by Chapter 971, Acts of 1978, ratified Nov. 7, 1978)*.

(13) The General Assembly may, from time to time, enact such laws not inconsistent with this section, as may be necessary and proper to carry out its provisions.

(14) In the event of any inconsistency between any of the provisions of this Section and any of the other provisions of the Constitution, the provisions of this Section shall prevail. But nothing herein shall in any manner affect the provisions of Section 34 of Article 3 of the Constitution or of any laws heretofore or hereafter passed in pursuance thereof, or be construed as preventing the Governor from calling extraordinary sessions of the General Assembly, as provided by Section 16 of Article 2, or as preventing the General Assembly at such extraordinary sessions from considering any emergency appropriation or appropriations *(amended by Chapter 159, Acts of 1916, ratified Nov. 7, 1916; Chapter 497, Acts of 1947, ratified Nov. 2, 1948)*.

(15) If any item of any appropriation bill passed under the provisions of this Section shall be held invalid upon any ground, such invalidity shall not affect the legality of the bill or of any other item of such bill or bills.

Maryland Constitution Declaration of Rights, Article 43.

Article 43. That the Legislature ought to encourage the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and the general melioration of the condition of the People. The Legislature may provide that land actively devoted to farm or agricultural use shall be assessed on the basis of such use and shall not be assessed as if sub-divided *(amended by Chapter 65, Acts of 1960, ratified Nov. 8, 1960)*.

Md. Code, Courts & Judicial Proceedings § 3-412: Supplementary Relief

(a) Further relief based on a declaratory judgment or decree may be granted if necessary or proper.

(b) An application for further relief shall be by petition to a court having jurisdiction to grant the relief.

(c) If the application is sufficient, the court, on reasonable notice, shall require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted.

2007 Md. Laws (Special Session) Ch. 2, § 5–202 (cleaned up).

(a) (13) "Target per pupil foundation amount" means:

(i) In fiscal [year 2004, $5,730] years 2008, 2009, and 2010, $6,694; and

(ii) In subsequent fiscal years:

1. The target per pupil foundation amount for the prior fiscal year increased by the same percentage as the lessor of:

A. The increase in the implicit price deflator for State and local government expenditures for the second prior fiscal year;

B. The consumer price index for all urban consumers for the Washington-Baltimore Metropolitan area or any successor index, for the second previous fiscal year; or

C. 5%; or

2. If there is no increase in the implicit price deflator for State and local government expenditures for the second prior fiscal year or in the consumer price index for all urban consumers for the Washington-Baltimore Metropolitan area, or any successor index, for the second previous fiscal year, the target per pupil foundation amount for the prior fiscal year.

Md. House Bill 1372, Md. Laws, 2021 Session, Chapter 55 §19 [Excerpts].

(a) (1) In this section the following words have the meanings indicated.

(2) "General Fund estimate" means the estimate of General Fund revenues [for fiscal year 2022] by the Board of Revenue Estimates as required under § 6–106 of the State Finance and Procurement Article.

(3) "Major education aid" has the meaning stated in § 5–201(l) of the Education Article as enacted by this Act.

(b) Beginning December 1, [2020] 2021, and each December 1 thereafter FOR FISCAL YEAR 2023 AND FOR EACH FISCAL YEAR THEREAFTER, if the December General Fund estimate in the December Board of Revenue Estimates report FOR THAT FISCAL YEAR is more than 7.5% below the March General Fund estimate in the March Board of Revenue Estimates report [of that year] FOR THAT FISCAL YEAR:

(1) notwithstanding any other provision of law, per pupil FORMULA increases in major education aid required under this Act shall be limited to the rate of inflation, as defined in § 5–201(h) of the Education Article as enacted by this Act; and

(2) notwithstanding any other provision of law, any additional funding increases required under this Act shall be limited to the rate of inflation, as defined in § 5–201(h) of the Education Article as enacted by this Act.

Maryland Rules, Rule 2-501: Motion for Summary Judgment [Excerpts].

(a) Motion. Any party may file a written motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. The motion shall be supported by affidavit if it is (1) filed before the day on which the adverse party's initial pleading or motion is filed or (2) based on facts not contained in the record. A motion for summary judgment may not be filed: (A) after any evidence is received at trial on the merits, or (B) unless permission of the court is granted, after the deadline for dispositive motions specified in the scheduling order entered pursuant to Rule 2-504(b)(1)(E).

(b) Response. A response to a motion for summary judgment shall be in writing and shall (1) identify with particularity each material fact as to which it is contended that there is a genuine dispute and (2) as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony (by page and line), or other statement under oath that demonstrates the dispute. A response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by an affidavit or other written statement under oath.

…

(f) Entry of Judgment. The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law. By order pursuant to Rule 2-602 (b), the court may direct entry of judgment (1) for or against one or more but less than all of the parties to the action, (2) upon one or more but less than all of the claims presented by a party to the action, or (3) for some but less than all of the amount requested when the claim for relief is for money only and the court reserves disposition of the balance of the amount requested. If the judgment is entered against a party in default for failure to appear in the action, the clerk promptly shall send a copy of the judgment to that party at the party's last known address appearing in the court file.

CERTIFICATE OF SERVICE

I, Jeffrey Liskov, attorney for Appellants, certify that I have this day served a copy of this "Page-Proof" Brief of Appellants on all counsel of record via MDEC.

SO CERTIFIED, this 13th day of November, 2023.

/s/

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