E-FILED
Rachel Dombrowski, Clerk
Appellate Court of Maryland
2/20/2024 4:59 PM

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)

REPLY AND OPPOSITION BRIEF OF APPELLANTS/CROSS-APPELLEES THE BRADFORD PLAINTIFFS (PAGE PROOF):

Elizabeth B. McCallum
Jeffrey E. Liskov
(MD Bar ID 2012170120)
Danyll Foix
Christine M. Kennedy
(MD Bar ID 2112140193)
Baker & Hostetler LLP
1050 Connecticut Ave., NW, Suite 1100
Washington, DC 20036
(202) 861-1522
emccallum@bakerlaw.com
jliskov@bakerlaw.com
dfoix@bakerlaw.com
ckennedy@bakerlaw.com

Arielle Humphries
Victor Genecin
Alaizah Koorji
NAACP Legal Defense & Educational Fund
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
ahumphries@naacpldf.org
vgenecin@naacpldf.org
akoorji@naacpldf.org

Joseph Wong
NAACP Legal Defense & Educational Fund
700 14th Street, NW, Suite 600
Washington, DC 20005
jwong@naacpldf.org

Deborah A. Jeon
(MD Bar ID 9006280125)
David Rocah
(MD Bar ID 0312050001)
ACLU of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
(410) 889-8550
jeon@aclu-md.org
drocah@aclu-md.org

Counsel for Appellants the Bradford Plaintiffs

Filed: February 20, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Appellants/Cross-Appellees ("Appellants"), the Private Plaintiffs below, respectfully submit this Reply and Opposition to the Cross-Appeal of Appellee/Cross-Appellant ("Appellee"), the Maryland State Board of Education ("MSBE" or the "State").

Appellants seek further relief from the State's failure to provide a thorough and efficient education to the schoolchildren attending Baltimore City Public Schools ("BCPSS"), in violation of the Consent Decree, multiple court orders implementing that Decree and granting further relief pursuant to it, and Article VIII of the Maryland Constitution. The Baltimore City Circuit Court first found that students in BCPSS were not receiving a constitutionally adequate education in 1996, and since that time the State has not remedied that failure, notwithstanding a Consent Decree and multiple court orders declaring that additional funding is needed to ensure students receive the thorough and efficient education to which they are entitled. The Court should flatly reject Appellee's implausible argument that Appellants have somehow conceded these claims. Moreover, the Court should reject any suggestion that Maryland courts lack authority to enforce their Decrees and orders when presented with extensive evidence that those orders have been continuously violated, as is the case here, or that they are barred from ensuring compliance with their own orders and the Maryland Constitution because of the separation of powers or political question doctrine.

As Supreme Court precedent and prior orders applying the Decree have repeatedly held, Article VIII mandates the State to provide an education to all public-school students that is "thorough and efficient," meaning, an education that is adequate by contemporary educational standards. Appellee's arguments that the schoolchildren of Baltimore City are only entitled to "efforts" to provide "at most" a "basic education," or an education that meets the standards acceptable at the time of *Hornbeck v. Somerset County Board of Education*, 295 Md. 597 (1983), are incorrect. The construction of Maryland's constitutional right to education advocated by

Appellee and adopted by the Circuit Court below is weaker than the standard established by Maryland Supreme Court precedent and prior orders in this case, weaker than Article VIII's drafters intended, and weaker than other states that have the same educational guarantees. The voluminous record presented by Appellants, moreover, raises at the very least a genuine dispute of material fact that the State has not provided sufficient funding to enable BCPSS to meet any standard for public education, even the low standard advocated by Appellee. Accordingly, summary judgment for Appellee was improperly granted.

Finally, on its cross-appeal, Appellee urges dissolution of the Consent Decree and exclusion of Appellants' experts if the case is remanded. Both arguments should be rejected. Appellee has not shown good cause to warrant dissolution of the Decree, nor that the Decree has been rendered moot by recent legislation. The arguments regarding Appellants' experts are extraneous to the summary judgment issue and need not be considered at this time. The Circuit Court's order, moreover, was within that court's discretion, and was correct on the merits because Appellee presents no challenge to the reliability of Appellants' expert opinions, and merely offers arguments that, if accepted, would reduce their evidentiary weight.

Accordingly, Appellants respectfully request that the Court reverse the Circuit Court's order granting Appellee's motion for summary judgment and remand for further proceedings; and that the Court affirm the Circuit Court's order denying Appellee's motions to dissolve the November 26, 1996, Consent Decree and to exclude Appellants' experts.

ARGUMENT

I. APPELLANTS SEEK FURTHER RELIEF FROM THE STATE'S ONGOING CONSTITUTIONAL VIOLATION UNDER THE CONSENT DECREE AND THE CIRCUIT COURT'S ORDERS PURSUANT TO THE DECREE.

Appellee incorrectly asserts that further relief for violation of the Consent Decree is unavailable to Appellants as a matter of law, and that Appellants denied below that they seek relief pursuant to the Decree and subsequent court orders implementing it. Appellee Br. at 24–25. These arguments should be rejected because the court has inherent authority to enforce its own orders, and the Decree explicitly authorized and contemplated further relief. Appellants have clearly stated and pursued their claims for violations of the Decree and orders pursuant to the Decree in their 2019 Petition for Further Relief and subsequent proceedings.

A. The Court Should Reject Appellee's Argument That the Petition Provides No Basis to Enforce the Consent Decree or Orders Pursuant to the Consent Decree.

As the Circuit Court ruled, it is a "well-established principle that a trial court retains jurisdiction to enforce consent decrees[.]" [3/3/23 Op. at 14 (quoting *Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 286 (D.C. Cir. 1993))]. This authority necessarily includes the power to issue orders to compel compliance with the consent decree when a party has violated its terms. *See generally, Beckett*, 995 F.2d 280 (holding against party violating decree and directing it to take action to comply). In some circumstances, particularly in cases involving institutional reform, a court may issue further orders to address the underlying violation addressed by the decree. *See, e.g., Borel on behalf of AL v. Sch. Bd. St. Martin Parish*, 44 F.4th 307, 312 (5th Cir. 2022) ("In an ongoing institutional reform case like this [school desegregation] one . . . [a] district court has the continuing ability to order affirmative relief to cure violations flowing from the original constitutional violation") (citations omitted); *Smith v. Sch. Bd. of Concordia Parish*, 906 F.3d 327 (5th Cir. 2018) (affirming the trial court's authority to enter further relief to enforce the terms of a

consent decree to desegregate school district). That is precisely what the Circuit Court did in its prior orders pursuant to the Decree at issue here. [6/30/00 Op. at 26 ("declar[ing] that additional funding is required to enable the Baltimore City public schools to provide an adequate education measured by contemporary educational standards"); *id.* at 2 ("having Ordered, Adjudged 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 [under the Consent Decree] to ensure compliance with its orders and constitutional mandates")].

Indeed, the Decree explicitly contemplated and authorized such further relief. Appellee ignores these terms and asserts that the "decree did not provide for expenditure of State funds in any other fiscal year, and contains no provision authorizing a court to entertain a request for funding for any period after FY 2002." Appellee Br. at 9; *see also id.* at 44. As detailed in Appellants' opening brief, 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]; *see also* Appellants Br. at 8–10 (detailing the terms of the Decree). The Decree also contemplates "a proceeding for additional relief," in which more funding might be ordered. [Decree ¶ 53]. And, while Appellee is correct that the original term of the Decree extended until 2002, Appellee fails to address that the Decree authorizes the court to extend its jurisdiction beyond 2002 "upon a showing of good cause to extend the Decree." [Decree ¶ 68]. The Circuit Court in fact extended its jurisdiction in 2002 "[s]o that the Court [could] continue to monitor and enforce compliance with its June 2000 Order," which applies and enforces the 1996 Decree. [6/25/02 Op. at 4–5; *see also* 8/20/04 Or. ¶ 6]. The

terms of the Decree thus clearly anticipate and permit further relief beyond FY 2002. This Court should reject Appellee's argument, just as the Circuit Court repeatedly did in orders denying Appellee's two motions to dismiss the 2019 Petition. [*See* 1/16/20 Or. at 9–10; 3/3/23 Or. at 15].

Pursuant to the Decree's authorization of further relief, the Circuit Court repeatedly declared additional funds were necessary and extended its jurisdiction. In 2000, BCPSS, supported by Appellants, applied to the Circuit Court pursuant to the Decree for additional funding to address the deficiencies identified by the expert assessment. [Decree ¶¶ 53–54; 6/9/00 BCPSS PET.]. In June 2000, the court adopted the expert's findings, and declared that "approximately $2,000 to $2,600 per pupil…[was] 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 until such time as the State brings "itself into compliance with" Article VIII. [*Id.* at 26].

The State did not bring itself into compliance by 2002 or 2004, and the court retained jurisdiction to ensure compliance with the Decree, the court's orders pursuant to the Decree, and constitutional mandates. [6/25/02 Op. at 5; 8/20/04 Op. at 67; 8/20/04 Or. At ¶ 6]. Appellee's efforts to cabin its obligations under the Decree to the period from FY 1998 to FY 2002 are contrary to the terms of the Decree and the record in this case. As such, Appellants may pursue further relief for the State's failure to comply with the funding targets declared necessary in the court's 2000 order.[1]

[1] As Appellants noted in their opening brief, Appellee first appealed and then dismissed its appeal from the 2000 order, without ever claiming that the 2000 order was not final and appealable, and ultimately agreed to provide the relief declared necessary by the Circuit Court in 2000, waiving arguments that the declared relief was improper. Appellants' Br. at 5.

Finally, Appellee's interpretation of the Maryland Declaratory Judgments Act ("MDJA") is overly restrictive. Appellee claims that the 2000, 2002, and 2004 orders were not final declaratory judgments, and thus there can be no further or ancillary relief under the MDJA. Appellee Br. at 24–25. As explained in Appellants' opening brief, however, courts must construe the MDJA liberally, and the Decree itself is a basis for further or ancillary relief under the MDJA. *See* Appellants Br. at 11–12. It is well established that consent decrees are given the same force as other judgments entered by the court, and this Decree is no different. *See Long v. State*, 371 Md. 72, 82–83 (2002) ("A consent judgment or consent order is an agreement of the parties with respect to the resolution of the issues in the case or the settlement of the case, that has been embodied in a court order and entered by the court, thus evidencing its acceptance by the court." (quoting *Jones v. Hubbard*, 356 Md. 513, 529 (1990)). In any event, it bears repetition that jurisdiction under the MDJA, albeit entirely proper, is not necessary to the court's jurisdiction here because of the court's inherent authority to enforce its orders and the terms of the Decree empower the court to provide further relief.

B. Appellants Never "Conceded" that the Relief They Sought Was Not Based on the Consent Decree and Prior Orders Pursuant to the Decree.

Appellee advances the inaccurate and misleading claim that Appellants "effectively conceded that the petition for further relief is not seeking to 'effectuate' or 'implement' any judgment of the circuit court," and that "Appellants' discovery responses expressly stated that they sought relief only for what they called 'ongoing violations of Article VIII of the Constitution of Maryland, not the violation of specific terms of the Consent Decree or the Court's subsequent orders.'" Appellee Br. at 25, 40. This argument is plucked from a single line in an interrogatory response, taken out of context. It should be rejected by the Court just as it was rejected by the Circuit Court. *See* [03/7/22 Or. (denying Second Motion to Dismiss raising this argument)].

As Appellant argued in its opposition to the Second Motion to Dismiss, this snippet from one interrogatory response cited by Appellee fails to establish any concession by Appellants. *See* [12/22/21 Pls. Opp'n 2nd MTD at 22–36]. In response to Appellee's objectionable interrogatory asking Appellants to identify "the specific paragraph numbers" of each Court order violated by Appellee, "each act or omission" for each paragraph, and "all corresponding facts, communications, and documents," Appellants' full response—which Appellee omits in its brief, as it did in its Second Motion to Dismiss—was:

> Although the Court's jurisdiction over the case arises out of the Consent Decree and the Court's previous orders in 2000, 2002, and 2004, Plaintiffs' Petition concerns Defendants' ongoing violations of Article VIII of the Constitution of Maryland, not the violation of specific terms of the Consent Decree or the Court's subsequent orders. The Court's continuing jurisdiction is fully consistent with the terms of the Court's 2004 Order. Declaration Six of the 2004 Order stated that the Court would continue to ensure compliance with its Orders and constitutional mandates until necessary funding had been provided. As the Court concluded in its 2020 Order, this continuing Jurisdiction is also consistent with paragraphs 53, 68, and 69 of the Consent Decree, as well as language on page 5 of the Court's 2002 Order. Plaintiffs note, further, that the State admits as of 2017 it was providing BCPSS with over $300 million less annually than was required by the Court's earlier orders.

[Pls. Opp'n 2nd MTD Ex. O, Pls. Answers to Def. Interrogatories at 12]. It is clear from the complete quotation that Appellants cited specific provisions of the Consent Decree, as well as the Court's previous Orders, all of which Appellants alleged had been violated and continue to be violated, depriving students of a constitutionally adequate education and conferring jurisdiction on the court. Appellants' response, as well as their Petition and subsequent briefs, all make clear that they are presenting a challenge to the ways in which the State failed to satisfy its obligations to provide enough funding for a constitutionally adequate education, as required by orders applying the Decree, rather than a limited challenge based on the State's failure to fulfill a discrete obligation

under the Decree's initial term.[2] Appellee further seeks to mislead this Court by omitting Appellants' other interrogatory responses detailing Appellee's failure to comply with the Decree and the Circuit Court's orders pursuant to it. *See e.g.*, [*id.* at 9, 11, 14, 16–17, 27].

Appellee is wrong, moreover, when it argues Appellants' claims involve conditions "not addressed, or even imagined, by the parties when they agreed to the consent decree." Appellee Br. at 25. The constitutional deficiencies raised in the 2019 Petition are the same types of constitutional deficiencies that plagued BCPSS in 1994 and gave rise to this case. *Compare* [1994 Compl. at 13–20 (low test scores), 20–23 (high dropout rates), 24–29 (lack of sufficient and experienced staff), and 30 (inadequate school facilities)] *with* 2019 Pet. at 27–30 (low test scores), 31 (high dropout rates), 25–27 (lack of sufficient and experienced staff), 41–48 (inadequate school facilities)]. Importantly, Appellants' motion for summary judgment demonstrated in detail the persistence of the conditions that led the Circuit Court to find in 2004 that the State had not fulfilled the terms of the prior orders and continued to violate the Constitution. *See* [P MSJ at 16–20].

Appellants' claims concern the violation of the Court's orders pursuant to the Decree because the constitutional violation found at the outset of this case was not remedied and is ongoing. These claims are entirely consistent with what Appellants argued in Plaintiffs' Petition, Plaintiffs' Memorandum in Support of their Petition for Further Relief, Plaintiffs' Opposition to Defendant's First Motion to Dismiss, Plaintiffs' Opposition to Defendant's Second Motion to Dismiss, Plaintiffs Motion for Summary Judgment, and Plaintiffs' Opposition to Defendant's Motion for Summary Judgment. Given Appellants' detailed descriptions of Appellee's noncompliance with the Maryland Constitution, the Consent Decree, and the Circuit Court's prior

[2] In any event, even if Appellee's interpretation of the language they highlight were correct, this sentence in response to a contention interrogatory does not serve as a basis for dismissing the case, particularly when the Appellants have repeatedly clarified their claim.

orders, Appellee's strained attempt to induce the Court to hold that Appellant has conceded claims to further relief based on a single line in an interrogatory response should again be rejected.

II. ARTICLE VIII GUARANTEES AN EDUCATION THAT IS ADEQUATE BY CONTEMPORARY EDUCATIONAL STANDARDS.

The Circuit Court's alternative holding on the meaning and scope of Article VIII is plainly incorrect, and this Court should reject it. The Circuit Court ignored precedent that Article VIII requires an education that is "adequate by contemporary educational standards" and held instead that Maryland's Constitution only requires "an effort by the State to at most provide a basic education." [3/8/23 Op. at 18]. The court ignored *Hornbeck*, subsequent authority from the Supreme Court applying *Hornbeck*, and extensive authority from courts in other States interpreting identical or similar language in those states' constitutions. *See* Appellants Br. at 12–16. Appellee's argument that *Hornbeck* permits a constitutional claim only if educational quality has deteriorated since *Hornbeck* was decided in 1983, is similarly without basis.

A. *Hornbeck* and *Bradford I* Establish that Article VIII Requires an Education that Meets Contemporary Educational Standards.

Maryland Supreme Court precedent makes clear that Article VIII requires an education that is adequate by contemporary educational standards. In *Hornbeck*, the Supreme Court established that plaintiffs could present a claim for a violation of Article VIII if the State's own "qualitative standards" for education were not being met in any district, if the standards themselves "failed to make provision for an adequate education," or if "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. *Hornbeck*, 295 Md. at 639. The case teaches, therefore, that when "the schools in any district fail[] to provide an adequate education measured by contemporary educational standards," a constitutional violation could be evident. *Id.*

In connection with this very case, moreover, the Supreme Court reiterated that Article VIII requires the State to provide its children an education that is "adequate by contemporary educational standards." *See Montgomery County v. Bradford*, 345 Md. 175 (1997) ("*Bradford I*"). In *Bradford I*, the Court explained that "*Hornbeck* recognizes" that "a constitutional violation may be evident when the State's educational standards 'fail[] to make provision for an adequate education,' or the State's school financing system 'd[oes] not provide all school districts with the means essential to provide the basic education contemplated by § 1 of Article VIII, when measured by contemporary educational standards.'" *Id.* at 181 (quoting *Hornbeck*, 295 Md. at 639). *Accord Zimmer-Rubert v. Bd. Of Educ. Of Baltimore Cnty.,* 179 Md. App. 589, 603 (2008) (describing *Hornbeck* as "holding that Maryland's Constitution and Declaration of Rights requires "an adequate education measured by contemporary educational standards'") (emphasis added), *aff'd*, 409 Md. 200 (2009). Appellee avoids any mention of *Bradford I.*

Appellee also advances the argument that the claim in this case, which focuses on the substantive *inadequacy* of the education being provided in Baltimore City, is foreclosed by the quite different claim presented in *Hornbeck*, which focused solely on the *uniformity of funding* among districts. Appellee Br. at 34–36. *Hornbeck* held that "[s]imply to show that the educational resources available in the poorer school districts are inferior to those in the rich districts does not mean that there is insufficient funding provided by the State's financing system for all students to obtain an adequate education." 295 Md. at 639. The *Hornbeck* Court clarified, however, that a different, and cognizable, claim would be presented by a showing that a district is receiving insufficient funding to enable it to meet the state's standards. *Id.*

As *Bradford I* explained, "*Hornbeck* . . . focused in particular upon the existence of wide disparities in taxable wealth among the various school districts, and the effect of those differences

upon the fiscal capacity of the poorer districts to provide their students with educational offerings and resources comparable to those of the more affluent school districts." 345 Md. at 181. That claim, *Bradford I* stated, was different from, and does not foreclose, the adequacy claim presented here: "*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," but nonetheless it "does require" the General Assembly to "establish a Statewide system to provide an adequate public school education to the children in every school district." *Id.*

In affirming denial of Montgomery County's motion to intervene, which was based on a claim that this case would affect Montgomery County's funding, *Bradford I* further confirmed that this case does not present the same claim as *Hornbeck.* Rather, it involves "*solely* . . . the constitutional adequacy of the education provided to children in the Baltimore City public schools." *Id.* at 199 (emphasis added). Indeed, the *Bradford I* Court noted that Appellee itself had argued that "the primary issue presented concerns the adequacy of the education of the children of Baltimore City." *Id.* at 182.

B. Appellee is Incorrect that *Hornbeck* Established 1983 As the Benchmark for a Constitutionally Adequate Education.

Appellee claims that Maryland schoolchildren are entitled only to the quality of education that was provided 40 years ago when *Hornbeck* was decided, establishing a violation under Article VIII only if they "demonstrate . . . that [they] have been receiving a measurably worse education than any child received in Maryland in 1983." Appellee Br. at 35–37. That claim is incorrect.

First, the argument ignores Maryland Supreme Court precedent recognizing that educational adequacy is something that necessarily evolves with time to address changing educational needs as society itself evolves. The standards by which an adequate education is measured are "*contemporary* educational standards." *Hornbeck*, 295. Md. at 638 (emphasis

added); *accord Bradford I*, 345 Md. at 181. The Supreme Court further recognized that "contemporary" educational standards control when it explained that the State's own educational standards can be a measurement of adequacy, *i.e.*, that a constitutional claim is stated when the State has not set sufficient "qualitative standards governing all facets of the educational process in the State's public elementary and secondary schools" or when such standards "fail[] to make provision for an adequate education." *Hornbeck*, 295. Md. at 638; *accord Bradford I*, 345 Md. at 181. Those standards, of course, must (and do) change over time based on changing educational needs.

The Circuit Court held that Article VIII as interpreted by *Hornbeck* requires only "an effort by the State to at most provide a basic education," however "imperfect" it may be. [3/3/23 Or. at 18]. Appellee defends that holding with the assertion that *Hornbeck*'s use of the word "basic" means something less than an education that is adequate by contemporary educational standards, *see* Appellee Br. at 34, 35 (Article VIII requires only a "bare framework for delivery a minimum basic education"), but then concedes that "the *Hornbeck* decision equates the word 'adequate' with the word 'basic.'" Appellee Br. at 36. Appellee fails, however, to address the decision's repetition of the phrase "contemporary educational standards." The Circuit Court's holding, and Appellee's contention, are incorrect and contrary to both *Hornbeck* and *Bradford I*, which as explained above, require an education that is adequate by "contemporary educational standards." *Hornbeck,* 295 Md. at 632, 638; *Bradford I*, 345 Md. at 181.

Moreover, as discussed in Appellant's opening brief, numerous courts interpreting similar constitutional provisions have recognized that a "basic" education encompasses contemporary standards. Appellants Br. at 15. *See also* Brief of National Education Law Center, American Federation of Teachers, et. al., as Amici Curiae Supporting Appellants, *Bradford, et. al. v.*

Maryland State Bd. Of Educ., (No. ACM-REG-0209-2023) (Jan. 12, 2024) ("Education Law Center Amicus Br.") at 3–4.

Finally, Appellee argues that the standards of 1983 must govern because *Hornbeck* was decided in that year, and held that "the right to an adequate education prescribed under Article VIII of the Maryland Constitution [wa]s not being denied to any child in this State." Appellee Br. at 32 (quoting *Hornbeck*, 295 Md. at 652). The quoted language, however, does not come from the court's discussion of Article VIII, but rather from the section of the opinion concerning whether strict scrutiny should be applied to equal protection claims. *See* 295 Md. at 652. Nowhere in the opinion—neither in the equal protection or Article VIII discussion—does the court state it is using the quality of education being provided to students in 1983 "to provide guidance as to where the threshold is for a constitutionally acceptable education," as Appellee inaccurately states. Appellee Br. at 35. Indeed, Appellee's argument is counter to the Supreme Court's unequivocal statements in *Hornbeck* and *Bradford I* that "contemporary" educational standards are the benchmark. *Hornbeck*, 295. Md. at 638; *Bradford I*, 345 Md. at 181.

C. The State's Own Standards and Adequacy Definitions Confirm that Baltimore City's Public Schoolchildren Are Not Receiving an Education that is Adequate by Contemporary Educational Standards.

Appellee's argument that Appellants somehow are precluded from stating a claim under Article VIII because they cited several purportedly inconsistent sources on adequacy, Appellee Br. at 36–37, disregards the contents of Appellants' allegations and the teachings of *Hornbeck*. Appellants have reiterated that, to define "adequate by contemporary standards," they rely on *the State's own educational standards*. That position is consistent with the Court's recognition in *Hornbeck* that a constitutional claim is cognizable when the State's "comprehensive statewide qualitative standards governing all facets of the educational process" are "not being met" in a school district. 295 Md. at 632. The fact that numerous other sources *also* establish the inadequacy

of Appellee's education system merely demonstrates that there is, at a minimum, a genuine issue of material fact in this case.

In keeping with *Hornbeck*, as well as the reasoning of the courts of other states, this Court should reject the Circuit Court's attempt to divorce Article VIII standard from these frameworks. *See* Appellants' Br. at 12–15; Education Law Center Amicus Br. at 1–8 (describing nationwide standards governing a constitutionally adequate education).

III. APPELLEE WRONGLY ASSERTS THAT THERE ARE NO GENUINELY DISPUTED MATERIAL FACTS.

In complete disregard of the voluminous record, Appellee reduces the factual evidence to a single page in its brief and asserts that State has fulfilled all its obligations under the Consent Decree, the orders pursuant to the Decree, and the Constitution by enacting the Built to Learn and Blueprint Acts. Appellee Br. at 38–39. Appellee does not even mention the substantial evidence in the record showing that thousands of children must try to learn in a system utterly lacking in the tools needed to achieve the State's own standards in core subjects, and in which the majority of buildings are in disrepair and pose health and safety risks. Appellants refer the Court to their opening brief for a full discussion of that evidence, Appellants Br. at 16–24, and summarize it below. There is at least a genuine issue of material fact that these systemic issues exist *notwithstanding* funding from the Built to Learn and Blueprint Acts, such that Appellee was not entitled to a grant of summary judgment under any constitutional standard.

A. The Record Presents at Least a Genuine Dispute of Material Fact as to Whether the State Has Provided Sufficient Funding for BCPSS to Have Constitutionally Adequate Facilities.

Appellee asserts that there is no genuine issue of disputed fact whether BCPSS facilities meet constitutional standards because the Built to Learn Act and other state and federal legislation increased mandated State funding for construction programs and established a new

fund for the highest priority school facilities. Appellee Br. at 2. Appellee does not acknowledge the undisputed evidence that those funding programs do not even touch the majority of BCPSS facilities. As detailed in Appellants' opening brief, the 21st Century School Buildings Program is expected to fund 29 new or completely renovated facilities (housing 34 schools), while the Built to Learn Act funding will be used to address facility needs in three high schools, housed in two school facilities. Appellants Br. at 22. Moreover, the Built to Learn Act provides only for an additional $420 million in State funding, far less than the amount needed to restore the BCPSS high school buildings that it is funding through comprehensive renovations or replacements, and the 21st Century School Buildings Program will not provide additional funding to address BCPSS's unmet facilities needs, absent additional legislative action. [8/12/22 Perkins-Cohen Aff. ¶¶ 14, 22, 28]. The undisputed evidence demonstrates that, even after these projects are completed and taking into consideration other State funding streams, 89 of the 149 school buildings in BCPSS's portfolio still required systemic renovations as of August 2022. [*Id.* ¶ 26]. Using the State's own evidence, BCPSS calculated that, even if the funding anticipated under the Built to Learn and other statutes were provided in full, there will remain over $3.86 billion (in 2022 dollars) in unaddressed facilities needs to bring all of BCPSS's school facilities up to minimally acceptable standards. [*Id.* ¶ 14].

Appellee similarly looks past evidence that BCPSS facilities force students to deal with inhospitable temperatures, unhygienic bathrooms, and rodent infestations. Nor does Appellee even mention the evidence that BCPSS's substandard facilities hinder students' ability to learn, increase the risk of educational failure, and send a clearly understood message of segregation and discrimination. *See* Appellants Br. at 18–19.

This evidence at a minimum presents a genuine dispute of fact as to whether the facilities in BCPSS are constitutionally adequate. Thus, the Circuit Court erred in granting summary judgment for Appellee.

B. The Record Presents at Least a Genuine Dispute of Material Fact as to Whether the State Provided Sufficient Funding for BCPSS to Have Constitutionally Adequate Educational Programs.

The court below ignored substantial evidence in the record creating a genuine issue of fact on both the inputs (funding, facilities) and the outputs (educational outcomes) with respect to educational programming in the BCPSS. Appellee's focus on funding inputs—which themselves are insufficient, see *infra*—disregards the actual quality of the education being provided to BCPSS students, as shown by the performance and experiences of BCPSS's schoolchildren. Appellee also ignores substantial evidence in the record, creating at least a genuine issue of fact, that low student performance is caused by insufficient funding.

1. Assessment of Constitutional Adequacy Requires Consideration of Inputs, Outputs, and Causation.

The Circuit Court in its 1996, 2000, and 2004 decisions evaluated educational adequacy by considering both inputs (funding, facilities) and outputs (student performance such as test scores, dropout rates, and graduation rates), as well as the causal connection between inputs and outputs. [8/28/96 Pls. MSJ at 55–56] (BCPSS "spends less per student on instructional expenses than any other district, has fewer teachers per student than almost any other district, has a large number of inadequate physical facilities, and ranks well towards the bottom of the State in other 'input' measures" leading to poor performance on "other 'outcome' standards"); [*id.* at 27, n.23] ("An 'output' measure assesses schools by the results they achieve in student performance; an 'input' measure is what goes into the system in terms of funding, number of teachers, and resources.).]; [6/30/00 Op. at 16 (discussing inputs and outputs)]; [8/20/04 Op. at 8, 25, 68 (same)].

This approach is applied by other courts nationwide in assessing compliance with constitutional provisions similar to Article VIII. A recent New York Appellate Court decision applying a similar constitutional guarantee explained that an analysis of educational adequacy requires the Court to consider (1) whether the State "has provided inadequate *inputs*—such as physical facilities, instrumentalities of learning and teaching instruction" for schools; which (2) has resulted in "deficient *outputs*, such as poor test results and graduation rates," for students. *See Maisto v. State*, 149 N.Y.S.3d 599, 604–605 (App. Div. 2021) (internal citation omitted) (emphasis added). A court must also consider whether there is a "*causal link* between the present funding system" and the inadequacy of the education provided, which may be demonstrated "by a showing that increased funding can provide better teachers, facilities and instrumentalities of learning[,] . . . together with evidence that such improved inputs yield better student performance." *Id*. *Accord Abbott by Abbott v. Burke*, 153 N.J. 480, 519 (1990) (evaluating compliance with a "thorough and efficient" clause and identifying inputs such as "crumbling and obsolescent" school buildings and lack of "supplemental programs;" and outputs such as students' pervasive failure to meet state academic standards); *Hoke Cnty. Bd. Of Educ. v. State*, 599 S.E.2d 365, 390 (N.C. 2004) (noting the state's constitutional obligation to provide inputs such as "tutoring, extra class sessions, counseling" and ensure outputs that "measure[] student performance"); *State v. Campbell*, *Cnty. Sch. Dist*., 19 P.3d 518, 545 (Wyo. 2001) (identifying "aspects of a quality education" including "small classes and low pupil/teacher ratios" as well as a finding that "[a]t risk students require specially tailored programs and more time spent on all aspects of academic endeavor"); *McDuffy v. Sec'y of the Exec. Off. of Educ.*, 615 N.E.2d 516, 554–55 (Mass. 1993) (noting the plaintiff's stipulations of "crowded classes," "reductions in staff" and "inadequate teaching of basic subjects"); *see also* Education Law Center, Amicus Br. (discussing states that have analyzed

"inputs, outputs, and causation to determine whether a state is providing its children with an opportunity to obtain an adequate education"). In the sections that follow, Appellants address the evidence that raises genuine disputes regarding outputs, inputs, and causation.

2. Appellants Presented a Genuine Dispute of Material Fact as to Whether Educational Outputs are Sufficient to Meet the Constitutional Standard.

Appellee's claim that the "undisputed factual record" demonstrates that it satisfied "all of the obligations it had" to the students of BCPSS, Appellee Br. at 38, makes no mention of the undisputed record evidence—much of which comes from the State's own documents—that BCPSS students continue to severely underperform compared to State standards. As Appellee admitted, "The private plaintiffs … argue compellingly that outcomes for Baltimore's school children in 2022 remain sobering." *See* [D MSJ Opp. at 5].

The evidence shows that BCPSS students continue to achieve significantly lower proficiency rates in English Language Arts ("ELA") and Math compared to state targets. [P MSJ at 16–17]. For example, in its 2019 assessment of school performance, the State reported that 17.9% of BCPSS elementary students were proficient in Math, and 18.6% proficient in ELA; 13.5% of middle school students were proficient in Math, and 22.7% proficient in ELA; and 21.8% of high school students were proficient in Algebra I, and 32.9% proficient in ELA 10. The most recent report, from 2022-23, shows that BCPSS students continue to underperform.[3]

The court below also ignored the troubling graduation and dropout rates in BCPSS. For example, the State's 2019 report shows a BCPSS 4-year cohort high school graduation rate of

[3] Specifically, 12.7% of elementary students are proficient in Math, and 22.6% proficient in ELA; 7.5% of middle school students are proficient in Math, and 28.5% proficient in ELA; and 14.2% of high school students are proficient in Math, and 40.1% proficient in ELA. *See* https://reportcard.msde.maryland.gov/Graphs/#/ReportCards/ReportCardSchool/1/E/1/30/XXXX/2023. This Court may take judicial notice of these scores. *See Duckett-Murray v. Encompass Ins. Co. of Am.*, 235 Md. App. 344, 349 (2018) (court taking judicial notice of records on government website); *Chesek v. Jones*, 406 Md. 446, 456 (2008) (appellate court taking judicial notice of official public documents); *Anderson v. Burson*, 424 Md. 232, 251 (2011) (taking judicial notice of official public document on government website).

72%, and for students with disabilities, the rate was less than 50%. [P MSJ 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.*]. The Circuit Court, moreover, took no account of the undisputed evidence demonstrating that BCPSS students substantially underperform on college entrance exams and advanced placement courses compared to students statewide. [P MSJ at 16–17]. And the rate of graduating BCPSS students that enroll in two- or four-year colleges in their first year after graduation are substantially lower than other school districts. [*Id.* at 20]. The most recent report, from 2022-23, again shows that BCPSS students continue to underperform.[4]

This evidence, detailed in Appellants' opening brief, demonstrates that Appellee is not entitled to summary judgment because the student performance (output) creates at least a genuine dispute of material fact as to whether BCPSS's students are receiving the constitutional education to which they are entitled. Any system in which the vast majority of students cannot read and do math on grade level, as in BCPSS, means that students are far from receiving a "thorough and efficient" education. As discussed further below, *see infra* Section III(B)(4), Appellants also presented evidence of the causal link between these outputs and the funding provided by the State.

---

[4] The 2022-2023 Report Card shows a BCPSS 4-year cohort high school graduation rate of 68.65%, and 51.56% for students with disabilities. *See* https://reportcard.msde.maryland.gov/Graphs/#/ReportCards/ReportCardSchool/1/E/1/30/XXXX/2023; https://reportcard.msde.maryland.gov/Graphs/#/ReportCards/ReportCardSchool/1/E/1/99/XXXX/2023. The 2022 BCPSS dropout rate for all students was double that of the statewide rate. *Compare* https://reportcard.msde.maryland.gov/Graphs/#/Graduation/DropOut/1/6/3/1/30/XXXX/2022 (showing BCPSS' dropout rate as 17.79%) *to* https://reportcard.msde.maryland.gov/Graphs/#/Graduation/DropOut/1/6/3/1/99/XXXX/2022 (showing that Maryland's overall dropout rate is 8.54%). BCPSS student performance on college entrance exams and the percent of BCPSS students that enroll in two- or four-year colleges in their first year after graduation also continue to be substantially lower than results seen statewide. *Compare* https://reportcard.msde.maryland.gov/Graphs/#/Assessments/CollegeReadiness_SAT/6/3/1/30/XXXX/2022 (BCPSS' 2022 mean ACT and SAT scores were 22 and 875 respectively) *with* https://reportcard.msde.maryland.gov/Graphs/#/Graduation/GradRate/1/6/3/1/99/XXXX (Maryland state averages in 2022 were 24 and 1072 respectively); *compare* https://reportcard.msde.maryland.gov/Graphs/#/Graduation/CollegeEnroll/6/3/1/1/30/XXXX (BCPSS college enrollment rate in 2021 was 46.6%) *with* https://reportcard.msde.maryland.gov/Graphs/#/Graduation/CollegeEnroll/6/3/1/1/99/XXXX (Maryland statewide enrollment at 59.8% in 2021).. *See* Note 4, *supra* (citing cases regarding judicial notice).

3. Appellants Presented a Genuine Dispute of Material Fact as to Whether Programmatic Funding Meets the Constitutional Standard.

Appellants presented evidence giving rise to a genuine dispute of material fact as to whether the State has failed to achieve the programmatic funding (an educational input) necessary to meet the constitutional standard, notwithstanding the Blueprint Act.

As Appellants explained in their opening brief, the State failed from as early as 2004 to provide the baseline funding required by the 2000 Order and the Bridge to Excellence Act, which Appellee conceded was required for educational adequacy. Appellants Br. at 22–24. In 2004, the Circuit Court found that the State had not "come close to complying" with the Court's 2000 Order as of FY 2005 and was still "unlawfully underfund[ing]" BCPSS by between approximately $439 million and $835 million. [2004 Mem. Op. at 21, 67, ¶¶ 80–88]. Subsequently, the General Assembly eliminated inflation increases and cut the annual inflation adjustment, causing the funding gap to grow exponentially. By FY 2017, the last year the Department of Legislative Services tracked this information, the "adequacy gaps" in funding for BCPSS had grown to $4,384 per pupil, or $342 million annually. [Pls. EX8 at 2, 4]. Appellee fails to address this evidence from the State's contemporaneous budget documents, and merely asserts that it has always over-complied with its funding obligations. Appellee Br. at 38–39.

Appellee also fails to address the evidence establishing at least a genuine factual dispute regarding whether the Blueprint Act and federal funding will actually cure the severe underfunding of BCPSS, much less enable improvement in the educational outputs from the concededly "sobering" levels described above. [Def. MSJ Opp'n at 5]; Appellants Br. at 22–24. The Blueprint Act will not be fully phased in for many years, and whether the funding stream will continue at current levels is uncertain because the Blueprint Act 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.[5] As BCPSS noted in its amicus brief, "officials throughout Maryland have expressed increasing concerns about the fiscal capacity of the State and local jurisdictions" to fully fund the Blueprint Act. BCPSS Amicus Br. at 14 & Note 4. Nor does the Blueprint Act fully account for the additional resources required to meet the needs of specific student populations in BCPSS, including students with disabilities and those living in poverty. [*See* 10/3/22 Perkins-Cohen Aff. at ¶¶ 19–20].

4. Appellants Presented a Genuine Dispute of Material Fact as to Whether Educational Outcomes Are Caused by Underfunding.

On the record before the Circuit Court, there was at least a disputed fact issue that the historic under funding of BCPSS (inputs) caused inadequate student performance (outputs). Appellants' expert Dr. Bruce Baker, an expert in school financing and its effects, determined that Appellee's deliberate choice to underfund BCPSS results in fewer teachers and staff per pupil, and that BCPSS's teachers and staff are compensated at lower rates than their peers in wealthier school districts. *See* [Pls. MSJ EX13(A) at 23–51]. The results: higher drop-out rates, lower graduation rates, lower rates of college attendance, and lower rates of rigorous academic performance, such as participation in Advanced Placement classes. *See* [*id.* at 65–69]. Appellants' expert Dr. Kirabo Jackson, also a school finance expert, examined more than thirty high-quality studies and found they demonstrate a positive correlation between spending and student outcomes, and further

[5] The Court should also take judicial notice of and consider the official government sources raising serious concerns about the State's budget and its capacity to fully fund the Blueprint in subsequent years—issues that provide even more uncertainty as to whether full funding under the Blueprint Act will ever be achieved. *See, e.g.,* Dep't of Legis. Servs., Fiscal Briefing (Jan. 2024) https://mgaleg.maryland.gov/meeting_material/2024/w&m%20-%20133504350092455377%20-%202024_Fiscal_Briefing_Final.pdf?emci=07417456-91bb-ee11-b660-002248223197&emdi=d1967c0b-9fbb-ee11-b660-002248223197&ceid=7821473 (showing that Blueprint Fund will be depleted in FY27 and there will be a shortfall that will grow in future years). The Maryland State Department of Education has also indicated that the Blueprint Act needs to be adjusted to fully address the needs of students living in neighborhoods of concentrated poverty; and more of the student population in Baltimore City lives in concentrated poverty than other school districts across the state. MSDE, *Report on Neighborhood Indicators of Poverty – Updated Report* (October 2022), *available at*: https://www.marylandpublicschools.org/Blueprint/Documents/BlueprintReportNeighborhoodIndicatorsPoverty.pdf. *See* Note 4, *supra* (citing cases regarding judicial notice).

applied statistical techniques to estimate the relationship between increased spending in BCPSS and better student outcomes. *See* [Pls. MSJ EX96 at 2–3, 5–6 (opining that an increase of $4,400 per pupil would increase proficiency rates by 6.14 percent (on average), increase the graduation rate by 8.46 percent, and increase college attendance by 11.6 percent (on average))].

Additionally, State reports also show that when State funding to BCPSS increased in the past, student performance also improved. Appellants Br. at 21–22. For instance, during the time funding was increasingly phased in under the Bridge to Excellence Act from FY 2002 through FY 2008, the Department of Fiscal Services reported that a 22.3% increase in spending directed to BCPSS led to a 27.9% increase in student proficiency. *See* [EX84 at 20–21]. However, as discussed *supra* in Section III(B)(3), the funding did not continue to increase at the rate necessary, and funding adequacy gaps emerged by FY 2009 and continued through FY 2017.

IV. APPELLANTS' REQUESTED RELIEF DOES NOT PRESENT NON-JUSTICIABLE POLITICAL QUESTIONS.

Appellants' requested relief—consisting of a declaratory judgment, a comprehensive remedial plan, and an order for funding directed to BCPSS—does not present non-justiciable political questions. First, Appellee does not dispute that the court is empowered to find an Article VIII violation, issue a declaratory judgment, and fashion a remedy to address the violation, including a comprehensive remedial plan, which courts of other states have directed and implemented in comparable cases. *See* Appellee Br. at 26–33. Second, in arguing that the court lacks authority to issue an order that directs funding to BCPSS, the Appellee misinterprets precedent, mistakes the requested relief for an "appropriation" measure, and improperly constrains the judiciary's crucial role in enforcing constitutional rights.

A. Appellee Does Not Dispute That the Circuit Court Can Issue a Declaratory Judgment and Order a Comprehensive Remedial Plan.

Appellee does not challenge the justiciability of two of the three forms of Appellants' requested relief. In fact, it has conceded that the judicial branch can hear Article VIII claims and issue a declaratory judgment against Appellee for its Article VIII violation. *See* Appellee Br. at 26–33; [*See* MSBE Appellant Br., Dec. 14, 2004 at 29–30 ("[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*); Def. MSJ Reply at 19 (It is "within the province of Maryland's Courts to declare an action constitutional or unconstitutional")]. Nor does Appellee dispute that the court can craft a remedy to address the Article VIII violation, including a comprehensive plan for State action that Appellants seek. *See* Appellee Br. at 26–33. Such a plan is squarely within the judiciary's injunctive powers and would provide critical relief to BCPSS schoolchildren and fill the significant gaps left by the current legislation. *See Maryland Comm'n on Hum. Rels. v. Downey Commc'ns, Inc*., 110 Md. App. 493, 515 (1996) ("An 'injunction' is 'a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice…") (citing 12 MARYLAND LAW ENCYCLOPEDIA, INJUNCTIONS § 1 at 250 (1961)); *United States v. Paradise*, 480 U.S. 149, 183–84 (1987) ("Once a right and a violation has been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.") (internal quotations and citations omitted).

Courts in other jurisdictions have consistently granted these forms of relief, both declaring that the state violated the constitution's educational mandate, and ordering the state to abide by a remedial plan. For example, in *Campaign for Fiscal Equity v. State of New York*, after declaring that the state violated the right to a "sound basic education," the court issued an order requiring

New York state to provide sufficient numbers of qualified teachers and principals; appropriate class sizes; adequate school buildings; sufficient and up-to-date books, supplies, libraries, educational technology and laboratories; suitable curricula; adequate resources for students with extraordinary needs; and a safe orderly environment for learning. 719 N.Y.S.2d 475, 550 (N.Y. Sup. Ct. 2001), *aff'd* 801 N.E.2d 326.

Similarly, in *Campbell County School District v. State of Wyoming*, following a declaration that the state had failed to deliver a quality education, the court issued an order requiring constitutional compliance by a date certain, and directed the Wyoming legislature to consider low student/teacher ratios and student/personal computer ratios; provision of adequate textbooks; an integrated curriculum; ample provision for at-risk students, special problem students and talented students; setting meaningful standards for course content and knowledge attainment; and conducting a timely and meaningful assessment of all students' progress in core curriculum and core skills. 907 P.2d 1238, 1279 (Wyo. 1995), *as clarified on denial of reh'g* (Dec. 6, 1995); *see also DeRolph v. State of Ohio*, 728 N.E.2d 993, 1001 (Ohio 2000) (directing Governor and General Assembly to comply with constitutional mandate and requiring close attention to, *inter alia*, funding the construction of new school facilities, repairing "older, decaying school buildings, until the task is complete," and mandating that "strict, statewide academic guidelines must be developed and rigorously followed throughout all of Ohio's public school districts."). Appellants' request for a comprehensive plan proposes similar reforms to benefit BCPSS schoolchildren. *See* [2019 Petition for Relief at 75–76] (proposing that Appellees provide sufficient funding for BCPSS to comply with Maryland's educational adequacy standards, and to ensure, *inter alia*, school buildings are clean, have functioning HVAC and plumbing systems, and drinkable water).

It is thus undisputed that the Court may grant partial, and meaningful relief for Appellants without reaching the political question issue raised by Appellee. Appellants' requests for a declaratory judgment and a comprehensive remedial plan are thus justiciable, and Appellee's justiciability arguments provide no basis for a summary judgment ruling in its favor. In addition, for the reasons set forth below, this Court is also well within its powers to reverse the Circuit Court's judgment that it cannot grant Appellants' final remedial request for an order to direct funds to BCPSS.

B. Maryland Courts Have the Power to Require the State to Expend Funds to Remedy Violation of the Orders Implementing the Decree and Article VIII.

In arguing that Appellants' third form of requested relief is non-justiciable, Appellee misconstrues Maryland precedent, mistakes the requested remedy for an "appropriation" rather than an order to direct funds, and impermissibly constrains the court's remedial powers.

To begin, Appellee is wrong that *Ehrlich v. Perez* is inapplicable here. Appellee Br. at 31. The fact that the *Ehrlich* order was an injunction restoring a previous funding scheme is immaterial. That order had the ultimate effect of providing funding to a class of people whose constitutional rights had been violated—funding that the State would not otherwise have provided absent the order. *Ehrlich v. Perez*, 394 Md. 691 (2006); *see also* Appellants' Br. at 29; [Pls. MSJ at 44.] The order Appellants seek would have the same effect and draws upon the same power of the judiciary, which is charged with ensuring that "the executive and legislative budget authority is subject to the constitutional limitations." *See Ehrlich*, 394 Md. at 736.

It is notable, as discussed above, that Appellee does not dispute that the judiciary can order a plan to improve the delivery of education to BCPSS. Such a plan would almost certainly require an increase in public-school funding. However, Appellee does not dispute such a plan is permissible, only that the court may not appropriate funds. Appellee Br. at 32 (characterizing

Appellants' proposed order as "asking that the State be ordered to appropriate funds"). Appellants, however, do not seek an appropriation from the court, but rather an order to meet the level of funding required for constitutional adequacy; it is then up to the State to provide such funds consistent with the court's order.

It cannot be true, as Appellee suggests, that courts are without power to issue an order addressing the "public-school funding standard" without "disrespect[ing] the coordinate branches." Appellee Br. at 30. Stripping the courts of this authority would mean that the State could neglect its funding responsibilities to BCPSS altogether, leaving schoolchildren without any recourse under the constitution—an impermissible result under Maryland law. *Ehrlich*, 394 Md. at 736 ("Indeed, to hold otherwise would create a 'legal' means for State government to employ invidious classifications that violate . . . constitutional guarantees").

Next, Appellee argues that Appellant's requested relief is prohibited by *Maryland Action for Foster Children Inc. v. State*, 279 Md. 133 (1977) ("*MAFC*"), because the "judiciary has no authority to control the Governor's discretion and require him to include more funds in the Budget Bill." Appellee Br. at 32 (quoting *MAFC*, 279 Md. at 152–53). However, this case does not categorically bar Appellants' requested relief for two reasons. First, the *MAFC* plaintiffs did not seek to vindicate a constitutional right and the decision did not concern the judiciary's authority to remedy a constitutional violation. In this way, Appellants' requested relief is akin to *Ehrlich*, and it is entirely within the court's power to "remedy a constitutional violation and protect [Appellants] from irreparable harm, while leaving the mechanism for rectifying the constitutional violation entirely up to [the State]." *Ehrlich*, 394 Md. at 715. Second, Appellants reiterate that they do not seek an appropriation from the court. Rather, Appellants seek an order setting the amounts needed for a constitutionally adequate education, and "leav[e] it" to the State to then provide funds or if

necessary, pass "another bill" to appropriate them. *MAFC*, 279 Md. at 139. The *MAFC* Court made clear that this type of relief is permissible. *See id.* (reasoning that the social services administration's "budget amendment," which fixed the criteria for foster care payments, was not an appropriation measure because it "did not purport to appropriate money," instead "leaving it to another bill, such as the annual Budget Bill, to determine the amount of money available for the program.").

Appellee further argues that the cases cited by Appellants are inapposite because they involved "extraordinary" circumstances that do not exist here. Appellee Br. at 32. But the correct standard to determine whether the court may order Appellants' requested relief is whether a constitutional violation exists to be remedied, not whether the circumstances of the constitutional violation are "extraordinary." In any case, the poor conditions across BCPSS *are* extraordinary, and Appellants cite cases concerning similarly grave constitutional violations in the educational context. Appellee tries to distinguish *Hoke County Board of Education v. State*, 879 S.E.2d 193 (N.C. 2022), but the same educational inadequacies that compelled the *Hoke* court to find a constitutional violation exist in the instant case: BCPSS has acute "facilities issues," a "lack of basic [] equipment and up-to-date textbooks," and "a lack of well qualified teachers," leading to the majority of students "unable to satisfy the State's standards for basic proficiency," with low standardized test scores, and lagging graduation and college-admission rates. *See id.* at 199.

Similarly, in *Tennessee Small School System v. McWherter*, the state violated its constitution where schools suffered from "decaying physical plants, inadequate heating . . . buckling floors, leaking roofs, inadequate science laboratories [] outdated textbooks and libraries . . . [insufficient] advanced placement courses [], art and music classes, [] and athletic programs."). 91 S.W. 3d 232, 235 (Tenn. 2002). And in *Milliken v. Bradley*, the state "ha[d] been adjudged a

participant in [] constitutional violations," where segregated school district was in "exceptional disarray," thus warranting a judicial order to transfer state funds to the district. 433 U.S. 267 (1977); *see also Abbott by Abbott v. Burke*, 153 N.J. 480 (1998) (court required state to increase funding for teacher's salaries to cure its "constitutional defect").

Finally, the State argues that an order directing funds to BCPSS "would undoubtedly give rise to countless other cases" and "sow chaos." Appellee Br. at 4, 33. There is a high bar, however, to prove a constitutional violation. Appellants clear that bar precisely because BCPSS has been uniquely and chronically neglected by the State, has significant concentrations of poverty, and lags far behind other districts across adequacy metrics. *See supra* Section III.[6] Appellants brought this case in 1994, and though they received favorable rulings in 1996, 2000, 2002, 2004 and 2019, this did not prompt a single comparable Article VIII case in Maryland. Appellee's assertions simply do not hold water, and do not undermine the court's authority to require funding to vindicate constitutional rights.

V. THE CIRCUIT COURT DID NOT ERR WHEN IT DENIED APPELLEE'S MOTION TO DISSOLVE THE CONSENT DECREE.

The Circuit Court's decision to deny Appellee's motion to dissolve the Consent Decree was not erroneous. [*See* 3/3/23 Op. at 15]. The Circuit Court was correct in holding that it "ha[s] jurisdiction to hear claims regarding a violation of the Consent Decree." [*Id.* (stating it had "repeatedly held that it retains jurisdiction under the terms of the Consent Decree to monitor and

[6] Moreover, even if a number of children in other Maryland districts pursued Article VIII claims, this would not necessarily result in "[b]illions of dollars of appropriation [] in limbo for years." Appellee Br. at 33. Rather, those cases could be consolidated, and a statewide remedy could be ordered, as has happened in other states. *See Hoke Cty Board of Education v. State of North Carolina*, 879 S.E.2d 193 (N.C. 2022) (ordering a statewide remedy for constitutional compliance); *Campaign for Fiscal Equity v. State of New York*, 719 N.Y.S.2d 475, 550 (N.Y. Sup. Ct. 2001), *aff'd* 801 N.E.2d 326 (same); *Gannon v. State of Kansas,* 319 P.3d 1196, 1236 (Kan. 2014) (same).

enforce compliance with its terms" and citing memorandum opinions from 2000, 2002, 2004, 2020)].

Appellee must make a showing of "good cause" to warrant termination of the Consent Decree. [Decree ¶ 68]. In similar contexts, courts have held that termination of a consent decree is warranted only when the party bound shows good faith compliance over a reasonable period of time, and that it is not likely to recommit its constitutional violation. *See Peery v. City of Miami*, 977 F.3d 1061, 1075 (11th Cir. 2020) (to prove a consent decree has been fully achieved, a party must establish "(1) current substantial, good-faith compliance, and (2) that it is 'unlikely…[to] return to its former ways' absent the consent decree.") (quoting *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991)). Neither condition is met here. To the contrary, the record shows that Appellee has *never* achieved compliance with the Decree's subsequent orders—let alone consistent compliance for a reasonable period of time—and that without the Court's intervention, it is likely to continue to violate Article VIII.

The fact that the legislature enacted the Blueprint and the Built to Learn Act, or that BCPSS was the recipient of emergency COVID-19 federal funding, does not relieve Appellee from its evidentiary burden to prove actual compliance. *See* Appellee Br. at 41. That legislation provided desperately needed funding to BCPSS, but, even if fully implemented, it will not be sufficient to deliver an adequate education to all BCPSS schoolchildren. Appellants Br. at 22–24. Thus, the uncertain and ultimately insufficient legislation does not moot Appellants' claims or warrant dissolution of the Consent Decree. If anything, it counsels in favor of continued monitoring under the Decree until Appellee achieves Article VIII compliance and maintains compliance for a reasonable period of time. *See Brown v. Plata*, 563 U.S. 493, 542 (2011) ("A court that invokes equity's power to remedy a constitutional violation by an injunction mandating systemic changes

to an institution has the continuing duty and responsibility to assess the efficacy and consequences of its order.").

In light of the widespread inadequacies across BCPSS, *see supra* Section III, the issues presented are inarguably still "live." Appellee Br. at 41. (citation omitted). The cases Appellee cites in support of mootness are both factually distinct and concern intervening circumstances that, unlike here, "eliminate[d] the requisite case-or-controversy." *See* Appellee Br. at 41–42 (citing *Kranz v. State*, 459 Md. 456, 472 (2018) (State argued that criminal defendant's habeas claims were moot because he was no longer in custody); *Voters Organized for the Integrity of City Elections v. Baltimore City Elections Bd.*, 451 Md. 377, 392 (2017) (appeal on behalf of incarcerated voters filed on the day before the election was moot because it would have "been impossible" to create a system for inmate voting in time); *Hill v. Snyder*, 878 F.3d 193, 204 (6th Cir. 2017) (juvenile offenders' Eighth Amendment claims were mooted by Michigan's enactment of new sentencing statute that excluded juvenile offenders from the challenged sentence); *American Bar Ass'n v. F.T.C.*, 636 F.3d 641, 643 (D.C. Cir. 2011) (case mooted where new legislation by the Federal Trade Commission made challenged rule no longer applicable); *Burch v. United Cable Television*, 391 Md. 687, 701 (2006) (where injunction had previously been entered to limit cable providers from charging over a certain amount in late fees, new legislation that increased the maximum fees served as appropriate basis to vacate injunction); *Dep't of Treasury v. Galioto*, 477 U.S. 556 (1986) (case mooted where mentally ill patient had challenged the constitutionality of firearms statute, and statute was later amended to squarely address patient's claims)).

Appellee's claim that Appellants' petition is "riddled with requests for relief that are now superseded" is false. Appellee Br. at 42. Appellee has not once addressed the reality that even after

receiving every penny promised by this legislation, an enormous funding deficit would remain across BCPSS. For instance, after all renovations funded by the Built to Learn Act and 21st Century School Buildings Program are complete, the majority of BCPSS' facilities will remain in disrepair and in need of systemic renovations. [8/12/22 Perkins-Cohen Aff. ¶¶ 26–27]. And even assuming full implementation, the Blueprint fails to provide the necessary funding for BCPSS to meet contemporary educational standards. *See supra* Section III(B)(3); *see also* [10/4/22 Perkins-Cohen Aff. ¶¶ 20–22, 24, 30, 34–35, 48–49, 50]. Rather than respond to these deficiencies, the Appellee merely avers that the foregoing legislation was "thoroughly considered," "costly," and "visionary;" but that is of no relevance to the question of whether BCPSS schoolchildren are receiving a thorough and efficient education. Appellee Br. at 43.

Appellee may want a consent decree that was only "meant to restructure BCPSS in the immediate term to guarantee funding through FY 2002,"—but that is simply not what Appellee agreed to: it is bound by the provision that allows for continued jurisdiction to monitor and enforce compliance. Appellee Br. at 44. Appellee's insistence that the "landscape" that existed at the outset of this case has "completely disappeared" is not only factually untrue, as BCPSS still suffers from the oldest buildings in the state and low student performance, but is again immaterial to the legal standard the Appellee must meet to warrant dissolution of the Decree. *Id. See also* [Pls. MSJ at 18–22 (State data showing stark underperformance of BCPSS school students; and State facilities assessments showing BCPSS schools in extremely poor condition and posing health and safety risks to occupants)]. Given how far Appellee is from making the requisite showing of good cause, the Circuit Court was correct in denying its motion to dissolve the Decree.

VI. THE COURT SHOULD REJECT APPELLEE'S ARGUMENT TO EXCLUDE APPELLANTS' EXPERTS.

The final pages of Appellee's brief attack the Circuit Court's denial of its motion to exclude Appellants' expert witnesses. Such contentions are extraneous to the summary judgment issue at the heart of this appeal and need not be considered by this Court at this juncture. Moreover, the Circuit Court's denial of the motion was correct on the merits because Appellee improperly attacks Appellants' expert opinions based on their evidentiary weight, not their reliability.

A. Appellee's Argument Concerning Expert Witnesses Should Not Be Considered.

The Court need not address Appellee's alternative argument regarding the exclusion of Appellants' experts, because it was only raised by Appellee "out of an abundance of caution," and a decision on the point will not affect the ultimate outcome of the case. Appellee Br. at 44.

Maryland appellate courts regularly decline to answer such questions. For example, in *Heard v. County Council of Prince George's County*, the court declined to address a possible standing issue "because addressing the issue of [standing was] unnecessary to deciding the outcome of the case." 256 Md. App. 586, 619 (2022); *see also Sugarloaf Citizens Ass'n v. Ne. Md. Waste Disposal Auth*, 323 Md. 641, 650 n. 6 (1991) (declining to address a possible standing issue because it was unnecessary: "[i]n light of our decision on the merits, we need not and do not reach any issue of standing."). Maryland courts have similarly declined to address unnecessary arguments in other contexts. *See Demby v. State*, 444 Md. 45, 51 (2015) ("It is unnecessary to address every argument the parties make in support of their respective sides of the case because, in the end, the question of whether Petitioner was entitled to suppression of the evidence that the police obtained from the cell phone is controlled by application of the good faith doctrine"); *see also Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 46 (2008) (explaining that "an appellate court should use great caution in exercising its discretion to comment gratuitously on issues beyond those necessary to be decided"); *United States v. Nowak*, 825 F.3d 946, 948 (8th Cir. 2016)

("We take up the abandonment issue first because our resolution of the question could make it unnecessary for us to decide the other issues on appeal").

These cases teach that this Court should answer "only the questions of law integral to the necessary holdings in the instant case, based on the questions properly presented[.]" *Garner*, 405 Md. at 46; *see also People's Couns. for Balt. Cnty. v. Loyola Coll. in Md.*, 406 Md. 54, 92 (2008) (explaining "we note, as we recently had occasion to do, that withholding unnecessary comment on matters not required to be addressed frequently is the better course."); *Celink v. Est. of Pyle*, 258 Md. App. 512, 516 n.2 (2023) (declining to address the merits of a party's "alternative argument" because it was unnecessary to do so); *Singleton v. State*, 2022 WL 1016606, at *8 n. 8 (Md. Ct. Spec. App. Apr. 5, 2022), *cert. denied*, 482 Md. 29 (2022) (same). As explained above, the Circuit Court's order granting Appellee's motion for summary judgment should be reversed and remanded for further proceedings, and Appellee may properly object to and challenge Appellants' expert opinions as appropriate during those further proceedings before the Circuit Court, or on appeal following trial. Thus, the Court need not address Appellee's arguments regarding Appellants' experts at this juncture.

B. The Circuit Court's Denial of the Motion to Exclude Appellants' Experts Was Correct on The Merits.

Even if the Court were to address the issue, it is clear that the Circuit Court did not abuse its discretion in denying Appellee's motion to exclude Appellants' experts. Maryland courts have adopted the *Daubert* standard for assessment of the admissibility of expert testimony. *See Rochkind v. Stevenson*, 471 Md. 1, 5, 26, 38 (2020). Such an assessment requires that a circuit court judge "gaug[e] only the threshold *reliability*—not the ultimate validity—of a particular methodology or theory." *See id.* at 33 (emphasis in original). And, moreover, determinations on

expert exclusion motions are within the discretion of the trial court, reviewable only for "serious mistake," or "clear[] abuse [of] discretion." *See id.* at 11.

Appellee does not articulate any basis upon which the Circuit Court abused its discretion in denying the motion to exclude Appellants' experts. *See* Appellee Br. at 45–46. Appellee cannot satisfy the abuse of discretion standard: by the text of the order denying the motion, the Circuit Court considered all the briefing on the motion, *see* [3/7/23 Order, Dkt. 247/3], and it only issued its ruling after oral argument on the motion. This alone should give the Court pause to disturb the discretion of the Circuit Court.

Moreover, Appellee attacks Appellants' expert opinions based on their evidentiary weight, not their reliability. *See* Appellee Br. at 45–46. Notably, Appellee does not address the methodology employed by Appellants' experts but complains only that they should be excluded because their opinions fail to consider how BCPSS spends its money, resulting in an "analytical gap." *See id.* The fact that Appellants' experts did not opine on this issue—which Appellants have disputed through other evidence in the record, *see* [Mot. To Preclude Oppo. at 18–25; 10/4/22 Perkins-Cohen Aff. ¶ 32–33]—does not undermine the reliability of their opinions on other relevant issues in this case, including whether the funding provided by the State is sufficient to allow BCPSS to comply with State standards. *See* [P MSJ EX20(A), Fine Report (addressing effects of cumulative inadequacy); P MSJ Reply EX 96, Jackson Report (addressing the connection between spending and student performance); P MSJ EX 66(A), Maxwell Report (addressing the impact of school condition on student performance); P MSJ EX 49(A), Roseman Report (addressing the condition of BCPSS facilities); P MSJ EX 56(A), Sharfstein Report (addressing the method of assessing facility adequacy)].

As Appellants made plain in their opposition to the motions to exclude below, Appellants' experts utilized reliable and accepted methods, and relied on peer-reviewed publications and widely-accepted statistical methods to address these relevant topics in their reports, all of which fall squarely within their areas of expertise. Appellee does not attack the various methods employed as unreliable, but instead introduces its own factual argument—that how money is spent matters more than anything else—and claims this *per se* renders Appellants' experts' opinions unreliable. *See* Appellee Br. at 45–46. This is not an attack on reliability, but rather a factual dispute over what is relevant in this case disguised as an attack on expert opinions. Indeed, Appellee has offered two expert opinions of its own that speak to its factual contention. *See* [Def. MSJ Opp. EX. Q, Hanushek Report (arguing that how money is spent is the most critical determinant of school system outputs); Def. MSJ Opp. EX R, Levenson Report (same)].

Appellee's argument that Appellants' experts should have analyzed patterns of funding affects the weight the opinions should be afforded by the factfinder—not their reliability. *See Rochkind*, 471 Md. at 33 (admissibility of expert opinion is based on reliability, not evidentiary weight). On remand, the Appellee could raise this issue before the factfinder in cross-examination to attempt to diminish the weight of the expert opinion, but none of this is relevant in considering whether Appellants' experts applied a reliable methodology. Accordingly, the Court should ignore Appellee's argument concerning Appellants' experts and allow the Circuit Court's discretionary determination to stand.

CONCLUSION

Appellants respectfully request that the Court reverse the Circuit Court's order granting Appellee's motion for summary judgment and remand for further proceedings; and that the Court

affirm the Circuit Court's order denying Appellee's motions to dissolve the November 26, 1996, Consent Decree and to exclude Appellants' experts.

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 11,530 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.

CERTIFICATE OF SERVICE

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

SO CERTIFIED, this 20th day of February, 2024.

/s/
Jeffrey E. Liskov
Baker & Hostetler LLP
1050 Connecticut Ave., NW, Suite 1100
Washington, DC 20036
Phone: (202) 861-1522
Email: jliskov@bakerlaw.com